00006368-1637

ress Notes

Printed On Dec 05, 2014

LOCAL TITLE: [redacted]
STANDARD TITLE: LETTERS
DATE OF NOTE: DEC 04, 2014@15:29 ENTRY DATE: DEC 04, 2014@15:30:06
AUTHOR: JOHNSON,AMANDA M EXP COSIGNER:
URGENCY: STATUS: COMPLETED

DEPARTMENT OF VETERANS AFFAIRS
CHEYENNE VA MEDICAL CENTER
2360 EAST PERSHING BLVD.
CHEYENNE, WYOMING 82001

DANA ALIX ZZYYM
[redacted]
FORT COLLINS, COLORADO 80521

Dear Ms. ZZYYM,DANA ALIX,

To Whom it May Concern:

My name is Amanda Moore Johnson, MD. Wyoming medical license number 8490A.
I am an obstetrician/gynecologist.
I have evaluated Dana Alix Zzyym, DOB [redacted]/1958 as a gynecologic consult after genital surgery for Dana's intersex condition. It is my understanding, as a physician, that Dana was born interex. She identifies as intersex. She has had surgery for transition to female genitalia and, based on record review, it appears that her treatment for transition has been appropriate.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

My address and telephone at the Cheyenne VAMC, where I have seen and evaluated Dana Zzyym is 2360 East Pershing Blvd, Cheyenne, WY 82001, 307-778-7526.

Sincerely,

Amanda Johnson, MD

PATIENT NAME AND ADDRESS (Mechanical imprinting, if available)
ZZYYM,DANA ALIX
[redacted]
FORT COLLINS, COLORADO 80521

VISTA Electronic Medical Documentation

Printed at CHEYENNE VAMC

ress Notes

Sincerely,

Cheyenne VAMC - (307) 778-7550, Ext. 7555
Fort Collins CBOC - (970) 224-1550
Greeley CBOC - (970) 313-0027
Tricare/ChampVA/Sharing - (307) 778-7513

PATIENT NAME AND ADDRESS (Mechanical Imprinting, if available)

ZZYYM, DANA ALIX
[redacted]
FORT COLLINS, COLORADO 80521

VISTA Electronic Medical Documentation

Printed at CHEYENNE VAMC

00006368-1639

Interim Electronic Accounting of Disclosure for: ZZYYM,DANA ALIX

Patient: ZZYYM,DANA ALIX
[redacted]
FORT COLLINS, CO 80521

Requestor: DANA ALIX ZZYYM
[redacted]
FORT COLLINS, CO 80521

Current Status: OPEN

Entered On: Dec 05, 2014

Closed On:

Assigned Clerk: GILBERT R. MADRID

Request Comments:
DR JOHNSON WROTE LETTER -GRM

Released Info:
ProgressNotes: [redacted] December 04, 2014

Interim: Printed while request was Open or Pending.

Printed on December 05, 2014

00006368-1643

United States Department of State
Colorado Passport Agency
44132 Mercure Circle
PO Box 1045
Sterling, Virginia 20166-1045

December 29, 2014

Dana Alix Zzyym
[redacted]
Fort Collins, CO 80521

RE: 172460355

Dear Dana Zzyym:

Thank you for your passport application. Because your application did not meet our requirements, our office sent you a letter on September 24, 2014, requesting additional information. A copy of that letter is enclosed. You appeared at our office on December 19, 2014, to present additional documentation and to discuss our letter.

As explained in our letter of September 24, and as you discussed with our staff on December 19, the Department of State requires the sex field on United States passports to be listed as "M" or "F." Therefore, we cannot fulfill your request to list your sex as "X."

You indicated both in your letter dated December 18 and in person on December 19 that you did not wish a passport to be issued to you unless it could be issued showing the sex as "X." Because we are unable to accommodate your request, your passport application is denied. The original documents you submitted with your application are enclosed. By law, the passport execution and application fees are non-refundable.

If you still wish to obtain a passport book and/or card, you will need to re-apply on a new application, provide all required information, and pay the appropriate fees.

If you have any questions regarding this letter you may contact the National Passport Information Center (NPIC), toll-free, at 1-877-487-2778 (TTY/TDD: 1-888-874-7793).

Sincerely,

Sherman D. Portell
Director

UPS CampusShip: View/Print Label

1. **Ensure there are no other shipping or tracking labels attached to your package.** Select the Print button on the print dialog box that appears. Note: If your browser does not support this function select Print from the File menu to print the label.

2. **Fold the printed sheet containing the label at the line so that the entire shipping label is visible. Place the label on a single side of the package and cover it completely with clear plastic shipping tape. Do not cover any seams or closures on the package with the label.** Place the label in a UPS Shipping Pouch. If you do not have a pouch, affix the folded label using clear plastic shipping tape over the entire label.

3. **GETTING YOUR SHIPMENT TO UPS**
   UPS locations include the UPS Store®, UPS drop boxes, UPS customer centers, authorized retail outlets and UPS drivers.
   Schedule a same day or future day Pickup to have a UPS driver pickup all your CampusShip packages.
   Hand the package to any UPS driver in your area.
   Take your package to any location of The UPS Store®, UPS Drop Box, UPS Customer Center, UPS Alliances (Office Depot® or Staples®) or Authorized Shipping Outlet near you. Items sent via UPS Return Services(SM) (including via Ground) are also accepted at Drop Boxes. To find the location nearest you, please visit the Resources area of CampusShip and select UPS Locations.

   Customers with a Daily Pickup
   Your driver will pickup your shipment(s) as usual.

FOLD HERE



From: Paul Castillo [mailto:pcastillo@lambdalegal.org]
Sent: Thursday, February 26, 2015 4:57 PM
To: Portell, Sherman D
Subject: Passport Applicant Zzyym (No. 172460355)

Dear Mr. Portell,

Please find attached a letter requesting reconsideration of the decision to deny a U.S. passport to Dana Alix Zzyym or, alternatively, a hearing for final decision by the Deputy Assistant Secretary for Passport Services. Due to the size of the electronic file for the enclosures, those documents were submitted along with the original letter to your attention via overnight mail.

Thank you kindly for your attention.

Sincerely,

Paul D. Castillo
Staff Attorney
Lambda Legal
South Central Regional Office
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219-6722
Phone: 214-219-8585
Direct: 214-302-2216
Fax: 214-219-4455
pcastillo@lambdalegal.org

CONFIDENTIALITY NOTICE: This email transmission from Lambda Legal Defense and Education Fund, Inc. and any documents, files or previous email messages attached to it may contain confidential information that is legally privileged. If you are not the intended recipient, or a person responsible for delivering it to the intended recipient, you are hereby notified that any disclosure, copying, distribution or use of any of the information contained in or attached to this transmission is STRICTLY PROHIBITED. If you have received this transmission in error, please immediately notify us by reply email or by telephone at (214) 219-8585, ext. 242, and destroy the original transmission and its attachments without reading or saving it in any manner. Thank you.

Lambda Legal
making the case for equality

PAUL D. CASTILLO, STAFF ATTORNEY
EMAIL: PCASTILLO@LAMBDALEGAL.ORG

February 26, 2015

Via overnight mail and email to portellsd@state.gov

Mr. Sherman D. Portell, Director
United States Department of State
Colorado Passport Agency
44132 Mercure Cir.
P.O. Box 1045
Sterling, VA 20166-1045

RE: Dana Alix Zzyym, Passport Applicant – Request for Reconsideration or Hearing
U.S. Department of State, File No. 172460355

Dear Mr. Portell:

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") and the Law Office of Jessica Kunevicius, LLC jointly represent Dana Alix Zzyym, an intersex American citizen and veteran who applied for a passport through the Colorado Passport Agency. We write to request that the United States Department of State ("DOS") reconsider its decision to deny Dana a passport that accurately designates Dana's sex as 'X.' Alternatively, we request a hearing pursuant to 22 CFR § 51.70(a) for final decision by the Deputy Assistant Secretary for Passport Services.

In Dana's case, as is true for numerous other intersex people, a passport with the designation of male or female is inaccurate, inappropriate, and dangerous to Dana's security and well-being. Many Americans do not and cannot identify as male or female because their sex chromosomes, gonads, and/or internal or external sexual anatomy do not fit clearly into binary categories. Dana was identified as intersex at birth, which is reflected on Dana's birth certificate. However, for others, an inability to identify as male or female becomes evident later in life. In any event, a passport that mischaracterizes the holder as male or female can subject the holder to discrimination in numerous contexts and prevents the holder from traveling safely. Accordingly, we request the use of 'X' on Dana's passport in accordance with international travel standards for designating people who are neither male nor female.

In early September 2014, Dana visited the Colorado Passport Agency in Aurora, Colorado to obtain a U.S. passport. Dana submitted an Application for a U.S. Passport, Form DS-11 (09-2013) ("Form") with the requisite identity and citizenship documentation, photograph, and fee payment. Dana accurately listed "intersex" in the sex field on the Form and, by separate letter, clarified that "[a]s an intersex person, I'm not male or female." Dana requested 'X' as the marker in the sex field on Dana's passport, noting that such designation conforms to

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the International Civil Aviation Organization (ICAO) standards for machine-readable travel documents. *See* ICAO Doc 9303, Part 1, Volume 1 Sixth Ed. (2006).

By letter dated September 24, 2014 ("September 24 Letter"), CPA acknowledged receipt of Dana's application, but asserted that DOS "currently requires the sex field on U.S. passports to be listed as 'M' or 'F.'" Although Dana clearly and unequivocally informed DOS that Dana is neither male nor female, but intersex, DOS directed Dana to select either a male or female sex designation if Dana wanted to receive a passport for international travel. Alternatively, DOS invited Dana to withdraw Dana's passport application.

Dana timely responded to DOS's September 24 Letter, reiterating that neither male nor female applies "because I am intersex." Indeed, as part of the original application, Dana had previously submitted a certified Michigan Certificate of Live Birth showing "unknown" in the sex field. Nevertheless, Dana provided CPA with additional documentation, including sworn statements from licensed physicians at the U.S. Department of Veterans Affairs attesting to the fact that Dana is intersex. Despite submitting supplemental information and complying with the relevant provisions of Part 51, Title 22 of the Code of Federal Regulations ("Passport Regulations"), DOS denied Dana a U.S. passport by letter dated December 29, 2014 ("Notification of Denial"). *See* Enclosed Application Materials and DOS Responses.

The Notification of Denial did not set forth any explanation, specific reason, or legal basis for the assertion that DOS "*requires* the sex field on United States passports to be listed as 'M' or 'F.'" (emphasis added). Nor did the Notification of Denial set forth the procedures for review available under 22 CFR § 51.70 through 51.74. At minimum, DOS must articulate the reasoning behind its conclusion that Dana is not entitled to a U.S. passport for international travel with an accurate sex marker, 'X'. In the absence of statute, regulation, or other referenced authority "requiring" use of the 'M'/'F' sex binary in DOS's issuance of U.S. passports, the Foreign Affairs Manual specifically allows for Dana's request insofar as the applicant's "birth documentation will determine the gender to be listed on the passport." 7 FAM 1350, Appendix M §(c), Intersex Conditions. Given that Dana's birth certificate lists "unknown" as Dana's sex, 'X' would be the only accurate and appropriate designation for the sex field on Dana's passport.

In light of the foregoing, we respectfully request that DOS reconsider its decision to deprive Dana of a passport for international travel or, alternatively, provide Dana a hearing in accordance with Subpart F of the Passport Regulations for final decision by the Deputy Assistant Secretary for Passport Services. If such a hearing is granted, our client waives the requirement that the hearing occur within 60 days after DOS receives this request and recommends a mutually convenient time and place to be determined by the parties through counsel.

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making the case for equality

Please submit your response to this letter at your earliest convenience. Also, do not hesitate to contact us if we can be of further assistance in providing additional information in support of our client's request.

Very truly yours,

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.

Paul D. Castillo
Staff Attorney

Encl.

cc: Director, Colorado Passport Agency
United States Department of State
3151 South Vaughn Way, Suite 600
Aurora, Colorado 80014

2 September 2014

To: The US Passport Office

My name is Dana Alix Zzyym. I am an Intersex person. Both my biological sex and my gender is Intersex.

The International Civil Aviation Organization, the UN organization that controls passports worldwide allows for a third sex marker on passports an "X". As an Intersex person, I'm not male or female. I want the third sex marker on my passport the "X".

Sincerely,

Dana Alix Zzyym

00007293-0144

APPLICATION FOR A U.S. PASSPORT

Please Print Legibly Using Black Ink Only

OMB CONTROL NO. 1405-0004
OMB EXPIRATION DATE: 01-31-2017
ESTIMATED BURDEN: 95 MIN

Attention: Read WARNING on page 1 of instructions

Please select the document(s) for which you are applying:

☐ U.S. Passport Book ☐ U.S. Passport Card ☒ Both

The U.S. passport card is not valid for international air travel. For more information see page 1 of instructions.

☐ 28 Page Book (Standard) ☐ 52 Page Book (Non-Standard)

Note: The 52 page option is for those who frequently travel abroad during the passport validity period, and is recommended for applicants who have previously required the addition of visa pages.

☐ D ☐ O ☐ Dep DOTS _____

End. # _____ Exp. _____

1. Name Last: ZZYYM

First: DANA Middle: ALIX

2. Date of Birth (mm/dd/yyyy): [redacted] 1958

3. Sex: Intersex

4. Place of Birth (City & State if in the U.S., or City & Country as it is presently known.): [redacted] MICHIGAN

5. Social Security Number: [redacted]

6. Email Address (e.g., my_email@domain.com):

7. Primary Contact Phone Number:

8. Mailing Address: Line 1: Street/RFD#, P.O. Box, or URB.

[redacted]

Address Line 2: Clearly label Apartment, Company, Suite, Unit, Building, Floor, In Care Of or Attention if applicable. (e.g., In Care Of - Jane Doe, Apt # 100)

[redacted]

City: FORT COLLINS State: CO Zip Code: 80521 Country: If outside the United States

9. List all other names you have used. (Examples: Birth Name, Maiden, Previous Marriage, Legal Name Change. Attach additional pages if needed)

A. BRIAN ORIN WHITNEY B.

STAPLE 2" x 2" STAPLE

FROM 1" TO 1 3/8"

Attach a color photograph taken within the last six months

STOP! CONTINUE TO PAGE 2

DO NOT SIGN APPLICATION UNTIL REQUESTED TO DO SO BY AUTHORIZED AGENT

Identifying Documents - Applicant or Mother/Father/Parent on Second Signature Line (if identifying minor)

☐ Driver's License ☐ State Issued ID Card ☐ Passport ☐ Military ☐ Other _____

Name _____

Issue Date (mm/dd/yyyy) _____ Exp. Date (mm/dd/yyyy) _____ State of Issuance _____

ID No _____ Country of Issuance _____

Identifying Documents - Applicant or Mother/Father/Parent on Third Signature Line (if identifying minor)

☐ Driver's License ☐ State Issued ID Card ☐ Passport ☐ Military ☐ Other _____

Name _____

Issue Date (mm/dd/yyyy) _____ Exp. Date (mm/dd/yyyy) _____ State of Issuance _____

ID No _____ Country of Issuance _____

☐ Acceptance Agent ☐ (Visa) Consul USA

☐ Passport Staff Agent

(Seal)

I declare under penalty of perjury all of the following: 1) I am a citizen or non-citizen national of the United States and have not, since acquiring U.S. citizenship or nationality, performed any of the acts listed under "Acts or Conditions" on page four of the instructions of this application (unless explanatory statement is attached); 2) the statements made on the application are true and correct; 3) I have not knowingly and willfully made false statements or included false documents in support of this application; 4) the photograph attached to this application is a genuine, current photograph of me; and 5) I have read and understood the warning on page one of the instructions to the application form.

Name of courier company (if applicable) _____ Facility ID Number _____

Facility Name/Location _____ Agent ID Number _____

Signature of person authorized to accept applications _____ Date _____

x _____ Applicant's Legal Signature - age 16 and older

x _____ Mother/Father/Parent/Legal Guardian's Signature (if identifying minor)

x _____ Mother/Father/Parent/Legal Guardian's Signature (if identifying minor)

For Issuing Office Only → Bk _____ Card _____ EF _____ Postage _____ Execution _____ Other _____

* DS 11 C 09 2013 1 *

DS-11 09-2013

Page 1 of 2

00007293-0145

Name of Applicant (Last, First, & Middle)
Zzyym DANA ALIX

Date of Birth (mm/dd/yyyy) [redacted] 1958

10. Parental Information
Mother/Father/Parent - First & Middle Name | Last Name (at Parent's Birth)
[redacted]

Date of Birth (mm/dd/yyyy) | Place of Birth | Sex | U.S. Citizen?
[redacted] | Male ☒ Female ☐ | Yes ☒ No ☐

Mother/Father/Parent - First & Middle Name | Last Name (at Parent's Birth)
[redacted]

Date of Birth (mm/dd/yyyy) | Place of Birth | Sex | U.S. Citizen?
[redacted] | Male ☒ Female ☐ | Yes ☒ No ☐

11. Have you ever been married? ☒ Yes ☐ No *If yes, complete the remaining items in #11.*
Full Name of Current Spouse or Most Recent Spouse | Date of Birth (mm/dd/yyyy) | Place of Birth
[redacted]

U.S. Citizen? ☐ Yes ☐ No | Date of Marriage (mm/dd/yyyy) 02/06/2004 | Have you ever been widowed or divorced? ☒ Yes ☐ No | Widow/Divorce Date (mm/dd/yyyy) 01/08/2008

12. Additional Contact Phone Number — Home ☐ Cell ☐ Work ☐

13. Occupation *(if age 16 or older)*: Disabled

14. Employer or School *(if applicable)*

15. Height 5'9" | **16. Hair Color** Grey | **17. Eye Color** Blue | **18. Travel Plans** Departure Date (mm/dd/yyyy) 10/24/2014 | Return Date (mm/dd/yyyy) 11/03/2014 | Countries to be Visited Mexico

19. Permanent Address - *If P.O. Box is listed under Mailing Address or if residence is different from Mailing Address*
Street/RFD # or URB (*No P.O. Box*) | Apartment/Unit

City | State | Zip Code

20. Emergency Contact - *Provide the information of a person not traveling with you to be contacted in the event of an emergency.*
Name | Address: Street/RFD # or P.O. Box | Apartment/Unit
[redacted]

City | State | Zip Code | Phone Number | Relationship
[redacted]

21. Have you ever applied for or been issued a U.S. Passport Book or Passport Card? Yes ☒ No ☐ *If yes, complete the remaining items in #21.*
Name as printed on your most recent passport book | Most recent passport book number | Most recent passport book issue date (mm/dd/yyyy)

Status of your most recent passport book: Submitting with application ☐ Stolen ☐ Lost ☐ In my possession (*If expired*) ☐

Name as printed on your most recent passport card | Most recent passport card number | Most recent passport card issue date (mm/dd/yyyy)

Status of your most recent passport card: Submitting with application ☐ Stolen ☐ Lost ☐ In my possession (*If expired*) ☐

PLEASE DO NOT WRITE BELOW THIS LINE - FOR ISSUING OFFICE ONLY

Name as it appears on citizenship evidence

☐ Birth Certificate SR CR City Filed: Issued:
☐ Nat. / Citz. Cert. USCIS USDC Date/Place Acquired: All
☐ Report of Birth Filed/Place:
☐ Passport C/R S/R Per PIERS #DOI:
☐ Other:
☐ Attached:
☐ PIC of ID ☐ DS-3053 ☐ DS-64 ☐ DS-5520 ☐ DS-5513 ☐ Citz W/S
☐ PIC of Citz ☐ DS-10 ☐ DS-86 ☐ DS-71 ☐ IRL ☐ CIS Ver

* DS 11 C 09 2013 2 *

DS-11 09-2013 Page 2 of 2

00007293-0146

STATE OF MICHIGAN

DANA ZZYYM
[redacted]

IMPORTANT INFORMATION
This certificate is a valuable and legal document. Please keep it in a safe place.

Errors or omissions should be reported to the State Vital Records Office within 30 days of issue by calling (517)335-8666

STATE OF MICHIGAN

LF 64

CF

STATE OF MICHIGAN
DEPARTMENT OF COMMUNITY HEALTH

CERTIFICATE OF LIVE BIRTH
Addended

121 - 1334217
State File Number

1. CHILD'S NAME (First, Middle, Last, Suffix): Brian Orin Whitney				
2. SEX: UnKnown	3a. PLURALITY (Single, Twin, Triplet, etc. (Specify)): Single	3b. IF NOT SINGLE BIRTH (First, Second, Third, etc. (Specify)):	4a. DATE OF BIRTH (Month, Day, Year): [redacted] 1958	4b. TIME OF BIRTH: Not Recorded
5a. CHILDS BIRTHPLACE(Hospital or Address if other): [redacted]				5b. COUNTY: [redacted]
6a. MOTHER'S CURRENT LEGAL NAME (First, Middle, Last): [redacted]			6b. MOTHER'S FULL NAME BEFORE FIRST MARRIED (First, Middle, Last): [redacted]	
7a. STATE OF BIRTH - Name Country if not USA: Michigan	7b. DATE OF BIRTH OR AGE: [redacted]	7c. COUNTY OF RESIDENCE: [redacted]	7d. STATE OF RESIDENCE: Michigan	
8a. FATHER'S CURRENT LEGAL NAME (First, Middle, Last): [redacted]		8b. STATE OF BIRTH - Name Country if not USA: Michigan	8c. DATE OF BIRTH OR AGE: [redacted]	
9a. REGISTRAR'S SIGNATURE: \\S\\ Fred G. Catrell			9b. DATE FILED BY LOCAL REGISTRAR (Month, Day, Year): March 3, 1958	

New Name: Dana Alix Zzyym, Established By: Larimer County, Colorado County Court, January 12, 1995

I hereby certify that the above is a true and correct representation of the birth facts on file with the State of Michigan, issued from the Michigan Centralized Birth Certification System.

Certified by: Glenn Copeland
Glenn Copeland
State Registrar

Date Issued: November 1, 2013
AFS: 2605850

20182341

VOID WITHOUT WATERMARK OR IF ALTERED OR ERASED

00007293-0147

Progress Notes

Oct 24, 2013

LOCAL TITLE: MHC FOLLOW UP
DATE OF NOTE: OCT 23, 2013@13:40 ENTRY DATE: OCT 23, 2013@13:40:30
AUTHOR: CHOBOT-SOCHET,ELZBI EXP COSIGNER:
URGENCY: STATUS: COMPLETED

To Whom It May Concern :

Dana Zzyym was born with ambigous genitalia which would classify her as intersex.

Sincerely

/es/ ELZBIETA J CHOBOT-SOCHET MD
PSYCHIATRY
Signed: 10/23/2013 13:41

PATIENT NAME AND ADDRESS (Mechanical imprinting, if available)

ZZYYM,DANA ALIX
[redacted]
RUSKIN, FLORIDA 33570

Printed at BAY PINES VA HCS

00007293-0148

COUNTY COURT, LARIMER COUNTY, COLORADO

CASE NO. F94C4088

ORDER

IN THE MATTER OF THE PETITION OF: FOR A CHANGE OF NAME TO:

BRIAN [illegible] WHITNEY DANA ALIX ZZYYM

The petition of BRIAN ORIN WHITNEY to change his/her legal name and designation from BRIAN ORIN WHITNEY to DANA ALIX ZZYYM, having been presented to this Court on the 12 day of Jan, 19 95, and upon interrogation of the petitioner and examination of said Petition, the Court finds the same sufficient and regular in form, and that the desired name change would be proper and not detrimental to the interest of any other person.

IT IS THEREFORE ORDERED: That the name of the said BRIAN ORIN WHITNEY is hereby changed to DANA ALIX ZZYYM, and (s)he is hereby authorized to hereafter use said latter name as his/her legal name; and that such change shall be made and spread upon the records of this Court.

IT IS FURTHER ORDERED that public notice of such change be given at least three times in the Reporter Herald a newspaper published in Larimer County, where Petitioner is residing, within twenty days of the date of this Order, and shall file proper affidavit of publication of said notice with the Clerk of this Court.

DATED THIS 12 day of Jan 19 95.

BY THE COURT:

JUDGE

CERTIFIED TRUE COPY
Dated 01-23-2008
SHERLYN K. SAMPSON
County & District Court Clerk
Larimer County Colorado
By [illegible]
Deputy Clerk

12/18/14

Dear Passport Appeal Officer:

I was recently notified in a letter from the Colorado Passport Agency that my passport application was denied because "the Department of State currently requires the sex field on United States passports to be listed as "M" or "F". I was provided two choices, male or female, for obtaining a United States passport, but neither of these applies because I am, intersex, both biologically and in terms of my Gender (as per Supreme Court Justice Ruth Bader Ginsberg). In addition to being intersex, I am a United States Navy veteran, and served six years of active duty in Beirut.

Delivered with this appeal are two signed, sworn documents which verify that my sex is intersex, from my current doctors, both of whom work for the VA MEDICAL CENTER in Cheyenne, WY. I am thus providing the required documentation for obtaining a "passport book reflecting a gender different from the one on some or all of [my] citizenship and/or identity evidence" – as the gender listed on my Colorado state driver's license is "female"—but the gender I wish to have reflected is not male, but intersex.

As I stated in my letter delivered with the original passport application, the International Civil Aviation Organization, which controls passports worldwide, allows for an "X" gender marker in the sex field of passports, representing "indeterminate sex" or "sex unknown". Intersex Australian citizens are legally utilizing an X sex marker on their passports (upon their request), representing "Intersex/Indeterminate/Unspecified". In fact, the Department of State recently recognized the "X"/intersex individuals legally identified by an "X" gender marker, by providing a Visa for entry to an intersex Australian (Morgan Carpenter) with an "X" in the sex field of his passport. I would thus like, for international consistency and bureaucratic ease, to likewise have my intersex status represented by an "X" sex marker on my passport.

The U.N. Declaration of Human Rights states:
Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. **Article 6.** Everyone has the right to recognition everywhere as a person before the law. **Article 13.** (2) Everyone has the right to leave any country, including his own, and to return to his country.

In addition, the Organization of American States (OAS) aims, 1. To... urge the states within the parameters of the legal institutions of their domestic systems to eliminate, where they exist, barriers faced by lesbians, gays, and bisexual, transsexual, and intersex (LGBTI) persons in equal access to political participation and in other areas of public life, and to avoid interferences in their private life., 4. In addition, to encourage states, within their institutional capacities, to produce data on homophobi cand transphobic violence, with a view to fostering public policies that protect the human rights of lesbians, gays, and bisexual, transsexual, and intersex people.

In the United States, the authority of the Secretary of State to issue passports was made exclusive by the Act of Congress, August 18, 1856 . . The decisions in *Crandal l v. Nevada*", *Edwards v. California3*, and *Williams v. Fears4*, although concerned with interstate travel, reflect a philosophy of basic rights readily applicable to travel abroad. . . the decision gave the first legal recognition . . to the right to travel outside the United States as a civil liberty . . of increasing importance to the ordinary citizen. (William & Mary Law Review, Vol. issue 2. Passport Denial and the Freedom to Travel, Roger M. Johnson).

The U.S. Department of Veterans Affairs recognizes intersex citizens in VHA DIRECTIVE 2011-024, http://www.va.gov/vhapublicabons/ViewPublication.asp?pub_ID=2416). It likewise behooves the Department of State to recognize the existence of intersex American citizens. Denying me my passport because I will not incorrectly identify my sex as male or female denies me the right to legal recognition and the right to leave and return to my country that is granted to male and female U.S. citizens.

Discrimination against marginalized communities is facilitated and reflected by a lack of equal legal rights and recognition. This is why in 2011, in response to Australia's X passport legislation, the U.N. High Commissioner of Human Rights stated, "'I... urge other states around the world to review their own laws, policies and practices to ensure that discrimination against transgender and intersex individuals is addressed in a systematic and effective way.' (http://news.smh.com.au/breaking-news-world/un-welcomes-aust-passport-changes-20110916-1xee2.html)." As the article in the link discusses, England is considering abolishing sex markers altogether in identification documents.

I urge you to join other Commonwealth nations in enacting policies that are inclusive of intersex citizens. A small technicality such as updating sex marker fields in passport forms and documents should not prevent U.S. citizens, particularly those who have served their country, from obtaining accurate legal recognition and equal rights under the eyes of the law.

Thank you

Dana Zzyym
Intersex Person/IGM survivor
[redacted] Fort Collins CO. 80521

00007293-0151

Progress Notes

Printed On Dec 05, 2014

LOCAL TITLE: PAP NORMAL
STANDARD TITLE: LETTER3
DATE OF NOTE: DEC 04, 2014@15:23 ENTRY DATE: DEC 04, 2014@19:10:06
AUTHOR: JOHNSON,AMANDA M EXP COSIGNER:
URGENCY: STATUS: COMPLETED

DEPARTMENT OF VETERANS AFFAIRS
CHEYENNE VA MEDICAL CENTER
2360 EAST PERSHING BLVD.
CHEYENNE, WYOMING 82001

DANA ALIX ZZYM
[redacted]
FORT COLLINS, COLORADO 80521

Dear Ms ZZYYM,DANA ALIX,

To Whom it May Concern:

My name is Amanda Moore Johnson, MD. Wyoming medical license number 8190A. I am an obstetrician/gynecologist.
I have evaluated Dana Alix Zzyym, DOB [redacted]1958 as a gynecologic consult after genital surgery for Dana's intersex condition. It is my understanding, as a physician, that Dana was born intersex. She identifies as intersex. She has had surgery for transition to female genitalia and, based on record review, it appears that her treatment for transition has been appropriate.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

My address and telephone at the Cheyenne VAMC, where I have seen and evaluated Dana Zzyym is 2360 East Pershing Blvd, Cheyenne, WY 82001, 307-778-7526.

Sincerely,

Amanda Johnson, MD

PATIENT NAME AND ADDRESS (Mechanical Imprinting, if available)
ZZYYM,DANA ALIX
[redacted]

VISTA Electronic Medical Documentation

Printed at CHEYENNE VAMC

00007293-0152

DEPARTMENT OF VETERANS AFFAIRS
Medical Center
2360 East Pershing Boulevard
Cheyenne WY 82001

December 16, 2014

To Whom it May Concern,

Re: Dana Zzyym, DOB [redacted]/58

I have been veteran's mental health provider since 6/23/08. I have had a 6 year doctor/patient relationship with her. She has had the apropriate clinical treatment for transition to intersex.

I declare under penalty of perjury under the laws of the United States of America that the forgoing is true and correct.

Terri Orcutt M.D.

Terri Orcutt M.D.

Colorado medical license number CO 38367

Fort Collins VA Outpatient Clinic

2509 Research Blvd

Fort Collins, CO 80526

00007293-0153

United States Department of State
Colorado Passport Agency
3151 South Vaughn Way, Suite 600
Aurora, Colorado 80014

September 24, 2014

Dana Alix Zzyym
[redacted]
Fort Collins, CO 80521

RE: 172460355

Dear Dana Zzyym:

Thank you for your recent passport application.

The Department of State currently requires the sex field on United States passports to be listed as "M" or "F." Therefore, we are unable to fulfill your request to list your sex as "X." If you wish to receive a passport listing you as female as shown on your driver's license, please return a signed statement indicating that to our office.

If you wish to receive a passport listing you as male, please refer to the second page of this letter.

If you wish to withdraw your application, please let us know.

We appreciate your assistance in this matter so that we may continue processing your passport application. If we do not receive the requested information **within ninety (90) days from the date of this letter**; or the information you submit is insufficient to establish your entitlement to a U.S. passport in accordance with the relevant provisions of Part 51, Title 22 of the Code of Federal Regulations, your application will be denied and your evidence returned to you. By law, the passport execution and application fees are non-refundable. Any special return postage will be returned or refunded.

If you have any questions regarding this letter or your passport application, contact the National Passport Information Center (NPIC), toll-free, at 1-877-487-2778 (TTY/TDD: 1-888-874-7793). For general passport information, to check the status of your passport application, or to enroll in our Smart Traveler Enrollment Program (STEP), please visit us online at travel.state.gov.

PLEASE RETURN A COPY OF THIS LETTER WITH YOUR REPLY.

Sincerely,

Customer Service Department

In order to issue you a full validity passport book reflecting a gender different from the one on some or all of your citizenship and/or identity evidence, please send us a signed original statement on office letterhead from your attending medical physician. Statements from medical physicians can be from licensed medical doctors (M.D.) and osteopathic doctors (D.O.); the physicians may specialize in various medical fields, including, but not limited to: internal medicine, endocrinology, gynecology, urology, surgery, psychiatry, pediatrics, and family practice. The statement must include the following information:

a) Physician's full name;
b) Medical license or certificate number;
c) Issuing state of medical license/certificate;
d) Address and telephone number of the physician;
e) Language stating that he/she has treated you or has reviewed and evaluated your medical history and that he/she has a doctor/patient relationship with you;
f) Language stating that you have had appropriate clinical treatment for transition to the new gender (the new gender, male or female, must be stated); and
g) The statement must clearly state the following: "I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct."

If your gender transition process is ongoing, a two-year limited validity passport book reflecting the new gender will be issued upon submission of the letter stated above with language from your attending physician that you are in the process of gender transition.

The two-year passport may be replaced for the remaining validity period without additional fees (except for expedited service), if you apply within two (2) years of issuance using a DS-5504 Application for a U.S. Passport (Name Change, Data Correction and Limited Passport Book Replacement) and provide a new statement from your attending physician attesting that you have had appropriate clinical treatment for transition to the new gender.

00007293-0155

United States Department of State
Colorado Passport Agency
44132 Mercure Circle
PO Box 1045
Sterling, Virginia 20166-1045

December 29, 2014

Dana Alix Zzyym
[redacted]
Fort Collins, CO 80521

RE: 172460355

Dear Dana Zzyym:

Thank you for your passport application. Because your application did not meet our requirements, our office sent you a letter on September 24, 2014, requesting additional information. A copy of that letter is enclosed. You appeared at our office on December 19, 2014, to present additional documentation and to discuss our letter.

As explained in our letter of September 24, and as you discussed with our staff on December 19, the Department of State requires the sex field on United States passports to be listed as "M" or "F." Therefore, we cannot fulfill your request to list your sex as "X."

You indicated both in your letter dated December 18 and in person on December 19 that you did not wish a passport to be issued to you unless it could be issued showing the sex as "X." Because we are unable to accommodate your request, your passport application is denied. The original documents you submitted with your application are enclosed. By law, the passport execution and application fees are non-refundable.

If you still wish to obtain a passport book and/or card, you will need to re-apply on a new application, provide all required information, and pay the appropriate fees.

If you have any questions regarding this letter you may contact the National Passport Information Center (NPIC), toll-free, at 1-877-487-2778 (TTY/TDD: 1-888-874-7793).

Sincerely,

Sherman D. Portell
Director

00061409-1023

United States Department of State

Washington, D.C. 20520

April 10, 2015

Mr. Paul D. Castillo
Lambda Legal
3500 Oak Lawn Avenue
Suite 500
Dallas, Texas 75219-6722

Dear Mr. Castillo:

Our office received your February 26, 2015 letter concerning Dana Alix Zzyym's passport application number 172460355. You requested that the Department of State reconsider its decision to deny Dana Zzyym's passport application, or alternatively, provide a hearing regarding the denial of the application.

The denial was the final decision of the Department on Dana Zzyym's passport application and the request for a designation of "intersex." This action does not meet the requirements for a review hearing specified at 22 C.F.R. § 51.70. As noted in our previous communications with Dana, and consistent with several other federal agencies, the Department of State's current policy requires that the applicant select "M" or "F" on the sex field on a U.S. passport application, and that the corresponding sex of "M" or "F" be identified on the issued passport. The Department does not recognize the use of "X" on a U.S. passport, and therefore Dana cannot select the sex as "X." While the denial of passport application number 172460355 is final, Dana remains eligible at any time to submit a new passport application, provide sufficient supporting documentation, and receive a U.S. passport listing the sex supported by the documentation.

Thank you for your inquiry.

Sincerely,

Jonathan M. Rolbin
Director
for Legal Affairs and Law Enforcement Liaison
Passport Services

U.S. Department of State

CONSULAR OFFICES OF THE UNITED STATES OF AMERICA

AUTHORIZATION FOR THE RELEASE OF INFORMATION UNDER THE PRIVACY ACT

In accordance with the Privacy Act (PL 93-579) passed by Congress in 1974, a U.S. Consular Office cannot release any information regarding you to anyone without your written consent except as set forth in the Act. Please complete the authorization below, specifying whom a U.S. Consular Office may contact and to whom to release information with regard to your case. Please return the completed authorization to a U.S. Consular Office. Local language translations are acceptable to facilitate completion of the form in English.

The U.S. Government, by providing the Authorization for the Release of Information Under the Privacy Act Form, cannot under any circumstances compel an individual to complete and submit the form. PLEASE CAREFULLY CONSIDER TO WHOM, AND WHAT INFORMATION IS BEING DISCLOSED.

IMPORTANT: You are not obliged to grant anyone access to information regarding you but failure to provide the information requested on this form may make it more difficult, or impossible, for the Department of State or the U.S. Consular Office to assist you.

Your Full Name (Last, First, MI)			Born At:	Place of Birth (City, State/Province, Country)
Zzyym	Dana	A		Howell, Michigan

On:	Date of Birth (mm-dd-yyyy)
	02-12-1958

SECTION A

I hereby authorize the U.S. Consular Office of the United States of America and the U.S. Department of State to release information regarding me to the following individuals :

Name (Last, First)	Telephone Number	Address	Relationship
Castillo Paul	(214) 302-2216	3500 Oak Lawn Ave., #500 Dallas, TX 75219	Attorney
Name (Last, First)	Telephone Number	Address	Relationship
Ponto Michael	(612) 766-7000	90 South Seventh St, #2200 Minneapolis, MN 55402	Attorney
Name (Last, First)	Telephone Number	Address	Relationship
Kunevicius Jessica	(303) 459-2806	695 S Colorado Blvd, #480 Denver, CO 80246	Attorney
Name (Last, First)	Telephone Number	Address	Relationship
Name (Last, First)	Telephone Number	Address	Relationship

DS-5505
10-2008

IN THE EVENT OTHER PERSONS REQUEST INFORMATION REGARDING MY CASE, INFORMATION CAN BE RELEASED TO THE FOLLOWING:

YES	NO	
☐	☒	Family (Other than Those Listed Under Section A)
☐	☒	Friends (Other than Those Listed Under Section A)
☐	☒	Individual Members of Congress and Staff
☐	☒	Members of the Media
☐	☒	The General Public
☐	☒	Employer

Please review the form before signing. Information will only be released under Section A if requested and if we have your signed authorization.

Signature of the Applicant
(Please Sign In Black or Blue Ink)

Fort Collins, CO - USA
City, Country

Dana Alix Zzyym
Print Your Name

01-25-2016
Date *(mm-dd-yyyy)*

PRIVACY ACT STATEMENT

This information is needed to assist you in your present need for consular services. The primary purpose for soliciting this information is to establish your citizenship, identity, and entitlement to welfare protection services offered by the U.S. Government.

The U.S. Department of State is committed to ensuring that any personal information received is safeguarded against unauthorized disclosure. The data you provide is subject to the provisions of the Privacy Act (5 U.S.C. 552a). This means that the U.S. Department of State will not disclose the information you provide unless you have given us written authorization to do so, or unless the disclosure is otherwise permitted under the provisions of the Act or in accordance with our routine uses published in Title 22 of the Code of Federal Regulations. The information solicited on this form may be made available as a routine use to other government agencies for law enforcement and administrative purposes. For further information on routine uses, please visit http://www.state.gov/documents/organization/102787.pdf.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No 15-cv-02362-RBJ

DANA ALIX ZZYYM,

Plaintiff,

v.

JOHN FORBES KERRY, in his official capacity as the Secretary of State; and
SHERMAN PORTELL, in his official capacity as the Director of the Colorado Passport Agency for the United States Department of State,

Defendants.

ORDER

Dana Alix Zzyym is an intersex individual.[1] ECF No. 1 at ¶1 (Complaint). In September 2014 Dana submitted an application for a United States passport. *Id.* at ¶34. Instead of checking the box labeled "M" for male or "F" for female on the application form, Dana instead wrote "intersex" below the "sex" category. ECF No. 34 at 2 (Administrative Record). By separate letter Dana informed the passport authorities that Dana was neither male nor female. *Id.* at 4. The letter requested "X" as an acceptable marker in the sex field to conform to International Civil Aviation Organization ("ICAO") standards for machine-readable travel documents. ECF No. 1 at ¶35.

[1] Plaintiff explains: "'Intersex' is an umbrella term used to describe a wide range of natural bodily variations. Intersex people are born with sex characteristics that do not fit typical binary notions of bodies designated 'male' or 'female.' In some cases, intersex traits are visible at birth, while in others they are not apparent until puberty. Some variations may not be visibly apparent at all." Complaint, ECF No. 1, at ¶11.

It is undisputed that in every other respect Dana is qualified to receive a passport. However, the application was denied. ECF No. 34 at 18. Dana sued, contending that the State Department's denial of the application and its underlying binary-only gender policy violated the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A), as well as plaintiff's due process and equal protection rights under the Fifth Amendment of the U.S. Constitution. *See generally* ECF No. 1.

Administrative Record

The Department issued its initial denial of Dana's passport application on September 24, 2014, explaining that "[t]he Department of State currently requires the sex field on United States passports to be listed as 'M' or 'F[,]'" and that the Department would be "unable to fulfill your request to list your sex as 'X.'" ECF No. 34 at 18. The Department nevertheless stated that it would issue Dana a passport listing gender as "female," which was the sex listed on the driver's license plaintiff submitted to prove Dana's identity during the application process. *Id.* Alternatively, the Department explained that it could issue Dana a "male" passport if Dana provided "a signed original statement on office letterhead from [Dana's] attending medical physician" in which the doctor attested to Dana's "new gender." *Id.* at 19 (referencing 7 FAM 1300 App. M "Gender Change").

Dana chose neither. Instead, Dana submitted a letter to the Department on December 18, 2014 appealing the Department's decision. *Id.* at 29–30. Dana included with that appeal two sworn documents by physicians from the United States Department of Veterans Affairs Medical Center in Cheyenne, Wyoming (Dana served in the Navy) that verified Dana's sex as "intersex."[2] *Id.* at 31–32. Dana also met with people at the Colorado Passport Agency (part of

[2] Dana also included a birth certificate that had been amended in 2012 to list Dana's sex as "unknown." ECF No. 34 at 5; ECF No. 1 at ¶10.

the State Department) and informed them that Dana "did not wish a passport to be issued . . . unless it could be issued showing the sex as 'X.'" *Id.*

The Department nevertheless denied Dana's appeal on December 29, 2014, informing Dana that the Department could not accommodate the request for the same reasons it stated in its initial denial letter. *Id.*; ECF No. 1 at ¶38. The Department, however, explained that Dana could still obtain a passport by reapplying and providing all required information on the passport application form—that is, checking either the box "M" for male or "F" for female. ECF No. 34 at 36. On February 26, 2015 Dana requested that the Department once again reconsider its decision or conduct a review hearing under 22 C.F.R. § 51.70(a). ECF No. 1 at ¶39. The Department denied both requests on April 10, 2015. *Id.* at ¶40.

Procedural History

Dana subsequently brought suit against defendants Secretary of State John Forbes Kerry and Sherman Portell, the Director of the Colorado Passport Agency, in their official capacities on October 25, 2015. *Id.* The Complaint asserts (1) that the Department's conduct was in violation of the APA because it was "arbitrary and capricious;" (2) that the conduct also violated the APA because it exceeded the Department's Congressionally-delegated authority; (3) that such action deprived plaintiff of due process in violation of the Fifth Amendment; (4) that it similarly deprived plaintiff of equal protection in violation of the Fifth Amendment; and (5) that the Court should issue a writ of mandamus to compel the Department to issue a passport accurately reflecting plaintiff's self-described sex. *Id.* at ¶¶48–95. Several months later on March 18, 2016 defendants filed a motion seeking judgment on the administrative record on plaintiff's APA claims and dismissal of the claims contained within the remainder of plaintiff's Complaint. ECF

No. 35. The Court held oral arguments on that motion on July 20, 2016. ECF No. 51 (Transcript). That motion is the subject of this Order.[3]

II. STANDARD OF REVIEW

A. Motion for Judgment on the Administrative Record.

Under the APA, a court must "hold unlawful and set aside agency action, findings, and conclusions" that it finds to be, among other things: (1) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" or (2) "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" 5 U.S.C. § 706(2)(A), (C). I discuss each standard below.

1. "Arbitrary or Capricious" Standard.

Typically, "[a]n agency's action is entitled to a presumption of validity, and the burden is upon the petitioner to establish the action is arbitrary or capricious." *Sorenson Commc'ns, Inc. v. F.C.C.*, 567 F.3d 1215, 1221 (10th Cir. 2009). Once agency action is challenged as arbitrary or capricious, a district court reviews that action under the APA as if it were an appellate court.[4] *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994). As part of the appeal, the court "ascertain[s] whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Id.* at 1574 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)). That is, the court

[3] The parties confusingly appear to suggest that plaintiff has also filed a dispositive motion in this case. *See, e.g.*, ECF No. 45 (Plaintiff's "Reply Brief" in Support of Declaratory, Injunctive, and Other Relief). Defendants characterize plaintiff's Response to their dispositive motion as one that "raises a distinct motion for (summary) judgment on *all* claims." ECF No. 41 at 5 n.2 (emphasis in original). However, plaintiff has not formally submitted a motion for summary judgment or any other dispositive motion in this case, aside from plaintiff's APA "appeal" of the Department's action discussed *infra*.

[4] As defendant explains, although in the District of Colorado a plaintiff or petitioner typically files the opening brief when "appealing" a government agency's decision under the APA, the parties have agreed "with the Court's approval, that defendants would file the first dispositive motion in this case," and that their motion would address the APA claims. ECF No. 35 at 6 n.1.

"must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment." *Id.*

A court will set aside agency action "if the agency relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* (citing *State Farm*, 463 U.S. at 43) (internal quotation marks omitted). Furthermore, "[b]ecause the arbitrary and capricious standard focuses on the rationality of an agency's decisionmaking process rather than on the rationality of the actual decision, it is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id.* at 1575 (citing *State Farm*, 463 U.S. at 50) (internal quotation marks and brackets omitted).

In terms of remedies, if "a court finds that an agency has acted arbitrarily in violation of the APA . . . the appropriate remedy is to remand the issue back to the agency for reconsideration and, if appropriate, further investigation or an explanation adequate to support the agency's decision upon remand." *Mohammed v. Holder*, 47 F. Supp. 3d 1236, 1263 (D. Colo. 2014), *appeal dismissed* (Nov. 19, 2014) (citing *Fox Television Stations, Inc. v. F.C.C.*, 280 F.3d 1027, 1047 (D.C. Cir. 2002)).

2. "Excess of Authority" Standard.

Plaintiff also challenges the Department's conduct under the APA as being in excess of its Congressionally-delegated authority. "Determination of whether the agency acted within the scope of its authority requires a delineation of the scope of the agency's authority and discretion, and consideration of whether on the facts, the agency's action can reasonably be said to be

within that range." *Olenhouse*, 42 F.3d at 1574 (citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971)).

B. Rule 12(b)(6) Motion to Dismiss.

To survive a 12(b)(6) motion to dismiss, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plausible claim is a claim that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the Court must accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff, *Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002), conclusory allegations are not entitled to be presumed true, *Iqbal*, 556 U.S. at 681. However, so long as the plaintiff offers sufficient factual allegations such that the right to relief is raised above the speculative level, he has met the threshold pleading standard. *See, e.g.*, *Twombly*, 550 U.S. at 556; *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008).

III. ANALYSIS

Plaintiff seeks a passport marked "X" to comport with plaintiff's intersex identity. Citing its binary-only gender policy, the government has refused. Plaintiff contends that the government's unwillingness to adapt to the needs and desires of intersex individuals, in contrast to policies it has implemented for others such as transsexuals, is of constitutional significance. But in my view, we are not yet at the point where this Court must venture into the constitutional fray. I find that the administrative record contains no evidence that the Department followed a rational decisionmaking process in deciding to implement its binary-only gender passport policy. Therefore, the proper next step is to remand the case to the Department to give it an opportunity

either to shore up the record, if it can, or reconsider its policy. *See Mohammed*, 47 F. Supp. 3d at 1263 (explaining that a remand is the proper remedy after a finding that an agency has acted in an "arbitrary or capricious" way).

A. The State Department's Binary-Only Gender "Policy."

As indicated above, because plaintiff alleges that the Department's binary-only gender policy was not the product of reasoned decisionmaking, the Court begins by examining the administrative record for evidence that the government formulated its policy in a rational manner. *Olenhouse*, 42 F.3d at 1575. Before turning to that task, however, I note that plaintiff takes issue with the decisionmaking behind both the Department's denial of plaintiff's specific passport application, as well as its underlying binary-only gender "policy." ECF No. 1 at ¶50. But because the Department explains its decision to deny plaintiff's individual application by reference to its underlying policy, my focus will be on whether the Department formulated its broader policy in a rational manner.

I also note that while both parties refer to this agency action as a singular Department "policy," doing so is a bit of a misnomer. The "policy" which the Department claims requires it to issue passports only marked "M" for male or "F" for female is really a collection of rules pertaining to gender contained within the Foreign Affairs Manual ("FAM"). *See* ECF No. 34 at 20–27 (citing 7 FAM 1310 Appendix M, 7 FAM 1320 Appendix M, 7 FAM 1330 Appendix M, 7 FAM 1340 Appendix M, 7 FAM 1350 Appendix M, 7 FAM 1360 Appendix M, 7 FAM 1370 Appendix M, 7 FAM 1380 Appendix M, and 7 FAM 1390 Appendix M). These rules do not explicitly state that the Department cannot issue a passport containing an alternative gender marking. *See id.* Rather, they simply explain how the Department deals with different issues related to gender on passport applications. *Id.* The rules collectively do not contemplate the