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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Carmen Figueroa Otero,
Plaintiff,
vs.
Jeh Johnson, Secretary for the
Department of Homeland Security, et al.,
Defendants.

No. CIV 16-090-TUC-CKJ

ORDER

Pending before the Court is the Motion for Preliminary Injunction and/or Temporary Restraining Order (Doc. 25) filed by Plaintiff Carmen Figueroa Otero (“Otero”). A response has been filed (Doc. 27). The parties presented argument on October 26, 2016, and the Court took the matter under advisement. In light of the scheduled interview of Otero, on October 27, 2016, this Court issued a summary (Doc. 29) Order granting the request for Temporary Restraining Order and setting this matter for hearing on the request for Preliminary Injunction.¹ The summary Order informed the parties a more detailed order would follow. This is that Order. Additionally, this Order modifies the specific injunctive relief ordered in its summary Order (Doc. 29).

Additionally, as the issues presented in the Motion to Dismiss (Doc. 17) and the Motion for Leave to File Second Amended Complaint (Doc. 18) are so interrelated to the

¹A Motion to Continue Hearing on Preliminary Injunction has been filed by Defendants. The Court’s staff has been in contact with counsel to arrange for the rescheduling of the hearing. The hearing on the request for Preliminary Injunction is reset herein.

1 issues presented in the Motion for Preliminary Injunction and/or Temporary Restraining
2 Order (Doc. 25), the Court finds it is appropriate to also address these pending motions
3 herein.

4
5 *Factual and Procedural Background*

6 On February 16, 2016, Otero filed a Complaint for Declaratory and Injunctive Relief
7 against Jeh Johnson, Secretary for the Department of Homeland Security, Leon Rodriguez,
8 Director for the United States Citizenship and Immigration Services ("CIS"), John Kramer,
9 District Court Director for the Phoenix CIS, Julie Hashimoto, Director for the Tucson Field
10 Office of CIS (collectively, "Defendants"). Otero alleges she believed in good faith she was
11 a U.S. citizen until approximately May 2013. She further alleges she should be granted
12 classification as an "immediate relative" of her husband, Mr. Alberto Otero, who is a U.S.
13 citizen and resident of Marana, Arizona. An "immediate relative" of a U.S. citizen is
14 instantly "eligible to receive an immigrant visa," as long as she can demonstrate she "was
15 inspected and admitted or paroled into the United States." See INA § 201(b), 8 U.S.C. §
16 1151(b); INA § 245(a), 8 U.S.C. 1255(a).

17 The United States Department of Homeland Security ("DHS"), Citizenship and
18 Immigration Services, Tucson Field Office ("TFO"), denied Otero's application on September
19 28, 2015, stating it was denying the application because Otero had not been "inspected and
20 admitted or paroled into the United States," because she had used her improperly-issued U.S.
21 passport to gain entry into the country as a U.S. citizen in May 2013. The decision denying
22 the application states, *inter alia*:

23 You indicated on your Form I-485 that your last entry into the United States was at
24 or near San Ysidro, California on or about May 2013, using a United States Passport.
25 At that time, you were not inspected, admitted, or paroled. Because you are unable
26 to show that you were inspected and admitted or paroled, or that you are exempt from
27 that requirement, you are ineligible as a matter of law to adjust status in the United
28 States. You have not established that you are eligible for adjustment under INA
245(i). Therefore, USCIS must deny your Form I-485. See INA sections 245(a) and
245(i); 8 CFR 245.10.

The Supreme Court has recognized that a United States citizen is not subject to the
same scrutiny and requirements as an alien during the process of inspection and

1 admission. *Reid v. INS*, 420 U.S. 619, 624-25 (1975). Immigration authorities more
2 closely examine the right of aliens to enter the country and they require and obtain
3 information and records, such as fingerprints and registration forms, to help keep
4 track of aliens who have been admitted after they have entered the country. *Id.* at 625.
5 Aliens who enter by falsely claiming to be a United States citizen significantly
frustrate the process for inspecting incoming aliens and effectively put themselves in
a position that is “comparable to that of a person who slips over the border and who
has, therefore, clearly not been inspected.” *Id.* (quoting *Goon Mee Heung v. INS*, 380
F.2d 236, 237 (1st Cir. 1967)).

6 The BIA noted in *Quilantan*, 25 I&N Dec. at 293, that an immigration officer is not
7 empowered to inspect a United States citizen in the same manner as an alien.
8 Acknowledging this difference in treatment between citizens and aliens, the BIA held
9 there that an alien who entered the United States under a false claim of United States
10 citizenship cannot be considered to have been inspected. *Id.* (citing *Reid v. INS*, 492
11 F.2d 251, 255 (2d Cir. 1974); *Matter of S-*, 9 I&N Dec. 599, 600 (BIA 1962)). **There
12 is no reason to diverge from the long-standing rule that an alien who enters the
United States by falsely claiming United States citizenship, knowingly or
otherwise, effectively eludes the procedural regularity of inspection by an
immigration officer. See *Reid v. INS*, 420 U.S. at 624-25; *Matter of F-*, 9 I&N
Dec. 54 (Reg'l Comm'r, Ass't Comm'r 1960). It must therefore hold that such
an entry does not constitute an admission as that term is defined in section
101(a)(13)(A) of the Act.**

13 The evidence of record shows that, when you filed your application, you were
14 present in the United States contrary to law because you were present without
15 admission or parole. You are not authorized to remain in the United States and should
16 make arrangements to depart as soon as possible. Failure to depart may result in your
being found ineligible for immigration benefits and inadmissible to the United States
in the future. See section 212(a)(9)(B) of the INA.

17 Motion for Leave to File Second Amended Complaint, Exhibit I, Attachment 1 (Doc. 18-10)
18 (emphasis added).²

19 Otero requested the matter be reopened or reconsidered on October 16, 2015.
20 Defendants denied Otero's request on December 18, 2015. That decision states *inter alia*:

21 . . . The denial did not address a “knowingly” false claim to United States citizen and
22 denial was not based on a false claim to United States citizen, rather that applicant
23 could not have been inspected and admitted because the entry was as a United States
citizen. It should be noted that even though it was a false claim to United States
citizenry the applicant has not been charged or found inadmissible for false claim to
United States citizen.

24 * * * * *

25 The denial did not contain Title 8 of the Code of Federal Regulations, Part 1235 –

26
27 ²Otero alleges a large portion of this decision is taken from *Matter of Pinzon*, 26 I. &
28 N. Dec. 189, 191 (BIA 2013), with a modification that alters the meaning of *Pinzon*. The
bolded portion is not included in *Pinzon*.

1 Inspection of Persons applying for admission which states:

2 Title 8 – Aliens and Nationality [8 CFR]

3 PART 1235 – INSPECTION OF PERSONS APPLYING FOR ADMISSION [8 CFR
4 1235]

5 (b) *U.S. citizens.* A person claiming U.S. citizenship must establish that fact to the
6 examining officer’s satisfaction and must present a U.S. passport if such passport is
7 required under the provisions of 22 CFR part 53. If such applicant for admission fails
8 to satisfy the examining immigration officer that he or she is a U.S. citizen, **he or she**
9 **shall thereafter be inspected as an alien.**

10 Counsel has not provided any legal basis identifying that aliens and United States
11 citizens are inspected and admitted in the same manner. In fact each of the precedent
12 decisions glaringly outline the significant difference in inspection and admission of
13 aliens as related to entry of a United States citizen. Declaring the entry to be regular
14 is a disregard for the laws pertaining to aliens and those relegated for United States
15 citizens.

16 * * * * *

17 Motion for Leave to File Second Amended Complaint, Exhibit J (Doc. 18-11).

18 On June 15, 2016, Defendants issued a decision that states:

19 . . . USCIS moves to grant the Service Motion to Reopen under 8 CFR 103.5(a)(5)
20 based on the failure to establish whether your false claim to United States citizenship
21 was made knowingly. Thus, the following order is entered:

22 ORDER: It is ordered that the motion be granted and the I-485 application be
23 returned to a pending status.

24 Motion for Leave to File Second Amended Complaint, Exhibit K (Doc. 18-12). Otero asserts
25 Defendants had scheduled a re-interview of her for October 28, 2016. Otero asserts:

26 Subjecting Ms. Figueroa Otero to another interview on the subject of whether she
27 made a knowing false claim to citizenship would transform questioning into
28 interrogation, and would change the nature of the administrative proceedings from
non-adversarial to adversarial, which is prohibited. *See, e.g.*, USCIS Adjudicator’s
Field Manual (“AFM”), Chapter 15.1(a) (2014) (“Interviews conducted by
adjudication officers are non-adversarial in nature, as opposed to a court proceeding
involving two attorneys where each advocates a particular position.”); *see also id.*,
Chapter 15.4(a) (“Interview proceedings are not to be adversarial in nature. The
purpose of the interview is to obtain the correct information in order to make the
correct adjudication of the case, not to prove a particular point or to find a reason to
deny the benefit sought. The purpose is to cover (and discover) all the pertinent
information, both favorable and unfavorable to the applicant.”)

29 Proposed SAC (Doc. 24-1), p. 14 (emphasis removed).

30 Otero requests this Court reverse the agency decision not to reopen or reconsider its

1 denial of Otero's adjustment of status application,³ order Defendants to grant Otero's
2 adjustment of status application, and retain jurisdiction during the adjudication of the
3 adjustment of status application in order to ensure compliance with the Court's orders.

4 An Amended Complaint (Doc. 10) was filed. The amendment substituted Al
5 Gallmann for Jon Kramer as a defendant.

6 On June 17, 2016, a Motion to Dismiss Case (Doc. 17) was filed. Defendants assert
7 CIS vacated the challenged denial and reopened Otero's I-485 application. Defendants assert
8 that, because CIS's action is no longer final, it cannot provide the basis for subject matter
9 jurisdiction under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 501, et seq.
10 Defendants also assert the Court cannot grant the requested relief of ordering Defendants to
11 grant Otero's adjustment status because the authority to grant an adjustment of status is
12 within the discretion of the agency, not the district court.

13 On June 21, 2016, Otero filed a Motion for Leave to File a Second Amended
14 Complaint ("SAC") (Doc. 18). The proposed amendments include a claim regarding the
15 reopening of the proceeding by CIS and asking the Court to direct CIS to perform the
16 non-discretionary duty of permitting Otero to submit a brief within 30 days of the service of
17 the CIS motion to reopen her case. Additionally, the request for relief has been modified to
18 correctly seek relief that this Court may provide.

19
20 *Standard for Injunctive Relief*

21 The standard for a temporary restraining order ("TRO") is the same as for a
22 preliminary injunction; a preliminary injunction is "an extraordinary and drastic remedy, one
23 that should not be granted unless the movant, by a clear showing, carries the burden of
24 persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation
25 omitted) (emphasis in original). The Ninth Circuit has adopted two tests a district court must

26
27 ³Defendants granted its own motion to reopen after having denied Otero's request to
28 reopen.

1 use when deciding whether to grant a preliminary injunction. *See Alliance for the Wild*
2 *Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (finding District Court "made an
3 error of law" by employing only one test when denying preliminary injunction). First, a
4 plaintiff can attempt to satisfy the four-part test adopted by the Supreme Court in *Winter v.*
5 *Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). Under the *Winter* test, a
6 plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer
7 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his
8 favor, and that an injunction is in the public interest." *Id.* at 20. If a plaintiff cannot meet the
9 *Winter* test, he may attempt to satisfy the second test by showing there are "serious questions
10 going to the merits," the balance of hardships tips sharply in his favor, there is a likelihood
11 of irreparable injury, and the injunction is in the public interest. *Cottrell*, 632 F.3d at 1135.
12 This latter "sliding scale approach" allows a plaintiff to make a lesser showing of likelihood
13 of success provided he will suffer substantial harm in the absence of relief. *Id.* at 1133. The
14 Ninth Circuit has explained that "these two alternatives represent 'extremes of a single
15 continuum,' rather than two separate tests. Thus, the greater the relative hardship to the
16 moving party, the less probability of success must be shown." *Immigrant Assistant Project*
17 *of Los Angeles County Fed'n of Labor (AFLCIO) v. INS*, 306 F.3d 842, 873 (9th Cir. 2002)
18 (citation omitted).

19 TROs are governed by Fed.R.Civ.P. 65(b). A TRO lasts for only 14 days and may
20 only be extended an additional 14 days for good cause shown or upon consent of the
21 opposing party. Fed.R.Civ.P. 65(b). If a TRO is granted, the motion for a preliminary
22 injunction must be heard at the earliest possible time and takes precedence over all matters
23 except older matters of the same character. *Id.*

24 Under the rule, a TRO may not be issued without imposition of a bond or other
25 security upon the applicant. Fed.R.Civ.P. 65(c). The district court, however, has wide
26 discretion in setting the amount of the bond. *Connecticut General Life Ins. Co. v. New*
27 *Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003). In fact, the amount may be set
28 at zero if there is no evidence the party will suffer damages from the injunction. *Id.*

1 *Motion for Preliminary Injunction and/or Temporary Restraining Order (Doc. 25)*

2 Under the APA, agency action is subject to judicial review only when it is either: (1)
3 made reviewable by statute; or (2) a "final" action "for which there is no other adequate
4 remedy in a court." 5 U.S.C. § 704. As there is no statute that authorizes judicial review
5 over denials of status adjustment, the issue is whether CIS's denial of Ortero's request for an
6 adjustment of status has no other adequate remedy. Defendants concede subject matter
7 jurisdiction existed at the time of the filing of the action, but assert that, because the denial
8 was vacated, there is no denial of adjustment of status that now confers jurisdiction.
9 Specifically, Defendants assert there is no final agency action that is subject to review.
10 *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S.
11 172, 193 (1985) ("The finality requirement is concerned with whether the initial decision
12 maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.")

13
14 *Likelihood of Success – Subject Matter Jurisdiction*

15 Defendants assert that, although jurisdiction is usually determined from the filing of
16 the relevant complaint, after-arising events can defeat jurisdiction by negating the ripeness
17 of a claim. *Hose v. United States Immigration & Naturalization Serv.*, 180 F.3d 992, 996
18 (9th Cir. 1999); *see also, Cabaccang v. United States Citizenship & Immigration Servs.*, 627
19 F.3d 1313, 1317 (9th Cir. 2010) (holding that CIS's initiation of removal proceedings while
20 a complaint was pending rendered the claims not ripe for judicial review and stating that "[t]o
21 hold otherwise would allow plaintiffs to confer jurisdiction on the federal courts simply by
22 racing to the courthouse before the government initiates removal proceedings.").

23 Further, Defendants point out that the regulation permits them to *sua sponte* reopen
24 a proceeding. Indeed, the regulation is very clear that generally the proceeding can be
25 reopened *sua sponte* by Defendants. See 8 C.F.R. § 103.5(a)(5); *Net-Inspect, L.L.C. v.*
26 *United States Citizenship and Immigration Services*, C14-1514-JLR, 2015 WL 880956, at
27 *5 (W.D. Wash. Mar. 2, 2015) ("Contrary to Net-Inspect's contention, USCIS's regulations
28 permit the agency to reopen and reconsider petitions both on its own motion and on motions

1 by affected parties."); *True Capital Mgmt., LLC v. United States Dep't of Homeland Sec.*, No.
2 13-261-JSC, 2013 WL 3157904, at *3 (N.D. Cal. June 20, 2013) (finding that USCIS's
3 regulations permit it to reopen a petition *sua sponte* and issue a request for evidence).
4 However, there is a question whether the general rule which prohibits reopening after judicial
5 review is sought nullifies Defendants' actions.

6 Also, Defendants assert the proposed SAC does not cure the fatal flaw of this action
7 – that there is no final agency action for the Court to review. *See True Capital Mgmt., LLC*,
8 2013 WL 3157904, at *4 (concluding that the court did not have jurisdiction under the APA
9 after CIS reopened plaintiff's visa application *sua sponte* "because there is no longer a final
10 agency decision to review."); *see also Bhasin v. United States Dep't of Homeland Sec.*, 413
11 F. App'x 983, 985 (9th Cir. 2011) (determining that CIS's *sua sponte* reopening of an I-130
12 visa petition rendered non-final the agency's prior order denying the petition and holding that
13 in such circumstances "the denial is not a 'final agency action' under 5 U.S.C. § 704 and is
14 not subject to judicial review under the Administrative Procedure Act."). If, however,
15 Defendants did not have the authority to reopen the proceeding after judicial review was
16 initiated, as discussed *supra*, there is still a final agency action in place in this case.

17 As to whether the matter could be reopened after judicial review was sought, Otero
18 asserts *Cabaccang v. USCIS*, 627 F.3d 1313, 1317 (9th Cir. 2010), prohibits Defendants from
19 reopening Otero's application, and therefore forcing her to a subsequent interview, without
20 first receiving permission to do so from this Court. Otero asserts that, without pending
21 removal proceedings against Otero, agency action remains final, and exclusive jurisdiction
22 over the matter remains vested in the District Court. *Cabaccang*, 627 F.3d at 1317 ("Without
23 a pending removal proceeding, a denial of status adjustment is final because there is no
24 appeal to a superior administrative authority. On the other hand, when removal proceedings
25 are pending, further administrative relief is available."). Indeed, Otero asserts that cases on
26 point have historically disapproved of agency attempts to "divest the federal courts of
27 jurisdiction by unilaterally reopening its administrative proceedings." *Goede v. Colvin*,
28 CV-09-01777-SMS, 2013 WL 1731070, *1 (E.D. Cal. 2013) (citing *Doctors Nursing &*

1 *Rehab. Ctr. v. Sebelius*, 613 F.3d 672, 676-77 (7th Cir. 2010); *Jackson v. Nicholson*, 449
2 F.3d 1204, 1208 (Fed. Cir. 2006); *Cerullo v. Derwinski*, 1 Vet. App. 195, 196-99 (1991)).
3 "The reason is simple: otherwise, 'a litigant could deprive the court of jurisdiction at any and
4 every critical juncture.'" *Goede*, 2013 U.S. Dist. LEXIS 57638 at 4 (quoting *Cochran v.*
5 *Birkel*, 651 F.2d 1219, 1222 (6th Cir. 1981)).

6 Otero cites to the Seventh Circuit Court of Appeals for the assertion that "if
7 jurisdiction exists at the outset of a suit, subsequent procedural events will not divest the
8 court of that original jurisdiction." *Doctors Nursing & Rehab. Ctr.*, 613 F.3d at 677 (citing
9 *Laborers' Pension Fund v. Pavement Maint., Inc.*, 542 F.3d 189, 194 (7th Cir. 2008)). Otero
10 cited to *Doctors Nursing & Rehab. Ctr.* to point out that "Congress has specifically spoken
11 on the issue of when and how the agency can reopen its administrative proceedings after
12 judicial review begins." *Id.* Counsel for Otero stated during argument that there is no similar
13 provision in this immigration context.

14 The *Doctors Nursing & Rehab. Ctr.* court distinguished another Seventh Circuit case,
15 *Gao v. Gonzales*, 464 F.3d 728 (7th Cir. 2006) because "*Gao* was fundamentally a mootness
16 case," and 2) "*Gao* did not establish a general rule that agencies may divest courts of
17 jurisdiction by reopening final decisions." "Rather, *Gao* was careful to justify its holding
18 based on the particulars of the immigration context." *Id.* More importantly, the court further
19 clarified that the "immigration context" of which it spoke referred to the "statutory scheme"
20 that empowered the Board of Immigration Appeals (BIA) "to consider, and decide, the very
21 same issue that was pending before the court." *Id.*

22 Otero argues that the statutory scheme at issue in *Gao*, Part 1003, et seq. of Title 8 of
23 the Code of Federal Regulations, is not the same statutory scheme that applies to this case,
24 Part 103, Subpart A, of Title 8 of the Code of Federal Regulations. Otero points out that the
25 statutory scheme that applies to the BIA is tailored to an "agency" that is, by definition, an
26 administrative law appellate court. Therefore, the BIA's statutory scheme provides greater
27 discretion and power to the BIA to *sua sponte* reopen its own decisions. Otero argues CIS
28 does not enjoy such leeway.

1 Otero also distinguishes the cases relied upon by Defendants. In *True Capital Mgmt.*,
2 when a petition to employ an alien with an H1-B visa by the plaintiff company was denied,
3 plaintiff filed a declaratory judgment action in the federal court. While the action was
4 pending, CIS *sua sponte* reopened the case and issued a formal request for additional
5 evidence ("RFE") pursuant to 8 C.F.R. § 103.2(b)(8)(iii). 2013 U.S. Dist. LEXIS at 3-4, 11.
6 Otero asserts that court's reliance on *Bhasin* and *Cabaccang* was misplaced:

7 In *Bhasin*, the Ninth Circuit considered the question of whether CIS's *sua sponte*
8 reopening of a plaintiff's I-130 visa petition rendered its prior order denying the
9 petition non-final. See *True Capital Mgmt.*, 2013 U.S. LEXIS at 6-7. However, in
10 *Bhasin*, the Ninth Circuit explained that after the underlying proceedings in that case
11 were reopened by CIS, the plaintiff's petitioner wife apparently withdrew her I-130
12 petition upon which plaintiff's claim rested. *Bhasin*, 413 Fed. Appx. 983 at 2. The
13 Ninth Circuit therefore concluded that the withdrawal of the petition mooted
14 challenges to the denial and, as such, "there was no longer a case or controversy
15 sufficient to satisfy Article III standing." *Id.*, 413 Fed. Appx. 983 at 3. *Bhasin*, then,
16 is similar to the Seventh Circuit's opinion in *Gao*, in that the courts in each case
17 upheld the district courts' dismissals of the petitioners' federal lawsuits, not just
18 because the immigration agencies reopened their proceedings, but because there was
19 simply no longer any order left to review. But that is simply not the situation in Ms.
20 Figueroa-Otero's case.

21 Reply to Response to Motion for Leave to File SAC (Doc. 24), pp. 8-9. Further, Otero points
22 out the *Cabaccang* court endorsed the general rule that "district courts lack jurisdiction to
23 review denials of status adjustment if removal proceedings are pending[.]" 627 F.3d at 1317,
24 but also stated that "[w]ithout a pending removal proceeding, a denial of status adjustment
25 is final because there is no appeal to a superior administrative authority. On the other hand,
26 when removal proceedings are pending, further administrative relief is available." *Id.*
27 (citations omitted). Further, Otero asserts the *True Capital Mgmt.* and *Net-Inspect* courts
28 failed to grasp the differences between the immigration context versus the removal context
made in *Gao* and *Cabaccang*.

While Otero's argument appears well-reasoned, the Ninth Circuit Court of Appeals
has not specifically addressed the issue before this Court. Rather, it has recognized further
administrative relief is available if a pending removal proceeding exists. *Cabaccang*, 627
F.3d at 1317 ("Without a pending removal proceeding, a denial of status adjustment is final
because there is no appeal to a superior administrative authority. On the other hand, when

1 removal proceedings are pending, further administrative relief is available."). In doing so,
2 the Ninth Circuit has not discussed the status of a case prior to the initiation of the removal
3 proceeding nor did it discuss the Seventh Circuit cases or their analysis. The conclusion
4 sought by Otero would mean that, when an citizenship/immigration case is relatively new (as
5 in this case), Defendants cannot reopen the matter, but if at some time in the future removal
6 proceedings are initiated, at least one of these same Defendants (or a similarly situated
7 defendant) would be permitted to reopen the matter. Indeed, this matter would then be
8 subject to the BIA, as discussed in *Cabaccang*. As a practical matter, it does not make sense
9 that the matter could not be reopened now, but at some unknown time in the future it could
10 be reopened.

11 However, in *Cabaccang*, the Ninth Circuit did discuss the "crucial" distinction a
12 pending removal proceeding makes:

13 Without a pending removal proceeding, a denial of status adjustment is final because
14 there is no appeal to a superior administrative authority. *Id.*; *see also supra* n. 2. On
15 the other hand, when removal proceedings are pending, further administrative relief
16 is available. [*Pinho v. Gonzales*, 432 F.3d 193, 201–02 (3d Cir. 2005).] Accordingly,
17 we join our sister circuits in holding that district courts lack jurisdiction to review
18 denials of status adjustment if removal proceedings are simultaneously pending.
19 *Howell v. INS*, 72 F.3d 288, 292-93 & n. 5 (2d Cir. 1995); *Randall v. Meese*, 854 F.2d
20 472, 481-82 (D.C.Cir. 1988).

21 *Cabaccang*, 627 F.3d at 1317. The *Pinho* court also discussed the importance of an
22 administrative appeal:

23 [In] this case, *Pinho's* adjustment of status application was not filed because of
24 pending deportation proceedings, but rather because of his marriage to a U.S. citizen.
25 Because the Department of Homeland Security ("DHS") did not provide an avenue
26 for administrative appeal of the AAO decision, *Pinho* had no further opportunity to
27 challenge the legality of the decision within the agency, and would have none at all,
28 were he forced to await deportation proceedings that the agency may or may not
choose to institute.

29 *Pinho v. Gonzales*, 432 F.3d 193, 201 (3d Cir. 2005). The *Pinho* court also recognized that
30 a "ruling that *Pinho* must wait for possible future deportation proceedings in order to
31 challenge the AAO's legal determination would sit ill at ease with *Darby* [*v. Cisneros*, 509
32 U.S. 137, 154 (1993) (agency action is final when the "aggrieved party has exhausted all
33 administrative remedies expressly prescribed by statute or agency rule . . ."). The court also

1 stated:

2 We hold that an AAO decision is final where there are no deportation proceedings
3 pending in which the decision might be reopened or challenged. But even if the
4 possibility of renewing an adjustment application in future deportation proceedings
5 were thought to cast doubt on the finality of an AAO decision, this case falls into one
6 of the categories “in which the interests of the individual weigh heavily against
7 requiring administrative exhaustion,” *McCarthy*, 503 U.S. at 146, 112 S.Ct. 1081,
8 namely, circumstances in which an “indefinite timeframe for administrative action,”
9 *id.* at 147, 112 S.Ct. 1081 results in prejudice to the individual who must await that
10 action. The decision whether or not to institute deportation proceedings is entirely
11 within the discretion of the agency. There are no steps that Pinho can take to force
12 the question in order to have his claim resolved. If the only route to the courts is
13 through deportation proceedings, then the agency retains sole control over whether
14 an individual's purely legal claim – one which has not been made non-reviewable by
15 statute – may ever be brought before the courts. Such a result would be plainly at
16 odds not only with the APA, but also with broader principles of separation of powers.

17 *Pinho*, 432 F.3d at 202 (3d Cir. 2005) (footnotes omitted).

18 Although *Pinho* was not discussing the re-opening of a status of adjustment
19 application, the principles discussed in *Pinho* and approved of in *Cabannag*, including an
20 administrative appellate procedure, indicate the Ninth Circuit has approved the analysis in
21 *Gao* which emphasized the BIA’s authority to decide an issue while it is pending before the
22 Seventh Circuit. There is no similar authority afforded to CIS.

23 Notably, the Ninth Circuit also stated it was joining its “sister circuits in holding that
24 district courts lack jurisdiction to review denials of status adjustment if removal proceedings
25 are simultaneously pending[,]” citing to *Howell* and *Randall*. *Cabaccang*, 627 F.3d at 1317.
26 In *Howell*, that Second Circuit determined that, because deportation proceedings were
27 pending, the district court did not have jurisdiction to review the adjustment of status denial.
28 Additionally, in *Randall*, the D.C. Circuit stated, in affirming the district court’s decision to
dismiss the complaint while deportation proceedings were ongoing, that it was assuring “that
[the] eventual court review will be enlightened by a full record, including the Board of
Immigration Appeals' decision, and that this court avoids premature blockage of, or
interference with, regulatory actions Congress has assigned to other government bodies.”
854 F.2d at 482.

It seems clear the Ninth Circuit’s decision in *Cabannag* relied upon the “crucial”
distinction of the removal or deportation proceeding in determining whether an adjustment

1 of status proceeding is final, rather than a general ongoing “immigration” proceeding as we
2 have here. Therefore, the Court finds it appropriate to interpret the Ninth Circuit’s statement
3 that “[w]ithout a pending removal proceeding, a denial of status adjustment is final because
4 there is no appeal to a superior administrative authority[,]” 627 F.3d at 1317, to apply only
5 to removal or deportation proceedings rather than expand it to include the reopening by CIS
6 of an adjustment of status application. The general rule that an agency may not divest a
7 federal court of jurisdiction by unilaterally reopening its administrative proceedings, *Goede*,
8 2013 WL 1731070 at *1, applies in this case. The Court finds, therefore, Otero has
9 established a likelihood of success in establishing subject matter jurisdiction in this case.

10
11 *Likelihood of Success – Merits of Claim*

12 Otero must also establish a likelihood of success on the merits of her claims to warrant
13 injunctive relief. Otero asserts Defendants misapplied controlling law when it issued its
14 decisions denying her application for adjustment of status and motion for reconsideration.
15 She further asserts Defendants have never denied this.

16 As previously stated, Defendants stated they were denying Otero’s application for
17 adjustment of status because Otero had not been inspected and admitted or paroled into the
18 United States and implies she had used her improperly-issued U.S. passport to gain entry into
19 the country as a U.S. citizen in May 2013. Motion for Leave to File Second Amended
20 Complaint, Exhibit I, Attachment 1 (Doc. 18-10). Defendants did not allege or conclude that
21 Otero had fraudulently used her passport or claimed U.S. citizenship in a knowingly false
22 manner, but based its denial solely on the fact that Otero was not actually entitled to be
23 inspected and admitted as a citizen in May 2013, regardless of her good faith.

24 Although the decisions of Defendants cited to *Matter of Quilantan*, 25 I. & N. Dec.
25 285, 285 (BIA 2010), the decisions did not acknowledge that the *Quilantan* court determined
26 that an unchallenged entry of a person who gives an unknowingly false suggestion or claim
27 of citizenship to a border inspector has long been considered procedurally regular. 25 I &
28 N Dec. at 293; *see also Matter of Arguellini*, 17 I & N Dec. 308 (BIA 1980). In light of this

1 authority, the Court finds Otero has established she is likely to succeed on the merits of at
2 least one of her original claims and obtain at least one of her proposed amended requests for
3 relief. *See* Discussion Re: Motion for Leave to File SAC, *infra*.

4
5 *Irreparable Harm and Public Interest*

6 As previously discussed, the *Pinho* court stated:

7 The decision whether or not to institute deportation proceedings is entirely within the
8 discretion of the agency. There are no steps that *Pinho* can take to force the question
9 in order to have his claim resolved. If the only route to the courts is through
10 deportation proceedings, then the agency retains sole control over whether an
individual's purely legal claim – one which has not been made non-reviewable by
statute – may ever be brought before the courts. Such a result would be plainly at
odds not only with the APA, but also with broader principles of separation of powers.

11 *Pinho*, 432 F.3d at 202 (3d Cir. 2005) (footnotes omitted). Here, if Defendants actions are
12 permitted to go unchecked, Defendants would retain sole control over whether Otero's claim
13 may ever be brought before the courts. Further, Otero has been advised that she is "not
14 authorized to remain in the United States and should make arrangements to depart as soon
15 as possible. Failure to depart may result in [her] being found ineligible for immigration
16 benefits and inadmissible to the United States in the future." Motion for Leave to File
17 Second Amended Complaint, Exhibit I, Attachment 1 (Doc. 18-10). Additionally, it is not
18 known what consequences Otero faces if she remains in administrative limbo. *See e.g.*
19 *Baliles v. Donovan*, 549 F.Supp. 661, 666 (W.D.Va. 1982) (using terms judicial,
20 administrative, and legislative limbo in factually and legally unrelated case). For example,
21 the Court does not know if Otero's status will affect her ability to be employed, drive, etc.
22 The Court finds Otero has established she will suffer irreparable harm if her requested
23 injunctive relief is not granted.⁴

24 _____
25 ⁴The Court does not find Otero would suffer from sufficient irreparable harm from
26 a second interview to warrant injunctive relief as she has asserted. Otero's argument as to
27 the possible harm resulting from a second interview is speculative. While there is a risk
28 Otero may state something unfavorable to her case during the interview, the Court does not
find this presents anything more than a minimal hardship. Indeed, while counsel for Otero
argued she should not reasonably be expected to be subject to the interview process again,

1 Further, for these same reasons and because agency attempts to "divest the federal
2 courts of jurisdiction by unilaterally reopening its administrative proceedings" are disfavored,
3 *Goede*, 2013 WL 1731070 at *1, the Court finds there is a public interest in granting the
4 requested injunctive relief.

5
6 *Balance of Equities*

7 The Court finds the balance of equities does not favor either party. While the
8 concerns of Otero, i.e. "the interests of the individual[,] weigh heavily against requiring
9 administrative exhaustion," *Pinho*, 432 F.3d at 202 (citations omitted), Defendants also have
10 an interest in fully and correctly resolving the claims before them.

11
12 *Conclusion as to Injunctive Relief*

13 After balancing the factors, the Court finds granting injunctive relief is appropriate
14 in this case. It is highly likely Otero will succeed on the merits of at least one of her claims
15 and there is a likelihood she would suffer irreparable injury if the injunctive relief is not
16 granted. The Court will grant Otero's request.

17
18 *Requirement of a Bond Upon Issuance of a Temporary Restraining Order*

19 Under the rule, a TRO may not be issued without imposition of a bond or other
20 security upon the applicant:

21 (c) Security. The court may issue a preliminary injunction or a temporary restraining
22 order only if the movant gives security in an amount that the court considers proper

23
24 the Court simply does not find this to be an onerous burden. The Supreme Court has
25 "recognized that the right to acquire American citizenship is a precious one" and that "there
26 must be strict compliance with all the congressionally imposed prerequisites to the
27 acquisition of citizenship." *Fedorenko v. United States*, 449 U.S. 490, 505-06 (1981). While
28 Otero's circumstances may be more sympathetic than the average applicant, this does not
change the fact that "[n]o alien has the slightest right to naturalization unless all statutory
requirements are complied with." *Id.* at 506 (citation omitted). A re-interview in this
situation does not constitute a significant hardship nor is it likely to cause irreparable harm.

1 to pay the costs and damages sustained by any party found to have been wrongfully
2 enjoined or restrained. The United States, its officers, and its agencies are not
required to give security.

3 Fed.R.Civ.P. 65(c). The district court, however, has wide discretion in setting the amount
4 of the bond. *Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d
5 878, 882 (9th Cir. 2003). In fact, the amount may be set at zero if there is no evidence the
6 party will suffer damages from the injunction. *Id.*

7 Here, no evidence has been presented that Defendants will suffer any damages from
8 the injunction. The Court finds, in its discretion, that a bond/security of \$0 is appropriate.

9
10 *Motion for Leave to File Second Amended Complaint* (Doc. 18)

11 Otero requests leave to file a SAC. The proposed SAC includes allegations regarding
12 Defendants compliance with 8 C.F.R. § 103.5(a) and modifies the request for relief to
13 comport with standards outlined by Defendants in their Motion to Dismiss. Defendants
14 assert, however, that Otero has not complied with LRCiv 15.1, which requires the submission
15 of a strikeout copy of the proposed amended document to be submitted with the motion. In
16 this case, Otero has submitted a proposed strikeout copy with her Reply. The Court does not
17 find it appropriate to deny the request on this basis.

18 Defendants also assert the submission of this SAC is not appropriate. In determining
19 whether an amended pleading should be permitted, courts generally consider five facts:
20 undue delay, bad faith, futility of amendment, prejudice to the opposing party, and whether
21 the party has previously amended their pleadings. *Ahlmeyer v. Nev. Sys. of Higher Educ.*,
22 555 F.3d 1051, 1055 n.3 (9th Cir. 2009).

23 In this case, the Court does not find Otero has acted in bad faith. Indeed, as pointed
24 out by her counsel, it is only because one Defendant had been renamed in the First Amended
25 Complaint that she now seeks to submit a SAC. At that time, the events raised in the SAC
26 had not occurred. *See Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir.
27 1989) (failure to cure deficiencies by previous amendments is factor to be considered). The
28 Court also finds Otero has not exercised undue delay in seeking to file the SAC. Shortly

1 after learning Defendants had scheduled her for another interview and were not affording her
2 an opportunity to submit a brief prior to that interview, Otero filed her request to file a SAC.

3 Additionally, the Court finds Defendants would not be prejudiced by the proposed
4 amendment. It is this consideration that carries the greatest weight. *Eminence Capital, LLC*
5 *v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). The Court considers that “generally
6 a party will not be deemed prejudiced by an amended pleading if the amendment relates to
7 the same conduct, transaction, or occurrence alleged in the original pleading, or if the
8 opposing party is otherwise aware of the facts contained in the amended pleading.” 61A Am.
9 Jur. 2d Pleading § 724, *citations omitted*. Here, the proposed amendment concerns the same
10 all-encompassing status of adjustment proceeding that is at issue in the original claims.
11 Further, as the allegations relate to the conduct of Defendants, the Court finds Defendants
12 are aware of these additional facts.

13 The Court also considers whether the proposed amendments are futile based on
14 subject matter jurisdiction and Otero’s incorrect interpretation of 8 C.F.R. § 103.5 as argued
15 by Defendants. As previously discussed, this Court finds it has subject matter jurisdiction
16 over this matter.

17 As to whether Otero has incorrectly interpreted 8 C.F.R. § 103.5, the applicable
18 regulation states:

19 (a) Motions to reopen or reconsider in other than special agricultural worker and
20 legalization cases –

21 (5) Motion by Service officer –

22 (i) Service motion with decision favorable to affected party. When a
23 Service officer, on his or her own motion, reopens a Service proceeding
24 or reconsiders a Service decision in order to make a new decision
25 favorable to the affected party, the Service officer shall combine the
26 motion and the favorable decision in one action.

27 (ii) Service motion with decision that may be unfavorable to affected
28 party. When a Service officer, on his or her own motion, reopens a
Service proceeding or reconsiders a Service decision, and the new
decision may be unfavorable to the affected party, the officer shall give
the affected party 30 days after service of the motion to submit a brief.
The officer may extend the time period for good cause shown. If the
affected party does not wish to submit a brief, the affected party may
waive the 30-day period.

1 8 C.F.R. § 103.5(a). As Defendants' action does not include a favorable decision, Otero
2 asserts Defendants' actions are under 8 C.F.R. § 103.5(a)(5)(ii). In other words, Defendants'
3 motion to reopen was with a decision that may be unfavorable to Otero. Under that
4 provision, Defendants must give Otero "30 days after service of the motion to submit a brief
5 apply." *Id.*

6 Otero asserts this action is non-discretionary under the regulation, and because
7 Defendants did not give Otero a chance to submit a brief, Defendants have acted
8 unconstitutionally.

9 Defendants interpret the regulation differently. Specifically, they assert:

10 Under Plaintiff's interpretation of subsection (ii), the Service must give an
11 applicant notice of its intent to reopen proceedings, allow the applicant 30 days
12 to file a brief on the issue of reopening the proceedings, and only then can the
13 Service reopen proceedings or reconsider a prior decision. Plaintiff reads a
14 requirement into the regulation that is not there. The phrase in subsection (ii)
15 that states: "When a Service officer, on his or her own motion, reopens a
16 Service proceeding or reconsiders a Service decision . . ." permits a Service
17 officer to reopen proceedings sua sponte, and implies that after the officer has
18 so moved, the matter is reopened. After the Service officer has reopened the
19 proceedings, if he determines that the new decision may be unfavorable to the
20 applicant, he must give the applicant 30 days to file a brief. If the brief fails to
21 establish the applicant's eligibility, the Service officer must issue a new
22 decision denying the application.

23 The plain language of 8 C.F.R. § 103.5(a)(5) permits USCIS to reopen
24 proceedings sua sponte, and only requires notice to the applicant and an
25 opportunity to respond in the event USCIS's decision on the pending
26 application may be unfavorable. Therefore, USCIS's sua sponte decision to
27 reopen proceedings without first giving Plaintiff an opportunity to contest
28 reopening did not violate its own regulations or Plaintiff's due process rights.
See Net-Inspect, L.L.C. v. United States Citizenship and Immigration Services,
C14-1514-JLR, 2015 WL 880956, at *5 (W.D. Wash. Mar. 2, 2015)
("Contrary to Net-Inspect's contention, USCIS's regulations permit the agency
to reopen and reconsider petitions both on its own motion and on motions by
affected parties."); *True Capital Mgmt., LLC v. United States Dep't of
Homeland Sec.*, No. 13-261-JSC, 2013 WL 3157904, at *3 (N.D. Cal. June 20,
2013) (finding that USCIS's regulations permit it to reopen a petition sua
sponte and issue a request for evidence). Plaintiff's proposed second amended
complaint does not cure the fatal flaw of this action – that there is no final
agency action for the Court to review.

Response to Motion for Leave to File SAC (Doc. 20), pp. 5-6. However, the cases cited by
Defendants do not discuss the specific issue of how to interpret this regulation.

An initial reading of the regulation leads to the conclusion Otero reached. Simply put,

1 if Defendants' argument is accepted, the use of "motion" in the phrase "give the affected
2 party 30 days after service of the motion to submit a brief" would mean something other than
3 its plain meaning – specifically, it would mean order or decision. However, upon further
4 contemplation, when the Court considers the caption of the subsection to place the statement
5 in context; the caption arguably qualifies every mention of "motion" in the subsection.
6 Under this interpretation, the phrase would then state: "give the affected party 30 days after
7 service of the motion [with decision that may be unfavorable to affected party] to submit a
8 brief[.]" In other words, it would then only be after the decision that Otero could submit a
9 brief (or, as Defendants state, within 30 days after the service officer decides the decision
10 may be unfavorable).

11 The interpretation urged by Defendants does not constitute a plain reading of the
12 regulation. Rather, to reach the result urged by Defendants, mental jiu-jitsu must be
13 employed. Otero's interpretation of the regulation constitutes a plain reading of the
14 regulation. It gives effect to the plain meaning of the word "motion." Moreover, in the
15 context of considering the caption to replace the word "motion," to more clearly reach the
16 interpretation argued by Defendants, the regulation would have to state: "give the affected
17 party 30 days after service of the motion [with decision that IS unfavorable to affected party]
18 to submit a brief[.]" Further, unlike subsection 8 C.F.R. § 103.5(a)(5)(i), this subsection does
19 not require the motion and decision be included in one document – this would seem to
20 recognize the motion is made first, then presumably an opportunity for a claimant to submit
21 a brief, and then the issuance of a decision.

22 Defendants also point out that other regulations provide they may request additional
23 evidence. 8 C.F.R. § 103.2(b)(8)(iii) (stating that if the initial evidence submitted does not
24 establish eligibility, USCIS may "request more information or evidence from the application
25 or petitioner, to be submitted within a specified period of time as determined by USCIS");
26 *True Capital Mgmt., LLC*, 2013 WL 3157904 at *3 ("Section 103.5(a)(5) . . . does not
27 preclude Defendants from asking for additional evidence before deciding whether to change
28 course and grant a petition. . . ."). However, this does not dispute Otero's assertion that the

1 procedure itself violated 8 C.F.R. § 103.5 or due process.

2 Based on the arguments of Defendants, the Court does not find this claim or the
3 related due process claim is futile.

4 Otero has also amended her request for relief. The Court does not find this to be a
5 substantive amendment (rather than a clarification) because in the original Complaint and the
6 First Amended Complaint Otero also requested the Court grant any relief the Court deemed
7 just and proper. The Court finds Otero may file the proposed Second Amended Complaint.

8
9 *Motion to Dismiss (Doc. 17)*

10 Defendants assert that, because their proceedings have been reopened, there is no final
11 agency action which provides this Court with subject matter jurisdiction. The party invoking
12 the jurisdiction of the federal court bears the burden of establishing that the court has the
13 requisite subject matter jurisdiction to grant the relief requested. *See Kokkonen v. Guardian*
14 *Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citation omitted).

15 As previously discussed, Otero has established that while the Ninth Circuit recognizes
16 that an agency can reopen removal proceedings, the Ninth Circuit has not similarly
17 concluded as to the reopening of status of adjustment proceedings while a judicial action in
18 pending. There is no basis to conclude, therefore, that the actions of Defendants in vacating
19 its prior decision and reopening the status of adjustment proceedings was valid or that it
20 divested this Court of subject matter jurisdiction. The Court finds dismissal for lack of
21 subject matter jurisdiction is not appropriate.

22 Accordingly, IT IS ORDERED:

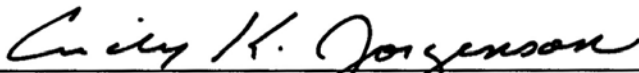
- 23 1. The Court's previous Order granting in part the Motion for Preliminary
24 Injunction and/or Temporary Restraining Order (Doc. 25) is CONFIRMED.
- 25 2. Paragraph 2 of the Court's October 27, 2016, Order (Doc. 29) is AMENDED
26 to state:
 - 27 2. The June 15, 2016, Order of Defendants having been issued without
28 authority as this judicial case has been initiated, the June 15, 2016,

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Order of Defendants reopening the status of adjustment proceedings is STAYED. The Notice of Defendants scheduling an interview for October 28, 2016, is VACATED.

- 3. The Court’s Order enjoining Defendants from requiring Otero to appear at a new interview on her adjustment of status application, or take any adverse action against Otero for not appearing at such an interview is CONFIRMED.
- 4. Pursuant to Fed.R.Civ.P. 65(c), a security/bond of \$0 is required.
- 5. The Motion to Reset Preliminary Injunction Hearing (Doc. 30) is GRANTED. The Preliminary Injunction Hearing is continued to December 1, 2016, at 1:30 p.m.
- 6. As discussed between counsel and court staff, the parties shall submit a stipulation on or before November 8, 2016, indicating their agreement to continue the Preliminary Injunction hearing.
- 7. Counsel shall file their witness and exhibit lists on or before November 28, 2016, by noon.
- 8. The Motion for Leave to File Second Amended Complaint (Doc. 18) is GRANTED. Otero shall file her Second Amended Complaint within ten days of the date of this Order. *See* ECF Administrative Policies and Procedures Manual § II.H (“If the motion to amend is granted, the party seeking the amendment must file the amended pleading with the court and serve it on the other parties.”).
- 9. The Motion to Dismiss (Doc. 17) is DENIED.

DATED this 2nd day of November, 2016.



Cindy K. Jorgenson
United States District Judge