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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

JOHN DOE #1; JUAN RAMON MORALES; JANE DOE #2; JANE DOE #3; IRIS ANGELINA CASTRO; BLAKE DOE; BRENDA VILLARRUEL; GABINO SORIANO CASTELLANOS; and LATINO NETWORK,

Plaintiffs,

v.

DONALD TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, in his official capacity as Acting Secretary of the Department of Homeland Security; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX M. AZAR II, in his official capacity as Secretary of the Department of Health and Human Services; U.S. DEPARTMENT OF STATE; MICHAEL POMPEO, in his official capacity as Secretary of State; and UNITED STATES OF AMERICA,

Defendants.

CASE NO. 3:19-cv-01743-SI

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL COMPLETION OF ADMINSTRATIVE RECORD AND PRIVILEGE LOG

INTRODUCTION

Defendants respectfully oppose Plaintiffs' Motion to Compel Completion of Administrative Record and Privilege Log. ECF No. 119. Plaintiffs have not met the high burden necessary to overcome the presumption that the Administrative Record ("A.R.") is complete.

ARGUMENT

On November 15, 2019, the Court ordered Defendants to produce "documents from the State Department's administrative record relating to the amendments to the Foreign Affairs Manual and the State Department's 'methodology' and other definitions implementing the Proclamation." ECF No. 83 at 11. The Court identified "[s]ending [a] cable [to consular officers] and preparing amendments to the Foreign Affairs Manual" as "actions taken by the State Department to implement the Proclamation." *Id*. at 5-6. The Court further noted that "to resolve Plaintiffs' APA claim the Court must determine whether that agency has engaged in final agency action." *Id*. at 7. This is correct. Plaintiffs must identify a "final agency action" to raise an APA claim. *See* 5 U.S.C. § 704; *Lujan v. Nat'l Wildlife Fed'n.*, 497 U.S. 871, 890-93 (1990). Although Plaintiffs have not identified any final agency action, and Defendants dispute that there is any reviewable final agency action here, the Court ordered a record be produced to determine *whether* there is final agency action:

> Defendants contend that the State Department has not engaged in any final agency action. The Court is unable to determine whether, for example, the amendments to the Foreign Affairs Manual were fully drafted or only partially drafted. Defendants note that the "final issuance" of the revised Foreign Affairs Manual was "halted" because of the temporary injunction, but that does not answer the question of whether the amendments had already been finalized. Without production of the administrative record, it will be difficult conclusively to determine whether the agency action was final.

ECF No. 83 at 9.[1] Defendants produced an initial administrative record on November 20, 2019, and on January 10, 2020, filed a full administrative record. ECF Nos. 91, 118. In between the initial record and January 10, there was no ruling determining that there is any final agency action or further clarifying the agency action for which a record should be produced.[2] Accordingly, Defendants filed a complete administrative record containing all documents the State Department considered, either directly or indirectly, "relating to the amendments to the Foreign Affairs Manual and the State Department's 'methodology' and other definitions implementing the Proclamation," as the Court had ordered. *See* ECF No. 83 at 11.

An agency compiling a record is entitled to a "presumption of regularity," and the record is entitled to a "presumption of completeness." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *In re United States*, 875 F.3d 1200, 1206 (9th Cir. 2017), *judgment vacated on other grounds*, 138 S. Ct. 443 (2017). As Plaintiffs acknowledge, the presumption of completeness can only be rebutted by "clear evidence to the contrary." Mot. 3 (quoting *In re United States*, 875 F.3d at 1206). Plaintiffs must cite specific documents and identify "reasonable, non-speculative grounds" to believe these documents actually were considered in reaching the agency decision Plaintiffs challenge. *Nw. Envtl. Advocates v. United States Fish & Wildlife Serv.*, No. 3:18-CV-01420, 2019 WL 6977406, at *4-5 (D. Or. Dec. 20, 2019).

[1] The interpretive guidance in the FAM is not final agency action for purposes of APA review. The FAM does not carry the "force of law," or create or impose legal requirements. *Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000); *Miller v. Clinton*, 687 F.3d 1332, 1341 (D.C. Cir. 2012). The FAM merely details how to comply with legal requirements imposed by other sources such as the Proclamation. Because it is the Proclamation, and not the FAM, that determines legal rights, obligations, and consequences, regardless of whether the FAM amendments were finalized, they cannot be "final agency action" for purposes of establishing jurisdiction under the APA. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

[2] The Court's preliminary injunction ruling did not reach Plaintiffs' APA claims, ECF No. 95 at 35, and there has been no ruling identifying a final agency action subject to APA review or finding that Plaintiffs have viable APA claims.

For the reasons set out below, the Court should deny the motion because Plaintiffs have not met this burden. At a minimum, the Court should not require any supplementation of the record until a determination is made that Plaintiffs' APA claims can survive a motion to dismiss, which will require the Court to determine whether there is any final agency action. *In re United States*, 138 S. Ct. 443, 445 (2017) (holding that threshold arguments regarding reviewability under the APA must be resolved before granting a motion to complete the record). If, as Defendants have argued, there is no reviewable final agency action, then there is no viable APA claim and no need for a record at all. If, alternatively, the Court identifies some final agency action that is subject to APA review, that determination will clarify the scope of the record.

I. Comments in response to the emergency notice of information collection

Plaintiffs first argue that comments submitted in response to the OMB Notice of Information Collection, 84 Fed. Reg. 58199, should be included in the record. Mot. 4-5. But these comments were not considered, even indirectly, in developing the FAM amendments or in implementing the Proclamation.

The Notice of Information Collection did not implement or provide any guidance to consular officers on how to follow the Proclamation. The Notice was merely a preliminary step in the statutorily-mandated Paperwork Reduction Act ("PRA") process for obtaining OMB approval to collect the information required by the Proclamation. Plaintiffs argue that the comments submitted in response were "materials directly or indirectly considered by agency decision-makers." Mot. 4 (quoting *Thompson v. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)). However, an administrative record should be limited to the "record on which the administrative decision was based," *Thompson*, 885 F.2d at 555, and Plaintiffs do not argue—and there is no basis to argue—that the State Department considered these comments in developing "the amendments to the Foreign Affairs Manual" or "the State Department's

'methodology' and other definitions implementing the Proclamation." Comments in response to a Notice of Information Collection are supposed to address the purposes of the PRA, such as encouraging agencies to "minimize the paperwork burden" on individuals and promote efficient, cost-effective information collection and management. *See* 44 U.S.C. § 3501; *United States v. Hatch*, 919 F.2d 1394, 1396 (9th Cir. 1990). The State Department did not, and need not, consider these comments in implementing the Proclamation, so they are not part of the record.

II. Comments and redactions relating to the public charge rule

Plaintiffs next argue for inclusion of "all comments received in response to the public charge rule and questionnaire." Mot. 5. But the State Department did not consider these comments in implementing the Proclamation or developing the FAM guidance, and Plaintiffs point to no evidence showing otherwise. The State Department only considered the questionnaire and portions of the rule itself that addressed or defined terms that are also used in the Proclamation, such as "reasonably foreseeable medical costs" and "health insurance." As Plaintiffs acknowledge, these are already included in the record. Mot. 5 (citing A.R. 38-63). The agency is not required to include additional documents related to the public charge rule in this record if it did not consider them when preparing to implement the Proclamation. *See, e.g.*, *Audubon Soc'y of Portland v. Zinke*, No. 117-cv-00069, 2017 WL 6376464, at *4-5 (D. Or. Dec. 12, 2017) (inclusion of a particular document the agency considered does not mean record must include all other documents related to or cited in that document); *Cape Hatteras Access Pres. All. v. Dep't of Interior*, 667 F. Supp. 2d 111, 113 (D.D.C. 2009) (agency's consideration of a document in one decision does not mean it must be included in record for later decision even if two decisions are related or address similar issue).

Plaintiffs base their argument on a statement from a webinar training that the Proclamation and the public charge rule "are related" because "if somebody is ineligible under

one there's a possibility they're going to be ineligible under both." A.R. 118; Mot. 5. But the training is also clear that these remain "separate determinations" and consular officers must independently "apply each legal standard." A.R. 118. Plaintiffs also cite a statement that, although the public charge questionnaire "is not for the purpose of adjudicating the Proclamation," it might generate health insurance information that is also useful for purposes of the Proclamation. A.R. 120; Mot. 5. Nothing in either of these statements indicates that the comments in response to the public charge rule or questionnaire were considered in implementing the Proclamation, and Plaintiffs cite nothing in the FAM amendments or anywhere else citing these comments in relation to the Proclamation. Plaintiffs have not identified "clear evidence" that the comments were considered and have not rebutted the presumption that the record is complete. *In re United States*, 875 F.3d at 1206.

Plaintiffs also argue that Defendants "improperly redacted portions of documents" that address the public charge rule. Mot. 5. The redactions they cite relate only to the webinar training for State Department personnel, a portion of which was on the public charge rule, which is not the subject of Plaintiffs' complaint. As the title of this training demonstrates, it was divided into two separate sections, covering two separate upcoming changes that would affect visa adjudications: Presidential Proclamation 9945 and the public charge rule. A.R. 000070. The first portion of this webinar addressing the Proclamation has been included in the record. A.R. 71-100. The second half—A.R. 101-11—addressed the public charge rule, is not information that was considered in implementing the Proclamation, and should not be included in the record.

III. Documents Plaintiffs argue relate to implementation of the Proclamation

Plaintiffs next claim that "Defendants have asserted, before this Court and the Ninth Circuit, that the agencies have construed the Proclamation to permit an intending immigrant to switch to a non-'approved' health insurance plan upon entry into the United States," Mot. 6

(citing ECF No. 84 at 6), and argue the record lacks documents related to that assertion. The language Plaintiffs cite actually says, "to the extent an intending immigrant purchases a particular insurance plan in advance of her entry, or shortly thereafter, nothing in the Proclamation bars her from later switching to a different plan once in the United States or applying for a plan with different coverage." ECF No. 84 at 6. This statement only references the terms of the Proclamation, and the Proclamation is already included in the record. A.R. 3-6.

Plaintiffs next cite language in the Proclamation that says aliens who circumvent the Proclamation through fraud, misrepresentation or illegal entry should be considered priorities for removal by DHS, and argue the record should contain documents related to this provision. Mot. 6 (citing A.R. 5). But the Court has already held that,"[b]ecause the President is not an agency, a court does not have authority under [the APA] to review actions such as the Proclamation," ECF No. 83 at 2, and Plaintiffs thus have no basis to obtain a record for the Proclamation or statements in the Proclamation. The Court also found "no evidence before the Court of agency action by the Department of Homeland Security" and denied Plaintiffs' motion to obtain an administrative record from DHS. *Id*. at 7.

Plaintiffs also seek documents supporting statements in the webinar training that a consular officer does not need to consider the costs of an applicant's medical conditions if the applicant has an approved health insurance plan, and that a family member's plan can satisfy the Proclamation, arguing that "nothing in the administrative records supports" these decisions. Mot. 6-7. But the Proclamation, which again is included in the record, says this directly. A.R. 4 (explaining that the Proclamation can be satisfied by showing the alien will obtain approved health insurance, as defined in the Proclamation, *or* by showing resources to pay for reasonably foreseeable medical costs, and listing "a family member's plan" as approved health insurance).

IV. Redaction of individual names

Plaintiffs challenge the redaction of names of State Department officials below the Deputy Assistant Secretary level. Defendants redacted these names as Personally Identifiable Information that is irrelevant to the claims and issues in this case to avoid the need to otherwise designate the record confidential and file it under seal. Plaintiffs, who are themselves proceeding under pseudonyms, advance no argument that these names are necessary to the resolution of their claims or that they are somehow "materials directly or indirectly considered by agency decision-makers," such that they must be included in the record. *Thompson*, 885 F.2d at 555.

V. Documents and information referred to in the record

Plaintiffs argue the record should include the Secretary of State's approval of the FAM amendments, referred to in the Sunden Declaration. Mot. 7 (citing ECF No. 91). The Sunden Declaration references "an Action Memorandum from Assistant Secretary for Consular Affairs Carl Risch to Secretary of State Pompeo, which reflects that on October 28, 2019, Secretary Pompeo approved updates to 9 FAM 302.14." ECF No. 91 at 1. This Risch Memorandum reflecting the Secretary of State's approval is already included in the record. *See* A.R. 19-21.

Plaintiffs next cite references to information from the Center for Disease Control and Prevention ("CDC") and the Department of Health and Human Services Agency for Healthcare Research and Quality ("AHRQ") in the public charge Federal Register notice in the record that they argue should be part of the record. Mot. 8 (citing A.R. 45, 47, 48). But again, if a document in the record refers to or cites another document, that additional document is only part of the record if the agency actually considered it. *Audubon*, 2017 WL 6376464, at *4-5. Plaintiffs do not identify anything in the FAM amendments or other documents related to the Proclamation that cites or refers to CDC or AHRQ information, or any other evidence showing that the State Department considered this information in implementing the Proclamation.

Plaintiffs argue that documents should be included that support the estimate in the Notice of Information Collection that up to 450,500 individuals might be asked questions related to the Proclamation annually. Mot. 8. This number was simply generated by estimating the number of visa applications the State Department receives annually and there are no documents setting out this calculation that could be included in the record. Moreover, as noted above, this information was submitted as part of the OMB PRA process and was not information that was considered in developing "the amendments to the [FAM]" or "the State Department's 'methodology' and other definitions implementing the Proclamation." ECF No. 83 at 11.

Plaintiffs cite a reference in the webinar to the cost of treating diabetes. Mot. 8; A.R. 116. This similarly is not information that was referenced in the FAM or considered in implementing the Proclamation. Moreover, it appears this figure may be part of a question from a participant, as the context makes clear that cost estimates must consider information provided by doctors and applicants and must be made on a case-by-case basis. *See* A.R. 114, 115 ("'How much money is enough to treat Diabetes?' I don't think we have an answer on that.").

Finally, Plaintiffs ask for documents supporting findings in the Proclamation related to uncompensated care costs and rates at which immigrants carry health insurance. Mot. 8. As explained above, the Court has already determined that Plaintiffs cannot directly challenge the Proclamation under the APA, and there is no basis to seek a record for the Proclamation itself.

VI. Deliberative materials are not part of the record and need not be logged.

Plaintiffs' final argument is that the Court should "order Defendants to produce a privilege log describing any documents withheld under any claim of privilege, including the deliberative process privilege." Mot. 10. As an initial matter, Defendants have already provided a privilege log for all parts of the record that were redacted based on any privilege.

Deliberative materials are not part of the administrative record. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 50 (1983). Generally, "the actual subjective motivation of agency decisionmakers is immaterial as a matter of law," *In re Subpoena Duces Tecum*, 156 F.3d 1279, 1279-80 (D.C. Cir. 1998), so, in reviewing an APA claim, it is "not the function of the court to probe the mental processes" of the agency, *United States v. Morgan*, 304 U.S. 1, 18 (1938). Accordingly, "inquiry into the mental processes of administrative decisionmakers is usually to be avoided," unless there is "a strong showing of bad faith or improper behavior." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Plaintiffs do not argue that there is any evidence of bad faith or improper motive here.

In *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44-45 (D.C. Cir. 1986), the *en banc* D.C. Circuit similarly held that "examining the deliberative proceedings of the agency" "would represent an extraordinary intrusion into the realm of the agency" and should only be considered in rare cases where there is a strong showing of bad faith or improper behavior. *Id.* Decision-makers must otherwise have "the assurance of secrecy" if "agencies are to engage in the uninhibited and frank discussions during their deliberations" that the privilege is intended to protect and promote. *Id.* Although the Ninth Circuit has not squarely addressed the issue, it has strongly suggested that deliberative materials are not part of the record.[3] In *Portland Audubon Society v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993), the Ninth Circuit cited approvingly *Mothers for Peace* for the proposition that the administrative record includes "neither the internal deliberative processes of the agency nor the

[3] Plaintiffs' reliance on *In re United States*, 875 F.3d 1200 (9th Cir. 2017) is misplaced. *See* Mot. 9-10. As the dissent in that decision noted, the district court decision "violate[d] two well-settled principles governing judicial review of agency action under the [APA]," *id.* at 1211, and the Ninth Circuit's decision was subsequently vacated by the Supreme Court, *see* 138 S. Ct. 443.

mental processes of individual agency members." *Id.* at 1549; *see also Carlsson v. USCIS*, 2015 WL 1467174, at *7 n.5 (C.D. Cal. Mar. 23, 2015).

Accordingly, "predecisional and deliberative documents are not part of the administrative record to begin with, so they do not need to be logged as withheld from the administrative record." *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019); *California v. U.S. Dep't of Labor*, 2014 WL 1665290, at *13 (E.D. Cal. Apr. 24, 2014) ("because internal agency deliberations are properly excluded from the administrative record, the agency need not provide a privilege log"); *Nat'l Ass'n of Chain Drug Stores v. HHS*, 631 F. Supp. 2d 23, 27 (D.D.C. 2009) (same); *Louisiana v. Salazar*, 170 F. Supp. 3d 75, 83 n.7 (D.D.C. 2016) (same); *Tafas v. Dudas*, 530 F. Supp. 2d 786, 801-02 (E.D. Va. 2008) (same); *see also Cook Inletkeeper v. Envtl. Protection Agency*, 400 F. App'x 239, 240 (9th Cir. 2010) (denying "motion to require preparation of a privilege log" where there was no clear evidence rebutting presumption record was complete); *Stand Up for California! v. Dep't of Interior*, 71 F. Supp. 3d 109, 123 (D.D.C. 2014) ("[T]o obtain a log of privileged and deliberative materials excluded from the administrative record, plaintiffs must overcome, with clear evidence, the presumption of regularity in the agency proceedings by showing bad faith or other exceptional circumstances.").

Requiring "all predecisional and deliberative documents to be logged" "would place a significant burden on agencies." *Oceana, Inc. v. Pritzker*, 217 F. Supp. 3d 310, 320 (D.D.C. 2016). Requiring the State Department to engage in this time-consuming process here is wholly unjustified where Plaintiffs have not established that they have viable APA claims, have not presented clear evidence to rebut the presumption that the record is complete, and have not alleged any bad faith or other improper motive.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion.

Dated: February 7, 2020

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