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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OLGA TIKHONOVA,
Plaintiff,
v.
U.S. DEPARTMENT OF STATE, et al.,
Defendants.

Case No. [22-cv-06034-HSG](#)

**ORDER GRANTING MOTION TO
DISMISS**

Re: Dkt. No. 12

Pending before the Court is Defendants' motion to dismiss. Dkt. No. 12. The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. *See* Civil L.R. 7-1(b). For the reasons detailed below, the Court **GRANTS** the motion to dismiss.

I. BACKGROUND

Pro se Plaintiff Olga Tikhonova is a U.S. citizen. *See* Dkt. No. 1 ("Compl.") at ¶ 3. Her mother, Liubov Tikhonova, is the beneficiary in this case and is a citizen and resident of Russia. *See id.* at ¶¶ 3, 6. Plaintiff filed a Form I-130 Petition for Alien Relative on behalf of her mother in July 2021. *See id.* at ¶ 7. According to the complaint, the U.S. Citizenship and Immigration Service approved the application, and sent the petition to the National Visa Center ("NVC"), a part of the U.S. Department of State. *Id.* at ¶ 8. Plaintiff and her mother then submitted the required Form DS-260 in November 2021. *See id.* at ¶ 9. In May 2022, NVC stated that it had received all necessary "fees, forms, and documents" and would work with the U.S. Embassy in Warsaw to schedule the interview. *Id.* at ¶ 11. At the time (and as of the date of this order), the Department of State suspended immigrant visa services at the U.S. Embassy in Moscow "due to the Russian government's April 23 notification of its intention to prohibit U.S. Mission Russia from

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1 employing foreign nationals in any capacity.”¹ See DEP’T OF STATE, U.S. Embassy & Consulates
 2 in Russia, *Message to U.S. Citizens: U.S. Mission Russia - Reduction of Consular Servs.*² The
 3 State Department accordingly “designated the U.S. Embassy in Warsaw to process immigrant
 4 visas for residents of Russia.” See DEP’T OF STATE, U.S. Embassy & Consulates in Russia, *Visas.*³
 5 However, on September 9, 2022, Poland also announced that it would no longer issue visas to
 6 Russian citizens or allow Russian citizens into the country. Compl. at ¶ 12. Despite this
 7 announcement, Plaintiff alleges that NVC notified Plaintiff and her mother that an immigrant visa
 8 interview had been scheduled in Warsaw for November 23, 2022. *Id.* at ¶ 13. Plaintiff alleges
 9 that she reached out several times to NVC to change the location of the interview and “has
 10 exhausted any and all administrative remedies that may exist.” *Id.* at ¶¶ 17–18.

11 Plaintiff filed this case against the U.S. Department of State and Antony Blinken in his
 12 official capacity as U.S. Secretary of State. See *id.* at ¶¶ 4–5. By refusing to relocate the visa
 13 interview to Russia, Plaintiff contends that “Defendants have failed to fulfill their duty to
 14 adjudicate [the] immigration visa application” *Id.* at ¶¶ 21–23. She seeks “an order directing
 15 Defendants to schedule the immigration interview in the country where [her mother] resides in and
 16 approve [her mother’s] immigration visa application” See Compl. at 1. Plaintiff has alleged
 17 causes of action under the Mandamus Act, 28 U.S.C. § 1361, and the Administrative Procedure
 18 Act, 5 U.S.C. § 555(b) and 5 U.S.C. § 706(1).

19 Defendants now move to dismiss the complaint in its entirety under both Federal Rule of
 20 Civil Procedure 12(b)(1) and 12(b)(6). See Dkt. No. 12. The Court notes that the parties have not
 21 provided any update on whether the Warsaw interview was rescheduled or relocated in the
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23 ¹ The government requests the Court take judicial notice of the State Department’s public
 24 announcement and information from its website. See Dkt. No. 12-1 at 1, & n.1. The Court finds it
 25 may take judicial notice of these documents, which are: (1) statements of government officials or
 26 entities that are not subject to reasonable dispute; or (2) other public records and government
 27 documents available on reliable internet sources, such as government websites. See *DeHoog v.*
 28 *Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 763 n.5 (9th Cir. 2018) (taking “judicial notice of
 government documents, court filings, press releases, and undisputed matters of public record”);
 see also Fed. R. Evid. 201(b).

² Available at <https://ru.usembassy.gov/message-to-u-s-citizens-u-s-mission-russia-reduction-of-consular-services/> (last visited August 8, 2023).

³ Available at <https://ru.usembassy.gov/visas/> (last visited August 8, 2023).

1 intervening months since this case was filed.⁴

2 **II. LEGAL STANDARD**

3 **A. Rule 12(b)(1)**

4 Federal Rule of Civil Procedure Rule 12(b)(1) allows a party to move to dismiss for lack of
5 subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). A Rule 12(b)(1) motion may be either
6 facial, where the inquiry is confined to the allegations in the complaint, or factual, where the court
7 is permitted to look beyond the complaint to extrinsic evidence. *See Wolfe v. Strankman*, 392 F.3d
8 358, 362 (9th Cir. 2004); *Savage v. Glendale Union High School Dist. No. 205*, 343 F.3d 1036,
9 1040, n.2 (9th Cir. 2003). A facial challenge “asserts that the allegations contained in a complaint
10 are insufficient on their face to invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373
11 F.3d 1035, 1039 (9th Cir. 2004). Where the plaintiff cannot cure a jurisdictional defect by
12 amendment, the court may dismiss the complaint without leave to amend. *Eminence Capital, LLC*
13 *v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

14 **B. Rule 12(b)(6)**

15 Federal Rule of Civil Procedure 8(a) requires that a complaint contain “a short and plain
16 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A
17 defendant may move to dismiss a complaint for failing to state a claim upon which relief can be
18 granted under Rule 12(b)(6). “Dismissal under Rule 12(b)(6) is appropriate only where the
19 complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.”
20 *Mendondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule
21 12(b)(6) motion, a plaintiff need only plead “enough facts to state a claim to relief that is plausible
22 on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible
23 when a plaintiff pleads “factual content that allows the court to draw the reasonable inference that
24 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

25 In reviewing the plausibility of a complaint, courts “accept factual allegations in the

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27 ⁴ According to the complaint, Liubov Tikhonova’s interview was scheduled for November 23,
28 2022. Compl. at ¶ 13. The Court assumes, based on Plaintiff filing this case and the absence of
any further update, that this interview did not occur, no other interview has occurred, and the visa
application remains pending.

1 complaint as true and construe the pleadings in the light most favorable to the nonmoving party.”
2 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nevertheless,
3 courts do not “accept as true allegations that are merely conclusory, unwarranted deductions of
4 fact, or unreasonable inferences.” *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir.
5 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

6 **III. DISCUSSION**

7 Plaintiff brings claims under both the Mandamus Act and the APA. Plaintiff offers little
8 explanation in her complaint or opposition to the motion to dismiss as to why she is entitled to
9 relief under these statutory provisions. But regardless of the statutory basis, Plaintiff ultimately is
10 seeking an order changing the location of her mother’s visa interview and compelling the
11 adjudication of her visa application. Plaintiff specifically requests an order compelling
12 Defendants to schedule her mother’s visa interview at the U.S. Embassy in Moscow, Russia rather
13 than in Warsaw, Poland. *See* Compl. at ¶¶ 19–26; *see generally* Dkt. No. 17. By failing to change
14 the location of the interview to Moscow, Plaintiff urges that Defendants have indefinitely delayed
15 the adjudication of the visa application. Compl. at ¶¶ 13–17, 27–32. Defendants contend that the
16 Court lacks subject matter jurisdiction because Plaintiff is challenging Defendants’ discretionary
17 authority. *See* Dkt. No. 12-1 at 7–11.

18 The Mandamus Act vests district courts with “original jurisdiction of any action in the
19 nature of mandamus to compel an officer or employee of the United States or any agency thereof
20 to perform a duty owed to the plaintiff.” 28 U.S.C. § 1361. Similarly, under § 706(1) of the APA,
21 a court may “compel agency action unlawfully withheld or unreasonably delayed.” *See* 5 U.S.C.
22 § 706(1). The Supreme Court has interpreted this language to mean that “the only agency action
23 that can be compelled under the APA is action *legally required*.” *Norton v. S. Utah Wilderness*
24 *All. (“SUWA”)*, 542 U.S. 55, 63, n.1 (2004) (emphasis in original)). An action is only legally
25 required “if there is ‘a specific, unequivocal command’ placed on the agency to take a ‘discrete
26 agency action.’” *Vietnam Veterans of Am. v. Cent. Intel. Agency*, 811 F.3d 1068, 1075 (9th Cir.
27 2016) (quoting *SUWA*, 542 U.S. at 63); *see also SUWA*, 542 at 63 (finding that a case under
28 § 706(1) “can proceed only where a plaintiff asserts that an agency failed to take a discrete agency

1 action that it is *required to take*”) (emphasis in original). In short, in order to compel an agency to
2 act under either the Mandamus Act or the APA, Plaintiff must establish that the agency has a duty
3 to act.

4 Defendants argue that they do not have a legal duty to hold a visa interview in the location
5 of an applicant’s choosing. Dkt. No. 12 at 7, 9–10. Rather, in their view, this is a discretionary
6 act over which the Court has no subject matter jurisdiction. *Id.* Defendants first point to 8 U.S.C.
7 § 1202(a), which states that an individual shall apply for an immigrant visa “in such form and
8 manner at such place as shall be by regulations prescribed.” 8 U.S.C. § 1202(a). The “form,”
9 “manner” and “place” are thus all determined by the agency’s own regulations. The statute itself
10 therefore does not contain any “specific, unequivocal command” about the location of a visa
11 application or interview. *See Vietnam Veterans*, 811 F.3d at 1075 (quoting *SUWA*, 542 at 63).

12 Although few cases have analyzed what legal duties are imposed by § 1202(a), those that
13 have considered the statute have concluded that it vests the State Department with wide discretion.
14 In *Legal Assistance for Vietnamese Asylum Seekers v. Department of State, Bureau of Consular*
15 *Affairs*, the D.C. Circuit considered § 1202(a) and concluded that visa applicants have “no
16 substantive right” to have their applications processed in “any particular venue.” 104 F.3d 1349,
17 1354 (D.C. Cir. 1997). Such decisions were “entrusted to the discretion of the State Department”
18 and were thus unreviewable by the Court. *See id.* at 1353–54. The plaintiffs challenged the
19 Department of State’s consular venue policy, which required Vietnamese and Laotian migrants—
20 who were fleeing to nearby countries in the 1980s seeking refuge—to submit their visa
21 applications in their home country. *Id.* at 1350–51. In looking at § 1202(a), the court reasoned
22 that the statute “grants to the Secretary discretion to prescribe the place at which aliens apply for
23 immigrant visas without providing substantive standards against which the Secretary’s
24 determination could be measured.” *Id.* at 1353. The form, manner, and place “are left entirely to
25 the discretion of the Secretary of State.” *Id.* The court further noted that such discretion is
26 sensible where “the agency is entrusted by a broadly worded statute with balancing complex
27 concerns involving security and diplomacy.” *Id.*

28 Here, Defendants further point out that the pertinent regulations also grant the agency wide

1 discretion, although they place some limitations on the *applicant*. For example, 22 C.F.R. § 42.61
 2 provides that a foreign national “shall make an immigrant visa application in person at the
 3 consular office having jurisdiction over [his or her] place of residence,” “*unless otherwise directed*
 4 *by the Department.*” 22 C.F.R. §§ 42.61(a) (emphasis added). Similarly, “a consular office may,
 5 *as a matter of discretion*, or shall, *at the direction of the Department*, accept an immigrant visa
 6 application from [a foreign national] who is neither a resident of, nor physically present in, the
 7 area designated for that office for such purpose.” *Id.* (emphasis added). The State Department
 8 therefore may determine where it will accept visa applications. The visa interview itself is
 9 prescribed by 22 C.F.R. § 42.62. Under this regulation, “[e]very applicant applying for an
 10 immigrant visa . . . shall be required to appear personally before a consular officer for the
 11 execution of the application” and “must be interviewed by a consular officer . . .” 22 C.F.R.
 12 § 42.62(a)–(b). The regulation does not, however, place any limitations on where Defendants
 13 schedule that interview.

14 In response, Plaintiff does not cite—and the Court is not aware—of any statute or
 15 regulation dictating the location of a visa interview. To the contrary, courts have broadly found
 16 that “Congress has given [the State Department and other agencies] wide discretion in the area of
 17 immigration processing.” *See Poursohi v. Blinken*, No. 21-cv- 01960-TSH, 2021 WL 5331446 at
 18 *5 (N.D. Cal. Nov. 16, 2021) (quotation omitted). Likewise, the limitations on judicial review
 19 under the APA and the Mandamus Act are intended to “protect agencies from undue judicial
 20 interference with their lawful discretion” and “avoid entanglement in abstract policy
 21 disagreements which courts lack both expertise and information to resolve.” *SUWA*, 542 U.S. at
 22 66–67. The location of a visa interview falls squarely within this kind of complex and nuanced
 23 policy determination. Accordingly, to the extent Plaintiff seeks an order changing the location of
 24 Liubov Tikhonova’s visa interview to Moscow, she has not established that Defendants have a
 25 nondiscretionary duty to schedule her interview there. The Court therefore **GRANTS** the motion
 26 to dismiss on this basis.

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1 **IV. CONCLUSION**

2 The Court **GRANTS** the motion to dismiss. This order also **TERMINATES AS MOOT**
3 Dkt. No. 20. To the extent Plaintiff’s claims are based on the belief that her mother’s visa
4 interview should be scheduled in Russia (or any specific location of her choosing), the Court
5 dismisses these claims **WITHOUT LEAVE TO AMEND**.

6 Nevertheless, the Court cannot say at this stage that amending the complaint would be
7 futile. *See Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995) (“[A] pro se litigant is
8 entitled to notice of the complaint’s deficiencies and an opportunity to amend prior to dismissal of
9 the action.”); *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (“[A] district court should not
10 dismiss a pro se complaint without leave to amend unless it is absolutely clear that the deficiencies
11 of the complaint could not be cured by amendment.”) (quotations omitted). To the extent Plaintiff
12 seeks relief other than choosing the location of the visa interview, she may amend her complaint to
13 clarify these claims. Plaintiff shall file any amended complaint by no later than September 8,
14 2023.

15 The Court notes that in February 2023, the State Department added the U.S. Embassy in
16 Tashkent, Uzbekistan and the U.S. Consulate General Almaty in Kazakhstan “as processing posts
17 for Russian IR-5 (parent of a U.S. citizen) immigrant visa applicants.” *See DEP’T OF STATE, U.S.*
18 *Embassy & Consulates in Russia, Visas*, available at <https://ru.usembassy.gov/visas/> (last visited
19 August 8, 2023). In their reply brief, Defendants also suggest that the visa application was in fact
20 transferred to the U.S. Consulate General Almaty in Kazakhstan and that they provided Liubov
21 Tikhonova with instructions for how to schedule an interview there. *See* Dkt. No. 18-1 at ¶¶ 7–9.
22 Any amended complaint should therefore address the current status of the visa application;
23 whether an interview in Kazakhstan—or another location—was offered, scheduled, or has taken
24 place; and why Plaintiff believes that she still has a live claim. Failure to file an amended
25 complaint by this deadline or to address these issues may result in the dismissal of the action in its
26 entirety without further leave to amend.

27 The Court further **SETS** a telephonic case management conference on October 17, 2023, at
28 2:00 p.m. to discuss how to move this case forward efficiently. The Court **DIRECTS** the parties

1 to submit individual case management statements by October 10, 2023. The parties shall use the
2 following dial-in information to access the call:

3 **Dial-In:** 888-808-6929;

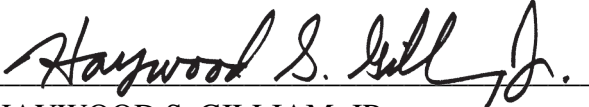
4 **Passcode:** 6064255

5 All attorneys and pro se litigants appearing for a telephonic case management conference are
6 required to dial in at least 15 minutes before the hearing to check in with the courtroom deputy.
7 For call clarity, parties shall NOT use speaker phone or earpieces for these calls, and where at all
8 possible, parties shall use landlines.

9 Given the complexity of this case, the Court encourages Plaintiff to seek assistance at the
10 Legal Help Center, which provides free information and limited-scope legal assistance to pro se
11 litigants, if she is unable to retain counsel. More information about the Legal Help Center is
12 provided at <http://www.cand.uscourts.gov/legal-help>. Telephone appointments may be scheduled
13 either over the phone at (415) 782-8982 or by email at federalprobonoproject@sfbar.org.

14 **IT IS SO ORDERED.**

15 Dated: 8/9/2023

16 
17 HAYWOOD S. GILLIAM, JR.
18 United States District Judge

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