UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN ACADEMY OF RELIGION, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, PEN AMERICAN CENTER, and TARIQ RAMADAN,	:	**ECF CASE**
Plaintiffs,	:	06 Civ. 588 (PAC)
- v.-	:	
MICHAEL CHERTOFF, in his official capacity as Secretary of the Department of Homeland Seciruty; CONDOLEEZZA RICE, in her official capacity as Secretary of State,	:	
Defendants.	:	

DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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Defendants Michael Chertoff, in his official capacity as Secretary of Homeland Security, and Condoleezza Rice, in her official capacity as Secretary of State, by their counsel, Michael J. Garcia, United States Attorney for the Southern District of New York, respectfully submit this supplemental memorandum of law in opposition to plaintiffs' motion for a preliminary injunction, responding to questions posed by the Court at oral argument on April 13, 2006, and in a separate order also dated April 13, 2006.

QUESTIONS ARTICULATED BY THE COURT

1. At oral argument, the Court stated: "I would like the benefit of additional briefing on this . . . particular topic . . . of the third prayer for relief [in] the motion for preliminary injunction" – generally, the request that the Court require the State Department to resolve Mr. Ramadan's pending visa application by a date certain. (Transcript of Oral Argument dated April 13, 2006 ("Tr."), at 55). More specifically, the Court stated, "I'd like some kind of indication of when the government is going to decide, and in light of the First Amendment rights that are raised here, how long the court should wait? . . . . And what's the process, if you can tell us, with respect to the confidentiality [of] the consular process, how much longer we might have to wait." (Tr. 56.)

2. By order issued later in the day April 13, the Court directed: "In addition to the question raised at the preliminary injunction hearing . . . concerning whether the Court should enter an order directing the prompt determination of Tariq Ramadan's pending visa application, pursuant to both the Administrative Procedure Act and the First Amendment, the Court requests supplemental briefing on one additional matter: In light of the Government's statements that it has not excluded Tariq Ramadan from the United States on the basis of 8 U.S.C. § 1182(a)(3)(B)(i)(VII), nor does it have the present intention of doing so in the future, why should the Court not enter an order

enjoining the Government from denying Tariq Ramadan a nonimmigrant visa on the basis of this provision?". Order dated April 13, 2006.

PRELIMINARY STATEMENT

As an initial matter, in light of the Court's comments at the April 13, 2006 oral argument, the Government seeks to rectify any misimpression left with the Court regarding its position as to the permissibility of any court review of consular action in any circumstance. In light of the doctrine of consular nonreviewability, the Government does not concede that judicial review of consular action can be appropriate, as neither Supreme Court nor Second Circuit precedent affirmatively authorizes judicial invalidation or compulsion of consular actions. See Point I, infra. The Government reserves its right to develop this argument at a future date, if necessary.

The Court need not reach this fundamental issue to resolve the present motion, however, because numerous reasons preclude the preliminary injunction that plaintiffs seek, even if the Court were to conclude that there is some legal basis for judicial review of the visa process. First, there is no basis to impose a deadline for consular action, especially where, as here, the Government represents that consular review of Mr. Ramadan's visa application is actively underway. See Point II, infra. Second, especially given that the Government has disavowed any present intention to rely on the "endorse or espouse" provision, there is no basis to order the Government not to deny a visa based on that provision, for a host of reasons: plaintiffs stand to suffer no injury in fact absent their requested order, and therefore lack standing; the question presented is hypothetical, and not a live case or controversy; the question is not ripe for adjudication; and plaintiffs can establish neither a likelihood of irreparable injury (i.e., that Mr. Ramadan's visa application might be denied solely on the basis of the "endorse or espouse" provision), nor a likelihood of success on the merits (because

their claim is that a visa denial based on the endorse or espouse provision did or would violate their rights, yet no such injury has occurred and there is no non-speculative basis to believe such an injury ever will occur). See infra Point III.

Accordingly, for the reasons stated herein, in the accompanying declaration of Christopher Derrick, in the Government's prior submissions and upon all prior proceedings herein, the motion for preliminary injunction should be denied.

ARGUMENT

POINT I

THE CONSULAR PROCESS AND CONSULAR DECISIONS ARE IMMUNE FROM JUDICIAL REVIEW

The Government wishes to clarify that, notwithstanding the Court's statement at the April 13 oral argument that the Government has "conceded that consular actions here when they implicate First Amendment rights can be reviewed by the court," Tr. 42, the Government does not in fact concede that consular actions can be properly subject to judicial review or compulsion.

The Government fully recognizes that Kleindienst[1] states that the First Amendment is "implicated" when persons in the United States wish to meet in person with an alien who has been excluded or denied a visa. The Supreme Court in Kleindienst, however, expressly declined to hold that courts could compel or bar any particular consular action even if the Government did not articulate any "facially legitimate and bona fide" explanation for its action. See Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction ("Def. Mem."), at 26. While some courts have reviewed actions relating to visas on the presumed authority

[1] Kleindienst v. Mandel, 408 U.S. 753 (1972).

of Kleindienst, it remains an open issue within the Second Circuit whether such review is ever permissible, or whether the Government ever has any affirmative burden to state or demonstrate a reason for an alien's exclusion. See id. The Second Circuit's decision in Burrafato v. United States Dep't of State, 523 F.2d 554, 556-57 (2d Cir. 1975), relied on by plaintiffs, does not affirmatively hold the Government is required to present such a justification, but merely notes in dicta based on citation to one unreported decision of a three-judge district court panel that "the courts of this circuit" – not a panel of the Circuit – have imposed such a requirement. See id. at 556. Burrafato certainly may be read as at least suggestive that there may be a burden of articulation, but it nevertheless does not constitute a binding Circuit holding that there is such a requirement, and the Government disputes the existence of such a requirement.

Moreover, and importantly, Kleindienst did not involve a challenge to a consular determination, and it suggests that it would violate the doctrine of consular nonreviewability to permit such challenges. In Kleindienst, plaintiffs argued it was unconstitutional for the Government to refuse to grant a waiver of ineligibility after a consular determination that the alien was statutorily ineligible for a visa. See Kleindienst, 408 U.S. at 767 (appellees' claim was that "Executive's implementation of [waiver procedure] . . . must be limited by First Amendment rights" of persons in the United States).[2]

In its present posture, by contrast, this case involves a pending visa application that remains under active consideration. The Supreme Court has recognized that Executive Branch considerations

[2] It was even this limited theory – that the challenge was to a waiver denial, not the underlying consular determination – that the Supreme Court held would still "prove too much" by either as a practical matter nullifying the Executive's plenary authority, or by requiring a "danger[ous] and undesirab[le]" judicial balancing of competing First Amendment and border control interests. Id. at 768.

of visa applications are quintessential questions for the political branches, as they necessarily are steeped in questions of foreign affairs and national security that are not properly the subject of judicial review. Id. at 766-67. The Government is unaware of any case, with the exception of two distinguishable cases (at least one of which is wrongly decided) imposing deadlines for action, in which courts have intruded in any way into a pending consular review of a visa application. See infra at 13-15.

It also is vital not to overlook the important constraints that Kleindienst imposes on any possible judicial review of First Amendment claims relating to visa determinations. Kleindienst makes abundantly clear that courts may not "balanc[e]" or weigh the competing interests of American litigants asserting First Amendment rights to hear an excluded alien as against the Government's interests, whatever those may be, in deeming an alien ineligible for a visa or otherwise inadmissible. Kleindienst, 408 U.S. at 770. Kleindienst holds merely that, where the State Department has deemed an alien ineligible for a visa and a waiver of ineligibility has been refused, at least so long as the United States states a "facially legitimate and bona fide" reason for its determination, the courts shall look no further, shall not balance the significance of that reason against whatever countervailing constitutional arguments may have been advanced, and shall not look behind that articulated reason to consider the decision's merits. See Def. Mem. at 29 n.10 (citing Azzouka v. Sava, 777 F.2d 68, 72 (2d Cir. 1985); El-Werfalli v. Smith, 547 F. Supp. 152, 153 (S.D.N.Y. 1982)). Thus, were the Court confronted with a visa denial on a specified basis, these limits would preclude the type of analysis proposed by plaintiffs here, i.e., an independent review of evidence to assess whether the visa denial comported with any relevant statutory basis.

Finally, again with the exception of two cases imposing deadlines on consular officials regarding pending immigrant visa applications, no case known to the Government has granted relief to a plaintiff in a case in which the Government had neither taken adverse action against an alien based on a determination of ineligibility nor squarely indicated that it would imminently do so. Any such holding would be unsound for a host of reasons stated in the Government's initial memorandum opposing preliminary injunction. Rather, the cases relied on by plaintiffs have entailed findings that the Government had denied a visa request on an articulated basis that was not "facially legitimate and bona fide," generally because the stated basis did not satisfy the plain meaning of the asserted statutory basis for ineligibility. See, e.g., Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986); Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985).

POINT II

THE COURT MAY NOT AND, AT ANY RATE, SHOULD NOT IMPOSE A DEADLINE FOR CONSULAR ACTION ON TARIQ RAMADAN'S PENDING VISA APPLICATION

A. Factual and Procedural Background

As stated in the Declaration of Christopher Dilworth ("Dilworth Decl.") submitted in opposition to the preliminary injunction motion, the Government regrettably cannot commit to completing its pending visa review process by any particular date. The visa application review process in any instance is a sensitive matter that is barred from public disclosure pursuant to 8 U.S.C. § 1202(f). The general statement that visa applications are sensitive matters is emphatically true in this case.

Defendants are submitting herewith a declaration by Christopher K. Derrick ("Derrick Decl."), a Consular Officer in Bern, Switzerland, with personal knowledge of Mr. Ramadan's

application. Mr. Derrick confirms that, as previously attested in the Dilworth Declaration, consular officials interviewed Mr. Ramadan twice regarding his September 2005 visa application, once in September and once in December 2005. See Derrick Decl. ¶ 3. Pursuant to the usual consular procedures applicable in this situation, Mr. Derrick has requested a Security Advisory Opinion ("SAO") from Washington, and is awaiting an SAO so that he can make a "final adjudication regarding Mr. Ramadan's visa eligibility." Id. ¶ 2. Mr. Derrick confirms that it is "impossible to predict the time required for processing of a complicated visa application," and explains that complicated cases such as Mr. Ramadan's "take significantly longer" than simple applications. Id. ¶ 4.

Contrary to plaintiffs' assertion, Mr. Derrick did not tell Mr. Ramadan that his application would take "at least" two years to process. Rather, when asked by Mr. Ramadan how long the visa review process would take, Mr. Derrick informed him that, among other cases on which Mr. Derrick had worked, the shortest review time was two days and the longest two years, so Mr. Derrick "would expect that it would take at least two days but no more than two years." Id. ¶ 5. As Mr. Derrick explained, "My comment to Mr. Ramadan was intended to convey two things, firstly, that I have no idea how long it will take, and secondly, that Dr. Ramadan is not the only one whose visa processing takes a long time." Id. ¶ 6.

In addition, without commenting on the specific status of Mr. Ramadan's application, the Government can amplify somewhat on the process-related concerns voiced by the Court at oral argument. As stated in the Dilworth Declaration, Mr. Ramadan's visa application of September 2005 presented an opportunity for exploration of all relevant issues relating to his eligibility for a visa. There had been no basis for pursuing those issues after Mr. Ramadan abandoned his prior

application in December 2004. Accordingly, Mr. Ramadan was interviewed in September 2005, shortly after receipt of the application. That interview presented new information and, following further analysis, gave rise to additional questions which were asked in the December 2005 interview. In the approximately four months since the December interview, the Government has been considering the information obtained in those interviews and other available information in light of a range of INA provisions governing visa eligibility. The process has progressed far enough that the State Department has been able to state that at this time it has not determined, and does not intend to determine, that Mr. Ramadan is ineligible for a visa based on the provision under attack in this suit, namely, 8 U.S.C. § 1182(a)(3)(B)(i)(VII). Moreover, the Government continues to actively deliberate over Mr. Ramadan's application. See Dilworth Decl. ¶ 10. It would be inappropriate for the Government to publicize its deliberations, both in fairness to Mr. Ramadan and in deference to the privileged and sensitive nature of government deliberations generally and consular deliberations relating to visa applications in particular.[3]

B. The Court Should Not, and Indeed May Not, Impose a Deadline for Consular Action

The Court should not enter an order imposing a deadline for the State Department to complete action on Mr. Ramadan's pending visa applications for two central reasons: first, the Court has no authority to do so, and second, even if the Court did have such power, doing so would be inappropriate in the present circumstances.

[3] Nor should the Court be troubled by the promptness with which the Government acted on Mr. Ramadan's 2004 visa application once he resigned the teaching post that formed the basis for that application. That prompt action once the application became moot merely reflects the dispositive nature of Mr. Ramadan's resignation. At that point, no further analysis was required.

Courts have rejected a variety of attempts to secure orders requiring the Government to complete work on a pending visa application, whether those applications relied on the APA, the courts' mandamus powers, or any other basis. See generally Def. Mem. at 22-23; see also Kent v. United States, 8 F.3d 27 (table)[4], 1993 WL 414166 at *2-*3 (9th Cir. 1993) (rejecting APA and mandamus claim seeking order requiring grant or denial of visa where Government allegedly "delayed unreasonably in acting" on visa petition; "the statutes and regulations provide the consular official considerable discretion in granting or denying a visa . . . mandamus is not an appropriate remedy and is not available as a basis of district court jurisdiction"); Hsieh v. Kiley, 569 F.2d 1179, 1181-82 (2d Cir. 1978) (holding neither APA nor mandamus relief is available to compel INS to conduct investigation whose results would bear on State Department issuance of visas given lack of duty on part of INS to conduct such investigations, and noting, "[a]side from our powerlessness to intervene, the judicial creation of such a duty would have the potential for mischievous interference with the functioning of already overburdened administrative agencies."); cf. INS v. Miranda, 459 U.S. 14 (1982) (rejecting assertion that Government should be estopped from excluding alien based on 18-month delay in considering application for a spousal visa application, despite hardship to United States family of alien); Martinez v. Bell, 468 F. Supp. 719, 724-25 (S.D.N.Y. 1979) (in case not seeking to impose a deadline on consular action, noting, "[t]he decision to issue a visa . . . is that type of discretionary conduct not within the scope of mandamus jurisdiction").

The decision in Saavedra Bruno v. Albright, 197 F.3d 1153 (D.C. Cir. 1999), provides an especially thorough explanation of why plaintiffs cannot rely on the APA to compel consular action

[4] The Ninth Circuit does not prohibit citation of its unreported decisions to courts outside the Ninth Circuit. See 9th Cir. R. 36-3.

on a pending visa application. In Saavedra, an alien and his United States citizen sponsors and business partners brought an APA challenge of a determination that the alien was ineligible to receive a visa, and of the Government's failure to act on a request for a waiver of ineligibility for two years and four months. See 197 F.3d at 1156. Following extensive discussion of the history and purposes of the consular nonreviewability doctrine, see 197 F.3d at 1156-57, the court observed that, under the APA, "judicial review of agency action is the norm, preclusion the exception." Id. at 1157. Nevertheless, noted the court, there are express exceptions to APA review set forth at 5 U.S.C.§ 701(a)(1) and (2), and, in addition, there is a "limiting clause" within section 702: "Nothing herein . . . affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." Id. at 1158 (quoting § 702). This "limiting clause" was, according to the legislative history, intended to capture any "express or implied preclusion of judicial review," id., including cases that would require courts "to decide issues about foreign affairs, military policy and other subjects inappropriate for judicial action." Id. Given "the nature of consular visa determinations," the court held, "[w]hether analyzed in terms of § 702(1), or in terms of § 701(a)(1), the conclusion is the same – the district court rightly held that it could not entertain [the] lawsuit." Id.

At the April 13 oral argument in this case, plaintiffs rightly noted that the court in Saavedra distinguished Kleindienst and Abourezk on the ground that those cases presented First Amendment challenges by United States nationals, whereas Saavedra's American sponsors did not assert constitutional claims. Id. at 1163. That distinction is not dispositive concerning the availability of APA review, however, because, as the Saavedra court also noted, the INA was modified after the decision in Abourezk to eliminate the provision on which Abourezk depended to hold that the APA

§ 701(a)(1) exception to jurisdiction was inapplicable. Id. at 1164. Specifically, when Abourezk was decided, 8 U.S.C. § 1329 provided general federal subject matter jurisdiction over "all causes, civil and criminal, arising under any of the provisions" of the immigration statutes. See Saavedra, 197 F.3d at 1164. Since Abourezk, however, § 1329 was amended and "now makes clear that district courts do not have general jurisdiction over claims arising under the immigration laws and that their jurisdiction extends only to actions brought by the Government" in the context of the visa process. Id. Section 1329 remains as it was when Saavedra was decided in 1999 – i.e., it does not authorize general federal subject matter jurisdiction. Accordingly, the statutory basis that the Abourezk court relied on to escape the APA's inapplicability to matters "committed to agency discretion" or barred by "other limitations" no longer applies, and, accordingly, the APA does not authorize review of the pending consular action here.

As the Saavedra court noted and plaintiffs stressed at oral argument, Saavedra is distinguishable from Abourezk and Kleindienst in that the latter cases involved constitutional challenges by Americans to completed actions taken with respect to an alien. However, this distinction is immaterial as to the possible availability of APA review. Even if the Court were to hold that some type of review can in appropriate circumstances be available under Kleindienst, the APA would not provide a permissible statutory vehicle for such review.

Moreover, no decision known to the Government (or cited by plaintiffs) has relied on Kleindienst to permit review of an incomplete consular review of a visa application – whether to bar a particular outcome, or to impose a deadline for consular officials to act. To so extend Kleindienst would be contrary to the cautions voiced in Kleindienst itself, see id. at 768-69, that the consular visa issuance process remains at the heart of the political branches' powers and free from judicial review.

At most, there may be very limited judicial review of fully ripe First Amendment claims by United States nationals after an alien's eligibility is determined and the government is considering the exercise of a discretionary waiver. The practical result of employing Kleindienst to compel immediate resolution of Mr. Ramadan's pending visa application would be to invite any alien whose visa application was not immediately granted to identify someone in the United States who wished to hear from that alien, and to cause that person to assert a First Amendment interest in meeting with that alien immediately. Such an exception, in the words of the Supreme Court, "would prove too much," as "[e]ither every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest against that of the Government," with all the perils attendant to such a balancing. See Kleindienst, 408 U.S. at 768-69.[5] The perils for the courts and for consular functioning of embarking on such a course are very real, as the State Department issued 5,388,937 nonimmigrant visas in fiscal year 2005, refused 1,969,185, and eventually permitted waivers to 431,602 applicants. See Nonimmigrant Visa Workload, Fiscal Year 2005, reported at: http://travel.state.gov/pdf/fy%202005%20niv%20workload%20by%20category.pdf (last visited April 19, 2006). Moreover, as a practical matter, applying Kleindienst in this posture would make no sense, as the Executive Branch can hardly be expected to voice a "facially legitimate and bona fide justification" for deeming an alien ineligible for a visa even as the Government is attempting to determine, in the first instance, the very question of the alien's eligibility.[6]

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[5] Such a ruling would also be contrary to the Second Circuit's holding in Hsieh that courts will not engage in mandamus review of the visa application "process."

[6] The Court may not properly deem the Government required to explain its actions with respect to Mr. Ramadan's pending visa application; nevertheless, the Government has addressed

Finally, the cases cited by plaintiffs as imposing deadlines for completion of Government action with respect to aliens are distinguishable and, in at least one instance, wrongly decided. See Reply in Support of Plaintiffs' Motion for Preliminary Injunction ("Pl. Reply Mem."), at 12-13. First, all but two cases cited by plaintiffs do not involve consular action, but rather INS or other administrative action, and therefore do not shed light on the central question here – the interplay of consular nonreviewability and judicial review of incomplete agency action.

The two cases cited by plaintiffs that did involve consular action are readily distinguishable. See Pl. Reply Mem. 12-13. First, in Patel v. Reno, 134 F.3d 929 (9th Cir. 1997), the court held that mandamus relief was available where a United States Consulate in Bombay, India had failed to resolve a pending immigrant visa application for eight years, and indeed, affirmatively "refused to act" on the pending applications, see Patel, 134 F.3d at 930, with the Government's counsel expressly conceding that the relevant officials were "holding the visa applications in abeyance." Id. at 932. Patel thus is readily factually distinguishable from the present case: here, the application has been pending for much less time, and the State Department continues to actively consider Mr. Ramadan's visa application, see Dilworth Decl. ¶ 10 (application "remains under active consideration"), with the State Department having interviewed Mr. Ramadan as recently as December 2005.

In addition to these factual differences, Patel hinged on a finding that the State Department had violated a nondiscretionary duty to act imposed by its own regulations, whereas no such duty exists with respect to Mr. Ramadan's application. In Patel, the consular official, in

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the central allegation of the pending motion, by declaring that the "endorse or espouse" provisions have not been and are not now the basis of any anticipated State Department action with respect to Mr. Ramadan's visas. See Gov. Mem. 32-33.

considering an immigrant visa rather than a non-immigrant visa as is sought by Mr. Ramadan, was bound by a regulation titled "Issuance or refusal mandatory," which required that, "[w]hen a visa application has been properly completed . . ., the consular officer shall either issue or refuse the visa." Patel, 134 F.3d at 932. In contradiction to that requirement, the Government in Patel admitted that the application was being held in abeyance. Accordingly, the Patel court held that "the consulate had a duty to act and that . . . the consulate has failed to act in accordance with that duty and the writ [of mandamus] should issue." Id. at 933. Here, by contrast, the Government has not violated any nondiscretionary duty, the Government is actively considering the application, there are no time limits on resolution of nonimmigrant visa applications, and, accordingly, there is no basis for mandamus relief.

The second case involving an incomplete consular review of a visa application, Raduga USA Corp. v. United States Department of State, 2005 U.S. Dist. LEXIS 22941 (S.D. Cal. May 20, 2005), also is factually distinguishable in that it granted mandamus relief only after a delay of four years in processing a visa application and it also involved an application for an immigrant visa. In addition, like Patel, it turned on a perceived violation of 22 C.F.R. § 42.81(a)'s "mandatory" requirement – which applies to immigrant visas – that consular officials "either issue or refuse" a visa in response to a completed visa application. Here, by contrast, Mr. Ramadan's application for a nonimmigrant visa has been pending roughly seven months, has received significant attention including two interviews of Mr. Ramadan, and remains under "active consideration."

Finally, in addition to being distinguishable from the present case, Raduga does not bind this Court, and is wrongly decided insofar as it held that mandamus relief could ever be

appropriate to impose a deadline on a pending visa application. Mandamus relief is an extraordinary remedy strictly limited to cases where a government official has violated a nondiscretionary duty to act, see Def. Mem. at 22 (citing cases), and in Raduga the applicable regulation did not impose any particular deadline by which the Government was obliged to decide a visa application. While Patel arguably qualified for mandamus relief in light of the Government's statement that it was holding the visa application "in abeyance" rather than fulfilling the regulatory duty to grant or refuse an immigrant visa, the court in Raduga was wrong to conclude that the mere passage of "[t]ime ha[d] proved" that the Government was refusing to act, and that mandamus accordingly was warranted. Here, of course, both the Dilworth Declaration and the sequence of events make clear that Mr. Ramadan's application is under active consideration and has not been the subject of an improper governmental decision simply not to act, but even without that showing, mandamus relief would be inappropriate notwithstanding Raduga.[7]

POINT III

THERE IS NO BASIS TO ENJOIN RELIANCE ON SECTION 1182(a)(3)(B)(i)(VII)

A. Factual Background

As set forth in the Dilworth Declaration, the State Department has not determined Mr. Ramadan to be ineligible pursuant to § 1182(a)(3)(B)(i)(VII), and does not presently intend to do so. Defendants cannot rule out ever relying on this provision in the future, however, because, as stated at oral argument, it needs to retain flexibility to act based upon, among other things,

[7] For the same reasons, even if the Court were to conclude that the APA could, in some circumstances, authorize the Court to impose a deadline on consular action, there has been no "undue delay" here and, accordingly, no such relief should be ordered in any event.

possible future statements by Mr. Ramadan, a possible future discovery of statements that have already been made by Mr. Ramadan, or possible further analysis of information already known to the Government should such analysis lead to a conclusion that Mr. Ramadan is ineligible on this basis. Nevertheless, based on significant work done to date, the State Department has declared that it has not determined and does not intend to determine Mr. Ramadan ineligible on this basis. See Dilworth Decl. ¶ 13.

B. Numerous Bases Preclude Ordering the Government Not to Deem Mr. Ramadan Ineligible for a Visa Pursuant to 8 U.S.C. § 1182(a)(3)(B)(i)(VII)

Any order enjoining the Government from relying on § 1182(a)(3)(B)(i)(VII) in its eventual determination of Mr. Ramadan's visa application would be unsound for a host of reasons. Such an order would be a preliminary injunction requiring, among other things, a "clear showing" that plaintiffs will suffer "irreparable harm" absent the requested injunction, yet they cannot meet this burden because there is no basis other than pure speculation to believe that they will suffer the complained-of harm given the Government's statement that it does not intent to exclude Mr. Ramadan on the challenged basis. See Def. Mem. at 11-13. Nor can plaintiffs make the clear showing of a "likelihood of success on the merits" required for entry of a preliminary injunction, because plaintiffs have not established a "likelihood" that any such visa denial will occur, and they accordingly cannot show that they are likely ever to prevail on a claim that such a denial violated their rights. Further, because there is no nonspeculative basis to believe that an exclusion based on § 1182(a)(3)(B)(i)(VII) will occur, there is no injury in fact sufficient to confer standing, see Def. Mem. at 16-17, nor is there a dispute that is ripe for adjudication. See Def. Mem. at 17-18. These considerations – many of which are jurisdictional, and, indeed,

bedrock principles concerning the availability of judicial review, render the basis of any possible future denial of Mr. Ramadan's visa application beyond this Court's authority to adjudicate.

Finally, a word is in order about plaintiffs' charge that the Government is engaging in an improper "jurisdictional shell game" designed to frustrate plaintiffs' attempt to secure judicial review. Tr. 49. The Government emphatically is not doing so. The Government is giving Mr. Ramadan's visa application "active consideration," Dilworth Decl. ¶ 10, and, despite plaintiffs' objections that the process has taken time, the available evidence indicates that the Government is carrying out its consular duties with care and responsibility. Plaintiffs seek extraordinary, and indeed unprecedented, relief. It is entirely proper for the Government to oppose plaintiffs' premature preliminary injunction motion on the basis of the many jurisdictional and other flaws that undermine plaintiffs' application.

The Government will resolve Mr. Ramadan's visa application at some point in the future. If, as plaintiffs anticipate, this suit remains pending and plaintiffs object to some presently undetermined future consular official's determination, then the Government will present appropriate defenses at that time, and those defenses will be judged on their merits. That possibility too is entirely appropriate, and, indeed, the Government, the Court and the public would be ill-served if the Government were to waive meritorious defenses at this premature stage of the proceedings. Plaintiffs are simply incorrect to suggest that any aspect of this process is, somehow, nefarious.

CONCLUSION

For the reasons stated above and in the prior pleadings and proceedings herein, plaintiffs' motion for a preliminary injunction should be denied.

Dated: New York, New York
April 24, 2006

Respectfully submitted,

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