UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN ACADEMY OF RELIGION, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, PEN AMERICAN CENTER, and TARIQ RAMADAN,	:	
Plaintiffs,	:	**ECF CASE**
- v.-	:	06 Civ. 588 (PAC)
MICHAEL CHERTOFF, in his official capacity as Secretary of the Department of Homeland Security; CONDOLEEZZA RICE, in her official capacity as Secretary of State,	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CERTIFICATION PURSUANT TO 8 U.S.C. § 1202(F)

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
86 Chambers Street
New York, NY 10007
Tel: (212) 637-2739/2822
Fax: (212) 637-2717/2730

DAVID S. JONES (DJ-5276)
KRISTIN L. VASSALLO (KV-0918)
Assistant United States Attorneys
- Of Counsel -

Defendant Michael Chertoff, in his official capacity as Secretary of Homeland Security, and Condoleezza Rice, in her official capacity as Secretary of State (collectively, "defendants" or the "Government"), by their counsel, Michael J. Garcia, United States Attorney for the Southern District of New York, respectfully submit this memorandum of law in opposition to plaintiffs' "Motion For Certification to the Secretary of State to Release Visa Records."

Plaintiffs, academic organizations who wish to confer in the United States with non-citizen Tariq Ramadan, have moved this Court for a preliminary injunction enjoining defendants from excluding Mr. Ramadan on the basis of 8 U.S.C. § 1182(a)(3)(B)(i)(VII), which renders ineligible for admission any alien who "endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization." In addition to their preliminary injunction motion, plaintiffs have also moved for this Court to certify to the Secretary of State, in accordance with 8 U.S.C. § 1202(f), that the information contained in the "visa file" of Tariq Ramadan is needed by the Court in the interest of the ends of justice. See Motion for Certification to the Secretary of State to Release Visa Records ("Certification Motion") at 1.

This motion should be denied. As detailed below, release of the records concerning Mr. Ramadan's visa applications would not serve the interest of the ends of justice because the information plaintiffs seek is irrelevant to the pending preliminary injunction motion, or any other matter now before the Court. This reason alone is sufficient to warrant denial of the motion in all respects.

ARGUMENT

THE COURT SHOULD NOT CERTIFY THAT TARIQ RAMADAN'S VISA RECORDS ARE NEEDED IN THE INTERESTS OF THE ENDS OF JUSTICE

In their motion, plaintiffs seek a certification from the Court that information in Professor Ramadan's "visa file" is needed for this case in the interest of justice. Specifically, plaintiffs contend that under 8 U.S.C. § 1208(f), they should be afforded access to Mr. Ramadan's "visa file" because it would "enable plaintiffs to determine the basis on which defendants concluded in 2004 that Professor Ramadan had endorsed or espoused terrorism; on what basis defendants continue to regard Professor Ramadan as inadmissible today; and for what reasons defendants have failed to act on a nonimmigrant visa application that Professor Ramadan submitted in September 2005." Certification Motion at 3. Plaintiffs' contentions fail to justify certification by this Court.

Pursuant to section 222(f) of the Immigration and Nationality Act, 8 U.S.C. § 1202(f), the Department of State is generally prohibited from disclosing visa records. Pursuant to that provision:

> The records of the Department of State and of diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States shall be considered confidential and shall be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States. . . .

8 U.S.C. § 1202(f). By its terms, section 222(f) "incorporates a [C]ongressional mandate of confidentiality" with respect to records concerning the issuance or non-issuance of visas. Medina-Hincapie v. Dept. of State, 700 F.2d 737, 741 (D.C. Cir. 1983). Under this statute, "the Secretary of State has no authority to disclose material to the public. In that sense the confidentiality mandate is absolute; all matters covered by the statute shall be considered confidential." Id.

Although section 222(f) contains two exceptions to the mandate of confidentiality, both are limited to very narrow and specific circumstances. One of these exceptions, set forth at § 222(f)(1), affords the Secretary of State discretion to make available "certified copies of [visa] records to a court which certifies that the information contained in such records is needed by the court in the interest of the ends of justice in a case pending before the court." 8 U.S.C. § 1202(f)(1).[1] This discretion, however, "does not relieve the Secretary of the mandate to treat the matter as confidential" – rather, "it permits the Secretary to do only that which any agency subject to a confidentiality requirement would be required to do if it received a court order or subpoena to produce specified documents." Medina-Hincapie, 700 F.2d at 741 (emphasis supplied).[2]

This Court should deny plaintiffs' motion because the information concerning Mr. Ramadan's visa applications is not needed here in the interest of justice, and none of the reasons proposed by plaintiffs as supporting certification has any merit. With respect to plaintiffs' first contention – that release of the information would allow them to determine "the basis on which defendants concluded in 2004 that Professor Ramadan had endorsed or espoused terrorism" – the premise of this assertion is factually incorrect. As the Government explains in its opposition to the preliminary injunction motion, defendants have never concluded, as a basis for any visa-related

[1] The second exception, not relevant here, provides that the Secretary of State may, in her discretion, share information with a foreign government "for the purpose of preventing, investigating, or punishing acts that would constitute a crime in the United States" or "to deny visas to persons who would be inadmissible to the United States." 8 U.S.C. § 1202(f)(2).

[2] Given the language of the provision, characterizing section 222(f) as "specifically provid[ing] that confidential reports must be furnished to a requesting court," as one court has done, Ass'n for Women in Science v. Califano, 566 F.2d 339, 346 n.38 (D.C. Cir. 1977) is simply incorrect. By its terms, section 222(f) grants the Secretary of State discretion to make available records to a certifying court; it does not mandate that the Secretary do so.

determination, that Mr. Ramadan endorsed or espoused terrorism; have not excluded Mr. Ramadan based on 8 U.S.C. § 1182(a)(3)(B)(i)(VII); and do not at this time contemplate finding him inadmissible on the basis of that provision. Given these circumstances, and in view of the fact that plaintiffs do not challenge any provision of the immigration law other than § 1182(a)(3)(B)(i)(VII), the second and third reasons cited by plaintiffs do not justify certification, and any documents relating to Mr. Ramadan's visa applications would be irrelevant to this proceeding.

The case law governing plaintiffs' substantive claims further supports this conclusion. As explained more fully in the Government's opposition to plaintiffs' preliminary injunction motion, Congress has delegated plenary authority over the visa process to the Executive, and the decision of a consular officer to grant or deny a visa is not subject to court review. See Government's Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction, at § C.3. Further, the Supreme Court has made clear that, in a case brought by U.S. citizens claiming that exclusion of an alien on a particular ground violates their First Amendment rights, once the Government has articulated a "facially legitimate and bona fide" reason for its actions, "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." Kleindienst v. Mandel, 408 U.S. 753, 769-70 (1972); see also Azzouka v. Sava, 777 F.2d 68, 72 (2d Cir. 1985) ("the governing standard permits the Court to inquire as to the Government's reasons [for excluding an alien], but proscribes its probing into their wisdom or basis. If the Court finds that the Government acted on a facially legitimate and bona fide reason, its inquiry is complete") (quotation omitted). Accordingly, given the very circumscribed nature of the Court's inquiry on plaintiffs'

preliminary injunction motion, disclosure of the information in Mr. Ramadan's "visa file" would be both unnecessary and inappropriate.[3]

Finally, even if this Court were to find that disclosure of the information in Mr. Ramadan's "visa file" is needed by the court "in the interest of the ends of justice," and if the Court also gave no weight to the inherent sensitivity of visa records, it should nonetheless decline to issue a certification because it would not be in the interest of justice to release this information. As evidenced by the terms of § 222(f) itself, the Government has only very limited bases on which visa records may be released and an exceptionally strong interest in keeping visa records confidential, and will only authorize the release of such records in the most compelling of circumstances. To the extent any visa records are national security classified, that classification would constitute an independent basis for precluding their disclosure. Furthermore, the types of records in which plaintiffs indicate an interest may be protected by other privileges, like the deliberative process privilege, and therefore would not be appropriate for release. For all of these reasons, the Government respectfully submits that the requested information is not "needed by the court in the interest of the ends of justice," and this Court should therefore deny plaintiffs' request in all respects.

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[3] To the extent plaintiffs argue that their certification request is warranted by aspects of the case beyond the pending preliminary injunction motion, they are incorrect, because the request for records relating to Mr. Ramadan is even less relevant to the case's facial challenge to 8 U.S.C. § 1182(a)(3)(B)(i)(VII) than it is to the "as applied" challenge in the preliminary injunction motion. In addition, such a request would be premature given that defendants have not yet answered or otherwise responded to the complaint, and their time to do so has been extended to April 26, 2006.

CONCLUSION

For all of the foregoing reasons, plaintiffs' motion for certification pursuant to 8 U.S.C. § 1202(f) should be denied.

Dated: New York, New York
April 4, 2006

Respectfully submitted,

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: /s/ Kristin L. Vassallo
KRISTIN L. VASSALLO (KV-0918)
DAVID S. JONES (DJ-5276)
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone No.: (212) 637-2739/2822
Fax No.: (212) 637-2686/2730