No. 23-334

In the Supreme Court of the United States

DEPARTMENT OF STATE, ET AL., PETITIONERS

v.

SANDRA MUÑOZ, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: SEPT. 29, 2023
CERTIORARI GRANTED: JAN. 12, 2024

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:17-cv-37

MUÑOZ, SANDRA; ASENCIO-CORDERO,
LUIS ERNESTO, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF STATE;
JOHN F. KERRY, UNITED STATES SECRETARY OF STATE;
MARK LEONI, UNITED STATES CONSUL
GENERAL, SAN SALVADOR, EL SALVADOR, DEFENDANTS

Jan. 3, 2017

COMPLAINT FOR DECLARATORY RELIEF

INTRODUCTION

1. Plaintiffs Sandra ("Ms. Muñoz") and Luis Ernesto Asencio-Cordero ("Mr. Ascencio-Cordero") have been married since July 2, 2010.

2. Ms. Munoz is a United States citizen and Mr. Asencio-Cordero is a citizen of El Salvador.

3. Mr. Asencio-Cordero lived in the United States from March 2005 until 2015, when he departed the United States to obtain his immigrant visa from the United States Consulate in San Salvador, El Salvador, based on an approved immigrant petition filed by Ms. Muñoz and an inadmissibility waiver.

4. Mr. Asencio-Cordero has been unable to return to the United States since 2015 because the Depart-

ment of State (DOS) found that he was permanently inadmissible based on Immigration and Nationality Act (INA) Section 212(a)(3)(A)(ii). This Section gives DOS the ability to find applicants inadmissible if they have "reasonable ground to believe" that an alien "seeks to enter the United States to engage solely, principally, or incidentally in . . . any other unlawful activity." *See* 8 U.S.C. Section 1182(a)(3)(A)(ii).

5. In the course of its dealings with Mr. Asencio-Cordero and Ms. Muñoz, DOS has never provided a factual basis for denying Mr. Asencio-Cordero's immigrant visa on the ground of inadmissibility.

6. Plaintiffs now file an action with this Court, seeking a finding that DOS's failure to provide a factual basis for its refusal to admit Mr. Asencio-Cordero is insufficient grounds for an inadmissibility determination. DOS has shown no facially legitimate bona fide reason for determining Mr. Asencio-Cordero is inadmissible because it has not established a facial connection to the statutory ground of inadmissibility.

7. Plaintiffs request that this Court intervene to prevent a situation in which DOS can continue to deny Ms. Muñoz her rights to petition her husband to reside with her in the United States as a lawful permanent resident of the United States.

JURISDICTION AND VENUE

8. This Court has jurisdiction over the present action based on 28 U.S.C. Section 1331 (Federal Question), 28 U.S.C. Section 1346(b) (Federal Defendant), 5 U.S.C. Section 704 (Administrative Proce-

dures Act), and 28 U.S.C. 2201-2 (authority to issue declaratory judgment when jurisdiction already exists).

9. Venue is properly with this Court pursuant to 28 U.S.C. Section 1391(e) (general venue) because this is a civil action in which Defendant is the United States of America, Plaintiff Sandra MUÑOZ resides in the judicial district, and there is no real property involved in this action.

PARTIES

10. Plaintiff Luis Ernesto ASENCIO-CORDERO is a citizen and national of El Salvador who is married to a United States citizen and seeks to return to the United States as a lawful permanent resident. Mr. Asencio-Cordero is currently residing in Concepcion de Ataco, Ahuachapan, El Salvador.

11. Plaintiff Sandra MUÑOZ is a United States citizen by birth and has been married to Mr. Asencio-Cordero since July 2, 2010. Ms. Muñoz was born in Hollywood, California and presently resides in Alhambra, California. She has resided in the United States her entire life.

12. Defendant UNITED STATES DEPARTMENT OF STATE is the agency responsible for the granting and denying of immigrant visas for applicants outside of the United States. 8 U.S.C. Section 1104.

13. Defendant JOHN KERRY is sued in his official capacity as the United States Secretary of State. Defendant Kerry is the highest ranking official within the Department of State and is responsible for the actions of the agency.

14. Defendant Mark LEONI is sued in his official capacity as the United States Consul General, in San Salvador, El Salvador. Defendant Leoni is responsible for the denial of Mr. Asencio-Cordero's application for an immigrant visa. 8 U.S.C. Section 1104(a); 22 C.F.R. Section 42.61(a).

FACTUAL ALLEGATIONS

15. Mr. Asencio-Cordero is a native and citizen of El Salvador who originally arrived in the United States in March, 2005.

16. On July 2, 2010 he married his wife, Ms. Muñoz in East Los Angeles, California. Ms. Muñoz, is a United States citizen by birth.

17. Mr. Asencio-Cordero has never been charged with committing a crime anywhere in the world. Mr. Asencio-Cordero's violations of the law amounted to driving violations that had been resolved after traffic school and the payment of fines.

18. In April 2015, Mr. Asencio-Cordero departed the United States to pursue an immigrant visa with the DOS, based on the approved immigrant relative petition that his wife, Ms. Muñoz, filed.

19. On May 28, 2015, Mr. Asencio-Cordero had an initial interview with the U.S. Consulate in San Salvador.

20. At all times, Mr. Asencio-Cordero has denied ever being associated with a criminal gang. On December 28, 2015, the Consular Section denied his immigration visa application.

21. Mr. Asencio-Cordero has multiple tattoos. The Consular Section denied the application notwith-

standing the submission of evidence from an expert witness finding that Mr. Asencio-Cordero was, "[N]ot a gang member nor does he have any tattoos that are representative of any known criminal street gang."

22. Mr. Asencio-Cordero was denied lawful permanent residency on the grounds that he was inadmissible pursuant to 8 U.S.C. Section 1182(a)(3)(A)(ii) (INA Section 212(a)(3)(A)(ii)), "Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in any other unlawful activity." There is no appeal of this decision nor is this Section of the law waivable. The Consular Section, nor any other agent of the Department of State, provided a bona fide factual reason that provided a facial connection to the finding pursuant to 8 U.S.C. Section 1182(a)(3)(A)(ii).

23. Ms. Muñoz contacted Congresswoman Judy Chu, who sent a letter on Ms. Muñoz's behalf to the Department of State on January 20, 2016.

24. Consul Landon R. Taylor replied to Congresswoman Chu's letter on January 21, 2016. Consul Taylor cited INA Section 212(a)(3)(A)(ii), but provided no specific facts for relying and finding Mr. Asencio-Cordero inadmissible. The Consulate also indicated that Mr. Asencio-Cordero had no further remedies.

25. On January 29, 2016, prior counsel for Ms. Muñoz contacted the DOS and explained that the Consulate had provided no factual basis for their finding that Mr. Asencio-Cordero is inadmissible. Mr.

Asencio-Cordero and Ms. Muñoz received no response, and so prior counsel sent a follow-up letter on April 6, 2016.

26. On April 8, 2016 the Consulate's Correspondence and Information Unit notified Ms. Muñoz and Mr. Asencio-Cordero through prior counsel that they were forwarding the case to the immigration visa unit for review.

27. On April 12, 2016, prior counsel sent additional information regarding Mr. Asencio-Cordero and Ms. Muñoz to the Immigration Visa Unit.

28. On April 13, 2016, Consul Taylor responded: "The finding of ineligibility for this applicant was reviewed by the Department of State in Washington, D.C., which concurred with the consular officer's decision. Per your request, our Immigrant Visa Unit took another look at this case, but did not change the decision."

29. On April 15, 2016, the Consulate sent an email to Mr. Asencio-Cordero and Ms. Muñoz, through prior counsel, which was the exact same response as the Consulate's previous letters of April 8 and April 13.

30. On April 18, 2016, prior counsel for Mr. Asencio-Cordero and Ms. Muñoz wrote to the Office of Inspector General for the Department of State, requesting that a *reason* be given for the decision finding Mr. Asencio-Cordero inadmissible. The communication stated counsel's belief that "an immigration visa application is unjustly being denied just for the simple fact that the applicant has tattoos when the rest of the underlying evidence and

facts demonstrate the applicant has no criminal history and is not a gang member. . .”

31. On May 18, 2016, Christine Parker, the Chief of the Outreach and Inquiries Division of Visa Services at the Department of State, replied to the April 18 letter and stated that the Department of State does not have the authority to overturn consular decisions based on INA Section 104(a). Chief Parker also stated that the Department had “concurred in the finding of ineligibility. . .”

32. On May 19, 2016, Consul Taylor wrote to Mr. Asencio-Cordero and Ms. Muñoz, through prior counsel, listing the agencies that had reviewed Mr. Munoz’s immigrant visa application. He said, “None of the abovementioned reviews have revealed any grounds to change the finding of inadmissibility, and there is no appeal.”

33. In total, Mr. Asencio-Cordero’s case was reviewed by 1) a consular officer, 2) consular supervisors, 3) the Bureau of Consular Affairs, 4) the Immigration Visa Unit, and 5) Consul Taylor. The Office of the Inspector General and the Outreach and Inquiries Division of Visa services both stated they could not review the consulate’s decision. In the course of the communications between these offices and Mr. Asencio-Cordero and Ms. Muñoz, the government failed to provide any factual reasons for their decision to find Mr. Asencio-Cordero inadmissible under INA Section 212(a)(3)(A)(ii).

CAUSES OF ACTION

COUNT ONE

(*Defendant Department of State*)

(Denial of Immigrant Visa Not Facially Legitimate and Bona Fide)

34. Plaintiffs incorporate the allegations in paragraphs 1 through 33 above as though fully set forth here.

35. Ms. Muñoz is a United States citizen who has a protected liberty interest in her marriage that "gives rise to a right to constitutionally adequate procedures in the adjudication of her husband's visa application." *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008).

36. In denying a visa, a consular officer must first cite to a valid admissibility statute. Second, the law requires that the consular officer "specifies discrete factual predicates the consular officer must find to exist before denying a visa" or the consular officer must prove there is a fact on the record that constitutes "a facial connection to" the statutory ground of inadmissibility. *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016) (citing *Kerry v. Din*, 135 S. Ct. 2128, 2141, 192 L. Ed. 2d 183 (2015) (Kennedy, J., concurring)).

37. The doctrine of consular non-reviewability does not give the consulate wide latitude to deny visa applications without providing a factual basis for its inadmissibility findings. In *Cardenas*, the Ninth Circuit adopted Justice Kennedy's concurrence in *Din*, which affirmed that "the reasoning and the holding in *Mandel* control here." 135 S. Ct. 2128, 2139 (2015).

38. Through counsel, Mr. Asencio-Cordero and Ms. Muñoz repeatedly provided DOS with the opportunity to provide a reason for their inadmissibility finding. Their repeated inability to do so constitutes a lack of "facial connection" to 8 U.S.C. Section 1182(a)(3)(A)(ii).

COUNT TWO

(Defendant Department of State)

(Denial of Immigrant Visa Violates the Equal Protection Clause of the Fifth Amendment)

39. Plaintiffs incorporate the allegations in the paragraphs above as though fully set forth here.

40. There is no rational relationship between the DOS's discriminatory policy of denying entry to aliens based solely (a) on the presence of non-gang related tattoos on their bodies and any legitimate state interest, or (b) based on the date at which their relative initially petitioned them for lawful permanent residence.

41. The DOS treats Mr. Asencio-Cordero, who has no arrest or violations of the law aside from minor traffic violations, and who is married to a U.S. citizen, differently from similarly situated applicants without tattoos, as well as from similarly situated individuals applying for relief under the INA. The DOS cannot and has not pointed to Mr. Asencio-Cordero's tattoos as a facial connection to an inadmissibility ground as described in 8 U.S.C. Section 1182(a)(3)(A)(ii), and their policy of doing so based on his tattoos or based on the date of his I-130 approval would violate the Due Process Clause of the Fifth Amendment.

COUNT THREE

(*Defendant Department of State*)

(Denial of Immigrant Visa Violates Separation of Powers Article Three)

42. Plaintiffs incorporate the allegations in paragraphs 1 through 41 above as though fully set forth here.

43. The plenary power of Congress does not protect consular officers from judicial review when they act in violation of the INA. Plaintiffs do not challenge the doctrine of consular non-reviewability, but assert that Defendant is not protected from judicial review when they fail to produce a "reasonable ground to believe" Mr. Asencio-Cordero is inadmissible under 8 U.S.C. Section 1182(a)(3). This is consistent with the Supreme Court's decisions in *Kleindienst v. Mandel,* 408 U.S. 753 (1973), Justice Kennedy's concurrence in *Din v. Kerry*, 135 S. Ct. 2128 (2015), and the Ninth Circuit's recent ruling in *Cardenas v. Lynch*, No. 13-35957 (9th Cir. 2016). To rule otherwise would amount to an unprecedented override of the powers of Article Three courts. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

COUNT FOUR

(*Defendant Department of State*)

(Denial of Immigrant Visa Was Made in Bad Faith)

44. Plaintiffs incorporate the allegations in paragraphs 1 through 43 above as though fully set forth here.

45. Defendant denied Mr. Asencio-Cordero's immigrant visa in bad faith. Mr. Asencio-Cordero has no criminal record and is legally eligible for an immi-

grant visa so that he can be reunited with his wife who is an attorney in Los Angeles. 8 U.S.C. Section 1182(a)(3)(A)(ii) states that a consular officer must "know" or have "reasonable ground to believe" that the applicant is "likely to engage in . . . any other unlawful activity."

46. The Consulate has no reasonable basis for denying Mr. Asencio-Cordero's application and repeatedly failed to provide justification for its decision when asked by plaintiffs, through counsel. Because the right to be free from prejudice due to non-gang-related tattoos is protected by the First Amendment, a denial on this basis is not "reasonable" and is therefore made in bad faith. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010). The Consulate's inadmissibility finding was made in a conscious effort to bypass the statutory requirement that the decision be "reasonable," as evidenced by their repeated failure to provide any factual justification for the inadmissibility finding.

COUNT FIVE

(*Defendant Department of State*)

(Denial of Immigrant Visa Without Judicial Review Violates Administrative Procedure Act)

47. Plaintiffs incorporate the allegations in paragraphs 1 through 46 above as though fully set forth here.

48. The Administrative Procedure Act (APA) provides a presumption of reviewability of decisions made under the INA. The United States Supreme Court has found that the exceptions to the APA's presumption of reviewability would not be made "in the absence of clear and convincing evidence that Con-

gress so intended." *Rusk v. Cort*, 369 U.S. 367, 380 (1962). Furthermore, agency discretion is not protected from judicial review if the action allegedly exceeds constitutional bounds. *Ness Investment Corp. v. United States Department of Agriculture*, 512 F.2d 706 (9th Cir. 1975).

COUNT SIX

(*Defendant Department of State*)

(8 U.S.C. Section 1182(a)(3)(A)(ii) Is Unconstitutionally Vague)

49. Plaintiffs incorporate the allegations in the paragraphs above as though fully set forth here.

50. 8 U.S.C. Section 1182(a)(3)(A)(ii) fails to give ordinary people fair notice of the conduct it punishes and is so "standardless" that it invites arbitrary enforcement. *Johnson v. United States*, 576 U.S. ___ (2015). In *Kolender v. Lawson*, the U.S. Supreme Court warned that statutes must be worded with sufficient guidelines to protect against a "standardless sweep." 461 U.S. 352, 357 (1983).

51. Defendants failed to notify Mr. Asencio-Cordero of the reason for denying his application for an immigrant visa. They merely cited a statutory ban on "any other lawful activity" and refused to respond with any "reasonable" or factual basis for their finding. Defendants' conduct is a clear example of precisely the type of arbitrary, standardless sweeps the Supreme Court has sought to protect against.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court grant the following relief:

(1) Declare that the Department of State's finding that Mr. Asencio-Cordero is ineligible to immigrate to the United States due to an unfounded belief that he is entering for the purpose of carrying out "unlawful acts" is not bona fide;

(2) Declare that 8 U.S.C. Section 1182(a)(3)(A)(ii) is unconstitutionally vague;

(3) Award costs and reasonable attorney fees under the Equal Access to Justice Act, 28 U.S.C. Section 2412(b); and

(4) Grant such further relief as the Court deems just and proper.

Dated: Jan. 3, 2017

Respectfully submitted,

/s/ ALAN R. DIAMANTE
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**Selected exhibits to declaration of
Alan R. Diamante
in support of plaintiffs' response to
defendants' supplemental brief**

EXHIBIT A

Embassy of the United States of America

Consular Section, San Salvador

Jan. 21, 2016

The Honorable Judy Chu
U.S. House of Representatives
527 S. Lake Ave. Ste. 106
Pasadena, CA 91101

Attention: Mr. Enrique Robles

Dear Representative Chu,

Thank you for your letter of January 20, 2016, regarding the immigrant visa case of Mr. Luis Ernesto Asencio Cordero, the beneficiary of a spousal petition filed by your constituent, Mrs. Sandra Munoz.

During the course of the immigrant visa process, Mr. Asencio Cordero was found permanently ineligible to receive an immigrant visa under Section 212(a)(3)(A)(ii) of the Immigration and Nationality Act (INA). This section of the Act applies to "Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in any other unlawful activity."

The finding of ineligibility for this applicant was reviewed by the Department of State in Washington, D.C., which concurred with the consular officer's decision.

The Consular Section sent a notification letter to Mr. Asencio Cordero at mcobos@cobos-ayala.com on December 28, 2015, advising him of his ineligibility.

U.S. law provides no waiver for this ineligibility. Therefore, we cannot continue to process this immigrant visa, and Mr. Asencio Cordero is permanently ineligible to immigrate to the United States.

I hope that this information is helpful to you.

Sincerely,

/s/ LANDON R. TAYLOR
LANDON R. TAYLOR
Consul

EXHIBIT B

From: "Marci Cobos" <mcobos@cobos-ayala.com>
To: legalnet@state.gov
Cc: "congensansal" <congensansal@state.gov>
Sent: Friday, January 29, 2016 11:11:14 AM
Subject: Request for Reconsideration of Immigrant Visa Denial (SNS2013690038)

01/29/2016

Attention: Supervisor

Request for Reconsideration of Immigrant Visa Case Denial received December 28, 2015 (Case SNS2013690038)

1. Name of Immigrant Visa Applicant: Luis Ernesto Asencio Cordero (DOB: 05/16/ * * * * * : POB: El Salvador)

2. Case Number: SNS2013690038 (Alien Registration Number A207-176-943)

3. Category of visa: IR1 (I-130 approved 03/27/2013, MSC-13-905-797222)

4. Petitioner's Name: Sandra Munoz (U.S. Citizen Spouse, DOB: 08/08/ * * * * * , POB: USA)

5. Previous Interviews: 05/28/2015, 08/19/2015, 10/26/2015

6. Last Interview: 10/26/2015

7. Date I-601A Provisional Waiver for Unlawful Presence was Approved: 08/26/2014 (MSC-14-907-54917)

8. Date received email from IVSanSalvador@state.gov with general attachment letter stating Applicant was found ineligible to receive an immigrant visa under section 212(a)(3)(A)(II) of the INA: 12/28/2015

9. Attorneys of Record: Law Offices of Cobos & Ayala, 601 S. Glenoaks Blvd., Suite 305, Burbank, CA. 91502, 213-943-4949, mcobos@cobos-ayala.com

Dear Sir/Madam,

We are the attorneys of record for Immigrant Visa Applicant, Mr. Luis Ernesto Asencio Cordero (Case SNS2013690038).

On December 28, 2015, we received an email from IVSanSalvador@state.gov with a general attachment letter stating Applicant was found ineligible to receive an immigrant visa under section 212(a)(3)(A)(ii) of the INA—an alien, who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the US to engage in any unlawful activity is inadmissible. There was no explanation in the email or on the attachment letter as to how they came to this incorrect conclusion regarding Mr. Asencio.

We find this decision is completely incorrect and unsubstantiated for Mr. Asencio, prior to his immigrant visa interview, had been residing in the United States since March 2005 until he departed to El Salvador for his interview in May 2015 and he never engaged in illegal activity or gang activity past or present. There are no reasonable grounds whatsoever to believe that Mr. Asencio would engage in illegal activity in the United States upon his return. this particularly true because while in the United States, Mr. Asencio only had a few driving violation tickets for driving without a license. With respect to these tickets, Mr. Asencio paid all the fines and does not have a criminal record. The fact that Mr. Asencio has some tattoos is not a correct, just, or

valid reason to believe he will participate in illegal activity in the United States when the record as a whole shows that he is not a criminal and he has been working and filing taxes in the U.S. Most importantly, please keep in mind that Mr. Asencio is married to a very reputable attorney, Sandra Munoz, who has been practicing law since 1997, helping the working class, poor people, and immigrants. They have been married since July 21 2010 after meeting at their close friend's wedding.

We called the call center on December 28, 2015 after we received the unjust decision and were instructed to send an email. We have sent emails since December 28, 2015 when we received the unsubstantiated and unjust decision in an effort to get a Supervisor to review the case. We have sent emails to the following email addresses: congensal@state.gov, fpuss@state.gov, supportelsalvador@ustraveldocs.com. The last emails we sent were on January 20, 2016 to congensal@state.gov, and to fpuss@state.gov. We have not received a response yet as to whether a Supervisor is actually reviewing the decision. Petitioner, Sandra Munoz, has been in contact with the office of U.S. Congresswoman Judy Chu who represents California's 27th Congressional District wherein Petitioner, Sandra Munoz, resides and U.S. Representative Judy Chu's office has been trying to help us with this matter.

We respectfully request that Mr. Asencio's immigrant visa application denial be reconsidered and that he be found eligible for his immigrant visa for he is a person of good character and is not a criminal and there is no reasonable evidence to suspect that he will engage in criminal activity upon his return to the United States since he never engaged in criminal activity in the United

States during the ten years he had been residing here before he departed for his interview in May 2015.

Under former 9 FAM 40.31, Note 5.3, the Department of State (DOS) has determined that inadmissibility under INA 212(a)(3)(A)(ii) may arise from the fact that the applicant is a member of a known criminal organization. Also under former 9 FAM 40.31, Procedural Note 1.3, DOS provided guidelines for determining whether a visa applicant is a member of an organized crime group. The relevant factors to consider include: (1) acknowledgement of membership by the individual, the organization, or another party member; (2) actively working to further the organization's aims in a way that suggests close affiliation; (3) receiving financial support or recognition from the organization; (4) determination of membership by a competent court; (5) statement from local or US law enforcement authorities that the individual is a member; (6) frequent association with other members; (7) voluntarily displaying symbols of the organization; and (8) participating in the organization's activities, even if these activities are lawful. DOS recognizes that, in most cases, membership requirements are not open to public scrutiny. Thus, organized crime membership must be inferred from the totality of the information available. This is where tattoos may become relevant. A consular officer may consider certain tattoos as a display of symbols of the organization or maybe as a form of acknowledgment by the individual of his membership in the organized crime group. However, the presence of certain tattoos, by itself, should not be a basis for finding the applicant inadmissible. The consular officer must also consider the applicant's own statements under oath during the visa interview and the applicant's personal, criminal and immigration history. Consular

officers are required to examine the totality of circumstances when making a finding of inadmissibility under INA 212(a)(3)(A)(ii).

We believe the consular officer in deciding Mr. Asencio's immigrant visa case did not examine the totality of the circumstances and did not carefully consider Mr. Asencio's own statements under oath during the visa interview along with his personal, criminal and immigration history and the immigrant visa denial was incorrectly based on the tattoos that Mr. Asencio has. Mr. Asencio got these tattoos when he was a teenager and did not know any better. However, he was not then a gang member and he is certainly not now a gang member. Also, inadmissibility under INA 212(a)(3)(A)(ii) applies only to current circumstances and in Mr. Asencio's case there are no current circumstances for the consular officer who issued the decision to believe that Mr. Asencio would engage in illegal activity in the United States upon his return and also there are no past circumstances to believe that Mr. Asencio would currently engage in criminal activity upon his return to the U.S. for Mr. Asencio does not have a criminal record in the U.S.

Mr. Asencio has been in the United States since March 2005 and apart from tickets for driving without a license, he has had no encounter with the police and no criminal record whatsoever that would indicate he has any involvement with any gangs. The denial of Mr. Asencio's immigrant visa application is devastating and inexplicable for Mr. Asencio is incorrectly being judged as a criminal because of his tattoos. But the totality of evidence in his file shows there is no reason to believe Mr. Asencio will engage in illegal activity, gang-related or otherwise, should he be allowed to re-enter the

United States. Please review and correct this unsupported decision and carefully consider Mr. Asencio's own statements under oath during the visa interview and his personal, criminal and immigration history.

Please also take into consideration certain facts about Mr. Asencio's wife, Attorney Sandra Munoz. She was born in the United States on August 8, * * * * * , daughter of a Mexican immigrant who came to this country unlawfully and an American-born father who fought in World War II. She grew up in East Los Angeles, attended Garfield High School and eventually graduated from UCLA. In 1997, she graduated from Loyola Law School and became a lawyer. Since then, she has practiced civil rights and employment law and has represented hundreds of workers in cases of unlawful discrimination and harassment, wage and hour violations, and police abuse. Recently, she was one of several plaintiffs' attorneys who worked on the case of Carrillo v. Schneider, a federal wage and hour lawsuit in front of the Honorable Christina A. Snyder who sits on the United States Central District Court of California. In September of this year, Judge Snyder approved a $21 million lawsuit that greatly benefited hundreds of workers employed at Wal-mart warehouses in Ontario, California who had not been properly paid overtime for numerous years.

Attorney Sandra Munoz has dedicated her life to helping the under-represented, disenfranchised, the working class, and employees who have been unlawfully wronged in the workplace. In 2008, she opened her own office where she continues to represent workers in employment cases. Her office is located in East Los Angeles on Beverly Blvd., less than a mile from the home where she grew up and where her 85 year old U.S. Cit-

izen mother, who has medical problems, still lives. She has employed a number of people and has helped the lives of many who have been devastated by, among other things, wrongful terminations and/or unbearable harassment in the workplace. She has served as President, Vice President, and as a Board Member for the Latina Lawyers Bar Association and also served on the Mexican American Bar Association as a Board Member and is a member of the California Employment Lawyer Association. She is very involved in the community as a mentor and volunteer and she is also a poet and writer who worked on a play which was performed at the Kennedy Center and the Smithsonian Institute in Washington D.C.

Mr. Asencio before departing for his immigrant visa interview in May 2015 had been working as a cable company installer since 2008 and had been filing his income taxes. Mr. Asencio spent most of his time in the U.S. working to support his family, his 9-year old American citizen daughter, and his family in El Salvador. Mr. Asencio has been a devoted father to his U.S. Citizen daughter * * * * * Asencio, born on * * * * * , who lives in Las Vegas, Nevada. Mr. Asencio and his wife visited his daughter regularly and often and he sent her bi-weekly financial support. Mr. Asencio's daughter would also comes to visit them in California and would stay with them over school breaks and when apart, they would regularly speak via telephone. However, because Mr. Asencio has not been allowed to reenter the United States since he left for his interview in May 2015, he has not seen his daughter for 9 months and she constantly asks when he will return.

As an American citizen, it is not just that Attorney Sandra Munoz not be allowed to be with the person with

whom she has chosen to spend the rest of her life. Attorney Sandra Munoz would not have married Mr. Asencio if he were engaged in illegal activity for she is a law professional and law abiding citizen. She has known her husband for more than 6 years and, as an officer of the court, she can attest that her husband is not a gang member and does not affiliate with gang members of any sort. Since her husband left in May, she has had the opportunity of traveling on two occasions to El Salvador to spend time with Mr. Asencio. She has met his family, and has been in the town where he grew up, and has met his friends and she can attest her husband does not affiliate with any gang members.

We respectfully request that a Supervisor review and reconsider this case and that a favorable and just decision be issued immediately for Mr. Asencio's wife Attorney Sandra Munoz has been suffering extreme hardship since her husband left to El Salvador for his interview in May 2015. Attorney's Sandra Munoz suffers from health conditions and Mr. Asencio being in El Salvador since May 2015 has been causing her undue and unnecessary stress which is not good for her health conditions and it is unjust that she is being put through this torment in being separated from her husband based on incorrect and unsubstantiated beliefs that Mr. Asencio will engage in criminal activity.

You will find evidence of all the above said in the documents that had been submitted to USCIS in support of Mr. Asencio's Application for Provisional Unlawful Presence Waiver, Form I-601A, that was approved. If any further information or documentation is needed to correct this matter please let us know. We hope for a prompt response and resolution.

Thank you.

Attorney Marisela Cobos-Soto
Law Offices of Cobos & Ayala
601 S. Glenoaks Blvd., Suite 305
Burbank, CA. 91502
213-943-4949
mcobos@cobos-ayala.com

EXHIBIT C

From: Marci Cobos Soto [http://redirectstate.sbu/?url=mailto:mcobos@cobos-ayala.com]
Sent: Wednesday, April 06, 2016 5:26 PM
To: San Salvador, Congen
Subject: Re: Request for Reconsideration of Immigrant Visa Denial (SNS2013690038)

04/06/2016

Dear Sir/Madam,

Attached is the 2016 California Attorney of the Year Award that Petitioner, Attorney Sandra Munoz, received on March 15, 2016. Please take this into great consideration since Attorney Sandra Munoz would not be married to Applicant, Mr. Luis Ernesto Asencio Cordero, if he were a person that would engage in unlawful activity in the U.S. for all the evidence clearly shows Mr. Asencio is not a criminal nor a gang member. Thank you.

Regards,

Attorney Marisela Cobos-Soto
Law Offices of Cobos & Ayala,
601 S. Glenoaks Blvd., Suite 305, Burbank. CA. 91502,
213-943-4949, mcobos@cobos-ayala.com

EXHIBIT E

From: Marci Cobos-Soto [mailto:mcobos@cobos-ayala.com]
Sent: Tuesday, April 12, 2016 5:29 AM
To: San Salvador, Congen
Subject: Re: Request for Reconsideration of Immigrant Visa Denial (SNS2013690038)

Dear Sir/Madam,

Thank you for your response on April 8, 2016. At this time, please also kindly forward the attached correspondence, letter from priest, to the Immigrant Visa Unit for review as further evidence of the good character of Mr. Luis Ernesto Asencio Cordero, SNS2013690038. Thank you.

Regards,

Attorney Marisela Cobos-Soto
Law Offices of Cobos & Ayala,
601 S. Glenoaks Blvd., Suite 305, Burbank. CA. 91502,
213-943-4949, mcobos@cobos-ayala.com

EXHIBIT F

Embassy of the United States of America

Consular Section, San Salvador

Apr. 13, 2016

Law Offices of Cobos & Ayala
Ms. Marisela Cobos-Soto
601 South Glenoaks Blvd., Suite 305
Burbank, CA 91502
e-mail address: mcobos@cobos-ayala.com

Dear Ms. Cobos-Soto

Thank you for your e-mail of February 6, 2016, regarding the immigrant visa case of your client, Mr. Luis Ernesto Asencio Cordero, the beneficiary of a spousal petition filed by Mrs. Sandra Munoz. Thank you for noting the details of Mr. Asencio Cordero's background, and Mrs. Munoz's credentials.

During the course of the immigrant visa process, which included multiple interviews with Mr. Asencio Cordero, he was found permanently ineligible to receive an immigrant visa under Section 212(a)(3)(A)(ii) of the Immigration and Nationality Act (INA). This section of the Act applies to "Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in any other unlawful activity."

The finding of ineligibility for this applicant was reviewed by the Department of State in Washington, D.C., which concurred with the consular officer's decision. Per your request, our Immigrant Visa Unit took

another look at this case, but did not change the decision.

U.S. law provides no waiver for this ineligibility. Therefore, we cannot continue to process this immigrant visa, and Mr. Asencio Cordero is permanently ineligible to immigrate to the United States.

I hope that this information is helpful to yon.

Sincerely,

/s/ LANDON R. TAYLOR
LANDON R. TAYLOR
Consul

EXHIBIT G

Zimbra **mcobos@cobos-ayala.com**

Re: Request for Reconsideration of Immigrant Visa Denial (SNS2013690038)

From: Marci Cobos-Soto <mcobos@cobos-ayala.com>
Wed, Apr 13, 2016 04:06 PM
Subject: Re: Request for Reconsideration of Immigrant Visa Denial (SNS2013690038)
To: congensansal <congensansal@state.gov>

Dear Sir/Madam,

Thank you for your response and letter dated April 13, 2016. At this time, I would like some clarification as to whether a Supervisor newly reviewed the case and agreed with the consul's current decision. Also, I would like some clarification as to whether the Department of State agreed with the consulate again upon review for we had sent a request to the Department of State on January 29, 2016 for review and are still awaiting for the Department of State to notify us of their decision upon review. Please kindly forward this email to a supervisor at the immigrant visa unit. Thank you.

Regards,

Attorney Marisela Cobos-Soto
Law Offices of Cobos & Ayala,
601 S. Glenoaks Blvd., Suite 305, Burbank. CA. 91502,
213-943-4949, mcobos@cobos-ayala.com

From: "congensansal" <congensansal@state.gov>
To: "Marci Cobos" <mcobos@cobos-ayala.com>
Sent: Wednesday, April 13, 2016 2:54:22 PM
Subject: RE: Request for Reconsideration of Immigrant Visa Denial (SNS2013690038)

Dear Ms. Cobos-Soto:

This is a follow up of your letter regarding the immigrant visa petition on behalf of * * *

EXHIBIT L

United States Department of State
Washington, D.C. 20522

May 18, 2016

Marisela Cobos-Soto
Via Email: mcobos@cobos-ayala.com

Dear Ms. Cobos-Soto:

We are writing in response to your April 18 letter to the Office of Inspector General concerning the immigrant visa case of your client, Mr. Luis Ernesto Asencio Cordero. Your letter was forwarded to the Visa Office, Outreach and Inquiries Division for our reply. We appreciate your patience in awaiting a response.

Visa applications are adjudicated on a case-by-case basis according to the provisions of the Immigration and Nationality Act (INA) and applicable federal regulations. The authority to issue or refuse visas is vested solely in consular officers abroad by section 104(a) of the INA. For this reason, the Department of State in Washington, D.C. cannot overturn consular decisions. Our review of Department records found that Mr. Ascencio was interviewed at the U.S. Embassy in San Salvador, El Salvador, on May 28, 2015. After the interview and a thorough review of his visa application, the consular officer determined that Mr. Asencio was inadmissible to the United States under section 212(a)(3)(A)(ii) of the INA. This determination was reviewed by consular management at the Embassy and, as required, Department concurrence was requested. The Department of

State concurred in the finding of ineligibility on January 15.

U.S. immigration law does not provide for a waiver of this finding of ineligibility under section 212(a)(3)(ii) for an immigrant visa. No further processing is, therefore, possible on Mr. Asencio's case.

Your most recent letter to the Embassy was received on April 28, requesting another review of Mr. Asencio's case. The management at the Embassy reviewed the file and the latest documents you submitted and found no new information or reason to question the Department's concurrence with the original finding.

Mr. Asencio was also found inadmissible to the United States under section 212(a)(9)(B)(ii) of the INA. Under this section of the law, anyone was unlawfully present in the United States for more than one year is inadmissible for 10 years after departure. The records show that Mr. Asencio was in the United States without lawful status from 2005 until his departure in 2015. Mr. Asencio had an approved provisional waiver (I-601A) for the finding of inadmissibility under section 212(a)(9)(B)(ii). However, because of the second finding of inadmissibility under section 212(a)(3)(A)(ii), Mr. Asencio's I-601A waiver is no longer valid for visa issuance.

We hope this information is helpful.

Sincerely,

/s/ CHRISTINE PARKER
CHRISTINE PARKER
Chief
Outreach and Inquiries Division
Visa Services

EXHIBIT M

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. SNS2013590038

IN RE: LUIS ERNESTO ASENCIO

Nov. 30, 2018

DECLARATION OF HUMBERTO GUIZAR, SUBMITTED ON BEHALF OF LUIS ERNESTO ASENCIO IN SUPPORT OF HIS APPLICATION FOR AN IMMIGRANT VISA

I, HUMBERTO GUIZAR, declare under penalty of perjury the following facts:

1. I am an attorney duly licensed to practice law in all courts in California, including this court. I have worked as an attorney for the past 27 years. In my law practice I handle a variety of personal injury and civil rights cases. My business address 3500 West Beverly Boulevard, Montebello, CA 90640-1541. My telephone number is (323) 725-1151. My fax number is (323) 725-0350. I can be contacted by e-mail at herito@aol.com. In addition to be being a licensed lawyer I am also a court-approved "gang expert." In fact, I believe I am the only licensed lawyer in the State of California that provides expert testimony as a gang expert in the local courts of the Southern California State and Federal Jurisdictions. A true and correct copy of my curriculum vitae is attached hereto.

2. The facts started below are accurate and true facts based on my personal knowledge training and experience. If I were called as a witness to testify to any facts stated in this Declaration I would and I could competently testify thereto.

3. I am familiar with the above entitled proceedings and the fact that there is a belief by the Immigration authorities and the consulate that Luis Ernesto Asencio is a gang member or affiliated with a gang, or a member of a known criminal organization.

4. This declaration is submitted on behalf of Luis Ernesto Asencio in support of a request for reconsideration by the Department of State's Visa Office of the prior ruling by a consular officer, that refused an immigrant visa to Mr. Asencio under INA 212(a)(3)(A)(II) or "3A2," as the consular officer allegedly found there was a reason to believe Mr. Asencio is a member of a known criminal organization. For the reasons stated below, I respectfully disagree with the consular's officer's conclusion and request that you reconsider Mr. Asencio's application for an immigrant visa.

5. I began working as a gang expert in April of 2009. Since then I have been appointed by the Los Angeles Superior Court to work and testify in court as a gang expert on approximately 50 gang cases. I have also been consulted on approximately 40 other matters. I have provided educational presentations to legal organizations on the subject of gangs. Most of the matters that I have been appointed to work on as an expert involve pending criminal complaints involving serious allegations that the defendant is a "gang member" under California Penal Code 186.22. This statute basically provides enhanced sentences in cases where a defendant

has committed a crime in the status of a "gang member." The elements of the statute require a showing that the defendant committed the underlying crime with a plan or motive, specific intent, in promoting a street "gang" and that the defendant is in fact an active gang member as defined in the statute. In my capacity as an expert I evaluate the character of the person alleged to be a gang member to determine if he is in fact "gang member." I have also provided prior opinions to the Federal Immigration Court with regard to tattoos on individuals and whether the individual appears to be a gang member.

6. My expertise on the subject of gangs and gang behavior is derived from my 35 years of studying and researching the subject of gangs and my direct and personal involvement in gangs as an actual hard core member when I was a juvenile. During my juvenile years I was institutionally categorized a recidivist incorrigible delinquent. Nonetheless, I was able to get involved in a educational program that allowed me to work on my G.E.D. instead of going to jail. I obtained my GED and then enrolled in college. Thereafter I attended law school and I passed the bar exam. I practice law in the area of civil rights and personal injury, and some criminal law. I was lead counsel in a landmark case before the United States Supreme Court, entitled Richard Ceballos vs. County of Los Angles, et al. I was also the gang expert in the high profile class action gang case of Christian Rodriguez, et al. vs. City of Los Angeles, USDC-Case Number: CV11-01135 DMG.

7. In order to determine gang involvement or membership I look to the past and present behavior patterns of the individual alleged to be a gang member. I also look to see if there is any "gang intelligence" suggesting

the person was involved in gang activity. Some gang members place tattoos on their body in order to show allegiance and membership in a gang. This does not necessarily imply active gang membership, but it is evidence that helps to determine gang membership of the individual at some time in the individual's life. I am intimately familiar with tattoos that are commonly known as gang tattoos. In general, most gang tattoos are specific and openly identify with a known gang or criminal organization. For example, in El Salvador, where Mr. Asencio was born, the majority of young men from El Salvador that have become involved in gang activity identify with the "Mara Salvatruchas" gang. The common tattoos to identify with this gang include the entire name of this gang or MS and MS13. Mr. Ascensio does not have any tattoos that are representative of the Mara Salvatruchas gang or any other known criminal street gang.

8. In this matter I have reviewed photographs of all of the tattoos that are located on Mr. Asencio's body. According to his immigration attorney, Mr. Asencio's has never been arrested or convicted of any gang crime as defined in the California Penal Code. Nor is there any evidence that Mr. Asencio was arrested as a member of a gang in El Salvador. Most importantly, none of the tattoos on Mr. Asencio are related to any gang or criminal organization in the United States or elsewhere.

9. In my opinion, none of the tattoos on Mr. Asencio's body represent any gang or criminal organization that I am aware of. Most of the tattoos that I observed are merely commonly known images, such as images of Catholic icons, clowns, and other non-gang related tattoos. More importantly, none of the tattoos that I saw on his body were of any currently known gang or crim-

inal organization known to exist in El Salvador or in the United States.

10. In conclusion, based on the information stated above, it is my opinion that Mr. Luis Ernesto Asencio is not a gang member, nor is there anything that I am aware of that can reasonably link him to any known criminal organization.

Executed on this Apr. 27, 2016, in Montebello, California.

/s/ HUMBERTO GUIZAR
HUMBERTO GUIZAR
Declarant

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 17-0037 AS

SANDRA MUÑOZ AND LUIS ERNESTO ASENCIO-CORDERO, PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF STATE, ET AL., DEFENDANTS

Apr. 2, 2019

MEMORANDUM OPINION AND ORDER

INTRODUCTION

On January 3, 2017, Sandra Muñoz and Luis Ernesto Asencio-Cordero filed a Complaint for Declaratory Relief against the U.S. Department of State ("DOS"); Mike Pompeo, the U.S. Secretary of State; and Brendan O'Brien, the U.S. Consul General in San Salvador, El Salvador,[1] challenging the denial of Asencio's visa application. (Dkt. No. 1). The Complaint raises six causes of action: (1) the visa denial was not facially legitimate and bona fide (Count One); (2) the visa denial violates the Equal Protection Clause of the Fifth Amendment

[1] The Complaint originally named John F. Kerry as U.S. Secretary of State and Mark Leoni as U.S. Consul General. Mike Pompeo, the current U.S. Secretary of State, and Brendan O'Brien, Consul General at the U.S. Embassy in Sal Salvador, are substituted for their predecessors. Fed. R. Civ. P. 25(d).

(Count Two); (3) the visa denial violates the separation of powers (Count Three); (4) the visa denial was made in bad faith (Count Four); (5) the visa denial without judicial review violates the Administrative Procedures Act (Count Five); and (6) 8 U.S.C. § 1182(a)(3)(A)(ii) is unconstitutionally vague (Count Six). (Compl. ¶¶ 34-51). Plaintiffs seek a declaration that the DOS's reason for denying Asencio's visa application was not bona fide and 8 U.S.C. § 1182(a)(3)(A)(ii) is unconstitutionally vague. (Id. at 12). The parties have consented to the jurisdiction of the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 25, 27, 29).

On September 11, 2018, after the Court had denied Defendants' Motion to Dismiss (Dkt. Nos. 37, 47) and Plaintiffs' Motion for Judgment on the Pleadings (Dkt. Nos. 52, 49), the parties filed a Joint Rule 26(f) Report and Case Management Conference Statement (Dkt. No. 65). In the Rule 26(f) Report, the parties disagree whether Plaintiffs are entitled to take any discovery. Defendants contend that because "Defendants have now provided Plaintiffs with a bona fide factual reason for denying Mr. Asencio-Cordero's visa," "discovery is [not] warranted or necessary to resolve the issues in this case." (Dkt. No. 65 at 9). After hearing arguments from the parties, the Court ordered further briefing on "whether Plaintiff is entitled to conduct discovery relating to the following issues: the facts in the record on which the Consular Officer based the decision to deny Mr. Asencio-Cordero's immigrant visa application; and whether the denial of Mr. Asencio-Cordero's immigrant visa application was in bad faith." (Dkt. No. 66). On November 9, 2018, Defendants filed their Supplemental

Brief. (Dkt. No. 76). Plaintiffs filed a Response on November 30, 2018. (Dkt. No. 77).

The Court finds this issue appropriate for resolution without an additional hearing. L.R. 7-15. For the reasons discussed below, the Court grants Plaintiffs the authority to conduct limited discovery.

BACKGROUND

Asencio is a native and citizen of El Salvador, who arrived in the United States in March 2005. (Compl. ¶ 15).[2] In July 2010, he married Muñoz, who is a U.S. citizen by birth. (¶ 16). In April 2015, Asencio departed the United States to pursue an immigration visa with the DOS, based on the approved immigrant relative petition that Muñoz filed. (¶¶ 3, 18). In May 2015, Asencio had an initial interview with the U.S. Consulate in El Salvador. (¶ 19). Asencio has multiple tattoos but denied ever being associated with a criminal gang. (¶¶ 20-21). He submitted evidence from Humberto Guizar, an expert witness, finding that Asencio was "not a gang member nor does he have any tattoos that are representative of any known criminal street gang." (¶ 21). Guizar, an attorney and a court-approved gang expert, declared after reviewing photographs of all Asencio's tattoos that "Asencio does not have any tattoos that are representative of the Mara Salvatruchas gang [(MS-13)] or any other known criminal street gang" in either El Salvador or the United States. (Dkt. No. 77-1, Ex. M (Guizar Decl.) at ¶¶ 1, 7-9). Guizar concluded that "Asencio is not a gang member, nor is there anything

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[2] Unless otherwise noted, all citations to Plaintiffs' factual allegations are to the relevant paragraph numbers in the Complaint. (Dkt. No. 1).

that I am aware of that can reasonably link him to any known criminal organization." (Id. ¶ 10).

On or about December 28, 2015, the Consular Section denied Asencio's visa application. (Compl. ¶ 20). Asencio was denied lawful permanent residence status on the grounds that he was inadmissible pursuant to 8 U.S.C. § 1182(a)(3)(A)(ii), which states that "[a]ny alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in . . . any other unlawful activity" is ineligible to receive a visa and is ineligible to be admitted to the United States. (¶ 22).

Muñoz contacted Congresswoman Judy Chu, who sent a letter on Muñoz's behalf to the DOS on January 20, 2016. (¶ 23). Consul Landon R. Taylor responded to Chu's letter on January 21, 2016, citing § 1182(a)(3)(A)(ii), but provided no specific facts for finding Asencio inadmissible. (¶ 24). In April 2016, the Consulate forwarded the case to the immigration visa unit for review. (¶ 26). On April 13, 2016, Taylor reported to Plaintiffs: "the finding of ineligibility for [Asencio] was reviewed by the [DOS], which concurred with the consular officer's decision. Per your request, our Immigration Visa Unit took another look at this case, but did not change the decision." (¶ 28). Plaintiffs wrote to the DOS's Office of Inspector General, requesting that a reason be given for the inadmissibility decision. (¶ 30). On May 18, 2016, Christine Parker, the DOS's Chief of the Outreach and Inquiries Division of Visa Services, responded merely that the DOS "concurred in the finding of ineligibility." (¶ 33).

In the parties' Rule 26(f) Report, Defendants assert —for the first time—that "the consular officer who denied Mr. Asencio-Cordero's visa application did so after determining that Mr. Asencio-Cordero was a member of known criminal organization." (Dkt. No. 65 at 4). In their Supplemental Brief, Defendants filed a declaration by Matt McNeil, an attorney advisor at DOS, who reviewed DOS's electronic database concerning the immigrant visa application filed by Muñoz on behalf of Asencio. (Dkt. No. 76-1 (McNeil Decl.) at ¶¶ 1-2). The database indicates that the consular officer denied Asencio's immigrant visa application "based on the in-person interview, a criminal review of Mr. Asencio-Cordero, and a review of the [sic] Mr. Asencio-Cordero's tattoos." (Id. ¶ 3). The consular officer "determined that Mr. Asencio-Cordero was a member of a known criminal organization identified in 9 FAM 302-5-4(b)(2), specifically MS-13."[3] (Id.).

STANDARD OF REVIEW

Under amended Rule 26(b), the scope of permissible discovery is subject to a proportionality requirement. Thus, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' re-

[3] The Foreign Affairs Manual (FAM) "is published by the Department of State and . . . contains the functional statements, organizational responsibilities, and authorities of each of the major components of the U.S. Department of State, including Consular Officers." Sheikh v. U.S. Dep't of Homeland Sec., 685 F. Supp. 2d 1076, 1090 (C.D. Cal. 2009).

sources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). This proportionality requirement "is designed to avoid . . . sweeping discovery that is untethered to the claims and defenses in litigation." Mfg. Automation & Software Sys., Inc. v. Hughes, No. CV 16-8962, 2017 WL 5641120, at *5 (C.D. Cal. Sept. 21, 2017). Nevertheless, relevant information "need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1). In fact, "[r]elevance for purposes of discovery is defined very broadly." Garneau v. City of Seattle, 147 F.3d 802, 812 (9th Cir. 1998). The party opposing discovery is "required to carry a heavy burden of showing why discovery [should be] denied." Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975); accord Hsingching Hsu v. Puma Biotechnology, Inc., No. 15 CV 0865, 2018 WL 4951918, at *4 (C.D. Cal. June 27, 2018). Further, district courts have "broad discretion" to determine relevancy for discovery purposes. See Hallett v. Morgan, 296 F.3d 732, 751 (9th Cir. 2002) (citation and alteration omitted).

DISCUSSION

"Although the Constitution contains no direct mandate relating to immigration matters, the Supreme Court has long recognized that the political branches of the federal government have plenary authority to establish and implement substantive and procedural rules governing the admission of aliens to this country." Jean v. Nelson, 727 F.2d 957, 964 (11th Cir. 1984), aff'd, 472 U.S. 846 (1985). "The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." U.S.

ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950). "In practice, however, the comprehensive character of the [Immigration and Nationality Act (INA)] vastly restricts the area of potential executive freedom of action, and the courts have repeatedly emphasized that the responsibility for regulating the admission of aliens resides in the first instance with Congress." Jean, 727 F.2d at 965. "Thus, as a result of the existence of inherent executive power over immigration and the broad delegations of discretionary authority in the INA, the separation-of-powers doctrine places few restrictions on executive officials in dealing with aliens who come to this country in search of admission or asylum." Id. at 967. "The Court without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (citation omitted). "When Congress delegates this plenary power to the Executive, the Executive's decisions are likewise generally shielded from administrative or judicial review." Andrade-Garcia v. Lynch, 828 F.3d 829, 834 (9th Cir. 2016); see Knauff, 338 U.S. at 544 ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

Nevertheless, the Government's plenary power "does not mean that it is wholly immune from judicial review." Jean, 727 F.2d at 975; see Hazama v. Tillerson, 851 F.3d 706, 708 (7th Cir. 2017) ("the Court has never entirely slammed the door shut on review of consular decisions on visas"). While "[t]he discretionary decisions of executive officials in the immigration area are . . . subject to judicial review, . . . the scope of that review is extremely limited." Id. at 976; see Fiallo v.

Bell, 430 U.S. 787, 793 n.5 (1977) ("Our cases reflect acceptance of a limited judicial responsibility under the Constitution . . . with respect to the power of Congress to regulate the admission and exclusion of aliens . . . ."); Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976) ("the power over aliens is of a political character and therefore subject only to narrow judicial review"). Thus, in the context of denying a visa application, a court must "limit[ ] its inquiry to the question whether the Government had provided a 'facially legitimate and bona fide' reason for its action." Kerry v. Din, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring); see Mandel, 408 U.S. at 770 ("We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."); see generally Nadarajah v. Gonzales, 443 F.3d 1069, 1082 (9th Cir. 2006) ("The [Government] abused its discretion in denying parole [to any asylum applicant] because the reasons it provided were not facially legitimate and bona fide."); see also Cardenas v. United States, 826 F.3d 1164, 1171-72 (9th Cir. 2016) (determining that the Kennedy concurrence in Din "represents the holding of the Court").

Din laid out a two-part test for determining whether the denial of a visa provides the "facially legitimate and bona fide reason" required by Mandel. "First, the consular officer must deny the visa under a valid statute of inadmissibility." Cardenas, 826 F.3d at 1172. "Second, the consular officer must cite an admissibility statute that 'specifies discrete factual predicates the consular officer must find to exist before denying a visa,' or there

must be a fact in the record that 'provides at least a facial connection to' the statutory ground of inadmissibility." Id. (quoting Din, 135 S. Ct. at 2141). Here, while the consular officer's citation to § 1182(a)(3)(A)(ii) was sufficient to demonstrate that the visa denial relied on a valid statute of inadmissibility, the Court previously determined that § 1182(a)(3)(A)(ii) does not provide the "discrete factual predicates" necessary to deny a visa because the statute merely precludes admission, without further edification, to an alien who a consular officer "knows, or has reasonable ground to believe, seeks to enter the United States to engage . . . in . . . any other unlawful activity." 8 U.S.C. § 1182(a)(3)(A)(ii); (see Dkt. No. 59 at 11-12).[4]

Defendants contend that there are now facts in the record that provide a facial connection to the inadmissibility determination under § 1182(a)(3)(A)(ii). (Dkt. No.

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[4] In its Supplemental Brief, Defendants contend that the Supreme Court's recent decision in Trump v. Hawaii, 138 S. Ct. 2392 (2018), makes clear that a citation to a valid statute of inadmissibility alone satisfies Din's "facially legitimate and bona fide" standard. (Dkt. No. 76 at 6-8). The Court finds Defendants' arguments unavailing. In dicta, the Hawaii Court provided a limited summary of the Supreme Court's ruling in Din, stating that "the Government need provide only a statutory citation to explain a visa denial." 138 S. Ct. at 2419. However, the Hawaii Court cited the very page in Din where the Supreme Court explicitly noted that the consular officer must either cite an inadmissibility statute that specifies discrete factual predicates or there must be a fact in the record that provides at least a facial connection to the statutory ground of inadmissibility. Id. (citing Din, 135 S. Ct. at 2141). Further, there is no indication in Hawaii that the Supreme Court intended to overrule Din. Indeed, no court has concluded that Hawaii overruled either Din or the Ninth Circuit's opinion in Cardenas, which carefully summarized the Din decision.

76 at 8-10). However, the consular officer's mere conclusion that Asencio is a member of MS-13 is unsupported by any evidence or discrete fact in the record that provides at least a facial connection to the ground of inadmissibility. That the consular officer's determination was "based on the in-person interview, a criminal review of Mr. Asencio-Cordero, and a review of Mr. Asencio-Cordero's tattoos," do not, by themselves, provide any facts in the record to provide a facial connection to the consular officer's "reason to believe" that Asencio seeks to enter the United States to engage in unlawful activity. To the contrary, Asencio does not have a criminal record. (Dkt. No. 77 at 6 & Ex. B; see Guizar Decl. ¶ 8). And the mere existence of random tattoos does not provide a facial connection to MS-13 or other gang membership. In multiple other cases where courts have found that the Government's denial of an immigrant visa was bona fide, the record has included discrete facts supporting the denial—not mere conclusions. See, e.g., Matushkina v. Nielsen, 877 F.3d 289, 295-96 (7th Cir. 2017), reh'g denied (Jan. 26, 2018) (consular officer cited § 1182(a)(6)(C)(i), which precludes admissibility for an alien who fraudulently or willfully misrepresents a material fact, and the plaintiff acknowledged in her consular interview that she omitted material information); Morfin v. Tillerson, 851 F.3d 710, 711 714 (7th Cir. 2017), cert. denied, No. 17-98, 2017 WL 3136962 (U.S. Oct. 30, 2017) (alien previously indicted for possessing cocaine, with intent to distribute); Hazama, 851 F.3d at 709-10 (consular officer's decision to deny alien's visa application on ground that alien previously engaged in terrorist acts was facially legitimate and bona fide, as the record contained undisputed facts that when alien was 13 years old he threw rocks at armed Israeli soldiers); Allen v. Milas, No. 15 CV 0705,

2016 WL 704353, at *3 (E.D. Cal. Feb. 23, 2016), aff'd 896 F.3d 1094 (9th Cir. 2018) ("[T]he consular office determined that she was ineligible for a visa . . . because she was convicted in a German court of theft . . . [and] for illicit acquisition of narcotics."); Santos v. Lynch, No. 15 CV 0979, 2016 WL 3549366, at *4 (E.D. Cal. June 29, 2016) ("consular officer . . . determined that [aliens] were ineligible for visas . . . because they lived unlawfully in the United States for a period exceeding 1 year"); Sidney v. Howerton, 777 F.2d 1490, 1491-92 (11th Cir. 1985) ("the Record supports the INS'[s] contention that one of its reasons for denying Sidney's release request was that Sidney's track record indicated a likelihood that he would abscond"); see also Yafai v. Pompeo, 912 F.3d 1018, 1027-28 (7th Cir. 2019) (summarizing cases and noting that "[i]n each case, . . . we also went past the statutory citations and took notice of the evidence supporting the stated ground for inadmissibility") (Ripple, J., dissenting); Amanullah v. Nelson, 811 F.2d 1, 11 (1st Cir. 1987) ("We thus scrutinize the record to ascertain whether Cobb advanced a facially legitimate and bona fide reason for withholding parole from these appellants.").

The State Department's policies and procedures suggest that the consular official should have provided Asencio with a more thorough explanation for the visa denial. The stated reason for the consular official's decision was that he had "reason to believe" that Asencio was seeking to enter the United States to engage in "unlawful activity," apparently because he was suspected of being a member of the MS-13 criminal gang. "The term 'reason to believe' . . . shall be considered to require a determination based upon facts or circumstances which would lead a reasonable person to conclude that the ap-

plicant is ineligible to receive a visa as provided in the INA and as implemented by the regulations." 22 C.F.R. § 40.6; see generally Roman v. United States Dep't of State, No. 15 CV 0887, 2017 WL 1380039, at *1 (W.D. Mich. Mar. 27, 2017), report and recommendation adopted, No. 15 CV 0887, 2017 WL 1366504 (W.D. Mich. Apr. 14, 2017) (consular official noting that "the 'reason to believe' standard refers to more than just mere suspicion; it is a probability, supported by the facts, that the alien is a member of an organized criminal entity"). Moreover, all documentation and other evidence submitted by the visa applicant "shall be considered by the [consular] officer." Id. § 42.65(a). While the statute states that "a consular officer is not required to provide an explanation of an alien's visa denial if it is premised on the alien's inadmissibility on criminal or security-related grounds," 8 U.S.C. § 1182(b)(3), DOS's Foreign Affairs Manual requires consular officials to provide "[t]he factual basis for the refusal" unless the DOS instructs the consular official "not to provide notice" or the consular official "receive[s] permission from the [DOS] not to provide notice." 9 FAM 504.11-3(A)(1)(b)-(c). The Foreign Affairs Manual also includes specific requirements when the consular official identifies a "fact that the applicant is a member of a known criminal organization," such as "the Mara Salvatrucha 13 (MS 13)." 9 FAM 302.5-4(B)(2)(a). In these circumstances, the official "must . . . submit a request for an advisory opinion." Id.

Further, the consular officer's conclusion was disputed by the gang expert's sworn declaration. Sometimes even the existence of alleged facts may not satisfy the "facially legitimate and bona fide" standard where the visa applicant credibly disputes the allegations. For

example, in Morfin, the Seventh Circuit observed that "the refusal to issue Ulloa a visa could be said to lack a 'facially legitimate and bona fide reason' (in Mandel's words) if the consular official had concluded that the indictment's charges were false, or if [the applicant] had presented strong evidence of innocence that the consular officer refused to consider." 851 F.3d at 713-14. Similarly, in Hazama, the court noted that "if the undisputed record includes facts that would support that ground, our task is over." 851 F.3d at 709 (emphasis added); accord Matushkina, 877 F.3d at 294; Khachatryan v. United States, No. CV 17 7503, 2018 WL 4629622, at *4 (D.N.J. Sept. 27, 2018); cf. Din, 135 S. Ct. at 2141 (it was undisputed that the applicant worked for the Taliban); Bertrand v. Sava, 684 F.2d 204, 213 (2d Cir. 1982) (uncontroverted evidence indicates that the INS district director properly exercised discretion in denying parole to unadmitted aliens); Al Khader v. Pompeo, No. 18 CV 1355, 2019 WL 423141, at *5 (N.D. Ill. Feb. 4, 2019) ("the undisputed record includes facts that support the consular officer's determination") (emphasis added). Here, Guizar, an attorney who has appeared as a gang expert in state court and federal immigration court and is "intimately familiar with tattoos that are commonly known as gang tattoos," opined that "none of the tattoos . . . on [Asencio's] body [are] of any currently known gang or criminal organization known to exist in El Salvador or in the United States." (Guizar Decl. ¶¶ 7-9). Indeed, Guizar asserted that "Asencio is not a gang member, nor is there anything that I am aware of that can reasonably link him to any known criminal organization." (Id. ¶ 10). Thus, a credible dispute exists as to whether Asencio is or ever has been a member of MS-13. Indeed, it appears that the consular officer refused to consider Asencio's strong ev-

idence that he was not. See Morfin, 851 F.3d at 713-14 ("the refusal to issue [the applicant] a visa could be said to lack a 'facially legitimate and bona fide reason' . . . if [the applicant] had presented strong evidence of innocence that the consular officer refused to consider"); see also Yafai, 912 F.3d at 1028 (Ripple, J., dissenting) ("the evidence submitted by Mr. Yafai raises the distinct possibility that the consular officer . . . never considered the evidence submitted").

Accordingly, limited discovery is warranted to test whether there is a fact in the record that provides a facial connection to the statute at issue and, thus, whether the consular officer's stated "reason to believe" is facially legitimate and bona fide.

CONCLUSION

For the reasons discussed above, the Court finds that Plaintiffs are entitled to limited discovery in support of their claims. Plaintiffs may seek a deposition—or a Rule 31 deposition by written questions, if Defendants prefer—of the consular official who refused the visa application of Asencio on or about December 28, 2015, regarding the discrete facts in the record that provide a facial connection to Asencio's purported MS-13 affiliation and the consular officer's consideration of the gang expert's declaration.[5]

DATED: April 2, 2019

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[5] The parties may advise the Court of the necessity for a hearing and/or telephonic conference to resolve any remaining issues relating to discovery production by contacting the Courtroom Deputy via telephone or email *only* after they have engaged in at least two attempts to resolve the dispute without court involvement. See http://www.cacd.uscourts.gov/judges-schedules-procedures.

/S/ _____
ALKA SAGAR
UNITED STATES MAGISTRATE JUDGE

Present: The Honorable ALKA SAGAR, United States Magistrate Judge

Proceedings (In Chambers): Order GRANTING IN PART Defendants' Application for a Protective Order (Dkt. Nos. 87, 90, 91)

On May 13, 2020, Defendants filed an application for a protective order forbidding taking of discovery regarding high-level agency officials and employees ("Motion"). (Dkt. No. 87). On May 21, 2020, Plaintiffs filed their Response. (Dkt. No. 90). On May 26, 2020, Defendants filed a Reply. (Dkt. No. 91). The Court finds this discovery dispute appropriate for resolution without a hearing.[1] L.R. 7-15. For the reasons discussed below, the Motion is **GRANTED-IN-PART**.[2]

A. Background

On December 11, 2017, the Court denied Defendants' motion to dismiss.[3] (Dkt. No. 47). The Court determined that despite the Government's plenary power to make rules for the admission of aliens and to exclude them, the Court retains a limited authority to determine if the Government provided a "facially legitimate and bona fide reason" for denying a visa to Plaintiff Luis

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[1] On June 4, 2020, the Court vacated the hearing previously scheduled for June 11, 2020. (Dkt. No. 92).

[2] The parties have consented to the jurisdiction of the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 25, 27, 29).

[3] The Court has previously described all the factual allegations in Plaintiffs' Complaint, and they will not be repeated here. (Dkt. Nos. 47 at 2-3, 59 at 4-6; 82 at 3-5).

Ernesto Asencio-Cordero. (*Id.* at 5-7). In 2015, the Supreme Court laid out a two-part test for determining whether the denial of a visa provides the requisite facially legitimate and bona fide reason. *Kerry v. Din*, 135 S. Ct. 2128, 2140-41 (2015) (Kennedy, J., concurring). "First, the consular officer must deny the visa under a valid statute of inadmissibility." *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016) (citing *Din*, 135 S. Ct. at 2140-41). "Second, the consular officer must cite an admissibility statute that 'specifies discrete factual predicates the consular officer must find to exist before denying a visa,' or there must be a fact in the record that 'provides at least a facial connection to' the statutory ground of inadmissibility." *Id.* (quoting *Din*, 135 S. Ct. at 2141). Here, while the consular officer's citation to 8 U.S.C. § 1182(a)(3)(A)(ii) was sufficient to demonstrate that Asencio's visa denial relied on a valid statute of inadmissibility, the Court denied Defendants' motion to dismiss, finding that § 1182(a)(3)(A)(ii) does not provide the "discrete factual predicates" necessary to deny a visa because the statute merely precludes admission, without further edification, to an alien who a consular officer "knows, or has reasonable ground to believe, seeks to enter the United States to engage . . . in . . . any other unlawful activity." (*See* Dkt. No. 47 at 11-12). The Court determined that because paragraph (A) of the statute provides *no* factual predicates for what "unlawful activity" entails, paragraph (A) grants the consular officer "nearly unbridled discretion," which the Supreme Court in *Din* cautioned against. (*Id.* at 12-13). Instead, the Government must identify a discrete fact in the record that is facially connected to the statutory ground of inadmissibility. (*Id.* at 13-15; *see* Dkt. No. 82 at 9-10).

In November 2018, Defendants disclosed that "based on the in-person interview, a criminal review of Mr. Asencio-Cordero, and a review of the [*sic*] Mr. Asencio-Cordero's tattoos, the consular officer determined that Mr. Asencio-Cordero was a member of a known criminal organization . . . , specifically MS-13." (Dkt. No. 76-1 (McNeil Decl.) at ¶ 5). The Court, however, found "the consular officer's mere *conclusion* that Asencio is a member of MS-13 is unsupported by any evidence or discrete fact in the record that provides at least a facial connection to the ground of inadmissibility." (Dkt. No. 82 at 10-11) (emphasis in original). Indeed, the only *facts* in the record indicate that Asencio does not have a criminal record, is not a member of any known criminal street gang, and does not have tattoos representative of MS-13 or any other known criminal street gang in either the United States or El Salvador. (Dkt. No. 77-1 (Diamante Decl.) at ¶ 3 & Exs. B; Dkt. No. 77, Ex. M (Guizar Decl.) at ¶¶ 1, 7-10). Accordingly, the Court ordered "*limited discovery* . . . to test whether there is a fact in the record that provides a facial connection to the statute at issue and, thus, whether the consular officer's stated 'reason to believe' is facially legitimate and bona fide." (Dkt. No. 82 at 15) (emphasis added). Specifically, the Court determined that "Plaintiffs may seek a deposition—or a Rule 31 deposition by written questions, if Defendants prefer—of the consular official who refused the visa application of Asencio on or about December 28, 2015 regarding the discrete facts in the record that provide a facial connection to Asencio's purported MS-13 affiliation and the consular officer's consideration of the gang expert's declaration." (*Id.* at 15-16). On February 20, 2020, Plaintiffs' counsel provided Defendants with a list of intended questions to be

served on the Rule 31 deponent (*see* Motion, Ex. 1), to which Defendants now object.

B. The Motion

1. Consular Nonreviewability

The Government opposes the proposed Rule 31 questions because "the consular officer's citation to § 1182(a)(3)(A)(ii) provided a facially legitimate and bona fide basis for a denial of his visa petition and satisfied the Constitution." (Motion at 13). But as discussed above, the Court has previously ruled to the contrary. (*See* Dkt. No. 47 at 12 (ruling that § 1182(a)(3)(A)(ii) "does *not* provide the 'discrete factual predicates' necessary to deny a visa") (emphasis added); *accord* Dkt. No. 82 at 10). Nor has the Government moved under Rule 60(b) for relief from the Court's orders. Nonetheless, the Government does not identify—and this Court cannot locate—any dispositive caselaw that calls into question the Court's prior rulings. *See* L.R. 7-18 ("A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision.").

The Government also reprises its previous argument that it "has now provided [the requisite factual predicate] through the declarations explaining the consular officer's determination that Mr. Asencio-Cordero is a member of MS-13." (Motion at 12). The Government

argues that with the addition of the McNeil Declaration, this case now "contains the discrete factual predicates that *Cardenas* and *Din* require." (*Id.*). The Government contends that "[b]ecause the information that is now in the record provides an unambiguous connection to section 1182(a)(3)(A)(ii), the visa refusal is facially legitimate and bona fide under any application of the *Cardenas* standard." (*Id.* at 12-13). But as the Court previously ruled, the McNeil Declaration was "unsupported by any evidence or discrete fact in the record that provides at least a facial connection to the ground of inadmissibility." (Dkt. No. 82 at 10-11). Further, in *Cardenas*, the record included a Form I-213 report created by U.S. Immigration and Customs Enforcement (ICE), which indicated that during a June 2008 traffic stop, the alien was identified as a Sureno gang associate by Nampa Police Department while a passenger in a vehicle owned and driven by a known Sureno gang member. 826 F.3d at 1167-68. When the alien's visa application was denied, the consulate informed the alien *in writing* the basis for its decision:

> At the time of [the alien's] June 16, 2008 arrest, [the alien] was identified as a gang associate by law enforcement. The circumstances of [the alien's] arrest, as well as information gleaned during the consular interview, gave the consular officer sufficient 'reason to believe' that [the alien] has ties to an organized street gang.

Id. at 1168. Thus, in *Cardenas*, the consulate provided the *discrete factual basis*—the June 2008 arrest record—for its *conclusion* that the alien had ties to an organized street gang. Here, the Government has merely provided its *conclusion* that Asencio is a member of

MS-13 *without any factual basis*. The Government's "consular nonreviewability" objection is **OVERRULED**.

2. Law Enforcement Privilege

The Government also opposes the proposed Rule 31 questions on the basis of the "law enforcement privilege." (Motion at 5-11). In order to establish the law enforcement privilege,

> (1) there must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege.

Wagafe v. Trump, —F.R.D.—, 2020 WL 246693, at *2 (W.D. Wash. Jan. 16, 2020). In assessing whether the claimed information fits within the scope of the privilege, a court must "weigh the public interest in nondisclosure against the [requesting party's] need for access to the privileged information." *Tuite v. Henry*, 98 F.3d 1411, 1417 (D.C. Cir. 1996) (citation and alterations omitted).

> To achieve this end, a number of factors must be considered, including: (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or

> evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; (10) the importance of the information sought to the plaintiff's case.

Wagafe, 2020 WL 246693, at *2 (citation omitted). While the Ninth Circuit has "assume[d] without deciding" that the law enforcement privilege exists, it notes that neither the Supreme Court nor the Ninth Circuit has "yet to recognize or reject" the privilege. *Shah v. Dep't of Justice*, 714 F. App'x 657, 659 n.1 (9th Cir. 2017).

Even assuming that the law enforcement privilege exists, the Government's declaration in support of their assertion of the privilege is woefully inadequate. (*See* Dkt. No. 87-2 (Colleran Decl.)). While Colleran states that she is Chief of the International Division in the Office of Fraud Prevention Programs in the Department of State's Bureau of Consular Affairs (Colleran Decl. ¶ 1), she does not assert that she is "head of the department having control over the requested information." Even assuming that she is the appropriate person to be asserting the privilege, Colleran does not specifically describe why each of Plaintiffs' proposed Rule 31 questions—or set of questions—properly falls within the scope of the privilege. Though Colleran describes a number of concerns with answering Plaintiffs' ques-

tions (*id.* ¶¶ 5, 7-11), she "makes no attempt to link each exemption to specific [questions]." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 746 F.3d 1082, 1100 (D.C. Cir. 2014); *see also Blackwell v. F.B.I.*, 646 F.3d 37, 42 (D.C. Cir. 2011) (the agency must "demonstrate logically how the release of the requested information might create a risk of circumvention of the law"). Indeed, Colleran appears to be asserting that every one of Plaintiff's proposed questions "constitutes non-public information that, if disclosed, would undermine the ability of consular officers to apply and enforce immigration law, facilitate fraud, and pose harm to the national security and public safety of the United States and directly to its officers and employees overseas." (Colleran Decl. ¶ 5; *see also id.* ¶ 7 ("Plaintiff's questions explicitly request sources, methods, techniques, and procedures for the enforcement of the INA's bars to admissibility, most specifically INA section 211(a).")). But the memorandum supporting the Government's motion contends that less than half off the proposed 109 questions are protected by the law enforcement privilege. (Motion at 7). Neither the Court nor Plaintiffs should have to guess whether or why the Government is asserting the privilege as to each proposed question. *Wagafe*, 2020 WL 246693, at *2.

Further, while the Government argues that answering Plaintiff's questions would disclose the Government's knowledge of gang tattoos and revealing the individual officer's identity would place the official's life in danger (Motion at 7-8), the Colleran Declaration does not specifically include these issues as justification for the privilege. Instead, she asserts that answering the Rule 31 questions would help visa applicants lie and would reveal coordination between the Department of

State and other agencies and foreign governments. (Colleran Decl. ¶¶ 7, 10). But the Government's assertion that answering Plaintiffs' questions would disclose secrets is belied by the Government's routine disclosure of the information requested in many of Plaintiffs' questions. For example, the Foreign Affairs Manual (FAM) enumerates the types of discrete facts that could lead to a § 1182(a)(3)(A)(ii) ineligibility finding:

> (1) Acknowledgement of membership by the individual, the organization, or another party member; (2) Actively working to further the organization's aims in a way to suggest close affiliation; (3) Receiving financial support or recognition from the organization; (4) Determination of membership by a competent court; (5) Statement from local or U.S. law enforcement authorities that the individual is a member; (6) Frequent association with other members; (7) Voluntarily displaying symbols of the organization; and (8) Participating in the organization's activities, even if lawful.

9 FAM 302.5-4(B)(2)(f); *see Cardenas*, 826 F.3d at 1168 (consular official stating, *in writing*, that the alien was ineligible for a visa because he was identified as a gang member by local law enforcement, as described in paragraph (5)). Further, the Foreign Affairs Manual acknowledges that consular officials obtain ineligibility-related information from "(1) applicants, through the application form and supporting documents . . . or during the interview . . . ; (2) From U.S. government sources, including other agencies . . . or posts . . . ; or (3) From third parties," including host country law enforcement or other officials, public sources like newspapers or local magazines, and nonofficial sources. 9 FAM 301.5-2.

For all of these reasons, the Government has not met its burden to justify why each of Plaintiffs' proposed Rule 31 questions falls within the scope of the privilege. Nevertheless, as discussed below, Plaintiff's proposed questions are largely beyond the *limited* scope of discovery authorized in the Court's April 2, 2019 Order. (Dkt. No. 82). Accordingly, the Government's assertion of the law enforcement privilege is **OVERRULED WITHOUT PREJUDICE**.

3. Overbroad and Irrelevant Questions

Plaintiffs' proposed Rule 31 questions are largely overbroad, not relevant to Plaintiffs' claims, or not proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). As this Court has repeatedly emphasized, the reviewability of the consular official's decision is *very limited*. (Dkt. No. 47 at 11 (requiring only a single fact in the record that provides a facial connection to the statutory ground for inadmissibility); Dkt No. 59 at 10-15 (noting that the Court's review is *limited* to determining whether there is a fact in the record that provides a facial connection to the statutory ground for inadmissibility)). Indeed, in ruling that Plaintiffs are entitled to take discovery, the Court reiterated that Plaintiffs' discovery is *limited* to whether there is *a* fact in the record that provides *a* facial connection to the statute at issue. (Dkt. No. 82 at 15). Thus, the identities of everyone who reviewed Asencio's file, the methods and procedures utilized in reviewing Asencio's file, training protocols, and thought processes of consular officials are simply not relevant to whether there is a fact in the record that provides a facial connection to the statute at issue. Indeed, either there is a fact in the record that provides the facial connection or there is not.

Defendants have provided Plaintiffs with the ambit of allowed inquiries. The Government attested that "based on the in-person interview, a criminal review of Mr. Asencio-Cordero, and a review of the [*sic*] Mr. Asencio-Cordero's tattoos, the consular officer determined that Mr. Asencio-Cordero was a member of a known criminal organization . . . , specifically MS-13." (McNeil Decl. ¶ 5). Thus, discovery is *limited* to determining whether there is a *fact* in the record that supports McNeil's *conclusion*. Accordingly, other than very basic background questions, Plaintiffs are *limited* to seeking responses to these questions:

1. Identify a *fact* in the record that supports the conclusion that Asencio was a member of MS-13.
2. What specific *fact* provided by Asencio in his in-person interview, if any, provides a facial connection to the conclusion that Asencio was a member of MS-13.
3. What specific *fact* in the criminal review of Asencio, if any, provides a facial connection to the conclusion that Asencio was a member of MS-13.
4. What specific *fact* in the review of Asencio's tattoos, if any, provides a facial connection to the conclusion that Asencio was a member of MS-13.
5. Was the declaration of Humberto Guizar taken into consideration before determining that Asencio was a member of MS-13.

In answering these questions, Defendants shall provide an official with the El Salvador consulate who has the necessary knowledge to respond. *See generally Cardenas*, 826 F.3d at 1168 ("An official with the Ciudad Juárez consulate later clarified the basis for [the ineli-

gibility] decision in an email to [the alien's] prior counsel: . . . ."). The person designated need not be the consular official who found Asencio ineligible so long as the official with the El Salvador consulate can testify competently on the subject matter of Asencio's visa application. *See* Fed. R. Civ. P. 30(b)(6) ("The persons designated must testify about information known or reasonably available to the organization.").

C. Conclusion

Defendants' Application for a Protective Order [87] is **GRANTED-IN-PART**. Plaintiffs Rule 31 deposition of Defendants is limited to the discrete set of topics delineated above.

The parties are encouraged to avail themselves of the Court's informal discovery dispute resolution process to resolve any remaining discovery issues. (See Judge Sagar's Procedures).

IT IS SO ORDERED.

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. LACV 17-0037-AS

SANDRA MUÑOZ, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF STATE, ET AL., DEFENDANTS

Aug. 10, 2020

DEFENDANTS' RESPONSES AND OBJECTIONS TO PLAINTIFFS' INTERROGATORIES

Pursuant to Federal Rule of Civil Procedure 33 and this Court's Order dated July 10, 2020 (ECF No. 100), the United States Department of State; Michael R. Pompeo, in his official capacity as Secretary of State; and Brendan O'Brien, in his official capacity as Acting Deputy Chief of Mission at the U.S. Embassy in San Salvador ("Defendants"), by undersigned counsel, hereby submit their objections and responses to Plaintiffs' Interrogatories (the "Interrogatories"). Defendants' Objections are based on the information known to them at this time, and are made without prejudice to assertion of additional objections should Defendants identify additional grounds for objection.

GENERAL OBJECTIONS AND PREFATORY STATEMENT

Defendants continue to investigate and develop the facts related to this lawsuit. By responding to Plaintiffs' Interrogatories, Defendants do not waive, and expressly reserve, the right to assert any and all objections to the admissibility of its responses into evidence at trial. To the extent not specifically set forth in response to each Interrogatory, Defendants hereby incorporate by reference each and every General Objection below into each and every response. The General Objections include:

1. Defendants base these responses and objections on information currently available to them. Defendants have not yet completed discovery or preparation for trial in this action and will therefore supplement or amend the responses and objections to the extent the Federal Rules of Civil Procedure may require.

2. Defendants object to these Interrogatories in their entirety to the extent they request information protected from discovery and disclosure by the attorney-client privilege, the deliberative process privilege, the law enforcement privilege, or any other privilege available under Federal or State statutory, constitutional, or common law. Finally, Defendants object to Plaintiffs' Interrogatories to the extent they attempt or purport to impose obligations greater than authorized by the Federal Rules of Civil Procedure.

3. Finally, Defendants note that they are only obligated to produce information within their *actual* possession or information for which the party has a "the legal right to obtain documents upon demand." *United States v. Int'l Union of Petroleum & Indus. Workers,*

AFL-CIO, 870 F.2d 1450, 1452 (9th Cir. 1989); *see also In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999) ("[P]roof of theoretical control is insufficient; a showing of actual control is required."); *Matthew Enter., Inc. v. Chrysler Grp. LLC*, No. 13-cv-04236, 2015 WL 8482256, at *3 (N.D. Cal. Dec. 10, 2015) ("Like the majority of circuits, the Ninth Circuit has explicitly rejected an invitation to define 'control' in a manner that focuses on the party's practical ability to obtain the requested documents[.]" (internal quotations and citation omitted)). Thus, Plaintiffs are not entitled to request third-party information where Defendants have no legal right to demand that those third parties provide Defendants with that information. In short, Defendants are only under the obligation to produce relevant, non-privileged information, to the extent that it exists.

INTERROGATORY NO. 1

Identify a *fact* in the record that supports the conclusion that Asencio was a member of MS-13.

Responses and Objections to Interrogatory No. 1:

The consular officer considered specific information that was obtained from law enforcement operations, along with the other information already identified for the court in the McNeil Declaration, and determined there was a reason to believe Mr. Asencio was a member of MS-13.

Any further response is subject to law enforcement privilege and, if released or disclosed, would jeopardize U.S. and foreign law-enforcement sources and methods, risk the lives and safety of U.S. and foreign individuals, significantly damage the bilateral relationship with the Government of El Salvador, and undermine the ability

of consular officers to apply and enforce immigration law.

INTERROGATORY NO. 2

What specific *fact* provided by Asencio in his in-person interview, if any, provides a facial connection to the conclusion that Asencio was a member of MS-13.

Responses and Objections to Interrogatory No. 2:

In order to carry out their obligations in adjudicating visa applications to determine visa eligibility, consular officers interview aliens applying for immigrant visas. The consular officers reviewed Mr. Asencio's representations about his health, criminal activity, financial status, employment, and associations to determine whether any provision of the INA would render the alien ineligible for a U.S. visa. The consular officer also considered specific information that was obtained from law enforcement operations, along with the other information already identified for the Court in the McNeil Declaration, and determined there was a reason to believe the applicant was a member of MS-13. Any further response regarding the consular officer's assessment of the credibility of Mr. Asencio's responses or refusal to respond to questions during interview regarding his health, criminal activity, financial status, employment, and associations is barred by the doctrine of consular nonreviewability which provides that the decisions of consular officers to issue or refuse visas are not subject to judicial review.

Additionally, any further response is subject to law enforcement privilege and, if released or disclosed, would jeopardize U.S. and foreign law-enforcement sources and methods, risk the lives and safety of U.S.

and foreign individuals, significantly damage the bilateral relationship with the Government of El Salvador, and undermine the ability of consular officers to apply and enforce immigration law.

INTERROGATORY NO. 3

What specific *fact* in the criminal review of Asencio, if any, provides a facial connection to the conclusion that Asencio was a member of MS-13.

Responses and Objections to Interrogatory No. 3:

The consular officer considered specific information that was obtained from law enforcement operations, along with the other information already identified for the court in the McNeil Declaration, and determined there was a reason to believe the applicant was a member of MS-13.

Any further response regarding the consular officer's assessment of the relevance and credibility of law enforcement information about Mr. Asencio is barred by the doctrine of consular nonreviewability which provides that the decisions of consular officers to issue or refuse visas are not subject to judicial review.

Additionally, any further response is subject to law enforcement privilege and, if released or disclosed, would jeopardize U.S. and foreign law-enforcement sources and methods, risk the lives and safety of U.S. and foreign individuals, significantly damage the bilateral relationship with the Government of El Salvador, and undermine the ability of consular officers to apply and enforce immigration law.

INTERROGATORY NO. 4

What specific *fact* in the review of Asencio's tattoos, if any, provides a facial connection to the conclusion that Asencio was a member of MS-13.

Responses and Objections to Interrogatory No. 4:

In addition to the interview, consular officers also receive information related to an alien's visa eligibility from a variety of other sources, including investigations by Fraud Prevention Units, other U.S. government agencies, and foreign governments. When adjudicating visa applications, consular officers are expected to draw on their training, experience working with the relevant foreign government and/or local law enforcement, and knowledge of local conditions, including crime and fraud trends. The consular officer considered specific information that was obtained from law enforcement operations, along with the other information already identified for the court in the McNeil Declaration, and determined there was a reason to believe Mr. Asencio was a member of MS-13.

Any further response regarding the consular officer's assessment of the credibility and relevance of information regarding Mr. Asencio is barred by the doctrine of consular nonreviewability which provides that the decisions of consular officers to issue or refuse visas are not subject to judicial review.

Additionally, any further response is subject to law enforcement privilege and, if released or disclosed, would jeopardize U.S. and foreign law-enforcement sources and methods, risk the lives and safety of U.S. and foreign individuals, significantly damage the bilateral relationship with the Government of El Salvador,

and undermine the ability of consular officers to apply and enforce immigration law.

INTERROGATORY NO. 5

Was the declaration of Humberto Guizar taken into consideration before determining that Asencio was a member of MS-13[?]

Responses and Objections to Interrogatory No. 5:

Yes. Any further response regarding the consular officer's assessment of the credibility and relevance of information regarding Mr. Asencio is barred by the doctrine of consular nonreviewability which provides that the decisions of consular officers to issue or refuse visas are not subject to judicial review.

Dated: July 17, 2020

By: /s/ * * * * * *
* * * * *

United States Department of State

Objections By: ETHAN P. DAVIS
Acting Assistant Attorney General

WILLIAM C. PEACHEY
Director

WILLIAM C. SILVIS
Assistant Director

JOSHUA S. PRESS
Trial Attorney

By: /s/ JOSHUA S. PRESS
JOSHUA S. PRESS
Trial Attorney
United States Department of Justice

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Attorneys for Defendants

VERIFICATION OF INTERROGATORY ANSWERS

I, * * * * * , am employed by the U.S. Department of State (the "Department") in the International Division in the Office of Fraud Prevention Programs in the Department's Bureau of Consular Affairs. I believe, based on reasonable inquiry, that the foregoing answers are true and correct to the best of my knowledge, information and belief.

I verify under penalty of perjury that the foregoing is true and correct.

Executed on July 17, 2020

_____/s/_____
* * * * *

United States Department of State

DECLARATION OF JOSHUA S. PRESS

1. I am an attorney with the United States Department of Justice, Civil Division, Office of Immigration Litigation, District Court Section, in Washington, DC, and I represent Defendants in this matter. I have personal knowledge of the facts set forth herein, and if called upon to testify, I could and would testify competently and completely to the statements made herein.

2. On July 20 and August 10, 2020, in compliance with L.R. 7-3 and L.R. 7-19.1, I conferred with Plaintiffs' counsel via telephone regarding Defendants' intention to file a supporting the United States Department of State's ("State Department") declaration *in camera* due to its law-enforcement sensitivity. Plaintiffs' counsel indicated that he opposed the relief and would oppose the motion.

4. The State Department respectfully requests permission to file the declaration for *in camera* review.

5. This document is based on, and describes, law-enforcement and diplomatic information contained in sensitive databases related to ongoing law-enforcement operations against transnational gangs.

6. The information described within the declaration is confidential under 8 U.S.C. § 1202(f).

7. Therefore, the appropriate method for submitting this document to the Court is *in camera* review pursuant to Local Rule 79-6.

I declare under penalty of perjury under the laws of the United States of America that the following is true and correct.

Executed on August 10, 2020, at Chicago, Illinois.

By: /s/ JOSHUA S. PRESS
JOSHUA S. PRESS
Trial Attorney
United States Department of Justice
Civil Division

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 17-00037-AS

SANDRA MUÑOZ, ET AL.

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.

Aug. 21, 2020

ORDER GRANTING IN PART *EX PARTE* APPLICATION FOR LEAVE FOR *IN CAMERA* REVIEW (Dkt. Nos. 104-107)

Present: The Honorable ALKA SAGAR, United States Magistrate Judge

A telephonic hearing was held on August 20, 2020 on Defendant's *ex parte* application for leave to submit documents pertaining to the parties' cross motions for summary judgment for the Court's *in camera* review. See Docket Nos. 104-107. The Court, having reviewed the parties' submissions and the arguments presented at the hearing, ordered Defendants to disclose—no later than August 31, 2020—a declaration from an official who has personal knowledge of, or is tasked with custody or control of, information that the Court has previously ordered Defendants to produce: a fact in the record that provides a facial connection to the statute that was cited as the basis for the denial of Mr. Ascensio's visa application. Defendants may redact information that is privileged, classified, sensitive or other-

wise confidential in the declaration that is produced to Plaintiffs. Defendants must submit, for the Court's *in camera* review, the redacted and unredacted declaration.

The parties' respective oppositions to the cross-motions for summary judgment must be filed no later than September 11, 2020.

The Court will issue a separate order setting this matter for trial in February 2021.

IT IS SO ORDERED.

00: 40

DECLARATION OF [REDACTED]

Pursuant to 28 U.S.C. § 1746, I, **[REDACTED]**, declare and state as follows:

1. I am employed by the U.S. Department of State (the "Department") in the International Division in the Office of Fraud Prevention Programs ("FPP") in the Department's Bureau of Consular Affairs. Since July 2018, I have served as a liaison officer between FPP and Fraud Prevention Units ("FPU") at overseas posts. I have worked with overseas posts in Mexico and Central America, including El Salvador. In this role, I review and communicate investigation policies and provide guidance to identify, prevent, and disrupt passport, visa, and other types of consular fraud. Additionally, I have served as a Foreign Service Officer with the Department since 2008. In my time with the Department, I have worked at three posts overseas and at Department headquarters within the Bureau of Consular Affairs. I have personally adjudicated visa applications and managed consular officers as they adjudicated visa applications. The following declaration is based on my personal knowledge and information acquired in my official capacity in the performance of my official functions.

2. The mission of FPP is to deter fraud in consular services, including visa applications, ensure the integrity of the application processes, and provide analysis to inform adjudication decisions. Additionally, FPP supports U.S. border security by ensuring that consular officers have the tools and information they need to properly apply U.S. law. FPP, under the direction of the Principal Deputy Assistant Secretary of State for Consular Affairs, develops and coordinates policies,

programs, and training courses for consular operations, both domestic and overseas, to identify, prevent, and disrupt passport and visa fraud and to identify and deny passport and visas to unqualified or ineligible applicants. It contributes to the development of technology, managerial guidance, exemplar guides, and other fraud prevention and adjudication materials, as well as conducts training in these areas. FPP analyzes fraud, security, and overstay trends and disseminates relevant information to adjudicators worldwide. FPP is also a liaison with the Department of Homeland Security and other federal agencies and interagency organizations concerned with immigration fraud and national security. We do so by building the skills of consular officers, analyzing and sharing information to improve decision-making, developing technology and best practices, fostering liaison with other official entities, and assessing vulnerabilities of Department systems and processes to fraud and malfeasance by employees. Among others, FPP serves the following groups: fraud prevention personnel at overseas posts; consular officers overseas; consular managers; and border security officials. FPP works together with the Office of Visa Services in the Bureau of Consular Affairs (the "Visa Office") to develop applicant screening tools and procedures, such as the Enterprise Case Assessment Service, for fraud and ineligibility-related research performed by consular officers.

3. In the International Division of FPP where I work, we act as the liaisons with FPUs at consular sections of U.S. embassies and consulates overseas. We are a consular section's primary contacts when seeking advice on fraud issues or in conducting an investigation into visa ineligibility grounds.

4. I have reviewed the material related to the immigrant visa application of Luis Ernesto Ascencio Cordero ("Mr. Ascencio Cordero") that was provided to the court for *ex parte in camera* review. This material includes certain records from the Consolidated Consular Database ("CCD") pertaining to the issuance or refusal of a visa application, specifically a Memorandum regarding Mr. Ascencio Cordero from the FPU at the U.S. Embassy in El Salvador ("FPU Memorandum" or "Memorandum") and an Advisory Opinion request submitted by a consular officer and the Visa Office's response to that request. I have determined that all of this material constitutes non-public information that, if released or disclosed at a deposition, would jeopardize U.S. and foreign law-enforcement sources and methods, risk the lives and safety of U.S. and foreign individuals, significantly damage the bilateral relationship with the Government of El Salvador, and undermine the ability of consular officers to apply and enforce immigration law.

5. Section 212(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a), enumerates specific categories of aliens who "are ineligible to receive visas and ineligible to be admitted to the United States." In determining whether an alien is eligible for a visa and may seek admission to the United States on the basis of that visa, the adjudicating consular officer must consider all of the grounds of ineligibility under Section 212(a) and other provisions of law, including INA Section 212(a)(3)(a)(ii) which renders inadmissible "[a]ny alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in any other unlawful activity." In order to

carry out their obligations in adjudicating visa applications, consular officers interview most aliens applying for visas. The consular officers review representations about the applicants' health, criminal activity, financial status, employment, and associations to determine whether any provision of the INA would render the alien ineligible for a U.S. visa. In addition to the interview, consular officers also receive information related to an alien's visa eligibility from a variety of other sources, including investigations by FPUs, other U.S. government agencies, **[REDACTED]** When adjudicating visa applications, consular officers are expected to draw on their training, experience **[REDACTED]** and knowledge of local conditions, including crime and fraud trends.

6. For decades, the U.S. government has recognized the threat to national security posed by organized crime. As described in the Department's Foreign Affairs Manual ("FAM"), "[t]he Department began considering organized crime membership as a ground of ineligibility in 1965, when then Attorney General Katzenbach concurred with a recommendation by Secretary of State Rusk that an alien's membership in the Mafia was a sufficient basis on which to find the alien ineligible [for a visa] under then section 212(a)(27)." The FAM further notes that the basis for these determinations was that certain transnational criminal groups operate as "permanent organized criminal societies." "Active membership in these groups could reasonably be considered to involve a permanent association with criminal activities and, therefore, could reasonably support a conclusion that any travel by such an alien member to the United States could result in a violation of U.S. law, whether as a principal or incidental result of such

travel." 9 FAM 302.5-4(B)(2)(b) and (c). The Department of Justice, Department of Homeland Security, and Department of State have agreed that aliens determined to be members of certain transnational criminal organizations will be ineligible for visas and inadmissible to the United States under INA section 212(a)(3)(A)(ii). The designated transnational criminal organizations are identified at 9 FAM 302.5-4(B)(2)(a): the Chinese Triads; the Mafia; the Yakuza; any of the various groups constituting the organized crime families of the Former Soviet Union; any of the organized Salvadoran, Honduran, Guatemalan, and Mexican street gangs in North America, including, but not limited to, the Mara Salvatrucha 13 ("MS-13"), Mexican Mafia, SUR-13, Matidos-13, Florencia-13, La Familia, Nortenos, Clanton-14, Center Street Locos, Diablos, South Los, La Raza, Vatos Locos, Tortilla Flats, Latin Kings, Eastside Homeboys, Varrio Northside, Rebels-13, Brown Pride, and 18th Street gangs; the biker gangs the Hells Angels, Outlaws, Bandidos, and Mongols; and the transnational criminal organization Primeiro Comando da Capital (First Capital Command).

7. In order to ensure proper and consistent adjudications of visa ineligibility under INA section 212(a)(3)(A)(ii), the FAM requires a consular officer to obtain an Advisory Opinion from attorneys in the Visa Office at State Department headquarters before refusing a visa application on that ground. 9 FAM 302.5-4(B)(2)(a). The Advisory Opinion sets out the consular officer's factual findings regarding the applicability of the ineligibility ground to the visa applicant and the basis for such findings, and requests that the Visa Office provide an opinion on whether the standard for visa ineligibility has been met. The Advisory Opinion in this

case refers to the Memorandum regarding Mr. Ascencio Cordero from the FPU at the U.S. Embassy in El Salvador and the findings therein that led the consular officer to determine Mr. Ascencio Cordero's membership in MS-13, an organization identified in the FAM as a transnational criminal organization.

8. The MS-13 gang is a transnational criminal organization. The motto of MS-13 is "rape, control, kill." The Federal Bureau of Investigation ("FBI") was directed by Congress to establish the National Gang Intelligence Center. The National Gang Threat Intelligence Center reports on MS-13 activity in the United States including threats to U.S. law enforcement.

9. The U.S. Embassy in San Salvador estimates that up to 94% of El Salvador has some gang presence, including MS-13 presence, meaning most areas of the country are believed to have a gang presence. **[REDACTED]** including proper adjudication of U.S. visa applications.

10. The FPU Memorandum was prepared by personnel at the FPU at the U.S. Embassy in San Salvador. The Memorandum is based on an interview of Mr. Ascencio Cordero and an investigation **[REDACTED]** The information contained in the Memorandum, **[REDACTED]** must be intensely protected **[REDACTED]**[REDACTED] **[REDACTED]**

11. The Memorandum and the Advisory Opinion reflect FPU **[REDACTED]**

12. **[REDACTED]**

[REDACTED] **[REDACTED]**

13. **[REDACTED]**[REDACTED] **[REDACTED]**

14. **[REDACTED]** This would severely impact consular officers' ability to properly apply the INA and pose a risk to national security by allowing members of transnational organized criminal groups to circumvent the law and enter the United States.

15. Beyond depriving consular officers of information that would allow them to determine if an alien is ineligible for a U.S. visa, **[REDACTED]**

16. **[REDACTED]**

17. The information set forth in the Memorandum and Advisory Opinion **[REDACTED]** would frustrate implementation of the INA, a law that was enacted to bar the entry of certain aliens into the United States. Such evasion of the INA would create a national security vulnerability. **[REDACTED]**

18. The CCD is a non-public database used to administer and enforce U.S. immigration laws and to prevent and track fraud. It is this database that contains the Memorandum and Advisory Opinion. The CCD is used for official purposes by the Department **[REDACTED]** Access to the CCD is tightly restricted, and its combined applications and databases are protected; **[REDACTED]** The database is a crucial law enforcement tool, used to administer and enforce U.S. immigration law, to assess an alien's visa eligibility under the INA and other applicable laws, and to prevent and track fraud by recording information received by consular officers regarding aliens who are ineligible for visas and inadmissible to the United States. Revealing infor-

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[REDACTED] **[REDACTED]**

mation contained in the CCD would allow aliens to defeat fraud detection efforts and conceal derogatory information relevant to their eligibility for a visa.

19. The CCD records in this case contain details of the consular officer's adjudication of Mr. Ascencio Cordero's visa application. These records pertain directly to the issuance or refusal of a visa to enter the United States. **[REDACTED]** Accordingly, the disclosure of the CCD records would impede correct and secure visa adjudications and could reasonably be expected to risk circumvention of the law.

20. Based upon my professional experience, I have concluded that such fraud and risk to national security are a reasonable and justified concern. My office assists consular officers in investigating and determining when an alien may be ineligible for a visa based on any provision of U.S. law. Both in my work in my current office and as a consular officer, I have encountered aliens who have altered their representations about their memberships, affiliations, and activities after being denied a visa.

21. In short, any further disclosure of material related to the immigrant visa application of Mr. Ascencio Cordero, including the Memorandum from the Fraud Prevention Unit and the Advisory Opinion, could reasonably be expected to reveal law-enforcement sensitive information, techniques, and procedures, and could reasonably be expected to risk national security, **[REDACTED]** and circumvention of the law by visa applicants.

I declare under the penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge.

Executed this 6 day of May, 2020, at Washington, D.C.

[REDACTED]
[REDACTED] International Division
Office of Fraud Prevention Programs
Bureau of Consular Affairs
U.S. Department of State

Embassy of the United States of America
Fraud Prevention Unit

October 28, 2015

MEMORANDUM

TO: [REDACTED]

THROUGH: [REDACTED] Fraud Prevention Manager **[REDACTED]**

FROM: [REDACTED]

SUBJECT: Luis Ernesto Ascencio Cordero

REF: Possible Gang Association

IV Case #: SNS2013690038

CASE REFERRED TO FPU ON: August 20, 2015

FINDINGS: Fraud is Indicated

Per Officer's notes: Still pending meds and **[REDACTED]** FPU would like to do an interview once the meds have been received. Returned passport to applicant. Once meds are here, please schedule a follow up interview with FPU.

During the interview, **[REDACTED]**

[REDACTED – 5 PAGES]

United States Department of State—
Bureau of Consular Affairs

SAO Response
[REDACTED]

Sensitive But Unclassified (SBU)—Information Protected under INA 222(f) and 9 FAM 40.4: This information "shall be considered confidential" per Section 222(f) of the Immigration and Nationality Act (INA) [8 U.S.C. Section 1202]. Access to and use of such information must be solely for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States under INA 222(f) and 9 FAM 40.4. Do not access this information in anything other than an official capacity, and do not share it without the permission of the Department of State. If this record is for Visa Class LPR, the subject of the record is a lawful permanent resident of the U.S., and the personally identifiable information (PII) contained in the record is subject to the Privacy Act of 1974 and must be protected in accordance with those provisions.

SAO Response

MRN Number: SNS0000NWT01

VISTA RESPONSE:

Response User: [REDACTED]

Date Response Received in CCD: 15-JAN-16

Response Text:

Post requests guidance regarding whether the applicant is ineligible under INA 212(a)(3)(A)(ii) (?3A2?) based on possible membership in the Central American transnational organized street gang Mara Salvatrucha or ?MS-13.? Under 9 FAM 302.5-4(B)(2)(a), an alien is ineligible under 3A2 when they are an active member of a Central American transnational organized street gang. The adjudicating officer must make gang membership determinations on a case-by-case basis, and in this case the Department concurs with post's finding of ineligibility under 3A2. Active membership in a transnational organized street gang can reasonably be considered to involve a permanent association with criminal activities for purposes of 3A2 ineligibility determinations. [REDACTED] Additionally, the following factors can support a finding that the applicant is a gang member: [REDACTED] The consular officer should evaluate all relevant factors, including those on this list and local indicia from interviews, and should consider the existence of multiple factors to be especially compelling evidence of gang membership. In this case, the consular officer identified several facts that form the basis of reasonable grounds to believe that the applicant is a member of MS-13 and thus is likely to engage in unlawful activity in the United States. According to the factual findings in this case: [REDACTED] For these reasons, the Department concurs in a finding of ineligibility under 212(a)(3)(A)(ii) based on the applicant's active membership in a street gang. Once an applicant is determined to be an active member of a gang as described here, he is considered to remain a member until and if post finds clear and convincing evidence that he is no longer such a member.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CV 17-00037-AS

SANDRA MUNOZ, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.,
DEFENDANTS

Jan. 6, 2021
Los Angeles, California

TELEPHONIC HEARING

APPEARANCES:

FOR THE PLAINTIFFS:

SANDRA MUNOZ, ET AL.:
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ALAN R. DIAMANTE
ATTORNEYS AT LAW
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WEINBERG ROGER & ROSENFELD APC
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FOR THE DEFENDANTS:

UNITED STATES DEPARTMENT OF STATE, ET AL.:
DEPARTMENT OF JUSTICE
CIVIL DIVISION—OFFICE OF IMMIGRATION LITIGATION

BY: JOSHUA SAMUEL PRESS
TRIAL ATTORNEY
BEN FRANKLIN STATION
P.O. BOX 868
WASHINGTON, D.C. 20044

* * * * *

[25]

THE COURT: OKAY.

ALL RIGHT. MR. PRESS, DO YOU WANT TO ADD ANYTHING?

[26]

MR. PRESS: YES, YOUR HONOR.

SO, FIRST OFF, I DO WANT TO SORT OF GO BACK TO THE—WHETHER THIS WAS—THE TATTOOS WERE CONSIDERED OR WHETHER THEY WERE THE BASIS.

I THINK THAT I MAY HAVE BEEN A LITTLE TOO BLUNT WITH THE EARLIER HEARING THAT OPPOSING COUNSEL REFERENCED ON THAT.

I DO KNOW—AND THAT THE INTERROGATORY RESPONSES THAT WE DID SUBMIT BEFORE THE COURT FILED ALONG WITH OUR

MOTION FOR SUMMARY JUDGMENT—DOES INDICATE THAT THE TATTOOS WE'LL CONSIDER. AND THAT'S INDICATED BY PLAINTIFF'S INTERROGATORIES QUESTION WAS DID YOU CONSIDER THE EXPERT OPINION ON THE TATTOOS. THE ANSWER BY THE STATE DEPARTMENT AND THE CONSULAR OFFICER WAS YES.

AND LIKEWISE AS YOUR HONOR WAS GETTING AT WITH THE QUESTIONING OF MR. LEE, THE LAW ENFORCEMENT AUTHORITIES WHO GAVE US THAT INFORMATION WITH RESPECT TO THE MEMBERSHIP IN MS-13 BY MR. ASENCIO-CORDERO, WE DO NOT WANT TO DISCLOSE WHO OR WHAT AGENCY THAT IS.

AND THE SIMPLE FACT IS MOST MEMBERS OF TRANSNATIONAL GANGS HAVE NOT BEEN CONVICTED OR HAVE NOT BEEN ARRESTED.

I WANT TO POINT OUT—I MEAN, I'M NOT COMPARING MR. ASENCIO-CORDERO TO MR. AL CAPONE, BUT AL CAPONE WAS ONLY CONVICTED OF TAX EVASION DURING LATE IN HIS LIFE.

YET, I DO THINK THAT THE UNITED STATES GOVERNMENT HAD SUFFICIENT REASON TO BELIEVE THAT HE WAS CONNECTED WITH THE [27] MAFIA AT THE TIME OF THAT TAX EVASION ARREST AND CONVICTION.

SO, YOU CAN HAVE INFORMATION. AND TO COME TO THIS SORT OF CONCLUSION BASED—AND THEREFORE HAVE A REASON TO BELIEVE WITH THE LANGUAGE SET AS IN THE STATUTE AND IN THE CASE LAW. BUT

THERE'S NOT A SPECIFIC CITED VIDEOTAPED EVIDENCE WHICH ASSUMES SEEMINGLY WHAT OPPOSING COUNSEL IS SORT OF DEMANDING HERE WITH SAYING THAT THAT WAS JUST DISCUSSED IN THE COLLOQUY BETWEEN YOUR HONOR AND OPPOSING COUNSEL.

I THINK IF SOMEONE TELLS YOU—IF A POLICE OFFICER TELLS YOU I KNOW THAT GUY. HE'S A MEMBER OF MS 13. THAT IS A SPECIFIC ENOUGH FACTUAL PREDICATE TO COME TO THE FACTUAL CONCLUSION—TO USE YOUR HONOR'S TERMINOLOGY—THIS HEARING—THAT THAT MEMBER—THAT PERSON IS A MEMBER OF DOMESTIC TERRORISM.

AND THAT IS EXACTLY WHAT WE'VE TOLD PLAINTIFFS IN THIS CASE, WHAT WE HAVE TOLD YOUR HONOR, AND WHAT WE ARE BASING THE CONSULAR—THE VISA DENIAL IN THIS CASE UPON.

THAT IS MORE THAN WHAT WAS PROVIDED IN DIN. IN DIN I WANT TO ALSO FLAG—AND IT ALSO—ALMOST ALL OF THESE OTHER CIRCUIT LEVEL CASES THE PLAINTIFFS ARE ALMOST ALWAYS THE ONES WHO COME FORWARD SAYING IS THIS THE REASON WHY YOU DENIED MY VISA.

AND THEN IT WAS, WELL, IS IT BECAUSE I—I USED TO WORK FOR THE TALIBAN.

THE UNITED STATES GOVERNMENT NEVER ACTUALLY ACCEPTED [28] THAT. NEVER SAID ANYTHING ABOUT THAT. IT WAS ALWAYS THE

PLAINTIFFS WHO HAD COME FORWARD WITH THAT.

SO, IT'S NOT UNUSUAL FOR US TO NOT DISCLOSE OUR SOURCES OR SPECIFIC FACTUAL UNDERPINNINGS.

WHAT WE DO DISCLOSE IS THE FACTUAL CONNECTION FOR THE PURPOSES OF CARDENAS TO GET TO THE STATUTORY SUBSECTION. THAT'S NOT UNUSUAL.

AND I THINK THE CONCERN THAT THE PANEL HAD IN CARDENAS WAS COULD THE EXECUTIVE BRANCH JUST DO WHAT OPPOSING COUNSEL IS SAYING AT THE BEGINNING OF HIS ARGUMENT THERE—JUST SAY WILLY-NILLY I'M POINTING AT THIS SPECIFIC PROVISION OF THE I.N.A. AND THAT'S IT.

THE ANSWER TO THAT IS NO UNDER CARDENAS. THERE HAS TO BE SOME SORT OF FACTUAL NEXUS. THAT FACTUAL NEXUS HAS BEEN PROVIDED IN THIS CASE SINCE IT HAPPENS TO BE THE EXACT SAME FACTUAL NEXUS THAT WAS AT ISSUE IN CARDENAS.

AND THE FACT OR THE—THE ABSENCE IN THIS CASE THAT WE HAVE NOT PROVIDED WHO EXACTLY OUR SOURCES WERE TO COME TO THE FACTUAL CONCLUSION—TO USE YOUR HONOR'S TERMINOLOGY—THAT MR. ASENCIO-CORDERO IS A MEMBER OF A MS 13 SHOULD NOT BE THOUGHT OF AS SOME SORT OF UNDERHANDED THING THAT MORE IS DEMANDED BECAUSE THAT WOULD BE COUN-

TERING EXACTLY WHAT WAS PUT FORWARD BY THE COURT IN MANDEL.

ALSO I WANT TO FLAG THAT IN MANDEL ITSELF, THERE WAS A DISPUTED FACT. IT WAS DISPUTED AS TO WHETHER DR. MANDEL HAD [29] VIOLATED THE TERMS OF HIS VISAS PRIOR TO ASKING FOR THE WAIVER FROM ATTORNEY GENERAL KLEINDIENST AT THAT TIME. IT WAS A DISPUTE. THEY DISAGREED. AND THAT IS CONFIRMED BY THE ORAL ARGUMENT WHERE PLAINTIFF'S COUNSEL IN THAT CASE WAS BASICALLY COMPLAINING AT THE —TO THE VERY END OF HIS ARGUMENT ABOUT THAT, SAYING HE DID NOT—HE DID NOT VIOLATE TERMS OF HIS VISAS BEFORE. THAT WAS PRETENSE.

BUT THE COURT WAS CRYSTAL CLEAR IN ITS DECISION THAT YOU CANNOT LOOK BEHIND THAT EVEN IF THERE'S AN ALLEGATION IT IS PRETENSE.

AND TO BE CLEAR HERE, THERE HAS NOT BEEN AN ALLEGATION THAT THERE'S ANY PRETENSE.

CONSULAR OFFICERS, THE FACT IS THEY'RE CONFRONTED WITH LIMITED INFORMATION AND THEY HAVE TO ASSESS THAT LIMITED INFORMATION.

WHEN THEY HEAR FROM LAW ENFORCEMENT AUTHORITIES—WHOM THEY TRUST—AND THEY DON'T HAVE TO TRUST ALL LAW ENFORCEMENT AUTHORITIES—BUT WHEN THEY HEAR FROM THEM THEY CONSIDER

THAT INFORMATION AND THEY COME TO A CONCLUSION. THE CONCLUSION HERE WAS I THINK HE'S A MEMBER OF MS 13. THAT FALLS IN THE THIS STATUTORY SUBSECTION, AND THAT'S CONFIRMED BY THE NINTH CIRCUIT. THEREFORE, HE IS INADMISSIBLE. BECAUSE WE ARE MAKING A PREDICTED JUDGMENT THAT HE WILL IN THE FUTURE POTENTIALLY COMMIT UNLAWFUL ACTIVITIES.

SOMETIMES THEY HAVE A VERY CRYSTAL CLEAR FACTUAL [30] REASON. TO GIVE YOU AN EXAMPLE. THIS PROVISION SOMETIMES GETS USED AGAINST PERSONS WHO WANT TO COME INTO THE COUNTRY TO MARRY SOMEBODY. AND YOU MIGHT THINK, WELL, THAT'S KIND OF WEIRD BECAUSE THAT SEEMS LIKE A PERFECTLY INNOCENT REASON. BUT IF THEY SAY I WANT TO COME INTO THE COUNTRY TO MARRY MY SISTER, THAT RAISES A RED FLAG TO THE CONSULAR OFFICER.

MAYBE THAT VIOLATES INCEST LAWS IN THAT STATE. AND THEY GO TO THE LAW OF THE STATE WHERE THE PERSON SAYS THAT HE OR SHE WANTS TO IMMIGRATE. AND THEN THEY CONFIRM WHETHER OR NOT THAT WOULD VIOLATE THE LAW. AND THEY COULD SAY, WELL, YOU SAID THAT YOU WANTED TO DO THAT. THAT'S SUFFICIENT REASON TO BELIEVE. THEREFORE WE THINK YOU WILL VIOLATE THIS STATUTORY SUBSECTION. YOU WILL POTENTIALLY COMMIT UNLAWFUL ACTIVITY.

BUT IT'S NOT NORMAL—WHEN IT'S CRYSTAL CLEAR IS THAT NORMALLY THE SOURCES FOR BELIEVING SOMEONE TO BE A MEMBER OF A GANG NEED TO BE MORE PROTECTED THAN THAT. THEY'RE NOT USUALLY AS BLATANT AS THAT. AND THAT'S WHY WE HAVE THE FACTUAL SITUATION THAT WE HAVE IN THIS CASE.

THE COURT: OKAY.

I UNDERSTAND THE ARGUMENT.

IF THERE'S NOTHING FURTHER, THEN, THIS MATTER IS SUBMITTED. AND I'LL ISSUE A DECISION.

ALL RIGHT.

MR. LEE: YOUR HONOR—

THE COURT: YES.

MR. LEE: —MAY I JUST POINT THIS COURT'S ATTENTION VERY BRIEFLY TO TWO QUICK THINGS.

THE COURT: YES. GO AHEAD.

MR. LEE: AT DOCKET 82 AT PAGE 11, THIS COURT MADE THE POINT THAT—CORRECTLY THAT THE MERE EXISTENCE OF RANDOM TATOOS DOES NOT PROVIDE A FACIAL CONNECTION TO MS 13 OR OTHER GANG MEMBERSHIP.

AND, THEN, THE NEXT SENTENCE IS REFERENCING IN MULTIPLE OTHER CASES WHERE COURTS HAVE FOUND THAT THE GOVERNMENT'S DENIAL OF THE VISA WAS BONA

FIDE, THE RECORD HAS INCLUDED THE DISCRETE FACTS, NOT A MERE CONCLUSION.

AND, THEN, SECONDLY, I'M LOOKING AT THE INTERROGATORIES. UNLESS I'M MISSING SOMETHING, AND I ADMIT I'M READING THIS AGAIN NOW, YOU KNOW, IN THE MIDDLE OF THIS HEARING, BUT INTERROGATORY NUMBER 4 IS THE ONLY REFERENCE TO A TATOO. AND ACTUALLY THE ONLY TIME THE WORD "TATOO" COMES UP IS IN THE QUESTION. IN THE RESPONSE IT DOES NOT APPEAR TO ME BASED ON MY READING NOW THAT THERE'S ANY STATEMENT THAT THE TATOO WAS THE BASIS FOR THE DENIAL. AND I THINK THAT MR. PRESS'S STATEMENT AT THE LAST HEARING CONFIRMED THAT.

THANK YOU, YOUR HONOR.

THAT'S ALL.

THE COURT: OKAY.

ALL RIGHT. THANK YOU.

ALL RIGHT. LET ME ASK YOU, MR. PRESS, ARE YOU SAYING [32] THAT THE CONSULAR OFFICER RECEIVED INFORMATION FROM LAW ENFORCEMENT THAT IDENTIFIED MR. ASENCIO AS A GANG MEMBER. OR THAT THEY RECEIVED INFORMATION FROM LAW ENFORCEMENT WHICH LED THE CONSULAR OFFICER TO BELIEVE THAT HE WAS A GANG MEMBER?

MR. PRESS: THE FORMER.

I DO ALSO WANT TO FLAG THAT I'M NOT SURE—I MEAN, I'M TRYING TO SPLIT HAIRS HERE WITH RESPECT TO WHAT MR. LEE JUST SAID ABOUT TATOOS. BUT I THINK WE HAVE TO UNDERSTAND FROM A CONSULAR OFFICER'S PERSPECTIVE IN EL SALVADOR GIVEN THE PREVALENCE OF MS 13 YOU MAY SEE SOMEONE COME WITH THE LINE OF TATOOS. THEY LOOK SUSPICIOUS OR MORE SUSPICIOUS THAN THE AVERAGE PERSON WHO DOESN'T HAVE TATOOS.

THAT LEADS THE CONSULAR OFFICER INTO AN INQUIRY WHERE THEY THEN TALK TO LAW ENFORCEMENT PARTNERS OR DOMESTIC LAW ENFORCEMENT AGENCIES. AND THEY CONDUCT AN INQUIRY ON THE INTERVIEWEE AT THAT POINT.

AND, SO—

THE COURT: OKAY.

MR. PRESS: —I AM SAYING THAT THE LAW ENFORCEMENT OPERATIONS IDENTIFIED MR. ASENCIO-CORDERO AS AN MS 13 MEMBER. AND BASED ON THAT, THE CONSULAR OFFICER CAME TO THE SAME CONCLUSION AS WELL AS OTHER INTERVIEW FACTORS SUCH AS THE TATOOS THAT LED HIM DOWN THAT GARDEN PATH TO DO THE INQUIRY IN THE FIRST PLACE.

THE COURT: AND, SO, WITH RESPECT TO THE TATOOS, ARE [33] YOU SAYING THAT THEY WERE CONSIDERED BY THE CONSULAR OF-

FICER OR 2 THAT THEY WERE DETERMINED TO BE EVIDENCE OF GANG MEMBERSHIP?

MR. PRESS: I'M SAYING THEY WERE CONSIDERED—I THINK IT'S DIFFICULT TO DISTINGUISH IT. AND I DON'T KNOW EXACTLY WHAT WAS IN THE CONSULAR OFFICER'S MIND. I THINK THEY WERE CONTRIBUTORY—CONTRIBUTED TO THE SAME CONCLUSION.

BUT THEY CERTAINLY I KNOW FOR A FACT THAT THEY USED THAT TO JUSTIFY GOING FURTHER WITH RESPECT TO THEIR INVESTIGATION OF MR. ASENCIO.

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