BRENT W. RENISON, OSB No. 96475
E-mail: brent@entrylaw.com
Direct Dial: (503) 597-7190
Fax: (503) 726-0730
PARRILLI RENISON LLC
411 NW Park Avenue Suite 201
Portland, OR 97209

Attorneys for Petitioner

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON
PORTLAND DIVISION

DZU CONG TRAN, on behalf of himself and all others similarly situated,

Civil No. CV '10 - 724 ST

PLAINTIFF,

v.

JANET NAPOLITANO, Secretary, Department of Homeland Security; **ALEJANDRO MAYORKAS**, Director, U.S. Citizenship and Immigration Services; **DONALD NEUFELD**, Associate Director, USCIS Service Center Operations Directorate; **CHRISTINA POULOS**, Director, USCIS California Service Center; **HILLARY RODHAM CLINTON**, Secretary of State, U.S. Department of State; **JANICE L. JACOBS,** Assistant Secretary for Consular Affairs, U.S. Department of State,

DEFENDANTS.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR WRIT OF MANDAMUS

CLASS ACTION

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR WRIT OF MANDAMUS

Nearly three years ago, the former United States Citizenship and Immigration Services ("USCIS") Ombudsman Mr. Prakash Khatri issued recommendations to Department of Homeland Security ("DHS") and USCIS regarding necessary changes to the standards and processes for re-adjudication of petitions returned by consular offices for revocation or revalidation, due to systemic nationwide failures of the system. Two years ago, Jonathan R. Scharfen, former Acting Director of USCIS under the Bush Administration responded to the USCIS Ombudsman's recommendations, implementing only some of those recommendations and specifically rejecting others. This class action lawsuit involves some of the recommendations of the USCIS Ombudsman which were rejected by defendants, in addition to other issues.

Through the contradictory and unlawful practices of each defendant agency, plaintiff and class members have been aggrieved by agency action and inaction, have suffered agency action unlawfully withheld and unreasonably delayed, have been subjected to arbitrary, capricious and unlawful denials and file transfers, have been deprived of due process of law and had visa issuance and petition approval denied or unreasonably withheld contrary to constitutional right, contrary to procedure required by law, and contrary to the limitations of statutory jurisdiction and authority. Thousands of families across the country and around the world have been separated due to a colossal sparring match between the defendant agencies, and because of internal dissent within each agency.

Specifically, Plaintiff Dzu Cong Tran, on behalf of himself and all others similarly situated, challenges (a) defendant U.S. State Department's (State Department's) policies and procedures for processing and returning approved petitions to defendant U.S. Citizenship and Immigration Services (USCIS) with a recommendation that the petition be

revoked; and (b) defendant USCIS' policies and procedures for revoking, denying or terminating petitions returned to it by defendant State Department. Plaintiff respectfully petitions this Court for injunctive, declaratory and mandamus relief to: (a) compel State Department to schedule a visa interview within a reasonable period from the date that State Department's National Visa Center receives an approved I-129F petition for fiancé(e) from USCIS; (b) compel State Department to issue a K-1 visa to the fiancé(e) of a U.S. citizen or notify the petitioner and beneficiary that the petition will be returned to DHS/USCIS within reasonable period following interview; (c) compel State Department to provide a reasonable period during which a petitioner and beneficiary may rebut consular findings before the petition is returned to DHS/USCIS; (d) compel State Department to return petitions to DHS/USCIS only where substantial evidence exists that fraud, misrepresentation, or ineligibility would lead to denial, and not where it is merely suspected; and to provide a written notice supported by the legal and factual basis for the visa denial and petition return that are not conclusive, speculative, equivocal or irrelevant; (e) compel State Department to render a final decision to approve the K-1 visa or return a petition to DHS/USCIS within a reasonable period not to exceed 30 days from the receipt of all necessary documents from the petitioner and beneficiary, and to accomplish delivery of the petition to State Department's National Visa Center within such period; (f) declare that 8 C.F.R. § 214.2(k)(5), which purports to limit the validity of a K-1 fiancé(e) petition (Form I-129F) to four months, is *ultra vires* and in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (g) following such declaration, enjoin DHS/USCIS from limiting the validity period of any approved fiancé(e) petition; (h) declare that the Foreign Affairs Manual, at 9 FAM 40.63 N10.1, which purports to establish the materiality of an alleged misrepresentation pursuant to 8 U.S.C. 1182(a)(6)(C)(i), INA 212(a)(6)(C)(i), merely based upon DHS/USCIS summary revocation of the petition is *ultra vires* and in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (i) issue a permanent injunction barring the State Department from placing a marker, called a "P6C1" marker, or "quasi-refusal" in a visa beneficiary's record, and deeming

the DHS/USCIS revocation of the petition as automatically establishing the permanent misrepresentation bar to any future immigration possibility; (j) compel DHS/USCIS to issue a notice to petitioner within a reasonable period of time not to exceed 30 days from receipt of the returned petition from the State Department, providing petitioner with the legal and factual basis for the consular recommendation that is not conclusive, speculative, equivocal or irrelevant; (k) compel DHS/USCIS to provide petitioner the opportunity to submit evidence to rebut the consular recommendation within a reasonable period of time; (l) compel DHS/USCIS, in the case of a reaffirmation of approval, to deliver the reaffirmed petition to the State Department within a reasonable period of time, and compel State Department to issue the K-1 visa within a reasonable period of time following reaffirmation; (m) compel DHS/USCIS, in the case of a denial, to issue a decision within a reasonable period of time, and to advise petitioner of the right to appeal the decision to the Administrative Appeals Office.

Plaintiff alleges as follows:

JURISDICTION

1. This action arises under the United States Constitution and the statutes of the United States including the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1184(d); 8 U.S.C. § 1101(a)(15)(K); 8 U.S.C. § 1201; and 8 U.S.C. § 1201 note 6, Act Sept. 30, 2002, P.L. 107-228, Div. A, Title II, Subtitle C, § 233, 116 Stat. 1373. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question), and may review defendants' actions or omissions under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., the Mandamus Act, 28 U.S.C. § 1361, and the Declaratory Judgment Act, 28 U.S.C. § 2201 et. seq. (declaratory relief).

VENUE

2. Venue in this district is proper under 28 U.S.C. § 1391(e)(3) because no real property is involved in the action and plaintiff resided in Portland, Oregon at the time he filed the I-129F petition for alien fiancée and continues to reside in Portland, Oregon. Further, venue is

proper under 28 U.S.C. § 1391(e)(1) and (2) because the United States Citizenship and Immigration Services ("USCIS"), an agency of the United States Department of Homeland Security ("DHS"), maintains a Field Office in Portland, Oregon, and DHS/USCIS receives petitions on Form I-129F from petitioners in Oregon through its network of "Lock Box" operations and Service Center locations, and a substantial part of the events or omissions giving rise to the claim occurred in Oregon.

FINAL AGENCY ACTION AND EXHAUSTION

3. Defendant State Department has rendered final agency action by returning the petition to USCIS with a recommendation to revoke, and by its action in administratively closing the case.

4. Defendant USCIS has rendered final agency action. It is the policy of USCIS, upon receipt of the previously approved petition from State Department, to terminate the petition without further action due to the expiration of the four-month validity period found at 8 C.F.R. § 214.2(k)(5). These regulations are being challenged in this action as unlawful and *ultra vires*.

5. There is no other adequate remedy in a court, because plaintiff is not offered the opportunity to rebut consular findings concerning the case, and because plaintiff is not permitted to appeal the termination due to the expiration of the four month validity period of the challenged regulations.

6. DHS/USCIS' policy to not review K-1 petitions returned from consulates that are received by DHS/USCIS after the challenged four month validity period renders any recourse to administrative review futile. There is no mandatory administrative appeal and petitioner is not required to exhaust non-existent administrative remedies. *See Darby v. Cisneros*, 509 U.S. 137 (1993)

PARTIES

7. Plaintiff Dzu Cong Tran is a naturalized United States citizen, born in Vietnam in 1978, and a resident of Portland, Oregon. He filed a Form I-129F petition for fiancé(e) with

USCIS on August 24, 2009, which was approved by USCIS on October 27, 2009. Defendant State Department returned the approved petition to defendant USCIS for revocation on or about May 12, 2010.

8. Defendant Janet Napolitano is sued in her official capacity as Secretary of Department of Homeland Security ("DHS"). As Secretary of DHS, Ms. Napolitano is responsible for the administration and enforcement of the immigration laws of the United States.

9. Defendant Alejandro Mayorkas is sued in his official capacity as Director of the United States Department of Homeland Security, United States Citizenship and Immigration Services ("USCIS"). As Director of USCIS, Mr. Mayorkas is responsible for the overall administration of USCIS and the implementation of the immigration laws of the United States.

10. Defendant Donald Neufeld is sued in his official capacity as Associate Director, USCIS Service Center Operations Directorate. As Associate Director, Mr. Neufeld is responsible for overall administration of Service Center Operations, including those at the California Service Center.

11. Defendant Christina Poulos is sued in her official capacity as Director of the USCIS California Service Center ("CSC"). As Director of the California Service Center, Ms. Poulos is responsible for administration of the CSC, the USCIS Service Center which currently processes all of the consular return cases.

12. Defendant Hillary Rodham Clinton is sued in her official capacity as Secretary of State of the United States Department of State ("State Department"). As Secretary of State, Ms. Clinton is responsible for the overall administration the Department of State, including the Bureau of Consular Affairs which is responsible for issuance of non-immigrant visas under the immigration laws of the United States.

13. Defendant Janice L. Jacobs is sued in her official capacity as Assistant Secretary for the Bureau of Consular Affairs within the United States Department of State. As Assistant Secretary, Ms. Jacobs is responsible for the overall administration of the non-immigrant visa

issuance process under the immigration laws of the United States.

STATUTORY BACKGROUND

14. In order to become a permanent resident, the fiancé(e) of a U.S. citizen first obtains a K-1 visa at a U.S. Embassy or Consulate abroad through a visa petition (the I-129F petition) filed by the U.S. citizen fiancé(e) with DHS/USCIS. 8 U.S.C. §1184(d); 8 C.F.R § 214.2(k)(1). K-1 petition approval requires that the couple have met in person within two years of the filing of the petition and must have a bona fide intention to marry within 90 days of the non-citizen's arrival. 8 U.S.C. §1184(d)(1).

15. If the K-1 petition is denied, DHS/USCIS shall explain in writing the specific reasons for denial and notify the petitioner of the right to appeal. Denials of K-1 petitions may be appealed to the Administrative Appeals Office ("AAO"), by submitting within 30 days of the decision a Notice of Appeal form (Form I-290B) with the Service Center that denied the petition. 8 C.F.R § 103.3(a)(2)(i).

16. The K-1 petition, when approved by DHS/USCIS, bears a four-month validity period. 8 C.F.R. § 214.2(k)(5). No statute authorizes the four-month validity period. The regulation grants consular officers of the State Department the discretion to extend the four-month validity period.

17. In recognition of the special place that spouses and fiancé(e)s of U.S. citizens hold in immigration law, Congress has mandated that it shall be the policy of the State Department to process each application for a spouse or K-1 fiancé(e) of a U.S. citizen within 30 days of receipt of all necessary documents from the applicant and the USCIS. 8 U.S.C. § 1201 note 6, Act Sept. 30, 2002, P.L. 107-228, Div. A, Title II, Subtitle C, § 233, 116 Stat. 1373.

18. Non-immigrant visas that require a USCIS petition approval prior to issuance are typically issued by the State Department utilizing procedures that are less formal and less document-intensive than immigrant visas, which are subject to more formal and more document-intensive procedures.

19. Despite the K-1 category being classified in the INA as a non-immigrant visa, State Department has chosen to subject the category to immigrant visa processing procedures. State Department has chosen to only issue K-1 visas through designated posts which also process immigrant visas, thereby funneling these cases to a select number of State Department Embassies and Consulates.

20. If it appears to the State Department consular officer, from statements in the application or in documents submitted, that the K-1 fiancé(e) is not eligible to receive a visa, the consular officer shall refuse to issue the visa. 8 U.S.C. § 1201(g).

21. Following a visa refusal, the State Department's policy is to return the K-1 petition with a recommendation for revocation to the State Department's National Visa Center ("NVC"). See Volume 9, Foreign Affairs Manual, 9 FAM 41.81 N.6.5 (available at http://www.state.gov/documents/organization/87391.pdf).

22. State Department routinely advises petitioners and beneficiaries that they will have the opportunity to rebut consular findings, knowing that such advice is false and misleading.

23. Following receipt of the returned K-1 petition, the NVC forwards all K-1 consular returns directly to USCIS' California Service Center ("CSC").

24. It is the policy of DHS/USCIS/CSC to delay action on returned K-1 petitions for six months, and in some cases for periods in excess of one year or more.

25. It is the policy of DHS/USCIS/CSC to not act on returned K-1 petitions, reasoning that K-1 petitions are temporally limited to four months under 8 C.F.R. § 214.2(k)(5), and due to defendants' own processing delays have all expired by the time they reach DHS/USCIS/CSC. DHS/USCIS/CSC will not review such returned petitions, nor will defendants provide the petitioner the opportunity to rebut consular findings, nor will defendants provide the petitioner the opportunity to appeal such non action.

26. In the case of a K-1 visa that is approved, a period of six (6) months of visa

validity is provided to allow the fiancé(e) enough time to plan to relocate to the United States, given the uncertainty of exact timing of visa issuance. Following visa issuance, the fiancé(e) can legally enter the United States during the six month window of visa validity to be married. If the couple does not marry within 90 days of the non-citizen's entry, the non-citizen is required to depart from the United States. To ensure compliance with this requirement, DHS issues an entry document (Form I-94) to the K-1 fiancé(e) valid for 90 days. If the couple is married within 90 days, the non-citizen spouse can apply to adjust her status to that of a lawful permanent resident through the filing of a Form I-485. 8 U.S.C. § 1255(d); 8 C.F.R. § 245.2(c).

27. Following the filing of an application to adjust status, USCIS will personally interview the couple and conduct any necessary investigation into the bona fide nature of the marriage.

28. If the adjustment of status application is approved following interview and investigation, and the parties have not been married at least two years at the time of approval, the fiancé(e) will be granted Conditional Permanent Resident ("CPR") status valid for a two year period from the date of grant. 8 U.S.C. §1186a(a); 8 U.S.C. §1186a(g)(1)(B).

29. During the 90 day period prior to expiration of CPR status, the Conditional Permanent Resident spouse must file another form, Form I-751, requesting removal of the conditional status. 8 U.S.C. §1186a(c)(1). The CPR must establish that the qualifying marriage was entered into in accordance with the laws of the place where the marriage took place, has not been judicially annulled or terminated (unless a hardship waiver is granted) other than through the death of a spouse, and that the marriage was not entered into for the purpose of procuring an alien's admission as an immigrant. 8 U.S.C. §1186a(d)(1). The CPR is again interviewed regarding the bona fides of the marriage, unless the interview is waived by USCIS. 8 U.S.C. §1186a(d)(3).

30. If USCIS is satisfied that all requirements have been met and the marriage is bona fide, the condition is lifted and the CPR obtains lawful permanent resident ("LPR") status. 8

U.S.C. §1186a(c)(3)(B). If USCIS is not satisfied that all requirements have been met and the marriage is bona fide, the CPR status is terminated and the spouse is placed in removal proceedings where the application may be renewed before an Immigration Judge. 8 U.S.C. §1186a(c)(3)(C), (D).

STATEMENT OF FACTS

Background

31. Petitioner Dzu Cong Tran was born in Vietnam in 1978 and immigrated to the United States in October 2002. He was naturalized as a United States citizen on May 21, 2008 in Portland, Oregon.

32. Mr. Tran has lived in Oregon since 2002, and is currently employed by Leupold & Stevens, a precision optics company headquartered in Beaverton, Oregon.

33. In September 1998, Mr. Tran first met his fiancée Trinh Thi Tuyet Pham in Da Nang, Vietnam. Mr. Tran was 19 years of age, and Ms. Pham was 16 years of age. After first meeting, Mr. Tran and Ms. Pham began corresponding with each other through the address of a friend. At the time, Mr. Tran lived in Nha Trang city, and Ms. Pham lived in Da Nang city. Mr. Tran went to Da Nang city to visit his aunt and met Ms. Pham. Three weeks later, they saw each other again in Da Nang city at the Mid-Autumn Moon Festival. Mr. Tran and Ms. Pham started to see each other once a month and spend three or four days together per visit. They went to eat at sidewalk restaurants and markets, strolled along the Han River bank, sang karaoke, went to coffee houses and went camping with friends. They continued to see each other once a month, meeting in Da Nang.

34. The night of the Mid-Autumn Moon Festival in September 1999, Mr. Tran and Ms. Pham first discussed marriage in a coffee house in Da Nang city. Mr. Tran proposed to Ms. Pham and she accepted immediately, but they felt that they were too young to start their own family. For the next several years, they continued to see each other a few times every month despite living in different cities until Mr. Tran immigrated to the U.S. on October 16, 2002.

35. After Mr. Tran moved to the U.S., he stayed in touch with Ms. Pham once a week or more by email, yahoo messenger and phone. He traveled to Vietnam to see Ms. Pham in June 2005 for seven weeks. Mr. Tran made another trip to visit Ms. Pham in September 2008, staying for three weeks. During that visit, Mr. Tran and Ms. Pham decided to take the necessary steps to start their own family once Mr. Tran had saved sufficient funds to move out of his parents' house.

The Petition

36. On August 24, 2009, Mr. Tran filed a Form I-129F, petition for fiancé(e), paying a filing fee of $455 to USCIS. A receipt notice was issued to him, bearing the receipt number "WAC-09-230-50932", issued from the California Service Center of USCIS.

37. On October 27, 2009, USCIS approved the Form I-129F petition for fiancé(e), and advised him that the original visa petition was sent to the Department of State's National Visa Center ("NVC") in Portsmouth, New Hampshire. The notice of approval, Form I-797, stated that NVC processing should be complete within two to four weeks, and that NVC would then send the petition to the U.S. Embassy or consulate for interview. The Form I-797 notice also stated that the petition was valid from October 27, 2009 to February 26, 2010.

38. On November 4, 2009, the State Department's NVC issued a letter stating that, "within a week, the petition will be forwarded to the appropriate visa-issuing post where your visa interview will take place." The letter identified that the visa-issuing post would be the Consulate General in Ho Chi Minh City, Vietnam.

The Consular Interview

39. Over four months later, on March 9, 2010, the State Department's Consulate General in Ho Chi Minh City, Vietnam, sent Ms. Pham a letter indicating that the State Department was ready to begin final processing of the visa, and scheduled Ms. Pham for an interview on April 14, 2010 at 9:30 a.m., well after the stated petition validity. The consulate referenced the case number HCM2009806204.

40. On April 14, 2010, Ms. Pham appeared for her interview as scheduled. The U.S. Consular Officer, a duly authorized employee of defendant State Department, interviewed Ms. Pham. The Officer refused to issue a K-1 fiancé(e) visa to Ms. Pham, and instead issued a letter dated April 14, 2010, requesting from petitioner (Mr. Tran) a sworn, notarized statement containing a detailed chronology of the relationship and certain other biographical information. The letter set an appointment date for resubmission of the requested documents as May 12, 2010 between the hours of 13:00 and 14:00 hours (1 p.m. and 2 p.m. local time).

The Denial and Petition Return

41. On May 12, 2010, Ms. Pham appeared at the Consulate at 12:30 p.m. and waited in line for half an hour until she was led inside. She took a number and waited an hour and one half until approximately 2:30 p.m., at which time a Vietnamese national employee of the Consulate called her to submit her documents. She was told to wait. Sometime around 3:40 p.m. she was called up by the Vietnamese national employee and handed a denial letter. She was not interviewed on this date, and she never spoke to an American consular officer. She was told that her case had been closed, and if there were any questions to read the letter.

42. The letter that she was handed by the State Department employee on May 12, 2010 was a visa denial, premised upon 8 U.S.C. § 1201(g), INA § 221(g), advising Ms. Pham that the petition was being returned to USCIS with the recommendation that it be revoked. The visa denial letter stated that when USCIS receives the returned petition, USCIS will contact the plaintiff who will have an opportunity to rebut consular findings concerning this case.

43. Based on current DHS/USCIS policy and interpretation as expressed in the Scharfen memorandum to the USCIS Ombudsman, however, plaintiff will not have an opportunity to rebut consular findings concerning the case.

44. The denial stated that, "[p]hotographs submitted as evidence of the relationship indicate that Petitioner and Beneficiary have spent only four or five days together."

45. The evidence in the record directly contradicts the conclusory statement contained

in paragraph 44, and it is thus conclusive, speculative, equivocal or irrelevant. Plaintiff arrived in Ho Chi Minh city on August 30, 2008, and Ms. Pham picked him up at the airport. They left Ho Chi Minh city on September 4, 2008 to go to Ha Noi city. As they could not fly to North Vietnam, the couple took a bus to Ha Long bay, to Sapa, and returned to Ha Noi city. This trip took one week. The couple spent three weeks together on that 2008 trip alone. The denial disregarded the evidence of other trips and time the couple spent together.

46. Neither plaintiff nor his fiancé(e) were provided an opportunity to rebut the conclusion by defendant State Department contained in paragraph 44, and they will not be provided an opportunity to rebut this conclusion by defendants DHS/USCIS due to the Scharfen policy.

47. The denial stated that, "Beneficiary and-or Petitioner submitted no evidence of any engagement celebration. This contradicts local social and cultural norms in which many family members and friends, including those in the U.S. are invited to engagement celebrations numbering in the hundreds of guests for families of even modest means. Together with other factors, this has been established as one of the key elements of a sham relationship to evade U.S. immigration laws."

48. Plaintiff and his fiancée have had a long relationship. Plaintiff and Ms. Pham submitted no evidence of any engagement celebration because they had not yet had one. First, this Ms. Pham was not asked about this during her interview, and had no opportunity to provide evidence on this point. Second, when the couple first decided to become engaged, they were young and without resources. When Plaintiff later immigrated to the United States, he struggled with his new life, his new home, new culture, new language, new weather, and new traffic. Despite these challenges, he graduated from Portland Community College on September 6, 2009 with an Associate's Degree in Applied Science, majoring in Computer Information Systems, and began a job with Leupold & Stevens on February 18, 2010. Plaintiff reserved his funds for the wedding party. The statement in paragraph 47 is conclusive, speculative, equivocal or irrelevant.

49. Neither plaintiff nor his fiancé(e) were provided an opportunity to rebut the conclusion by defendant State Department contained in paragraph 47, and they will not be provided an opportunity to rebut this conclusion by defendants DHS/USCIS due to the Scharfen policy.

50. The denial stated that, "[i]t does not appear that the claimed relationship is continuous and on-going. For example, Petitioner has not returned to visit Beneficiary since September 2008."

51. Plaintiff and his fiancée have maintained a long relationship over many years. First, the statute requires only that the parties have met in person within the past two (2) years prior to the filing of the fiancé(e) petition. The statement in paragraph 50 is irrelevant.

52. Second, plaintiff has struggled with his new life, his new home, new culture, new language, new weather, and new traffic. Despite these challenges, he graduated from Portland Community College on September 6, 2009 with an Associate's Degree in Applied Science, majoring in Computer Information Systems, and began a new job with Leupold & Stevens on February 18, 2010. Plaintiff decided to save money on travel, reserving his funds for the wedding party and the couple's shared life together, including a new residence outside of his parents' home. Ms. Pham cannot speak English, and when she arrives in the United States will not be readily employable. She will need to take English classes, which require resources. Plaintiff, given the long courtship, made a wise decision to reserve funds for the wedding and for the practical aspects of married life. The couple has also maintained an on-going relationship through phone, email and yahoo messenger. The statement contained in paragraph 50 is conclusive, speculative, equivocal or irrelevant.

53. Neither plaintiff nor his fiancé(e) were provided an opportunity to rebut the conclusion by defendant State Department contained in paragraph 50, and they will not be provided an opportunity to rebut this conclusion by defendants DHS/USCIS due to the Scharfen policy.

54. The denial stated that, "Beneficiary is unaware of basic facts regarding Petitioner's occupation, livelihood and-or worklife. For example, Beneficiary did not know the name of Petitioner's company."

55. During the consular interview April 14, 2010, the consular officer asked Ms. Pham what plaintiff's occupation was. Ms. Pham replied that he was in computer information systems. The consular officer asked Ms. Pham plaintiff's parents' and sister's name. Ms. Pham provided the information. The consular officer asked what plaintiff's job was. Ms. Pham replied that he was an assembler. The consular officer asked if Ms. Pham knew the name of plaintiff's company. Ms. Pham replied that plaintiff works for a company which makes binoculars, and because it was an English name, she did not remember it. The name "Leupold & Stevens" is an English name of an American company, and it was not reasonable for the consular officer to expect Ms. Pham to know the name, since she does not speak English, only speaks Vietnamese, and has never been to the United States. The statement contained in paragraph 54 is conclusive, speculative, equivocal or irrelevant.

56. Neither plaintiff nor his fiancé(e) were provided an opportunity to rebut the conclusion by defendant State Department contained in paragraph 54, and they will not be provided an opportunity to rebut this conclusion by defendants DHS/USCIS due to the Scharfen policy.

57. The denial stated that, "Beneficiary is unaware of basic facts regarding Petitioner's educational level, background, and history. For example, Beneficiary did not know the name of the college Petitioner attended."

58. Ms. Pham is aware of plaintiff's educational level, background and history. The statement contained in paragraph 57 is conclusive, speculative, equivocal or irrelevant. Ms. Pham is aware of what plaintiff's major was, and intimate details of plaintiff's life. The couple speaks on the phone almost every night at 9:00 p.m. and on the weekends. Ms. Pham is aware of when plaintiff began school, and when he finished school. The statement, contained in

paragraph 57, that Ms. Pham is unaware of plaintiff's living situation because she could not name the English language title of plaintiff's college where she and plaintiff speak only in Vietnamese to each other is conclusive, speculative, equivocal or irrelevant.

59. Neither plaintiff nor his fiancé(e) were provided an opportunity to rebut the conclusion by defendant State Department contained in paragraph 57, and they will not be provided an opportunity to rebut this conclusion by defendants DHS/USCIS due to the Scharfen policy.

60. The denial stated that, "Beneficiary is unable to provide basic facts (such as ceremony, manner of celebration, venue, guests or approximate costs) regarding the claimed planned marriage in the U.S. It appears that the relationship is a sham or that Beneficiary has no actual intent to marry within 90 days of admission to the U.S. (or both)."

61. The State Department's website for the Consulate General in Ho Chi Minh City (http://hochiminh.usconsulate.gov/immigrant_visas.html) states "[n]o assurance regarding the issuance of visas can be given in advance. **Please do not make any binding travel plans until you have received your visa.**" (emphasis in original). Visa processing is subject to delay and the State Department has specifically advised not to make concrete plans prior to visa issuance. While the statute requires legal marriage within 90 days of admission, it does not require that the actual wedding party or ceremony take place within the 90 days. The 90 day period is also triggered only upon entry, and the K-1 visa is valid for entry up to six (6) months after issuance. It is for these reasons that many petitioners and fiancé(e)s plan more elaborate ceremonies after the bureaucratic and undependable visa issuance is accomplished. Additionally, Ms. Pham indicated in the interview that she intended to marry within 90 days of admission, and that after the wedding, both she and plaintiff would return to Vietnam to see her parents and her family. Plaintiff and Ms. Pham intend to marry within 90 days of Ms. Pham's admission to the United States, and to apply for an adjustment of status. The relationship is not a sham, and the statements contained in paragraph 60 are conclusive, speculative, equivocal or irrelevant.

62. Neither plaintiff nor his fiancé(e) were provided an opportunity to rebut the conclusion by defendant State Department contained in paragraph 60, and they will not be provided an opportunity to rebut this conclusion by defendants DHS/USCIS due to the Scharfen policy.

63. The denial stated that, "Beneficiary is unaware of the requirement to marry within 90 days of admission to the U.S. Therefore, it appears that Beneficiary does not have the intent to comply with the requirements of the visa category applied for or that the claimed relationship is a sham (or both)."

64. Ms. Pham was aware of the requirement to marry within 90 days of admission to the U.S., and intends to marry within 90 days of admission. Ms. Pham was advised of this requirement by the consular officer. This is a legal condition of the visa that is routinely communicated by consular officers to visa applicants, and the statement contained in paragraph 63 is conclusive, speculative, equivocal or irrelevant.

65. Neither plaintiff nor his fiancé(e) were provided an opportunity to rebut the conclusion by defendant State Department contained in paragraph 63, and they will not be provided an opportunity to rebut this conclusion by defendants DHS/USCIS due to the Scharfen policy.

66. State Department issued the denial based on mere suspicion and failed to provide a written notice supported by the legal and factual basis for the visa denial and petition return that was not conclusive, speculative, equivocal or irrelevant.

67. State Department, in its denial, stated that, "[i]f USCIS revokes the petition, beneficiary will become ineligible for a visa under section 212(a)(6)(C)(i) of the Act." INA 212(a)(6)(C)(i), 8 U.S.C. 1182(a)(6)(C)(i), is a permanent bar to admissibility for misrepresentation. Pursuant to the Foreign Affairs Manual, 9 FAM 40.63 N10.1, State Department placed a marker, called a "P6C1" marker, or "quasi-refusal" in Ms. Pham's records, and will deem USCIS revocation of the petition as automatically establishing the permanent

misrepresentation bar to any future immigration possibility.

68. On May 17, 2010, the office of Senator Ron Wyden (D-OR) contacted the Consulate General in Ho Chi Minh City, Vietnam on behalf of Mr. Tran. On May 19, 2010, Charles E. Bennett, Consular Section Chief of the Consulate General issued a letter to Senator Wyden stating that the petition had been returned to USCIS for revocation. The letter stated that it could take several months for the petition to be received by USCIS, and that the case was now closed in their office.

69. U.S. citizen petitioners of K-1 fiancé(e) petitions nationwide have reported to the USCIS Ombudsman extensive delays of six months or more than one year before petitions are returned by State Department to USCIS. State Department has unreasonably delayed action on consular returns.

70. Action on consular returns has taken DHS/USCIS an average of 18 months from the date of denial and return at the Consulate.

71. DHS/USCIS do not publish processing times for consular returns. State Department does not publish processing times for delivery of petitions to DHS/USCIS for recommended revocation. DHS/USCIS consider consular returns as low priority work.

72. DHS/USCIS supervisors and managers are not accountable for allowing consular returns to remain unadjudicated. DHS/USCIS has unreasonably delayed action on consular returns.

CLASS ACTION ALLEGATIONS

73. The named plaintiff brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of himself and all other persons similarly situated. The named plaintiff seeks to represent: All United States citizens who filed an I-129F Petition for Fiancé(e) that was approved by DHS/USCIS, but whose alien fiancé(e) was not issued a K-1 visa due to the State Department's issuance of a visa denial for the purpose of returning the approved petition to DHS/USCIS for review and revocation, termination, or denial.

74. The members of plaintiff's class warrant class action treatment because they fulfill the requirements under Rule 23(a) of the Federal Rules of Civil Procedure.

75. The proposed class is so numerous that joinder of all members is impracticable. Thousands of United States citizens qualify for the proposed class. Fed. R. Civ. P. 23(a)(1).

76. There are questions of law common to the class. The action seeks to compel defendants to comply with the Due Process clause of the Fifth Amendment to the United States Constitution, and comply with the federal statutes passed by Congress. Whether the process and treatment afforded the class comports with the Constitution and statutes of the United States is at issue. These questions of law are common to each member of the affected class. Fed. R. Civ. P. 23(a)(2).

77. The claims and defenses of the representative plaintiff are typical of the claims or defenses of the class. Plaintiff filed an I-129F Petition for Fiancé(e) that was approved by DHS/USCIS, but his alien fiancée was not issued a K-1 visa due to the State Department's issuance of a visa denial for the purpose of returning the approved petition to DHS/USCIS for review and revocation. He complains about the denial of due process of law, just as do members of the class. Fed. R. Civ. P. 23(a)(3).

78. The representative plaintiff will fairly and adequately protect the interests of the class. Plaintiff has been wronged by defendants' actions and inactions, and harmed by the denial of due process of law that is common to all class members. Fed. R. Civ. P. 23(a)(4)

79. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole. Defendants' systemic failures to act in a manner that comports with due process applies equally to all class members. This action is maintainable as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

80. Plaintiff's counsel, Brent W. Renison, is an appropriate class counsel for the proposed class. Renison has undertaken work identifying and investigating potential claims in

the action, has experience handling a class action involving immigrant rights issues, and possesses other immigration-related litigation experience. Renison has knowledge of the applicable law, and will commit appropriate resources to representing the class. Fed. R. Civ. P. 23(g)

FIRST CLAIM FOR RELIEF

Action, Findings and Conclusions in Excess of Statutory Authority

81. Plaintiff realleges and incorporates by reference paragraphs 1 through 80 above, as if fully set forth herein.

82. The regulation at 8 C.F.R. § 214.2(k)(5), which purports to impose a four-month validity period for approved K-1 petitions, is in excess of statutory jurisdiction, authority and short of statutory right. The Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), allows Courts to hold unlawful and set aside agency action, findings, and conclusions found to be in excess of statutory authority or short of statutory right.

83. The statutes of the United States do not provide authority for the limited four-month validity period as applied to K-1 petitions. The regulation at 8 C.F.R. § 214.2(k)(5) is unlawful and *ultra vires*.

84. The Foreign Affairs Manual, at 9 FAM 40.63 N10.1, which purports to establish the materiality of an alleged misrepresentation pursuant to 8 U.S.C. 1182(a)(6)(C)(i), INA 212(a)(6)(C)(i), merely based upon DHS/USCIS summary revocation of the petition is in excess of statutory jurisdiction, authority and short of statutory right. The State Department engages in an unlawful practice by placing a marker, called a "P6C1" marker, or "quasi-refusal" in a visa beneficiary's record, and through deeming the DHS/USCIS revocation of the petition as automatically establishing the permanent misrepresentation bar to any future immigration possibility.

85. Plaintiff has suffered a legal wrong and has been adversely affected and aggrieved by agency actions alleged in paragraphs 82 through 84 above, because defendants, in relying

upon the unlawful regulation limiting K-1 petitions to a four-month validity period to justify their policy of not acting on returned petitions, have violated plaintiff's legal right to an adjudication in accordance with fundamental principles of fairness. As a result, the regulation at 8 C.F.R. § 214.2(k)(5) must be declared "not in accordance with law" under 5 U.S.C. § 706(2)(A), and in excess of the agency's "statutory jurisdiction, authority" or "statutory right," within the meaning of 5 U.S.C. § 706(2)(C). Likewise, the Foreign Affairs Manual, at 9 FAM 40.63 N10.1, which purports to establish the materiality of an alleged misrepresentation pursuant to 8 U.S.C. 1182(a)(6)(C)(i), INA 212(a)(6)(C)(i), merely based upon DHS/USCIS summary revocation of the petition must be declared "not in accordance with law" under 5 U.S.C. § 706(2)(A), and in excess of the agency's "statutory jurisdiction, authority" or "statutory right," within the meaning of 5 U.S.C. § 706(2)(C).

SECOND CLAIM FOR RELIEF

Contrary to Constitutional Right and Without Observance of Procedure Required by Law
Arbitrary and Capricious and Not in Accordance with Law

86. Plaintiff realleges and incorporates by reference paragraphs 1 through 85 above, as if fully set forth herein.

87. State Department, by failing to provide a reasonable period during which a petitioner and beneficiary may rebut consular findings before the petition is returned to DHS/USCIS, has not observed the procedure required by law and has violated plaintiff's right to due process of law under the United States Constitution.

88. Defendant State Department, by systematically failing to return petitions to DHS/USCIS only where substantial evidence exists that fraud, misrepresentation, or ineligibility would lead to denial, has not observed the procedure required by law and has violated plaintiff's right to due process of law under the United States Constitution.

89. Defendant State Department, by systematically returning petitions to

DHS/USCIS, where fraud, misrepresentation or ineligibility is merely suspected, has not observed the procedure required by law and has violated plaintiff's right to due process of law under the United States Constitution. Defendant State Department has also acted on mere suspicion in an arbitrary and capricious manner.

90. Defendant State Department, by systematically failing to provide a sufficient written notice supported by the legal and factual basis for the visa denial and petition return that is not conclusive, speculative, equivocal or irrelevant, has not observed the procedure required by the law and has violated plaintiff's right to due process of law under the United States Constitution. Defendant State Department has also acted on conclusive, speculative, equivocal or irrelevant bases in an arbitrary and capricious manner.

91. The APA, 5 U.S.C. § 706(2), allows Courts to hold unlawful and set aside agency action, findings, and conclusions found to be contrary to constitutional right, power, privilege, or immunity or without observance of procedure required by law. Plaintiff has suffered a legal wrong and has been adversely affected and aggrieved by agency actions alleged in paragraphs 87 through 90 above. As a result, defendants' actions and inactions must be held unlawful and set aside.

92. The APA, 5 U.S.C. § 706(2), allows Courts to hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Plaintiff has suffered a legal wrong and has been adversely affected and aggrieved by agency actions alleged in paragraphs 87 through 90 above. As a result, defendants' actions and inactions must be held unlawful and set aside.

93. The right to fundamental fairness in administrative adjudication is protected by the Due Process Clause of the Fifth Amendment to the United States Constitution. The right to marry is a right protected under the United States Constitution. Plaintiff, on behalf of himself and all others similarly situated, may seek redress in this Court for the defendants' combined failures to provide a reasonable and just framework of adjudication in accordance with law and

the United States Constitution.

THIRD CLAIM FOR RELIEF

Agency Action Unlawfully Withheld and Unreasonably Delayed

94. Plaintiff realleges and incorporates by reference paragraphs 1 through 93 above, as if fully set forth herein.

95. Defendant State Department regularly fails to schedule a visa interview within a reasonable period from the date that State Department's National Visa Center receives an approved I-129F petition for fiancé(e) from USCIS. Given Congress' intent that fiancé(e)s of United States citizens be given preferential treatment in terms of accelerated adjudication, the agency has unreasonably delayed the process system wide. See 8 U.S.C. § 1201 note 6, Act Sept. 30, 2002, P.L. 107-228, Div. A, Title II, Subtitle C, § 233, 116 Stat. 1373.

96. Defendant State Department has systematically failed to issue a K-1 visa to the fiancé(e) of a U.S. citizen or notify the petitioner and beneficiary that the petition will be returned to DHS/USCIS within reasonable period following interview. Given Congress' intent that fiancé(e)s of United States citizens be given preferential treatment in terms of accelerated adjudication, the agency has unreasonably delayed the process system wide. *Id.*

97. Defendant State Department has systematically failed to render a final decision to approve the K-1 visa or return a petition to DHS/USCIS within a reasonable period not to exceed 30 days from the receipt of all necessary documents from the petitioner and beneficiary, and to accomplish delivery of the petition to State Department's National Visa Center within such period. Given Congress' intent that fiancé(e)s of United States citizens be given preferential treatment in terms of accelerated adjudication, the agency has unreasonably delayed the process system wide. *Id.*

98. Defendants DHS/USCIS have systematically failed to issue a notice to petitioner within a reasonable period of time not to exceed 30 days from receipt of the returned petition from the State Department, providing petitioner with the legal and factual basis for the consular

recommendation that is not conclusive, speculative, equivocal or irrelevant. Defendants egregious delays have been the subject of multitudes of complaints from United States citizens and Congressional offices, and constitute agency action unlawfully withheld or unreasonably delayed.

99. DHS/USCIS, in the case of a reaffirmation of approval, have systematically failed to deliver the reaffirmed petition to the State Department within a reasonable period of time, and defendant State Department has systematically failed to issue the K-1 visa within a reasonable period of time following reaffirmation.

100. DHS/USCIS, in the case of a denial, has systematically failed to issue a decision within a reasonable period of time, and to advise petitioner of the right to appeal the decision to the Administrative Appeals Office.

101. The APA, 5 U.S.C. § 706(2), allows Courts to compel agency action unlawfully withheld or unreasonably delayed. Plaintiff has suffered a legal wrong and has been adversely affected and aggrieved by agency actions alleged in paragraphs 95 through 100 above. As a result, defendants' actions and inactions must be held unlawful and set aside, and defendants must be ordered to establish an orderly system of adjudication of the rights of United States citizens to have their fiancé(e)s join them in the United States so that they may marry.

FOURTH CLAIM FOR RELIEF

Declaratory and Mandamus Relief

102. Plaintiff realleges and incorporates by reference paragraphs 1 through 101 above, as if fully set forth herein.

103. The Mandamus Act, 28 U.S.C. § 1361, provides that district courts shall have jurisdiction over any action in the nature of mandamus, and may compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff. Plaintiff must demonstrate that "(1) [his or her] claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt; and (3) no other

adequate remedy is available." *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1997).

104. Plaintiff's claims as set forth in paragraphs 82 through 101 also qualify for mandamus relief because the statutory and Constitutional claims are clear, the defendants' duties are not in doubt, and in the case of any remedies not available under the APA, no other adequate remedy is available.

105. The Declaratory Judgement Act, 28 U.S.C. § 2201, et. seq., provides the Court with the authority to declare the rights and other legal relations of any party. Plaintiff's claims as set forth in paragraphs 82 through 101 also qualify for declaratory relief, including "[f]urther necessary or proper relief based on a declaratory judgment…" 28 U.S.C. § 2202.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Assume jurisdiction over this action
2. At the earliest practicable time certify this action as a class action;
3. Issue a writ of mandamus compelling State Department to schedule a visa interview within a reasonable period from the date that State Department's National Visa Center receives an approved I-129F petition for fiancé(e) from USCIS;
4. Issue a writ of mandamus compelling State Department to issue a K-1 visa to the fiancé(e) of a U.S. citizen or notify the petitioner and beneficiary that the petition will be returned to DHS/USCIS within reasonable period following interview;
5. Issue a writ of mandamus compelling State Department to provide a reasonable period during which a petitioner and beneficiary may rebut consular findings before the petition is returned to DHS/USCIS;
6. Issue a writ of mandamus compelling State Department to return petitions to DHS/USCIS only where substantial evidence exists that fraud, misrepresentation, or ineligibility would lead to denial, and not where it is merely suspected; and to

provide a written notice supported by the legal and factual basis for the visa denial and petition return that are not conclusive, speculative, equivocal or irrelevant;

7. Issue a writ of mandamus compelling State Department to render a final decision to approve the K-1 visa or return a petition to DHS/USCIS within a reasonable period not to exceed 30 days from the receipt of all necessary documents from the petitioner and beneficiary, and to accomplish delivery of the petition to State Department's National Visa Center within such period;

8. Declare that 8 C.F.R. § 214.2(k)(5), which purports to limit the validity of a K-1 fiancé(e) petition (Form I-129F) to four months, is *ultra vires* and in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

9. Issue a permanent injunction barring DHS/USCIS from limiting the validity period of any approved fiancé(e) petition;

10. Declare that the Foreign Affairs Manual, at 9 FAM 40.63 N10.1, which purports to establish the materiality of an alleged misrepresentation pursuant to 8 U.S.C. 1182(a)(6)(C)(i), INA 212(a)(6)(C)(i), merely based upon DHS/USCIS summary revocation of the petition is *ultra vires* and in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

11. Issue a permanent injunction barring the State Department from placing a marker, called a "P6C1" marker, or "quasi-refusal" in a visa beneficiary's record, and deeming the DHS/USCIS revocation of the petition as automatically establishing the permanent misrepresentation bar to any future immigration possibility;

12. Issue a writ of mandamus compelling DHS/USCIS to issue a notice to petitioner within a reasonable period of time not to exceed 30 days from receipt of the returned petition from the State Department, providing petitioner with the legal and factual basis for the consular recommendation that is not conclusive, speculative, equivocal or irrelevant;

opportunity to submit evidence to rebut the consular recommendation within a reasonable period of time;

14. Issue a writ of mandamus compelling DHS/USCIS, in the case of a reaffirmation of approval, to deliver the reaffirmed petition to the State Department within a reasonable period of time, and compel State Department to issue the K-1 visa within a reasonable period of time following reaffirmation;

15. Issue a writ of mandamus compelling DHS/USCIS, in the case of a denial, to issue a decision within a reasonable period of time, and to advise petitioner of the right to appeal the decision to the Administrative Appeals Office;

16. Award plaintiff reasonable costs and attorney's fees under the Equal Access to Justice Act; and

17. Award such further relief as the Court deems necessary or appropriate.

DATED this 24th day of June, 2010.

PARRILLI RENISON LLC

By _____

BRENT W. RENISON, OSB No. 96475
E-mail: brent@entrylaw.com
Phone: (503) 597-7190
Attorneys for Plaintiff