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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 for Leave to Take Discovery (Doc. 49) filed by Carmen Figueroa Otero ("Otero") and Alberto Otero (collectively, "the Oteros"). A response (Doc. 51) and a reply (Doc. 53) have been filed. Also pending before the Court is the Motion to Supplement Administrative Record (Doc. 50) and the Motion for Extension of Time and for Status Conference (Doc. 52).

Factual and Procedural Background

On February 16, 2016, 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, "Defendants").[1] Otero alleges she believed in good faith she was a U.S. citizen until approximately May 2013. She further alleges she should be granted classification as an "immediate relative" of her husband, Alberto Otero, who is a U.S. citizen and resident of Marana, Arizona. 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).

The United States Department of Homeland Security ("DHS"), Citizenship and Immigration Services, Tucson Field Office ("TFO"), denied Otero's 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.

Otero requested the matter be reopened or reconsidered on October 16, 2015. Defendants denied Otero's request on December 18, 2015. On June 15, 2016, Defendants issued a decision that states:

> . . . USCIS moves to grant the Service Motion to Reopen under 8 CFR 103.5(a)(5) based on the failure to establish whether your false claim to United States citizenship was made knowingly. Thus, the following order is entered:
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> ORDER: It is ordered that the motion be granted and the I-485 application be returned to a pending status.

Motion for Leave to File Second Amended Complaint, Exhibit K (Doc. 18-12). Otero asserts Defendants had 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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[1]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.

> 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.)."

Proposed SAC (Doc. 34), p. 14 (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 Alberto 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 USCIS' flawed findings of fact and conclusions of law and order the matter remanded to USCIS 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. 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. 49) have been filed.

On January 9, 2017, the Court ordered case management deadlines in this case. Included in the Order was a directive that "Plaintiff may file a motion for leave to take discovery after review of the administrative record." January 9, 2017, Order (Doc. 41).

On February 21, 2017, the Oteros filed a Motion for Discovery (Doc. 49). The Oteros assert that at a minimum, Officer Nelson should be subject to deposition. A response (Doc. 51) and a reply (Doc. 53) have been filed. Also on February 21, 2017, the Oteros filed an Unopposed Motion to Supplement Administrative Record (Doc. 50). The Court will grant this unopposed motion.

On March 9, 2017, the Oteros filed a Motion for Extension of Time to File Dispositive

Motions and Request for Status Conference (Doc. 52).

Motion for Discovery

The Administrative Procedures Act ("APA") provides for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. A reviewing court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In other words:

> [An] agency's decision can be set aside if:
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> > the agency has relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Native Vill. of Point Hope v. Jewell, 740 F.3d 489, 495 (9th Cir. 2014) (citation omitted).

Review of agency action under the APA is generally limited to review of the administrative record. 5 U.S.C. § 706 ("In making . . . determinations, the court shall review the whole record or those parts of it cited by a party . . . "). "The reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Id*. (citation omitted). "The 'whole' administrative record . . . consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (further internal quotation marks and citation omitted); *Oropeza v. C.I.R.*, 402 F. App'x 221, 222 (9th Cir. 2010).

"It is widely recognized that agencies, in preparing and submitting administrative records that form the basis for judicial review, enjoy a presumption of regularity." James N. Saul, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38

Envtl. L. 1301, 1311 (2008) (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993); *see also McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007) ("An agency's designation and certification of the administrative record is treated like other administrative procedures, and thus entitled to a presumption of administrative regularity.").

However, the Ninth Circuit has determined that certain circumstances may justify expanding review beyond the record or permitting discovery. *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988). District courts may consider extra-record evidence in limited circumstances:

> (1) if admission is necessary to determine "whether the agency has considered all relevant factors and has explained its decision,"
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> (2) if "the agency has relied on documents not in the record,"
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> (3) "when supplementing the record is necessary to explain technical terms or complex subject matter," or
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> (4) "when plaintiffs make a showing of agency bad faith."

Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005) (citation omitted). The exceptions from the general rule "are narrowly construed and applied." *Id.* Additionally, the burden is on the party seeking to introduce the extra record materials. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014).

The Oteros assert extra-record information was considered by the agency in this case:

> The most significant document in the administrative record that indicates extra-record information was considered by the agency is an email dated March 11, 2014. Doc. 43-2, p. 50. This document contains a limited portion[1] of an email exchange between a Supervisory Detention and Deportation Officer (SDDO), who works for Immigration and Customs Enforcement (ICE) in Phoenix, and a woman named Sherry L. Wheeler who works for the USCIS National Benefits Center (NBC). *Id.*
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> [1]It is clear from the context of the document that the unidentified SDDO initiated the email correspondence by sending a message with an attachment to Ms. Wheeler sometime prior to her response dated March 11, 2014, 01:59 p.m. The SDDO's message at the top of the page is at least his second communication to Ms. Wheeler in this email string, not his first.

Motion (Doc. 49), p. 8.

The Oteros argue ICE intervened when the unidentified SDDO wrote to Ms. Wheeler, "It is very important that I speak to you regarding this application. There is fraud involved

and I need to bring it to your attention." AR-0236 (Doc. 43-2, p. 50). The Oteros assert the communication is obviously significant to the case, since it is included as part of the administrative record. However, there is no mention of fraud in the USCIS decision to deny Otero's application for adjustment of status or her motion to reconsider. Further, the Oteros point out that Otero (through counsel) advised USCIS that the Department of State and the Department of Justice were conducting a criminal investigation (the Department of State alleged that, in 2013, Otero's mother had stated Otero had knowledge of her Mexican birth).

The Oteros point out that the eight months between the conclusion of Otero's adjustment interview and the denial of her I-485 application, in light of the fact that USCIS had considered derogatory information and allegations from ICE and the Department of State, raises the question of whether USCIS consider any additional extra-record information form ICE, the Department of State, or the U.S. Attorney's Office. The Oteros argue that the record appears to show that Otero's Motion to Reconsider had initially been marked for approval, but was subsequently denied. The Oteros asserts one USCIS official was overruled by a superior official. However, the Oteros assert the circumstances surrounding the decision-making process cannot be discerned from the administrative record.

Defendants assert the Otero's allegations that USCIS relied on outside information are baseless. Defendants summarize the National Benefits Center's role in preparing applications, including forwarding applications to a USCIS Field Office. However, Defendants state the decision to deny Otero's application was made by Hashimoto based, in part, on a recommendation from Nelson. The administrative record, therefore, is comprised of the information available to and relied upon, directly or indirectly, by Hashimoto and Nelson. Defendants state:

> The March 2014 email was properly included in the administrative record because it was available to the agency decision-makers. Plaintiff has alleged that the email appears to be a follow-up to an earlier email. However, since the earlier email, if it exists, was not available to the agency decision-makers, it was not included in the administrative record. Moreover, even if the ISO in Missouri spoke with the DSSO in Phoenix in the course of completing the background and security checks prior to forwarding the application to the USCIS Field Office for adjudication, any information she obtained was not included in the administrative record because it was not available to the agency decision-makers. Plaintiff's background, security and

> eligibility checks were confirmed by the National Benefits Center, so her application was forwarded to the Tucson Field Office for further adjudication. Since any information obtained by the ISO from the DSSO (other than the email at AR-0236) was not [] available to or considered by the agency decision-makers, it is not part of the administrative record.

Response (Doc. 51), pp. 6-7.

"Normally there must be a strong showing of bad faith or improper behavior before the court may inquire into the thought processes of administrative decisionmakers." *Animal Defense Council*, 840 F.2d at 1437 (citation omitted). "A plaintiff seeking discovery based on allegations of bad faith or prejudgment must make allegations that are 'serious' and 'nonconclusory,' ... or present 'independent evidence of improper conduct." *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, No. CIV.A. 10–0804 PLF, 2010 WL 8917910, at *2 (D.D.C. June 4, 2010) (citations omitted). An agency acts in bad faith when it engages in wilful misconduct. *Iron Mountain Mines, Inc.*, 987 F.Supp.at 1260–61. The bad faith exception "only comes into play if the plaintiff can adequately justify their discovery request." *Bark v. Northrop, et al.*, 2 F.Supp.3d 1147, 1153 (D.Or. 2014). Indeed, "a party seeking to depose an administrative official must show specific facts to indicate that the challenged action was reached because of improper motives." *Udall v. Washington, Virginia and Maryland Coach Co.*, 398 F.2d 765 (D.C. Cir. 1968).

While the Court does not disagree with Defendants that the Oteros' request is speculative, the Oteros have pointed to specific facts justifying their request. Specifically, the SDDO email indicates that a conversation regarding Otero and alleged fraud may have occurred prior to the decisions issued in this case. The parties have not pointed to anything in the record to indicate whether or not such a conversation took place. Indeed, by stating that " . . . even if the ISO in Missouri spoke with the DSSO in Phoenix . . . ," Response (Doc. 51), pp. 6-7, Defendants appear to acknowledge that the record does not establish whether any conversation, documents, or other follow-up resulted from the email. While this may not be indicative of bad faith or improper motives, it is indicative Defendants may have relied on documents or other information not in the record. Indeed, the Ninth Circuit has stated that, "if an Agency's administrative record is incomplete, we would expect litigants to seek

to supplement the record in the agency before seeking to expand the record before the district court." *Lands Council v. Powell*, 395 F.3d 1019, 1030 n. 10 (9th Cir. 2005). The Court finds it appropriate to permit limited discovery to ascertain if Defendants received additional or follow-up information from the SDDO email.

Defendants argue remand is appropriate if the record is unclear. *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990). However, the purpose of this limited discovery is to ensure all information considered by Defendants is part of the record (and, if warranted, present evidence of bad faith), not to provide information to this Court to conduct a *de novo* review. Rather, this will permit the Court "to ensure that [Defendants' action are] not arbitrary and capricious or otherwise contrary to law[.]" *Id.*; *see also Puerto Rico Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urban Dev.*, 59 F.Supp.2d 310, 328 (D.P.R. 1999) ("a plaintiff who is entitled to judicial review of its constitutional claims under the APA is entitled to discovery in connection with those claims.") (citing *Webster v. Doe*, 486 U.S. 592, 604, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988)).

Limited Discovery

Although the Oteros seek to conduct depositions, the Court finds written discovery will adequately provide the additional information sought by the Oteros. Indeed, as inquiry into the mental and deliberative processes is prohibited, written discovery will adequately afford the Oteros an opportunity to discover if decision-makers received additional information that is not part of the administrative record. Accordingly, the Court will permit the Oteros to conduct limited discovery as follows:

1. The Oteros may seek any documentation that explains what, if any, follow-up communications occurred as a result of the SDDO email. Similarly, the Oteros may also request admissions and/or seek responses to interrogatories as to any oral communications that may have occurred.

2. Specifically, the Oteros may seek to ascertain what, if any, communications occurred in response to SDDO email and the contents of those follow-up

communications. However, discovery into the mental processes of Defendants (methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others) is not authorized and is prohibited. *See e.g. Lugo v. Holder*, No. CV-13-02108-JAS, 2015 WL1969091, *2 (D. Ariz. April 20, 2015) (finding that mental processes privilege and deliberative process privilege protected from disclosure testamentary and documentary evidence of pre-decisional materials that revealed the mental processes of the decision makers and denying motion to compel same).

3. Discovery shall be completed within forty-five (45) days of the date of this Order.

Motion for Extension of Time to File Dispositive Motions and Status Conference (Doc. 52)

The Court will grant the requested extension, but deny the request for a status conference.

Accordingly, IT IS ORDERED:

1. The Motion for Leave to Take Discovery (Doc. 49) is GRANTED as discussed herein.
2. The Motion to Supplement Administrative Record (Doc. 50) is GRANTED. The Oteros shall file the transcript of the interview of Otero (Doc. 50-2) as a Supplement to the Administrative Record.
3. The Motion for Extension of Time and for Status Conference (Doc. 52) is GRANTED IN PART AND DENIED IN PART.
4. The following deadlines shall apply in this case:
   a. Discovery as authorized herein shall be completed within forty-five (45) days of the date of the Court's Order on the Motion to Dismiss
   b. The Oteros shall file their dispositive motion on or before October 27, 2017. Defendants shall file their response and cross-motion on or before

December 15, 2017. The Oteros shall file their reply and response on or before February 2, 2018. Defendants shall file their reply on or before March 2, 2018.

DATED this 18th day of July, 2017.

Cindy K. Jorgenson
United States District Judge