

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Saleh v. Blinken

Saleh · No. 5:24-cv-02450-EJD · Decided March 25, 2025

SUMMARY

The Northern District of California denied defendants’ motion to dismiss an action challenging the refusal of a U.S. Embassy consular officer to accept a directly filed Form I-130 petition. The court held that the Foreign Affairs Manual provided a meaningful standard for reviewing the agency’s exercise of discretion under the Administrative Procedure Act and that consular non-reviewability did not categorically apply because no visa application had been denied. The court also held that the U.S. citizen plaintiff plausibly alleged a protected property interest in his own I-130 petition under Ninth Circuit precedent.

OPINION

1 2 3 4 UNITED STATES DISTRICT COURT 5 NORTHERN DISTRICT OF CALIFORNIA 6
SAN JOSE DIVISION 7 8 MAHMOOD AHMED FADHL SALEH, et Case No. 5:24-cv-02450-
EJD al., 9 ORDER DENYING MOTION TO Plaintiffs, DISMISS 10 v. 11 Re: Dkt. No. 30
ANTONY BLINKEN, et al., 12 Defendants. 13 Plaintiff Mahmood Saleh (“Saleh”), a U.S.
citizen, brings this action challenging a U.S. 14 Department of State (“DOS”) consular officer’s
refusal to accept for adjudication a direct-filed 15 Form I-130, Petition for Alien Relative (“I-130
Petition”), on behalf of Saleh’s minor daughter, 16 Plaintiff S.M.A.F (collectively, “Plaintiffs”).

Compl., ECF No. 1. Before the Court is a motion to 17 dismiss filed by Defendants U.S. Secretary
of State, Ambassador to Djibouti, the Embassy of the 18 U.S. of Djibouti, and the DOS. Mot. to
Dismiss, ECF No. 30. This motion is fully briefed. 19 Opp’n, ECF No. 33; Reply, ECF No. 41. 20
After carefully reviewing the relevant documents, the Court finds this matter suitable for 21
decision without oral arguments pursuant to Local Rule 7-1(b).

For the reasons stated below, the 22 Court DENIES Defendants’ motion. 23 I. BACKGROUND
24 Plaintiffs allege that Defendants arbitrarily rejected Saleh’s request to file his I-130 25 Petition
directly with the U.S. Embassy of Djibouti in contradiction to their written policy, 26 resulting in
the forced separation of his four-year-old child from her parents in a war-torn region.

27 The Court will first provide a brief overview of the relevant process for obtaining the family-
based 1 immigration visa Saleh seeks before moving to the facts of Plaintiffs’ complaint. 2 A. I-
130 Petition Process for Family-Based Visa 3 An I-130 Petition is a form submitted by a U.S.
citizen or Lawful Permanent Resident 4 (“LPR”) petitioning to establish a familial relationship

with an immediate relative or close relative⁵ intending to immigrate to the U.S. See USCIS, I-130, Petition for Alien Relative, Form Details⁶ (“I-130 Form Details”), available at <https://www.uscis.gov/i-130>.

There are generally two steps⁷ to securing a family-based visa through an I-130 Petition.⁸ First, the U.S. citizen files an I-130 Petition with the U.S. Citizenship and Immigration⁹ Services (“USCIS”) on behalf of the noncitizen-relative living abroad, asking to have the¹⁰ noncitizen classified as an immigrant based on the qualifying familial relationship.

Id. The¹¹ petitioner can file an I-130 Petition online or by mail to a lockbox in the U.S. for processing, and¹² the petitioner can request expedited processing. Id.¹³ Second, if the I-130 Petition is approved, the noncitizen then applies for an immigrant visa¹⁴ with a DOS consular officer, which involves appearing at a U.S. embassy for an interview with a¹⁵ consular officer.

Id. The consular officer has the authority to grant or refuse a visa application.¹⁶ See 8 U.S.C. § 1201(a)(1); 22 C.F.R. §§ 42.71, 42.81.¹⁷ In limited circumstances, a U.S. citizen petitioner may seek to bypass the first step of filing¹⁸ the petition with USCIS and directly file the I-130 Petition with an embassy or consulate overseas¹⁹ (also referred to as a “direct-file”).

See generally 9 Foreign Affairs Manual (“FAM”) 504.2-²⁰ 4(B)(1)(b). In the DOS’s Foreign Affairs Manual, the Bureau of Consular Affairs provides that an²¹ I-130 Petition may be directly filed in “exceptional circumstances.” Id. “Exceptional²² circumstances” include: (1) military emergencies; (2) medical emergencies; (3) threats to personal²³ safety; (4) the beneficiary being close to ageing out; (5) the petitioner’s recent naturalization; (6)²⁴ the adoption of a child; (7) the short notice of position relocation; and (8) other circumstances of²⁵ an urgent non-routine nature.

See id. at 505.2-4(B)(1)(b)(4). Relevant here, the FAM defines²⁶ “threats to personal safety” as occurring when, for example, “a petitioner and beneficiary may²⁷ have been forced to flee their country of residence due to civil strife or natural disaster and are in¹ precarious circumstances in a different country outside of the United States.” Id. at 505.2-² 4(B)(1)(b)(4)(c).

If the consular officer encounters a case they believe meets the exceptional³ circumstance criteria, then the officer may exercise discretion to accept and adjudicate the filing.⁴ See id. at 504.2-4(B)(1)(b).⁵ B. Saleh’s I-130 Petition⁶ Saleh is a U.S. citizen who naturalized on January 30, 2014. Compl. ¶¶ 40, 41. Saleh⁷ married his wife, Najiah Mutahar Ali Hussein (referred to in the Complaint as “Najiah”), in 2017.

⁸ Id. ¶ 42. Saleh filed an I-130 Petition for Najiah in January 2019, which was approved shortly⁹ after. Id. The couple’s first child, S.M.A.F., was born on May 28, 2019, after USCIS approved¹⁰ Saleh’s I-130 Petition, but before Najiah’s visa interview at a consulate. Id. ¶¶ 44, 46. At the¹¹ time, Saleh believed that S.M.A.F. was a U.S. citizen born abroad; but it appears Saleh recently¹² discovered that, perhaps due to the timing of Najiah’s I-130 Petition and visa interview, S.M.A.F.

13 is a citizen and national of Yemen, and Saleh needs to file a separate I-130 Petition so that 14 S.M.A.F. can immigrate to the U.S.¹ Id. ¶¶ 47, 48. 15 Because Yemen was unsafe due to the increasingly dangerous conditions escalated by the 16 Houthis, Saleh and his family were residing in Djibouti at this time at a considerable financial cost 17 to Saleh while they tried to obtain the necessary visa.

Id. ¶¶ 50, 53. However, Najiah needed to 18 return to the U.S. before the expiration of her immigrant visa in May 2024, and Saleh needed to 19 return to the U.S. for work. Id. ¶¶ 50, 52. Given these circumstances, Saleh sought to file his I- 20 130 Petition directly with the U.S. Embassy of Djibouti (“the Embassy”). Id. Saleh believes these 21 circumstances are “exceptional” under the FAM’s definition of “threats to personal safety” 22 because Saleh’s family was forced to flee Yemen due to civil strife, and now S.M.A.F. is left in 23 precarious circumstances in Djibouti.

See Compl. ¶¶ 54–60; FAM 505.2-4(B)(1)(b)(4)(c). 24 On January 22, 2024, counsel for Saleh contacted the U.S. Embassy of Djibouti and 25 26 1 Plaintiffs also allege facts regarding successfully obtaining status for Saleh and Najiah’s second 27 child which are irrelevant to the present motion. 1 requested an appointment to directly file an I-130 Petition on behalf of S.M.A.F.

Id. ¶ 55. He 2 received a generic response that day with information about the visa process that did not address 3 the request to direct-file the I-130 Petition. Id. Saleh’s counsel emailed the Embassy again on 4 February 15, 2024, with a request to direct-file Saleh’s I-130 Petition. Id. ¶ 56.

The next day, 5 counsel also emailed a U.S. Attorney with the same request. Id. ¶ 57. 6 On February 28, 2024, the U.S. Attorney responded, advising that the Embassy reported 7 the interview would have to be scheduled through the National Visa Center. Id. ¶ 58.

However, 8 Saleh’s counsel confirmed that the National Visa Center had no control over direct-filed I-130 9 Petition appointments. Id. On March 6, 2024, the U.S. Attorney reported to Saleh’s counsel that 10 the Embassy was denying the request for a direct-filed I-130 Petition. Id. ¶ 59.

On March 13, 11 2024, the Embassy also emailed counsel to advise that it was denying the request for a direct-filed 12 I-130 Petition. Id. ¶ 60. This action was subsequently filed on April 25, 2024. 13 C. Pattern of Conduct Toward Yemeni Americans 14 Plaintiffs allege that Defendants’ conduct in denying Saleh’s request to directly file his I- 15 130 Petition is symptomatic of their pattern and practice of categorically delaying and denying 16 applications for immigration benefits filed by U.S. citizens and LPRs of Yemeni race and/or 17 national origin and their beneficiary family members.

Id. ¶ 15. 18 For example, Plaintiffs allege that USCIS subjects petitioners of Yemeni national origin to 19 a heightened standard that considers all Yemeni petitions “fraudulent until proven otherwise,” 20 despite the data showing that most Yemeni American citizens’ applications for family members 21 are bona fide. Id. ¶¶ 25, 26. Plaintiffs also allege that USCIS intentionally

delays Yemeni 22 applications by employing tactics such as: repeatedly failing to acknowledge receipt of benefits 23 applications requests for years; failing to issue or reasonably process applications or requests; 24 relocating benefits requests to other agencies for purposes of compiling data and information to be 25 used in unrelated adjudications and investigations; requiring the taking of sworn statements for the 26 purpose of collecting information to be used in unrelated investigations; issuing duplicative 27 Requests For Evidence and Notices of Intent to Deny; failing to timely and promptly forward 1 administrative appeals of denied petitions to the Board of Immigration Appeals (“BIA”); requiring 2 DNA testing for the approval of petitions filed by Yemenis without the necessary statutory and 3 regulatory authority; systematically failing to request optional DNA after receipt of petitions, 4 while precluding the unsolicited submission of DNA testing results; failing to serve required 5 notices; and “losing” files at Defendants’ various offices.

Id. ¶ 29. 6 D. Plaintiffs’ Claims 7 Plaintiffs argue that Defendants’ denial of Saleh’s request to direct-file his I-130 Petition 8 violates the Administrative Procedure Act (“APA”), 5 U.S.C. § 706 —specifically, that their 9 “failure to follow their own policy explicitly set forth in the Foreign Affairs Manual and officially 10 and publicly adopted agency policies,” Compl. ¶ 72, and their “denial of Plaintiffs’ request for 11 direct filing of the I-130 Petition for Plaintiff S.M.A.F,” id. ¶ 80, were arbitrary, capricious, and 12 abuses of discretion under 5 U.S.C. § 706(2).

See id. ¶¶ 65–82. Plaintiffs also allege that this 13 conduct violates the Due Process Clause of the Fifth Amendment and the Declaratory Judgment 14 Act, 28 U.S.C. § 2201. Id. ¶¶ 83–115. Plaintiffs request the Court mandate that they be permitted 15 to direct-file Saleh’s I-130 Petition with the U.S. Embassy of Djibouti, among other requested 16 relief. Id. at 20.

17 II. LEGAL STANDARD 18 To survive a motion to dismiss brought under Rule 12(b)(6), “a complaint must contain 19 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” 20 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 21 570 (2007)). A plaintiff must “plead[] factual content that allows the court to draw the reasonable 22 inference that the defendant is liable for the misconduct alleged,” which requires “more than a 23 sheer possibility that a defendant has acted unlawfully.” Id. The Court must “accept factual 24 allegations in the complaint as true and construe the pleadings in the light most favorable to the 25 nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins.*

Co., 519 F.3d 1025, 1031 (9th Cir. 26 2008). However, courts “are not bound to accept as true a legal conclusion couched as a factual 27 allegation.” *Iqbal*, 556 U.S. at 678. III. DISCUSSION 1 Defendants move to dismiss Plaintiffs’ claims on the following grounds: (1) the consular 2 officer’s decision to deny Saleh’s request is discretionary and not subject to judicial review under 3 the APA; (2) there is no constitutionally protected interest in I-130 Petitions; and (3) the doctrine 4 of consular non-reviewability precludes all of Plaintiffs’ claims.

The Court will review each 5 argument in turn.^{2 6} A. Judicial Review of APA Claim 7 First, Defendants argue that the Court does not have jurisdiction to review Plaintiffs' APA 8 claim because the agency's actions here are committed to agency discretion by law. 9 The APA provides that "[a] person suffering legal wrong because of agency action, or 10 adversely affected or aggrieved by agency action within the meaning of a relevant statute, is 11 entitled to judicial review thereof." 5 U.S.C. § 702.

There is a "strong presumption that Congress 12 intends judicial review of administrative action." *Helgeson v. Bureau of Indian Affairs*, 153 F.3d 13 1000, 1003 (9th Cir.1998) (quoting *Traynor v. Turnage*, 485 U.S. 535, 542 (1988)); see also 14 *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140–41 (1967) ("[T]he Administrative Procedure 15 Act... embodies the basic presumption of judicial review....

[O]nly upon a showing of 'clear 16 and convincing evidence' of a contrary legislative intent should the courts restrict access to 17 judicial review."), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99, 97 (1977); 18 *ANA Int'l, Inc. v. Way*, 393 F.3d 886, 890 (9th Cir. 2004) ("The default rule is that agency actions 19 are reviewable... even if no statute specifically authorizes judicial review"), abrogated on other 20 grounds by *Bouarfa v. Mayorkas*, 604 U.S. 6 (2024).

21 There are two narrow circumstances that can overcome the strong presumption of 22 reviewability: (1) when Congress expressly bars review by statute, 5 U.S.C. § 701(a)(1); and (2) 23 when agency actions are "committed to agency discretion by law," *id.* § 701(a)(2). See *Pinnacle 24 Armor, Inc. v. United States*, 648 F.3d 708, 718–19 (9th Cir. 2011).

The only exception relevant 25 26 2 Plaintiffs' opposition defends their complaint in ways that were not raised by Defendants and 27 therefore will not be discussed in this Order. 1 here is the second. 2 The Supreme Court has acknowledged the tension between this exception for discretionary 3 decisions and the APA's purpose of examining abuses of discretion, observing that "[a] court 4 could never determine that an agency abused its discretion if all matters committed to agency 5 discretion were unreviewable." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586 U.S. 9, 23 6 (2018) (citing *Heckler v. Chaney*, 470 U.S. 821, 829 (1985)).

To resolve this tension, the Supreme 7 Court reads Section 701(a)(2) "quite narrowly, restricting it to 'those rare circumstances where the 8 relevant statute is drawn so that a court would have no meaningful standard against which to judge 9 the agency's exercise of discretion.'" *Id.* (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)).

In 10 other words, judicial review is only unavailable in rare circumstances where there is no "judicially 11 manageable standard[]" by which to judge the agency's action. *Heckler*, 470 U.S. at

830. Under 12 this reading, “the mere fact that a statute contains discretionary language does not make agency 13 action unreviewable.” *Beno v. Shalala*, 30 F.3d 1057, 1066 (9th Cir.

1994). 14 Courts often look to the language in the statutes and regulations to determine whether there 15 are meaningful standards for review; but courts are also permitted to examine agency rules or 16 well-established agency policies to provide sufficient standards to transform unreviewable 17 discretion into discretion reviewable for abuse. *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) 18 (“Though the agency’s discretion is unfettered at the outset, if it announces and follows—by rule 19 or by settled course of adjudication—a general policy by which its exercise of discretion will be 20 governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could 21 constitute action that must be overturned.... ”); see also *Jajati v. United States Customs & 22 Border Prot.*, 102 F.4th 1011, 1017 n.1 (9th Cir.

2024) (“Even if a statute grants an agency 23 unfettered discretion, an agency’s decision may nonetheless be reviewed if regulations or agency 24 practice provide a meaningful standard by which this court may review its exercise of discretion.”) 25 (internal quotation marks omitted); *Pinnacle*, 648 F.3d at 719 (noting that courts “may also look to 26 regulations, established agency policies, or judicial decisions for a meaningful standard to 27 review”) (internal quotation marks and citation omitted).

1 Here, the relevant statutes and regulations do not provide any standards for the Court to 2 review the agency’s decision. The Immigration and Nationality Act (“INA”) establishes that “any 3 citizen of the United States claiming that an alien is entitled to classification by reason of a 4 [familial] relationship... may file a petition with the Attorney General for such classification.” 8 5 U.S.C. § 1154(a)(1)(A)(i).

But the statute is silent as to the filing procedures to which petitioners 6 are entitled. The regulations likewise state simply that a petition “must be filed on the form 7 prescribed by USCIS in accordance with the form instructions,” without describing those 8 procedures further. 8 C.F.R. § 204.1(b). 9 However, the FAM, which the DOS describes as an “authoritative source for the 10 Department’s organization structures, policies, and procedures that govern the operations of the 11 State Department, the Foreign Service and, when applicable, other federal agencies,” does provide 12 meaningful standards for review.

See U.S. Dept. of State, Foreign Affairs Manual, available at 13 <https://fam.state.gov/>. As discussed above, the FAM provides that, “[i]f a consular section 14 encounters a case they believe meets the exceptional circumstances criteria outlined below, then 15 the Consular Chief or another designated consular officer may exercise discretion to accept and 16 adjudicate the filing.” FAM 504.2-4(B)(1)(b).

The manual goes on to provide eight specific 17 “examples of the types of exceptional circumstances where consular officers may opt to accept 18 Form I-130 immediate relative petitions.” Id. at 504.2-4(B)(1)(b)(4). These examples include 19 “[t]hreats to personal safety,” i.e., when “a petitioner and beneficiary may have been forced to flee 20 their country of residence due to civil strife or natural disaster and are in precarious circumstances 21 in a different country outside of the United States.” Id. at 504.2-4(B)(1)(b)(4)(c).

The Court 22 agrees with Plaintiffs that this well-established policy supplies a meaningful standard to review 23 agency actions under Heckler and its progeny. 24 The Court finds Defendants’ arguments to the contrary unpersuasive. Defendants 25 primarily contend that the decision to accept a direct-filed I-130 Petition is committed solely to 26 agency discretion because there are no relevant statutes or regulations that require the DOS to 27 accept any I-130 Petition filed directly, and the FAM guidelines likewise only outline permissible 1 reasons to accept a direct filing.

Defendants rely heavily on two New York district court cases 2 that held there is no legal framework to examine a consular officer’s decision regarding whether to 3 accept a directly filed I-130 Petition because the FAM’s criteria are permissive and no other law or 4 regulation requires consular officers accept these petitions directly. *Ahmed v. Cissna*, 327 F. 5 Supp. 3d 650, 671 (S.D.N.Y.

2018), *aff’d sub nom. Ahmed v. Cuccinelli*, 792 F. App’x 908, 910 6 (2d Cir. 2020) (finding no jurisdiction because there was no authority requiring consular officers 7 to accept I-130 Petitions); *Al Saidi v. U.S. Embassy in Djibouti*, 544 F. Supp. 3d 289, 297 8 (E.D.N.Y. 2021) (rejecting plaintiffs’ challenge to the DOS’s determination that a direct-filed I- 9 130 Petition was not clearly approvable³ and holding that the Court lacked jurisdiction over the 10 plaintiffs’ claims USCIS enjoys broad discretion in its processing of I-130 Petitions).

One of 11 these decisions was affirmed by the Second Circuit. *Ahmed*, 792 F. App’x at 910. 4 12 However, the Court’s understanding of this issue is informed by the Ninth Circuit, not the 13 Second Circuit. Though neither Defendants nor Plaintiffs provide the Court any relevant Ninth 14 Circuit authority on this point, the Court observes that the Ninth Circuit has generally found an 15 agency’s broad discretion in choosing whether to act, if at all, does not on its own preclude 16 judicial review: 17 The fact that an agency has broad discretion in choosing whether to act does not establish that the agency may justify its choice on 18 specious grounds.

To concede otherwise would be to disregard entirely the value of political accountability, which itself is the very 19 premise of administrative discretion in all its forms. 20 *Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir. 2000); see also *Jajati*, 102 F.4th at 1017 21 22 3 After a consular officer decides there are “exceptional circumstances” justifying a direct filing, they must then decide whether the petition is “clearly approvable” before proceeding.

The 23 “clearly approvable” issue is not present in this case. 24 4 Defendants also cite to Norton v. S. Utah Wilderness All., 542 U.S. 55, 64 (2004), for the proposition that “a claim under § 706(1) can proceed only where a plaintiff asserts that an agency 25 failed to take a discrete agency action that it is required to take.” Norton v. S. Utah Wilderness All., 542 U.S. 55, 64 (2004) (emphasis in original).

However, Plaintiffs here bring APA claims 26 under Section 706(2), arguing that Defendants’ conduct “violates the APA as arbitrary, capricious, and an abuse of discretion.” Compl. ¶ 80; see also id. ¶ 72. Defendants have failed to explain the 27 connection between this holding and the circumstances here. 1 (summarizing Newman’s principles); Socop-Gonzalez v. I.N.S., 272 F.3d 1176 (9th Cir.

2001) 2 (reviewing BIA’s discretionary decision to not reopen deportation proceedings). 5 So too here, the 3 fact that a consular officer is not obligated to accept direct I-130 filings does not insulate that 4 decision from judicial review when the Court has a standard to review the exercise of that 5 discretion. 6 The Court repeats, this catchall exception in Section 701(a)(2) is extraordinarily narrow.

7 As noted by the Ninth Circuit on multiple occasions, this exception has only applied in rare 8 instances of discretionary decisions regarding, for example: docket control, national security, 9 allocation of lump-sum appropriation, and instituting enforcement proceedings or granting 10 reconsideration of a final decision. See, e.g., Pinnacle, 648 F.3d at 720–21 (citing cases); 11 Newman, 223 F.3d at 943 (citing cases).

This is not one of those rare cases. Here, consular 12 officers are given the authority to accept direct-filed I-130 Petitions under “exceptional 13 circumstances,” and the FAM provides an enumerated list of what those circumstances include. 14 Using these standards, a consular officer’s decision to deny a direct filing based upon a finding 15 that the circumstances do not meet the FAM’s definition of “threats to personal safety” is 16 reviewable by the Court under the APA.

17 Therefore, the Court finds that Section 701(a)(2) does not categorically preclude the Court 18 from reviewing the consular officer’s decision and DENIES Defendants’ motion to dismiss 19 Plaintiffs’ APA claim on this ground. 20 B. Constitutionally Protected Interest in I-130 Petition 21 Second, Defendants argue that Plaintiffs’ due process claims fail because there is no 22 constitutionally protected liberty or property interest in the adjudication of an I-130 Petition.

23 24 5 To be clear, this Order does not examine judicial authority in the context of 8 U.S.C. § 1252(a)(2)(B), which strips judicial jurisdiction over agency denials of discretionary relief in 25 defined circumstances. See, e.g., ANA Int’l, 393 F.3d at 891 (explaining differences in standards); Spencer Enters. v. United States, 345 F.3d 683, 691 (9th Cir. 2003) (same).

As Defendants 26 highlight, “[t]he jurisdiction-stripping provisions in Section 1252(a)(2)(B) has no relevance to this case since Plaintiffs are not challenging a USCIS decision on an immigration benefit specified in 27 the statute, such as adjustment of status.” Reply 2. 1 As an initial matter, it is undisputed that S.M.A.F. has no constitutional right to immigrate 2 to the U.S. Regarding Saleh, Defendants argue that he does not have a due process right in the 3 visa processing of others, citing the Supreme Court’s holding that “a citizen does not have a 4 fundamental liberty interest in her noncitizen spouse being admitted to the country.” Dep’t of 5 State v. Muñoz, 602 U.S. 899, 909 (2024).

Defendants highlight that the Supreme Court also 6 noted that a “claim to a procedural due process right in someone else’s legal proceeding would 7 have unsettling collateral consequences.” Id. at 916. 8 However, as Plaintiffs highlight, the circumstances here are distinguishable from those in 9 Muñoz.

In Muñoz, a U.S. citizen spouse filed a petition with USCIS to have her spouse classified 10 as an immediate relative, which was granted. Id. at 904–05. After the petition was granted, the 11 spouse applied for her visa with the consulate in San Salvador, who denied her application on 12 inadmissibility grounds. Id. The U.S. citizen’s claims challenged the consular’s denial of his 13 spouse’s visa.

See id. 14 Here, Saleh is challenging the consular officer’s decision to refuse direct-filing of his own 15 petition to establish a qualifying familial relationship—the first step in the I-130 Petition process 16 that the Court described above. See also id. at 904 (describing the two-step process). Saleh is not 17 challenging the consular officer’s decision in step two, when the relative applies for a visa and 18 attends an interview at the consulate.

See id. In other words, this case does not concern a 19 noncitizen’s visa application; it concerns a U.S. citizen’s own petition to establish a qualifying 20 familial relationship. As Plaintiffs highlight, the Ninth Circuit has clearly held that a U.S. citizen 21 filing an I-130 Petition is entitled to due process: 22 [G]rant of an I–130 petition for immediate relative status is a nondiscretionary decision.

Immediate relative status for an alien 23 spouse is a right to which citizen applicants are entitled as long as the petitioner and spouse beneficiary meet the statutory and regulatory 24 requirements for eligibility. This protected [property] interest is entitled to the protections of due process. 25 Ching v. Mayorkas, 725 F.3d 1149, 1156 (9th Cir. 2013). Regardless of whether Saleh has a 26 liberty interest in residing with his daughter in the U.S. under Muñoz, he has a clearly established 27 1 property interest in his own petition to establish that S.M.A.F. is his daughter under Ching, and 2 this interest is entitled to the protections of due process.

Id.; see also *Hanan v. USCIS*, No. 23-cv- 3 2414-HSG, 2024 WL 4293917, at *11 (N.D. Cal. Sep. 25, 2024) (“Given the different procedural 4 postures of Ching and Muñoz, the Court cannot say that the reasoning of Ching is clearly 5 irreconcilable with Muñoz. Plaintiffs may have a property interest in the approval of an I-130 6 while lacking a liberty interest in residing in the United States together.

The Court therefore 7 continues to conclude, as Ching found, that the grant of an I-130 petition is a ‘protected interest [] 8 entitled to the protections of due process.’”). 6 9 Therefore, the Court DENIES Defendants’ motion to dismiss Saleh’s due process claims 10 on this ground. 11 C. Doctrine of Consular Non-reviewability 12 Finally, Defendants argue that all of Plaintiffs’ claims are precluded under the doctrine of 13 consular non-reviewability.

14 The Ninth Circuit has held that a consular officer’s decision to deny a visa application “is 15 not subject to judicial review... based on ‘the recognition that the power to exclude or expel 16 aliens, as a matter affecting international relations and national security, is vested in the Executive 17 and Legislative branches of government.’” *Allen v. Milas*, 896 F.3d 1094, 1104 (9th Cir.

2018). 18 The Supreme Court recently reiterated this doctrine in *Muñoz*, stating: “The Immigration and 19 Nationality Act (INA) does not authorize judicial review of a consular officer’s denial of a visa; 20 thus, as a rule, the federal courts cannot review those decisions.” *Muñoz*, 602 U.S. at 908. 21 However, as Plaintiffs highlight, and as the Court discussed above, there has been no 22 denial of a visa application here; only a denial of Saleh’s request to directly file his own I-130 23 Petition with the U.S. Embassy of Djibouti rather than with USCIS in the U.S. Opp’n 2.

24 25 6 In a footnote, Defendants conclusorily state that “Plaintiff’s claim is unripe and not non-justiciable.” Mot. 8 n.3. In their reply, Defendants make what could be perceived as a related 26 argument that Saleh has no right to challenge the adjudication of an I-130 Petition because he has not filed one yet.

However, Defendants fail to cite any authority in support or expand any further 27 on this argument. 1 Defendants have failed to cite any case applying the doctrine of consular non-reviewability to 2 || these circumstances. 3 Therefore, the Court DENIES Defendants’ motion to dismiss Plaintiffs’ claims on this 4 || ground.’ 5 || IV. CONCLUSION 6 Based on the foregoing, the Court DENIES Defendants’ motion to dismiss.

7 IT IS SO ORDERED. 8 Dated: March 25, 2025 9 10 EDWARD J. DAVILA 11 United States District Judge 12 13 15 16 = 17 Z 18 19 20 21 22 23 24 || ’ Defendants also raise an argument in a footnote that the Court should dismiss Plaintiffs’ Declaratory Judgment Act claim because “[t]he Declaratory Judgment Act is not a source of 5 substantive rights,” and “Plaintiffs have not

provided any basis for the Court to issue the requested declaration, as they have not proved any substantive violation by Defendants”; but Defendants 26 || drop this argument in their reply.

Mot. 9n.4. Regardless, for the same reasons the Court denies Defendants’ motion to dismiss the due process claims, the Court rejects Defendants’ arguments 27 || regarding the Declaratory Judgment Act. 28 || Case No.: 5:24-cv-02450-EJD ORDER DENYING MOTION TO DISMISS