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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RAHINAH IBRAHIM,

Plaintiff,

v.

DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants.

No. 3:06-cv-0545 (WHA)

ATTCHMENT A: DEFENDANTS' POST-TRIAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

[REDACTED]

Pursuant to the Court's December 6, 2013 Order (Dkt. 652), Defendants respectfully submit the following proposed findings of fact and conclusions of law after bench trial:

PROPOSED FINDINGS OF FACT

The Federal Government's Terrorist Screening Apparatus

1. Multiple components of the federal government work together to secure the nation's borders and its airways and protect them from terrorist threats.

Lubman at 556:12-557:1, 559-560; TX 250 at TSC001043; TX 251 at TSC000890-891; TX 538; TX 541

2. The Federal Bureau of Investigation ("FBI") investigates and analyzes intelligence relating to both domestic and international terrorist activities and administers the Terrorist Screening Center ("TSC").

TX 508 at TSC000006; Lubman at 566:7-13, 585:9-12

3. The National Counterterrorism Center ("NCTC") serves as the primary organization for analyzing and integrating intelligence relating to international terrorism and counterterrorism.

TX 251 at TSC000889; Lubman at 560:10-18

4. The Department of State ("State") adjudicates visa applications in accordance with the Immigration and Nationality Act ("INA") and, with respect to its visa function, works with other agencies to reduce the United States' vulnerability to terrorism.

Cooper at 625:24-626:1, 629:22-630:4; TX 251 at TSC000891

5. The purpose of the Government's terrorist watchlisting and screening processes is to support the U.S. government's efforts to combat terrorism by consolidating the terrorist watchlist and providing screening and law enforcement agencies with information to help them respond appropriately during encounters with known or suspected terrorists.

Lubman at 556:5-557:11, 559:2-560:6; TX 251 at TSC000889

Creation of the Terrorist Screening Center ("TSC")

6. In 2003, the President ordered the establishment of a governmental organization to consolidate the Government's approach to terrorism screening and provide for the appropriate

and lawful use of terrorist information in screening processes.

Lubman at 557:3-11, 566:16-21; TX 538; TX 541; TX 1034 at 3

7. The creation of this new entity, TSC, was driven in part by the 9/11 Commission's conclusion that the lack of intelligence-sharing across federal agencies had created vulnerabilities in the nation's security.

Lubman at 556:12-18

8. Before the creation of TSC, multiple terrorist watchlists were maintained separately in different agencies.

Lubman at 556:15-16

9. TSC consolidated and centralized the watchlists, as the 9/11 Commission recommended.

Lubman at 557:3-11; TX 250 at TSC001043

10. TSC was created through a Memorandum of Understanding entered into by the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of Central Intelligence in order to fulfill the requirements of Homeland Security Presidential Directive (HSPD) 6.

TX 541; TX 201; Lubman at 556:11-557: 11

11. TSC is administered by the FBI.

Lubman at 566:8-9

12. TSC is staffed by officials from a variety of agencies, including the Department of Homeland Security and the Department of State.

Lubman at 566:9-10; TX 1034 at 4; TX 1041

13. TSC, in turn, maintains the Terrorist Screening Database ("TSDB"), which generally contains identifying information about persons known or reasonably suspected of being engaged in terrorist activity.

Lubman at 559:2-8, 22-25, 560:1-6, 566:7-13, 619:14-16; TX 250 at TSC001043; TX 251 at TSC000889; TX 541

The Terrorist Screening Database ("TSDB")

14. To fulfill its mission of providing appropriate terrorist-related information in screening processes, TSC shares TSDB information with front-line screening agencies, including the Department of State, U.S. Customs and Border Protection ("CBP"), and the Transportation Security Administration ("TSA").

Lubman at 559:22-25; TX 251 at TSC000891-891

15. TSC exports TSDB information to other government agencies for upload to their databases, such as State's Consular Lookout and Support System database ("CLASS") and CBP's TECS database.

Lubman at 573:6-19; 575:4-6, 13-15, 620:6-8; Cooper at 635:11-19; TX 251; TX 1034

16. The substantive derogatory information supporting a TSDB nomination related to international terrorism is contained in a separate database known as the Terrorist Identities Datamart Environment ("TIDE"), maintained by the National Counterterrorism Center.

Lubman at 559:12-16

17. The contents of a TIDE record, including the basis for an individual's watchlisting, are classified.

Lubman at 559:16; 563:10-12

18. The biographic information contained in the classified TIDE database is deemed "Unclassified For Official Use Only" so that the data can be provided to the unclassified TSDB database and exported from the TSDB to government agencies for screening purposes; the information remains classified for all other purposes.

Lubman at 568:17-21; 569:22-570:5; 570:17-23; TX 541; TX 544; TX 1033 at NCTC000060

19. In general, TSC accepts nominations into the TSDB of individuals who meet the "reasonable suspicion" standard of having been engaged in conduct constituting, in preparation for, in aid of or related to terrorism and terrorist activities.

TX 250 at TSC001047

20. Prior to 2009, each nominating agency set its own nominating procedures for inclusion in the TSDB based on its interpretation of HSPD-6, HSPD-11, and the MOU that established the TSC.

Lubman 308:4-11

21. Under certain circumstances, individuals who do not meet the reasonable suspicion standard can be included in the TSDB as exceptions to the reasonable suspicion standard.

Lubman Dep. 0065:11-12; RFA 316:25 – 317:9

22. REDACTED .

RFA at 316:25 – 317:9 ;RFA at 319:1-10; Lubman at 317:12-13, 319:13-14

23. Each nomination to the TSDB undergoes a multi-agency review process to ensure accuracy and sufficiency.

Lubman at 560:23-561:6; TX 250 at TSC001047

24. First, a nominating agency, like the FBI, nominates an individual after reviewing the nomination and confirming that the individual to be nominated meets the relevant watchlisting criteria.

Lubman Dep. at 41:20-24; TX 92 at TSC000682-690, 000756-764; TX 251 at TSC000890, 920-922; TX 508 at TSC000007; Lubman at 560:21-25; 561:1, 563:10-19, Lubman at 578:2-9;

25. Next, the nomination is reviewed by NCTC to ensure that it is supported by sufficient "derogatory information that meet[s] the watchlisting standard" and includes "sufficient biographical or biometric identifiers."

TX 250 at TSC001047; TX 251 at TSC000921; Lubman at 560:21-561:1, 563:10-19; Lubman Dep. at 44:18 - 45:14

26. After NCTC reviews the nomination and supporting derogatory information, the nomination is sent to TSC, and TSC reviews the nomination. TSC accepts nominations if they meet the minimum substantive derogatory criteria for placement in the TSDB and, if applicable, the minimum criteria for placement on two derivative subsets of the TSDB, the No Fly and

Selectee Lists.

Lubman at 560:21 – 561:12; TX 250 at TSC001043, 1047

27. When a government agency encounters an individual in the TSDB, for example, at the border or at an airport, the TSDB record of that individual is reviewed by TSC to confirm the individual is properly watchlisted.

Lubman at 560:21-561:6 ; TX 238 at P006549-6552

28. Also, whenever a TSDB record is modified (for example, if a CIA operator sends information about a new passport for a known or suspected terrorist in the database), TSC will review the TSDB record to ensure that it continues to be appropriate to have the individual in the TSDB, and if applicable, on the No Fly or Selectee List.

Lubman at 561:8-12

29. Nominations to the TSDB or its derivative subsets may not be based solely on an individual's religion or nationality.

Lubman at 564:17-19; Kelley at 380:16-22

30. The TSDB does not contain a field to indicate an individual's religion.

Lubman at 339:19-22; TX 1033

31. FBI policy prohibits the nomination of an individual to the TSDB or its derivative subsets on the basis of religion or nationality.

Lubman at 565:4-6; 611:19-23

32. Individuals are not notified when they are placed in the TSDB because doing so could compromise a counterterrorism intelligence effort or investigation by revealing sources and methods, and alerting the individual that they may be the subject of an investigation, which could compromise the investigation.

Lubman at 563:20-564:7.

33. Individuals are not given an opportunity to present evidence rebutting the inclusion of their identity in the TSDB because to do so would require the government to release classified information which would compromise investigations, compromise terrorist combative efforts, and could compromise lives and undercover sources.

Lubman at 564:8-16

Redress Procedures for Travelers Denied Boarding

34. Pursuant to a Memorandum of Understanding, the government sought to "establish and implement a coordinated redress process to respond to individual complaints about adverse experiences during terrorism screening that relate to the use of information contained in the [TSDB]."

TX 537 at NCTC000002; Lubman at 560:21-563:6

35. As part of the legislation implementing the recommendations of the 9/11 Commission, Congress enacted 49 U.S.C. § 44926, which requires DHS to establish a timely and fair process for individuals who believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat in the screening systems and programs utilized by TSA, CBP, or any other office or component of DHS.

Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266, 482-83 (Aug. 3, 2007); 49 U.S.C. § 44926

36. DHS TRIP—and prior to 2007, the Traveler Identity Verification Program—is the central administrative redress process for individuals who claim they, for example, have been denied or delayed airline boarding or have been repeatedly referred for additional screening prior to being permitted to board

49 U.S.C. § 44926; 73 Fed. Reg. 64018-01 (Oct. 28, 2008); 49 C.F.R. 1560.201-1560.207; Lubman at 348:12-23; 561:16-562:9, 563:3-6; 603:17-19; TX 39

37. Travelers who experience travel difficulties at transportation hubs, including denied or delayed boarding, or who believe that they have been improperly placed in the TSDB, may submit a redress inquiry to DHS TRIP.

49 C.F.R. § 1560.205(a); Lubman Dep. 0098:5-9; Lubman at 561:13-17

38. If the applicable DHS component determines that the complainant is an exact or near match to an identity in the TSDB, the matter is referred to the TSC Redress Unit.

Lubman at 348:14-19, 561:23 – 562: 1

39. The TSC Redress Unit reviews the available information to determine (1) whether the individual's status is an exact match to an identity in the TSDB; if an exact match, (2)

whether the traveler should continue to be in the TSDB; and (3) if the traveler should continue to be in the TSDB, whether the traveler meets the additional criteria for placement on either the No Fly or Selectee List.

Lubman Dep. 85:5-23; 87:22-24; Lubman at 562: 4-5; TX 537 at NCTC00008-9

40. As part of this process, TSC conducts a "de novo review" of the TSDB record.

Lubman at 562:2 - 5

41. TSC's review includes contacting the agency that originally nominated the individual for placement in the TSDB, and analyzing any derogatory information that supports the nomination as well as any information from other sources.

Lubman at 562:3 – 5; TX 537 at NCTC00008-9; TX 250.

42. The TSC Redress Unit then notifies DHS TRIP of any modification or removal of the individual's record.

Lubman at 562:7 – 9

43. In response to a request for redress, a determination letter is sent to the complainant.

49 C.F.R. § 1560.205(d); TX 102 at TSC000162-165; TX 40; Lubman at 609:22 – 610:4

44. Plaintiff submitted a Passenger Identity Verification Form (PIVF) to DHS's Traveler Identity Verification Program on March 24, 2005.

Lubman at 342:1-9, 348:5-19; TX 39; TX 76

45. Plaintiff's PIVF was provided to TSC for review.

Lubman at 349: 17-22; TX 76

46. After TSC conducted the requisite review, DHS's Traveler Identity Verification Program sent Plaintiff a letter informing her that it had conducted a review of any applicable records in consultation with other federal agencies, as appropriate, and made any necessary changes to her records.

TX 40; Plaintiff Dep. at 172:17-20; 173:9-14

47. As a result of the review triggered by Plaintiff's PIVF application, Plaintiff REDACTED [redacted]

Lubman at 342:22-25; TX 228; Interrogatory Response, 298:1-13; TX 209 at TSC0001820-1823 (REDACTED in December 2005)

Visa Adjudication and Revocation

48. In general, to approach the border of the United States and apply for admission to the United States at the port of entry, an alien must obtain a visa.

Cooper at 625:16-626:1; 690:7-9; 8 U.S.C. § 1182(a)(7)

49. An alien who wishes to apply for a nonimmigrant visa must submit an application and, as a general matter, must appear before a U.S. consular officer at a U.S. Embassy or Consulate.

Cooper at 627:3-9; 628:1-4; 8 U.S.C. § 1202(c), (e), and (h); 22 C.F.R. § 41.102-103

50. Once a visa application is submitted, the consular officer adjudicates the visa application under the provisions of the INA.

Cooper at 629:4-6; Cooper at 629:12-13; Cooper at 629:20-21; 8 U.S.C. § 1182(a); 8 U.S.C. § 1201(a)

51. Once a visa application is submitted, the consular officer must either issue or refuse the visa.

22 C.F.R. § 41.121

52. As a general matter, consular officers cannot issue a visa where it appears that the applying alien may be ineligible to receive a visa.

Cooper at 629:14-19; 629:22-630:4; 8 U.S.C. § 1201(g); 22 C.F.R. § 40.6; 22 C.F.R. § 41.121

53. One tool available to consular officers to inform visa adjudication is the Consular Lookout and Support System database ("CLASS"), which consular officers use to review for information that might inform the visa application and adjudication process.

Cooper at 634:10-24

54. Information is entered into CLASS directly by the Department of State or indirectly through the communication of information to State by other government agencies.

Cooper at 634:25-635:10.

55. Though CLASS is not a derivative subset of the TSDB, TSDB information is sent

to State for inclusion in CLASS.

Cooper at 635:15-19

56. A consular officer may refuse an individual's visa application under INA Section 221(g) and request a Security Advisory Opinion ("SAO") if the officer has reason to believe an applicant may be inadmissible on a security-related ground of the Immigration and Nationality Act.

Cooper at 425:14-22; 671:18-23; 678:14-21

57. Where an applicant is refused under INA 221(g) to allow for the processing of an SAO request, that applicant's application will be subject to a second adjudication once the SAO response is received from the State Department.

Cooper at 423:18-25; 424:8-17; 670:10-671:9; 674:11-23

58. An SAO is a recommendation approved by the Visa office and forwarded by the Coordination Division of the Visa Office at State, in response to a request by a consular officer when the officer has reason to believe that the foreign national may be inadmissible because of security-related grounds under the INA.

Cooper at 425:14-22; 671:5-22.

59. A request for an SAO initiates an interagency review of all information about the applicant available to State and other interested agencies, including any classified intelligence, to determine whether the alien is inadmissible under 8 U.S.C. § 1182(a)(3)(A) or (B) or otherwise ineligible for a visas under certain other provision of law.

Cooper at 672:5-24.

60. Once an SAO has been requested, the individual's status in the TSDB plays no role in determining eligibility for a visa.

Cooper at 673:12-23; TX. 238 at P006552

61. A request for an SAO does not constitute a finding of inadmissibility, and in the majority of cases, the information uncovered during the SAO will be insufficient to render the foreign national ineligible under the INA.

Cooper 673:24-674:10.

62. Under the INA, a visa that has been issued may be revoked at any time by the Secretary of State or a U.S. consular officer, including when information arises subsequent to nonimmigrant visa issuance that calls into question the visa bearer's eligibility for the visa.

Cooper at 630:9-22; 8 U.S.C. § 1201(i); 22 C.F.R. § 41.122(a)

63. Once a visa is revoked, it is no longer usable for applying for admission to the United States.

Cooper 630:23-631:1.

64. A visa revocation does not constitute a finding that the alien is ineligible for a visa; it only indicates that the alien *may* be ineligible based on information that has come to the attention of the Department of State.

Cooper at 446:10-447:1; 631:19-632:2.

65. Consular officers only adjudicate eligibility for a visa when a visa application is received. A finding of ineligibility for a visa may only be made within the context of a visa application.

Cooper at 632:3-14; 645:17-18

66. If an alien wishes to travel to the United States and apply for admission after the alien's visa has been revoked, the alien may appeal the revocation by applying for a new visa and appearing before a consular officer to establish his or her eligibility for a new visa.

Cooper at 631:2-5

67. In general, when an alien's visa is revoked, the alien is informed of their right to establish their qualification for a visa through a new visa application.

Cooper at 631:2-8; TX 224

68. A prior visa revocation is not grounds for denying a future visa application.

Cooper at 631:9-18; 8 U.S.C. § 1182(a)

69. The fact that an individual is in the TSDB is, by itself, not a basis for denying his visa application or deeming him inadmissible to the United States.

Cooper 688:17-689:1; 8 U.S.C. §§ 1182, 1225.

70. If a person is in the TSDB, that person may obtain a visa.

Cooper 688:17-19

Plaintiff's Visa Status

71. In 2000, as a Malaysian citizen seeking to study at Stanford University, Plaintiff was required to have a valid student visa in order to travel to the United States and apply for admission at the port of entry.

Plaintiff Dep. at 100:13-15; 8 U.S.C. § 1101(a)(15)(F); 8 U.S.C. § 1182(a)(7); 22 C.F.R. § 41.61; 22 C.F.R. § 41.112(a); Cooper at 625:16-23, 626:17-18, 636:9-13

72. Plaintiff was issued an F-1 student visa in September 2000 that was valid until September 18, 2005.

Cooper at 626:17-18; 635:20-636:13; TX 207 at DOS000043

73. State prudentially revoked Plaintiff's F-1 visa on January 31, 2005.

Cooper at 637:5-22; TX 15

74. The decision to revoke Plaintiff's visa included a review of classified information.

Cooper at 708:15-17

75. As noted in the Certificate of Revocation, "subsequent to visa issuance, information [came] to light indicating that [Plaintiff] may be inadmissible to the United States and ineligible to receive a visa under section 212(a)(3)(B) [of the INA, 8 U.S.C. § 1182(a)(3)(B)], such that [she] should be required to re-appear before a U.S. Consular Officer to establish [her] eligibility for a visa before being permitted to apply for entry to the United States."

TX 15; Cooper at 637:23-638:8.

76. State revoked Plaintiff's visa because information came to light subsequent to the issuance of her visa in 2000 that indicated that Plaintiff may be ineligible for a visa.

Cooper at 637:23-638:8; 640:10-21; 641:14-19; 643:20-644:10; 645:2-3; 645:8-18; TX 15; TX 16; TX 17

77. As with all visa revocations, the revocation of Plaintiff's visa did not constitute a finding that Plaintiff was inadmissible as of January 31, 2005, or a finding that Plaintiff was permanently ineligible for a visa in the future.

TX 224; Cooper at 631:19-632:2; 638:13-16; 638:21-639:4; 644:15-20; 649:4-6.

78. State had in its possession derogatory information supporting the revocation of Plaintiff's visa.

Cooper at 439:19-22

79. On April 14, 2005, State informed Plaintiff by letter that her visa had been revoked.

TX 224; Cooper at 647:12-14.

80. State further indicated that the revocation of Plaintiff's visa "does not necessarily indicate that [she is] ineligible to receive a [visa] in [the] future" and invited her to apply for a visa.

TX 224; Cooper at 648:20-649:3

81. After Plaintiff's visa was revoked, State entered a record into CLASS that would notify any consular officer adjudicating a future visa application submitted by Plaintiff that Plaintiff may be inadmissible under 8 U.S.C. § 1182(a)(3)(B).

Cooper at 465:4-9; Cooper at 634:18-24, 678:21-679:9; TX 60at DOS000005; TX 60; TX 68 at DOS00083-84; 22 C.F.R. § 41.122(c)

82. The fact that Plaintiff's visa has been revoked is not grounds for denying a future visa application, because revocation of a visa is not a finding of inadmissibility or ineligibility for a visa.

Cooper at 645:19-24; 649:4-6; TX 224

83. Plaintiff did not apply for a new visa until September 28, 2009, when she submitted an application for a B-1/B-2 tourist/business visitor visa in order to return to the United States to testify at her deposition.

TX 27; Cooper at 654:5-25; 655:1-7

84. On September 29, 2009, Plaintiff was interviewed by Steven So, a consular officer at the U.S. Embassy in Kuala Lumpur.

Cooper at 420:22-423:14; 665:1-11; 669:22-670:4; TX 261

85. On September 29, 2009, Mr. So refused Plaintiff's visa application under Section 221(g) of the Immigration and Nationality Act (8 U.S.C. § 1201(g)), which requires the refusal

of a visa application when the applicant fails to demonstrate entitlement to a visa based on available information at the time of the interview.

TX 261; Cooper at 423:15-19; 670:5-671:4.

86. Because of Mr. So's concern that Plaintiff was potentially inadmissible under 8 U.S.C. § 1182(a)(3)(B) based on information reflected in CLASS with a "P(3)(B)" hit, a request was transmitted from the Consular Section for an SAO to State's Coordination Division of the Visa Office.

Cooper at 424:18-23; 426:8-21; 426:22-427:14; 429:15-21; 675:4-20; 677:10-25; 678:9-21; 679:10-20; 681:8-20; TX 68 at DOS000083-84

87. A "P(3)(B) hit" in CLASS indicates that an individual may potentially be inadmissible based on section 212(a)(3)(B) of the INA.

Cooper at 677:20-22; 678:14-21; 679:21-24

88. Plaintiff's "P(3)(B) hit", which prompted the SAO request, was added to CLASS in conjunction with Plaintiff's visa revocation in January 2005.

Cooper at 465:4-9; 678:21-679:9; TX 60 at DOS000005; TX 68 at DOS00083-84

89. The file containing the information related to Plaintiff's "P(3)(B) hit" in CLASS only contains information related to events prior to 2005 because the "hit" was added in conjunction with Plaintiff's visa revocation in 2005.

Cooper at 431:17-19; 465:4-9; 678:22-679:9; 695:9-20; 709:14-710:15; TX 68 at DOS000084

90. Plaintiff REDACTED on September 29, 2009, which is the date the SAO was ordered.

Interrogatory Response at 298:12-15

91. The 2009 SAO review included a review of classified information.

Cooper at 684:13-15; 684:18-22

92. During the SAO, State reviewed information that was in addition to that which was contained in the 2005 visa revocation file but that regarded the same general category of potential inadmissibility.

Cooper at 684:24-685:2; 686: 9-18

93. The SAO response to the consular section stated that:

> Information on this applicant surfaced during the SAO review that would support a 212(a)(3)(B) inadmissibility finding. Posts should refuse the case accordingly. Since the Department reports all visa refusals under INA Section 212(a)(3)(B) to Congress, post should notify CA/VO/L/C when the refusal is affected. There has been no request for an INA section 212(d)(3)(A) waiver at this time.

Cooper at 682:20-683:12; TX 68 at DOS000085

94. The consular officer followed the Department of State's instructions and denied Plaintiff's visa application in accordance with the instructions from the Coordination Office of State.

Cooper at 693:4-18; TX 22, 261 at DOS000061-62

95. On December 14, 2009, a consular officer denied Plaintiff's visa application on the basis of a finding of inadmissibility under 8 U.S.C. § 1182(a)(3)(B).

Cooper at 692:18-694:8; 687:2-7; TX 261 at DOS000061-62; TX 47 at P001033

96. Removal of Plaintiff's identity REDACTED will not affect the eligibility determination of a consular officer reviewing a future visa REDACTED ation.

Cooper at 688:20-689:1

97. The visa refusal letter dated December 13, 2009, did not have a check mark next to the box stating the following: "You are eligible to apply for a waiver of the ground(s) of ineligibility."

TX 47 at P001033

98. The INA provides that nonimmigrant visa applicants may apply for a waiver of many of the grounds of visa ineligibility at 8 U.S.C. § 1182(a).

Cooper at 698:15-699:18; 8 U.S.C. § 1182(d)(3)(A)

99. A consular officer may, upon his or her own initiative, and shall, at the request of the Secretary of State, or upon the request of the alien, submit a report to the Department for possible transmission of a request that the DHS waive a nonimmigrant visa applicant's ground of ineligibility under 8 U.S.C. § 1182(a), with certain exceptions.

8 U.S.C. § 1182(d)(3)(A); 22 C.F.R. § 40.301(a)

100. The decision of the consular officer or the Secretary of State to recommend a

waiver to the DHS is entirely discretionary.

8 U.S.C. § 1182(a); 22 C.F.R. § 40.301

101. The statute and regulations do not require notice to nonimmigrant visa applicants that the statute provides a possible waiver for their ineligibility.

8 U.S.C. § 1182(a); 22 C.F.R. § 40.301.

102. Plaintiff recently applied for a visa.

Cooper at 689:13-15

Plaintiff's Interview with the FBI in December 2004

103. FBI Special Agent Kevin Kelley met with Plaintiff at her home in December 2004.

Kelley at 369:7-8

104. Special Agent Kevin Kelley and Plaintiff discussed many topics during that interview.

TX 4; TX 71

105. Special Agent Kelley did not state that Malaysians are "blacklisted" from the United States or make any similar statement.

Kelley at 378:21-379:10

Plaintiff's Travel and Placement on Government Watchlists

106. On the morning of January 2, 2005, Plaintiff was on the No Fly List.

Interrogatory Response at 298:1-6; Lubman Dep. at 177:3-5; 178:9-16

107. On January 2, 2005, Plaintiff was denied boarding on a flight from San Francisco to Kona, Hawaii.

TX 229

108. Within hours of her denial of boarding, TSC researched Plaintiff's status and determined that Plaintiff's identity was not intended to be on the No Fly List.

Interrogatory Response at 298:1-6; TX 62

109. On January 2, 2005, TSC removed her identity from the No Fly List, [redacted], as Agent Kelley had originally intended.

Interrogatory Response at 298:1-8; Kelley at 367:17-21.

110. On that same day, Plaintiff arranged to fly on a United Airlines flight to Kona, Hawaii scheduled to depart the following day, on January 3, 2005.

Plaintiff Dep. 132: 7-10

111. From January 3-7, 2005, Plaintiff attended a conference in Kona, Hawaii, and she spoke on the last day of the conference.

Ibrahim at 239:12-21; TX 32

112. On January 7, 2005, Plaintiff flew on a United Airlines flight to Los Angeles and then flew on a Malaysian Airlines flight to Kuala Lumpur.

Ibrahim at 236:22 – 237:2; 6-7, 16-17

113. Plaintiff was not detained or arrested before or during her flights on January 3, 2005 and January 7, 2005.

Ibrahim 236:16 - 237:5

114. The handling code in place for Plaintiff on January 2, 2005 made clear that Plaintiff was not to be arrested unless there was a violation of law.

TX 8; TX 62

115. Plaintiff was [redacted]

Interrogatory Response at 298:8-13

116. During the entire pendency of this litigation, from its filing in January of 2006 through today, Plaintiff [redacted]

Interrogatory Response at 298:8-13

117. On October 20, 2009, Plaintiff was REDACTED [redacted]

Lubman at 298:8-13; 316:25-317:2

118. The only effect of Plaintiff's current REDACTED has been to [redacted]

[redacted]

RFA Response at 312:21-313:12; TX 9 at TSC001749

119. Plaintiff's REDACTED

[redacted]

TX 9 at TSC001749

120. There is no evidence that Defendants publicly revealed Plaintiff's REDACTED or the basis for Plaintiff's visa revocation and denial (outside of the context of this litigation).

Ibrahim at 238:15-18; Lubman at 563:20-564:7

121. Since 2005, Plaintiff has flown to the United Kingdom, Germany, Italy, the Netherlands, Morocco, China, and Thailand, and at no point during any of these flights was Plaintiff arrested, detained, delayed, or otherwise harmed.

Ibrahim at 226:12-236:6; Ibrahim 242:13-20

122. Plaintiff flew from San Francisco to Hawaii on January 3, 2005 and from Hawaii to Los Angeles on January 7, 2005, and at no point during those flights was she arrested or detained.

Ibrahim at 236:13-237:5

123. Plaintiff flew on a U.S. carrier on January 3, 2005 and January 7, 2005.

Ibrahim at 237:6-22

124. Plaintiff has not been arrested in Malaysia or in any other country since 2005.

Ibrahim 241:6-10

125. As a Malaysian foreign national, Plaintiff requires a visa to approach the borders of the United States to seek permission to enter.

Cooper at 625:16-626:1; 8 U.S.C. § 1182(a)(7)

126. It is unlawful for air carriers to transport to the United States aliens who lack proper documentation, including a valid visa.

8 U.S.C. §1323

127. Plaintiff's inability to fly to the United States is the result of her lack of a valid visa.

Lubman at 577:7-23

128. Plaintiff's inability to fly to the United States is not the result of her REDACTED [redacted].

Lubman at 577:7-23; TX 9

129. The fact that Plaintiff is REDACTED does not require that she be arrested or detained.

TX 9; Lubman 620:15-17; Ibrahim 241:6-10

Plaintiff's Employment

130. Over the past eight years, Plaintiff has continued her successful career in academia at the University Putra Malaysia ("UPM"), where Plaintiff has been employed since her return to Malaysia.

Ibrahim at 218:22-226:1; TX 28 at 2-3

131. Since 2005, she has been promoted from Lecturer to Senior Lecturer, to Associate Professor, and finally to Professor.

218:22-219:20; 220:11-16; TX 28 at 2-3

132. The research grant funding that Plaintiff alone received at one time accounted for 75% of the grant funding received for the entire faculty.

Ibrahim at 224:5-224:11; 224:21-225:5

133. She has also been selected for administrative promotions, starting as Deputy Dean in 2006 and achieving the title of Dean for the Faculty of Design and Architecture in 2011.

Ibrahim at 219:13-16; 221:12-222:21

134. Plaintiff admitted that she has been "incredibly successful" at UPM.

Ibrahim at 223:8-12

135. Plaintiff has extensively coordinated and exchanged information with her U.S. colleagues via email and telephone conversations.

Ibrahim at 242:21-243:12

136. On January 2, 2005, Plaintiff planned to return to Malaysia because she expected to be penalized if she did not report back to her work in Malaysia when she completed her

studies in the U.S, and would only need to return to the United States to discuss the comments of one professor to her paper.

Plaintiff Dep. at 30:18-21, 31:10-13; 34:2-10; Ibrahim at 238:2-238:8

137. Though Plaintiff claims that there have been conferences in the United States which she wanted to attend between 2005 and 2009, she did not apply for a visa until September 2009, when she applied for a visa so that she could testify in this case.

Ibrahim at 241:21-242:6; Cooper at 654:5-25; 655:1-7; TX 27

PROPOSED CONCLUSIONS OF LAW

1. **Standing:** Plaintiff does not have standing to bring her claims because (1) [redacted] (2) she is not suffering any injury as a result of her REDACTED; and (3) she did not establish the "significant voluntary connection" to the United States such that she, as a non-resident alien, has the right to assert constitutional claims.

Proposed Findings of Fact ¶¶ 69, 72, 112-113, 116-119, 121-124, 129-136; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (Plaintiff cannot rely on allegations from the complaint but rather "must 'set forth' by affidavit or other evidence 'specific facts'" establishing each element of standing); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (must show that [she] is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury."); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 170 (2000) (distinguishing the doctrine of standing from the doctrine of mootness); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *Ibrahim v. DHS*, 669 F.3d 983, 994-97 (9th Cir. 2012) (finding standing based on conclusion "that removal of[Plaintiff's] name from government watch lists would make a grant of a visa more likely.").

2. Plaintiff is a non-resident alien living in Malaysia, with no evidence indicating that she has either presence or property in the United States. She left the United States in 2005, intending to return permanently to Malaysia after completing her graduate work; as a result, she has no constitutional rights under applicable Circuit precedent.

Proposed Findings of Fact ¶¶ 71, 112, 136-37; *Ibrahim v. DHS*, 669 F.3d 983, 997 (9th Cir. 2012) (finding plaintiff had right to assert constitutional claims only where she alleged that "purpose of her [January 2005] trip was to further, not to sever, her connection to the United States, and she intended her stay abroad to be brief")

3. **Procedural Due Process:** Even if she had standing, Plaintiff failed to establish that she has been deprived of a liberty interest that would trigger a due process analysis.

Proposed Findings of Fact ¶¶ 69, 120, 121-124, 129; *Wedges/Ledges of Cal. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994).

4. Plaintiff's REDACTED does not interfere with any liberty or property interest that would trigger substantive or procedural due process.

Proposed Findings of Fact ¶¶ 69, 129-135

5. The decisions of Department of State consular officials with regard to admissibility of aliens are not reviewable.

Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) ("[U]nadmitted and nonresident alien[s] . . . [have] no constitutional right of entry to this country as a nonimmigrant or otherwise."); *U.S. ex rel Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("[w]hatever the procedure authorized by Congress is [to challenge an alien's denial of admission], it is due process as far as an alien denied entry is concerned."); *Ibrahim II*, 669 F.3d at 993 ("Ibrahim's future ability to obtain a visa is uncertain and we would be powerless to review a denial").

6. Plaintiff's inability to travel to the United States stems from her lack of a visa, and that inability cannot be the basis of a due process claim, because it amounts to a challenge to the visa decision.

Proposed Findings of Fact ¶¶ 48, 127; *Kleindienst*, 408 U.S. at 762; *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."); *see also* Nov. 1, 2013 Order on Summ. J. at 10 ("Our court of appeals has ruled that plaintiff's substantial connection to the United States gives her standing to assert constitutional claims but this ruling cannot undo the clear cut rule in *Kleindienst*.").

7. Because Plaintiff's alleged inability to work in the United States stems from her lack of a visa, that alleged inability cannot be the basis of a due process claim, because it amounts to a challenge to the visa decision.

Proposed Findings of Fact ¶¶ 48, 52, 59, 60, 127; *Kleindienst*, 408 U.S. at 762; *Landon*, 459 U.S. at 32; *see also* Nov. 1, 2013 Order on Summ. J. at 10.

8. Alternatively, Plaintiff failed to establish that she has suffered a complete prohibition of the right to engage in a calling.

Proposed Findings of Fact ¶¶ 130-135, 137; *Conn v. Gabbert*, 526 U.S. 286, 292 (1999) (right to pursue one's chosen profession is only implicated where there is a "complete prohibition of the right to engage in a calling."); *Dittman v. California*,

191 F.3d 1020, 1029 (9th Cir. 1999) (a violation of one's liberty interest in employment right requires a showing of a "complete barrier" to a profession).

9. Plaintiff failed to establish "the public disclosure of a stigmatizing statement by the government, the accuracy of which is contested," plus (2) "the denial of 'some more tangible interest[] such as employment' or the alteration of a right or status recognized by state law."

Proposed Findings of Fact ¶¶ 120, 130-135; *Ulrich v. City & Cnty. of S.F.*, 308 F.3d 968, 982 (9th Cir. 2002) (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

10. Even if Plaintiff had shown that she had been deprived of a liberty interest, the watchlisting and redress procedures that were provided in her case—including the TSC's review of the nomination, the TSC and nominating agencies' review at the point of encounter, the DHS referral of TSDB travel related complaints to TSC for review, and the availability of § 46110 review in the Court of Appeals—provide sufficient protection against the risk of erroneous deprivations.

Proposed Findings of Fact ¶¶ 19-28, 34-47, 69, 70; 49 U.S.C. §46110; *Jifry v. FAA*, 370 F.3d 1174, 1183 (D.C. Cir. 2004) (rejecting due process challenge to determination that plaintiffs posed threats to civil aviation because "substitute procedural safeguards may be impracticable, [in those cases], and in any event, are unnecessary" because of "the governmental interests at stake and the sensitive security information" involved; as a result, due process did not require that plaintiffs be given the "specific evidence" upon which the determinations are based); *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 980 (9th Cir. 2012) (explaining that the due process inquiry "cannot be done in the abstract," but instead requires that a court "carefully assess the precise 'procedures used' by the government, 'the value of additional safeguards,' and 'the burdens of additional procedural requirements'") (quoting *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 589 (9th Cir. 1998)); *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 671 F.3d 881, 902 (9th Cir. 2011) (internal quotation marks omitted) (due process balancing test is "flexible and calls for such procedural protections as the situation demands").

11. Protecting national security, including screening individuals to prevent terrorist activity, is a compelling government interest.

Proposed Findings of Fact ¶¶ 1-15; *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S. Ct. 2705, 2727 (2010) (("[N]ational security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess.").

12. Plaintiff has failed to identify alternative or substitute procedures that would not infringe upon the government's interests in protecting national security.

Proposed Findings of Fact ¶¶ 32-33, 1-15; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (courts must consider "the risk of an erroneous deprivation of such

interest through the procedures used, *and the probable value, if any, of additional or substitute procedural safeguards*," as well as "the Government's interest, including the function involved and the fiscal and administrative burdens *that the additional or substitute procedural requirement would entail*") (emphasis added); *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 980 (9th Cir. 2012); *NCRI v. Clinton*, 251 F.3d 208-9 (D.C. Cir. 2001) (government need not disclose the classified information to plaintiff because this information "is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect"); *Jifry*, 370 F.3d at 1183-84; *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992) ("To confirm or deny the existence of [CIA] records on [a particular individual] could . . . reveal intelligence sources or targets"); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1149 n.4 (2013) (government's disclosure in certain circumstances would still have the effect of revealing to an individual "whether his name was on the list of surveillance targets").

13. **Substantive Due Process:** Plaintiff failed to identify a deprivation of a fundamental right that would implicate substantive due process protections.

Proposed Findings of Fact ¶¶ 69, 112-113, 116-119, 120, 121-124, 129-136; *Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008) (threshold" requirement of any substantive due process claim is the showing of the deprivation of a protected interest); *Brittain v. Hansen*, 451 F.3d 982, 990 (9th Cir. 2006) ("("Substantive due process is ordinarily reserved for those rights that are 'fundamental.'") (citing *Washington v. Glucksberg*, 521 U.S. 702, 721–22 (1997)).

14. **Equal Protection:** Plaintiff failed to establish that Defendants intentionally, and without rational basis, treated her differently from others similarly situated.

Proposed Findings of Fact ¶¶ 29, 31; *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008) (plaintiff alleging equal protection claim must demonstrate that defendant "intentionally, and without rational basis, treated the plaintiff differently from others similarly situated")

15. **First Amendment (Association):** Plaintiff failed to establish a burden on a First Amendment right to associate with her husband or with other Muslims.

Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069 (9th Cir. 2008) (en banc) (courts scrutinize government action under RFRA "only if there is a substantial burden on the free exercise of religion").

16. **First Amendment (Retaliation):** Plaintiff failed to establish that the exercise of constitutionally protected rights was a "substantial" or "motivating" factor in placing her on a watchlist.

Mt. Healthy City Sch. Dist. of Educ. V. Doyle, 429 U.S. 274, 287 (1977) (prima facie case of First Amendment retaliation, Plaintiff has the burden of showing that the exercise of constitutionally protected rights was a "substantial" or "motivating" factor in the decision to REDACTED); *CarePartners v. Lashway*, 545 F.3d 867, 877 (9th Cir. 2008).

17. The Court's review of government actions related perceived security threats posed by non-resident aliens, must give substantial deference to the government's determinations.

Proposed Findings of Fact ¶¶ 1-20, 23-34; *IARA v. Gonzales*, 477 F.3d 728, 735 (D.C. Cir. 2007) (in adjudicating challenge of U.S. organization to its designation as a specially designated global terrorist pursuant to Executive Order 13224 and International Emergency Economic Powers Act, "our review-in an area at the intersection of national security, foreign policy, and administrative law – is extremely deferential."); *Al-Haramain Islamic Foundation, Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 979 (9th Cir. 2012) (same and quoting language from *IARA*).

18. Failing to check a box on a visa refusal form ("You are eligible to apply for a waiver of the ground(s) of ineligibility") did not constitute a "final agency action" subject to review under the Administrative Procedure Act ("APA").

Proposed Findings of Fact ¶¶ 97-102. 5 U.S.C. §704 (limiting judicial review to "final agency action"); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) ("When . . . review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'").

19. Even if that were an agency action subject to review under the APA, the ultimate decision of the consular officer or the Secretary of State to recommend a waiver or a possible transmission of a waiver request to the Department of Homeland Security is entirely discretionary and is thus not subject to review by this court.

Proposed Findings of Fact: ¶¶ 97-102. 8 U.S.C. § 1182(a); 22 C.F.R. § 40.301; *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (finding that, in action to compel Attorney General to grant a visa waiver, "the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers-a power to be exercised exclusively by the political branches of government")

20. Even if review of the consular officer's decision were available, any failure to inform Plaintiff of her ability to apply for a waiver was not an abuse of discretion, because the statute does not require that notice be given to nonimmigrant visa applicants that the statute provides a possible waiver.

Proposed Findings of Fact: ¶¶ 97, 99, 101. 8 U.S.C. § 1182(a); 22 C.F.R. § 40.301

21. Finally, by applying for a new visa and submitting the question of her eligibility for a visa anew to the Department of State, the issue of a waiver with respect to plaintiff's 2009

visa application is now moot, because the final adjudication of that application will determine Plaintiff's eligibility for a visa at this time.

Proposed Findings of Fact: ¶ 102; *Spencer v. Kemna*, 523 U.S. 1 (1998) (prisoner's challenge to a parole revocation became moot once his term of imprisonment ended);

22. **The Effect of the Order on the State Secrets Privilege**: The Court's ruling upholding the state secrets privilege excluded classified information related to the basis for Plaintiff's REDACTED, whether Plaintiff or any other individual is or was the subject of an investigation or intelligence operation, any sources and methods used during investigations or intelligence operations, and the classified information underlying the State Department's decision to revoke and deny her visa.

See Apr. 19, 2013 Order Regarding Classified Information.

23. Defendants cannot present a full explanation of the reasons for Plaintiff's REDACTED, or the information available to the Department of State when her visa was revoked in 2005 and or when it was denied in 2009, because to do so would require the presentation and consideration of classified information excluded by the Court as a result of its ruling on the state secrets privilege.

Proposed Findings of Fact 74, 76; Defendants' Classified Ex Parte Brief (setting forth excluded information and its relevance to Plaintiff's claims); April 19, 2013 Order (excluding classified information related to REDACTED, visa revocation, and visa denial); Tr. at 481:18-22 (classified information not part of the case); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) ("[o]nce the privilege is properly invoked, and the court satisfied as to the danger of divulging state secrets, the privilege is absolute."); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079 (9th Cir. 2010) (noting that even when evidence is excluded via an invocation of state secrets, the case may still need to be dismissed because "it will become apparent during the Reynolds analysis that the case cannot proceed without privileged evidence, or that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.").

24. The excluded information is central to the claims at issue in this trial because they involve claims for improper watchlisting and improper visa decisions, and the excluded information would provide the Court with a full explanation of the challenged agency actions.

Proposed Findings of Fact ¶¶ 74, 76; Tr. at 327-328; 491:15-17; 492-493; 578: 13-15.

25. The Court is not permitted to second-guess the executive's determination of what is and is not classified.

Proposed Findings of Fact ¶¶ 74, 76; *NCRI v. Clinton*, 251 F.3d 192, 108-09 (D.C. Cir. 2001) ("We recognize, as we have recognized before, that items of classified information which do not appear dangerous or perhaps even important to judges might "make all too much sense to a foreign counterintelligence specialist who could learn much about this nation's intelligence-gathering capabilities from what these documents revealed about sources and methods") (quoting *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989)).

26. Because Defendants cannot present a defense to Plaintiff's claims without recourse to the classified information protected by the state secrets privilege, judgment must be entered for Defendants.

Kasza v, 133 F.3d at 1166; *v. Jeppesen*, 614 F.3d at 1083.

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