CASE NO. 13-35957

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MADELINE CARDENAS AND ROLANDO MORA-HUERTA,

APPELLANTS,

V.

UNITED STATES OF AMERICA, ET AL.,

APPELLEES.

ON APPEAL FROM THE FEDERAL DISTRICT COURT FOR THE DISTRICT OF IDAHO, BOISE, D.C. NO. 1:12-CV-00346-EJL

BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF APPELLANTS MADELINE CARDENAS AND ROLANDO MORA-HUERTA

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FRAP 29(c) STATEMENT

The American Immigration Lawyers Association ("AILA") is a not-for-profit corporation organized under the laws of the State of New York. AILA has no parent corporation. As a not-for-profit entity, AILA does not issue stock and does not have shareholders.

No party's counsel has authored this brief in whole or in part. No party has contributed money for preparing or submitting this brief. No person, other than AILA, its members, or its counsel, has contributed money for preparing or submitting this brief.

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STATEMENT OF INTEREST OF AMICUS CURIAE AND INTRODUCTION

Amicus curiae, the American Immigration Lawyers Association, respectfully submits this brief in support of Appellants Madeline Cardenas and Rolando Mora-Huerta.[1] AILA is a national association with more than 13,000 members nationwide, including lawyers and law school professors, who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. As the nation's preeminent bar association for immigration attorneys, AILA's membership possesses expertise in the complexities of the INA's provisions, as well as on-the-ground experience in the adjudication by the United States Citizenship and Immigration Services ("USCIS") of petitions for family and employment-based immigration benefits, and by consular officers of visa applications filed by the beneficiaries of approved family- and employment-based petitions.

[1] AILA acknowledges with appreciation the significant research and writing assistance provided to the undersigned counsel in the preparation of this brief by Margret Bergerud, a third-year student at the University of Idaho College of Law.

The ability to seek judicial review of visa applications that are denied for inadequately supported reasons is a crucial check on unfounded and arbitrary use of authority by the Executive Branch. The members of AILA, and the people and businesses that AILA's members represent, have an important interest in ensuring that federal courts review allegedly erroneous denials of visa applications by consular officers. Visa denials can separate family members forever, or permanently deprive a United States employer of a valuable employee. With stakes so high, is imperative for such denials to be based upon a facially legitimate and bona fide reason, and for the federal judiciary to review visa denials for compliance with this standard.

This brief presents a collection of case examples that AILA has compiled from attorneys whose clients have been denied visas based on decisions untethered to facially legitimate or bona fide reasons. Through these stories, AILA seeks to illustrate that the issues presented in the instant appeal are pervasive in consular adjudications. The resolution of this case will affect not only the lives of the denied visa applicants, but also the lives of many United States citizens who have petitioned for family members to immigrate to the U.S., as well as the interests of United States employers seeking to hire talented employees from abroad.

AILA has collected many more case examples of unjustified visa denials than the examples presented below that highlight the separation of U.S. citizens

from loved ones trapped abroad due to unwarranted or unexplained visa denials. The stories below are indicative of the type of problems that visa applicants, and their family members, experience in trying to overcome a visa denial. Similar problems are experienced by employment-based visa applicants.

ARGUMENT

I. The Legal Framework.

The so-called doctrine of consular non-reviewability provides that decisions concerning the admission of aliens to the United States lie exclusively within the power of the political branches of the government.[2] The roots of the doctrine are found within the plenary power doctrine announced in *Chae Chan Ping v. U.S.*, 130 U.S. 581, 9 S. Ct. 623, 32 L.Ed. 1068 (1889), in which the Supreme Court ruled that Congress and the Executive Branch possess authority to exclude foreigners from the United States, and that the judiciary lacks authority to review such determinations. *Chae Chan Ping*, 130 U.S. at 602 – 607, 9 S.Ct. at 628 – 630, 32 L.Ed. at 1074 – 1076. The Supreme Court has stated that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the government to exclude a given alien."

[2] The consular non-reviewability doctrine is discussed in the Appellants' Opening Brief at pp. 18 – 21. In addition, it is examined in detail in an amici curiae brief filed by professors and academics who teach immigration law at law schools throughout the United States. This brief presents a summary overview of the doctrine to provide the legal backdrop for the case stories that follow.

U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543, 70 S. Ct. 309, 312 – 313, 94 L. Ed. 317, 324 (1950).

In 1972, the Supreme Court created a narrow but significant exception to the consular non-reviewability doctrine. *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972). In *Mandel*, the Court upheld the denial of a visitor visa and an associated waiver of inadmissibility to a prominent Belgian journalist who had been invited to speak at a series of conferences across the United States, because the Government had provided a "facially legitimate and bona fide reason" for doing so (hereafter, "the *Mandel* exception"). *Mandel*, 408 U.S. at 770, 92 S.Ct. at 2585, 33 L.Ed.2d at 696. Lower courts have reached varying results in how broadly to apply the *Mandel* exception to the consular non-reviewability doctrine.[3] *See, e.g.*, Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 Geo. Immigr. L.J. 113, 129 (2010).

AILA submits that, as evidenced in the following case examples, the doctrine, combined with a certain amount of judicial reticence to apply the *Mandel* exception meaningfully, has led to visa denials that lack either a facially legitimate

[3] This Court has addressed the consular non-reviewability doctrine and the *Mandel* exception in several cases, including *Din v. Kerry*, 718 F.3d 856, 859 - 867 (9th Cir. 2013) (rejecting the Government's approach that would eliminate essentially all judicial review of visa denials, even when the constitutional right of a United States citizen is implicated), and *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) (holding that a United States citizen raising a constitutional challenge to a visa denial is entitled to limited judicial review of the denial pursuant to the *Mandel* exception).

or a bona fide reason. The correct application of the *Mandel* exception, which allows – indeed requires – a federal court to decide whether the Executive Branch has articulated a facially legitimate and bona fide reason for denying a visa, should result in more transparent visa adjudication procedures, and better-reasoned decisions of visa applications. Especially when visa denials can cause the permanent separation of spouses, or parents from their children, the Executive Branch must articulate constitutionally adequate reasons for such denials. Federal courts possess unequivocal authority to review such denials pursuant to *Mandel*.

II. The consular non-reviewability doctrine results in visa denials that separate loved ones from one another, and have little articulated basis in law or fact.[4]

As exemplified by the individuals whose circumstances are described below, the consular non-reviewability doctrine contributes – and AILA would submit substantially contributes – to unjustified visa denials. These denials are based on factually incorrect or unsubstantiated reasoning by the consulate office. Those whose visa applications have been so denied are left with little or no recourse to have the consulate's decision reviewed. Others are sometimes stuck for years in an unexplained limbo, waiting for a decision to issue while they remain separated from loved ones.

[4] The following information is based on individual case files. The names are changed or abbreviated to protect their privacy. All information is available from the University of Idaho Legal Aid Clinic files.

N, married to a U.S. citizen

N is an Iranian who first came to the United States in the 1980s to attend college in Texas. In 1985, he graduated with a Master's degree and married A, a naturalized United States citizen. N became a lawful permanent resident of the United States based on his marriage to A. The couple has three children, now adults, all of whom are United States citizens. While returning from a trip to Iran 1996, N was stopped in the Detroit airport. The reason why is unclear, but N was told that he could either abandon his green card, or challenge his denial of admission in immigration court. N was ordered excluded by an immigration judge in April 1998; he departed for Iran in June 1998. Since the time of her husband's exclusion from the U.S., A has been trying to bring him back. She has filed three immigrant petitions on his behalf.

The first one was denied for "abandonment", even though neither N nor A had received notice of a scheduled interview. In 2003, A filed a second immigrant petition, which was approved, but in 2009, N's visa application was denied following a consular interview. The consulate office cited only 8 USC § 1182(a)(3) as the basis for denial, with no explanation of why that provision applied. While N's second application was being processed, A filed a third immigrant petition. This petition was approved, and N thereafter submitted his immigrant visa application in September 2009. After an interview with the consulate was

scheduled, it was cancelled only a few weeks before the appointment because of "administrative processing."

In the meantime, N was asked for and provided additional information about his educational background and employment history. N attended a visa interview in early 2012, but instead of having an opportunity to discuss his plans for returning to the U.S., he was informed that his petition was being denied under 8 USC § 1182 (a)(3)(A)(i), which states that someone is inadmissible if the consular officer has reasonable grounds to believe the petitioner seeks to enter the U.S. to engage in illegal activity "relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information." No reasons in support of this finding of inadmissibility were provided.

N works in public relations in Iran, in a managerial capacity. He lacks the technical ability to engage in the activities set forth in 8 USC § 1182 (a)(3)(A)(i). His sole reason for his application is to be reunited with his United States Citizen family in his retirement and be with his wife, children, and grandchildren. A Request for Reconsideration of Refusal Pursuant to 22 CFR § 42.81(e) was filed with the consulate office in March 2013. It remains pending.

M, married to a U.S. citizen

M had lived in the U.S. for nearly six years when she was apprehended by United States Customs and Border Protection. Following her apprehension, M was paroled into the U.S. as a material witness in October 2008. M departed the United States voluntarily, not pursuant to an order of removal, at the end of her parole period in January 2009. After an interview at the consulate in December 2011, M was found inadmissible pursuant to 8 USC § 1182 (a)(9)(B)(i)(II), for which she was granted a waiver by USCIS pursuant to 8 USC § 1182(a)(9)(B)(v).

At a second consular interview with updated materials in September 2012, M was found inadmissible under 8 USCA § 1182 (a)(9)(C)(i)(I), sometimes called the "permanent bar" to inadmissibility, which requires (subject to limited exceptions in this circuit) an individual to wait outside of the United States for ten years before seeking permission to reenter the U.S. following unlawful presence in the United States of more than one year in the aggregate and who enters or attempts the enter the United States without being admitted. The consulate decided that the paroled entry in October 2008 was the equivalent of an attempt to enter the U.S. without admission, and thus invoked the (a)(9)(C) permanent bar against M.

Through counsel, M submitted an objection to the permanent bar finding to the consulate. The consulate office responded that M indicated, under oath, that the entry in October 2008, for which she obtained parole, was an entry without legal documentation. Accordingly, the consulate found that M had unlawfully

entered the U.S. following more than a year of unlawful presence in the aggregate. M subsequently was advised that the consular officer's decision was "discretionary", and that no more inquiry would be entertained. M has been separated from her U.S. citizen husband for over five years, despite the fact that she has been granted a waiver for the only ground of inadmissibility that should apply to her.

P, married to a U.S. citizen

In 2004, P entered the U.S. as a passenger in a vehicle that was waived in at the San Ysidro port of entry along with southern border. She stayed in the U.S. for a day, then returned to Mexico. In 2012, P attended a consulate interview to immigrate to the U.S. to join her U.S. citizen husband, and was told she was barred for life from entering the U.S. under 8 USC § 1182(a)(6)(C)(ii), based on the assumption that she must have made a false claim to U.S. citizenship when she entered in 2004. P submitted to the consulate office a Congressional report indicating that irregular checks were common at that border in 2004, and was invited to a second interview in January 2013. She has heard nothing since attending the interview.

K, married to a U.S. citizen

K was deemed inadmissible after an interview with the consulate pursuant 8 USC §1182(a)(9)(C). Upon further review of his application, K determined that he

had provided incorrect dates on his application that made it appear as if the permanent bar applied to him. K's request to the consulate to reconsider his application was denied. K then submitted a new visa application, based on a new immigrant petition filed by his spouse. K's second visa application was denied after two interviews for the reason that his evidence did not outweigh the information filed in the original visa application.

A filing with USCIS requesting clarification as to the ground of inadmissibility being alleged was rejected. K is currently residing in Mexico, and his U.S. citizen wife goes to visit when she can.

B, married to a U.S. citizen

B first applied for an immigrant visa in 2011, based upon an approved immigrant petition filed by her United States citizen husband. She was denied a visa because the consulate did not believe that her marriage to her husband was genuine. B filed another visa application and attended an interview based on it. During that interview, B stated that her husband had three children. In fact, her husband has four children, but the oldest child is an adult. The consulate office requested B to return for a second interview to review additional documentation that she and her husband had submitted, which showed that the husband had four, not three, children. B was informed at this interview that because she had verbally reported at her first interview that her husband had three children, and had not

included her husband's oldest, adult daughter in her answer, she had misrepresented a material fact. Her application was denied pursuant to 8 USC § 1182(a)(6)(C)(i). B was not given a chance to explain that she did not consider the adult daughter a "child", nor that she had not intentionally provided incorrect information in her first interview. B has applied for a waiver of the alleged misrepresentation pursuant to 8 USC § 1182(i), but has received no decision.

V, engaged to a U.S. citizen

V was 50-year old entrepreneur when she met a professor at Vanderbilt University, who is a U.S. citizen, over the internet. The two began pursuing a relationship, and decided that she should visit the U.S. before taking the relationship further. V applied for a tourist visa, which was denied because the consular officer believed she wanted to visit the U.S. in order to marry the professor.

Months later, after the relationship progressed, V and the professor became engaged. The professor's fiancée petition was approved by USCIS, but V's fiancée visa application was denied because the consular officer did not believe the couple would marry within 90 days of her arrival in the U.S., which they are required to do pursuant to 8 USC § 1101(a)(15)(K)(i). In her second application, based on a new petition filed by her fiancé, V provided a comprehensive evidence

of their relationship, but her application was again denied after the consular officer refused to review her evidence. V and her fiancé remain separated.

C, sister of a U.S. citizen

C is a single-mother of a minor-age child who lives in Brazil. C's LPR sister and U.S. citizen brother-in-law live in Nevada. She has applied for a visitor visa at a US consulate in Brazil in 2006, 2008, 2011 and again in 2014, to visit her sister. C provided evidence of her income and employment in Brazil, a letter from her employer approving her vacation to the U.S., a copy of her minor daughter's birth certificate, a letter from her doctor in Brazil explaining that C is under medical treatment in Brazil and needs to return from the United States to complete it, a letter from her brother-in-law stating he would be responsible for all of her expenses while she visits, and a letter from the office of Senator Harry Reid stating that she was visiting family for pleasure. C's most recent petition was denied following a brief interview at the consulate pursuant to 8 USC §1184(b), for lack of evidence of bona fide nonimmigrant intent, despite the overwhelming evidence of her intent to return to her daughter, job, and life in Brazil.

D, father of a U.S. citizen

D is a citizen of Albania, where he lives with his wife and daughter and works for the government. D owns property in Albania. He is also the father of a U.S. citizen who currently resides in the U.S. D entered the U.S. to visit his son on

tourist visas in 2002, 2003, and 2005. He has no history of overstaying his authorized periods of stay as a visitor, nor has he ever had any issues with law enforcement while in the United States. He recently applied for a new visitor visa to visit his son, and was denied at his interview pursuant to 8 USC § 1184(b), for failure to demonstrate nonimmigrant intent. D submitted a request for reconsideration of the decision, along with further verification of his employment with the Albanian government, verification of his daughter's Albanian employment, verification of his wife's Albanian pension, proof of his property ownership in Albania, and proof of funds deposited into his Albanian bank account. His request for reconsideration was denied by the consulate.

D then submitted a request for review of the visa denial to the Department of State's LegalNet, which reviews and can reverse legally incorrect decisions made by consular officers. LegalNet declined to reverse the consular officer's decision.

CONCLUSION

For the reasons provided, amicus AILA respectfully requests the Court to provide judicial review of the instant appeal pursuant to the *Mandel* exception to the consular non-reviewability doctrine, and to reaffirm that the "facially legitimate and bona fide reason" standard requires meaningful inquiry by lower courts.

Respectfully submitted,

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DATED: April 30, 2014

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed.R.App.Proc. 32(a)(7)(B), because it contains 3,183 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I certify further that this brief complies with the typeface requirements in Fed.R.App.Proc. 32(a)(5), and the type style requirements of Rule 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Version 14.0.7106.5003, in Times New Roman14-point font.

April 30, 2014

s/ Deborah S. Smith

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I, Deborah S. Smith, certify that on April 30, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Deborah S. Smith