

cal\_\_\_\_\_

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MITRA AMIDI,

Plaintiff,

v.

MICHAEL CHERTOFF, Secretary of  
Homeland Security; EMILIO GONZALEZ,  
Director, Department of Homeland Security;  
CHRISTINE POULOS, Center Director,  
Department of Homeland Security;  
DEPARTMENT OF HOMELAND  
SECURITY,

Defendants.

Civil No. 07cv710 (AJB)

Order Granting In Part and Denying In Part  
Motion for Summary Judgment; and  
Denying Defendants' Ex Parte Application  
for Certification  
[Doc. Nos. 19 and 21]

The Plaintiff has filed a motion for summary judgment arguing that the termination of the Plaintiff's brother's immigrant visa application was improper, unlawful and therefore of no effect on two grounds: 1) the consulate lacked the authority to terminate the registration on the grounds that this action was not discretionary and the decision to terminate the registration was an abuse of discretion because the consulate failed to follow the proper procedures and regulations for termination under 8 U.S.C. 1153(g); and 2) that the consulate failed to notify Plaintiff of the termination of the registration. Defendants' have opposed Plaintiff's motion on the grounds that: 1) the consular determination at issue in this case is not judicially reviewable; and 2) the Plaintiff has presented no evidence that the consular determination was incorrect or unlawful.

**Background**

1  
2 Plaintiff, Mitra Amidi filed an immigrant visa petition for her brother, Daryoush Amidi on  
3 September 16, 1986, which eventually became available to him in 1996 or 1997. Once the visa became  
4 available to the Plaintiff, the U.S. consulate in Ankara, Turkey sent a letter to the Plaintiff outlining the  
5 steps her brother in Iran would have to take to pursue his visa application. This letter started a one year  
6 time period for the Plaintiff to take such action. When neither the Plaintiff nor her brother took action  
7 after the one-year period had expired, the U.S. Consulate sent a second letter again notifying the  
8 Plaintiff that the visa had become available and that failure to take action within one year would result in  
9 termination of the visa application (i.e. they would have to begin the process a new without the benefit  
10 of the 9/16/86 priority date). The Plaintiff responded to this letter, stating that her brother was unable to  
11 leave Iran and requested that the required interview at the U.S. consulate in Ankara, Turkey be  
12 rescheduled. This notification and rescheduling of the interview happened several times because the  
13 Plaintiff's brother was unable to leave Iran, which was deemed by the consulate to be a condition  
14 beyond his control.

15 However, in March of 2002, the consulate notified the Plaintiff that they had scheduled the  
16 interview for her brother and his family on April 11, 2002. The brother's wife and son traveled to the  
17 U.S. consulate in Ankara, Turkey for the interview and underwent the required medical exams, at their  
18 own expense, and informed the consulate that the brother was still unable to leave Iran. No visa could  
19 be issued in the absence of the principle applicant, the brother, but the wife requested that his interview  
20 be put over until such time as he would be permitted to leave Iran.

21 Defendants' contend that a termination notification letter was sent to the Plaintiff one year later  
22 on March 11, 2003, on the basis that the brother and his family had failed to appear for the April 11,  
23 2002 interview, and notifying the Plaintiff and her brother of their need to take further action to reinstate  
24 the visa application. The consulate received no response and the Plaintiff claims that she, nor her  
25 brother, ever received the 2003 letter. On March 11, 2004, Defendants' contend that the consulate sent a  
26 second letter notifying Plaintiff and her brother that the visa application could no longer be reinstated  
27 and had been terminated pursuant to 8 U.S.C. § 1153(g). Plaintiff claims that neither she nor her brother  
28 received this letter either.

1 On January 10, 2005, the Plaintiff notified the consulate that her brother could now depart Iran,  
2 however, the consulate responded by letter dated January 27, 2005, that the brother's case had been  
3 terminated pursuant to 8 U.S.C. § 1153(g) because they had failed to appear for the April 11, 2002  
4 interview or respond to the 2003 letter. March 18, 2005, the consulate purged the visa application file.  
5 On July 29, 2005, the Plaintiff filed a new visa application on her brother's behalf and requested that  
6 the 1986 priority date apply. The new visa application was approved, but the request for the 1986  
7 priority date was denied. In this action, the Plaintiff seeks to have the 2005 visa application be given the  
8 1986 priority date.

### 9 Legal Standard

10 Fed. R. Civ. P. 56(c) authorizes the granting of summary judgment "if the pleadings, depositions,  
11 answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is  
12 no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of  
13 law." The standard for granting a motion for summary judgment is essentially the same as for the  
14 granting of a directed verdict. Judgment must be entered "if, under the governing law, there can be but  
15 one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51  
16 (1986). However, "[i]f reasonable minds could differ," judgment should not be entered in favor of the  
17 moving party. *Id.*

18 The parties bear the same substantive burden of proof as would apply at a trial on the merits,  
19 including plaintiff's burden to establish any element essential to his case. *Liberty Lobby*, 477 U.S. at  
20 252; *Celotex v. Catrett*, 477 U.S. 317, 322 (1986); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).  
21 The moving party bears the initial burden of identifying the elements of the claim in the pleadings, or  
22 other evidence, which the moving party "believes demonstrates the absence of a genuine issue of  
23 material fact." *Celotex*, 477 U.S. at 323; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Zoslaw v.*  
24 *MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). "A material issue of fact is one that affects the  
25 outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth."  
26 *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982). More than a "metaphysical doubt" is  
27 required to establish a genuine issue of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio*  
28 *Corp.*, 475 U.S. 574, 586 (1986).

1 The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a  
2 genuine issue for trial. *Celotex*, 477 U.S. at 324. To successfully rebut a properly supported motion for  
3 summary judgment, the nonmoving party “must point to some facts in the record that demonstrate a  
4 genuine issue of material fact and, with all reasonable inferences made in the plaintiff[]’s favor, could  
5 convince a reasonable jury to find for the plaintiff[.]” *Reese v. Jefferson School Dist. No. 14J*, 208 F.3d  
6 736, 738 (9th Cir. 2000) (citing FED. R. CIV. P. 56; *Celotex*, 477 U.S. at 323; *Anderson*, 477 U.S. at  
7 249); *see also Paine v. City of Lompoc*, 265 F.3d 975, 984 (9th Cir. 2001) (“[I]f a plaintiff cannot in its  
8 summary judgment motion factual submissions connect any particular defendant to the incidents giving  
9 rise to liability, that defendant is entitled to summary judgment and may not be required to go to trial.”).

10 While the district court is “not required to comb the record to find some reason to deny a motion  
11 for summary judgment,” *Forsberg v. Pacific N.W. Bell Tel. Co.*, 840 F.2d 1409, 1417-18 (9th Cir.  
12 1988), *Nilsson v. Louisiana Hydraulic*, 854 F.2d 1538, 1545 (9th Cir. 1988), the court may nevertheless  
13 exercise its discretion “in appropriate circumstances,” to consider materials in the record which are on  
14 file, but not “specifically referred to.” *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026,  
15 1031 (9th Cir. 2001). However, the court need not “examine the entire file for evidence establishing a  
16 genuine issue of fact, where the evidence is not set forth in the moving papers with adequate references  
17 so that it could be conveniently found.” *Id.*; *see also Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870,  
18 883 (9th Cir. 1982) (“A party may not prevail in opposing a motion for summary judgment by simply  
19 overwhelming the district court with a miscellany of unorganized documentation.”).

20 In ruling on a motion for summary judgment, the court need not accept legal conclusions “cast in  
21 the form of factual allegations.” *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).  
22 “No valid interest is served by withholding summary judgment on a complaint that wraps nonactionable  
23 conduct in a jacket woven of legal conclusions and hyperbole.” *Vigliotto v. Terry*, 873 F.2d 1201, 1203  
24 (9th Cir. 1989); *see also Nelson v. Pima Community College*, 83 F.3d 1075, 1081-82 (9th Cir. 1996)  
25 (stating that “mere allegation and speculation do not create a factual dispute for purposes of summary  
26 judgment”).

27 ///

28 ///

**Discussion**

In the instant motion for summary judgment, the Plaintiff contends that the consulate lacked the authority to terminate the application on the grounds that this action was not discretionary and the decision to terminate the registration was an abuse of discretion, because the consulate failed to follow the proper procedures and regulations for termination under 8 U.S.C. 1153(g).<sup>1</sup> The Defendants' have opposed Plaintiff's motion on the grounds that: 1) the consular determination at issue in this case is not judicially reviewable; and 2) the Plaintiff has presented no evidence that the consular determination was incorrect or unlawful.

***1. Whether the Decision by the Consulate to Terminate the Application Is Subject to Judicial Review***

Defendants argue that the Court lacks jurisdiction in the instant case, because the decision in question was a discretionary decision by the consulate and therefore not subject to judicial review. Normally a consulate's discretionary decision to grant or deny a visa petition is not subject to judicial review.<sup>2</sup> However, consular determinations that do not relate to the actual grant or denial of a visa have been deemed to be subject to judicial review.<sup>3</sup> Jurisdiction exists when the suit challenges authority of a consulate to take or fail to take action, as opposed to decision taken within consulate's discretion. *Patel v. Reno*, 134 F.3d 929, 932 (9th Cir. 1997); *see also Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir.1988); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (finding that judicial review exists when the government has denied a visa if the government did not act "on the basis of a facially legitimate and bona fide reason."). Since the decision at issue in the present motion involves the consulate's decision to terminate or cancel the application, as opposed to the discretionary decision of whether to approve or

---

<sup>1</sup> The Plaintiff also contends that the consulate failed to notify Plaintiff of the termination of the registration, however, since this material fact is in dispute, the Court cannot reached the merits of this ground.

<sup>2</sup> *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir.1986); *Ventura-Escamilla v. INS*, 647 F.2d 28, 30 (9th Cir.1981).

<sup>3</sup> *See Fiallo v. Levi*, 406 F. Supp. 162 (E.D.N.Y. 1975), *aff'd sub. nom., Fiallo v. Bell*, 430 U.S. 787 (1977) ("We will not extend consular nonreviewability, insofar as that rule had been recognized, beyond the actual grant or denial of a visa. This is predicated upon our reluctance to insulate entirely the actions of any public official from judicial scrutiny, and thereby foreclose a group of plaintiffs from seeking relief in the courts.").

1 deny the application, it too challenges authority of consulate to take or fail to take action and, therefore,  
 2 jurisdiction exists to consider whether the consulate's decision to terminate Plaintiff's application was  
 3 an abuse of discretion. *Patel v. Reno*, 134 F.3d 929, 932 (9th Cir. 1997) (Whether a consular official  
 4 complied, or not, with their own regulations and procedures is not an issue within their discretionary  
 5 powers.).

6 Having found that jurisdiction exists, this Court may review the consulate's action to determine  
 7 whether there was an abuse of discretion. *Abdelhamid v. Ilchert*, 774 F.2d 1447 (9th Cir. 1985)((District  
 8 court had subject matter jurisdiction over non-immigrant exchange visitor's complaint alleging that INS  
 9 district director abused his discretion by failing to state reasons for denying visitor's application for  
 10 waiver of requirement that he reside for two years abroad before becoming eligible for immigrant visa  
 11 or permanent residence since essence of claim was that INS failed to comply with its own regulations.)  
 12 An abuse of discretion may be found if there is no evidence to support the decision or if the decision is  
 13 based on an improper understanding of the law. *Kaliski v. District Director of Immigration and*  
 14 *Naturalization Service*, 620 F.2d 214 (9th Cir. 1980).

15 The Plaintiff argues that the consulate abused its discretion by terminating the visa application.  
 16 The essence of this claim is that the consulate failed to comply with its own regulations. The  
 17 Department of State has established a procedure if a particular case is going to be terminated under  
 18 1153(g).

19 The Secretary of State shall terminate the registration of any alien who  
 20 fails to apply for an immigrant visa within one year following notification  
 21 to the alien of the availability of such visa, **but the Secretary shall**  
 22 **reinstate the registration of any such alien who establishes within two**  
 23 **years following the date of notification of the availability of such visa**  
 24 **that such failure to apply was due to circumstances beyond the alien's**  
 25 **control.** (Emphasis added.) 8 U.S.C. 1153(g).

26 The procedure is set out in the State Department regulations. 22 C.F.R. 42.83<sup>4</sup> states:

27 . . .the consular officer...shall notify the alien of the termination [and] of  
 28 the **right to have the registration reinstated if the alien**, before the end of  
 the second year after the missed appointment **date . . . establishes . . . that**  
**the failure to apply for an immigrant visa . . . was due to circumstances**  
**beyond the alien's control.** (Emphasis added.) 22 C.F.R. 42.83(c)." . . .  
 the term '**circumstances beyond the alien's control**' includes . . . a

<sup>4</sup> The procedural notes for this process are located in 9 FAM 42.83.

1 refusal by the authorities of the country of an alien's residence to grant  
2 the alien permission to depart as an immigrant . . . " 22 C.F.R. 42.83(e).

3 "...The one-year period stops, however, if the applicant, at any time  
4 within the one-year period, commencing with the date of the mailing [of  
5 the appointment], convincing the consular officer that the initial failure to  
6 appear was beyond his or her control. Thus, the mailing of a new letter  
7 setting a second appointment date would begin a new one-year period."  
8 (Emphasis supplied.) 9 FAM 42.83 N2.2.

9 The facts of this case indicate that the consulate accepted notification, by the Plaintiff, on several  
10 occasions, that the Plaintiff's brother was unable to obtain permission from Iran to depart as an  
11 immigrant to go to the consulate in Ankara, Turkey. What the Defendants attempt to put at issue now, is  
12 whether the notification to the consulate by the wife of the brother's inability to obtain permission from  
13 Iran to depart as an immigrant was sufficient or whether such notification had to come from either the  
14 Plaintiff or the primary applicant, her brother. There does not appear to be any dispute that the wife and  
15 one child appeared for the interview and notified the consulate of the brother's continued inability to  
16 leave Iran, which is clearly a circumstance beyond his control and was deemed such by the consulate on  
17 numerous prior occasions.

18 As such, the Court finds Defendants challenge to this notification to be disingenuous,  
19 particularly in light of the history in this case. The brother's absence at the April 11, 2002 interview had  
20 to have been questioned by the consulate and a reason had to have been proffered by his wife who  
21 traveled to Turkey for the interview and underwent the medical exams by the Embassy's medical team  
22 at their own expense. Since the file for this visa application was destroyed on March 18, 2005, there is  
23 no indication that this notification was not accepted by the consulate, when other prior notifications on  
24 the same basis were accepted and the appointments rescheduled. Furthermore, Defendants could not  
25 provide any authority to support the contention that this notification was somehow insufficient at the  
26 hearing on this motion on February 22, 2008.

27 Defendants also appear to argue that as citizens of Iran, the brother and his family have no right  
28 to judicial review. (Def. Opp. at 7-8.) However, as Plaintiff's aptly point out, the petition was filed by  
29 Ms. Amidi, a United States citizen, on behalf of her brother and his family in Iran, and therefore Ms.  
30 Amidi as a United States citizen, is the real party in interest. The Court agrees and notes that this point  
31 was conceded by Defendants at the February 22, 2008 hearing.

1 The relief sought by Plaintiff in this case, is to have the 2005 visa application afforded the 1986  
2 priority date. Citizenship and Immigration Services ("CIS") notified the Plaintiff on October 30, 2006  
3 that the visa application was accepted, but that the request for the 1986 priority date was denied. The  
4 denial of the 1986 priority date was based on the fact that the regulations prohibit giving previous  
5 priority dates to new applications when the prior application was terminated pursuant to 8 U.S.C. §  
6 1153(g). The reason stated for termination of the initial visa application was that the brother and his  
7 family had failed to appear for the April 11, 2002 interview or respond to the 2003 and 2004 letters.

8 Clearly, this reason is inaccurate, because the wife and one child did appear and notified the  
9 consulate that the principle applicant, the brother, was unable to do so for reasons beyond his control. In  
10 compliance with the State Department Regulations set forth above, the consulate was required to restart  
11 the one year period by setting another appointment for the brother's interview. The consulate failed to  
12 do so and instead began the termination process for the application. The consulate, in doing so, failed to  
13 comply with State Department Regulations set forth in 22 C.F.R. 42.83 and the procedural notes for this  
14 process in 9 FAM 42.83 and the Court therefore finds the consulate's decision to terminate Plaintiff's  
15 visa application was an abuse of discretion, because the consulate failed to comply with State  
16 Department Regulations. *Patel v. Reno*, 134 F.3d 929, 932 (9th Cir. 1997); *Abdelhamid v. Hehert*, 774  
17 F.2d 144 (9th Cir. 1985).

### 18 Conclusion

19 For reasons set forth above, Plaintiff's motion for summary judgment is GRANTED IN PART as  
20 to Plaintiff's argument that the consulate lacked the authority to terminate the registration on the  
21 grounds that this action was not discretionary and the decision to terminate the registration was an abuse  
22 of discretion, because the consulate failed to follow the proper procedures and regulations for  
23 termination under 8 U.S.C. 1153(g). As such, the Plaintiff's 2005 visa application is entitled to the  
24 benefit of the 1986 priority date, and Defendants' are hereby ORDERED to, without delay, amend  
25 Plaintiff's 2005 visa application to reflect the 1986 priority date. Since the Plaintiff's motion was  
26 granted as to her first argument, the Court need not address the second argument raised by the Plaintiff  
27 and hereby DENIES AS MOOT Plaintiff's motion for summary judgment as to whether Defendants  
28

1 properly notified her of the termination of the application. The Clerk is directed to enter judgment as set  
2 forth above.

3 Defendants ex parte request for certification of the screenshots for the Court's use in deciding the  
4 summary judgment motion is DENIED in light of Defendants' failure to properly disclose these  
5 documents to the Plaintiff prior to the filing of their opposition and the fact that the screenshots  
6 ultimately have no bearing on this motion because they go to the merits of the second argument which  
7 has been denied.


8

9 IT IS SO ORDERED.

10

11 DATED: March 17, 2008

12

  
Hon. Anthony J. Battaglia  
U.S. Magistrate Judge  
United States District Court

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28