IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAHINAH IBRAHIM	)	
Petitioner,	)	
v.	)	No. 06-1218
DEPARTMENT OF HOMELAND SECURITY, et al.	)	
Respondents.	)	

MOTION TO DISMISS FOR LACK OF JURISDICTION

Respondents respectfully submit this Motion to Dismiss for Lack of Jurisdiction. For the reasons stated below, this Court should grant the motion because Petitioner lacks Article III standing and her action is untimely.

FACTS AND PRIOR PROCEEDINGS

1. Petitioner filed the instant Petition for Review in the Court of Appeals for the Ninth Circuit on January 27, 2006. See Attachment 1. The petition invoked the Court's jurisdiction under 49 U.S.C. § 46110, and sought "review of the Security Directives issued by Respondent, the Transportation Security Administration, establishing the 'no-fly list' and the 'selectee list', collectively known as the 'No-Fly List', on or about November, 2001." No further facts or description of the action are

presented.

2. Although not currently before this Court, Petitioner also filed a complaint in the United States District Court for the Northern District of California, arising out of the same set of facts and raising various state law claims and claims under 42 U.S.C. § 1983. See Attachment 2.

According to that complaint, Respondent Transportation Security Administration manages and implements a "no-fly list" and a "selectee list," which are circulated to airlines and security personnel with instructions to detain and question any passenger whose name matches, or is similar to, a name on the no-fly list, and to require additional security screening for anyone on the selectee list. Id. at 6 ¶¶ 31, 33.

Petitioner alleges that on January 2, 2005, she attempted to fly from San Francisco to Malaysia via Hawaii. Id. at 8-9 ¶¶ 41, 47. Petitioner contends that because of the no-fly list, she was told that her name was on the no-fly list, detained, and prevented from flying. Id. at 8-9 ¶¶ 41-46. She was then told her name was removed from the no-fly list and the following day, January 3, 2005, she was able to fly to Malaysia. Id. at 9 ¶ 47.

3. The Government filed a motion to dismiss the Petition for Review in the Ninth Circuit. The Government argued that the jurisdictional statute invoked by

petitioner, 49 U.S.C. § 46110, provides that a person may "fil[e] a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business." According to Petitioner's district court complaint, she resides in Malaysia, see Attachment 2 at p. 2 ("Plaintiff, RAHINAH IBRAHIM . . . currently resides in the country of Malaysia."), a fact Petitioner confirmed in her opposition to the Government's Ninth Circuit motion, see Attachment 4 at 1. Accordingly, the Government argued that Petitioner could not file her petition in the Ninth Circuit; the only court of appeals that could have jurisdiction over her petition is this Court.

The Government also argued that the Petition for Review should be dismissed because it was not filed within the 60-day period required under the jurisdictional statute, and because petitioner lacks Article III standing.

4. On June 13, 2006, the Ninth Circuit issued an order finding that Petitioner resides and works in Malaysia, and agreeing with the Government that Petitioner had filed in the wrong forum. Accordingly, the Ninth Circuit transferred the petition to this Court. See Attachment 6. The Ninth Circuit also transferred all pending motions in the matter, including the Government's motion to dismiss because the Petition was untimely and because petitioner lacks Article III standing. Ibid.

The Government now renews its pending motion as set forth below.

ARGUMENT

I. PETITIONER'S CLAIMS ARE UNTIMELY

To be timely, a petition for review under 49 U.S.C. § 46110 "must be filed not later than 60 days after the order is issued." Neither the terse, one-page petition nor Petitioner's opposition to the Government's motion in the Ninth Circuit is clear as to what "order" is challenged or as to the precise nature of Petitioner's claims. But, however construed, it is clear that the petition is untimely, and thus must be dismissed.

1. Petitioner may intend to challenge the mere existence of the no-fly and selectee lists and/or the government's authority to maintain them. That is suggested by the language of the petition itself, which states that it seeks "review of the Security Directives issued by Respondent, the Transportation Security Administration, establishing the 'no-fly list' and the 'selectee list', collectively referred to as the 'No-Fly List', on or about November, 2001." Attachment 1 at 2 (emphasis added). If that is the claim, however, the petition was manifestly out of time.

Petitioner clearly had notice of the existence and maintenance of such lists when they were allegedly applied to her on January 2, 2005, as she attempted to fly from San Francisco to Malaysia. See Attachment 2 at 8-9 ¶¶ 41-46; Attachment 4 at 2. But she did not file her petition until well more than 60 days later, in January 2006.

Accordingly, if her petition intends to challenge the existence and/or maintenance of no-fly or selectee lists, it is clearly out of time because she filed her petition more than 60 days after she had notice of the orders being challenged and notice that they had allegedly been applied to her.

2. Petitioner may instead be challenging the manner in which those lists are administered and implemented. The petition (see Attachment 1) expressly references the claims raised in Green v. TSA, 351 F. Supp.2d 1119 (W.D. Wash. 2005), as does Petitioner's Ninth Circuit Civil Appeals Docketing Statement (Attachment 3 at 1), which describes the petition as an "[a]ction challenging administration, management and implementation of the No-Fly List, per Green v. TSA (2005) 351 F.Supp.2d 1119." The plaintiffs in Green did not "challenge the government's right to create or maintain either a No-Fly List or a Selectee List," 351 F. Supp.2d 1122 n.1, but instead challenged the "administration and maintenance of the No-Fly List," id. at 1126. Specifically, the Green plaintiffs contended that the lists violated due process by causing stigmatization, delays, searches, detentions, and other travel impediments; and violated the Fourth Amendment by subjecting persons to unreasonable searches and seizures. Id. at 1126. (These arguments were rejected by the district court in Green, and the plaintiffs never appealed.)

If petitioner is raising the same Due Process claims raised in Green based on alleged stigmatization, delays, travel impediments, etc., see Attachment 4 at 9

("Ibrahim's claim is based, in part, on a violation of her right to Due Process."), those claims are also untimely. Petitioner certainly became aware of those impediments and their alleged application to her on January 2, 2005, when she tried to fly from San Francisco to Malaysia. See Attachment 2 at 8-9 ¶¶ 40-46; Attachment 4 at 2. But she did not file a petition until well after 60 days had passed.

3. Petitioner instead may be seeking review of her "placement on the [No-Fly or Selectee] Lists." Attachment 4 at 2. Specifically, petitioner states that she "filed an application for passenger verification identification to clarify her status" as to the No-Fly and Selectee Lists. Id. at 8. The passenger verification identification process is a TSA procedure available to people who believe they are erroneously being taken for someone on the no-fly or selectee lists.

The trouble with petitioner's argument, however, is that the petition nowhere sets forth any such claim. Rather, it seeks review of the security directive "establishing" the No-Fly and Selectee Lists; it nowhere mentions any passenger verification identification application or any response from TSA. See Attachment 1 at 2. Petitioner cannot save the timeliness of her petition by relying on a claim she never brought in the petition.

Even if she had brought such a claim, it too would have been untimely – not because it was too late, but because it was too early. 49 U.S.C. § 46110 states that a petition "must be filed not later than 60 days after the order is issued." (Emphasis

added). Here, TSA responded to petitioner's passenger verification identification application on March 1, 2006, see Attachment 7, but the instant petition was filed in the Ninth Circuit more than a month earlier, on January 27, 2006. Plainly, the operative filing date is the date petitioner actually filed in the Ninth Circuit – not the date when that court transferred the action to this Court.[1]

4. In her Ninth Circuit papers opposing the Government's motion, Petitioner argued that she cannot file her petition until she receives some kind of formal notice or letter from TSA. See Attachment 4 at 7 ("She has received no letter from the TSA or from any other government official."). But no such written notice is required. Rather, what matters in this case is not whether a petitioner receives a formal written letter or order, but whether petitioner has notice of the TSA order being challenged because she is aware that it exists and it has allegedly been applied to her. That is precisely what has occurred here. See National Air Transp. Ass'n v. McArtor, 866 F.2d 483, 485 (D.C. Cir. 1989) ("[T]he calendar does not run until the agency has decided a question in a manner that reasonably puts aggrieved parties on notice of the

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[1] To the extent petitioner's challenge is to the procedures used to review her passenger verification identification application, those procedures are not "orders" subject to review under 49 U.S.C. § 46110. See Green, 351. F. Supp. 2d at 1125. Accordingly, such a claim would be improper in this Court because it should have been timely raised in the first instance in a proper district court.

rule's content.").[2]

5. Petitioner also argued in the Ninth Circuit (see Attachment 4 at 8) that she could not file her petition until a court of appeals held that security directives are "orders" reviewable in a court of appeals under § 46110. But petitioner does not and cannot point to any authority that excuses her from meeting a statutorily-set filing deadline so that she can await a jurisdictional ruling by a court of appeals in another case. Even if petitioner required case law to know whether § 46110 applied to her claims, she could have found it in the Green case (discussed supra at 3-4), which held that security directives are "orders" within the meaning of § 46110, see 351 F. Supp.2d at 1124-25, and which was decided five days after petitioner's attempted flight from San Francisco to Malaysia.

II. PETITIONER LACKS ARTICLE III STANDING

Petitioner independently lacks Article III standing to bring her claims. Although the Petition for Review itself does not address the point, from her complaint it appears that petitioner's claimed injury is that the "no fly" or "selectee" lists prohibit or interfere with her ability to return to the United States by air travel. If that is her claim, however, neither the "no fly" or "selectee" lists is the cause of Ibrahim's injury, nor will that injury be redressed by any decision of this Court. See Lujan v.

[2] McArtor addressed the former 49 U.S.C. § 1486, which was recodified as 49 U.S.C. § 46110. See Pub. L. No. 103-272 § 1(e), 108 Stat. 1230 (1994).

Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)(plaintiff must demonstrate, inter alia, a "causal connection between the injury and the conduct complained of" and that the injury is "likely" to be "redressed by a favorable decision") (alteration and internal quotation marks omitted).

Regardless of any effect the "no fly" or "selectee" lists may or may not have on Petitioner, she cannot return to the United States for an entirely independent reason. To enter the United States, petitioner must have a currently valid visa. See generally 8 U.S.C. § 1181(a). Her Petition for Review sets forth no facts asserting that Petitioner has a currently valid visa. Her district court complaint alleges no more than that at one time in the past she had a valid visa. See Attachment 2 at 3 ¶ 4; id. at 7 ¶ 38. And in her Ninth Circuit Opposition, petitioner conceded that her visa was revoked and that she has no valid visa to enter the United States. See Attachment 4 at 5, 12.

A plaintiff or petitioner bears the burden of establishing standing. See International Brotherhood of Teamsters v. TSA, 429 F.3d 1130, 1134 (D.C. Cir. 2005) (on petition for review under 49 U.S.C. § 46110, petitioner "should establish its standing . . . at the first appropriate point in the review proceeding," which includes establishing standing "in response to a motion to dismiss for want of standing"). Because Ibrahim has not established that she is currently eligible to return to the United States regardless of any "no fly" or "selectee" list, she cannot show that those lists are the cause of her claimed injury or that a favorable decision by this Court

would redress that injury. Accordingly, she lacks Article III standing.

Before the Ninth Circuit, petitioner argued that she might be able to obtain a visa in the future, and that such a possibility has not yet been precluded. See Attachment 4 at 12. But the party asserting standing must have an "actual or imminent" injury. Lujan, 504 U.S. at 560. "'[S]ome day' intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury." Id. at 564. Petitioner's argument relies on no more than the kind of "'some day' intentions" that are insufficient for standing. Although she admits she has known for a year that her visa has been revoked, see Attachment 4 at 5, 12; Attachment 5 at 3 ¶ 6 (Ibrahim Decl.), she still has not articulated any "concrete plan" to apply for a valid visa to this country, even though she contends that her work "requires that [she] travel to the United States . . . at least once a year," id. at 2 ¶ 3 (Ibrahim Decl.). Further, petitioner has provided no information tending to show that she would get a visa even if she applies. And, further still, petitioner's work in the U.S. is itself speculative; she contends only that she is "working on establishing a relationship" in the U.S., and no more. Ibid.

Petitioner also argues that the basis for her visa revocation – 8 U.S.C. § 1182(a)(3)(B) – "is likely . . . a direct result of respondents' apparent placement of her name on the No-Fly list." Attachment 4 at 12. But nothing on the face of the

statute suggests any such connection. Furthermore, as the attached State Department declaration attests, there is no such connection. See Attachment 8.

Finally, petitioner has argued that her injury is not just her inability to return to the United States, but the alleged harms of "being subjected to physical arrest as a result of her placement on the no-fly list," Attachment 4 at 6, as well as "unnecessary and undeserved arrest, incarceration, stigma, embarrassment, harassment, and delay," id. at 11. These harms do not support petitioner's standing.

This asserted injury must be based on either her attempt to fly out of Malaysia in March 2005, see Attachment 4 at 6, 11, or on her attempt to fly out of San Francisco in January 2005, see Attachment 2 at 8-9 ¶¶ 41-46. As to the former, the argument is entirely unsupported by her own declaration. That declaration states only that she was told she "had to wait for . . . clearance," and that "there was a note by my name, instructing airport personnel to call the police and have me arrested." Attachment 5 at 2 ¶ 4 (Ibrahim Decl.). No connection between this alleged harassment and TSA's no-fly or selectee lists is ever alleged. Petitioner therefore lacks standing because there is no connection between her alleged injuries occurring in Malaysia and the TSA order being challenged. See Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41-42 (1976) (Article III standing requires an injury "that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.").

Nor can petitioner rely on her January 2005 attempted flight from San Francisco to Malaysia. In this action, petitioner can seek only injunctive relief against the no-fly and selectee lists. See 49 U.S.C. § 46110 (authorizing courts only to "affirm, amend, modify, or set aside any part of the [challenged] order"). To have standing to seek injunctive relief, however, a plaintiff must show a credible threat of some future injury. See City of Houston v. Hill, 482 U.S. 451, 459 n.7 (1987) (plaintiff seeking prospective relief must show a "threat of future enforcement"); Haase v. Sessions, 835 F.2d 902, 911 (D.C. Cir. 1987). But to show any credible threat that petitioner would be subject in the future to harassment, embarrassment, etc. in this country, she would obviously need to be in the U.S. As explained above, however, she cannot return to the U.S. because she has no currently valid visa, nor any concrete plan to apply for one.[3]

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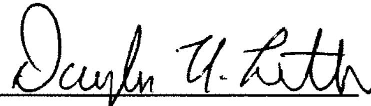
[3] In the Ninth Circuit, petitioner argued (see Attachment 4 at 15-16) that the Government's motion to dismiss was based on the inadmissible evidence of allegations in her own unverified complaint. While such allegations may not support a motion for summary judgment, this is a motion to dismiss. Courts routinely decide motions to dismiss by assuming the truth of allegations made in a complaint. See, e.g., Covad Communications Co. v. Bell Atlantic Corp., 407 F.3d 1220, 1222 (D.C. Cir. 2005) ("[O]n a motion to dismiss the court ordinarily assumes the truth of the facts alleged in the complaint."). In any event, all the relevant facts are set forth in petitioner's declaration. See Attachment 5. Furthermore, consideration of documents outside the pleadings is entirely permissible on a motion to dismiss for lack of subject matter jurisdiction. See, e.g., Jerome Stevens Pharmaceuticals Inc. v. FDA, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

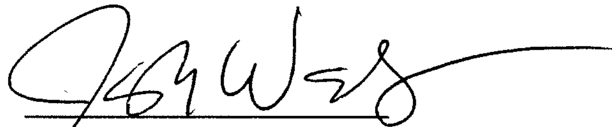
CONCLUSION

For the reasons stated above, this Court should dismiss the petition for lack of jurisdiction.

Respectfully submitted,



DOUGLAS N. LETTER
(202) 514-3602



JOSHUA WALDMAN
(202) 514-0236

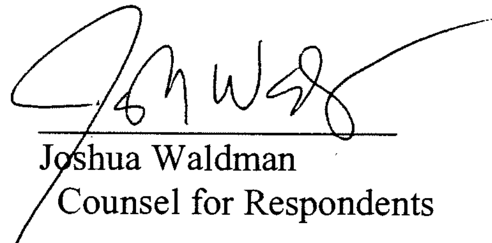
Attorneys, Appellate Staff
Civil Division, Room 7232
Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

July 21, 2006

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2006, I filed and served the foregoing MOTION TO DISMISS FOR LACK OF JURISDICTION by causing the original and four copies to be sent to this Court via ~~Federal Express~~ Hand Delivery and by causing one copy to be served upon the following counsel by Federal Express:

JAMES McMANIS
MARWA ELZANKALY
McManis, Faulkner & Morgan
50 West San Fernando
10th Floor
San Jose, CA 95113



Joshua Waldman
Counsel for Respondents