IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Brian P. Carr, Rueangrong Carr, and Buakhao Von Kramer Plaintiffs versus United States, US Department of Justice, USPS, USPS OIG, USPS BoG, US CIGIE, Department of State, Department of State OIG, USCIS, DHS OIG, and SSA Defendants	Civil No. 3-23CV2875 - S Reply in Support of Motion for Partial Summary Judgment (Doc 19) Response Opposing Defective Motion to Continue Consideration (Doc 22)

Reply in Support of

Motion for Partial Summary Judgment

and

Response Opposing Defective

Motion to Continue Consideration

In the widely cited Areizaga v. ADW Corp., No. 3:14-cv-2899-B (N.D. Tex. Jun. 28, 2016) this court found:

> FRCP Rule 56(d) is "designed to safeguard against a premature or improvident grant of summary judgment." Washington v. Allstate Ins. Co., 901 F.2d 1281, 1285 (5th Cir. 1990). To justify a continuance, the Rule 56(d) motion must demonstrate (1) why the movant needs additional discovery and (2) how the additional discovery will likely create a genuine issue of

material fact. See Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 534-35 (5th Cir. 1999) …

The nonmovant, however, must "present specific facts explaining his inability to make a substantive response ... and specifically demonstrating how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact" and defeat summary judgment. Washington, 901 F.2d at 1285 ... (construing former FED. R. CIV. P. 56(f)). The nonmovant "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts." Raby, 600 F.3d at 561 (quoting SEC v. Spence & Green Chem. Co., 612 F.2d 896, 901 (5th Cir. 1980)). "Rather, a request to stay summary judgment under [Rule 56(d)] must 'set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion.'" Id. (quoting C.B. Trucking, Inc. v. Waste Management Inc., 137 F.3d 41, 44 (1st Cir. 1998)). The party requesting the additional discovery or extension also must show that relevant discovery has been diligently pursued. See Wichita Falls Office Assocs. v. Banc One Corp., 978 F.2d 915, 919 (5th Cir. 1992). "If it appears that further discovery will not provide evidence creating a genuine issue of material fact, the district court may grant summary judgment." Raby, 600 F.3d at 561 (quoting Access Telecom, Inc. v. MCI Telecomm. Corp., 197 F.3d 694, 720 (5th Cir. 1999)).

In contrast, the supporting affidavit (Doc 23) states only:

...

> 4. If Defendants' motion to dismiss is denied, Defendants intend to seek discovery to respond to the allegations in the complaint (or the contemplated amended complaint), including serving written discovery on each Plaintiff and taking the depositions of each Plaintiff. Defendants may need to rely upon an administrative record, which has not yet been assembled or filed in this case.
>
> 5. Completing the above-mentioned discovery is necessary to fully respond to the assertions that Plaintiffs rely upon in their motion.
>
> 6. Defendants cannot at this time present facts essential to justify its opposition to Plaintiffs' motion.

Plaintiff's agree strongly with paragraph 6 above but disagree with the inference that there are not sufficient affirmed statements (in the verified Amended Complaint, Doc 18-1 and verified Opposition to Defendants' Motion to Dismiss, Doc 18 (classified in Doc 20)) and the numerous certified true and accurate copies of documents in the record.

Defendants cannot present the 'essential facts' because there is no justification for its opposition to Plaintiff's Motion for Partial Summary Judgment (MfPSJ).

Indeed, it appears to the Plaintiffs that the USATXN has not actually carefully read any of these documents, instead skimming them to pick out words and phrases to generate specious spurious legal arguments. The 'specified facts' in USATXN's Affidavit could apply to almost any case which has an MSJ. Mr. Carr was unable

to find any reference to this particular MfPSJ.

USATXN has failed to meet the clear requirements stated in Raby and cited in Areizaga, "The nonmovant may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts."

SSA Relief Well Founded and Supported by Undisputed Facts

To support a legitimate cause of action, it is incumbent on the Plaintiffs to establish a few elements. With SSA the cause of action is a little complex in that the duty and standing are derived from DoS and the Declaratory Relief which is sought in this MfPSJ is directed to the SSA. This could be problematic except that all of the Defendants in this matter are agencies of the United States and are not really distinct entities.

DoS Duty to Performance

In the verified Amended Complaint (Doc 18-1) paragraphs 4 and 84 to 104 there are affirmed statements that Mrs. Von Kramer applied for, paid for, scheduled, and attended three visa interviews in 2019 and in each case the visa application was denied based on a form letter letter citing INA 214(b), basically saying that she did not prove she that would not overstay any temporary visit though the form letter made no reference to any evidence which was considered.

This particularly troubling as in each case Mrs. Von Kramer had a packet of documents about one inch think with affirmations, flight tickets, invitation from

Mr. Carr promising accommodations, deeds, titles, diplomas, pay stubs, and numerous pictures of the houses, pets, car, and family.

In the first two interviewers the interviewer did not look at any of the documents in the 10 minute or so interaction and made an absurd verbal explanation for the denial such as 'no firm travel plans' (contradicted by the evidence available though it is questionable if any interviewer could have carefully reviewed all the documents in the 10 minutes or so allocated).

Unique Legal Questions for SSA

These material facts and the relevant INA statutes demonstrate duty and failure to perform and are undisputed. There are legal questions as to whether the court has jurisdiction to intervene in this matter (according to the disputed Doctrine of Consular Non Reviewablity (DoCNR)), but the particular relief sought is a Declaration that Mrs. Von Kramer was improperly denied her ability to demonstrate 'her sincere desire to establish enduring ties to the U.S.'

Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) endorses DoCNR, but creates exceptions requiring the court to insure there was a 'Facially Legitimate and Bona Fide Reason'. According to that test the failure to perform is clearly demonstrated as there was no discussion of the evidence to support the cited statutes.

There are three arguable justifications to extend Mrs. Von Kramer right to Due Process in Consular decisions.

1. On marriage to a U.S. citizen Mrs. Von Kramer was recognized as a person

who was entitled to Due Process in consular activities and that entitlement continues beyond the death of her spouse, e.g. the U.S. and Thailand each only recognize marriages as a legal union between two people which implies a recognition that Mrs. Von Kramer is a person (and would continue as person for the remainder of her life),

2. When Congress made special recognition for spouses of deceased pre-1968 veterans in restrictions on overseas payment of government assistance to foreign nationals, Congress intrinsically recognized that such surviving spouses were entitled to Due Process in consular activities, and
3. DoCNR is fundamentally flawed as Mrs. Von Kramer is a person and, hence, entitled to Due Process in all interactions with the U.S. government (and DoCNR should be relegated to the trash can of history where it belongs).

Further, even if DoCNR is held to be valid, the court is not subjecting DoS consular activities to court oversight as the relief sought does not impact DoS in any way, it is a simple declaration allowing SSA to consider additional factors in its 'lawful presence' analysis.

SSA Not Bound By Declaration

SSA has wide discretion in granting 'lawful presence' status in accordance with SSA POM RS 02610.025 5-Year Residency Requirement for Alien Dependents / Survivors. Mr. Carr has had a few disputes with SSA concerning Due Process and complained to SSA OIG on more than one occasion, but in each case SSA and SSA OIG were responsive and all such disputes were promptly resolved.

In those discussions SSA clearly stated that they do not make any determinations of whether a person is in the U.S. legally, but rely on other agencies (primarily Customs and Border Patrol (CBP)) for such determinations. As such, while SSA is a Defendant in this matter, their 'Order' amounts to mostly a declaration by the Court for SSA to consider as an additional factor in their 'lawful presence' decision. It is not binding on SSA in any way.

In 2023 Mr. Carr expressed an interest in the 'lawful presence' requirements with some SSA employees and after minimally including SSA in this suit, SSA has substantially improved and clarified the governing rules in SSA POM RS 02610.025 with an increased focus on 'sincere effort to establish enduring ties to the U.S..'

Mr. Carr is confident that with the requested declaration from this court, SSA will grant Mrs. Von Kramer five year 'lawful presence' and will reduce Mrs. Von Kramer's expense and inconvenience of six month visits and SSA will reduce their administrative verification burden. There will be no change in Mrs. Von Kramer's SSA benefits.

Mr. Carr is also concerned that USATXN has not ever clearly stated SSA's position on this requested declaratory relief. It is Mr. Carr's expectation that SSA would be happy to be removed as a defendant in this matter.

USCIS Duty to Perform

On 13 Nov 2018 USCIS issued a 'green card' to Mrs. Carr with an expiration date

of 13 Nov 2020 (it was a two year conditional 'green card' for spouses who have not been married for two years as of the date of the I-30 application) as can be seen in Doc 24-1.

On 8 Aug 2020 USCIS accepted Mrs. Carr I-751 application and $680 fee to remove the conditions from Mrs. Carr's 'green card' (Doc 18-1 para 147). According to 8 CFR Section 216.4(b)(1) USCIS must process the I-751 application within 90 days, waiving the interview if necessary to promptly issue a new 'green card'.

Instead USCIS sent Mrs. Carr an 18 month extension letter and later a 24 month extension letter as can be seen in Doc 18-6 which expired on 13 Nov 2022.

On 11 July 2022 USCIS accepted Mrs. Carr's N-400 application with the $725 fee as described in Doc 18-1 paragraph 148. However, as her 'green card' extension letter expired on 13 Nov 2022, Mrs. Carr was stranded in Thailand and had to get a non immigrant visa from DoS in order to return to the United States.

On 3 Jan 2023 Mrs. Carr got an A-551 stamp in her Thai passport with an expiration date of 02 Jan 2024 allowing to work and travel freely for the one year period which can be seen in Doc20-2.

The joint N-400 and I-751 interview was completed on 30 Jan 2022 as described in Doc 18-1 para 161. The final results of the interview were in the USCIS Final Findings of Facts, Decision and Order on 31 Jan 2023 published with notice to all parties via the I-797 shown in Doc-10-5. In that USCIS decision both the I-751

(for normal 10 year green card) and N-400 (citizenship) applications were approved as stated in Doc 18-1 para 163 which stated in part:

> We have approved your I-751, Petition to Remove Conditions on Residence. Our records also indicate we have approved your Form N-400 Application for Naturalization. Because we also approved your N-400, you will not receive a new Permanent Resident Card (also known as a Green Card). Instead, once you have taken the Oath of Allegiance, you will receive a Certificate of Naturalization, which will be proof of your U.S. citizenship.

A simple reading of that final decision implies that Mrs. Carr need only schedule her 'Oath of Allegiance' with USCIS (a purely administrative process) and Mrs. Carr would be a citizen. However, in the more than one year since that final decision, USCIS has failed to provide Mrs. Carr with any clear proof that she is not an 'illegal' (subject to deporting by vigilantes under the pending Texas SB4 law as all the previous cited documents have clearly expired) or a citizen (precluding important privileges such as voting).

As noted above all the previous proof of permanent resident status documents have expired and there is no replacement possible at this time (as explained in Doc 18-1 concerning recent efforts to get any such document, see paragraphs 166 and 205 to 209).

It is inexplicable as to why USCIS has failed to fulfill its obligations from the final decision of 31 Jan 2023 (Doc 10-5), but this court is not asked at this time to sort through the numerous contradictory documents which USCIS has filed since then. That can be left to be clarified and resolved after discovery but Mrs. Carr must be

promptly provided with clear proof that she is not an 'illegal' and provided with the rights of citizenship (and ability to vote) in accordance with final USCIS decision of 31 Jan 2023 (Doc 10-5).

Indeed, within thirty days (the normal period for a Notice of Appeal from a final decision) the Plaintiffs contacted USCIS and attempted to schedule the 'Oath of Allegiance' only to be told the normal delay for that was four to five months. This was nonsense as the normal period for scheduling an 'Oath of Allegiance' is from immediate (at the end of the interview) to a couple of weeks. The four to five month period is normal for the scheduling of a second interview in the case of a failed N-400 (citizenship) test. This is mentioned solely to note that USCIS was aware of any purported 'typographical' errors in the final decision of 31 Jan 2023 (Doc 10-5) and USCIS made no effort to correct the error within the normal thirty days.

As all of the documents relied on to demonstrate USCIS's duty and failure to perform were provided by USCIS with certified copies in the record provided by the Plaintiffs there is no need for further discovery and deposing the Plaintiffs concerning USCIS documents is absurd. USATXN has had ample time to contact USCIS to find out the rationale for USCIS's clearly unlawful refusal to provide Mrs. Carr with proof of her permanent resident and citizen status.

Improper Motion for Continuance

Plaintiffs raise a novel objection that there is no statutory basis for any FRCP Rule 56(d) Motion for Continuance.

However, as this court has a long history of FRCP Rule 56(d) motions it is expected this court will overrule this objection. Indeed in Areizaga cited above the Rule 56(d) Motion is dealt with as a matter of course as are numerous other 5th Circuit cases. However, in the 3rd Circuit there is also a long history of Rule 56 Responses (in opposition to the MSJ).

Both seem to work well enough though the 3rd Circuit seems to discourage excessive motion practice but the 5th Circuit process only adds a minimal one week delay (assuming the MSJ Reply is within one week as required and addresses the 56(d) motion as in this Reply) and does add the flexibility of seeking additional time.

Mr. Carr finds the different treatment needlessly confusing and would prefer if the Supreme Court resolved the matter of FRCP 56(d) motions. If this court overrules this objection (expected as a matter of course) and the 5th Circuit affirms that ruling (also expected as a matter of course) then the Supreme Court might have the opportunity to resolve this discrepancy between Circuit Courts.

Of course the decision on this MfPSJ is expected to be interlocutory and it could well be years before any appeals are possible. However, given the broad opposition to the offensive (to the Plaintiffs) Doctrine of Consular Non Reviewability in this matter, there is also a distinct possibility that this matter could actually be brought before the Supreme Court.

If that is the case, Mr. Carr would like to be on the record as opposing FRCP 56(d)

Motions for Continuance (and in particular the conflict with 3rd Circuit decisions) so that the Supreme Court could consider the differences between Rule 56 MSJ procedures between the various Circuit Courts.

Defendants Have Not Shown Due Diligence in Pursuing Discovery

In Areizaga this court went on to say:

> The party requesting the additional discovery or extension also must show that relevant discovery has been diligently pursued. See Wichita Falls Office Assocs. v. Banc One Corp., 978 F.2d 915, 919 (5th Cir. 1992).

In the SSA relief, the court is asked to rely on the Plaintiffs' limited recollection of the three non immigration visas denied by DoS which occurred almost five years ago (2019). Admittedly Plaintiffs recollection is limited but there is little reason to believe that USATXN deposing the Plaintiffs will provide any additional useful insights.

In contrast, in the Complaints (Doc 10-1 and 18-1) paragraph 118 to 123 describe the FOIA efforts Mr. Carr has made to get the video recordings of those interviews (based on the unique Appointment IDs which Mr. Carr provided)[1] but DoS has denied access (and this denial is one of the Due Processes issues raised in the matter). Indeed, in 2018 Mr. Carr had specifically asked DoS to preserve the video recordings of the 2018 interview of Mrs. Carr in anticipation that litigation might be necessary in the event that the speculative damages Mr. Carr described in 2018 became actual damages as described in this matter (Mrs. Carr being stranded in

[1] The actual FOIA requests made general requests for "copies of all records to include audio and video recordings" with the video recordings being of primary interest though not specifically cited as such.

Thailand by the unlawful failures to perform of both DoS and USCIS).

The question Mr. Carr would present to Mr. Padis, is what actions did Mr. Padis perform after carefully reading paragraphs 118 to 123 to determine which of the four video recordings are currently available and might provide insights which the court could use in deciding if the visa denials were 'improper'.

It should also be noted that DoS will remain a Defendant in this matter in any case and the court and parties will have ample opportunity to review any recordings which have been retained.

Defendants Affidavit in Opposition Justifies Novel Costs Treatment

Defendants' Affidavit is particularly egregious as overly broad and lacking specificity as required in Areizaga. While 5th Circuit courts limit such egregious responses through costs (see Areizaga, there would be no such penalty with a 3rd Circuit Response to an MSJ), such costs are not really applicable to the U.S. government or Pro Se parties.

However, excessive motion practice without any merit also needs to be discouraged as (amongst other things) it wastes the courts time wading through documents which have no merit and the opposition to those meritless documents.

Mr. Carr is not implying or inferring that USATXN has any malicious or malevolent intent. Mr. Carr assumes that USATXN has too many cases and not enough time to properly respond to all of them in a timely fashion. However, the

normal response is to juggle cases, making minimal responses as required to push off the deadline for each case until the next deadline.

This juggling of cases is not improper per se. However, if it leads to generating meritless Rule 56(d) Motions (as herein) or Motions to Dismiss, then it needlessly wastes the time of both court and the other parties to the case.

In this regard, this court is asked to consider holding USATXN personally liable for community service based on 28 USC section 1927 which states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

as well as FRCP Rule 56(h) Summary Judgment, Bad Faith which states:

> Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court - after notice and a reasonable time to respond - may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or **subjected to other appropriate sanctions**.[2]

FRCP Rule 11(c)(3) states:

> (3) On the Court's Initiative. On its own, the court may order an attorney,

[2] Bold added by Plaintiffs.

> law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

In that regard, Mr. Carr is retired and not averse to community service. Mr. Padis's personal time is significantly more limited and the cost of Mr. Padis's professional time is loaded (with significant adjustments for training, experience and supporting staff and facilities). As such Mr. Carr is suggesting a factor of four such that for every four hours of Mr. Carr's time wasted preparing defenses against spurious filings by Mr. Padis, Mr. Padis should be required to provide the community with one hour of community service (personal time, to be clear). This could be in the form of Pro Bono legal aid (perhaps helping indigents caught up in Texas SB4 in Texas courts if SB4 becomes law and the U.S. government is not a party to the matter), but any form of the well established community service would be sufficient.

For the reasons stated in Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs are seeking prompt relief for pressing issues of immediate concern. However, once USATXN files an Answer in this matter (preferably a well formed and well considered Answer), Plaintiffs intend to file a FRCP Rule 11 Motion for Sanctions for all the various delays which have not been previously addressed by the court.

However, in ruling on this MfPSJ and the Rule 56(d) Motion, this court could initiate proceedings to require a prompt Answer from USATXN and determine the appropriate sanctions in this matter based on the filings of USATXN to date.

Additional Areas for Sanctions Investigations

Early Attempts by Mr. Padis to Delay

This court is invited to consider Exhibit 1 attached to this Reply (likely Doc 28-1) RedactedEmailThread20240418.pdf which is a redacted email thread between Mr. Padis and Mr. Carr from 1 Mar 2024 to 5 Apr 2024. The courts' attention is called to the email 'On 3/1/2024 3:56 PM, Padis, George (USATXN)' where Mr. Padis makes the preposterous assertion:

> I have been made aware of the above-captioned civil action, but the U.S. Attorney's Office has no record of having been served in this case.

This is contradicted by Doc 10 in the record which is dated 11 Jan 2024 and contains adequate proof of service on USATXN on 9 Jan 2024.

This particular assertion is particularly egregious as it is a well known logical fallacy (under the simple premise that Mr. Padis is not omniscient) and it is exceedingly difficult to prove the non existence of a particular thing (record in this case) at a particular time and within a finite space.

In contrast, Mr. Carr would postulate that were there a careful review of all his technical / professional / legal writings / typings since his tutelage under Professor Ira Goldstein of the MIT AI Lab (see csail publications, AIM-381) in late 1976, such logical fallacies are exceedingly rare, possibly even non-existent. This particular claim may be rather tedious in its specificity, but it is quite accurate and supportable.

While Mr. Carr immediately recognized the logical fallacy and expected that Mr.

Padis was trying to trick Mr. Carr into granting Mr. Padis more time to respond he did not belabor the point but instead emphasized the importance of prompt relief for his wife. When Mr. Padis responded that there would be a 'timely response', Mr. Carr expected the usual 'Motion to Dismiss' but was disappointed with the quality of the Motion.

By Mr. Carr's personal estimation, Mr. Padis probably spent less than four hours preparing the actual motion even though he had more than a week to prepare it. This low estimate is based on the tenuous connection between the Motion to Dismiss and the actual Complaint. Mr. Padis made several assertions that had nothing to do with the matter at hand.

Mr. Carr further hypothesizes that had Mr. Padis spent eight hours writing a well founded Motion for Partial Dismissal (and requesting additional time to Answer) there would have been a substantial reduction in the time wasted by Mr. Carr and the court.

Mr. Carr asks that the court consider this exchange in its decision whether the court should initiate an Order To Show Cause for Sanctions.

Conclusion

For the reasons set forth above the court is asked to Grant the Motion for Partial Summary Judgment and Deny the Motion to Continue Consideration.

Respectfully submitted,

Verification of Reply and Response

We the undersigned Plaintiffs hereby affirm under penalty of perjury in both the United States and Thailand affirm that as individuals:

1. I have reviewed the above reply and response and believe all of the statements to be true to the best of my knowledge.
2. I have reviewed the associated documents and exhibits and believe them to be true and accurate copies with the exception of the documents identified as being redacted. The redacted documents have only been altered to remove sensitive personal information or other redactable information (as cited in the redaction) according to normal redaction procedures.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s *Brian P. Carr*

Brian P. Carr
1201 Brady Dr
Irving, TX 75061
Date: 23 Apr 2024
Location: Irving, Texas

/s *Air Carr*

Rueangrong Carr
1201 Brady Dr
Irving, TX 75061
Date: 23 Apr 2024
Location: Irving, Texas

/s *Buakhao Von Kramer*

Buakhao Von Kramer
105 - 3 M 5 T YANGNERNG
SARAPEE, CHIANG MAI 50140 THAILAND
Date: 23 Apr 2024
Location: Irving, Texas

CERTIFICATE OF SERVICE

On the recorded date of submission, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I also hereby certify that on this same date no copies were served via U.S. mail as all parties in this matter were enrolled in the court's electronic case filing (and service) system.

/s *Brian P. Carr*

_____

Brian P. Carr
1201 Brady Dr
Irving, TX 75061

CERTIFICATION OF ELECTRONIC SIGNATURES

In accordance with TXND LR 11.1(d), on the recorded date I received permission from Mrs. Carr and Mrs. Von Kramer to sign this document electronically on their behalf after having discussed with them relevant sections of the document in English.

/s *Brian P. Carr*

_____

Brian P. Carr
1201 Brady Dr
Irving, TX 75061

Date: 23 Apr 2024
Location: Irving, Texas