

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 1:15-cv-02362-RBJ

DANA ALIX ZZYYM,

Plaintiff,

v.

REX TILLERSON, in his official capacity as the Secretary of State; and,
SHERMAN D. PORTELL, in his official capacity as the Director of the Colorado
Passport Agency for the United States Department of State,

Defendants.

UNOPPOSED MOTION TO REOPEN THE CASE

Plaintiff Dana Alix Zzyym (“Plaintiff” or “Dana”) moves the Court to reopen this administratively closed matter to permit additional proceedings and in support thereof states as follows:

1. In accordance with D.C.COLO.LCivR 7.1, Plaintiff has conferred with counsel for Defendants Rex Tillerson, in his official capacity as the Secretary of State,¹ and Sherman Portell, in his official capacity as the Director of the Colorado Passport Agency for the United States Department of State (collectively, “Defendants” or the “Department of State”) regarding the relief requested herein. Defendants do not oppose this motion.

¹ Pursuant to Federal Rule of Civil Procedure 25(d), Rex Tillerson, who succeeded John F. Kerry in office as Secretary of State on February 1, 2017, “is automatically substituted as a party.”

2. On September 24, 2014, the Department of State denied a passport to Dana solely because Dana, an intersex person, cannot accurately identify as either male or female. In response to Dana's subsequent request for reconsideration of Dana's passport application, Defendants confirmed that the Department of State's denial was final in a letter dated April 1, 2015.

3. On October 26, 2015, Dana commenced this action by filing a complaint alleging that the Department of State's refusal to issue Dana a passport and the underlying binary-only gender policy was arbitrary and capricious, exceeded the Department of State's statutory authority, and deprived Dana of due process and equal protection. Dana also requested a writ of mandamus to compel Defendants to process Dana's passport application on an individualized, nondiscriminatory basis in a manner consistent with the applicable burden of proof. [Dkt. No. 1].

4. On March 18, 2016, Defendants filed a motion seeking judgment on the administrative record on Plaintiff's claims pursuant to the Administrative Procedure Act, and dismissal of the remainder of the Complaint. [Dkt. No. 35]. On April 22, 2016, Dana filed an Opening Brief in Support of Declaratory, Injunctive Relief and Opposition to Defendants' Motion for Judgment on the Administrative Record and Motion to Dismiss. [Dkt. 37]. After full briefing by the parties, oral arguments on Defendants' Motion were heard on July 20, 2016. [Dkt. No. 51].

5. On November 22, 2016, the Court issued an Order holding that the administrative record did not demonstrate that the Defendants' "decisionmaking process that resulted in the [binary-only gender] policy in question was rational" and its "first effort

to get over the arbitrary and capricious hump was not convincing.” Accordingly, the Court remanded the matter to the Department of State for reconsideration. [Dkt. No. 55].

6. The Court declined at that time to reach the constitutional questions raised by the Complaint in its Order, indicating it would not do so “unless and until it needs to.” [Dkt. No. 55].

7. Following the remand, the Court administratively closed the case on November 22, 2016. [Dkt. No. 56].

8. On May 1, 2017, the Department of State sent a letter to Dana, indicating that after reconsidering its previous decision, the agency, yet again, denied Dana’s passport application (the “May 1, 2017 Denial”). See Exhibit A.

9. Notably, the May 1, 2017 Denial does not address any of the issues or questions outlined in the Court’s Order, or make any effort to explain the basis for or importance of the Defendants’ binary-only gender policy. See Exhibit A.

10. In light of the May 1, 2017 Denial, this Court should again examine whether Defendants violated the Administrative Procedure Act, including Dana’s constitutional claims for violation of due process and equal protection, by relying on its binary-only gender policy to refuse to issue a passport to Dana.

11. Defendants’ continued and consistent refusal to issue Dana a passport, including the May 1, 2017 Denial, constitutes good cause for reopening this administratively closed matter for all purposes so that this case can proceed. See D.C.COLO.LCivR 41.2 (administratively closed matters subject “to reopening for good cause”).

WHEREFORE, Plaintiff respectfully requests that the Court reopen this case pursuant to D.C.COLO.LCivR 41.2.

Respectfully submitted this 26th day of June, 2017.

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United States Department of State

Washington, D.C. 20520

May 1, 2017

Dana Alix Zzyym



RE: 172460355

Dear Dana Alix Zzyym:

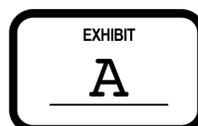
In response to the November 22, 2016 order of the District Court in *Zzyym v. Tillerson, et al.*, D. Col. No. 1:15-cv-2362-RBJ (Doc. 55), the Department of State has reconsidered its previous decision to deny your passport application, in which you requested a passport issued in a sex other than male or female. Consistent with the court order, we reviewed our policies and practices and reconsidered your previous application, supporting evidence, and all additional information. However, upon reconsideration the Department cannot fulfill your request for such a passport, and therefore your application is denied.

On your September 2, 2016 passport application, you did not indicate your sex as male or female. Rather, you wrote the word “Intersex” in the sex field and requested by supplemental letter that the Department issue you a passport book and card in a sex other than male or female. Among other documents supporting your application, you provided:

- (i) an amended birth certificate issued to you by the State of Michigan on November 1, 2013, listing your sex as “Unknown”;
- (ii) a driver’s license issued to you by the State of Colorado on June 25, 2010, listing your sex as female; and
- (iii) a copy of a medical certification dated October 15, 2013, in which Laura Ann Harper, M.D., certified that you were “born with ambiguous genitalia” which would classify you as “intersex.”

With a subsequent December 18, 2014 response letter, you provided signed originals of two additional supporting documents from your physicians:

- (iv) a medical certification dated December 4, 2014, in which Amanda Johnson, M.D., certified that you were “born intersex,” have had “surgery for transition to female genitalia,” and that your “treatment for transition has been appropriate”; and



- (v) a medical certification dated December 16, 2014, in which Terri Orcutt, M.D., certified that you have “had the appropriate clinical treatment for transition to intersex.”

After the December 29, 2014 denial of your passport application by the Colorado Passport Agency, your counsel, Lambda Legal Defense and Education Fund, Inc., and the Law Office of Jessica Kunevisius, LLC, submitted a request for reconsideration or hearing on your behalf dated February 26, 2015, which enclosed additional copies of several of the aforementioned documents, and a copy of an additional supporting document from a physician:

- (vi) a medical certification dated October 23, 2013, in which Elzbieta J. Chobot-Sochet, M.D., certified that you were “born with [ambiguous] genitalia” which would classify you as “intersex.”

Subsequently, the Department learned that you applied for and were issued the following:

- (vii) a driver’s license issued to you by the State of Colorado on February 24, 2015, valid through February 12, 2020, listing your sex as female.

As indicated on the passport application form, the Department recognizes and issues passports in two sexes, male and female. While the Department does accept a medical certification of an applicant’s transition from one of these two sexes to the other, the Department is unaware of generally accepted medical standards for diagnosing and evaluating a transition to any sex other than male or female. Thus, the Department does not accept a medical certification that specifies transition to a sex other than male or female as evidence for the issuance of a passport.

Additionally, the Department does not accept an amended birth certificate as evidence of a change in sex. Consistent with this policy, an amended birth certificate listing sex as “unknown” does not satisfy the Department’s requirements for issuance of a passport reflecting a sex that differs from the sex established by the applicant’s other evidence of identity and citizenship.

Because we are unable to accommodate your request for a passport in a sex other than male or female, your passport application is denied. If you wish to obtain a passport in a sex consistent with the sex listed in your currently valid driver’s license, you will need to submit a new application, provide all required evidence and information, and pay the appropriate fees.

Sincerely,

Bureau of Consular Affairs
Passport Services Directorate

cc: Paul D. Castillo, Lambda Legal Defense and Education Fund