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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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9 NAVJIT K. SIDHU, et al.,

10 Plaintiffs,

11 v.

12 EMILIA BARDINI, et al.,

13 Defendants.  
14 \_\_\_\_\_/

No. C 08-05350 CW

ORDER GRANTING IN  
PART DEFENDANTS'  
MOTION TO DISMISS

15 Plaintiffs bring this action to challenge the termination of  
16 their asylum status by United States Citizenship and Immigration  
17 Services (USCIS) as a violation of the Immigration and Nationality  
18 Act (INA), its governing regulations and the Administrative  
19 Procedures Act (APA). Defendants move to dismiss Plaintiffs'  
20 complaint arguing that the Court has no subject matter jurisdiction  
21 to hear it or, in the alternative, that Plaintiffs have failed to  
22 state a claim. Plaintiffs oppose the motion. The matter was heard  
23 on May 28, 2009. Having considered oral argument and all of the  
24 papers submitted by the parties, the Court grants in part  
25 Defendants' motion.

26 BACKGROUND

27 Plaintiff Navjit Sidhu is a native and citizen of India, and  
28 is currently residing in Hayward, California. On July 6, 2000, the

1 San Francisco Asylum Office (SFAO) granted Plaintiff Navjit Sidhu  
2 asylum. On January 2, 2002, Ms. Sidhu filed an application to  
3 adjust her status to that of a lawful permanent resident. She also  
4 filed petitions to confer derivative asylee status on behalf of her  
5 husband, Harjit Sidhu, and four children, Nirmaljit, Gurpreet, Sat  
6 and Sarbug. On March 28, 2002 and May 23, 2002, the USCIS approved  
7 the derivative status petitions. In September, 2006, Mr. Sidhu was  
8 interviewed by the USCIS about his application for adjustment of  
9 status.

10 On March 28, 2007, Ms. Sidhu filed a lawsuit in the U.S.  
11 District Court for the Northern District of California seeking to  
12 compel the USCIS to adjudicate her family's applications for  
13 adjustment of status. The lawsuit was dismissed after the USCIS  
14 agreed to adjudicate these applications within sixty days from the  
15 dismissal of the action.

16 On July 9, 2007, the SFAO issued a Notice of Intent to  
17 Terminate Asylum Status (NOIT), pursuant to 8 C.F.R.

18 § 208.24(a)(1).<sup>1</sup> The NOIT notified Ms. Sidhu that

19 USCIS has obtained evidence that indicates fraud in your  
20 application for asylum such that you were not eligible for  
21 asylum at the time it was granted: the grant of asylum you  
22 received was based in part on harm to you and your second  
23 husband, Harjit Singh Sidhu, in 1997. The I-730  
24 Refugee/Asylee Relative Petition that you filed on behalf of  
Harjit Sidhu calls into question the veracity of the testimony  
you provided about what happened to you and your husband in  
India. In addition, you failed to disclose on immigration  
forms filed after you were granted asylum in the U.S. that you

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25 <sup>1</sup>8 C.F.R. § 208.24(a) provides:  
26 [a]n asylum officer may terminate a grant of asylum made under  
27 the jurisdiction of an asylum officer or a district director if  
28 following an interview, the asylum officer determines that:  
(1) There is a showing of fraud in the alien's application  
such that he or she was not eligible for asylum at the  
time it was granted . . . .

1        were ever arrested. The grant of asylum you received was  
2        based in large part on the arrest and harm you claim to have  
3        suffered in India, combined with the harm to your husband in  
4        India. This evidence calls into question the veracity of the  
      asylum claim you presented and indicates fraud in your  
      application such that you were not eligible at the time you  
      were granted.

5        The letter also informed Ms. Sidhu that "in order to give you the  
6        opportunity to respond to this adverse information, we have  
7        scheduled a termination interview at least thirty (30) days after  
8        the date of this notice in order to give you sufficient time to  
9        prepare for the interview." The letter also noted, "You will have  
10       the opportunity at the interview to present information and  
11       evidence to show that you are still eligible for asylum. Your  
12       asylum status will not be terminated unless a preponderance of the  
13       evidence supports termination." The letter stated that Ms. Sidhu  
14       could bring legal representation to the termination interview.

15       On August 23, 2007, the Sidhu family and their attorney Sara  
16       Coppin attended the termination interview. Ms. Coppin alleges that  
17       she was not permitted meaningfully to participate in the USCIS's  
18       examination of Ms. Sidhu and her husband because (1) during the  
19       interview the asylum officer referred to notes from Ms. Sidhu's  
20       original asylum interview but Ms. Coppin and Ms. and Mr. Sidhu were  
21       not allowed to review these documents, (2) Ms. Coppin was not  
22       allowed to cross-examine the makers of these documents and (3) Ms.  
23       Sidhu was not permitted to present a witness to testify on her  
24       behalf.

25       On September 7, 2007, the SFAO terminated Ms. Sidhu's asylum  
26       status and the derivative asylum status of her husband and  
27       children. The termination notice stated:

28       You were granted asylum on July 6, 2000, based on your claim

1 that you were arrested together with your husband and  
2 subsequently harmed by the Indian authorities because of your  
3 and your husband's political activity. After a review of your  
4 asylum application, the testimony you gave at your asylum  
5 application, the I-730 you filed for your husband, the  
6 applications for adjustment of status filed by you and your  
7 husband, and the sworn testimony given by yourself and your  
8 husband at the asylum office on August 23, 2007,  
9 inconsistencies were evidenced concerning your claim that you  
10 and your husband were politically active and that as a result  
11 of these activities you were both arrested and harmed, you  
12 being detained for one day and your husband for over four  
13 years. You were unable to provide a reasonable explanation  
14 for these inconsistencies.

15 Taking into consideration the totality of the circumstances,  
16 the preponderance of the evidence indicates fraud in your  
17 asylum application such that you were not eligible for asylum  
18 and that termination of your asylum status is appropriate.

19 The letter also stated, "Enclosed please find a Notice of Appear  
20 (Form I-862), which places you and your dependents under removal  
21 proceedings."

22 On April 29, 2008, Plaintiffs renewed their asylum claims by  
23 filing applications with the immigration court. On November 25,  
24 2008, Plaintiffs filed the present lawsuit challenging the  
25 termination of their asylum status. Plaintiffs filed a first  
26 amended complaint on March 19, 2009.

#### 27 LEGAL STANDARD

##### 28 I. Motion to Dismiss for Lack of Subject Matter Jurisdiction

Subject matter jurisdiction is a threshold issue which goes to  
the power of the court to hear the case. Federal subject matter  
jurisdiction must exist at the time the action is commenced.

Morongo Band of Mission Indians v. Cal. State Bd. of Equalization,  
858 F.2d 1376, 1380 (9th Cir. 1988). A federal court is presumed  
to lack subject matter jurisdiction until the contrary  
affirmatively appears. Stock W., Inc. v. Confederated Tribes, 873  
F.2d 1221, 1225 (9th Cir. 1989).

1 Dismissal is appropriate under Rule 12(b)(1) when the district  
2 court lacks subject matter jurisdiction over the claim. Fed. R.  
3 Civ. P. 12(b)(1). A Rule 12(b)(1) motion may either attack the  
4 sufficiency of the pleadings to establish federal jurisdiction, or  
5 allege an actual lack of jurisdiction which exists despite the  
6 formal sufficiency of the complaint. Thornhill Publ'g Co. v. Gen.  
7 Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Roberts v.  
8 Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987).

9 II. Motion to Dismiss for Failure to State a Claim

10 A complaint must contain a "short and plain statement of the  
11 claim showing that the pleader is entitled to relief." Fed. R.  
12 Civ. P. 8(a). When considering a motion to dismiss under Rule  
13 12(b)(6) for failure to state a claim, dismissal is appropriate  
14 only when the complaint does not give the defendant fair notice of  
15 a legally cognizable claim and the grounds on which it rests.  
16 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In  
17 considering whether the complaint is sufficient to state a claim,  
18 the court will take all material allegations as true and construe  
19 them in the light most favorable to the plaintiff. NL Indus., Inc.  
20 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

21 When granting a motion to dismiss, the court is generally  
22 required to grant the plaintiff leave to amend, even if no request  
23 to amend the pleading was made, unless amendment would be futile.  
24 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
25 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment  
26 would be futile, the court examines whether the complaint could be  
27 amended to cure the defect requiring dismissal "without  
28 contradicting any of the allegations of [the] original complaint."

1 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).  
2 Leave to amend should be liberally granted, but an amended  
3 complaint cannot allege facts inconsistent with the challenged  
4 pleading. Id. at 296-97.

5 III. Legal Process to Terminate Asylum

6 Immigration law provides for two alternative routes to  
7 terminate a grant of asylum:

8 When USCIS initiates termination proceedings, it may do so by  
9 initiating and conducting termination proceedings at the  
10 asylum office . . . or USCIS may elect to issue an NTA [i.e.  
11 Notice to Appear] concurrently with a Notice of Intent to  
12 Terminate Asylum Status by EOIR [Executive Office for  
Immigration Review]. . . to vest the Immigration Court with  
jurisdiction over the termination proceedings. See 8 C.F.R.  
§ 208.24(f).

13 U.S. Citizenship and Immigration Services' Affirmative Asylum  
14 Procedures Manual at 144 (2007) (hereinafter Asylum Manual). In  
15 the present case, the USCIS chose to conduct its own termination  
16 proceeding at the SFAO.

17 Before holding the proceeding, the asylum office issues a  
18 NOIT, which lists the grounds for the intended termination and  
19 contains a summary of the evidence supporting the grounds. 8  
20 C.F.R. § 208.24(c); Asylum Manual at 143. The NOIT must be issued  
21 at least thirty days prior to the scheduled interview. At the  
22 interview, "The alien shall be provided with an opportunity to  
23 present evidence showing that he or she is still eligible for  
24 asylum or withholding of deportation or removal." 8 C.F.R.  
25 § 208.24(c). After the interview, "[i]f the asylum officer  
26 determines that the alien is no longer eligible for asylum or  
27 withholding of deportation or removal, the alien shall be given  
28 written notice that asylum status or withholding of deportation or

1 removal and any employment authorization issued pursuant thereto,  
2 are terminated." Id. After asylum status is terminated, the  
3 asylum office "must place the individual before the Immigration  
4 Court." Asylum Manual at 151.

5 In the present case, at the same time Plaintiffs' asylum  
6 status was terminated, the USCIS concurrently issued a NTA, which  
7 placed them in removal proceedings. In a removal proceeding, the  
8 alien is entitled to a full evidentiary hearing in immigration  
9 court, which includes "a reasonable opportunity to examine the  
10 evidence against the alien, to present evidence on the alien's own  
11 behalf, and to cross-examine witnesses presented by the Government  
12 . . . ." 8 U.S.C. § 1229a(b)(4).

#### 13 DISCUSSION

##### 14 I. Subject Matter Jurisdiction

##### 15 A. Final Agency Action and Ripeness

16 Plaintiffs assert subject matter jurisdiction under the APA.  
17 Judicial review under the APA is limited to review of "final agency  
18 action." 5 U.S.C. § 704. Section 704 of the APA states,

19 Agency action made reviewable by statute and final agency  
20 action for which there is no adequate remedy in court are  
21 subject to judicial review. A preliminary, procedural, or  
22 intermediate agency action or ruling not directly reviewable  
23 is subject to review on the review of the final agency  
24 action. Except as otherwise expressly required by statute,  
25 agency action otherwise final is final for the purposes of  
26 this section whether or not there has been presented or  
27 determined an application for a declaratory order, for any  
28 form of reconsideration, or, unless the agency otherwise  
requires by rule and provides that the action meanwhile is  
inoperative, for an appeal to superior agency authority.

For agency action to be final, the action must (1) "mark the  
consummation of the agency's decision making process -- it must not  
be of a merely tentative or interlocutory nature and" (2) "be one

1 by which rights or obligations have been determined or from which  
2 legal consequences will follow." Bennet v. Spear, 520 U.S. 154,  
3 177-178 (1997) (internal citations and quotations omitted). The  
4 Supreme Court has "interpreted the 'finality' element in a  
5 pragmatic way." FTC v. Standard Oil of Cal., 449 U.S. 232, 239  
6 (1980). "The core question is whether the agency has completed its  
7 decisionmaking process, and whether the result of that process is  
8 one that will directly affect the parties." Franklin v.  
9 Massachusetts, 505 U.S. 788, 797 (1992). Certain factors provide  
10 an indicia of finality, such as "whether the [action] amounts to a  
11 definitive statement of the agency's position, whether the [action]  
12 has a direct and immediate effect on the day-to-day operations of  
13 the party seeking review, and whether immediate compliance [with  
14 the terms] is expected." Cal. Dep't of Water Res. v. FERC, 341  
15 F.3d 906, 909 (9th Cir. 2003).

16 Here, the question is whether the USCIS's decision to  
17 terminate Plaintiffs' asylum status is a final agency action. One  
18 factor weighing in favor of such a finding is the fact that neither  
19 the INA nor its implementing regulations give them a right to  
20 appeal USCIS's decision to terminate their asylum status. Although  
21 an immigration judge does not have jurisdiction to review the  
22 specific USCIS decision to terminate asylum, such a judge does have  
23 the right to review and adjudicate whether Plaintiffs are entitled  
24 to asylum or withholding of removal. Defendants are currently in  
25 removal proceedings and have reasserted their right to apply for  
26 asylum in that proceeding. That hearing is similar to the  
27 interview Plaintiffs were provided as part of their asylum status  
28 termination but there are important differences between the two.



1 In the removal proceeding, Plaintiffs will have greater rights to  
2 present evidence and cross-examine witnesses,<sup>2</sup> but they will also  
3 have the burden to prove their asylum claim. In the asylum  
4 termination interview, Plaintiffs did not have the same rights with  
5 respect to presenting evidence and cross-examining witnesses, but  
6 Defendants had the burden to prove a valid reason to terminate  
7 Plaintiffs' asylum status.

8 Another factor in favor of finding final agency action is the  
9 fact that the USCIS's decision had a direct and immediate effect on  
10 Plaintiffs' day-to-day life. As a result of having their asylum  
11 status terminated, Plaintiffs lost their legal right to live and  
12 work in the United States, as well as their right to travel in and  
13 out of the United States.

14 Before determining whether an agency action is final, the  
15 Court must also consider whether Plaintiffs have exhausted their  
16 administrative remedies. At the same time that Plaintiffs received  
17 an official letter terminating their asylum application, they also  
18 received a Notice to Appear (NTA) (Form I-862), which placed them  
19 under removal proceedings. Defendants argue that, once removal  
20 proceedings were initiated against Plaintiffs, an administrative  
21 forum for raising their asylum legal claim became immediately  
22 available to them and the USCIS decision was rendered "non-final."  
23 Though it is true that Plaintiffs can and have renewed their asylum

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25 <sup>2</sup>Under 8 U.S.C. § 1229a(b)(4), an alien in removal proceedings  
26 has many procedural rights, including "the privilege of being  
27 represented, at no expense to the Government, by counsel of the  
28 alien's choosing," "a reasonable opportunity to examine the  
evidence against the alien, to present evidence on the alien's own  
behalf, and to cross examine witnesses presented by the  
government." Further, "a complete record shall be kept of all  
testimony and evidence produced at the proceeding."

1 claims in the removal proceeding, pursuing those claims is a far  
2 cry from the remedy they seek. If Plaintiffs prevail in all  
3 aspects of their APA suit, the Court would recognize that they were  
4 previously granted asylum status, set aside the unlawful  
5 termination, and order the agency to furnish them with proof of  
6 their asylum status. The mere opportunity to submit to the  
7 discretion of the immigration court a renewed request for asylum  
8 status would not relieve the hardship caused by withholding court  
9 consideration of Plaintiffs' claims that they already have that  
10 status. See Sharkey v. Quarantillo, 541 F.3d 75, 90 (2d Cir.  
11 2008). Thus, the Court has subject matter jurisdiction to hear  
12 Plaintiffs' claims.

13 II. Motion to Dismiss

14 Defendants argue that Plaintiffs fail to state a claim that  
15 Defendants violated the INA and its implementing regulations.  
16 Defendants assert that they sufficiently described and disclosed  
17 their reasons for seeking to terminate Plaintiffs' asylum status  
18 and afforded Plaintiffs an opportunity to submit rebuttal evidence,  
19 which is all that the regulations governing asylum termination  
20 requires. The Court disagrees. The NOIT issued by the USCIS was  
21 insufficient on its face to apprise Plaintiffs of its reasons for  
22 seeking to terminate Plaintiffs' asylum status.

23 The notice stated that Ms. Sidhu was granted asylum based on  
24 her claim that she was arrested together with her husband and  
25 subsequently harmed by the Indian authorities because of her and  
26 her husband's political activity. The notice vaguely explained  
27 that a recently filed form (I-730 Refugee/Asylee Relative Petition)  
28 on behalf of Harjit Sidhu "calls into question the veracity of the

1 testimony you provided about what happened to you and your husband  
2 in India." However the notice does not explain in any more detail  
3 how that form calls into question the veracity of Ms. Sidhu's  
4 testimony. There is no way to discern from this letter what aspect  
5 of her husband's I-730 conflicted with her previous testimony. The  
6 asylum office was required to issue a notice which lists the  
7 "ground(s) for the intended termination and [] a summary of the  
8 evidence supporting the ground(s)." Asylum Manual at 143; 8 C.F.R.  
9 § 208.24(c). Ms. Sidhu's notice contains neither. Therefore, the  
10 Court will allow Plaintiffs' first cause of action to proceed to  
11 the extent that it asserts a cause of action for violating the  
12 notice requirement of § 208.24(c).

13 Plaintiffs also assert that Defendants violated the INA by  
14 not following 8 C.F.R. § 295.5(b). However, that provision only  
15 applies to removal proceedings, not to termination of asylum  
16 interviews conducted by the USCIS. In removal proceedings, an  
17 alien is entitled to a full evidentiary hearing in immigration  
18 court, which includes "a reasonable opportunity to examine the  
19 evidence against the alien, to present evidence on the alien's own  
20 behalf, and to cross-examine witnesses presented by the Government  
21 . . . ." 8 U.S.C. § 1229a(b)(4); 8 C.F.R. § 292.5(b). In a  
22 termination interview, "the alien shall be provided the opportunity  
23 to present evidence showing that he or she is still eligible for  
24 asylum." 8 C.F.R. § 208.24. While an alien has an opportunity to  
25 present evidence at a termination interview, the regulations do not  
26 provide an alien with the right to present or cross-examine  
27 witnesses at the interview. Therefore, the Court grants  
28 Defendants' motion to dismiss to the extent that the complaint


1 asserts a violation of § 292.5(b).

2 CONCLUSION

3 For the foregoing reasons, the Court grants in part  
4 Defendants' motion to dismiss. Because Plaintiffs cannot state a  
5 claim for a violation of § 292.5(b), the Court dismisses with  
6 prejudice that aspect of the first cause of action. Defendants  
7 must file an answer within twenty (20) days from the date of this  
8 order. The parties shall attempt to stipulate to a schedule for  
9 filing the administrative record and filing cross-motions for  
10 summary judgment. If they are unable to stipulate, they shall each  
11 submit a proposal within thirty days from the date of this order.

12 IT IS SO ORDERED.

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14 Dated: 6/10/09



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CLAUDIA WILKEN  
United States District Judge