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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 KIMBERLY L. GARCIA and  
12 UMUT KOCER,

13 Plaintiffs,

14 v.

15 MELISSA MAXIM, Field Office  
16 Director, United States Citizenship &  
17 Immigration Services, San Diego,  
18 California; TRACEY RENAUD,  
19 Acting Director, United States Citizenship  
20 & Immigration Services; DAVID  
21 PEKOSKE, Acting Director,<sup>1</sup> United  
22 States Department of Homeland Security;  
23 and DOES 1, 2 and 3,

24 Defendants.

Case No.: 3:20-cv-01922-BEN-LL

**ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS**

[ECF No. 8]

25  
26 This is an immigration matter. Plaintiffs Kimberly Garcia and Umut Kocer  
27 (collectively, "Plaintiffs") have asked the Court to issue a writ of mandamus compelling  
28 Defendants Melissa Maxim, Tracey Renaud, and David Pecoske (collectively,

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1 On January 20, 2021, Tracey Renaud became Acting Director of Citizenship and  
Immigration Services and David Pecoske became Acting Director of Homeland Security.  
Pursuant to Fed. R. Civ. P. 25(d), Acting Directors Renaud and Pecoske are  
automatically substituted as Defendants.

1 “Defendants”) to adjudicate Plaintiffs’ I-130 immigration petition. Compl., ECF No. 1.  
2 Defendants filed a motion to dismiss. Mot., ECF No. 8. For the reasons set forth below,  
3 the motion is **GRANTED** and Plaintiffs’ Complaint is **DISMISSED WITHOUT**  
4 **PREJUDICE**.

5 **I. FACTUAL AND STATUTORY BACKGROUND**<sup>2</sup>

6 Kimberly Garcia is a United States citizen. Compl., ECF No. 1, ¶ 1. Umut Kocer  
7 is a Turkish citizen. *Id.* On September 3, 2009, Kocer entered the United States as a  
8 non-immigrant on a J-1 visa, which allowed him to lawfully remain in the United States  
9 for one year. *Id.* at ¶ 12. In 2017, however, Kocer was detained by U.S. Customs and  
10 Border Protection (“CBP”) and placed into removal proceedings in San Diego,  
11 California. *Id.*

12 On April 2, 2019, Kocer appeared with counsel at his removal proceedings before  
13 an immigration court and told the court officer he intended to marry his girlfriend,  
14 Kimberly Garcia, who would subsequently be filing a petition to adjust his immigration  
15 status pursuant to 8 U.S.C. § 1255(a). Compl., ECF No. 1, ¶ 12. The immigration court  
16 then reset Kocer’s hearing to August 20, 2019, to provide Kocer time to marry and  
17 request visa status adjustment. *Id.* at 13. On May 8, 2019, Garcia and Kocer were  
18 married in Las Vegas, Nevada. *Id.* at 14. On July 5, 2019, Garcia requested his visa  
19 status be adjusted via a Form I-130, Petition for Alien Relative, the application  
20 underlying this Complaint. *Id.* However, because Plaintiffs married while Kocer was  
21 subject to removal proceedings, there is a legal presumption their marriage is fraudulent.  
22 Compl., ECF No. 1, ¶ 15.

23 Thus, to be eligible for an I-130 status adjustment, Plaintiffs must establish the  
24 marriage is not fraudulent. 8 U.S.C. § 1361. Plaintiffs aver that United States  
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26  
27 <sup>2</sup> The following overview of the facts is drawn from Plaintiffs’ Complaint, ECF No.  
28 1, which the Court assumes true in analyzing the motions to dismiss. *Erickson v. Pardus*,  
551 U.S. 89, 94 (2007). The Court is not making factual findings.

1 Citizenship & Immigration Services (“USCIS”) is “the agency with sole jurisdiction to  
2 make this determination” and that USCIS has, through Defendants, “failed to take any  
3 steps to complete the adjudication of [Plaintiffs’] I-130 petition.” *Id.* at ¶¶ 15, 18. They  
4 also allege that, through counsel, they first inquired about the status of their I-130 Petition  
5 on April 8, 2020 and were told that an internal request would be submitted on their case.  
6 Compl., ECF No. 1, ¶ 22. One month later, Plaintiffs’ counsel followed-up with USCIS  
7 and obtained the same result. *Id.* at 23. On August 3, 2020, Plaintiffs’ counsel again  
8 contacted USCIS and was told the petition would be elevated to “Tier II.” *Id.* at 25. This  
9 escalation allegedly ensures a timelier response. *Id.* On August 5, 2020, Plaintiffs  
10 received an email from USCIS indicating their petition was “actively being reviewed” but  
11 did not provide a date for Plaintiffs to be interviewed by USCIS. *Id.* at 26.

12 On September 25, 2020, Plaintiffs filed this Complaint seeking an order requiring  
13 USCIS to adjudicate Plaintiffs’ I-130 Petition within sixty days and awarding them their  
14 attorney’s fees. Compl., ECF No. 1, Prayer. Plaintiffs allege Defendants violated (1) the  
15 Administrative Procedures Act, 5 U.S.C. § 500 *et seq.* (the “APA”); (2) the Immigration  
16 and Nationality Act, 8 U.S.C. § 1255 *et seq.* (the “INA”); and (3) denied Plaintiffs due  
17 process and equal protection under the Fifth Amendment. *Id.*

## 18 **II. LEGAL STANDARD**

19 Defendants have moved to dismiss Plaintiffs’ entire suit against them under two  
20 provisions of Rule 12 of the Federal Rules of Civil Procedure (“Rule 12”): Rule 12(b)(1),  
21 for lack of subject matter jurisdiction, and Rule 12(b)(6), for failure to state a claim upon  
22 which relief can be granted.

### 23 **A. *Motion to Dismiss for Lack of Subject-Matter Jurisdiction (Rule 12(b)(1))***

24 A motion to dismiss under Rule 12(b)(1) challenges the jurisdiction of the court  
25 over the subject matter of the complaint. Fed. R. Civ. P. 12(b)(1). “Federal courts are  
26 courts of limited jurisdiction and possess ‘only that power authorized by Constitution and  
27 statute.’” *Sandpiper Village Condominium Ass’n., Inc. v. Louisiana-Pacific Corp.*, 428  
28 F.3d 831, 841 (9th Cir. 2005). Limits upon federal jurisdiction must not be disregarded

1 or evaded. *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978).  
2 “A federal court is presumed to lack jurisdiction in a particular case unless the contrary  
3 affirmatively appears.” *A-Z Intern. v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003)  
4 (internal quotation and citation omitted). It is the burden of plaintiffs to persuade the  
5 Court that subject matter jurisdiction exists. *See Hexom v. Oregon Dept. of Transp.*, 177  
6 F.3d 1134, 1135 (9th Cir. 1999).

7 A motion to dismiss for lack of subject matter jurisdiction may be “facial” or  
8 “factual.” *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.2004) *cert.*  
9 *denied* 544 U.S. 1018 (2005). A facial attack challenges the sufficiency of the  
10 jurisdictional allegations in the complaint. *See id.* In contrast, a factual attack challenges  
11 the substance of a complaint’s jurisdictional allegations. *See St. Clair v. City of Chico*,  
12 880 F.2d 199, 201 (9th Cir. 1989). If the defendant brings a facial attack, a district court  
13 must assume that the factual allegations in the complaint are true and construe them in  
14 the light most favorable to the plaintiff. *See Love v. United States*, 915 F.2d 1242, 1245  
15 (9th Cir. 1990). A Rule 12(b)(1) motion will be granted if, on its face, the complaint fails  
16 to allege grounds for federal subject matter jurisdiction as required by Rule 8(a) of the  
17 Federal Rules of Civil Procedure. *See Warren v. Fox Family Worldwide, Inc.*, 328 F.3d  
18 1136, 1139 (9th Cir. 2003).

19 **B. Motion to Dismiss for Failure to State a Claim (Rule 12(b)(6))**

20 A dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure may be  
21 based on the lack of a cognizable legal theory or absence of sufficient facts to support a  
22 cognizable or plausible legal theory. *Johnson v. Riverside Healthcare Sys.*, 534 F.3d  
23 1116, 1121 (9th Cir. 2008); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). When  
24 considering a Rule 12(b)(6) motion, the Court “accept[s] as true facts alleged and draw[s]  
25 inferences from them in the light most favorable to the plaintiff.” *Stacy v. Rederite Otto*  
26 *Danielsen*, 609 F.3d 1033, 1035 (9th Cir. 2010). A plaintiff must not merely allege  
27 conceivably unlawful conduct but must allege “enough facts to state a claim to relief that  
28 is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim

1 is facially plausible ‘when the plaintiff pleads factual content that allows the court to  
2 draw the reasonable inference that the defendant is liable for the misconduct alleged.’”  
3 *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556  
4 U.S. 662, 678 (2009)). “Threadbare recitals of the elements of a cause of action,  
5 supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

### 6 **III. ANALYSIS**

7 Defendants argue the Court should dismiss this case because, on the facts pled, the  
8 Court lacks jurisdiction to grant mandamus relief. Mot., ECF No. 8, 6-9. Plaintiffs argue  
9 the Court has both (1) mandamus jurisdiction, *see* 28 U.S.C. § 1361, and (2) federal  
10 question jurisdiction, *see* 28 U.S.C. § 1331, to hear this case. Compl., ECF No. 1, ¶ 9.  
11 According to Plaintiffs, federal question jurisdiction allegedly arises under the APA,  
12 because under the APA, “Defendants are obligated to conclude all matters presented to  
13 [them], 5 U.S.C. § 555(b), without unreasonable delay, 5 U.S.C. § 706(1).” Opp’n, ECF  
14 No. 13, 10. As the party seeking to invoke this Court’s jurisdiction, Plaintiffs have the  
15 burden to persuade the Court that subject matter jurisdiction exists. *See Hexom*, 177 F.3d  
16 at 1135. The Court addresses Defendants’ Motion to Dismiss under Rule 12(b)(1) before  
17 addressing Defendants’ Motion to Dismiss under Rule 12(b)(6), because if the Court lacks  
18 jurisdiction over this case it has no power to evaluate the merits of Plaintiffs’ Complaint.  
19 *Cf. Polo v. Innoventions Int’l, LLC*, 833 F.3d 1193, 1196 (9th Cir. 2016) (noting that “a  
20 failure of federal subject-matter jurisdiction means only that the *federal* courts have no  
21 power to adjudicate the matter,” including by dismissing the case on the merits).

#### 22 **A. *Mandamus Jurisdiction***

23 Plaintiffs first assert the Court has mandamus jurisdiction over this matter pursuant  
24 to 28 U.S.C. § 1361. Opp’n, ECF No. 13, 6-9. Defendants respond that mandamus  
25 jurisdiction does not exist because (1) “Plaintiffs’ claim is not clear and certain” and (2)  
26 “there is no congressionally prescribed timeframe within which USCIS has a duty to  
27 adjudicate I-130 petitions.” Mot., ECF No. 8, 8. The Court finds the “clear and certain”  
28 requirement dispositive and addresses it below.

1 At issue here is USCIS' alleged failure to adjudicate Plaintiffs' I-130 petition. "A  
2 non-citizen spouse of a United States citizen may obtain lawful permanent residence  
3 status if the citizen files a Form I-130 on behalf of the non-citizen beneficiary to classify  
4 [him] as an 'immediate relative.'" *Wood v. Nielsen*, Case No. 18-cv-00281-DMR, 2019  
5 WL 285929, at \*1 (N.D. Cal. Jan. 22, 2019) (citing 8 U.S.C. § 1154(a)(1)(A)(i)). "The  
6 petitioner bears the burden of proving by a preponderance of the evidence that the  
7 beneficiary is eligible to receive the benefits of the I-130 petition." *Id.* (citing 8 U.S.C. §  
8 1361). However, "obtaining an immigrant visa as an immediate relative is a two-step  
9 process." *Dominguez v. U.S. Dep't of State*, Case No. 19-cv-5327-PSG-SSx, 2020 WL  
10 5026878, at \*3 (C.D. Cal. May 22, 2020). Only after "a petitioner of an immediate  
11 relative petition proves that his marriage meets the requirements for the approval of an I-  
12 130" is he entitled, "as a matter of right, to the approval of his petition." *Ching v.*  
13 *Mayorkas*, 725 F.3d 1149, 1155 (9th Cir. 2013). Thus, USCIS has discretion to  
14 determine whether an I-130 petition should be granted based on the proof submitted by  
15 the petitioning parties. *See* 8 U.S.C. § 1154(b).

16 Among the Court's limited jurisdictional hooks is mandamus. *See* 28 U.S.C. §  
17 1361 ("The district courts shall have original jurisdiction of any action in the nature of  
18 mandamus to compel an officer or employee of the United States or any agency thereof  
19 to perform a duty owed to the plaintiff.") However, "[a] writ of mandamus is an  
20 extraordinary remedy and [only] is available where: (1) the individual's claim is clear and  
21 certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed  
22 as to be free from doubt; and (3) no other adequate remedy is available." *Dong Liu v.*  
23 *Chertoff*, Case No. 07-cv-0005-BEN-WMC, 2007 WL 1300127, at \*3 (S.D. Cal. Apr. 30,  
24 2007) (citing *Kildare v. Saenz*, 325 F.3d 1078, 1084 (9th Cir. 2003)).

25 As discussed above, "obtaining an immigrant visa as an immediate relative is a  
26 two-step process." *Dominguez*, 2020 WL 5026878, at \*3. "First, a U.S. citizen or lawful  
27 permanent resident must file a petition, known as a Form I-130, Petition for Alien  
28 Relative, with the USCIS on behalf of the alien beneficiary, seeking to have the alien

1 classified as an immediate relative.” *Id.* (citing 8 U.S.C. § 1154(a)(1) and 8 C.F.R. §§  
2 204.2(a)(2), (d)(2), (g)(2)). “Second, if the petition is approved, the alien beneficiary  
3 may apply to the State Department for a visa.” *Id.* (citing 8 U.S.C. §§ 1201(a), 1202(a)).  
4 Here, Plaintiffs are still at step one and the statute does not compel USCIS to favorably  
5 adjudicate the I-130 petition. *See* 8 U.S.C. § 1154(b).

6 In the context of processing immigration petitions, courts have wrestled with  
7 whether USCIS’ function in adjudicating these petitions is discretionary or  
8 nondiscretionary. In *Dong Liu*, this Court examined whether it had mandamus  
9 jurisdiction to compel USCIS officers to adjudicate the plaintiffs’ I-485 immigration  
10 applications within a specified period. 2007 WL 1300127, at \*3-5. Like the I-130  
11 petition at issue here, the *Dong Liu* plaintiffs’ I-485 petition was submitted to USCIS  
12 pursuant to § 245 of the INA. *Id.* at \*3. The Court did not rule out the possibility that  
13 mandamus jurisdiction *could* exist for an immigration petition under some set of facts,  
14 *see id.* at \*\*5 n. 2, but nonetheless found mandamus jurisdiction lacking “[a]s long as  
15 USCIS continues to make reasonable efforts to complete Plaintiffs’ I-485 applications.”  
16 *Id.* at \*5. In such cases, the Court observed, “the pace required to complete that process  
17 is committed to their discretion.” *Id.* (citing *Li v. Chertoff*, 482 F. Supp. 2d 1172, 1178  
18 (S.D. Cal. 2007)); *but see Xiaohui He v. Chertoff*, No. 06-CV-2608-IEG-NLS, 2007 WL  
19 9778029, at \*5 (S.D. Cal. Mar. 8, 2007) (finding that while “the statute is silent as to a  
20 time limit by which the CIS must adjudicate [an I-485 petition] it stretches the statutory  
21 mandate for defendants to argue that there is unlimited and unfettered discretion in the  
22 time by which the CIS must adjudicate an application.”).

23 Here, as in *Dong Liu*, the record clearly indicates USCIS is making reasonable  
24 efforts to complete the adjudication. First, one month after this suit was filed, USCIS  
25 interviewed Plaintiffs. Mot., ECF No. 8, Ex. A. Following that initial interview, USCIS  
26 accommodated three requests by Plaintiffs to postpone a follow-on interview until  
27 February 4, 2021. *Id.* Plaintiffs argue they only requested delays because of “public  
28 health concerns in a pandemic and the threat of a job loss.” Opp’n, ECF No. 13, 11.

1 While these concerns are undoubtedly reasonable, they do not indicate any lack of  
2 diligence by USCIS. Second, on March 1, 2021, USCIS issued Plaintiffs its Notice of  
3 Intent to Deny their I-130 petition. Mot., ECF No. 8, Ex. A. As Plaintiffs’ note in their  
4 Complaint, this is a significant step forward in the adjudication of an I-130 Petition. *See*  
5 Compl., ECF No. 1, 15 (“It is customary for USCIS to conduct an interview after  
6 submission of the application and to make the decision shortly thereafter.”). Thus, it does  
7 not appear that “agency inaction” is the cause of the delay in adjudicating Plaintiffs’  
8 petition. *Dong Liu*, 2007 WL 1300127, at \*5.

9 Because USCIS is making reasonable efforts to adjudicate Plaintiffs’ I-130  
10 petition, the Court concludes it presently lacks subject matter jurisdiction to entertain  
11 Plaintiffs’ request for mandamus.

#### 12 **B. APA Jurisdiction**

13 Plaintiffs also argue the Court has jurisdiction over this matter pursuant to 28  
14 U.S.C. § 1331 because Defendants violated the APA, 5 U.S.C. § 551 *et seq.* Opp’n, ECF  
15 No. 13, 9-11. While acknowledging the APA “does not provide an independent basis for  
16 subject matter jurisdiction,” Plaintiffs argue the APA nonetheless creates a cause of  
17 action because “Defendants are obligated to conclude all matters presented to [them], 5  
18 U.S.C. § 555(b), and without unreasonable delay, 5 U.S.C. § 706(1).” *Id.* at 9-10. Thus,  
19 Plaintiffs argue jurisdiction also lies in this Court because Defendants violated a federal  
20 statute, namely the APA. *Id.* at 10, 17 (“It is clear this Court has subject matter  
21 jurisdiction over Plaintiffs’ claim under 28 U.S.C. § 1361 and 28 U.S.C. § 1331 and that  
22 Plaintiffs sufficiently stated a plausible claim for relief under 5 U.S.C. § 555(b) and  
23 706(1).”). As discussed below, this argument fails.

24 “To invoke jurisdiction under the APA, a petitioner must show that (1) an agency  
25 had a nondiscretionary duty to act and (2) the agency unreasonably delayed in acting on  
26 that duty.” *Dong Liu*, 2007 WL 1300127, at \*6 (citing *Norton v. Southern Utah*  
27 *Wilderness Alliance*, 542 U.S. 55, 63-65 (2004)). However, not all failures to act are  
28 remediable under the APA. *See Norton*, 542 U.S. at 61. “[A] delay cannot be



1 unreasonable with respect to action that is not required.” *Id.* at 63, n. 1. “Therefore, a  
2 court only has jurisdiction to compel an agency to act within a certain time period under  
3 the APA when the agency is compelled by law to act within a certain time period.” *Dong*  
4 *Liu*, 2007 WL 1300127, at \*6 (citing *Norton*, 542 U.S. at 63, n. 1).

5 Here, Congress did not specify a timeframe in which Defendants must adjudicate I-  
6 130 petitions. *See* 8 U.S.C. § 1154. Moreover, within the immigration petition context,  
7 this Court has previously declined the “invitation to judicially impose new heightened  
8 requirements on the administrative agency charged with adjudication of naturalization  
9 applications.” *Dong Liu*, 2007 WL 1300127, at \*6. The Court will not revisit that  
10 decision here. Plaintiffs have petitioned for an I-130 visa, and the statute vesting USCIS  
11 with authority to adjudicate that petition does not specify the amount of time in which  
12 USCIS must act to grant or deny it. *See* 8 U.S.C. § 1154. Contrary to Plaintiffs’  
13 suggestion, Defendants’ decision to publish average processing times for I-130 petitions  
14 online likewise does not create a deadline by which they must act. *See* Opp’n, ECF No.  
15 10-11. The Court finds these average processing times advance transparency about the  
16 agency’s work and should be encouraged, rather than used as a mechanism to create an  
17 alleged injury. Adopting a rule that bound USCIS to complete its review within the  
18 advertised average time would perversely incentivize agencies, like USCIS, to remove  
19 these processing times from public websites.

20 Because there is no statute or regulation requiring Defendants to complete their  
21 determination of Plaintiffs’ I-130 petition within a specific timeframe, the Court lacks  
22 jurisdiction to grant Plaintiffs’ requested relief under the APA. *See Dong Liu*, 2007 WL  
23 1300127, at \*6.

### 24 **C. Closing**

25 As set forth above, the Court concludes it lacks subject matter jurisdiction to hear  
26 Plaintiffs’ suit for a writ of mandamus pursuant to 28 U.S.C. § 1361 or the APA.  
27 Accordingly, and consistent with the Court’s discussion of mandamus jurisdiction herein,  
28 the Court grants Defendants’ Motion to Dismiss without prejudice. Because the Court


1 concludes it lacks subject matter jurisdiction, it declines to address whether the  
2 Complaint should be dismissed for failure to state a claim upon which relief may be  
3 granted.

4 **IV. CONCLUSION**

5 The Court **GRANTS** Defendants' Motion to Dismiss for lack of subject matter  
6 jurisdiction. ECF No. 8. The Complaint is **DISMISSED WITHOUT PREJUDICE**.

7 **IT IS SO ORDERED.**

8 Dated: June 28, 2021

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11 **HON. ROGER T. BENITEZ**  
12 United States District Judge  
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