APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1268
(1:17-cv-01130-TSE-TCB)

JOEY JURGENSEN

Plaintiff - Appellant

v.

MICHAEL R. POMPEO, Secretary, U.S. Department of State, In his official capacity; CHAD WOLF, Acting Secretary, U.S. Department of Homeland Security, In his official capacity

Defendants - Appellees

O R D E R

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Agee, Judge Floyd, and Judge Quattlebaum.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1268

JOEY JURGENSEN,

Plaintiff - Appellant,

v.

MICHAEL R. POMPEO, Secretary, U.S. Department of State, In his official capacity; CHAD WOLF, Acting Secretary, U.S. Department of Homeland Security, In his official capacity,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. T. S. Ellis, III, Senior District Judge. (1:17-cv-01130-TSE-TCB)

Submitted: October 28, 2019 Decided: November 20, 2019

Before AGEE, FLOYD, and QUATTLEBAUM, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Eric S. Montalvo, Ricardo J.A. Pitts-Wiley, Astrid Lockwood, THE FEDERAL PRACTICE GROUP, Washington, D.C., for Appellant. Joseph H. Hunt, Assistant Attorney General, William C. Peachey, Director, Timothy M. Belsan, Chief, Edward S. White, Senior Counsel, National Security & Affirmative Litigation Unit, Office of Immigration Litigation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Joey Jurgensen appeals the district court's order denying her motion for attorneys' fees under 28 U.S.C. § 2412(d)(1)(A) (2012) because Jurgensen was not the prevailing party. We affirm.

The district court's decision to grant or deny reimbursement for attorneys' fees is reviewed for abuse of discretion. *Priestly v. Astrue*, 651 F.3d 410, 415 (4th Cir. 2011). Whether a party is a prevailing party, however, is reviewed de novo. *Goldstein v. Moatz*, 445 F.3d 747, 751 (4th Cir. 2006). We conclude that the district court properly found that Jurgensen was not a prevailing party entitled to attorneys' fees. Accordingly, we affirm for the reasons stated by the district court. *See Jurgensen v. Pompeo*, No. 1:17-cv-01130-TSE-TCB (E.D. Va. Jan. 9, 2019). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JOEY JURGENSEN,	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 1:17-cv-1130**
	)	
HON. MICHAEL R. POMPEO, *et al.*,	)	
Defendants.	)	
	)	

ORDER

This matter is before the Court on (i) defendants' motion to dismiss plaintiff's first amended complaint as moot pursuant to Rule 12(b)(1), Fed. R. Civ. P., and (ii) plaintiff's motion for attorneys' fees pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). Plaintiff, Joey Jurgensen, a United States citizen, filed suit against the Secretary of the Department of State and the Acting Secretary of the Department of Homeland Security, alleging statutory and constitutional violations in connection with the denial of her husband's visa application. Jurgensen's husband, Mohammad Ismaiel Ahmadi, has since been issued a visa. Ahmadi entered the United States as a lawful permanent resident in November 2018. Defendants argue, correctly, that the case is now moot and must be dismissed. As such, and because Jurgensen is not a "prevailing party" under the EAJA, her motion for attorneys' fees must be denied.

I.

According to the amended complaint, Jurgensen and Ahmadi, then an Afghanistan citizen, wed in Turkey in October 2012. Ahmadi sought an immigrant visa, as the couple wished to live together in the United States. To that end, Jurgensen filed an I-130 Petition for Alien Relative on Ahmadi's behalf in November 2012. Following Ahmadi's second visa interview in

December 2015, Ahmadi's visa application was denied. Jurgensen subsequently initiated this suit to challenge the denial of her husband's visa application. Her amended complaint alleged statutory and constitutional violations arising out of Ahmadi's visa application denial and requested relief in the form of (i) a finding that defendants' denial of Ahmadi's visa application violated Jurgensen's constitutional rights, (ii) a finding that Ahmadi is admissible to the United States, (iii) a finding that defendants' denial of Ahmadi's visa application was unlawful and should be set aside pursuant to 5 U.S.C. §§ 706(2)(A)–(E), (iv) remand to the State Department to adjudicate Ahmadi's visa application in accordance with these findings, and (v) an order requiring the government to remove all information from its records that erroneously indicates Ahmadi is associated with terrorist activities and to certify that it has taken such action.

Defendants filed a motion to dismiss Jurgensen's amended complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P. In the course of oral argument on the motion, defense counsel represented that the State Department was "on its own initiative looking into potential new evidence" that might support approval of Ahmadi's visa application. Mot. Hr'g Tr. 15:22–24. The Court subsequently stayed the matter for forty-five days while the State Department conducted any additional review of Ahmadi's visa application. The stay was extended three times by consent order while the State Department continued to conduct any additional review of Ahmadi's visa application. Ultimately, Ahmadi's visa application was granted, and Ahmadi was issued an immigrant visa in October 2018. Ahmadi entered the United States in November 2018 as a lawful permanent resident.

II.

Defendants argue that the issuance of an immigrant visa to Ahmadi, and the lawful permanent residence status he now holds, moots this case. Put simply, "a case is moot when the

issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States v. Hardy*, 545 F.3d 280, 283 (4th Cir. 2008) (citation omitted). Jurgensen does not dispute that the issuance of a visa to Ahmadi largely resolves the controversy between her and defendants.[1] However, Jurgensen contends that she has suffered a new injury that keeps alive a controversy between the parties and entitles her to an order requiring the removal from government records of any information that inaccurately associates Ahmadi with terrorist activities. Namely, Jurgensen argues that her security clearance has been revoked, pending review, because Ahmadi was identified as a person of interest and initially denied a visa. Jurgensen's argument fails because this injury was not alleged in her complaint. Her argument fails for the additional reason that, even had the injury been alleged in her amended complaint, the constitutional requirements of standing would not have been satisfied.

Standing requires an injury in fact, causation, and redressability. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (2000). Jurgensen alleges the revocation, pending review, of her security clearance constitutes an injury in fact. Even assuming, *arguendo*, that she is correct,[2] the revocation of Jurgensen's security clearance fails to satisfy the constitutional requirements of standing because Jurgensen cannot establish redressability.

To establish redressability, Jurgensen must show that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 181. Jurgensen

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[1] A defendant's voluntary conduct moots a case only where "the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000) (citation omitted). Plaintiff did not argue that this standard precludes a finding of mootness here, nor does the record support such a conclusion.

[2] There is significant reason to doubt the accuracy of Jurgensen's claim. It is clear "that no one has a 'right' to a security clearance." *Dept. of Navy v. Egan*, 484 U.S. 518, 528 (1988). Jurgensen attempts to overcome this obstacle by claiming that the revocation of her security clearance has impaired her liberty and property rights in her employment and chosen profession. *See Greene v. McElroy*, 360 U.S. 474, 492 (1959) ("the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment").

cannot make this showing. Decisions regarding security clearances are committed to the broad discretion of the executive branch. *See Dept. of Navy v. Egan*, 484 U.S. 518, 529 (1988) ("the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it"). The Department of Defense informed Jurgensen that it had revoked her security clearance, pending review, for five reasons. Only one of these five reasons involved Ahmadi's visa application denial. Jurgensen's security clearance was revoked for the following four additional reasons: (i) her mother-in-law, four brothers-in-law, and three sisters-in-law are citizens and residents of Afghanistan; (ii) her brother-in-law is a citizen of Afghanistan and resident of India; (iii) she intentionally accessed and received classified information that she was not authorized to access or review,[3] "rais[ing] doubt about [her] trustworthiness, judgment, reliability or willingness and ability to safeguard such information;" and (iv) she knowingly provided false answers regarding her improper access and receipt of classified information during two separate interviews, "[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that] can raise questions about [her] reliability, trustworthiness, and ability to protect classified or sensitive information." Pl.'s Ex. A. Accordingly, it cannot be said that an order requiring correction of government records that erroneously indicate Ahmadi is associated with terrorist activities is likely to redress Jurgensen's alleged injury by prompting the Department of Defense to reverse its decision to revoke Jurgensen's security clearance. The Department of Defense may well conclude that the four reasons for revoking Jurgensen's clearance that are unrelated to the allegedly erroneous

[3] According to the Department of Defense, Jurgensen disclosed information about some of the classified reports to her lawyer, who was not authorized to receive or review the information.

information about Ahmadi in government records disqualify Jurgensen from holding a security clearance. This is especially so considering two of the reasons given for the revocation involve Jurgensen's improper accessing of classified information and false statements about that improper access.

Accordingly, Jurgensen cannot establish redressability. Thus, even if the amended complaint had alleged the revocation, pending review, of Jurgensen's security clearance—which it did not—Jurgensen still would not have had standing to sue on the basis of this alleged injury. Jurgensen acknowledges that the issuance of an immigrant visa to Ahmadi mooted the remainder of her claims. Because Jurgensen lacks standing to sue for the only injury she alleges remains, Jurgensen's claims must be dismissed as moot.

III.

Jurgensen contends that she is a "prevailing party" under the Equal Access to Justice Act ("EAJA")[4] and thus entitled to attorneys' fees. This argument is incorrect because Jurgensen was not awarded any relief by the Court; the State Department issued Ahmadi an immigrant visa after initiating, without compulsion by the Court, further review of his application.

The EAJA provides, in relevant part, that

> [A] court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). To qualify as a "prevailing party," one must have "been awarded some relief by the court" and thus obtained a "material alteration of the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S.

[4] 28 U.S.C. § 2412(d).

598, 603–04 (2001).[5] Importantly, mere alteration of the parties' legal relationship is insufficient; there must be "judicial *imprimatur* on the change." *Id.* at 605 (emphasis in original).

According to Jurgensen, she is a "prevailing party" entitled to attorneys' fees because the Court required defendants to continue to review Ahmadi's visa application, ultimately leading to the issuance of Ahmadi's visa. This argument fails because the Court did not require defendants to review Ahmadi's visa application or otherwise change the legal relationship between the parties. Rather, the Court issued an Order staying the matter while the State Department "conduct[ed] any additional review of [Ahmadi's] visa application."[6] *Jurgensen v. Tillerson, et al.*, No. 1:17-cv-1130 (E.D. Va. March 9, 2018) (Order). That review was conducted on the State Department's initiative; the Court ordered neither the initiation nor the continuation of review of Ahmadi's visa application. As such, although the legal relationship between the parties changed when Ahmadi was issued a visa, this change was not accompanied by the judicial imprimatur necessary to trigger the EAJA.[7]

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[5] Although *Buckhannon* involved attorneys' fees awarded under the Fair Housing Amendments Act, the Court characterized the decision as interpreting "prevailing party" in the context of "[n]umerous federal statutes [that] allow courts to award attorney's fees and costs to the 'prevailing party.'" *Buckhannon*, 532 U.S. at 600. Moreover, the Fourth Circuit has favorably cited the decisions of other circuits that apply *Buckhannon* to all fee-shifting statutes that use the "prevailing party" terminology. *See Grissom v. The Mills Corp.*, 549 F.3d 313, 318 (4th Cir. 2008).

[6] The Court did not order the State Department to conduct such a review. Indeed, during oral argument on defendants' motion to dismiss, defense counsel represented that "[t]he State Department is on its own initiative looking into potential new evidence at this time but they have made no decision." Mot. Hr'g Tr. 15:22–24. Although the Court responded that it was "inclined to stay this matter for 30 days and direct you to finish it," the State Department was never ordered to review Ahmadi's visa application. Mot. Hr'g Tr. 15:25–16:2. Rather, following the hearing, an Order issued that stayed the case "for 45 days while the State Department conducts any additional review of plaintiff's husband's visa application." Indeed, the only action required of the State Department was "to file an update with this Court as to the status of plaintiff's husband's visa on Friday, May 11, 2018." *Jurgensen v. Tillerson, et al.*, No. 1:17-cv-1130 (E.D. Va. March 9, 2018) (Order).

[7] The Ninth Circuit case Jurgensen cites is not to the contrary. In *Carbonell v. I.N.S.*, 429 F.3d 894 (9th Cir. 2005), the Ninth Circuit concluded that a plaintiff who sought a stay of deportation until the Board of Immigration Appeals ("BIA") ruled on his motion to reconsider was a prevailing party where the parties stipulated to a stay of deportation until the BIA ruled on plaintiff's motion to reconsider. The Ninth Circuit explained that the parties' legal relationship was materially altered through a means stamped with judicial imprimatur because the court incorporated the parties' stipulation into an order that required "the defendants . . . to do something directly benefitting the plaintiff[] that they otherwise would not have had to do." *Id.* at 900–01 (citation omitted). The case is thus

Moreover, even assuming the pending litigation prompted the State Department to reexamine Ahmadi's visa application, ultimately resulting in the issuance of a visa to Ahmadi, such voluntary change in defendants' conduct does not make Jurgensen a prevailing party. *See Buckhannon*, 532 U.S. at 600. Indeed, the Supreme Court has specifically rejected this "catalyst theory," concluding that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.* at 605. Accordingly, Jurgensen does not qualify as a "prevailing party" pursuant to the EAJA and is not entitled to attorneys' fees.

Accordingly, and for good cause,

It is hereby **ORDERED** that plaintiff's amended complaint (Doc. 24) is **DISMISSED WITHOUT PREJUDICE**.

It is further **ORDERED** that plaintiff's motion for attorneys' fees (Doc. 44) is **DENIED**.

The Clerk of Court is **DIRECTED** to place this matter among the ended causes and to terminate all pending motions and cancel all future hearings.

The Clerk is further **DIRECTED** to send a copy of this Order to all counsel of record.

Alexandria, Virginia
January 8, 2019

/s/
T. S. Ellis, III
United States District Judge

inapposite because the Order here did not require defendants to do anything to benefit Jurgensen that they would not have otherwise had to do. Rather, the Order granted a stay to allow, but did not require, the State Department to conduct any additional review of Ahmadi's visa application.