IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

ZERIN MAHZABIN KHAN, PhD, Plaintiff, -against- ANTONY BLINKEN, in his official capacity as U.S. Secretary of State; ALEJANDRO MAYORKAS, in his official capacity as the United States Secretary of Homeland Security; and MERRICK B. GARLAND, in his official capacity as the U.S. Attorney General, Defendants.	CIVIL ACTION NO. COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This section of the complaint gives a brief introduction to what happened and what is at stake, then a summary of the legal procedures involved. Waivers pursuant to 8 U.S.C. § 1182(e) will be called "J-1 waivers" and "J-2 waivers." Exchange visitors in the United States in "J-1" nonimmigrant (temporary) status will be called "J-1s" and their spouses or dependents will be called "J-2s."

2. On February 17, 2023, the U.S. Department of State ("State Department") declined to act as an Interested Government Agency ("IGA") for Dr. Zerin Mahzabin Khan, PhD ("Dr. Khan"), a J-2 visa holder. This will cause Dr. Khan to be unable to obtain a waiver of a two-year home-country physical presence requirement (also known as the foreign residence requirement) as mandated by regulation derived from agency interpretation of 8 U.S.C. § 1182(e). As asserted below, this interpretation by the State Department in 22 C.F.R. §

41.62(c)(4) and the U.S. Department of Homeland Security ("DHS") in 8 C.F.R. § 212.7(c)(4) has no basis in the statute or legislative history and is unlawful.[1]

3. Many foreigners come to the United States as J-1s. This is a kind of nonimmigrant (temporary) classification, as set forth in 8 U.S.C. § 1101(a)(15)(J). The J-2 visa is a derivative of the J-1 that allows the accompaniment of a spouse and/or child set forth in the same provision of 8 U.S.C. § 1101.

4. Under 8 U.S.C. § 1182(e), there are three ways that a J-1 can become subject to the two-year foreign residence requirement: (1) the J-1 program is funded by the U.S. Government or the J-1's Government; (2) the J-1 is engaged in training that is on the "Skills List" for the home country; or (3) the J-1 is coming to the United States for graduate medical education. The foreign residence requirement prohibits a J-1 from doing certain things, such as applying for permanent resident status (green card), until he/she has either fulfilled the requirement by spending two years in his/her home country or until he/she has obtained a waiver of the requirement.

5. Eligibility for a J-2 visa depends on the specific exchange program being offered to the J-1 non-immigrant. J-2 visas may be issued to the exchange visitor's accompanying spouse and dependents. 22 C.F.R. § 62.2. A J-2 may be admitted into the United States by presenting a Form DS-2019 issued in his/her own name by a program approved by the State

[1] In 2002 Congress enacted the Homeland Security Act and in doing so abolished the former Immigration and Naturalization Service (INS), which was part of the U.S. Department of Justice, and divided most of its functions among three agencies within the newly created Department of Homeland Security (DHS): USCIS, Customs and Border Protection; and Immigration and Customs Enforcement. Homeland Security Act, Pub. L. 107-296, 116 Stat. 2135 (November 25, 2002) (codified at 6 U.S.C. §§ 403, 411 42, 451 U.S.C. §§ 203, 251 52, 271).

Department for participation by J-1 exchange visitors. 8 C.F.R. § 214.2(j). Under current regulations, this obligates the J-2 to his/her own two-year foreign residence requirement, separate from that of the J-1.

6. As described with more specificity below, Dr. Khan became subject to the foreign residence requirement because she came to the United States in J-2 status as her mother's minor dependent in January 2000 at the age of five — her mother was a Fulbright Scholar in J-1 status.

7. Under 8 U.S.C. § 1182(e), there are four ways that a J-1 can pursue a waiver of the foreign residence requirement: Through (1) a "no objection" statement from the home country government; (2) a request by an IGA; (3) a waiver based on persecution; or (4) a waiver based on hardship to a qualifying U.S. citizen relative. The same is not true for J-2 visa holders; J-2s do not have standing for any of the four traditional waivers: With few exceptions, a J-2 cannot independently apply for waiver recommendations when his/her J-1 does not apply for one.

8. The State Department Waiver Review Division ("WRD") has stated that it will consider requests for waiver recommendations for J-2s when (1) the J-1 spouse dies; (2) the J-1 and J-2 spouse divorce; or (3) the J-2 child reaches age twenty-one.[2] Applicants in these circumstances have no other way to obtain a waiver other than to apply to the State Department to act as their IGA so that the WRD may issue a favorable recommendation. Dr. Khan's case

[2] The WRD's online Frequently Asked Questions report states that the WRD will act as an IGA to recommend a waiver for a J-2 in these circumstances. *FAQs: Waiver of the Exchange Visitor Two-Year Home-Country Physical Presence Requirement*, U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFS., https://travel.state.gov/content/travel/en/us-visas/study/exchange/waiver-of-the-exchange-visitor/exchange-waiver-faqs.html.

falls into the third category; however, the WRD denied her application to act as an IGA on her behalf, leaving her no other recourse.

9. This complaint asserts that (1) 8 U.S.C. § 1182(e) does not require that J-2s be subject to the two-year foreign residence requirement; (2) the State Department lacked the statutory authority to promulgate 22 C.F.R. § 41.62(c)(4); (3) that DHS's conforming regulation, 8 C.F.R. 212.7(c)(4), lacked statutory authority because it was based on the State Department's regulation; (4) that the State Department and DHS's regulations should have complied with the Administrative Procedure Act's ("APA") rulemaking requirements to promulgate their regulations because the regulations were not matters of foreign affairs; (5) that the State Department's statement of policy, 9 FAM 302.13-2(B)(2), is a substantive rule and has binding legal effect on J-2s in Dr. Khan's circumstances and the department should have complied with the APA's rulemaking requirements; and (6) the State Department failed to provide reasoned analysis describing a marked change in policy in the adjudication of J-2 requests for the State Department to act as an IGA.

JURISDICTION AND VENUE

10. This is a civil action brought to review administrative agency action of the State Department and DHS. The action arises under the Immigration and Nationality Act of 1952, as amended (the "Act"), 8 U.S.C. §§ 1101-1537, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, 701-706.

11. Subject matter jurisdiction is pursuant to 8 U.S.C. § 1329, 28 U.S.C. § 1331, and 5 U.S.C. § 702. This Court may grant the requested declaratory and injunctive relief pursuant to the Act, the APA, 28 U.S.C. §§ 2201-2202, and 5 U.S.C. §§ 705 and 706.

12. Venue is proper in the United States District Court for the District of Connecticut under 28 U.S.C. § 1391(e)(1)(C) because this is an action against officers and agencies of the United States in their official capacities, brought in the district where the Plaintiff resides, New Haven, Connecticut, and no real property is involved in the action.

PARTIES

13. Plaintiff Dr. Khan is a citizen of Bangladesh. She is currently a resident of New Haven, Connecticut. Her address is: 1050 State St., Apt. 418, New Haven, Connecticut 06511-2774.

14. Defendant Antony Blinken is the United States Secretary of State, the head of the United States Department of State, an agency of the United States. He is named in his official capacity. His address is: U.S. Department of State, 2201 C St., N.W., Washington, D.C. 20520-2204.

15. Defendant Alejandro Mayorkas is the United States Secretary of Homeland Security, the head of the United States Department of Homeland Security, an agency of the United States. He is named in his official capacity. His address is: U.S. Department of Homeland Security, Washington, D.C. 20528.

16. Defendant Merrick B. Garland is the Attorney General of the United States. He is named in his official capacity. His address is: U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001.

ALLEGATIONS

17. Dr. Khan arrived in the United States from Bangladesh on January 15, 2000, when she was five years old. She was admitted as a J-2 to join her mother who was a J-1

sponsored by the United States Information Agency ("USIA") — this independent agency has since been abolished and its cultural exchange and non-broadcasting intelligence functions were assigned to the State Department. 22 U.S.C. §§ 6531-6532. As Dr. Khan's mother was admitted under 8 U.S.C. § 1101(a)(15)(J) financed by a U.S. government agency, she became subject to the two-year foreign residence requirement pursuant to 8 U.S.C. § 1182(e).

18. Dr. Khan returned with her mother — who had finished her program — to Bangladesh in November 2000 with the intention of fulfilling the two-year foreign residence requirement. Dr. Khan's father was in the United States to complete a master's and PhD program on his own J-1. Given the difficulty of the family separation, Dr. Khan and her mother returned to the United States in the fall of 2001 so her mother could complete a PhD and so they could be closer to her father — this time they were admitted in F-1 and F-2 status. They later both changed status to J-2 under her father's J-1. Dr. Khan's family remained in the United States until June 2007, when her parents moved to Canada to pursue their respective careers.

19. Dr. Khan became a Canadian citizen and completed high school and an undergraduate program in Canada. She returned to the United States in July 2018 in F-1 status to complete a PhD program in biomedical engineering at Virginia Tech. Dr. Khan has since completed her PhD program and has accepted a postdoctoral associate position at Yale University to study cancer metastasis and dormancy.

20. Dr. Khan wants to remain in the United States to seek a career in academia as a biomedical engineering professor. Her research will greatly benefit the United States and the rest of the world as she seeks to investigate factors that contribute to cancer recurrence in patients with solid tumors. This research may help diagnose cancers, identify new therapeutic

drug targets to extend the lives of cancer patients, and improve patient survival by reducing the risk of cancer returning.

21. Dr. Khan has no close family members who live in Bangladesh and has only ever lived there for brief periods of time at a young age; she is unmarried, and her parents now live in Upstate New York. If she is required to return to Bangladesh, she would not have the support or resources she would need to contribute to the cancer engineering field and to help improve patients' lives. The instability of internet connections and the large time difference between the United States and Bangladesh would make it difficult to collaborate on research projects. Additionally, living in Bangladesh as a single woman with no social ties to rely on would place her in a dangerous position.

22. Dr. Khan, through counsel, signed and submitted an electronic DS-3035 for a J-2 request for waiver of the two-year foreign residence requirement on September 12, 2022.

23. After completing the electronic Form DS-3035, the State Department's website generates (1) a "Waiver Review Division Case Number," (2) a "Waiver Review Division Barcode Page," (3) a "Third Party Barcode Page," (4) an electronic DS-3035 in PDF format with the applicant's answers, (5) Supplementary Applicant Information Pages (if necessary), and (6) a "Packet Assembly Checklist" and "Instruction Sheet."

24. The State Department assigned Dr. Khan's case WRD Case Number 1797860.

25. The undersigned submitted an official request on December 16, 2022, for the WRD to act as an IGA to recommend a waiver of Dr. Khan's two-year foreign residence requirement as an applicant who was admitted in J-2 status as a child and has since reached the age of twenty-one. The request noted the WRD's Frequently Asked Questions report which

states that the WRD will act as an IGA to recommend a waiver for a J-2 or former J-2 in several circumstances. This webpage is available at https://travel.state.gov/content/travel/en/us-visas/study/exchange/waiver-of-the-exchange-visitor/exchange-waiver-faqs.html.

26. The request also noted that there is no way to waive the foreign residence requirement apart from requesting the WRD's recommendation as an IGA for a J-2 in Dr. Khan's circumstances. On the above-referenced webpage, the WRD says that an applicant in this position should include: (1) a DS-3035; (2) a processing fee; (3) a statement explaining why the applicant is applying for a waiver and not the J-1 parent, and why the applicant's situation requires special consideration; and (4) a copy of the applicant's birth certificate showing that the applicant is over the age of twenty-one. Dr. Khan's request included evidence to show that she became subject to the foreign residence requirement as a derivative of an exchange visitor as well as copies of her passports from Bangladesh and Canada, her Bangladesh birth certificate, and non-immigrant visa information. Also included was her statement of reasons that complied with WRD requirements.

27. The request included a $120.00 filing fee via a law firm operating account check dated December 16, 2022. The WRD received Dr. Khan's request and associated documents on January 5, 2023.

28. The WRD sent the undersigned a Request for Information ("RFI") on January 5, 2023. The RFI stated that the WRD could not process the IGA request "without an application letter from an interested U.S. Federal Government agency . . . requesting an IGA waiver on [Dr. Khan's] behalf." The undersigned responded to the RFI on January 10, 2023. In the response, the undersigned reiterated WRD's guidance on the above-referenced webpage, and how Dr.

Khan's case fits into one of the circumstances where the WRD will act as an IGA to recommend a waiver. The response continued by stating that the previously submitted evidence was all that was required by the WRD, and that Dr. Khan is not required to submit a letter from any other IGA for the State Department to act as an IGA.

29. The WRD sent the undersigned a letter on February 17, 2023, stating that it had reviewed Dr. Khan's request and that it declined to act as an IGA on her behalf.

30. Dr. Khan's request and evidence are all that is required for this kind of J-2 request, given that she has submitted all the evidence required by the FAQ page concerning J-2 requests. The State Department's declination to act as an IGA will require her to return to a country where she will have no close social ties and will prevent her from contributing to life-saving cancer research.

31. Dr. Khan has been in valid F-1 status since her admission in said status. She is currently completing Optional Practical Training ("OPT"), and her employment authorization ends on July 9, 2024. Dr. Khan is permitted to stay in the United States through the duration of her F-1 status.

A. 8 U.S.C. § 1182(e) Does Not Require J-2s to Fulfill a Two-Year Foreign Residency.

32. DHS and the State Department have long held that a J-2 derivative is subject to the two-year foreign residence requirement if the J-1 is subject. The policy and position of these agencies is being challenged in this action.

33. As put forth above, Dr. Khan is considered subject to the two-year foreign residence requirement under the State Department and DHS interpretations of 8 U.S.C. § 1182(e).

34. The legislative history of 8 U.S.C. § 1182(e) contains no indication that Congress intended J-2 derivatives to become subject to the requirement.

35. Currently, the statute provides as follows:

> No person admitted under section 1101(a)(15)(J) of this title or acquiring such status after admission (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States . . . shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 1101(a)(15)(H) or section 1101(a)(15)(L) of this title until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States . . .

36. The objective of the 1948 United States Information and Educational Exchange Act was to promote a better and mutual understanding of the United States in other countries, in part through an educational exchange service. Pub. L. No. 80-402, § 2, 62 Stat. 6 (1948). Section 201 of that act established a departure requirement for persons admitted under the provision but did not specify any further requirements. *Id.* at 7. A 1952 amendment updated Section 201 to reflect the passage of the Immigration and Nationality Act (INA) by noting nonimmigrants under 8 U.S.C. § 1101(a)(15) — a sub-provision for exchange visitors still did not exist — were subject to departure following program completion. Pub. L. No. 82-414, § 402(f), 66 Stat. 163, 276-77 (1952).

37. After concluding that there was nothing stopping exchange visitors from briefly leaving the country before returning to seek new admission, S. REP. NO. 84-1608 (1956), *reprinted in* 1956 U.S.C.C.A.N. 2662, Congress amended Section 201 again to deny immigrant visa eligibility and other nonimmigrant visas, and adjustment of status to lawful permanent

residence for exchange visitors until staying an aggregate of two years in a "cooperating country," Pub. L. No. 84-555, 70 Stat. 241 (1956).

38. Exchange visitor visas were originally issued as "EX" visas, but later changed to "J" to continue alphabetically with the 8 U.S.C. § 1101(a)(15) nonimmigrant categories. H.R. REP. NO. 87-721, at 76. Spouses and children of exchange visitors were not admitted on the exchange visitor visa, however, and could only enter on tourist visas. *See, e.g.*, 107 CONG. REC. 18,274 (1961) (statement of Rep. James Delaney) ("Under existing law members of a grantee's family must enter on visitors' [,] as distinguished from student, visas, which frequently means that they may not be admitted for periods of the same duration as the grantees.").

39. The 1961 Mutual Educational and Cultural Exchange Act updated 8 U.S.C. § 1101(a)(15) to officially add sub-provision (J), which included a definition of a nonimmigrant in that status and added that the "spouse and minor children of any such alien if accompanying him or following to join him" would also be in that status. Pub L. No. 87-256, § 109(b), 75 Stat. 527, 534-35 (1961). The act also added sub-provision (e) to 8 U.S.C. § 1182 to say that: "No person admitted under section 101(a)(15)(J) or acquiring such status after admission shall be eligible to apply for an immigrant visa, or for permanent residence . . . until it is established that such person has resided and been physically present in the country of his nationality or last residence, or another foreign country for an aggregate of at least two years . . ." *Id.* at § 109(c).

40. While the plain language of those two provisions seems to show that Congress intended to apply the two-year foreign residence requirement to derivative J visa recipients, the intent was *not* to subject the exchange visitor's accompanying family to the two-year foreign residence requirement. Rather, the intent of adding J-2's to the statute was to allow an exchange

visitor's family to stay with them through the duration of their stay, which was previously not possible with tourist visas. *See, e.g.*, 107 CONG. REC. 18,274 (1961) (statement of Rep. James Delaney) ("A particularly needed improvement in the exchange program is provided by the amendment of the Immigration and Nationality Act so as to allow the spouses and children of visiting students and scholars to come into the United States under visa provisions similar to those applying to the grantees themselves.").

41. Furthermore, the "person" language used in 8 U.S.C. § 1182(e) was carried over from each iteration of the provision since 1948 and did not refer to the spouse and minor child of the exchange visitor. *See* Pub. L. No. 80-402, 62 Stat. 6, 7 (1948) ("A person admitted under this section . . . who fails to depart . . ."); Pub. L. No. 84-555, 70 Stat. 241 (1956) ("No person admitted as an exchange visitor . . ."). Therefore, by updating the statute to allow spouses and minor children a derivative visa to accompany the exchange visitor, Congress did not intend to apply the same requirement to them in the 1961 act.

42. Congress amended 8 U.S.C. § 1182(e) again in 1970, to restrict the blanket two-year requirement to apply only to an exchange visitor who entered on a J visa or acquired J status after entry to participate in a program financed by the U.S. government or the government of last nationality or residence, or whose field of specialized knowledge or skill was on the State Department's "skills list." Pub. L. No. 91-225, § 2, 84 Stat. 116, 116-17 (1970). Important in this amendment was that it applied *only* to persons who entered on or acquired J status to "participate in" certain exchange visitor programs or was arriving from a country requiring persons in a "field of specialized knowledge or skill." *Id.* This change shows that it is even less likely that Congress intended the two-year requirement to apply to J-2s in 1970 because J-2s

are not admitted to participate in the program nor are they likely to have a specialized knowledge or skill.

43. In over fifty pieces of legislation since the 1970 act that has impacted 8 U.S.C. § 1182, Congress has made minor changes to 8 U.S.C. § 1182(e) without changing the above critical language. *See* Pub. L. No. 103-416, § 220, 108 Stat. 4305, 4319 (1994) (allowing waivers for international medical graduates by a State Department of Public Health, or equivalent); Pub. L. No. 104-208, § 622, 110 Stat. 3009, 3009-695 (1996) (making a similar change); Pub. L. No. 106-396, § 302, 114 Stat. 1637, 1646 (2000) (annotating in 47 U.S.C. § 763 that 8 U.S.C. § 1182(e) has precedence over potential multinational executives or managers obtaining immigrant status for employment); Pub. L. No. 107-273, § 11018, 116 Stat. 1758, 1825 (2002) (making a technical correction to strike and insert the title of another provision).

44. There have been few changes to 8 U.S.C. § 1101(a)(15)(J), and the language regarding the spouse and minor children is still in place.

45. Given the above legislative history, the plain language of 8 U.S.C. § 1182(e) does not make J-2 derivatives subject in the context of the J-1 admission. Therefore, notwithstanding the contrary interpretations by the State Department and DHS, 8 U.S.C. § 1182(e) does not mandate that Dr. Khan and other J-2 recipients have to fulfill the two-year foreign residence requirement.

B. The State Department Lacked the Authority to Promulgate Regulation Requiring J-2 Visa Holders to Fulfill the Two-Year Foreign Residence Requirement and the State Department and DHS Regulations Resulted from Improper Rulemaking Because the Foreign Affairs Exception to APA Rulemaking Does Not Apply.

46. The State Department and DHS regulations mandating that J-2s must also fulfill the two-year foreign residence requirement are invalid for three reasons aside from Congress's

intent for the enabling statute, as described above. First, the State Department's amendment to its regulations in 37 Fed. Reg. 7156 (Apr. 11, 1972) (amending 22 C.F.R. § 41.65(b) by adding subsection (b)(3) to say: "If an alien is subject to the 2-year foreign residence requirement of section 212(e) of the Act, the spouse or child of such alien shall also be subject to such a requirement if such spouse or child is admitted to the United States pursuant to section 101(a)(15)(J) of the Act for the purpose of accompanying or following to join such alien.") is a substantive rule that creates law and imposes extra statutory obligations inconsistent with its authority delegated by Congress. The regulation is currently published as 22 C.F.R. § 41.62(c)(4). *See* 52 Fed. Reg. 42,590 (Nov. 5, 1987). Second, the State Department did not engage in notice-and-comment under 5 U.S.C. § 553(b), stating in the Federal Register that the regulation was exempt because it involved foreign affairs functions of the United States. 37 Fed. Reg. 7156 (Apr. 11, 1972). However, the foreign affairs exception does not apply here. Therefore, when DHS promulgated its regulation, 8 C.F.R. 212.7(c)(4), to extend the requirement to J-2s, it was made to conform to the Department of State regulations and thus it was based on a regulation that lacked authority and did not engage in notice-and-comment, 37 Fed. Reg. 22725-22726 (Oct. 21, 1972).

1. The State Department Did Not Have the Statutory Authority to Promulgate Its Regulation Applying the Two-Year Foreign Residence Requirement to J-2 Visa Holders.

47. The State Department did not have the authority to promulgate 22 C.F.R. § 41.62(c)(4) under 8 U.S.C. § 1103. That provision of the INA states:

> The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions,

> and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

8 U.S.C. § 1103(a)(1). *See also* 8 C.F.R. § 2.1. The State Department's functions under 8 U.S.C. § 1182(e) are thus narrowly drawn, as it only exercises those functions that 8 U.S.C. § 1182(e) explicitly delegated to the Secretary of State, according to 8 U.S.C. § 1103.

48. Noteworthy, the State Department's authority in supervising foreign exchange programs is considerable. 22 C.F.R. §§ 62.1-62.63. The agency determines whether a given educational or cultural activity qualifies as a foreign exchange program and designates those activities which qualify. *Id.* at § 62.3. The State Department can also revoke an activity's designation as a qualifying program. *Id.* at § 62.61.

49. The State Department's authority on immigration and nationality matters, as granted by 8 U.S.C. § 1104, is as follows: "The Secretary of State shall be charged with the administration and the enforcement of the provisions of this chapter and all other immigration and nationality laws relating to . . . the powers, duties, and functions of diplomatic and consular officers of the United States, except those . . . conferred upon the consular officers relating to the granting or refusal of visas . . . ." Read plainly, the Secretary of State does not have the authority to grant or deny J-2 visas.

50. So, compared with its broad authority over foreign exchange *programs* and its great but limited authority over consular officers, the State Department's functions under 8 U.S.C. § 1182(e) are narrowly drawn. The agency exercises only those functions that 8 U.S.C. § 1182(e) delegated to the USIA, which are now the functions of the State Department. 22

U.S.C. §§ 6531-6532. These authorities consist of (1) what fields of specialized knowledge or skill should be on the skills list, and (2) whether to recommend that the Secretary of Homeland Security waive the foreign residence requirement. 8 U.S.C. § 1182(e). Neither 8 U.S.C. § 1101(a)(15)(J) nor 8 U.S.C. § 1182(e) entrust any other matters concerning this provision of the statute to the State Department.

51. The INA shows that it is DHS, and not the State Department, that determines whether an exchange visitor may enter or remain in the United States, engage in employment unrelated to the exchange program, change to a different exchange program or to a different nonimmigrant status, obtain a waiver of the foreign residence requirement, or apply for permanent residence. More specifically, an exchange program participant's eligibility for one or more of these immigration benefits is governed by the INA, not by laws and regulations that govern exchange programs. 8 U.S.C. §§ 1181-1182, 1184, 1255, 1256-1258, 1324a.

52. The INA also governs whether an alien is subject to the foreign residence requirement. 8 U.S.C. § 1182(e). The Act does not give authority to make this determination to the President, the Secretary of State, the Department of State, or diplomatic or consular officers. *Id.*; *see also* 8 U.S.C. § 1104. As with all immigration questions that are not delegated to another officer or to the Executive Office for Immigration Review ("EOIR"), it is the Secretary of Homeland Security that determines whether an alien is subject to the two-year foreign residence requirement. 8 U.S.C. §§ 1182(e), 1103(a); 8 C.F.R. § 2.1.

53. As explained above, Congress created the J visa and the foreign residence requirement when it provided the legal framework for the foreign exchange program. Mutual Education and Cultural Exchange Act of 1961, *supra*, § 109. However, it is clear that Congress

intended the J visa and foreign residence provisions, which are exclusively immigration matters, to be administered separately from the foreign exchange program itself. This intent is indicated by the fact that Congress incorporated the J visa and foreign residence provisions into the INA.

54. Congress thus vested the administration of the immigration laws in the Secretary of Homeland Security. 8 U.S.C. § 1103(a). DHS's authority embraces all matters arising under the INA that it does not expressly delegate to someone other than the Secretary. *Id.* The Secretary of Homeland Security's authority to determine whether an alien is subject to the two-year foreign residence requirement, including the promulgation of regulations concerning J-2 derivatives, is an exclusive component of DHS to administer the INA.

55. The very provisions of 8 U.S.C. § 1182(e) support the conclusion that the Secretary of Homeland Security determines whether any alien is subject to the foreign residence requirement, including the promulgation of regulations concerning same. No alien is subject to the two-year foreign residence requirement unless the alien has been "admitted" into the United States as an exchange visitor or has acquired that status after "admission." 8 U.S.C. § 1182(e). The statute also bars an alien subject to its provisions from admission as a permanent resident and from adjusting to permanent resident status. *Id.* The State Department has no authority to admit aliens into the United States or to adjust or change their status once they enter. *See id.*; *see also* 8 C.F.R. §§ 2.1, 214, 245, 247, 248.

56. It is the Secretary of Homeland Security, not the State Department, who has the authority to waive the two-year foreign residence requirement. 8 U.S.C. § 1182(e); 8 C.F.R. § 2.1. The State Department can block the grant of a waiver with an unfavorable recommendation, *Dina v. Attorney General of the United States*, 793 F.2d 473, 476 (2d Cir.

1986); *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970), but the State Department has no authority to compel the Secretary of Homeland Security to act in accordance with a favorable recommendation, 8 U.S.C. § 1182(e). So, although the State Department can effectively cause the denial of a waiver application through a "not favorable" recommendation, the ultimate authority to grant or deny a waiver of the foreign residence requirement always lies with the Secretary of Homeland Security under 8 U.S.C. § 1182(e).

57. For the aforementioned reasons, the State Department did not have statutory authority to promulgate 22 C.F.R. § 41.62(c)(4).

2. The State Department and DHS Could Not Use the Foreign Affairs Exception in this Matter and Should Have Complied with APA Notice-and-Comment Rulemaking.

58. Even if the State Department had had the authority to promulgate 22 C.F.R. § 41.62(c)(4), the agency could not have used the foreign affairs function exception and would have had to comply with the notice-and-comment requirements under 5 U.S.C. § 553(b).

59. The APA states that rulemaking requirements apply "except to the extent that there is involved . . . a military or foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). However, rules involving immigration matters cannot blanketly claim the foreign affairs exception. *See Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980) (citing *Hou Ching Chow v. Attorney General*, 362 F. Supp. 1288, 1290-91 (D.D.C. 1973)) (finding that the foreign affairs exception would become "distended" if applied to immigration actions generally, "even though immigration matters typically implicate foreign affairs" and that for the exception to apply, the proposed rule "should provoke definitely undesirable international consequences");

Zhang v. Slattery, 55 F.3d 732, 744 (2d Cir. 1995) (finding same), *superseded on other grounds by statute*, 8 U.S.C. § 1101(a)(42).

60. The Second Circuit has adopted the "definitely undesirable international consequences" test, but only for areas of the law that *indirectly* implicate international relations, like immigration. *See Rajah v. Mukasey*, 544 F.3d 427, 436-38 (2d Cir. 2008) (concluding, in a deportation case following the September 11 attacks consisting of plaintiffs from countries with majority-Muslim populations, that in using the "definitely undesirable international consequences" test that the rule was excepted on foreign affairs grounds because discussions during notice-and-comment might reveal sensitive foreign intelligence, impair relations with other countries, and diminish the nation's ability to collect intelligence regarding potential terror attacks); *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010) ("[W]hile a case-by-case determination that public rule making would provoke 'definitely undesirable international consequences,' may well be necessary before the foreign affairs exception is applied to areas of law like immigration that only indirectly implicate international relations, quintessential foreign affairs functions such as diplomatic relations and the regulation of foreign missions are different.").

61. 22 C.F.R. § 41.62(c)(4) and the DHS conforming regulation 8 C.F.R. § 212.7(c)(4) are regulations pertaining to immigration and may indirectly implicate international relations. Under the above Second Circuit precedent, this requires the regulation to be evaluated under the "definitely undesirable international consequences" test. The regulations require J-2 spouses and children with visas based on the visa of a participant in an exchange program to comply with the same two-year foreign residence requirement as the J-1.

62. The potential international consequences to public rulemaking for these regulations is not so evident as compared with the circumstances in *Rajah* as described above, which were concerned with overseas intelligence operations to detect potential national security threats. *Rajah*, 544 F.3d at 437. It is clear that 8 U.S.C. § 1182(e) was intended to have the program participant return to his/her home country or country of last residence to promote mutual understanding and perhaps impart some of the education or experience that he/she gained while in the United States. United States Information and Educational Exchange Act, *supra*, § 2, 62 Stat. at 6. But it is unlikely that going through notice-and-comment to create these regulations would cause similar undesirable consequences in the J-2's home country or country of last residence, because the regulations are not targeted at specific countries or classes of people and would be less likely to impair foreign relations. Therefore, these regulations should have gone through public rulemaking in compliance with the APA.

63. Similarly, the DHS regulation — 8 C.F.R. 212.7(c)(4) — then could not take advantage of the exception for notice-and-comment for non-legislative rules as a procedure or practice as it would be relying on a rule that lacked authority or exception from public rulemaking requirements. 5 U.S.C. § 553(b)(A).

64. As a result of the above analysis of the enabling statutes, regulations, and exceptions to public rule making, both the State Department and DHS failed to meet the notice-and-comment requirements of the APA.

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C. The State Department Policy Statement Regarding J-2 IGA Requests Is a Substantive Rule and Has a Binding Legal Effect and Should Be Subject to APA Rulemaking Procedures.

65. Because J-2s obtain their status derivatively from the J-1's status, they may only obtain the benefit of a waiver of the two-year foreign residence requirement through approval of the J-1's waiver application. *See* 8 C.F.R. § 212.7(c)(5). The regulations, despite applying the two-year foreign residence requirement on J-2's, do not provide alternate means of getting a waiver for J-2 spouses whose marriage has terminated through death or divorce of the J-1, or J-2 children who have reached the age of twenty-one and are no longer considered children under the INA. *See* 8 U.S.C. § 1101(b)(1) ("The term "child" means an unmarried person under twenty-one years of age . . . ."). Neither DHS nor the State Department has corrected this logical inconsistency — i.e., regulations applying the requirement on J-2s and providing a waiver for J-1s but not for J-2s in those three circumstances — through other regulations.

66. As discussed above, the State Department has, however, created an option for J-2s in those situations through its Foreign Affairs Manual ("FAM") — which deals with the department's policies — in its ninth volume on visas:

> The spouse or child of an exchange visitor subject to the provisions of INA 212(e) who is issued a J-2 visa is also subject to the provisions of that section. But, if such a spouse or child ceases to be the spouse or child of the former exchange visitor (that is, the child marries, or turns 21, or, in the case of a spouse, the marriage is terminated, either by death or divorce), and the former J-2 visa-holder wishes to obtain a waiver of the two year foreign requirement, a full report of the circumstances surrounding the case may be submitted by them requesting that the State Department act on their behalf for a waiver recommendation. . . . *However, the State Department will act on behalf of such applicants only rarely and for humanitarian circumstances*. Such an application should be submitted as an Interested Government Agency (IGA) request to the State Department. . . .

9 FAM 302.13-2(B)(2) (emphasis added). The policy statement cites to 8 U.S.C. § 1182(e) as its basis, despite no mention of "humanitarian circumstances" — unlike neighboring provisions explicitly mentioning humanitarian purposes or reasons. *See* 8 U.S.C. §§ 1182(a)(3)(D)(iv), (d)(5)(A), (d)(11), (d)(12).

67. This rule is not a policy statement because it establishes a substantive legal standard, which would have the force and effect of law, and should have undergone the rulemaking procedures of 5 U.S.C. 553(b). Statements of policy are *not* substantive, by definition, but are grouped with and treated as interpretive rules. *Azar v. Allina Health Services*, 139 S. Ct. 1804, 1811 (2019) (citing 5 U.S.C. § 553(b)(A)). Policy statements are exempt from the APA's requirements for the issuance of legislative rules, 5 U.S.C. § 553(b)(A), and do not have the force and effect of law, *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 103 (2015) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (citing ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947))).

68. A substantive standard creates duties, rights, and obligations. *Azar*, 139 S. Ct. at 1811 (citing Black's Law Dictionary 1281 (5th ed. 1979)). The State Department's policy of granting J-2s the ability to independently request that the department act on their behalf as an IGA — counter to 8 C.F.R. § 212.7(c)(5) — affects the J-2s' right to obtain a waiver. Additionally, by establishing a new standard of showing "humanitarian circumstances," the policy also obliges requesters to meet this standard with proof of humanitarian circumstances. From this, it follows that the public had a right to notice-and-comment before the State Department could adopt this policy.

69. While agencies may use policy statements to bind some agency employees to the approach of the policy statement, policy statements may not bind agency employees in a manner that forecloses a fair opportunity for the public or employee to argue for approaches different from those in the policy statement or seek modification of the policy statement. *See* Admin. Conf. of the U.S., Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992); Office of Mgmt. & Budget, Exec. Office of the President, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3436 (Jan. 25, 2007) ("[A]gency employees should not depart from significant agency guidance documents without appropriate justification and supervisory concurrence."); *id.* at 3437 ("[W]hile a guidance document cannot legally bind, agencies can appropriately bind their employees to abide by agency policy as a matter of their supervisory powers over such employees without undertaking pre-adoption notice and comment rulemaking."); *id.* at 3440 (recommending agencies to maintain ways for the public to provide feedback on significant guidance documents).

70. While the State Department can bind its employees to act according to 9 FAM 302.13-2(B)(2), under the principles above it cannot bind the public to its policy. However, the effect of the FAM — also reflected on the WRD's Frequently Asked Questions page — is to provide the *only* method of waiver relief for J-2s in similar circumstances to Dr. Khan and is therefore coercive to the extent that it has a binding legal effect. *See United States Telephone Ass'n v. F.C.C.*, 28 F.3d 1232, 1233-36 (D.C. Cir. 1994) (holding that federal agencies must follow the APA's notice and comment procedures before issuing any policy that is meant to bind). J-2s in these three circumstances have no other choice but to comply with 9 FAM 302.13-2(B)(2) to request that the State Department act as an IGA.

71. The State Department and DHS found it necessary to promulgate a regulation to signify that J-2s are subject to the two-year foreign residence requirement. But the departments did not find it necessary to go through the APA's rulemaking procedures to add a rule that J-2s could independently seek an IGA waiver. Moreover, under the State Department's policy, J-2s in the three above circumstances can only request the State Department to act as an IGA, whereas J-1's could request any federal agency to act as an IGA. The current regulatory scheme also *prohibits* the J-2's ability to seek a separate waiver, meaning that the State Department policy is granting a benefit that does not exist under statute or promulgated regulation. Clearly, 9 FAM 302.13-2(B)(2) should have been promulgated as a rule and hence should have complied with APA rulemaking procedures.

D. The State Department Has Changed Course on Its Policy to Adjudicate J-2 Requests to Act as an IGA Without Giving a Reasoned Analysis.

72. The undersigned can attest that the State Department has routinely granted such requests for J-2s in previous cases. In the last six years, the undersigned has filed twelve J-2 requests with the State Department, and each of those was approved — except for Dr. Khan's case. However, in three of the four cases that the undersigned has submitted since February 2022 — including Dr. Khan's — the State Department has issued RFI's, which it had not done previously. *See* DOSWRD Case Numbers 1753760 (issuing an RFI asking for another agency to provide an IGA letter and for a statement on why the J-1 was not applying for a waiver, and an email follow-up to the RFI response asking again for why the J-1 was not applying for a waiver, without acknowledging that the J-2 was over the age of twenty-one); 1828404 (issuing an RFI asking for another agency to provide an IGA letter, and issuing a second RFI asking for proof of legal residence and for a copy of the J-2's mother's asylum application despite the fact that the J-

2 was over the age of twenty-one). The primary issue has been the Department's apparent confusion over the request for itself to act as the IGA, as each RFI states that it needs a letter from an IGA to process the request, despite the requirements listed on the State Department's own website and in its FAM for the J-2s who would have no other way to obtain a waiver.

73. On information and belief, the State Department has abruptly changed the standard that it has previously afforded these cases and intends to arbitrarily limit the number of J-2 requests that it grants.

74. On information and belief, the State Department changed its internal policies and standards in the adjudication of J-2 requests in or about February 2022. But 8 U.S.C. § 1182(e) has not changed. The related regulations have not changed. 9 FAM 302.13-2(B)(2) has remained unchanged. And there has been no public announcement of any such change.

75. In the instant case, the State Department did not provide a reasoned analysis indicating that prior policies and standards of adjudication are being deliberately changed, as it is required to do under general principles of administrative agency law. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("'[A]n agency changing its course must supply a reasoned analysis . . . .'") (quoting *Greater Boston Television v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)); *Huntington Hospital v. Thompson*, 319 F.3d 74, 75 (2d Cir. 2003).

E. The State Department Did Not Have the Statutory Authority to Require a Processing Fee for Form DS-3035 for the Waiver of the Two-Year Foreign Residence Requirement.

76. The State Department does not have statutory authority to collect a mandatory processing fee for two-year foreign residence requirement waiver applications. The collection

of the application processing fee is *ultra vires* 8 U.S.C. § 1104(a) and is unlawful. The State Department's authority in processing the waiver application as discussed above is limited to making a "recommendation" upon the request of DHS. *See* 8 U.S.C. §§ 1182(e), 1104(a).

77. The State Department's requirement for the processing fee can be found at: https://travel.state.gov/content/travel/en/us-visas/study/exchange/waiver-of-the-exchange-visitor/fee.html. On that webpage, the Department says that there is a processing fee for its DS-3035 Application for Recommendation of a J-1 Waiver of the two-year "home-country" physical presence requirement. It also states that the fee is $120 and that it is non-refundable.

78. On information and belief, the State Department did not collect a processing fee prior to 1998. *See Abdo v. Pompeo*, No. 17-1053, 2020 WL 2614773, at *8 (D. Md. May 22, 2020) (noting that the government's amended answer "included an admission that a filing fee was required by the State Department for a form used in the waiver application beginning in 1998").

79. As mentioned above, most J-1 program and waiver matters used to be handled by USIA. USIA started charging a filing fee for its Data Sheet form — which later became the DS-3035 — in approximately 1998. J-1 waiver applicants were not required to submit any materials directly to the USIA or State Department prior to some date in the 1990s. In earlier times, in cases where the Immigration and Nationality Service ("INS")[3] made a finding of exceptional hardship, the District Director would submit a complete copy of the application

[3] The Homeland Security Act of 2002 abolished INS on March 1, 2003, and transferred its functions to USCIS, U.S. Immigration and Customs Enforcement, and U.S. Customs and Border Protection and housed them under DHS in response to the events of September 11, 2001. *See* 6 U.S.C. § 291.

materials to USIA or the State Department to obtain the agency or Department's recommendation. This required no independent action on the part of the applicant.

80. At least one federal court has found jurisdiction over the claim that the State Department does not have the authority to charge a processing fee in this exact type of case. In *Afato v. Clinton*, a U.S. District Court issued an order compelling discovery against the State Department after granting the plaintiffs' request to amend their complaint to allege that the Department was "illegally collecting application fees for I-612 waiver applications when no statute or agency rule permits assessment of fees . . . ." *See Afato v. Clinton*, No. S-10-0060, 2010 WL 3855264, at *3-4 (E.D. Cal. Sept. 29, 2010) (granting plaintiffs' motion to amend their complaint to add a claim for I-612 application fees under the APA); Order to Compel Discovery, No. S-10-0060, 2012 BL 133945, at *1-2 (E.D. Cal. May 30, 2012) (granting in part plaintiffs' motion to compel discovery). Notably, shortly after the court issued the discovery order, the parties entered a settlement in which the State Department and DHS agreed to reopen and approve the plaintiffs' waiver application. Stipulation of Settlement and Motion for Voluntary Dismissal Without Costs or Fees, No. S-10-0060, at *1-2 (E.D. Cal. June 19, 2012).

81. On information and belief, the State Department generates approximately $500,000 in annual income from 8 U.S.C. § 1182(e) waiver processing fees.

82. On information and belief, the State Department has unpublished memoranda, policy statements, adjudicatory guidelines, manuals, or rules regarding the collection of the $120 application filing fee.

83. The State Department never engaged in rulemaking under the APA in drafting the undisclosed rules concerning the collection of the $120 application processing fee.

84. Moreover, Dr. Khan paid the processing fee, but did not get the benefit of having the State Department process her waiver application because the Department declined to act as an IGA. So, Dr. Khan paid the processing fee without the benefit of having her waiver application reviewed and the State Department collected a fee for a service that it did not perform.

IRREPARABLE INJURY

85. Absent approval of Dr. Khan's IGA request and waiver of the foreign residence requirement, Plaintiff will suffer irreparable injury and many severe and exceptional hardships if forced to return to Bangladesh for a two-year obligation.

86. As stated above, Dr. Khan has no close family members who live in Bangladesh and has only lived there for short periods of time and at a young age. Her parents are lawful permanent residents and live and work in Upstate New York; as such, Dr. Khan would be faced with physical separation from her family for a significant period. Living in Bangladesh as a single woman with no social ties would place her in a dangerous position.

87. Dr. Khan would not have the support or resources that she would need to continue her work in contributing to the cancer treatment engineering field and to help improve the lives of numerous patients. Unstable internet connections and the large time difference between the United States and Bangladesh would make it difficult to collaborate with her counterparts in the United States on research projects.

88. Dr. Khan has limited time in F-1 status, and as a non-immigrant would have to return to Bangladesh eventually so that she could later resume her career in the United States. This interruption of her career path would postpone her ability hone her craft and her damage her

earning potential. Additionally, the denial of her IGA request and waiver will cause exceptional hardship to the public interest of the United States. It would delay or halt the benefits that the United States and the rest of the world would realize from her research; as mentioned above, she seeks to investigate factors that contribute to cancer recurrence in patients with solid tumors. The research may help with cancer diagnosis, development of new therapeutic drugs, and improve patient survival.

89. This disruption in her career and the distance from her family would cause many severe and exceptional hardships, including psychological hardship. Dr. Khan strongly wishes to remain in the United States and seek a career in academics as a biomedical engineer.

FIRST CLAIM FOR RELIEF

(Violation of the Immigration and Nationality Act, 8 U.S.C. § 1182(e))

90. Plaintiff incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

91. Under the APA, courts must "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

92. The State Department and DHS, as agencies charged with administering congressional statutes, may only exercise authority conferred by statute. *City of Arlington v. FCC*, 569 U.S. 290, 297-98 (2013).

93. The legislative history shows that Congress did not intend 8 U.S.C. § 1182(e) to apply to J-2 visa recipients. The original objective of the exchange program was to have the exchange visitor return home to promote a better and mutual understanding of the United States.

The allowance for the exchange visitor's family to get a derivative visa was only intended to allow an exchange visitor to bring their family with them, as tourist visas only allowed for short stays. The language of the statute, seen through the lens of its many iterations, shows that Congress did not intend to apply the two-year foreign residence requirement to the spouses and children of the exchange visitors.

94. Notwithstanding the contrary interpretations by the State Department and DHS, 8 U.S.C. § 1182(e) does not require Dr. Khan to fulfill the two-year foreign residence requirement.

95. 22 C.F.R. § 41.62(c)(4) and 8 C.F.R. 212.7(c)(4) impose extra-statutory obligations inconsistent with the departments' authorities as delegated by Congress.

96. Defendants' violation causes ongoing harm to Plaintiff.

SECOND CLAIM FOR RELIEF

(Violation of the Immigration and Nationality Act, 8 U.S.C. § 1103(a))

97. Plaintiff incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

98. Under the APA, courts must "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

99. The State Department and DHS, as agencies charged with administering congressional statutes, may only exercise authority conferred by statute. *City of Arlington v. FCC*, 569 U.S. 290, 297-98 (2013).

100. The State Department lacked the authority under 8 U.S.C. § 1103(a) to promulgate 22 C.F.R. § 41.62(c)(4) to require J-2 visa holders to fulfill the two-year foreign residence requirement.

101. 8 U.S.C. § 1103(a) grants broad authority to the Secretary of Homeland Security for the administration and enforcement over immigration and naturalization laws and grants narrow authority to the Secretary of State. The authorities granted to the State Department under 8 U.S.C. § 1104 are limited to the functions of diplomatic and consular officers, and even that authority comes with a prohibition of authority over those officers' functions for granting or refusing visas. Under 8 U.S.C. § 1182(e), the Secretary of State only has the authority to (1) determine what fields of specialized knowledge or skill should be on the skills list; and (2) whether to recommend that the Secretary of Homeland Security waive the foreign residence requirement. DHS has authority over all other aspects of 8 U.S.C. § 1182(e).

102. The statutory framework and Congress's intent make it clear that the J visa and two-year foreign residence provisions are exclusively immigration matters and are to be administered separately from the foreign exchange program itself. Those provisions were incorporated into the INA and are thus vested with the Secretary of Homeland Security. The language of 8 U.S.C. § 1182(e) makes it clear that the statute directs authority to DHS by using the words "admitted" and "admission" because the State Department has no authority to admit aliens into the United States. So, it is the Secretary of Homeland Security who has the ultimate authority regarding the two-year foreign residence requirement.

103. The State Department did not have the authority to promulgate 22 C.F.R. § 41.62(c)(4). Additionally, 8 C.F.R. 212.7(c)(4) is invalid because it conforms to a regulation that lacked authority in the enabling Act.

104. Defendants' violation causes ongoing harm to Plaintiff.

THIRD CLAIM FOR RELIEF

(Violation of Administrative Procedure Act, 5 U.S.C. §§ 553(b)-(c))

105. Plaintiff incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

106. The APA provides that courts must "hold unlawful and set aside agency action" that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

107. The APA requires agencies to publish notice of all proposed rulemakings in a manner that "give[s] interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . ." 5 U.S.C. § 553(c); *see also id.* § 553(b).

108. The State Department could not use the foreign affairs exception under 5 U.S.C. § 553(a)(1) to avoid APA notice-and-comment rulemaking procedures. Rules involving immigration matters cannot always claim the foreign affairs exception. Going through public notice-and-comment for 22 C.F.R. § 41.62(c)(4) or 8 C.F.R. 212.7(c)(4) would not create a "definitely undesirable international consequence." The regulations are not targeted at specific countries or classes of people and would be unlikely to impair foreign functions. Nor would public notice-and-comment create potential national security threats.

109. 22 C.F.R. § 41.62(c)(4) and 8 C.F.R. § 212.7(c)(4) do not fall under the foreign affairs exception and the departments should have complied with the procedures under 5 U.S.C. § 553(b).

110. Defendants' violation causes ongoing harm to Plaintiff.

FOURTH CLAIM FOR RELIEF

(Violation of Administrative Procedure Act, 5 U.S.C. § 553(b))

111. Plaintiff incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

112. The APA provides that courts must "hold unlawful and set aside agency action" that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

113. The APA requires agencies to publish notice of all proposed rulemakings in a manner that "give[s] interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . ." 5 U.S.C. § 553(c); *see also id.* § 553(b).

114. By regulation, J-2 visa holders may only obtain a waiver of the two-year foreign residence requirement through the approval of their corresponding J-1 visa holder's waiver. The regulatory scheme does not allow for spouses whose marriage was terminated through death or divorce of the J-1 or for children who have reached the age of twenty-one to obtain a waiver because they have no separate right from the J-1.

115. When the State Department created a benefit for those in these categories to request the department to act as an IGA in its policy statement in 9 FAM 302.13-2(B)(2), it created a substantive rule with binding legal effect. This is the only method of relief for these J-

2s, and they must comply with its requirements. The State Department created a separate right, by stating that it could act as an IGA for a J-2 in those three circumstances.

116. The State Department should have complied with the procedures under 5 U.S.C. § 553(b) to promulgate 9 FAM 302.13-2(B)(2) as a substantive rule.

117. Defendants' violation causes ongoing harm to Plaintiff.

FIFTH CLAIM FOR RELIEF

(Failure to provide reasoned analysis describing a marked change in policy in the adjudication of J-2 IGA requests)

118. Plaintiff incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

119. The APA provides that courts must "hold unlawful and set aside agency action" that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

120. An agency changing its course must supply a reasoned analysis. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983); *Huntington Hospital v. Thompson*, 319 F.3d 74, 75 (2d Cir. 2003).

121. Courts have held that an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed. In the last six years, every J-2 request that the undersigned filed with the WRD for adjudication was granted. Since February 2022, the State Department has changed course and began issuing RFI's for cases that were previously approvable as filed. The State Department's decision to not grant the J-2 request in Dr. Khan's case shows that the department has committed to changing its

internal policies and procedures in adjudicating J-2 requests. The decision lacked any reasoned analysis, and simply stated that the State Department was declining to act as an IGA.

122. The State Department's February 17, 2023, declination to act as an IGA without explaining the change in policy and standards violates federal decisional law that mandates such explanations.

123. Defendants' violation causes ongoing harm to Plaintiff.

SIXTH CLAIM FOR RELIEF

(Violation of the Immigration and Nationality Act, 8 U.S.C. §§ 1104(a), 1182(e))

124. Plaintiff incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

125. Under the APA, courts must "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

126. The State Department, as an agency charged with administering congressional statutes, may only exercise authority conferred by statute. *City of Arlington v. FCC*, 569 U.S. 290, 297-98 (2013).

127. The collection of the application processing fee is beyond the statutory authority granted to the State Department by Congress in 8 U.S.C. §§ 1104(a) and 1182(e). The Department has never engaged in rulemaking under the APA in drafting its undisclosed rules concerning the collection of the $120 application processing fee. The Department did not begin collecting a fee until 1998, and historically no agency collected a fee for performing the same duty. And, in Dr. Khan's case, the Department required her to submit a DS-3035 and pay the

processing fee without ultimately processing a waiver because it declined to act as an IGA. Thus, the State Department collected a fee, based on no statutory authority, for a service that it did not perform.

128. Notwithstanding any contrary interpretation by the State Department, 8 U.S.C. § 1182(e) does not grant authority to the Department to charge Dr. Khan a processing fee, nor does the State Department have the authority under 8 U.S.C. § 1104(a) to mandate the collection of a fee for a waiver of the two-year foreign residence requirement.

129. The State Department's $120 processing fee for waiver of the two-year foreign residence requirement imposes extra-statutory obligations inconsistent with the Department's authority as delegated by Congress.

130. Defendant's violation causes ongoing harm to Plaintiff.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays for the following relief:

A. Declare that 22 C.F.R. § 41.62(c)(4) and 8 U.S.C. § 212.7(c)(4) are in excess of Defendants' statutory jurisdiction, authority, or limitations, or short of statutory right within the meaning of 5 U.S.C. § 706(2)(C);

B. Declare that 22 C.F.R. § 41.62(c)(4) and 8 U.S.C. § 212.7(c)(4) are without observance of procedure required by law within the meaning of 5 U.S.C. § 706(2)(D);

C. Declare that the State Department's sub-regulatory guidance in 9 FAM 302.13-2(B)(2) is without observance of procedure required by law within the meaning of 5 U.S.C. § 706(2)(D);

D. Declare that the State Department's February 17, 2023, declination to act as an IGA is without observance of procedure required by law within the meaning of 5 U.S.C. § 706(2)(D);

E. Declare that the State Department's processing fee for the waiver of the exchange visitor two-year foreign residence requirement is in excess of Defendant's statutory jurisdiction, authority, or limitations, or short of statutory right within the meaning of 5 U.S.C. § 706(2)(C);

F. Vacate and set aside 22 C.F.R. § 41.62(c)(4), 8 C.F.R. § 212.7(c)(4), 9 FAM 302.13-2(B)(2), and the State Department's processing fee for the waiver of the exchange visitor two-year foreign residence requirement.

G. Enjoin the Defendants and all their officers, employees, and agents, and anyone acting in concert with them, from implementing, applying, or taking any action whatsoever against Plaintiff under 22 C.F.R. § 41.62(c)(4), 8 C.F.R. § 212.7(c)(4), 9 FAM 302.13-2(B)(2).

H. Grant an award of attorney's fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d); and

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I. Grant such other relief as the Court may deem just and proper.

Dated: September 19, 2023

/s/ Andrew L. Wizner
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