4742 North Oracle Road, Suite 111
Tucson, AZ 85705

U.S. Customs and Border Protection

DATE: August 20, 2010

FILE: (b) (7)(E) : (b)(6) (b)(7)(C)

MEMORANDUM FOR: SBPA (b)(6) (b)(7)(C)
Tucson Sector ICLU/ Prosecutions Unit

FROM: Assistant Chief Counsel
Tucson

SUBJECT: Release of Detainee Information/Telephone Inquiries

~~ATTORNEY WORK PRODUCT/PRIVILEGED COMMUNICATION – CIRCULATION RESTRICTED~~
~~THIS DOCUMENT CONTAINS ATTORNEY WORK PRODUCT AND/OR PRIVILEGED ATTORNEY CLIENT COMMUNICATIONS. IT IS THEREFORE NOT AVAILABLE FOR RELEASE, DISCLOSURE, OR USE OUTSIDE OF CBP WITHOUT THE EXPRESS PRIOR APPROVAL OF THE COMMISSIONER OF CBP AND THE OFFICE OF THE CHIEF COUNSEL.~~ (202) (b)(6) (b)(7)(C)

(b) (5), (b) (7)(E) (b)(5) (b)(7)(E)

The procedures regarding telephone use are in Section 6.21, which states:

> 6.21 Telephones. Persons detained more than 24 ours will be given access to a telephone for the purposes of contacting an attorney or other party as stated on the I-826 *Notice of Rights and Request for Disposition* and will be given access at a minimum of once per day until they are no longer in Border Patrol custody. Detainees who wish to make other than a local call must use a calling card or collect call. Processing agents may, at their discretion, grant telephone access to any alien. Unaccompanied alien children will be given access to telephones as soon as practicable to aid in locating family members.

The form I-826 further states:

> You have the right to contact an attorney or other legal representative to represent you at your hearing, or to answer any questions regarding your legal rights in the United States. Upon your request, the officer who gave you this notice will provide you with a list of legal organizations that may represent you for free or for a small fee. You have the right to communicate with the consular or diplomatic officers from your country. You may use a telephone to call a lawyer, other legal representative, or consular officer at any time prior to your departure from the United States.

(b) (5), (b) (7)(E) [redacted]

(b) (5), (b) (7)(E) [redacted]

(b) (5), (b) (7)(E) [redacted] The Statement of Records Notice for ENFORCE provides for release of alien information to family members as follows:

> N. To family members and attorneys or other agents acting on behalf of an alien, to assist those individuals in determining whether: (1) The alien has been arrested by DHS for immigration violations; (2) the location of the alien if in DHS custody; or (3) the alien has been removed from the United States, provided however, that the requesting individuals are able to verify the alien's date of birth or Alien Registration Number (A-Number), or can otherwise present adequate verification of a familial or agency relationship with the alien.

See DHS/ICE-011 - Immigration and Enforcement Operational Records System (ENFORCE) May 3, 2010 75 FR 23274.

(b) (5), (b) (7)(E)

[redacted].

If you have any questions, please call (b)(6) (b)(7)(C) at (b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)

cc: (A)DCPA (b)(6) (b)(7)(C)
ACPA (b)(6) (b)(7)(C)
ACPA (b)(6) (b)(7)(C)

From: (b)(6) (b)(7)(C)
Sent: Thursday, November 06, 2008 3:47 PM
To: (b)(6) (b)(7)(C)
Subject: RE: Attorney

Attachments: Attorney present in custody of alien caselaw.doc; Attorney present in custody of alien statute.doc
(b)(6) (b)(7)(C)

Attached, please find a couple of legal documents, (b)(5) provide guidance to similar cases. (b)(5) Specifically, the statute, 8 C.F.R. § 292.5, (b)(5) (b)(7)(E) "that nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody." (b)(5) (b)(7)(E)

(b)(5) (b)(7)(E)

(b)(5) (b)(7)(E)

please feel free to call us with any questions. Take care,
(b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)
Office of Assistant Chief Counsel
U.S. Department of Homeland Security
U.S. Customs and Border Protection
726 Exchange Street, (b)(6) (b)(7)(C)
Buffalo, New York 14210
Tele: 716-(b)(6) (b)(7)(C)
Fax: 716-(b)(6) (b)(7)(C)

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From: (b)(6) (b)(7)(C)
Sent: Wednesday, November 05, 2008 9:47 AM
To: (b)(6) (b)(7)(C)
Subject: FW: Attorney

Any chance you can open a file and address this question for (b)(6) (b)(7)(C) (b)(5) (b)(7)(E)
(b)(5) (b)(7)(E)

(b)(6) (b)(7)(C)
Department of Homeland Security
U.S. Customs and Border Protection
Office of Assistant Chief Counsel, Buffalo
726 Exchange Street, (b)(6) (b)(7)(C)
Buffalo, New York 14210
Tele: 716-(b)(6) (b)(7)(C)
Fax: 716-(b)(6) (b)(7)(C)

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(b)(7)(E)

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From: (b)(6) (b)(7)(C)
Sent: Wednesday, November 05, 2008 9:13 AM
To: (b)(6) (b)(7)(C)
Subject: Attorney

(b)(6) (b)(7)(C)

How are you today? I have a question for you. (b) (5)

thanks, (b)(6) (b)(7)(C)

(b)(6) (b)(7)(C)
Patrol Agent in Charge
United States Border Patrol Buffalo Station
600 Colvin Woods Parkway
Tonawanda, New York 14150
Voice: (716) (b)(6) (b)(7)(C)
Fax: (716) (b)(6) (b)(7)(C)

(b) (7)(E)

LEXISNEXIS' CODE OF FEDERAL REGULATIONS
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*** THIS SECTION IS CURRENT THROUGH THE OCTOBER 29, 2008 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 8 -- ALIENS AND NATIONALITY
CHAPTER I -- DEPARTMENT OF HOMELAND SECURITY (IMMIGRATION AND NATURALIZATION)
SUBCHAPTER B -- IMMIGRATION REGULATIONS
PART 292 -- REPRESENTATION AND APPEARANCES

Go to the CFR Archive Directory

8 CFR 292.5

§ 292.5 Service upon and action by attorney or representative of record.

(a) Representative capacity. Whenever a person is required by any of the provisions of this chapter to give or be given notice; to serve or be served with any paper other than a warrant of arrest or a subpoena; to make a motion; to file or submit an application or other document; or to perform or waive the performance of any act, such notice, service, motion, filing, submission, performance, or waiver shall be given by or to, served by or upon, made by, or requested of the attorney or representative of record, or the person himself if unrepresented.

(b) Right to representation. Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs. Provided, that nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.

HISTORY:
[37 FR 11471, June 8, 1972 and 45 FR 81733, Dec. 12, 1980; 46 FR 2025, Jan. 8, 1981; 58 FR 49911, Sept. 24, 1993, as confirmed at 60 FR 6650]

AUTHORITY:
8 U.S.C. 1103, 1252b, 1362

NOTES:
NOTES APPLICABLE TO ENTIRE TITLE:
Other regulations issued by the Department of Justice appear in title 4, chapter II, title 21, chapter II, and title 28, chapters I, III, and V.

NOTES APPLICABLE TO ENTIRE CHAPTER:
CROSS REFERENCE: For State Department regulations pertaining to visas and Nationality and Passports, see 22 CFR, chapter I, subchapters E and F.
This table shows sections of title 8 of the United States Code and corresponding sections of the Immigration and Nationality Act and of parts in subchapters A, B, and C of chapter I of title 8 of the Code of Federal Regulations. Those sections of title 8 of the United States Code bearing an asterisk do not have a corresponding part in chapter I of title 8 of the Code of Federal Regulations.

Section 8 USC	**Sections I. & N. Act and 8 CFR**
1101*	101
1102*	102
1103*	103
1104*	104
1105*	105
1105a*	106
1151	201
1152*	202
1153*	203
1154	204
1155*	205
1156*	206
1181	211
1182	212
1183	213
1184	214
1185	215
1201	221
1202*	222
1203	223
1204*	224
1221	231
1222	232
1223	233
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1225	235
1226	236
1227	237
1228	238
1229	239
1230*	240
1251	241

1252	242
1253	243
1254	244
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1256	246
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1258	248
1259	249
1260	250
1281	251
1282	252
1283	253
1284*	254
1285*	255
1286*	256
1287*	257
1301*	261
1302*	262
1303*	263
1304	264
1305	265
1306*	266
1321*	271
1322*	272
1323*	273
1324	274
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1361*	291
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1441	330
1442*	331
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1444	333
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1457*	346
1458*	347
1459*	348
1481	349
1482*	350
1483*	351
1484*	352
1485*	353
1486*	354
1487*	355
1488*	356
1489*	357
1501*	358
1502*	359
1503*	360

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --
Boukhris v Perryman (2002, ND Ill) 2002 US Dist LEXIS 1913

206 words

TAHER BOUKHRIS and ALEXANDRA GANZ BOUKHRIS, PlaintiffS, v. BRIAN PERRYMAN, as the District Director of the immigration and Naturalization Service and the IMMIGRATION AND NATURALIZATION SERVICE, Defendants.

No. 01 C 3516

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2002 U.S. Dist. LEXIS 1913

February 6, 2002, Decided
February 7, 2002, Docketed

DISPOSITION: [*1] Court granted plaintiffs' motion to reconsider and altered its initial holding. Court determined it did not have jurisdiction over the instant matter. Defendants' motion to dismiss counts II and III granted for failure to state a claim. Rulings regarding counts I and IV withheld pending further briefing by the parties.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiffs, husband and wife, filed a complaint against defendants, the United States Immigration and Naturalization Service (INS) and its district director. The INS and the district director moved to dismiss the complaint. The district court granted the motion because it found that it did not have jurisdiction over the case. The husband and wife moved for reconsideration of the jurisdictional issue. The INS moved to dismiss.

OVERVIEW: The husband was a Moroccan citizen who married a United States citizen. The husband applied to have his immigration status changed to that of a permanent resident. Immigration and Naturalization Service (INS) agents visited the wife's home. The INS agents pressed the wife to sign a statement that withdrew her petition to have the husband classified as an immediate relative and admitted that her marriage was fraudulent. The director denied the husband's application. The husband and wife brought suit against the INS and the director. The complaint alleged violation of the wife's right to representation, violation of the Immigration and Nationality Act, 15 U.S.C.S. § 1151 et seq., and violation of constitutional rights. The district court granted the INS's motion to dismiss. The husband and wife moved for reconsideration. The court found that the husband and wife demonstrated that further administrative appeals to the INS would have been futile. The claim that the INS violated the wife's right to representation by interviewing her without notifying her attorney in advance, and by basing the denial of her visa petition on the contents of that interview, was without merit.

OUTCOME: The court granted the husband and wife's motion to reconsider and found that it did have jurisdiction over the matter. The INS's motion to dismiss was granted as to the claims of violation of the wife's right to representation and violation of the immigration act. The court withheld its ruling with respect to the claims alleging violations of constitutional rights.

CORE TERMS: withdrawal, constitutional claims, marriage, visa, administrative remedies, immigration, notice, reconsider, fraudulent, resident, declare, immigration laws, right to representation, agency action, jurisdictional, nonimmigrant, addressing, foreclosed, married, evading, approve, futile, visited, provision of law, jurisdiction to review, failure to exhaust, constitutional challenges, good faith, circumstances surrounding, judicial review

LEXISNEXIS® HEADNOTES

⊟Hide

Civil Procedure > Jurisdiction > General Overview

Immigration Law > Adjustment of Status > General Overview

Immigration Law > Deportation & Removal > Administrative Proceedings > Jurisdiction

HN1 8 U.S.C.S. § 1252(a)(2)(B) provides that notwithstanding any other provision of law, no court shall have jurisdiction to review any judgment regarding the granting of relief under 8 U.S.C.S. § 1255, which covers, inter alia, the adjustment of status of a nonimmigrant to that of a person admitted for permanent residence. More Like This Headnote

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > Justiciability > Exhaustion of Remedies > Administrative Remedies

Civil Procedure > Justiciability > Exhaustion of Remedies > Exceptions

HN2 Under the futility exception to the exhaustion of administrative remedies requirement, the plaintiffs must show that it is certain their claims would be denied on appeal, not merely that they doubt they would meet with success on appeal. More Like This Headnote

Immigration Law > Adjustment of Status > General Overview

Immigration Law > Admission > Selection System > Preferences & Priorities

Immigration Law > Enforcement > Criminal Offenses > Marriage Fraud

HN3 8 C.F.R. § 103.2(b)(6) states that a withdrawal may not be retracted. A petitioner has no right to appeal the denial of an I-130 petition to have an alien classified as an immediate relative based on her withdrawal because she

was not given notice of that right, as required by 8 C.F.R. § 103.3(a)(1)(iii). Indeed, the only option a petitioner has is to file a new petition as permitted by 8 C.F.R. 103.2(b)(15) , which allows the director to take into consideration the facts and circumstances surrounding the petitioner's withdrawal of the first petition. Whatever crack in the door that procedure might create is foreclosed by 8 U.S.C.S. § 1154(c), which provides that, no petition shall be approved if the alien has previously sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by the attorney general to have been entered into for the purpose of evading the immigration laws. More Like This Headnote | *Shepardize:* Restrict By Headnote

Immigration Law > Adjustment of Status > General Overview

Immigration Law > Immigrants > Family-Sponsored Immigrants

HN4 Under 8 U.S.C.S. § 1154(b), approval of an I-130 petition to have an alien classified as an immediate relative is a condition precedent to the granting of an alien's I-485 application for adjustment of status to a permanent resident. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > Justiciability > Exhaustion of Remedies > Failure to Exhaust

Immigration Law > Adjustment of Status > General Overview

HN5 8 U.S.C.S. § 1252(a)(2)(B) states that, notwithstanding any other provision of law, no court shall have jurisdiction to review: (i) any judgment regarding the granting of relief under 8 U.S.C.S. § 1255, which includes the adjustment of status of nonimmigrant to that of a person admitted for permanent residence; or (ii) any other decision or action of the attorney general the authority for which is specified under 8 U.S.C.S. § 1151 et seq., to be in the discretion of the attorney general. Such door-closing statutes are often interpreted as being inapplicable to constitutional challenges. More Like This Headnote

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview

International Law > Dispute Resolution > Remedies > General Overview

HN6 Section 702 of the Administrative Procedure Act, 5 U.S.C.S. § 701 et seq., provides in part that, a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Similarly, 5 U.S.C.S. § 704 states in part that, final agency action for which there is no other adequate remedy in a court is subject to judicial review. Federal courts are granted original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C.S. § 1331. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements

Civil Procedure > Dismissals > General Overview

HN7 Under the federal notice pleading standards, all well-pleaded allegations are construed liberally, and dismissal is proper only where the claimant can prove no set of facts to support the allegations. Further, the court assumes that the plaintiffs' allegations are true and makes all reasonable inferences in favor of the plaintiffs. More Like This Headnote

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Immigration Law > Duties & Rights of Aliens > Legal Representation

HN8 8 C.F.R. § 292.5(b) merely grants the person involved in an examination under that chapter the right to be represented by an attorney or representative, but, as explained in 8 C.F.R. § 292.5(a), the Immigration and Naturalization Service's affirmative duty to notify a person's attorney or representative arises only in particular instances. More Like This Headnote

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning

Immigration Law > Duties & Rights of Aliens > Legal Representation

HN9 Although 8 C.F.R. § 103.2(a)(3) states that an applicant or petitioner may be represented by an attorney or by an accredited representative, there is no support for the assertion that once an applicant or a petitioner is represented by an attorney or an accredited representative, Immigration and Naturalization Service agents are forbidden from interviewing such person with their permission when their attorney is not present. More Like This Headnote | *Shepardize:* Restrict By Headnote

Immigration Law > Duties & Rights of Aliens > Legal Representation

HN10 8 C.F.R. § 103.2(b)(7) provides for more formal examinations in particular proceedings. More Like This Headnote | *Shepardize:* Restrict By Headnote

Immigration Law > Duties & Rights of Aliens > Legal Representation

HN11 See 8 C.F.R. § 292.5(a).

Immigration Law > Adjustment of Status > General Overview

Immigration Law > Enforcement > Criminal Offenses > Marriage Fraud

Immigration Law > Immigrants > Family-Sponsored Immigrants

HN12 8 U.S.C.S. §§ 1151(b)(2)(a)(i) and 1154 set forth the immediate relative status and the Immigration and Naturalization Service's procedure for granting applications for adjustment of status. More Like This Headnote

Immigration Law > Adjustment of Status > General Overview

Immigration Law > Immigrants > Family-Sponsored Immigrants

HN13 While nothing in the Immigration and Nationality Act, 15 U.S.C.S. § 1151 et seq., mandates that a married couple be living together in order to classify an individual as an immediate relative of a United States citizen, nothing in those statutes prohibits the Immigration and Naturalization Service from considering that factor in deciding whether to grant I-130 petitions and I-485 applications. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: For TAHER BOUKHRIS, ALEXANDRA GANZ BOUKHRIS, plaintiffs: Scott D. Pollock, Scott D. Pollock & Associates, Chicago, IL.

JUDGES: Robert W. Gettleman, United States District Judge.

OPINION BY: Robert W. Gettleman

OPINION

MEMORANDUM OPINION AND ORDER

Plaintiffs, Taher Boukhris ("Mr. Boukhris") and his wife Alexandra Ganz Boukhris ("Mrs. Boukhris") have filed a complaint against defendants, the U.S. Immigration and Naturalization Service ("INS") and Brian Perryman, District Director of the INS ("Director"), alleging denial of due process (Count I), violation of Mrs. Boukhris' right to representation, 8 C.F.R. §§ 292.5(b), § 103.2(a)(3), and 103.2(b)(7) (Count II), violation of INA §§ 201(b)(2)(a)(1) and 204 (Count III), and a First Amendment violation (Count IV).

Defendants previously moved to dismiss plaintiffs' complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim upon which relief can be granted). On October 16, 2001, the court granted defendants' motion, finding that the court did not have jurisdiction over the instant **[*2]** case because it was "not only premature but statutorily barred." Thereafter, plaintiffs filed the instant motion seeking the court's reconsideration of the jurisdictional issue. For the reasons explained below, the court grants plaintiffs' motion to reconsider and alters its initial holding as explained below.

FACTS

Mr. Boukhris is a citizen of Morocco who came to the U.S. in 1996 and married Mrs. Boukhris, a U.S. citizen, on September 27, 1997. One month later, plaintiffs applied to have Mr. Boukhris' immigration status changed to that of a permanent U.S. resident pursuant to 8 U.S.C. § 1255 ("Adjustment of status of nonimmigrant to that of person admitted for permanent residence"). To that end, Mrs. Boukhris completed an "I-130" petition to have Mr. Boukhris classified as an "immediate relative" pursuant to 8 U.S.C. § 1151(b)(2)(A)(i) (referred to as an "I-130 petition"), and Mr. Boukhris completed an "I-485" application for "adjustment of status" to a permanent resident pursuant to 8 U.S.C. § 1255 (referred to as an "I-485 application").

On February 1, 2001, two INS agents visited Mrs. Boukhris' home and **[*3]** asked to talk to her. At first, the INS agents listened as Mrs. Boukhris told them the story of how she met, married, and later separated from Mr. Bourkhris. Thereafter, one of the agents responded that her story was a lie, and that the INS knew Mr. Bourkhris had paid her $ 15,000 to marry him. Mrs. Bourkhris denied this, but the agent then held his badge up and asked her if she was "prepared to go to jail for this man, or spend the rest of [her] life paying money for fines for a fraudulent marriage?" Mrs. Boukhris was "afraid and intimidated" by this, and she "imagined herself in jail and unable to continue medical treatment for her condition" (which resulted from her "19 1/2 year-long history of family sexual abuse"). According to Mrs. Boukhris, after she told the INS agents about her condition, they "pressed her to sign a statement that they dictated to her" without informing her of "any rights that she may have had under the law, including the right to an attorney." Mrs. Boukhris' statement withdrew her I-130 petition and admitted that her marriage to Mr. Boukhris was "fraudulent." On February 23, 2001, the Director denied Mrs. Boukhris' petition and Mr. Boukhris' application, **[*4]** prompting the instant lawsuit.

DISCUSSION

In granting defendants' motion to dismiss previously, the court found the instant suit to be premature because Mr. Boukhris failed to appeal the denial of his I-485 application to the Board of Immigration Appeals. See McBrearty v. Perryman, 212 F.3d 985, 986 (7th Cir. 2000). The court also concluded that it was statutorily barred from reviewing that decision under HN1 8 U.S.C. § 1252(a)(2)(B), which provides:

"notwithstanding any other provision of law, no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under [8 U.S.C. § 1255]," which covers, *inter alia,* the adjustment of status of a nonimmigrant to that of a person admitted for permanent residence. See also McBrearty, 212 F.3d at 986. Finally, in response to plaintiffs' argument that the court has jurisdiction over the instant case due to Mrs. Boukhris' constitutional claims, the court concluded:
These are simply arguments about the merits of the Director's decision dressed in (scant) constitutional clothing, . . . as evidenced by plaintiff's prayer **[*5]** for relief, which asks the court in part to: (1) declare Mrs. Boukhris' withdrawal of her petition "a nullity, because it was obtained under duress and obtained by coercive measures"; (2) declare plaintiffs' marriage to be [in] "good faith and not for the purpose of evading immigration laws"; (3) compel defendants to approve plaintiffs' requests that Mr. Boukhris' visa status be adjusted to that of a permanent resident; and (4) enjoin defendants from deporting Mr. Boukhris from the US." Were the court to provide plaintiffs with any of the above relief, it would do so in violation of the clear language of 8 U.S.C. § 1252(a)(2)(B). See McBrearty at 986.

Having now reviewed both parties' arguments addressing plaintiffs' motion to reconsider, the court agrees with plaintiffs that their failure to exhaust administrative remedies is excusable under the circumstances, and further that plaintiffs' constitutional claims are not foreclosed by 8 U.S.C. § 1252(a)(2)(B). The court therefore grants plaintiffs' motion to reconsider and denies defendants' motion to dismiss on jurisdictional grounds. [1]

FOOTNOTES

[1] In doing so, however, the court does not alter its finding that it is not empowered to "compel[] Defendants to approve . . . [Mr.] Boukhris' application to adjust [his] status to that of a lawful permanent resident," "declare that Plaintiffs' marriage was entered into in good faith and not for the purpose of evading the immigration laws," "compel[] Defendants to approve [Mrs.] Boukhris' visa petition," or "enjoin[] Defendants from taking any action to detain or remove [Mr.] Boukhris from the United States, where such decision may arise from the INS' actions and/or conclusions that Plaintiffs engaged in a fraudulent marriage." The only relief--of the relief requested by plaintiffs--that the court can possibly grant in the instant case is to "declare [Mrs.] Boukhris' withdrawal of her visa petition for [Mr.] Boukhris a nullity." Of course, this relief will be granted only if, at a later stage in this litigation, plaintiffs prove that Mrs. Boukhris' withdrawal of her I-130 petition was in fact unlawfully coerced and that this violated Mrs. Boukhris' constitutional rights, as plaintiffs assert.

[*6] The court begins with plaintiffs' argument that they did in fact exhaust their administrative remedies. Although the court previously concluded to the contrary, the court now agrees with plaintiffs that the futility exception to exhaustion of administrative remedies applies in the instant case. See Wilczynski v. Lumbermens Mut. Cas. Co., 93 F.3d 397, 402 (7th Cir. 1996). HN2 Under Wilczynski, plaintiffs must show that it is "certain" their claims would be denied on appeal, not merely that they "doubt" they would meet with success on appeal. Id. (citations omitted). Plaintiffs have done this.

Beginning with Mrs. Boukhris, it is clear that she is prohibited from retracting her withdrawal of her I-130 petition in the administrative proceedings. See HN3 8 C.F.R. § 103.2(b)(6) (stating that, "a withdrawal may not be retracted"). Further, Mrs. Boukhris has no right to appeal the Director's denial of her I-130 petition based on her withdrawal because she was not given notice of that right, as required by 8 C.F.R. § 103.3(a)(1)(iii). Indeed, the only option Mrs. Boukhris has is to file a new petition as permitted by 8 C.F.R. 103.2(b)(15), **[*7]** which would allow the Director to take into consideration "the facts and circumstances" surrounding her withdrawal of her first petition. Whatever crack in the door that procedure might create is foreclosed, however, by 8 U.S.C. § 1154(c), which provides that, "no petition shall be approved if . . . the alien has previously . . . sought to be accorded . . . an immediate relative or preference status as the spouse of a citizen of the United States . . . by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws." The Attorney General made that determination in the instant case. Thus, any attempt by Mrs. Boukhris to file a new I-130 application on her husband's behalf would be futile under Wilczynski. 93 F.3d at 402.

As for Mr. Boukhris, his door to meaningful administrative review closed along with his wife's. HN4 Under 8 U.S.C. § 1154(b), approval of Mrs. Boukhris' I-130 petition is a condition precedent to the granting of Mr. Boukhris' I-485 application. Thus, because, as discussed above, Mrs. Boukhris could not retract her withdrawal of her I-130 **[*8]** petition, and she could not avoid the denial of future I-130 petitions she might file, any attempt by Mr. Boukhris to appeal the denial of his I-485 adjustment of status application would have also been futile given the language of 8 U.S.C. § 1154(c). Therefore, the court agrees with plaintiffs that they have, in fact, demonstrated that further administrative appeals to the Immigration and Naturalization Service would have been futile in the instant case. As a result, the court concludes that plaintiffs exhausted their administrative remedies.

Given that plaintiffs' claims are not foreclosed by their failure to exhaust administrative remedies, the court now considers whether plaintiffs' constitutional challenges nullify the effect of the door-closing statute, 8 U.S.C. § 1252(a)(2)(B), as plaintiffs argue. [2] HN5 Section 1252(a)(2)(B) states that, "Notwithstanding any other provision of law, no court shall have jurisdiction to review-- (i) any judgment regarding the granting of relief under [8 U.S.C.S. § 1255, which inlcudes the adjustment of status of nonimmigrant to that of a person admitted for permanent residence]". **[*9]** . . "or (ii) any other decision or action of the Attorney General the authority for which is specified under this title [8 USCS §§ 1151 et seq.] to be in the discretion of the Attorney General." While this statute would normally act as a jurisdictional bar, the existence of plaintiffs' constitutional claims spare the instant case, at least for the time-being. See McBrearty, 212 F.3d at 987 (noting

that, "[door-closing statutes] are often interpreted as being inapplicable to constitutional challenges," and citing Czerkies v. U.S. Dept. of Labor, 73 F.3d 1435, 1439 (7th Cir. 1996), LaGuerre v. Reno, 164 F.3d 1035, 1040 (7th Cir. 1998), and Stehney v. Perry, 101 F.3d 925, 936 (3d Cir. 1996)).

FOOTNOTES

2 The court disagreed with this argument in its October 16, 2001, Order, finding plaintiffs' constitutional claims to be "arguments about the merits of the Director's decision dressed in (scant) constitutional clothing." Upon reconsideration, the court concludes that it cannot grant plaintiffs the majority of relief they have requested, but defers judgment on the merit of plaintiffs' constitutional claims at this stage of the litigation.

[*10] Instead, this court has jurisdiction through the Administrative Procedure Act, 5 U.S.C. § 701, et seq. ("APA"), and 28 U.S.C. § 1331, as explained in Sabhari v. Reno, 197 F.3d 938, 943 (8th Cir. 1999), and the cases discussed therein. See Abboud v. INS, 140 F.3d 843, 846-47 (9th Cir. 1998); Shanti, Inc. v. Reno, 36 F. Supp. 2d 1151, 1159-61 (D. Minn. 1999); Burger v. McElroy, 1999 U.S. Dist. LEXIS 4854, *10-14, 1999 WL 203353 (S.D.N. Y. April 12, 1999). HN6 Section 702 of the APA provides in part that, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Similarly, § 704 states in part that, "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." These, along with the court's grant of original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, are sufficient to confer **[*11]** jurisdiction in the instant case. The court therefore concludes that it has jurisdiction to consider plaintiffs' claims. 3

FOOTNOTES

3 The court agrees also with plaintiffs that McBrearty does not proscribe the above result because it is distinguished from the instant case in three important respects. First, the plaintiffs in McBrearty filed I-485 applications requesting changes of status after automatically receiving visas due to winning "the diversity visa lottery." See 212 F.3d at 986. Thus, there was no need to examine the circumstances surrounding the denial of an I-130 petition based upon withdrawal in McBrearty. Further, unlike plaintiffs in the instant case, the plaintiffs in

McBrearty did not have a good reason for failing to exhaust their administrative remedies after their change of status applications were denied due mostly to their tardiness in filing the applications. See id. at 987. And finally, the plaintiffs' federal suit in McBrearty did not allege constitutional claims, whereas plaintiffs have alleged two such claims in the instant case. Id.

[*12] This is not the end of the court's inquiry, however. In its Order dated October 16, 2001, the court did not reach defendants' argument that the allegations in plaintiffs' complaint fail to state a claim upon which relief can be granted under Rule 12(b)(6) because the court concluded that it did not have jurisdiction over those claims. Having now found that it has jurisdiction to consider plaintiffs' claim, the court must do just that pursuant to Rule 12(b)(6). In doing so, the court is mindful of the fact that, HN7 under the federal notice pleading standards, all well-pleaded allegations are construed liberally, and dismissal is proper only where the claimant can prove no set of facts to support the allegations. Conley v. Gibson, 355 U.S. 41, 46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). Further, the court assumes that plaintiffs' allegations are true and makes all reasonable inferences in favor of plaintiffs. Ed Miniat, Inc. v. Globe Life Ins. Group, Inc., 805 F.2d 732, 733 (7th Cir. 1986).

First, plaintiffs' statutory claims that defendants violated Mrs. Boukhris' right to representation under 8 C.F.R. §§ 292.5(b), § 103.2(a)(3), **[*13]** and 103.2(b)(7) (Count II) are dismissed under Rule 12(b)(6). Plaintiffs allege that, "The INS" questioning of [Mrs.] Boukhris on February [1], 2001 without notice to her attorney violates 8 C.F.R. § 292.5(b)," and that, "Representation in visa petition proceedings is specifically guaranteed" under 8 C.F.R. § 103.2(a)(3), and finally that, "An examination is authorized in such proceedings" under 8 C.F.R. § 103.2(b)(7). In actuality, however, these statutes do not support plaintiffs allegations.

HN8 Section 292.5(b) merely grants the person involved in an examination under that chapter "the right" to be represented by an attorney or representative, but, as explained in § 292.5(a), the INS' affirmative duty to notify a person's attorney or representative arises only in particular instances. [4] Plaintiffs do not allege, and the facts do not appear to support, that the INS agents' visit to Mrs. Boukhris' home on February 1, 2001, embodied an instance covered by § 292.5(a). Next, although HN9 8 C.F.R. § 103.2(a)(3) states that, "An applicant or petitioner may be represented by an attorney . . **[*14]** . or by an accredited representative," plaintiffs have not provided any support for their assertion that once an applicant or petitioner is represented by an attorney or an accredited representative, INS agents are forbidden from interviewing such person with their permission when their attorney is not present. And finally, although HN10 8 C.F.R. § 103.2(b)(7) does provide for more formal examinations in particular proceedings, plaintiffs do not cite any cases supporting their assertion that the INS agents' talk with Mrs. Boukhris on February 1, 2001, should have been treated as such an event.

FOOTNOTES

4 HN11 Section 292.5(a) states that:

> Whenever a person is required by any of the provisions of this chapter to give or be given notice; to serve or be served with any paper other than a warrant of arrest or a subpoena; to make a motion; to file or submit an application or other document; or to perform or waive the performance of any act, such notice, service, motion, filing, submission, performance, or waiver shall be given by or to, served by or upon, made by, or requested of the attorney or representative of record, or the person himself if unrepresented.

[*15] Thus, plaintiffs' claim that defendants violated Mrs. Boukhris' "right to representation" by interviewing her without notifying her attorney in advance, and by basing the denial of her visa petition on the contents of that interview, is without merit. Had Mrs. Boukhris requested the presence of her attorney on February 1, 2001, or had the INS agents who visited her told Mrs. Boukhris that she could not have an attorney present, perhaps then Mrs. Boukrhis could state a claim under these statutes. But plaintiffs merely allege that INS agents visited Mrs. Boukhris' home on February 1, 2001, "without prior notice to Plaintiffs or their attorney," which is insufficient to state a claim based on these statutes. Accordingly, the court dismisses Count II.

Count III alleges that defendants violated HN12 8 U.S.C. §§ 1151(b)(2)(A)(i) and 1154, which set forth the "immediate relative" status sought via Mrs. Boukhris' I-130 petition, and the INS' procedure for granting I-485 applications. According to plaintiffs, the INS violated these statutes when it concluded that Mr. and Mrs. Boukhris engaged in a fraudulent marriage "based, in part, on the fact that they are living separately. **[*16]** " Again, plaintiffs are attempting to read a right into an immigration statute. HN13 While plaintiffs are correct that "nothing in the Immigration and Nationality Act mandates that a married couple be living together in order to classify an individual as an immediate relative of a U.S. citizen," nothing in these statutes prohibits the INS from considering that factor in deciding whether to grant I-130 petitions and I-485 applications. Thus, the court dismisses Count III pursuant to Rule 12(b)(6).

Counts I and IV are alleged as constitutional claims. Count I alleges that Mrs. Boukhris' right to due process of law under the Fifth Amendment to the U.S. Constitution was violated when the INS denied Mrs. Boukhris' 1-130 petition and Mr. Boukhris' 1-485 petition based on INS agents' coercion of Mrs. Boukhris to sign "a statement that was not true," and their coercive questioning of her "outside the presence of her husband and/or attorney." Count I alleges that Mrs. Boukhris' due process rights were further violated when INS agents obtained her incriminating statement "without first advising her of her rights to counsel or her rights against self-incrimination." Similarly, Count IV alleges that, **[*17]** "The INS' actions in denying immediate relative immigrant status to [Mr.] Boukhris violates the Plaintiffs' rights to freely associate and to determine the content of their marital relationship as

they see fit, in violation of the First Amendment to the U.S. Constitution."

Unlike Counts II and III above, the question of whether Counts I and IV state claims upon which relief can be granted cannot be addressed by interpreting the plain language of a statute. Instead, these claims, which purport to allege serious constitutional violations, require in-depth analysis of prevailing case law. The parties have not provided this necessary analysis for the court. Thus, the court defers its ruling on defendants' motion to dismiss Counts I and IV under Rule 12(b)(6). The parties are ordered to file simultaneous briefs addressing Counts I and IV on or before February 26, 2002. The parties' briefs are not to exceed ten pages in length.

CONCLUSION

For the reasons set forth above, the court grants plaintiffs' motion to reconsider and finds that it does have jurisdiction over the instant matter. The court grants defendants' motion to dismiss Counts II and III, however, finding that plaintiffs **[*18]** have failed to state a claim upon which relief can be granted in those claims. With respect to Counts I and IV, the court withholds its ruling and orders the parties to file simultaneous briefs addressing these counts on or before February 26, 2002. The parties' briefs are not to exceed ten pages in length. This matter is set for ruling April 3, 2002, at 9:00 a.m.

ENTER: February 6, 2002

Robert W. Gettleman

United States District Judge

909 SE 1st Avenue, Suite 606
Miami, FL 33131

U.S. Customs and Border Protection

APR 0 3 2009

(b) (7)(E) (b)(6) (b)(7)(C)

TO: (b)(6) (b)(7)(C)
Supervisory CBP Enforcement Officer
Office of Deferred Inspections

FROM: Associate Chief Counsel
Miami, Florida

SUBJECT: Outside Counsel Presence During Deferred Inspections

(b) (5), (b) (7)(E)

The regulations found at 8 Code of Federal Regulations (C.F.R.) § 292.5(b) state in part that "...nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody." The Inspector's Field Manual (IFM), Deferred Inspections, Chapter 17.1(e) states, "At a deferred inspection, an applicant for admission is not entitled to representation. However, an attorney may be allowed to be present upon request if the supervisory CBP Officer on duty deems it appropriate. The role of the attorney in such a situation is limited to that of observer and consultant to the applicant."

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If you have any questions or wish to discuss this case in greater detail, please do not hesitate to contact (b)(6) (b)(7)(C) **of this office at** (b)(6) (b)(7)(C) **x**

(b)(6) (b)(7)(C)