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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DAVID LEE YOCOM et al.,

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND
IMMIGRATION SERVICES et al.,

Defendants.

Case No.: 3:22-cv-00839-BEN-BLM

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

[ECF No. 4]

I. INTRODUCTION

Plaintiffs David Lee Yocom (“David”) and Duc Hua Yocom (“Duc”) (collectively, the “Yocom”) filed suit against Defendants United States Citizenship and Immigration Services (“USCIS”), Madeline Kristoff in her official capacity as San Diego Field Office Director of USCIS, the Board of Immigration Appeals (“BIA”), and Merrick B. Garland (collectively, the “Government”). ECF No. 1. Before the Court is the Government’s Motion to Dismiss. The Motion was submitted on the papers without oral argument pursuant to Civil Local Rule 7.1(d)(1) and Rule 78(b) of the Federal Rules of Civil Procedure. *See* ECF No. 9. After considering the papers submitted, supporting documentation, and applicable law, the Court **GRANTS** the Motion to Dismiss. For the reasons set forth below, the Complaint is **DISMISSED** in its entirety, *with prejudice*.

1 **II. BACKGROUND**

2 This case arises from the Government’s denial of David Yocom’s Form I-130 visa
3 petition, seeking to classify his spouse, Duc Yocom, as a United States citizen.

4 **A. Statement of Relevant Facts**¹

5 Plaintiffs David Lee Yocom and Duc Hua Yocom are a married couple residing in
6 Oceanside, California. ECF No. 1 (“Compl.”) at 2, ¶ 4.² David is a citizen of the United
7 States, and Duc is a citizen of Vietnam. *Id.* Duc entered the United States during
8 “December 2010, after United States Customs and Border Protection officers admitted him
9 in F-1 nonimmigrant status under 8 U.S.C. § 1101(a)(15)(F)(i), INA § 101(a)(15)(F)(i).”
10 *Id.* at 6, ¶ 20. Duc attended community college in Auburn, Washington from December
11 2010 to March 2011 and “transferred to Palomar College in San Diego County, California,
12 in April 2011.” *Id.* at 6, ¶ 21. “After moving to San Diego, [Duc] started dating a woman
13 named T.L.” and in September 2012, they married. *Id.* at 7, ¶ 22. Duc described this time
14 in his life in a declaration, stating the difficulties that came with growing up as a gay man
15 in Vietnam, and how his “intent was not to marry [T.L.] to obtain immigration benefit . . .
16 [and instead,] came from a place of fear and shame and [his] own effort to calm [his] family
17 and appease them of [his] sexuality.” *Id.* at 7, ¶ 23 (quoting Ex. D to Compl.).

18 In February 2013, T.L. filed a Form I-130 on Duc’s behalf and “supported it with
19 evidence of their marriage’s bona fides,” including joint tax filings, joint checking and
20 credit card accounts, car ownership, auto insurance, and photographs. Compl. at 7–8, ¶ 24.
21 Duc concurrently filed a Form I-485, Application to Register Permanent Resident or Adjust
22 Status based on the Form I-130. *Id.* at 8, ¶ 24. Duc and T.L. participated in an interview
23 at USCIS’s San Diego Field Office in June 2013 and at the conclusion of the interview,
24

25 ¹ The majority of the facts set forth are taken from the Complaint and for purposes of
26 ruling on the Government’s Motion to Dismiss, the Court assumes the truth of the
27 allegations pled and liberally construes all allegations in favor of the non-moving party.
Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008).

28 ² Unless otherwise indicated, all page number references are to the ECF-generated
page number contained in the header of each ECF-filed document.

1 T.L. withdrew the Form I-130 she had filed. *Id.* at 8, ¶ 25.

2 In an Acknowledgement of Withdrawal notice, USCIS’s San Diego Field Officer
3 Director stated that T.L. signed a sworn statement during the interview respecting her
4 marriage to Duc. It said: “We are friends, we have never been intimate together. We have
5 never lived together. We got married only to help him to get a green card. I receive no
6 money yet, but he is gonna take me out later and pay. Nobody else know about this.” *Id.*
7 at 9, ¶ 27 (quoting Ex. D to Compl.). The withdrawal notice further “stated that T.L notified
8 USCIS on June 5, 2013, that she wished to withdraw the visa petition.” Compl. at 9, ¶ 27.
9 Duc’s Alien File also includes his own “Sworn Statement Affidavit Form, which contains
10 the following handwritten statement: My address is 588 South Rancho Santa Fe road [sic.]
11 San Marcos 920 [illegible] We are friends, we have never intimate together. We never live
12 together. We got marriage [sic.] [illegible] to help me to get the green card. I received I
13 gave no mony [sic.] and I’m gonna [sic.] take her out later and pay. Nobody esle [sic.]
14 knows about us[.]” *Id.* at 9, ¶ 28. One week later, Duc’s adjustment of status application
15 was denied. *Id.* at 9, ¶ 29.

16 “[I]n February 2014, DHS officers issued Duc Yocom a putative notice to appear,
17 charging him with removability under 8 U.S.C. § 1227(a)(1)(A), INA § 237(a)(1)(A),
18 because at the time of adjustment of status he sought to procure a visa by fraud or willful
19 misrepresentation of a material fact” Compl. at 9, ¶ 30. Duc and T.L. divorced in
20 May 2014. *Id.* at 9, ¶ 31. However, in March 2015, an immigration judge administratively
21 closed Duc’s removal proceedings. *Id.* at 10, ¶ 32.

22 In April 2015, after completing his studies at Palomar College, Duc enrolled in a
23 new course of study at San Diego State University. *Id.* at 10, ¶ 33. In May 2016, Duc and
24 David married. *Id.* at 10, ¶ 34. The following November, David filed a Form I-130 on
25 Duc’s behalf. *Id.* David “proffered evidence of their marriage’s bona fides, including
26 evidence of their assets and shared health insurance and photographs.” *Id.* “In August
27 2017, USCIS’s San Diego Field Office Director sent David Yocom a Notice of Intent to
28 Deny (“NOID”),” wherein “[t]he agency requested that David Yocom provide proof of the

1 legal termination of his and Duc Yocom’s prior marriages and ‘evidence to establish that
2 [his] intent in marriage was to establish a life together’ *Id.* at 10, ¶ 35. David
3 responded to the NOID by submitting his October 2013 divorce decree, Duc’s May 2014
4 divorce decree, and a copy of their application to amend their marriage license. *Id.* at 10,
5 ¶ 36. David also submitted joint tax returns, insurance, bank accounts, credit cards, home-
6 purchase documentation, affidavits from friends and family, and additional photographs.
7 *Id.*

8 In January 2018, the Yocoms appeared for an interview at USCIS’s San Diego Field
9 Office, where Duc described how he married “T.L. to please his parents because he could
10 not come out as gay, that his wife was unaware he was gay, and that he told her only after
11 their interview.” *Id.* at 10, ¶ 37. The Yocoms proffered additional evidence, including
12 their marriage certificate, joint credit card and bank accounts, and additional photographs.
13 *Id.* at 10–11, ¶ 37. In March 2018, after the interview, the San Diego Field Office Director
14 sent David an Amended NOID, which set forth Duc and T.L.’s prior statements made
15 during the June 2013 interview, noting they contained discrepancies and inconsistencies
16 and lacked credibility. *Id.* at 11, ¶ 38. The Director reiterated T.L. and Duc’s sworn
17 statements cited above. *Id.* In addition, “[t]he Director determined that Duc Yocom ‘did
18 not provide any new, credible evidence to support his claim that his prior marriage was
19 entered in good faith’ because his ‘testimony regarding his prior marriage during [his]
20 interview on January 17, 2018, lacked credibility and did not overcome the evidence in the
21 record.’” *Id.* “The Director thus proposed to deny the visa petition and granted David
22 Yocom an opportunity ‘to offer evidence in support of the petition and in opposition to the
23 proposed denial.’” *Id.*

24 David responded to the Amended NOID, which included his counsel’s legal brief,
25 and Duc’s sworn declaration describing Duc’s intent behind marrying T.L. and the officer’s
26 conduct at the June 2013 interview. *Id.* at 11, ¶ 39. The Complaint quotes Duc’s
27 declaration describing the 2013 interview to allege that: (1) he was under a tremendous
28 amount of pressure and stress to hide his sexuality as a gay Vietnamese man; (2) he hid his

1 sexuality from his family due to fears of being punished and rejected; (3) he had to find a
2 woman to marry and start a family with to hide his sexuality and preserve his family’s
3 reputation in social circles; (4) his parents repeatedly asked him about girls and put stress
4 on him to find a girlfriend and stop rumors that he was gay; (5) growing up gay in Vietnam
5 was a bad and shameful experience; and (6) his intent was not to marry T.L. for
6 immigration purposes and instead, came from the fear and shame he had in hiding his
7 sexuality from his family. *Id.* at 7, ¶ 23. David also included copies of the sworn statement
8 and officer’s notes from the June 2013 interview, as well as “country reports and articles
9 detailing the societal pressure to marry women—including stigma, discrimination, and
10 verbal, emotional, and physical mistreatment—that gay Vietnamese men face.” *Id.*
11 David’s counsel argued that: (1) Duc felt compelled to marry a woman to prevent his family
12 from rejecting him; (2) the Director’s reasoning that his sexuality conflicted with a good-
13 faith marriage reflected bias rather than reasoned decision-making; (3) the Director’s
14 regulating Duc and T.L.’s lifestyles raised serious constitutional concerns; and (4) the
15 Amended NOID contained false statements. *Id.* at 12, ¶ 40. The allegedly false statements
16 were that “[t]he USCIS officer did not interview Duc Yocom and T.L. separately; the
17 officer did not interview them in February 2013; Duc Yocom stated he would “pay for
18 lunch” not pay for the marriage; the officer drafted the statements; and Duc Yocom’s
19 parents and T.L.’s child knew they had married. *Id.*

20 In July 2018, USCIS’s San Diego Field Office Director denied David’s visa petition
21 acknowledging that David proffered evidence supporting Duc’s familial and societal
22 pressures to marry a woman and that marriages can take many forms. *Id.* at 12, ¶ 41.
23 However, the Director “concluded this was ‘not relevant’ to the marriage’s validity.” *Id.*
24 The Director also “determined that the prior adjudicator ‘dubbed’ the marriage a ‘sham’
25 because of the limited evidence and Duc Yocom’s and T.L.’s admissions at the interview
26 that they were ‘only friends,’ ‘had never been intimate together,’ ‘never lived together,’
27 and ‘got married only for the green card.’” *Id.* at 13, ¶ 41. The Director concluded that
28 Duc’s declaration of intent behind his marriage to T.L. “did not overcome his and T.L.’s

1 statements at the interview.”³ *Id.*

2 David “appealed the Director’s decision to the BIA. In the supporting brief, his
3 counsel made three arguments: first, USCIS relied on limited and ambiguous evidence;
4 second, USCIS ignored evidence of Duc Yocom’s motivation and intent in marrying T.L.;
5 and third, USCIS deprived David Yocom of his procedural due process right to confront
6 the critical witness.” *Id.* at 14, ¶ 42. In October 2019, the BIA dismissed David’s appeal
7 and based the dismissal on the 2013 interview statements, saying they “‘raised questions
8 about whether their marriage was fraudulent’ and that these questions constituted sufficient
9 evidence to shift the burden of proof from the government to David Yocom, who became
10 ‘responsible for ambiguities in the record’ in proving that Duc Yocom did not seek to
11 circumvent the immigration laws based on the prior marriage.” *Id.* at 14, ¶ 43.

12 The Yocoms allege that the BIA “did not discuss how statements that ‘raised
13 questions’ constituted ‘substantial and probative evidence’ for 8 C.F.R. § 204.2(a)(1)(ii)’s
14 purposes.” *Id.* at 14, ¶ 44. Nor did the BIA “examine, much less discuss particularly, the
15 evidence that David Yocom proffered or his counsel’s arguments about the interview
16 statements’ unreliability and ambiguity.” *Id.* at 14, ¶ 45. The Yocoms further allege that
17 that the BIA did not address the evidence that the officer dictated T.L. and Duc’s sworn
18 statements. *Id.* at 14–15, ¶ 45. “Nor did the BIA examine the country conditions
19

20 ³ The Complaint alleges several other conclusions by the Director, including that: the
21 officer’s interview notes corroborated Duc’s statement that he and T.L. had met each
22 other’s parents over the telephone, but the notes were not relevant because they made those
23 statements early in the interview; (2) counsel’s contentions about factual errors in the
24 Amended NOID were also irrelevant because Duc and T.L. signed sworn statements; and
25 (3) that David Yocom proffered evidence that the word “intimate” is foreign to Vietnamese
26 culture and neither Duc nor T.L. uses it, further supporting that the officer drafted the
27 statements, but concluded this was irrelevant because they also admitted they were “just
28 friends,” never lived together, never consummated their marriage, and married only for a
green card. Compl. at 13, ¶ 41. As such, the Director “concluded that Duc Yocom’s prior
marriage ‘was a marriage of convenience for the sole purpose of circumventing
immigration laws to obtain an immigration benefit,’ such that 8 U.S.C. § 1154(c), INA §
204(c), prohibited USCIS from approving the visa petition.” *Id.*

1 evidence’s relevance to Duc Yocom’s intent to establish a life with T.L.” *Id.* at 15, ¶ 46.
2 “Contrary to the Director’s determining that the country conditions evidence was
3 irrelevant, [the Yocom’s allege that] . . . [Duc’s] fear over social mores in Vietnam and his
4 sexuality’s impact on his family there was crucial to his intent in marrying T.L.” *Id.* “And
5 Duc Yocom’s reason for marrying her—to appear normal, perhaps to ‘become straight’ by
6 creating a family with her, not only despite his sexual orientation but because of it—
7 demonstrated his intent to share a life with her, requiring that USCIS approve the petition.”
8 *Id.* Finally, the Yocom’s allege that “the BIA did not examine David Yocom’s due process
9 right to cross-examine T.L. and officer who took the statements.” *Id.* at 15, ¶ 47. The
10 Yocom’s allege that because Duc “refuted the statements in detail, due process requires that
11 David Yocom have a chance to cross-examine those witnesses.” *Id.*

12 **B. Procedural History**

13 The Yocom’s filed their Complaint on June 8, 2022, alleging violations of: (1) the
14 Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (the “APA”); and (2) the Due Process
15 Clause of the Fifth Amendment of the United States Constitution. *See generally* Compl.
16 On August 5, 2022, the Government filed the instant Motion to Dismiss. ECF No. 4
17 (“Motion”). The Yocom’s filed an opposition and the Government replied. ECF No. 7
18 (“Oppo.”); ECF No. 8 (“Reply”).

19 **III. LEGAL STANDARD**

20 Under Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed when
21 a plaintiff’s allegations fail to set forth a set of facts which, if true, would entitle the
22 complainant to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v.*
23 *Iqbal*, 556 U.S. 662, 679 (2009) (holding that a claim must be facially plausible to survive
24 a motion to dismiss). The pleadings must raise the right to relief beyond the speculative
25 level; a plaintiff must provide “more than labels and conclusions, and a formulaic recitation
26 of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (citing *Papasan*
27 *v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, a court accepts as true a
28 plaintiff’s well-pleaded factual allegations and construes all factual inferences in the light

1 most favorable to the plaintiff. *See Manzarek*, 519 F.3d at 1031. A court is not required
2 to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

3 “Generally, unless the court converts the Rule 12(b)(6) motion into a summary
4 judgment motion, it cannot consider material outside the complaint (*e.g.*, facts presented
5 in briefs, affidavits or discovery materials).” Phillips & Stevenson, California Practice
6 Guide: Federal Civil Procedure Before Trial § 9:211 (The Rutter Group April 2020). Thus,
7 in evaluating a Rule 12(b)(6) motion, review is ordinarily limited to the contents of the
8 complaint and material properly submitted with it. *Van Buskirk v. Cable News Network,*
9 *Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v. Richard Feiner & Co.,*
10 *Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). Courts may, however, consider any
11 statements made in a pleading or motion, including concessions made in plaintiff’s
12 response to the motion to dismiss as well as in response to any other pleading or motion.
13 Fed. R. Civ. P. 10(c). A Court may also “consider certain materials—documents attached
14 to the complaint, documents incorporated by reference in the complaint or matters of
15 judicial notice—without converting the motion to dismiss into a motion for summary
16 judgment.” *United States ex rel. Lazar v. S.M.R.T., LLC*, 542 F. Supp. 3d 1078, 1082 (S.D.
17 Cal. 2021) (quoting *United States v. Ritchie*, 342 F.3d 903, 907–908 (9th Cir. 2003)).

18 When a motion to dismiss is granted, the court must decide whether to grant leave
19 to amend. The Ninth Circuit has a liberal policy favoring amendments, and thus, leave to
20 amend should be freely granted. *See, e.g., DeSoto v. Yellow Freight System, Inc.*, 957 F.2d
21 655, 658 (9th Cir. 1992). However, a court need not grant leave to amend when permitting
22 a plaintiff to amend would be an exercise in futility. *See, e.g., Rutman Wine Co. v. E. & J.*
23 *Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) (“Denial of leave to amend is not an abuse
24 of discretion where the pleadings before the court demonstrate that further amendment
25 would be futile.”).

26 **IV. DISCUSSION**

27 The Government argues the Complaint fails to allege “a cognizable legal theory for
28 a due process claim, nor sufficient facts to support a cognizable legal theory.” Motion at

1 6. The Government explains that Congress is vested with authority over immigration and
2 there is no constitutional right for David to have Duc remain in the country. *Id.* The
3 Government further contends that the Yocombs were provided the process they were due,
4 and that this is reflected by the administrative record as alleged in the Complaint. *See id.*
5 at 8. The Yocombs argue that David has both a property interest and liberty interest at stake
6 for purposes of the Fifth Amendment. *Oppo.* at 7–12. The Yocombs contend that the
7 Complaint sufficiently alleges that the Government owed them more process. *Id.* at 12–
8 18. The Court disagrees. Regardless of David’s protected interests under the Due Process
9 Clause of the Fifth Amendment, the Yocombs were afforded sufficient process in this case.
10 As such, the Court **GRANTS** Defendants’ Motion to Dismiss.

11 **A. Fifth Amendment Due Process**

12 The Due Process Clause of the Fifth Amendment promises that no person shall “be
13 deprived of life, liberty, or property without due process of law.” U.S. Const. amend. V.
14 “The ‘threshold requirement’ for . . . [a plaintiff’s] claim to succeed is that they have ‘a
15 liberty or property interest protected by the Constitution.’” *Zerezghi v. United States*
16 *Citizenship & Immigr. Servs.*, 955 F.3d 802, 808 (9th Cir. 2020) (quoting *Wedges/Ledges*
17 *of California, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994)). The Ninth
18 Circuit has “held that a citizen petitioner has a constitutionally protected interest in the
19 grant of an I-130 petition.” *Zerezghi*, 955 F.3d at 808 (citing *Ching v. Mayorkas*, 725 F.3d
20 1149, 1156 (9th Cir. 2013)).

21 “The decision of whether to approve an I-130 visa petition is a nondiscretionary one
22 because ‘determinations that require application of law to factual determinations are
23 nondiscretionary.’” *Ching*, 725 F.3d at 1155 (quoting *Hernandez v. Ashcroft*, 345 F.3d 824,
24 833–34 (9th Cir. 2003) (internal quotations and alterations omitted)). “After an
25 investigation of the facts in each case, . . . the [Secretary of Homeland Security . . .] *shall*, if
26 he determines that the facts stated in the petition are true and that the alien in behalf of
27 whom the petition is made is an immediate relative[,] . . . *approve the petition . . .*” *Ching*,
28 725 F.3d at 1155 (quoting 8 U.S.C. § 1154(b)). However, “[v]irtually no government

1 benefit is available to individuals without a requirement that certain conditions are met.”
2 *Ching*, 725 F.3d at 1156. “[R]egardless of the strength of the current marriage, ‘no petition
3 shall be approved’ if USCIS determines that the noncitizen spouse *previously* entered into
4 a marriage ‘for the purpose of evading the immigration laws.’” *Zerezghi*, 955 F.3d at 804
5 (quoting 8 U.S.C. § 1154(c)). This is true “[e]ven if [the] current marriage is
6 unquestionably bona fide.” *Zerezghi*, 955 F.3d at 804 (quoting *Matter of Kahy*, 19 I. & N.
7 Dec. 803, 805 n.2 (BIA 1988)). This requirement is also “mandatory, not discretionary: If
8 the noncitizen committed marriage fraud at any time in the past, ‘no petition shall be
9 approved’ at any time in the future.” *Zerezghi*, 955 F.3d at 804 (citing 8 U.S.C. § 1154(c)).
10 “A USCIS regulation provides: ‘The director will deny a petition for immigrant visa
11 classification filed on behalf of any alien for whom there is *substantial and probative*
12 *evidence* of’ an attempt or conspiracy ‘to enter into a marriage for the purpose of evading
13 the immigration laws.’” *Zerezghi*, 955 F.3d at 805 (quoting 8 C.F.R. § 204.2(a)(1)(ii))
14 (emphasis added). While the initial burden of proof falls on the Government, evidence of
15 marriage fraud and the issuance of a NOID shifts the burden to the petitioner. *Zerezghi*,
16 955 F.3d at 808 (citing *Matter of Kahy*, 19 I. & N. Dec. 803, 806–807 (BIA 1988)). The
17 petitioner must then rebut the evidence or the petition is denied. *Id.*

18 In sum, “[i]mmediate relative status for an alien spouse is a right to which citizen
19 applicants are entitled as long as the petitioner and spouse beneficiary meet the statutory
20 and regulatory requirements for eligibility.” *Id.* David is thus “‘entitled to the protections
21 of due process’ in insuring that the government determination of ineligibility was properly
22 made.” *Zerezghi*, 955 F.3d at 808 (quoting *Ching*, 725 F.3d at 1156). The record reveals,
23 however, he received all the process he was due.

24 As to whether additional process was due, the Court considers three factors:

25
26 First, the private interest that will be affected by the official action; second,
27 the risk of an erroneous deprivation of such interest through the procedures
28 used, and the probable value, if any, of additional or substitute procedural
safeguards; and finally, the Government’s interest, including the function

1 involved and the fiscal and administrative burdens that the additional or
2 substitute procedural requirement would entail.

3 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Here, the factors favor the Government.

4 i. Private Interest Factor

5 The Government argues that Duc is not at imminent risk for deportation, because as
6 alleged in the Complaint, Duc’s removal proceedings were closed in March 2015 and Duc
7 currently resides with David in Oceanside, California. Motion at 7. The Yocoms counter
8 that the Government acknowledges Duc is the subject of administratively closed removal
9 proceedings, and that DHS “may move an Immigration Court to recalendar those
10 proceedings at any time.” Oppo. at 15. The Court agrees with the Government. The
11 Complaint clearly alleges that in March 2015, “[a]n immigration judge administratively
12 closed Duc Yocom’s removal proceedings,” and that Duc and David currently reside in
13 Oceanside California. Compl. at 2, ¶ 4; 10, ¶ 32.

14 The Yocoms rely on *Ching* and *Zerezghi*, but in both of those cases, removal was
15 imminent. *Ching*, 725 F.3d at 1157; *Zerezghi*, 955 F.3d at 810. *Ching* and *Zerezghi* further
16 reasoned that “[t]he right to marry and to enjoy marriage are unquestionably liberty
17 interests protected by the Due Process Clause,” and “[t]he right to live with and not be
18 separated from one’s immediate family is ‘a right that ranks high among the interests of
19 the individual’ and that cannot be taken away without procedural due process.” *Zerezghi*,
20 955 F.3d at 810 (quoting *Ching*, 725 F.3d at 1157). Here, removal proceedings were closed
21 several years ago, establishing that at this point, removal is not imminent. Because David
22 and Duc reside in Oceanside, California—and removal is not imminent—the rationale in
23 *Ching* and *Zerezghi* does not apply with equal force here. *See also Shashlov v. Sessions*,
24 No. 2:17-cv-02166-JFW-KS, 2017 WL 6496440, at *5 (C.D. Cal. Dec. 4, 2017) (holding
25 the private interest at stake was significantly less than in *Ching*, because the individual was
26 not in removal proceedings). Accordingly, the Court finds that in this case, the private
27 interest factor does not favor the Yocoms.

1 ii. Risk of Erroneous Deprivation Factor

2 In *Ching*, the Ninth Circuit held the “risk of an erroneous finding that a prior
3 marriage was fraudulent is high in cases where an ex-spouse is relied upon for evidence
4 that the previous marriage was fraudulent.” 725 F.3d at 1157–58. The Court explained
5 that “[m]any ex-spouses could be motivated by ‘malice, vindictiveness, ... or jealousy’ . . .
6 . [and] [t]hese nefarious motivations are even more likely if the marriage (and subsequent
7 divorce) were bona fide.” *Id.* at 1158. There, the USCIS officers went to the ex-spouse’s
8 home to solicit a six-sentence statement that the marriage was fraudulent—the BIA’s
9 conclusion was based entirely on this statement. *Id.* at 1158. There was also extensive
10 evidence that the marriage was not fraudulent. *Id.*

11 Although there are parallels to *Ching*, this case is easily distinguishable. The USCIS
12 Director and BIA relied on more than T.L.’s sworn statement—*Duc himself provided a*
13 *sworn statement indicating the marriage was a fraud.*⁴ The BIA took note of both Duc
14 and T.L.’s statements and concluded that they “raised questions about whether their
15 marriage was fraudulent.” Ex. E to Compl. at 82–83. At this point, the burden was on
16 David to show Duc’s marriage to T.L. was bona fide. The BIA found that the evidence
17 submitted was insufficient to show that Duc and T.L.’s marriage “was not intended to
18 circumvent the immigration laws.” *Id.* at 83. The BIA explained that the evidence
19 respecting Duc’s marriage to T.L. included “a copy of a joint Discover card, a joint car title,
20 copies of some pictures, and a marriage license.” *Id.* The BIA then stated that “the couple
21 lived at separate addresses, did not have children, and did not submit sufficient evidence
22 to show that they combined their financial assets and liabilities.” *Id.* As such, the BIA
23 held that “[t]he petitioner has not satisfied his burden to show that the beneficiary’s first
24 marriage was not fraudulent and that he and [T.L.] intended to establish a life together at
25 the time of their marriage.” *Id.*

26 Although the USCIS and BIA relied primarily on written evidence, which increases
27

28 ⁴ The Court considers all documents attached to the Complaint, as well as admissions therein. *See Ritchie*, 342 F.3d at 908.

1 the risk of erroneous deprivation, *see Ching*, 725 F.3d at 1158, the Complaint here does
2 not allege what evidence David and Duc would have obtained by cross-examining T.L. or
3 the USCIS officer. Essentially, the Yocoms do not allege the probative value of this
4 evidence, *i.e.*, that T.L. was likely to recant her previously sworn statement, or that if she
5 had, the outcome would have been different. In *Ching*, the petitioner submitted a
6 declaration describing intimate details of the marriage, from pillow talk to a description of
7 her spouse’s underwear to the marriage’s eventual end. 725 F.3d at 1153. There was also
8 more evidence of the marriage’s legitimacy, including substantial bona fides and a previous
9 statement by the ex-spouse that the couple “truly loved each other.” *Id.* However, the BIA
10 relied solely on the ex-spouse’s subsequent statement that the marriage was a fraud and
11 therefore, there was an increased risk of an erroneous deprivation of the petitioner’s
12 interest. *Id.* at 1158.

13 Here, there is no additional, conflicting statement by Duc’s ex-spouse, T.L. Duc’s
14 alleged reasoning for signing his statement was embarrassment over his sexuality, but the
15 record does not reflect why T.L. would sign an untrue statement. The Yocoms could have
16 obtained a declaration from T.L. or submitted evidence trying to explain why T.L. would
17 have lied. Even if the officer drafted the statements, *see* Compl. at 12, ¶ 40, T.L. and Duc
18 signed the statements attesting to their truthfulness. There is also no indication that T.L.
19 acted out of malice or jealousy. It would therefore be reasonable to scrutinize or call into
20 question any future, contradictory signed statements or declarations from Duc or T.L.

21 There are also no allegations that the Yocoms sought a hearing to cross-examine
22 witnesses in response to the Amended NOID. The Complaint simply alleges that David
23 responded to the Amended NOID with Duc’s sworn declaration and other documents
24 indicating that Duc felt compelled to marry T.L. to appease his family. However, this was
25 not enough evidence to overcome the prior sworn statements. Again, Duc’s declaration
26 stated his supposed reasons for marrying T.L., but these reasons did not support the
27 conclusion that the marriage was legitimate. Duc simply provided an alternative reason
28 for marrying T.L., after which the BIA still found the marriage was fraudulent.

1 Overall, despite Duc’s allegation, based on the entire Complaint and documents
2 attached thereto, there was substantial and probative evidence disclosed before the hearing
3 that Duc did not marry T.L. with the intention to establish a life together. Unlike in
4 *Zerezghi*, the Yocoms were told of all the information informing the Amended NOID and
5 therefore, had a chance to refute the evidence. *See Zerezghi*, 955 F.3d at 812 (“Put simply,
6 USCIS’s statement did not allow the couple to know what to investigate or what to rebut
7 against.”). The Yocoms knew what evidence was being used to support the Government’s
8 position⁵ and had the opportunity to further develop the record. Due process was satisfied.

9 Reading the allegations in the light most favorable to the Yocoms, the Court finds
10 this factor weighs against them. The USCIS and BIA relied on primarily written evidence
11 and statements made during interviews, which increases the risk for error. At the same
12 time, *T.L.’s and Duc’s own sworn statements indicated that his marriage to T.L. was*
13 *fraudulent*, and little evidence—aside from Duc’s self-serving declaration—was submitted
14 to establish the legitimacy of that marriage. The Yocoms had ample opportunity to gather
15 additional statements and evidence to try to prove legitimacy.

16 iii. Government Interest Factor

17 In *Ching*, the Ninth Circuit weighed the fiscal and administrative burdens of
18 additional procedure against the government’s “substantial interest in preventing marriage
19 fraud” 725 F.3d at 1158. The *Ching* Court held that an additional hearing “would
20 entail minimal cost to the government,” and that the process sought in that setting was
21 “guaranteed to aliens in removal proceedings” *Id.* (citing 8 U.S.C. § 1229a(b)(4)).
22 However, as explained above, the Complaint does not indicate that the Yocoms ever sought
23 an additional hearing or requested an opportunity to cross-examine T.L. or the USCIS
24 officer, and Duc is not currently in removal proceedings. Requiring the Government to
25

26 ⁵ Based on the Complaint, it appears Duc knew the Government would use this
27 evidence even before the Amended NOID was issued. During the 2018 interview with
28 USCIS, Duc discussed his supposed intentions for marrying T.L. Compl. at 10–11, ¶ 37.
The Amended NOID was issued after the interview.

1 hold an additional hearing allowing for cross-examination of multiple witnesses would be
2 fiscally and administratively burdensome, as the Yocombs have already had an opportunity
3 to provide additional evidence. *See Shashlov*, No. 2:17-cv-02166-JFW-KS, 2017 WL
4 6496440, at *5 (holding that “requiring cross-examination would unnecessarily burden the
5 Government.”).

6 **B. Administrative Procedure Act**

7 The Government reserved the right to challenge the Yocombs’ APA claim, *see*
8 Motion at 2 n.1, but did not make specific arguments respecting this claim. However, given
9 the record set forth in the Yocombs’ Complaint, the Court **DISMISSES** *sua sponte* any
10 claim made under the APA.

11 First, the Court questions its jurisdictional ability to review the APA claim, given
12 that Duc is not currently in removal proceedings and the Yocombs reside together in
13 Oceanside, California. David has therefore, not been deprived of his Due Process interest
14 and any potential deprivation is not imminent. Furthermore, as held in *Ching*, “there is no
15 statutory right of cross-examination in I-130 visa adjudications.” 725 F.3d at 1154.
16 Although an opportunity to cross-examination witnesses is available during removal
17 proceedings, “visa petitions are distinct from removal proceedings.” *Id.* (citing *Elbez v.*
18 *I.N.S.*, 767 F.2d 1313, 1314 (9th Cir. 1985). As such, the Court finds that it lacks
19 jurisdiction to hear the Yocombs’ APA claim.

20 Second, the review of a BIA “decision to impose a marriage-fraud penalty” can be
21 set aside only if “the BIA’s decision . . . is ‘arbitrary, capricious, an abuse of discretion, or
22 otherwise not in accordance with law.’” *Zerezghi*, 955 F.3d at 807 (quoting 5 U.S.C. §
23 706(2)(A)). For all the reasons stated above, the Court cannot conclude that the BIA’s
24 decision was arbitrary, capricious, or an abuse of discretion.

25 Despite Duc’s after the fact declaration and allegations of officer misconduct, both
26 Duc and T.L. signed sworn statements indicating the marriage was a fraud. The BIA was
27 in the best position to weigh the evidence and was under no obligation to believe Duc’s
28 subsequent interview statements and declaration—statements that directly controverted his

1 prior sworn statement. Not only did the Yocombs have the opportunity to rebut the
2 statement during their 2018 interviews (and attempted to do so), but they had another
3 opportunity to submit evidence after David was issued the Amended NOID. Simply put,
4 the evidence submitted in response to the Amended NOID was insufficient to overcome
5 Duc and T.L.'s 2013 sworn statements. The Court is able to evaluate this evidence at the
6 motion to dismiss stage because it was attached to the Complaint and is not being weighed
7 against contested evidence outside the Complaint. In light of the reviewable evidence, the
8 Court finds no plausible claim under the APA. *See supra* Part IV.A.ii (analyzing the BIA
9 decision).

10 **C. Leave to Amend**

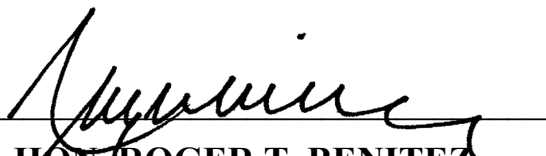
11 Based on the documents incorporated by reference in the Complaint, the Court
12 concludes that the Yocombs cannot, in good faith, state a plausible Due Process or APA
13 claim for relief. Therefore, providing leave to amend would be an exercise in futility. In
14 addition, although the Yocombs request leave to amend in a footnote, they do not state how
15 any amendment could cure the deficiencies in their claims. *See Oppo.* at 15 n.5.
16 Accordingly, the Court **DENIES** leave to amend. *See Beverly Oaks Physicians Surgical*
17 *Ctr., LLC v. Blue Cross Blue Shield of Illinois*, No. CV 18-3866-RSWL-JPR, 2019 WL
18 954780, at *9 (C.D. Cal. Feb. 27, 2019) (rejecting the plaintiff's allegations of
19 contradiction and denying leave to amend because "any amendment would likely be futile
20").

21 **V. CONCLUSION**

22 For the above reasons, the Court **GRANTS** the Government's Motion to Dismiss
23 and **DISMISSES** the Complaint in its entirety, *with prejudice*.

24 **IT IS SO ORDERED.**

25 Dated: March 10, 2023

26 
27 **HON. ROGER T. BENITEZ**
28 United States District Judge