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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Carmen Figueroa Otero and Alberto Otero, Plaintiffs, vs. John F. Kelly, Secretary for the Department of Homeland Security, et al., Defendants.	No. CIV 16-090-TUC-CKJ **ORDER**

Pending before the Court is the Motion to Dismiss Second Amended Complaint (Doc. 38) filed by Defendants. A response (Doc. 40) and a reply (Doc. 48) have been filed. Additionally, the Administrative Record (43 and 45) has been filed.[1]

I. *Factual and Procedural Background*

On February 16, 2016, Carmen Figueroa Otero ("Otero") filed a Complaint for Declaratory and Injunctive Relief against Jeh Johnson, Secretary for the Department of Homeland Security, Leon Rodriguez, Director for the United States Citizenship and Immigration Services ("CIS"), John Kramer ("Kramer"), District Court Director for the Phoenix CIS, and Julie Hashimoto, Director for the Tucson Field Office of CIS (collectively,

[1]A Motion for Discovery (Doc. 49), a Motion to Supplement Admin Record (Doc. 50), and a Motion for Extension of Time (Doc. 52) have also been filed. These are addressed in a separate order.

"Defendants").[2] Otero alleges she believed in good faith she was a U.S. citizen until approximately May 2013.

In May 2013, Otero used a United States passport to cross from Mexico into the United States; shortly thereafter she learned she was not a United States citizen. After learning that she was not a United States citizen, an I-130 was filed on Plaintiff's behalf by Alberto Otero ("A. Otero"), Otero's United States citizen husband. CIS approved the I-130 which classified her as an "immediate relative" of a United States citizen.[3] Otero also filed an Application for Adjustment of Status (i.e., a Form I-485). CIS denied the I-485 application on September 28, 2015, stating it was denying the application because Otero had not been "inspected and admitted or paroled into the United States" because she had used her improperly-issued U.S. passport to gain entry into the country as a U.S. citizen in May 2013. Second Amended Complaint (Doc. 34) ("SAC"), ¶ 15.

Otero requested the matter be reopened or reconsidered on October 16, 2015. Defendants denied Otero's request on December 18, 2015.

Otero asserts Defendants then scheduled a re-interview of her for October 28, 2016. Otero asserts:

> Subjecting Ms. Figueroa Otero to another interview on the subject of whether she made a knowing false claim to citizenship would transform questioning into 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

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[2]Pursuant to Fed.R.Civ.P. 25(d), John F. Kelly is substituted for Jeh Johnson and Lori Scialabba is substituted for Leon Rodriquez in this matter. The Second Amended Complaint named Al Gallman as a defendant rather than Kramer.

[3]An "immediate relative" of a U.S. citizen is instantly "eligible to receive an immigrant visa," as long as she can demonstrate she "was inspected and admitted or paroled into the United States." See INA § 201(b), 8 U.S.C. § 1151(b); INA § 245(a), 8 U.S.C. 1255(a).

> 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.)."

SAC, ¶ 81 (emphasis removed).

On October 27, 2016, this Court granted Otero's request for a temporary restraining order (Docs. 29 and 31). On November 10, 2016, a Second Amended Complaint (Doc. 34) was filed. Plaintiff A. Otero was added to the action in the Second Amended Complaint. The Oteros again request preliminary and final injunctive relief and request this Court set aside CIS' flawed findings of fact and conclusions of law and order the matter remanded to CIS for readjudication of Otero's adjustment of status application consistent with the Court's findings and order. Alternatively, the Oteros request this Court to issue a judgment declaring that Defendants violated Otero's due process rights by failing to allow her to issue a brief in opposition to Defendants' motion to reopen her proceedings when such reopening may result in an adverse decision against Otero. They further allege Defendants have had adequate opportunity to develop the administrative record and request Defendants be enjoined from conducting a subsequent interview of Otero. The Oteros also request the Court retain jurisdiction during the adjudication of the adjustment of status application in order to ensure compliance with the Court's orders and award reasonable costs and attorneys' fees.

Pursuant to an agreement of the parties, the Court ordered the temporary restraining order be converted to a preliminary injunction on November 28, 2016.

On December 28, 2016, Defendants filed a Motion to Dismiss Second Amended Complaint (Doc. 38). A response (Doc. 40) and a reply (Doc. 48) have been filed.

II. *Request for Dismissal Based on Lack of Subject Matter Jurisdiction*

A district court must dismiss an action if it lacks jurisdiction over the subject matter of the suit. Fed.R.Civ.P. 12(b)(1). A complaint will be dismissed under Rule 12(b)(1) if, among other things, there is no "case or controversy" within the meaning of that constitutional term. *Baker v. Carr*, 369 U.S. 186, 198 (1962). A party seeking to invoke federal jurisdiction bears the burden of establishing that jurisdiction exists "for each claim

he seeks to press" and for "each form of relief sought." *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). If jurisdiction is challenged at the pleading stage, "general factual allegations of injury resulting from defendant's conduct may suffice because [courts] presume that general allegations embrace those specific facts that are necessary to support the claim." *Id*. (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)) (internal quotation marks omitted); *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009) (noting that when deciding a 12(b)(1) motion courts "assume [plaintiff's] [factual] allegations to be true and draw all reasonable inferences in his favor.") (alterations in original).

"[A] Rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or any other evidence properly before the court." *St. Clair v. Chico*, 880 F.2d 199, 201 (9th Cir.1989). "With a [Rule] 12(b)(1) motion, a court may weigh the evidence to determine whether it has jurisdiction." *Autery v. United States*, 424 F.3d 944, 956 (9th Cir.2005). "When subject matter jurisdiction is challenged under [Rule] 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001).

A. *Counts Three (Due Process and Equal Protection), Four (Declaratory Judgment Act), and Five (Mandamus)*

Defendants assert the Court lacks subject matter jurisdiction over the Oteros' Fourth, Fifth, and Sixth Counts of the SAC because they relate to CIS's purported failure to allow Otero to file a brief before reopening proceedings – Defendants assert these claims are moot. The Oteros agree Counts Four and Five of the SAC are moot. The Court will grant the Motion to Dismiss as to Counts Four and Five and dismiss these counts. Additionally, the Oteros state Count Three is moot. The Court will also dismiss Count Three.

B. *Count Six (Fifth Amendment Due Process)*

Defendants also assert this claim is moot:

> [T]he Court has already ruled in this matter that USCIS lacked the authority to reopen proceedings on Plaintiff's I-485 application after this lawsuit was filed. *See* Doc. 29 at ¶ 2 and Doc. 31 at 20. Since USCIS's motion to reopen Plaintiff's application was not authorized, Plaintiff was not entitled to any process at all under 8 C.F.R. § 103.5, and no due process violation could have occurred. As such, Count Six of Plaintiff's Second Amended Complaint is both moot and fails to state a claim. Similarly, since the Court has determined that USCIS lacked the authority to reopen proceedings on Plaintiff's I-485 application after the lawsuit was filed, USCIS necessarily had no duty to allow Plaintiff to file a brief, and therefore, no agency action can be compelled under the Declaratory Judgment Act or the Mandamus Act.

Motion, pp. 5-6.

This Court's jurisdiction is limited to actual cases and controversies. U.S. Const., art. III, § 2. "To invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). This Court may not take action on a claim once it becomes moot. *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 715 (9th Cir. 2011) (court lacks jurisdiction to hear claims if a case is moot). An action is moot where issues are no longer live or the parties lack a legally cognizable interest in the outcome. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). *See Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1179 (9th Cir. 2010) (a case becomes moot when "there is no reasonable expectation that the alleged violation will recur" and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation"). However, a case is not moot if a court can provide any effective relief, even if it is not the precise relief originally sought. *Siskiyou Reg'l Educ. Project v. United States Forest Serv.*, 565 F.3d 545, 559 (9th Cir. 2009).

One exception to the mootness doctrine is where a party resisting mootness demonstrates the challenged action is too short in duration to be fully litigated before it ceases and there is a reasonable expectation that the party will be subjected to the same action in the future. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). The Oteros argue the transformation of the administrative adjustment of status proceedings into an adversarial

proceeding (including the possibility of a subsequent interview) is an actual injury already suffered and likely to be suffered. Further, the Oteros allege the injuries can be redressed by a favorable judicial decision and equitable remedy. The Court agrees with the Oteros that this presents a live case and controversy and that the Oteros continue to have a "personal stake in the outcome" of the claim. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478. The Court will deny the Motion to Dismiss Count Six for lack of subject matter jurisdiction.

III. *Request for Dismissal of Count Six (Fifth Amendment Due Process Clause) Based on Failure to State a Claim*

The United States Supreme Court has found that a plaintiff must allege "enough facts to state a claim to relief that is plausible on its facts." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While a complaint need not plead "detailed factual allegations," the factual allegations it does include "must be enough to raise a right to relief above the speculative level." *Id*. at 555; *see also Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) ("If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss[.]"). Indeed, Fed.R.Civ.P. 8(a)(2) requires a showing that a plaintiff is entitled to relief "rather than a blanket assertion" of entitlement to relief. *Id*. at 555, n. 3. The complaint "must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right to action." *Id*. at 1965.

In considering the Motion to Dismiss, the Court views the Complaint in light of *Twombly* and must determine if the Oteros have "nudge[d] [their] claims across the line from conceivable to plausible." *Id*. at 570. The Court also considers that the Supreme Court has cited *Twombly* for the traditional proposition that "[s]pecific facts are not necessary [for a pleading that satisfies Rule 8(a)(2)]; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardue*, 551 U.S. 89, 93 (2007). Indeed, *Twombly* requires "a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such

amplification is needed to render the claim *plausible.*" *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2nd Cir. 2007); *see also Moss v. U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009) (for a complaint to survive a motion to dismiss, the non-conclusory "factual content," and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief). "A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

This Court must "accept as true facts alleged and draw inferences from them in the light most favorable to the [Oteros]." *Stacy v. Rederite Otto Danielsen*, 609 F.3d 1033, 1035 (9th Cir. 2010). In general, a complaint is construed favorably to the pleader. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), *overruled on other grounds*, 457 U.S. 800. Nonetheless, the Court does not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

In their Count Six of the SAC, the Oteros allege Defendants have violated Otero's Fifth Amendment rights to due process by the Defendants violating their own policies and procedures, as set forth primarily in the CIS Adjudicator's Field Manual ("AFM"), which prohibits the agency from conducting adversarial administrative proceedings against Otero and prohibits the agency from attempting to find a reason to deny her application. The Oteros assert this conduct violates the principles of the *Accardi* doctrine. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *see also Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004).

"A procedural due process claim has two elements: deprivation of a constitutionally protected liberty or property interest and denial of adequate procedural protection." *Krainski v. Nevada ex rel. Bd. of Regents of Nevada Sys. of Higher Educ.*, 616 F.3d 963, 970 (9th Cir. 2010) (internal citation omitted). "A liberty interest may arise from the Constitution itself,

by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (internal citations omitted). Protected property interests are normally not created by the Constitution; rather, they are created and defined by independent sources such as state statutes and rules entitling a citizen to certain benefits. *Goss v. Lopez*, 419 U.S. 565, 572-73 (1975) (*citing Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

Defendants argue that, because Otero did not have an entitlement to an approved I-485 application, Otero did not have a liberty or property interest protected by the Constitution and, therefore, cannot assert a due process claim. Indeed, Defendants point out that the statute governing I-485 applications makes clear there is no absolute right to an adjustment of status and that any adjustment is at the discretion of the Attorney General:

> The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a [Violence Against Women Act] self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. § 1255(a). Defendants distinguish this statute and Otero's situation with the one presented in *Ching v. Mayorkas*, 725 F.3d 1149, 1155 (9th Cir. 2013). In that case, the Ninth Circuit determined that plaintiffs' Fifth Amendment due process right had been violated by the denial of I-130 visa petitions for an immigrant spouse of a United States citizen. However, the statute at issue in *Ching* created a mandatory entitlement. Defendants assert that, because Otero is seeking a discretionary adjustment of status, she does not have a protected liberty or property interest. Defendants argue, therefore, the Oteros have failed to state a claim upon which relief can be granted.

The Oteros assert, however, that the Accardi Doctrine requires agencies to follow their own rules, even if those rules are self-imposed and limit what would otherwise be entirely

discretionary decision-making. *Service v. Dulles*, 354 U.S. 363, 372 (1957).[4] The Oteros assert that, because CIS had established regulations, practices and/or procedures that were not followed with respect to Otero and because Otero was prejudiced by that lapse, they have stated a claim for which relief can be granted.[5] Indeed, in a different context, the Supreme Court has recognized that a liberty interest may exist where there is some right or justifiable expectation where an authority has created such a right or expectation. *Cofone v. Manson*, 594 F.2d 934, 938 (2d Cir. 1979) (quoting *Montanye v. Haymes*, 427 U.S. 236, 242 (1975)). However, the Supreme Court has stated:

> [T]here is no reason to exempt this case from the general principle that '(i)t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.' *NLRB v. Monsanto Chemical Co.*, 8 Cir., 205 F.2d 763, 764. And see *NLRB v. Grace Co.*, 8 Cir., 184 F.2d 126, 129; *Sun Oil Co. v. FPC*, 5 Cir. 256 F.2d 233; *McKenna v. Seaton*, 104 U.S.App.D.C. 50, 259 F.2d 780.

Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970).

Additionally, the Ninth Circuit has stated:

> The Accardi doctrine is not a constitutional one. [Citations omitted.] Because the doctrine is not a constitutional one, we can overrule the Secretary only by exercising our supervisory powers. [Footnote omitted.] We decline to exercise our supervisory powers in this case for several reasons. First, it is not entirely clear that the regulations have the meaning which Carnation attributes to them. The language does

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[4]The Oteros cite *Nat'l Treasury Employees Union v. Horner*, 854 F.2d 490, 497-98 (D.C. Cir. 1988), for the assertion that, in order to state a cause of action, a claimant must show that the agency had established regulations, practices and/or procedures, that it failed to adhere to those standards, and that the claimant was prejudiced by that failure. While the *Horner* court did discuss those factors, it did not clearly state this sufficiently stated a claim for which relief could be granted. Indeed, *Horner* does not discuss if these allegations are the only essential allegations or if these allegations are needed in addition to those required to state a claim for a procedural due process claim. The Oteros have not pointed to any authority that states the essential allegations for a due process claim are not needed when a plaintiff is making a claim pursuant to *Accardi*.

[5]The Court notes that the parties have not addressed whether the AFM includes a provision addressing whether it creates binding obligations. *See e.g. Wilkinson v. Legal Services Corp.*, 27 F. Supp. 2d 32 (D.D.C. 1998). However, as the Court accepts the Oteros' allegations as true, the Court does not find this affects the plausibility of the Oteros' claim.

> not give a clear mandate; and logic suggests that they cannot mean what Carnation says they mean [–] all violations must be located and cited or the suit is dismissed. The second reason why we decline to exercise our supervisory powers is that the deviation, if any, from the regulations was not prejudicial.[4]
>
> > [4]Although there is little discussion of when the Accardi supervisory powers should be invoked, courts have indicated that the standard is whether violation of the regulation prejudiced the party involved. *See United States v. Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir.), cert. denied, -- U.S. --, 101 S.Ct. 170, 66 L.Ed.2d 81 (1980) (INS' failure to follow regulations requiring advising an arrested alien of his right to speak to his consul was not prejudicial and thus not a ground for challenging the conviction); *see also United States v. Caceres*, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 743 (1979) (held, due process clause not implicated because appellants had not suffered substantially as a result of reasonable reliance on agency regulations, and that even if a case-by-case approach is used, this was not the case where the court should have exercised its discretion to suppress evidence); *see generally* Note, Violations by Agencies of Their Own Regulations, 87 Harv.L.Rev. 629, 634 (1974) (violations of procedural regulations should be upheld if there is no significant possibility that the violation affected the ultimate outcome of the agency's action). This seems like a reasonable approach and we adopt it here.

Carnation Co. v. Sec'y of Labor, 641 F.2d 801, 804 (9th Cir. 1981); *see also Leslie v. Attorney General of U.S.*, 611 F.3d 171 (3rd Cir. 2010) (absent a showing of prejudice, when a violation of an immigration regulation does not implicate an alien's fundamental rights, a wholesale remand places an unwarranted and potentially unworkable burden on BIA).

Indeed, Defendants point out that *Accardi* only applies to agency procedures that are intended to confer a substantive benefit on an individual. *Bridges v. Wixon*, 326 U.S. 135, 152-53 (1945). The Oteros' response indicates the alleged prejudice is having been subjected to an adversarial interview. The Oteros also assert:

> The due process violation is also properly considered as an actual injury already suffered, and an additional actual injury likely to be suffered, by Ms. Figueroa Otero, which is traceable to Defendants and likely to be redressed by favorable judicial decision and equitable remedy (e.g, agency remand with appropriate restrictions on agency action). *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990).

Response, p. 6. To the extent the Oteros are asserting as an injury the denial of an adjustment of status, either past or future, the Court agrees with Defendants that the denial of the adjustment of status is not actionable. In fact, the Oteros have not pointed to any authority that a particular result (or lack thereof) provides a basis for a procedural due process claim. Indeed, procedural due process is concerned with the process used to reach a result, not with the ultimate result. *Accardi*, 347 U.S. at 267-68 (there is a right to the process, but no right

to a particular result); *Ching*, 725 F.3d at 1156.

The Oteros also assert Otero suffered an injury by the adversarial interview, which the Oteros assert was outside of CIS procedures. However, Defendants assert:

> Agency rules for processing applications that structure the manner in which the agency applies substantive standards generally qualify as procedural rules. *See James v. Hurson Assocs. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000). Even if a procedural rule confers an important procedural right on the regulated entity, the rule is not enforceable against the agency unless the complaining party establishes substantial prejudice. *See PAM, S.p.A. v. United States*, 463 F.3d 1345, 1348 (Fed. Cir. 2006).

Reply, pp. 7-8. This appears to be consistent with *Am. Farm Lines* and the Ninth Circuit discussion in *Carnation Co.* regarding the prejudice needed to warrant *Accardi* intervention by the courts. In other words, the Court must determine whether the Oteros have alleged an injury that constitutes substantial prejudice.

The Supreme Court has distinguished rules that are promulgated to provide an agency necessary information to reach an informed decision as opposed to conferring important procedural benefits to an individual. *Montanye*, 427 U.S. at 242. The injury at issue in this case is based on a procedural rule that appears to have been promulgated to provide CIS with necessary information to reach an informed decision. Indeed, the Oteros have cited to portions of the AFM that indicate the interviews are to obtain information. AFM, 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."). The Oteros have not provided any authority that such an injury constitutes substantial prejudice. The Court finds a violation of this procedural rule, which the Oteros allege resulted in Otero being subjected to an adversarial interview, does not present prejudice warranting Accardi intervention. *See e.g. Hernandez-Rojas*, 617 F.2d at 535.

Additionally, to any extent the Oteros are seeking to prohibit or limit a second interview, the Court does not find this provides an actionable injury or prejudice. Rather, as

argued by Defendants, Defendants must determine if Otero satisfies the requirements for an adjustment of status. The Court does not find it appropriate to limit the means in which Defendants complete their task as long as Otero's due process rights are not violated. Further, the Court does not find there is any basis to conclude that a second interview would not protect Otero's due process rights. A second interview that complies with CIS procedures that protect Otero's due process rights does not warrant intervention by the Court.

Accordingly, IT IS ORDERED:

1. The Motion to Dismiss Second Amended Complaint (Doc. 38) is GRANTED.

2. Counts Three, Four and Five are DISMISSED as moot and, therefore, for lack of subject matter jurisdiction.

3. Count Six is DISMISSED for failure to state a claim upon which relief can be granted.

4. Counts One and Two, based on the Administrative Procedure Act, remain pending in this action.

DATED this 18th day of July, 2017.

Cindy K. Jorgenson
United States District Judge