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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MANI SALARIAN;  
FIROOZ SALARIAN,  
  
Plaintiffs,  
  
v.  
  
ANTONY J. BLINKEN, U.S. Secretary of  
State,  
  
Defendant.

Case No.: 23cv1315-LL-BJC

**ORDER DENYING DEFENDANT’S  
MOTION TO DISMISS**

**[ECF No. 4]**

Before the Court is Defendant Antony J. Blinken’s (“Defendant”) Motion to Dismiss Plaintiffs Mani Salarian’s and Firooz Salarian’s (collectively “Plaintiffs”) Complaint. ECF No. 4 (“Motion” or “Mot.”). Defendant’s Motion has been fully briefed, and the Court deems it suitable for submission without oral argument. S.D. Cal. CivLR 7.1(d). For the reasons stated below, the Court **DENIES** Defendant’s Motion to Dismiss.

**I. BACKGROUND**

**A. Plaintiffs’ Complaint**

Plaintiff Mani Salarian, a United States citizen, filed an I-130 visa petition with U.S. Citizenship and Immigration Services (“USCIS”) on behalf of his father, Plaintiff Firooz Salarian. ECF No. 1 (“Complaint” or “Compl.”) ¶ 67. Plaintiff Firooz Salarian is an Iranian national and currently lives in Iran. *Id.* ¶ 68. USCIS approved Plaintiffs’ I-130 petition and

1 forwarded the petition to the National Visa Center (“NVC”) for pre-processing. *Id.* ¶ 70.  
2 On September 1, 2022, Plaintiffs filed Form DS-260 to the NVC. *Id.* ¶ 2. On May 22, 2023,  
3 Plaintiff Firooz Salarian was interviewed by the consular section of the U.S. Embassy in  
4 Yerevan. *Id.* ¶ 73. Following the interview, Plaintiff Firooz Salarian completed and  
5 submitted Form DS-5535, which requested “15 years of detailed history including  
6 addresses, employment, travel, and social media handles.” *Id.* ¶ 76. On May 30, 2023, the  
7 Embassy confirmed receipt of Form DS-5535. *Id.* ¶ 77. Plaintiff Firooz Salarian’s  
8 application was then placed in “an indefinite state of additional administrative processing  
9 with no timeline for completion.” *Id.* ¶ 82. Plaintiffs contacted the U.S. Embassy numerous  
10 times following the interview to inquire about the status of Plaintiff Firooz Salarian’s  
11 application. *Id.* ¶ 81. Plaintiff Firooz Salarian’s application, however, remains pending.  
12 *Id.* ¶ 82.

13 As a result of the “unreasonable delay in adjudication,” “Plaintiffs have been  
14 separated from one another” and are “faced with the prospect of being separated  
15 indefinitely.” *Id.* ¶ 8. Plaintiffs allege the delay in the adjudication of Plaintiff Firooz  
16 Salarian’s application has placed a severe emotional and financial strain on the Plaintiffs.  
17 *Id.* ¶¶ 88, 93. Both Plaintiffs are concerned about Plaintiff Firooz Salarian’s health because  
18 he has advanced stage Parkinson’s disease. *Id.* ¶¶ 6, 90, 91.

19 On July 17, 2023, Plaintiffs filed this action seeking declaratory and injunctive relief  
20 and a writ of mandamus to compel the State Department to adjudicate Plaintiff Firooz  
21 Salarian’s visa application. *See generally id.* On September 18, 2023, Defendants moved  
22 to dismiss Plaintiffs’ Complaint for lack of subject matter jurisdiction and/or failure to state  
23 a claim. *See Mot.* On October 5, 2023, Plaintiffs filed an Opposition to the Motion.  
24 ECF No. 5 (“Opposition” or “Oppo.”). On October 16, 2023, Defendant filed its Reply in  
25 support of the Motion. ECF No. 6 (“Reply”).

26 On November 11, 2023, Plaintiffs filed an Ex Parte Request for Leave to File Notice  
27 of Supplemental Authority. ECF No. 7. Further, on December 17, 2023, Plaintiffs filed a  
28 Second Ex Parte Request for Leave to File Notice of Supplemental Authority. ECF No. 8.

1 On December 19, 2023, Defendant filed an opposition to the previous Ex Parte Requests.  
2 ECF No. 9. On January 22, 2024, Plaintiffs filed an Ex Parte Request for Leave to File a  
3 Declaration from Carson Wu. ECF No. 10. Defendant filed an opposition to this request  
4 on January 23, 2024. ECF No. 11.<sup>1</sup> On April 5, 2024, Plaintiffs filed a Third Ex Parte  
5 Request for Leave to File Notice of Supplemental Authority. ECF No. 12. Defendant filed  
6 an opposition to this request on April 7, 2024. ECF No. 13. On August 25, 2024, Plaintiff  
7 filed a Fourth Ex Parte Request for Leave to File Notice of Supplementary Authority. ECF  
8 No. 16. On August 26, 2024, Defendant filed an opposition to this request. ECF No. 17.<sup>2</sup>

9 **B. Declaration of Matthew McNeil**

10 A declaration provided in support of the Defendant’s Motion provides information  
11 from the Consular Consolidated Database (“CCD”) regarding Plaintiff Mani Salarian’s  
12 petition on behalf of his father, Plaintiff Firooz Salarian, and information regarding  
13 Plaintiff Firooz Salarian’s visa application. *See* ECF No. 4-1, Declaration of Matthew  
14 McNeil (“McNeil Decl.”).

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17 <sup>1</sup> Briefing on Defendant’s Motion to Dismiss concluded on October 16, 2023, and Plaintiffs  
18 filed the Request for Leave to File a Declaration on January 22, 2024. Accordingly, the  
19 Court **DENIES** Plaintiffs’ Request for Leave to File a Declaration from Carson Wu for  
untimeliness.

20 <sup>2</sup> Plaintiffs’ First, Second, Third, and Fourth Ex Parte Requests for Leave to File Notice of  
21 Supplemental Authority cite to multiple cases decided after Plaintiffs’ Opposition to the  
22 Motion was filed. *See* ECF Nos. 7, 8, 12, 16. These cases do not represent Ninth Circuit  
23 appellate court opinions and therefore, are not binding precedent on this Court. The Court  
24 does not find the supplemental authority to be particularly helpful when Plaintiffs have  
25 already cited to multiple cases supporting the same position in their Opposition. *See* Oppo.  
26 at 21. Accordingly, the Court **DENIES** Plaintiffs’ First Ex Parte Request for Leave to File  
27 Notice of Supplemental Authority, **DENIES** Plaintiffs’ Second Ex Parte Request for Leave  
28 to File Notice of Supplemental Authority, **DENIES** Plaintiffs’ Third Ex Parte Request for  
Leave to File Notice of Supplemental Authority, and **DENIES** Plaintiffs’ Fourth Ex Parte  
Request for Leave to File Notice of Supplemental Authority. The Court, however, will  
consider any identified legal authorities to the extent they are relevant or analogous to this  
action.

1 Consistent with Plaintiffs’ Complaint, the CCD records indicate that Plaintiff Mani  
2 Salarian filed an I-130 petition on behalf of his father, Plaintiff Firooz Salarian. *Id.* ¶ 4. On  
3 April 29, 2022, USCIS approved the I-130 petition. *Id.* The NVC received the approved  
4 petition, and on May 5, 2022, NVC created a case file, assigned a case number, and on  
5 February 28, 2023, transmitted it to the U.S. Embassy in Yerevan, Armenia. *Id.* ¶¶ 5–6. On  
6 May 22, 2023, Plaintiff Firooz Salarian appeared for his consular interview and applied for  
7 an immigrant visa. *Id.* ¶ 8. Also on May 22, 2023, consular staff sent a request to Plaintiff  
8 Firooz Salarian for additional information consistent with Form DS-5535, Supplemental  
9 Questions for Visa Applications. *Id.* On May 30, 2023, the U.S. Embassy in Yerevan  
10 received Plaintiff Firooz Salarian’s completed responses to Form DS-5535. *Id.* ¶ 9. “On  
11 August 11, 2023, the consular officer entered a refusal of Firooz Salarian’s visa application  
12 under INA § 221(g), 8 U.S.C. § 1201(g), into the Department’s visa application record.”  
13 *Id.* ¶ 10. The additional security screening for Plaintiff Firooz Salarian’s visa application  
14 remains ongoing. *Id.* ¶ 11.

## 15 **II. LEGAL STANDARD**

### 16 **A. Federal Rule of Civil Procedure 12(b)(1)**

17 “Federal courts are courts of limited jurisdiction,” possessing “only that power  
18 authorized by Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co. of Am.*,  
19 511 U.S. 375, 377 (1994). Pursuant to Rule 12(b)(1) of the Federal Rules of Civil  
20 Procedure, a party may move to dismiss a complaint based on a court’s lack of subject  
21 matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). Under Rule 12(b)(1), the plaintiff bears  
22 the burden of establishing jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562  
23 (1992); *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1168 (9th Cir. 2006)  
24 (citation omitted).

25 Rule 12(b)(1) motions can challenge a court’s subject matter jurisdiction on either  
26 facial or factual grounds. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039  
27 (9th Cir. 2004) (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). “A facial attack  
28 accepts the truth of the plaintiff’s allegations but asserts that they are insufficient on their

1 face to invoke federal jurisdiction.” *Leite v. Crane Co.*, 749 F.3d 1117, 1121  
2 (9th Cir. 2014). (internal quotation marks and citation omitted). Conversely, a factual  
3 attack “contests the truth of the plaintiff’s factual allegations, usually by introducing  
4 evidence outside the pleadings.” *Id.* (citations omitted); *see also St. Clair v. City of Chico*,  
5 880 F.2d 199, 201 (9th Cir. 1989) (noting that a Rule 12(b)(1) motion challenging a court’s  
6 subject matter jurisdiction on factual grounds may “rely on affidavits or any other evidence  
7 properly before the court”).

8 **B. Federal Rule of Civil Procedure 12(b)(6)**

9 Federal Rule of Civil Procedure 8(a) requires that a complaint include “a short and  
10 plain statement of the claim showing that the pleader is entitled to relief.” *Bell Atl. Corp.*  
11 *v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must plead sufficient factual  
12 allegations to “state a claim to relief that is plausible on its face.” *Id.* at 570. A claim is  
13 facially plausible when the facts pleaded “allow[] the court to draw the reasonable  
14 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,  
15 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). A court may accept all factual  
16 allegations as true, but it need not accept legal conclusions as true. *Id.*; *Twombly*,  
17 550 U.S. at 555.

18 Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a  
19 complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P.  
20 12(b)(6). A court may grant a Rule 12(b)(6) dismissal when the plaintiff fails to present a  
21 cognizable legal theory or allege sufficient facts to support a cognizable legal theory.  
22 *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010)  
23 (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). While a complaint “does  
24 not require ‘detailed factual allegations,’” to avoid a Rule 12(b)(6) motion to dismiss, it  
25 does require “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”  
26 *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). For purposes of ruling on a  
27 Rule 12(b)(6) motion, the court “accept[s] factual allegations in the complaint as true and  
28

1 construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek v.*  
2 *St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (citation omitted).

### 3 **III. DISCUSSION**

4 Defendant has moved to dismiss Plaintiffs’ Mandamus and APA claims under Rule  
5 12(b)(1) and Rule 12(b)(6). When a complaint seeks identical relief under the APA and the  
6 Mandamus Act, courts routinely elect to only analyze the APA claims. *See Vaz v. Neal*,  
7 33 F.4th 1131, 1135 (9th Cir. 2022) (citation omitted); *Salihi v. Blinken*,  
8 No. 23-CV-718-MMA-AHG, 2023 WL 8007348, at \*6 (S.D. Cal. Nov. 17, 2023). The  
9 Court therefore only addresses Plaintiffs’ APA claims.

10 Defendant argues that Plaintiffs fail to allege sufficient facts to state that Defendant  
11 has unreasonably delayed adjudication of Plaintiff Firooz Salarian’s visa application under  
12 Rule 12(b)(6). *See Mot.* at 12–18.

13 To determine whether agency delays are unreasonable under the APA, the Ninth  
14 Circuit has adopted the *TRAC* factors, or the six-factor balancing test from  
15 *Telecommunications Research & Action Center v. FCC*. *See* 750 F.2d 70, 79–80  
16 (D.C. Cir. 1984) (“*TRAC*”); *see also, e.g., Vaz*, 33 F.4th at 1137 (Ninth Circuit applying  
17 and assessing *TRAC* factors). The *TRAC* factors are: “(1) the time agencies take to make  
18 decisions must be governed by a ‘rule of reason[ ]’; (2) where Congress has provided a  
19 timetable or other indication of the speed with which it expects the agency to proceed in  
20 the enabling statute, that statutory scheme may supply content for this rule of reason;  
21 (3) delays that might be reasonable in the sphere of economic regulation are less tolerable  
22 when human health and welfare are at stake; (4) the court should consider the effect of  
23 expediting delayed action on agency activities of a higher or competing priority; (5) the  
24 court should also take into account the nature and extent of the interests prejudiced by  
25 delay; and (6) the court need not find any impropriety lurking behind agency lassitude in  
26 order to hold that agency action is ‘unreasonably delayed.’” *TRAC*, 750 F.2d at 80 (internal  
27 quotation marks and citations omitted).

1 Plaintiffs raise a preliminary argument that it is too early to apply the *TRAC* test,  
2 stating that it would be premature to consider whether an agency’s delay is unreasonable  
3 at the motion to dismiss stage because it is a “fact-specific inquiry.” *Oppo*. at 21.  
4 Defendant contends that in consular processing cases some district courts have found that  
5 evaluating the reasonableness of delay is appropriate at the motion to dismiss stage. Reply  
6 at 4–5.

7 Although some district courts have analyzed *TRAC* factors at the motion to dismiss  
8 stage, in the absence of binding case law, this Court agrees with Plaintiffs and those courts  
9 that find the *TRAC* test is more appropriately applied after further briefing and discovery.  
10 *See e.g., Gonzalez v. Cuccinelli*, 985 F.3d 357, 375 (4th Cir. 2021) (“A claim of  
11 unreasonable delay is necessarily fact dependent and thus sits uncomfortably at the motion  
12 to dismiss stage and should not typically be resolved at that stage.”); *Salih*,  
13 2023 WL 80007348, at \*7 (“The ultimate determination of whether the *TRAC* factors are  
14 satisfied is not capable of resolution on the pleadings and without further evidence  
15 and briefing.”); *Tailawal v. Alejandro Mayorkas, Sec’y of Homeland Sec.*,  
16 No. LACV2201515SPGRAO, 2022 WL 4493725, at \*4 (C.D. Cal. Aug. 18, 2022)  
17 (“[B]ecause the *TRAC* factor analysis is necessarily fact-intensive, it is more appropriately  
18 applied after some discovery than at the pleading stage.”); *Hui Dong v. Cuccinelli*,  
19 No. CV2010030CBMPLAX, 2021 WL 1214512, at \*4 (C.D. Cal. Mar. 2, 2021) (“The  
20 *TRAC* test is fact-intensive, and courts have declined to resolve whether the *TRAC* test has  
21 been satisfied at the pleading stage, including with respect to immigration applications.”);  
22 *Moghaddam v. Pomopeo*, 424 F. Supp. 3d 104, 117 (D.D.C. 2020) (“Undergoing such a  
23 fact-specific inquiry at this stage would be premature.”). *But see, e.g., Armah v. United*  
24 *States Department of State*, No. CV 22-1714 (BAH), 2024 WL 2721634, at \*5  
25 (D.D.C. May 28, 2024) (“[W]here the factual allegations are more fulsomely supplied and,  
26 as here, specific dates when relevant agency action occurred are undisputed, application of  
27 the *TRAC* factors at the motion to dismiss stage is appropriate to determine whether  
28 plaintiff has alleged facts sufficient to state a claim for unreasonable delay.”) (citing

1 *Mukkavilli v. Jaddou*, No. 23-5138, 2024 WL 1231346, at \*1–2 (D.C. Cir. Mar. 22, 2024);  
2 *Da Costa v. Immigr. Inv. Program Off.*, 80 F.4th 330, 339–46 (D.C. Cir. 2023)); *Assadian*  
3 *v. Oudkirk*, 694 F. Supp. 3d 1310, 1317–18 (S.D. Cal. 2023) (analyzing *TRAC* factors to  
4 resolve motion to dismiss).

5 The *TRAC* test is fact-intensive and the “[r]esolution of a claim of unreasonable  
6 delay is ordinarily a complicated and nuanced task requiring consideration of the particular  
7 facts and circumstances before the court.” *Gonzalez v. United States Dep’t of Homeland*  
8 *Sec.*, 500 F. Supp. 3d 1115, 1129–30 (E.D. Cal. 2020) (quoting *Mashpee Wampanoag*  
9 *Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003)). An assessment of  
10 whether the agency’s delay is unreasonable, even in the context of consular processing,  
11 “would require the court to look beyond the face of plaintiffs’ complaint and, without the  
12 benefit of the administrative record, evaluate facts concerning USCIS’ general practices,  
13 whether those practices were followed in this case, and the number of [] visa petitions filed  
14 over the past several years.” *Id.* at 1130.

15 Although Defendant contends that Plaintiffs fail to demonstrate unreasonable delay  
16 based on the *TRAC* factors, the determination of whether the *TRAC* factors are satisfied as  
17 to Plaintiff’s APA claims is not capable of resolution at this stage. *See, e.g., id.*

18 Defendant also argues that Plaintiffs’ APA claims must be dismissed because there  
19 are no statutory or regulatory provisions establishing temporal limits for consular  
20 processing or for conducting security screenings. *See Mot.* at 12–13.

21 The APA authorizes a court to “compel agency action unlawfully withheld or  
22 unreasonably delayed.” 5 U.S.C. § 706(1). A court can “compel agency action under this  
23 section only if there is ‘a specific, unequivocal command’ placed on the agency to take a  
24 ‘discrete agency action,’ and the agency has failed to take that action.” *Vietnam Veterans*  
25 *of Am. v. Cent. Intel. Agency*, 811 F.3d 1068, 1075 (9th Cir. 2016) (quoting *Norton v.*  
26 *S. Utah Wilderness All.*, 542 U.S. 55, 63–64 (2004)). “The agency action must be pursuant  
27 to a legal obligation ‘so clearly set forth that it could traditionally have been enforced  
28 through a writ of mandamus.” *Id.* at 1075–76 (quoting *Hells Canyon Pres. Council v.*



1 *U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010)). “Thus, a court may compel agency  
2 action under the APA when the agency (1) has ‘a clear, certain, and mandatory duty,’ *and*  
3 (2) has unreasonably delayed in performing such duty.” *Vaz*, 33 F.4th at 1136 (emphasis  
4 added) (citations omitted).

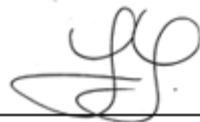
5 As previously stated above, the determination of whether an agency’s delay is  
6 unreasonable is premature at this stage of the proceeding. Therefore, the Court cannot  
7 determine at this time whether Plaintiff’s APA claims can be dismissed. Accordingly,  
8 Defendant’s Motion to Dismiss is **DENIED**.

9 **IV. CONCLUSION**

10 For the foregoing reasons, the Court **DENIES** Defendant’s Motion to Dismiss.  
11 Defendant must file an answer on or before **September 20, 2024**.

12 **IT IS SO ORDERED.**

13 Dated: August 30, 2024



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Honorable Linda Lopez  
United States District Judge