IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

LAURA NANCY CASTRO, et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**CIVIL ACTION NO. B-09-208**
	§	
MICHAEL T. FREEMAN, et al.	§	
	§	
Defendants.	§	

ORDER

BE IT REMEMBERED, that on November 22, 2011, the Court considered Defendants' Motion to Dismiss, Dkt. No. 178, and Plaintiffs' Second Motion for Class Certification, Dkt. No. 171, and the respective responses and replies.

On April 26, 2011, this Court ordered the causes of action initially raised by Plaintiffs severed into separate cases. On June 1, 2011, Plaintiffs filed their Fourth Amended Class Action Complaint in order to clarify the claims remaining in the above-captioned case. Plaintiffs assert the following causes of action: (1) violations of the Fifth and Fourteenth Amendments and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 702, 706, in conjunction with jurisdiction under the Mandamus Act, 28 U.S.C. § 1361, for improperly applying the preponderance of the evidence standard in adjudicating passport applications; (2) violations of the Fifth and Fourteenth Amendments in failing to provide due process in adjudicating passport applications; (3) violations of the Fifth and Fourteenth Amendments in failing to provide due process in revoking passports based on non-nationality; (4) violations of the Fifth Amendment in failing to provide for an adequate due process hearing for passports denied or revoked where the underlying basis for such denial or revocation is non-nationality; (5) violations of the Equal Protection Clause of persons whose passports have been denied based on non-nationality; (6) violations of the Equal Protection Clause of persons whose passports have been revoked based on non-nationality; (7) violations of the Fifth and Fourteenth Amendments and the United Nations' Convention Against

Torture ("UNCAT") and the Federal Detainee Treatment Act of 2005 ("DTA"), 42 U.S.C. § 2000dd-0, due to mistreatment at the U.S. border of persons claiming to be U.S. citizens; and (8) violations of the Fifth and Fourteenth Amendments and the UNCAT and the DTA, due to mistreatment at the U.S. border of parents of persons claiming to be U.S. citizens.

On June 27, 2011, Plaintiffs filed their Second Motion for Class Certification requesting the Court certify two of their proposed classes: (1) a class of individuals whose passports have been or will be revoked on allegations related to non-nationality; and (2) a class of individuals whose passport applications were or will be denied on the basis of failure to prove U.S. nationality. Dkt. Nos. 171, 172.

On July 15, 2011, Defendants filed their Motion to Dismiss arguing that the Court should dismiss Plaintiffs' eight causes of action on the grounds that the Court lacks subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), or that Plaintiffs have failed to state a claim on which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 178. On July 22, 2011, Defendants responded to Plaintiffs' Motion for Class Certification arguing that the proposed classes should not be certified.

On August 18, 2011, Plaintiffs responded to Defendants' Motion to Dismiss arguing that they adequately stated a claim as to each of their causes of action and that the Court has jurisdiction over each of their causes of action. Dkt. No. 184. On August 25, 2011, Plaintiffs replied to Defendants' response to Plaintiffs' Second Motion for Class Certification arguing that, because of the pattern and practice nature of the claims, there are common legal questions among all Plaintiffs. Dkt. No. 185. On September 9, 2011, Defendants replied to Plaintiffs' Response to Defendants' Motion to Dismiss.

I. Background

A. Laura Castro, Yuliana Castro, and Trinidad Muraira de Castro

Laura Nancy Castro ("Laura"), Yuliana Trinidad Castro ("Yuliana"), and Trinidad Muraira de Castro ("Castro") assert claims stemming from their attempt to enter the United States on August 24, 2009. Castro, a Mexican citizen, is the mother of Laura and Yuliana, who were born in Brownsville, Texas, in 1980 and 1984, respectively, with the assistance of a midwife, Trinidad Saldivar. Castro alleges that when Laura was about four years old, Castro

registered Laura's and Yuliana's births in Mexico stating that they were born in Matamoros, Mexico, so that they could attend school there. Dkt. No. 167 at 12.

Laura applied for a U.S. passport and received it on January 30, 2008. Yuliana applied for a U.S. passport in January 2009 and DOS requested additional evidence of her birth on July 30, 2009. On August 24, 2009, Laura, Yuliana, and Castro applied for admission at a port of entry in Brownsville, Texas. Laura presented her U.S. passport; Yuliana presented her Texas birth certificate, Texas ID, and receipt for her U.S. Passport; and Castro presented her laser visa.[1] After being detained and questioned by Officer Eliseo Cabrera ("Cabrera") "for about ten hours," Castro signed a document stating she had falsely registered the births of Laura and Yuliana in Texas when they were in fact born in Mexico. Dkt. No. 167 at 13. Laura and Yuliana were determined to have withdrawn their applications for entry and Castro was found to be inadmissible for fraud and all of their documents were confiscated. *Id.*

On April 5, 2010, Laura's passport was revoked under 22 C.F.R. § 51.62(a)(2).[2] Dkt. No. 167 at 15. Laura requested a hearing which was scheduled in Washington, D.C., but the hearing was canceled and her passport was returned to her. *Id.* Yuliana also received her passport. Laura and Yuliana assert that they continue to be hesitant to cross the border for fear that they will be detained and their documents confiscated. Castro argues that because of the document

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[1] A "laser visa" is the common term for a "border crossing identification card" ("BCC"), which is a form of a B1/B2 visitor's visa. Boswell, Richard A., Essentials of Immigration Law, 2nd Ed., at 197. A BCC is "a document of identity bearing that designation issued to . . . an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory . . . ." 8 U.S.C. § 1101(a)(6). A laser visa is a "non-immigrant" visa. Boswell, at 127. A "non-immigrant visa" is a document that is issued by a consular officer showing that the officer believes that the alien is eligible to apply for admission in a particular non-immigrant category. 8 U.S.C. § 1201(a)(1); Boswell, at 203.

[2] Title 22, Code of Federal Regulations, Section 51.62(a)(2) provides:
"(a) The Department may revoke or limit a passport when . . . (2) The passport has been obtained illegally, fraudulently or erroneously; was created through illegality or fraud practiced upon the Department; or has been fraudulently altered or misused . . . ."

Title 22, Code of Federal Regulations, Section 51.70(a) provides that a person whose passport is denied or revoked under § 51.62(a)(2) may request a hearing within sixty days of notice of the denial or revocation.

she signed stating she had falsely filed Laura's and Yuliana's births in the United States, she is permanently barred from admission to the United States under 8 U.S.C. § 1182(a)(6)(C)(i).[3]

In the Fourth Amended Complaint, Laura and Yuliana seek to represent the proposed class of U.S. citizen claimants they allege have been or will be subjected to mistreatment by Defendants and, with Castro, seek a declaration that Castro did not commit fraud in registering Laura and Yuliana as born in Texas. Castro also seeks to represent the proposed class of parents of U.S. citizen claimants which she alleges have been or will be subjected to mistreatment by Defendants. Dkt. No. 167 at 16.

B. Rodrigo Sampayo

Rodrigo Sampayo ("Sampayo") has a Texas birth certificate issued about eight months after he was born, stating that he was born in Brownsville, Texas, in 1949 with the assistance of a midwife, Belen Lopez. The midwife and both of Sampayo's parents are deceased. Sampayo was raised in Mexico City and had a Mexican birth certificate issued when he was about five years old. Sampayo claims he learned of his Texas birth certificate after his parents had passed away. In 2009, Sampayo applied for a United States passport. On June 24, 2009, DOS requested further documentation of his birth. On September 17, 2009, Sampayo applied for entry at a port of entry in Brownsville, Texas, and presented his Texas birth certificate, Texas driver's license, and the receipt for his U.S. passport. Sampayo was detained and questioned by Cabrera for approximately six hours and his attorney was denied access to see him. Dkt. 167 at 18. After Sampayo eventually signed a document stating he was born in Mexico, his documents were confiscated and it was determined that he had withdrawn his application for admission. *Id.* On March 1, 2010, DOS denied Sampayo's passport application asserting that he had "admitted freely" to being born in Mexico. *Id.* On May 7, 2010, DOS refused to reconsider the denial.

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[3] Title 8, United States Code, Section 1182(a)(6)(C)(i) provides:

"(a) Classes of aliens ineligible for visas or admission. Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States: . . . (C) Misrepresentation (i) In general Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible."

In the Fourth Amended Complaint, Sampayo seeks to represent (1) the proposed class of individuals who have had their passport applications erroneously denied without a due process hearing; and (2) the proposed class of U.S. citizen claimants who have been subjected to mistreatment by Defendants. Dkt. No. 167 at 19.

C. Jessica Garcia and Ana Alanis

Ana Alanis ("Alanis") is the mother of Jessica Garcia ("Garcia"). Garcia has a Texas birth certificate issued two weeks after her birth and signed by a midwife, Trinidad Saldivar. Garcia also has a Mexican birth certificate issued seven weeks after her birth and stating she was born in Mexico. In May 2009, Garcia applied for a U.S. passport. DOS requested further evidence of her birth. On October 31, 2009, Garcia applied for entry at a port of entry in Brownsville, Texas, and presented her Texas ID, her Texas birth certificate, and the receipt for her passport application. Garcia was detained and questioned by Cabrera. Alanis came to the port of entry to attempt to explain the reason her daughter had two birth certificates. Neither Garcia nor Alanis ever stated Garcia was born in Mexico. A Notice to Appear ("NTA") was issued to Garcia and she and Alanis returned to Mexico. The NTA was never filed and therefore Garcia was not provided with a hearing at which she could provide evidence of her citizenship status. On June 24, 2010, DOS denied Garcia's application for a U.S. passport on the grounds that she had not proven by a preponderance of the evidence that she is a United States citizen.[4]

Garcia seeks to represent (1) the proposed class of individuals who have had their passport applications erroneously denied without a due process hearing; and (2) the proposed class of U.S. citizen claimants who have allegedly been subjected to mistreatment by Defendants. Alanis seeks to represent the proposed class of parents of U.S. citizen claimants who allegedly were subjected to mistreatment by Defendants.

D. Luis Montemayor

Luis Montemayor ("Montemayor") claims he was born in Mercy Hospital in Brownsville, Texas, in 1967. His birth certificate was signed and dated the day of his birth but was not filed

[4] Title 22, Code of Federal Regulations, Section 51.70(b) states that the Department of State is not required to provide a hearing in cases where DOS has denied, revoked or invalidated a passport on the basis of non-nationality.

for over ten years. About one month after his birth, he was registered in Mexico as having been born in Mexico. In 2007, Montemayor obtained a United States passport and, in 2009, a passport card, which he used on numerous occasions. In January 2011, he received a letter from the Department of State revoking his passport and passport card and alleging that he had failed to provide additional evidence of his birth in Texas as requested. Montemayor alleges that he did not receive any such request from the Department of State and therefore has not has an opportunity to provide additional evidence of his birth. Montemayor seeks to represent individuals whose passports have been revoked without due process.

E. Ana Luisa Guerrero

Ana Luisa Guerrero ("Guerrero") alleges she was born in Brownsville, Texas, in July 1977, with the assistance of a midwife, Victoria Grimaldo. Two days after her birth, her mother registered her in Mexico as having been born in Mexico one month earlier, in June 1977. In or around August 1977, she was registered in Texas as having been born in Brownsville, Texas. In December 1977, Guerrero was baptized in Mexico and the baptismal certificate reflects the information found in her Mexican birth certificate. In 2006, Guerrero petitioned a Mexican court to correct her Mexican birth certificate to reflect her U.S. date and place of birth and the petition was granted in January 2007. A few days later, Guerrero applied for and later received a United States passport. In 2008, Guerrero filed an I-130 petition, seeking to obtain immigration documents for her Mexican-national husband. As part of the petition process, Guerrero and her husband interviewed with DHS. In January 2009, DHS requested further documentation of Guerrero's birth in the United States which she provided. In December 2009, Guerrero and her parents were interviewed by DHS. A few days later, DHS informed Guerrero that her passport had been revoked on the grounds that she had not proven by a preponderance of the evidence that she is a United States citizen. Guerrero seeks to represent individuals whose passports have been revoked without due process.

F. Alicia Ruiz

Alicia Ruiz ("Ruiz") alleges she was born in Mercedes, Texas, in 1933. Ruiz's birth was not immediately registered, but she was baptized in Mercedes when she was nine months old and her baptismal certificate states she was born in Texas. When she was ten, Ruiz's parents, who at

some time after her baptismal had moved to Mexico, registered her as having been born in Mexico. At some point thereafter, Ruiz had a delayed Texas birth certificate filed. Ruiz's marriage certificate shows she was born in Mexico but two of her three children's birth certificates show Ruiz was born in the United States. Ruiz has applied for a U.S. passport three times but her application has been rejected each time on the grounds that she has not proven by a preponderance of the evidence that she is a United States citizen. Ruiz seeks to represent the proposed class of individuals who have had their passport applications erroneously denied without a due process hearing.

E. Maria Reyes

Maria Reyes ("Reyes") alleges she was born in Creedmore, Texas, in 1931, but her family repatriated to Mexico when she was five months old. Reyes was baptized in Lampazos, Mexico, and her baptismal certificate states she was born in the United States. The next day, her parents registered her birth in Mexico stating she was born in Anahuac, Mexico. In 1975, Reyes obtained a delayed Texas birth certificate. In 2006, Reyes applied for a U.S. passport but the application was denied. In 2007, her application for a copy of her Texas birth certificate was denied but she requested a hearing where an Administrative Law Judge ("ALJ") found that she had been born in Texas. Thereafter, in 2008, Reyes applied for a U.S. passport but her application was again denied on the grounds that she had not proven by a preponderance of the evidence that she is a United States citizen. Reyes seeks to represent the proposed class of individuals who have had their passport applications erroneously denied without a due process hearing.

F. Jenifer Itzel Gonzalez

Jenifer Itzel Gonzalez ("Gonzalez") has a Texas birth certificate filed two days after her birth and showing birth in Port Isabel, Texas, with the aid of a midwife, Maria Martinez. Gonzalez has a Mexican birth certificate filed two weeks after her birth and showing birth in Mexico. About six months after her birth, Gonzalez was baptized in Mexico and the baptismal certificate states she was born in Texas. On June 8, 2007, Gonzalez applied for a U.S. passport. DOS requested additional documentation on two occasions before denying her application on March 25, 2010, on the grounds that she had not proven by a preponderance of the evidence that

she is a United States citizen. Gonzalez seeks to represent the proposed class of individuals who have had their passport applications erroneously denied without due process.

G. Ervey Lorenzo Santos

Ervey Lorenzo Santos ("Santos") alleges he was born in Brownsville, Texas, in August 1974, with the assistance of a midwife, Vicenta A. Vitte. Santos' birth was registered in Texas six days later. Approximately three months later, he was baptized in Mexico and his baptismal certificate reflects birth in Texas. When Santos was six years old, he was registered in Mexico showing that he was born in Mexico in July 1974. On March 20, 2001, Santos applied for a U.S. passport, but never received one. On November 30, 2007, Santos and his parents went to the U.S. consulate in Mexico for an interview regarding pending immigration applications. At the interview, his parents were questioned regarding the place of Santos' birth and Santos alleges that Santos' father falsely stated that his son was not born in the United States. After Santos' father signed a document to that effect, the consular officer confiscated Santos' social security card and Texas driver's license. On December 7, 2007, Santos again applied for a passport and DOS contacted him inquiring why he needed another passport. Santos informed DOS that he had never received a passport. On May 1, 2008, DOS issued Santos a passport. On March 10, 2011, Santos received a letter from DOS revoking his passport pursuant to 22 CFR § 51.62(a)(2) and informing him of his right to a hearing. Because the hearing would take place only in Washington, D.C., Santos did not request a hearing. Santos seeks to represent the proposed class of individuals whose passports were revoked without due process.

II. Defendants' Motion to Dismiss Plaintiffs' Fourth Amended Complaint for Lack of Subject Matter Jurisdiction under 12(b)(1)

Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge whether a court has subject matter jurisdiction to hear a case. FED. R. CIV. P. 12(b)(1). "Federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute, lack the power to adjudicate claims." *Stockman v. Federal Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998). "In examining a Rule 12(b)(1) motion, the district court is empowered to consider matters of fact which may be in dispute," *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)), and should

"grant[ ] [the motion] only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Id.* (citing *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998)). "In circumstances where 'the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case' under either Rule 12(b)(6) or Rule 56." *Montez v. Dep't of Navy*, 392 F.3d 147, 150 (5 Cir. 2004) (quoting *Williamson*, 645 F.2d at 415) (ellipses in original). The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *McDaniel v. United States*, 899 F. Supp. 305, 307 (E.D. Tex. 1995). Accordingly, Plaintiffs bear the burden of proof that jurisdiction does in fact exist. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).

A. Plaintiffs' First Cause of Action for Improperly Applying the Preponderance of the Evidence Standard

Sampayo, Garcia, Montemayor, Ruiz, Reyes, and Gonzalez seek to represent the proposed class in this cause of action. Plaintiffs seek declaratory and injunctive relief regarding their claim that DOS is improperly applying the preponderance of the evidence standard. Specifically, Plaintiffs request the Court "declare that applicants for United States passports are entitled to fair and transparent application of the preponderance of the evidence standard, in accordance with Fifth Circuit precedent, including, if a passport application is denied, or a previously issued passport is revoked, a discussion of the evidence presented, and the reasons it does not meet the preponderance test." Dkt. No. 167 at 41.

Defendants argue that the Court should dismiss Plaintiffs' claim of violations of the Fifth and Fourteenth Amendments and the APA for improperly applying the preponderance of the evidence standard in adjudicating passport applications because the Court lacks jurisdiction over this claim. Dkt. No. 178. Defendants argue that due process does not extend to non-citizens and thus until Plaintiffs prove they are citizens their claims are not ripe.

Plaintiffs respond that (1) the Court must accept their well-pleaded factual allegations that each Plaintiff is a United States citizen as true; (2) whether or not an individual Plaintiff is a

United States citizen does not impact their claim that DOS misapplies the preponderance of the evidence standard; (3) Supreme Court and Fifth Circuit precedent recognize that a due process liberty interest attaches to a person who claims U.S. citizenship; and (4) an individual Plaintiff does not need to be a U.S. citizen to bring a claim of a pattern and practice of procedural due process violations. Dkt. No. 184.

Defendants reply that (1) to the extent Plaintiffs are alleging jurisdiction under the APA, the Court does not have jurisdiction because the APA does not provide for generalized review of agency procedures and Plaintiffs have an adequate remedy under Section 1503 as to the denial or revocation of their passports; and (2) Plaintiffs must first prove that they are U.S. citizens before their claims for constitutional violations will be ripe. Dkt. No. 189.

As a threshold matter, this Court does not have jurisdiction over Plaintiffs' claims under the APA. The APA provides that a person suffering a legal wrong because of an agency action, or adversely affected or aggrieved by an agency action, is entitled to judicial review. 5 U.S.C. § 702. However, APA review is limited to situations where the agency action is reviewable by statute or is a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The Supreme Court has explained that in determining whether something is a final agency action the courts should apply the following two-part test:

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal citations omitted). "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992).

Plaintiffs argue that APA review should be available for the procedures used by the Department of State in reaching their final decisions regarding Plaintiffs' passports. However, those procedures are not a final agency action. The procedures are not the "consummation" of the DOS's decisionmaking process but are in fact the process itself and the procedures used are

not themselves the action from which the legal consequences flow. To the extent Plaintiffs seek review of the final decision of DOS as to their passports, courts in this Circuit have found that 8 U.S.C. § 1503(a) is a legitimate vehicle by which to seek judicial declaration of citizenship and entitlement to a passport. *See Patel v. Rice*, 403 F.Supp.2d 560 (N.D. Tex. 2005) *aff'd* 224 Fed. App'x 414 (5th Cir. 2007); *Tavera v. Harley-Bell*, Civil Action No. 4:09-0299, 2010 WL 1308800, *3 (S.D. Tex. Mar. 31, 2010). Plaintiffs do not state facts that show that the remedy under the APA is better or more effective than that under § 1503(a). *See Council of and for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521, 1532-33 (D.C.Cir. 1983). Therefore, the Court finds that, since the relief Plaintiffs seek is available under 8 U.S.C. § 1503(a), review of agency action under the APA is precluded and this Court lacks jurisdiction over Plaintiffs' first cause of action under the APA.

Plaintiffs also seek review of DOS procedures under the Fifth and Fourteenth Amendments and the Mandamus Act, arguing that Defendants have failed to provide adequate due process in improperly applying the preponderance of the evidence standard. Article III of the Constitution imposes limits on this Court's jurisdiction requiring that there exist a "case or controversy." *See* U.S. Const. art. III, § 2, cl. 1; *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968). The justiciability doctrine requires the case or controversy be "ripe." To be ripe, a case "must not be premature or speculative." *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002). A declaratory action is ripe where an "actual controversy" exists - that is, where "a substantial controversy of sufficient immediacy and reality exists between parties having adverse legal interests." *Id.* (quoting *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 896 (5th Cir. 2000)). First, the Court should grant Defendants' motion to dismiss for lack of subject matter jurisdiction only if it appears certain that Plaintiffs cannot prove any set of facts in support of their claim. Plaintiffs have adequately pled facts to support the allegations that they are United States citizens. Second, Montemayor, one of the named Plaintiffs, has received or will shortly receive his passport based on representations made by DOS in his individual Section 1503 action. *See Montemayor v. Clinton*, No. 1:11-CV-109, Dkt. No. 9. Therefore, following Defendants' own reasoning, Montemayor's claim is ripe for adjudication. Given that at least one of the named Plaintiffs has a U.S. passport, the Court finds that Plaintiffs can prove facts to support their

claims of citizenship and thus Defendants' argument is without merit. United States citizens, even when seeking entry into the United States, are "owed due process of law under the Fifth Amendment." *Hernandez v. Cremer*, 913 F.2d 230, 237 (5th Cir. 1990). Plaintiffs have presented an actual controversy that is ripe for determination. Therefore, the Court **DENIES** Defendants' Motion to Dismiss as to Plaintiffs' first cause of action for lack of subject matter jurisdiction under the ripeness doctrine.

B. Plaintiffs' Seventh and Eighth Causes of Action for Mistreatment at the Border by CBP

Laura, Yuliana, Sampayo and Garcia seek to represent the proposed class regarding Plaintiffs' seventh cause of action – that Defendants have violated the Fifth and Fourteenth Amendments and the UNCAT and the DTA by mistreating U.S. citizen claimants at the border. Laura, Yuliana, Castro, Garcia and Alanis seek to represent the proposed class regarding Laura and Yuliana's eighth cause of action – that Defendants have violated the Due Process Clause of the Fifth Amendment and the UNCAT and the DTA by mistreating the parents of U.S. citizen claimants at the border.

Defendants argue that the Court should dismiss these causes of action because Plaintiffs lack standing to bring these claims. Dkt. No. 178. Defendants argue that Plaintiffs have not demonstrated an injury in fact required to have standing to bring these claims because (1) Plaintiffs do not have a legally protected interest under the UNCAT or the DTA; (2) aliens do not have constitutional due process rights regarding their applications for admission into the United States; (3) Castro has not demonstrated a concrete injury relating to her allegedly false confession; and (4) none of Plaintiffs' alleged injuries are imminent or likely to reoccur.

Plaintiffs respond that they have due process interest in being humanely treated while seeking entry at a port of entry and further that Laura and Yuliana have standing to bring these claims and they seek to exercise their constitutional right to travel. Dkt. No. 184. Plaintiffs further respond that Castro has suffered a concrete injury when her laser visa was revoked and she was ordered removed and Defendants have not provided her with an avenue to challenge the conclusion that she committed fraud. Furthermore, Plaintiffs argue that requests for entry would be futile.

Defendants reply that Plaintiffs do not have a constitutional due process right regarding their applications for admission to the United States because they did not present facially valid documents given the Western Hemisphere Travel Initiative ("WHTI") requirements. Dkt. No. 189; *see* Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L 108-458, Title VII § 7209, 118 Stat. 3823. Only Laura had the required U.S. passport when seeking entry to the United States and therefore had due process protections in her application for entry. Defendants argue that Plaintiffs, including Laura, lack standing to bring this cause of action because they will not be subject to the same set of circumstances in the future. Specifically, Defendants argue that if Plaintiffs comply with the WHTI, they will not be seeking entry without U.S. passports or other approved documentation. In the event Plaintiffs do seek entry without passports, Defendants argue that they will be in violation of United States law and therefore will not be engaging in constitutionally protected activity. Defendants reiterate that Castro has not alleged a concrete injury because she is not a U.S. citizen or lawful permanent resident but merely an alien visitor seeking entry and therefore is not entitled to due process protections. Furthermore, Castro has not yet sought and been denied entry on the basis of her allegedly false confession.

As part of the justiciability doctrine, the courts have also developed the requirement that the plaintiff have "standing" to invoke the power of a federal court. *Allen v. Wright*, 468 U.S. 737, 750 (1984). "The core component of the standing requirement, derived directly from the Constitution, is that the plaintiff allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Hernandez*, 913 F.2d at 233 (citing *Allen*, 468 U.S. at 751). To show an "injury in fact," Plaintiffs must show that they have suffered "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotations omitted). The plaintiff must also show that the relief sought will redress the plaintiff's injury. In the case of injunctive relief, like that sought here, the plaintiff must show that he or she will benefit from the issuance of the injunction, otherwise the case is considered moot. *Hernandez*, 913 F.3d at 233. However, "[a] case may circumvent the mootness doctrine if the conduct about which the

plaintiff originally complained is 'capable of repetition, yet evading review.'" *Id.* (citing *Honig v. Doe*, 484 U.S. 305, 318 (1988)). "Conduct is capable of repetition if there is a reasonable expectation or a demonstrated probability that the same controversy will recur." *Id.* (citing *Honig*, 484 U.S. at 318 & n. 6).

To the extent Plaintiffs are invoking the UNCAT and the DTA, the Court finds that the Court does not have jurisdiction over these claims because these laws do not provide for private causes of action.[5]

Plaintiffs also assert jurisdiction under the Fifth and Fourteenth Amendments claiming that the treatment they received at the border is a violation of their due process rights. Laura is a United States citizen and seeks to represent the proposed classes in both of these causes of action. Where one plaintiff is found to have Article III standing, the Court "need not consider the standing issue" as to the other plaintiffs. *Brohwer v. Sinhart*, 478 U.S. 714, 721 (1986). Therefore, if the Court finds Laura has standing, it must deny Defendants' motion to dismiss as it pertains to Defendants' argument that Plaintiffs lack standing to bring their seventh and eighth causes of action.

As a United States citizen, Laura has a due process interest in her admission into the United States. *Hernandez*, 913 F.2d at 237. The Fifth Circuit's decision in *Hernandez* is instructive in this case. In *Hernandez*, the plaintiff was a United States citizen born in Puerto Rico who was detained when seeking entry into the United States at a port of entry in Del Rio, Texas. 913 F.2d at 231. Hernandez presented his Puerto Rican birth certificate and a union card with his social security number but the Immigration and Naturalization Services ("INS") officer was not satisfied that Hernandez had proven he was a United States citizen and processed him for an exclusion hearing. *Id.* Hernandez spent 46 days in Mexico and frequently returned to the port of entry to see if an immigration judge was available. *Id.* at 232-33. On one of these occasions, a different INS officer granted Hernandez entry after viewing his same documents and finding nothing that indicated fraud. *Id.* Hernandez sued the INS officer in charge of the Del Rio port of

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[5] The Court notes that Plaintiffs, in response to Defendants' Motion to Dismiss, acknowledge that these laws do not provide for private causes of action but argue that these laws support their claims for violation of the Due Process Clause for the treatment of individuals at the border.

entry, the INS officer who denied his entry initially, the INS, and the Department of Justice under the Federal Torts Claims Act. *Id.* at 233. The district court dismissed all his claims but "issued an injunction against the INS San Antonio District, requiring that the INS follow certain minimal procedures when an applicant to the United States presents documentary evidence which, if accepted as authentic, would conclusively establish the applicant's United States citizenship." *Id.* In affirming the district court's injunction with one substantive change, the Fifth Circuit held that Hernandez had standing to bring the action and thus the court had jurisdiction to issue the injunction because there was a "reasonable expectation that Hernandez [would] exercise his right to travel" and therefore face the same deprivation of due process rights. 913 F.2d at 234.

Defendants argue that because of the changes brought on by the WHTI, Plaintiffs will not face the same deprivations because if they attempt to enter the United States without a U.S. passport, they will be in violation of the laws and therefore will not be engaged in conduct protected by the Constitution. However, in this case, Laura was denied entry into the United States even with her facially valid, and later determined to be valid, United States passport. Like Hernandez, Laura was engaged in an activity protected by the Constitution and has expressed that she not only would like to travel to Mexico but also that she fears doing so because of her experiences at the border. The Court finds that there is a reasonable expectation that Laura will exercise her right to travel thereby invoking the same circumstances that led to her alleged detention and mistreatment and therefore has standing to bring this cause of action.

However, as to Plaintiffs' eighth cause of action, "an alien and a citizen seeking entry into the United States are not owed the same process." *Hernandez*, 913 F.2d at 237 (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)). Parents of individuals claiming to be United States citizens, who are not themselves claiming to be United States citizens, are aliens seeking admission into the United States and whatever procedure authorized by Congress is due process. *Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). For Castro and Alanis to assert a due process violation, they must first assert an injury in fact consisting of the invasion of a legally protected interest. Castro and Alanis admit that they are

non-immigrant aliens,[6] not United States citizens or permanent residents. Castro asserts that she possessed a laser visa which was revoked by Defendants without due process. However, possession of a visa does not guarantee admission into the United States[7] and at the time of the incident giving rise to these claims, Castro was an alien outside the United States seeking entry to the United States. Therefore, she was not entitled to constitutional protections. *Shaughnessy v. United States*, 345 U.S. 206 (1953). Furthermore, "[a]fter the issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State may at any time, in his discretion revoke such visa or other documentation." 8 U.S.C. § 1201(i). The statute governing revocation of visas plainly states that "[t]here shall be no means of judicial review (including review pursuant to section 2241 of Title 28 or any other habeas corpus provision and sections 1361 and 1651 of such title) of a revocation under this subsection . . . ." 8 U.S.C § 1201(i). Because as an alien seeking admission to the United States Castro has no constitutional right to admission and because her laser visa could be revoked at any time at the discretion of DOS, Castro does not have a legally protected interest at stake. Therefore, Castro lacks standing to bring this claim. Alanis has not asserted a specific deprivation of a legally protected interest that would give her standing to bring this claim.

For Laura or Garcia to assert a due process violation on behalf of Castro or Alanis, respectively, they must assert a liberty or property interest. Plaintiffs argue that because Laura is a U.S. citizen, she has a liberty interest in an application on behalf of Castro for an immediate relative petition. Plaintiffs have not asserted that Laura has filed an immediate relative petition on behalf of Castro and that such a petition has been denied. Therefore, the Court finds that Laura and Garcia cannot demonstrate an injury in fact that is concrete and not hypothetical or conjectural. Laura and Garcia lack standing to bring this claim and thus the Court lacks

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[6] A "non-immigrant" is defined at 8 U.S.C. § 1101(a)(15) and includes "an alien . . . having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure." 8 U.S.C. § 1101(a)(15)(B).

[7] The issuance of a visa does not guarantee admission and "nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted the [sic] United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter . . . ." 8 U.S.C. § 1201(h).

jurisdiction over Plaintiffs' eighth cause of action. Therefore, the Court **DENIES** Defendants' Motion to Dismiss as to Plaintiffs' seventh cause of action and **GRANTS** Defendants' Motion to Dismiss as to Plaintiffs' eighth cause of action.

III. Defendants' Motion to Dismiss Plaintiffs' Fourth Amended Complaint for Failure to State a Claim under 12(b)(6)

When reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), Fifth Circuit law dictates that a district court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). "Factual allegations must be enough to raise a right to relief above a speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). In order for a complaint to be sufficient, it "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action . . . ." *Id.* "A complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Essentially, "the complaint must contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995).

A. Plaintiffs' Second, Third, and Fourth Causes of Action for Due Process Violations for the Denial or Revocation of their Passports

Sampayo, Garcia, Ruiz, Reyez, and Gonzalez seek to represent the proposed class of individuals asserting Plaintiffs' second cause of action – denial of due process in adjudicating passport applications. Montemayor and Guerrero seek to represent the proposed class of individuals asserting Plaintiffs' third cause of action – denial of due process in revoking U.S. passports on the basis of non-nationality. Santos seeks to represent the proposed class of

individuals asserting Plaintiffs' fourth cause of action – denial of due process for passports denied or revoked under 22 CFR 51.62(a)(2).

Defendants argue that Plaintiffs failed to state a claim on which relief can be granted in these causes of action. Dkt. No. 178. Defendants argue that Plaintiffs do not have a constitutionally protected interest as U.S. citizens until they have proven they are, in fact, U.S. citizens. Alternatively, Defendants argue that even if Plaintiffs do have a constitutionally protected liberty or property interest, they have not shown that such interest was deprived without constitutionally sufficient procedures.

Plaintiffs respond that Defendants' denial and revocation of Plaintiffs' passports deprives them of liberty rights that accompany U.S. citizenship, including the right to vote, the right to engage in international travel, and the right to live and work in the United States. Dkt. No. 184. Plaintiffs argue that their due process rights are violated because they are not provided with an administrative hearing prior to having their passports revoked or after having their passport applications denied. Plaintiffs further argue that their fourth cause of action for denial of due process when determining non-nationality based on fraud or error states a claim because (1) Santos and Montemayor have liberty and property interests in the adjudication of their passports; and (2) the procedures provided for the administrative hearing are inadequate because the hearing is conducted only in Washington, D.C., before a Department of State employee rather than an impartial Administrative Law Judge, and that there is no discovery, body of law, or subpoena power.

Defendants reply that Plaintiffs' arguments are unavailing because they were provided with notice and an opportunity to be heard regarding the denial of the passport applications or the revocation of the passport applications. Dkt. No. 189. Furthermore, Defendants argue that Section 1503 provides for de novo judicial review of their claims and therefore they have received, or are receiving, all the due process to which they are entitled.

Assuming Plaintiffs are in fact United States citizens as they have pled, the Court finds that they have due process interests in their passports and the proper adjudication of those passports. However, the Court finds that Plaintiffs have failed to state a claim on which relief

can be granted in their second, third, and fourth causes of action because they have received or are receiving all the process to which they are entitled.

There is no due process right that "inheres naturally" in a claim to United States citizenship alone. *Rios-Valenzuela v. Department of Homeland Security*, 506 F.3d 393, 401 (5th Cir. 2007). The Court first finds that Plaintiffs have not established that they are deprived of all rights accompanying U.S. citizenship, such as the right to vote, by the denial or revocation of their U.S. passports. Plaintiffs merely make the blanket allegations that they are deprived of their rights without asserting any facts to support these allegations. *See Twombly*, 550 U.S. at 555. Second, as to the right of international travel, it is "no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment . . . [that] can be regulated within the bounds of due process." *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978). The Due Process Clause does not demand that the government provide the same procedural protections for every deprivation of a property or liberty interest. *See Matthews v. Eldridge*, 424 U.S. 319, 334 (1976) (finding "due process is flexible and calls for such procedural protections as the particular situation demands"). At a minimum, due process requires that the government provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Title 8, United States Code, Section 1503 provides district courts with jurisdiction to hear cases where an individual claims to have been denied a right or privilege as a United States citizen. 8 U.S.C. § 1503(a). Individuals who have had their passports denied, such as Sampayo, Garcia, Ruiz, Reyes, and Gonzalez, or revoked, such as Montemayor, Guerrero and Santos, are eligible to seek federal judicial review under 8 U.S.C. § 1503. *See Tavera v. Harley-Bell*, No. 4:09-CV-299, 2010 WL 1308800, at *4 (S.D. Tex. Mar. 31, 2010) (finding the individual's due process rights were not violated where the Government denied a U.S. passport because the individual could seek judicial review under 8 U.S.C. § 1503). Therefore, Plaintiffs are being afforded all the due process to which they are entitled.

B. Plaintiffs' Fifth and Sixth Causes of Action for Equal Protection Violations for the Denial or Revocation of their Passports

Sampayo, Garcia, Ruiz, Reyes, and Gonzalez seek to represent the proposed class of individuals asserting Plaintiffs' fifth cause of action – denial of equal protection of persons whose passport applications have been denied based on non-nationality. Montemayor and Guerrero seek to represent the class of individuals asserting Plaintiffs' sixth cause of action – denial of equal protection of persons whose passports have been revoked based on non-nationality.

Defendants argue that Plaintiffs have not alleged that they were treated differently by DOS than similarly situated individuals or that any such treatment arose from Defendants' intent to discriminate against them based on a protected class and that the treatment had a discriminatory impact. Dkt. No. 178. Plaintiffs respond that their equal protection violation claims are not based on a suspect class and therefore Defendants' regulations must meet the rational basis standard rather than a higher level of scrutiny. Dkt. No. 184. Plaintiffs argue that they have sufficiently stated a claim for an equal protection violation and that Defendants' procedures are not rationally related to a legitimate government interest. Defendants reply that Plaintiffs have not pointed to any recognized constitutional right that has been violated and therefore have not stated a claim for an equal protection violation. Dkt. No. 189.

To state a claim for discrimination under the equal protection clause, Plaintiffs must allege that (1) they were treated differently by Defendants than similarly situated individuals; and (2) the unequal treatment stemmed from Defendants' discriminatory purpose or intent and had a discriminatory impact. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike."); *Washington v. Davis*, 426 U.S. 229, 244-45 (1976) (holding that both discriminatory purpose and discriminatory impact must be present in finding an equal protection violation). To prevail, "a plaintiff must plead and prove that the defendant acted with discriminatory purpose . . . on account of race, religion, or national origin." *Iqbal*, 129 S.Ct. at 1948.

Plaintiffs have not pled sufficient facts to support a claim that they were treated differently by Defendants than similarly situated individuals or that this unequal treatment was due to a discriminatory purpose or intent. Plaintiffs do not allege that other individuals (1) with United States birth certificates signed by midwives; (2) with foreign birth certificates attesting to birth in a foreign country; (3) who have lived for significant periods of time in that foreign country; and/or (4) who have outwardly represented that they were born in that foreign country have been treated differently. Furthermore, Plaintiffs have not pled facts to support a finding that Defendants' actions in denying or revoking passports was due to a discriminatory purpose or intent. Plaintiffs have not pled facts to support a contention that Defendants were aware of Plaintiffs' racial and ethnic backgrounds or that these factors played a role in the outcome of Defendants' decisions to deny or revoke the individual Plaintiffs' passports. *See Tavera*, 2010 WL 1308800, at *4. Therefore, the Court finds that Plaintiffs have failed to state a claim on which relief can be granted as to their second, third, fourth, fifth, and sixth causes of action.

IV. Plaintiffs' Second Motion for Class Certification

In their Second Motion for Class Certification, Plaintiffs request the Court certify two of their proposed classes: (1) a class of individuals whose passports have been or will be revoked on allegations related to non-nationality; and (2) a class of individuals whose passport applications were or will be denied on the basis of failure to prove U.S. nationality. Dkt. Nos. 171, 172. Based on the holdings of the Court in this Order, the Court finds Plaintiffs' Second Motion for Class Certification is **MOOT**. The Court has dismissed Plaintiffs' second, third, fourth, fifth, sixth and eighth causes of action thereby eliminating the causes of action which these proposed classes would assert.

V. Conclusion

Based on the foregoing, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' Motion to Dismiss, Dkt. No. 178, and **ORDERS** the following:

1. Defendants' Motion to Dismiss is **GRANTED** as to Plaintiffs' first cause of action regarding Plaintiffs' assertion of jurisdiction under the APA. However, Defendants' Motion to Dismiss is **DENIED** as to Plaintiffs' first cause of action

regarding Plaintiffs' claims under the Fifth and Fourteenth Amendments and Mandamus Act on the finding that Plaintiffs' claims are ripe.

2. Defendants' Motion to Dismiss is **GRANTED** as to Plaintiffs' assertion of jurisdiction under the United Nations Convention Against Torture and the Federal Detainee Treatment Act of 2005. Defendants' Motion to Dismiss is **DENIED** as to Plaintiffs' seventh cause of action on the finding that Laura has standing to assert a claim for violations of the Fifth and Fourteenth Amendments relating to her request for entry as a United States citizen. Defendants' Motion to Dismiss is **GRANTED** as to Plaintiffs' eighth cause of action for due process violations of the parents of individuals who claim to be U.S. citizens.

3. Defendants' Motion to Dismiss is **GRANTED** as to Plaintiffs' second, third, fourth, fifth, and sixth causes of action for failure to state a claim on which relief can be granted.

The Court further **DENIES AS MOOT** Plaintiffs' Second Motion for Class Certification, Dkt. NO. 171.

DONE at Brownsville, Texas, on November 22, 2011.

Hilda G. Tagle
United States District Judge