UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Zixiang Li, Jun Li, Jun Guo, Shibao Zhang, and Ming Chang,
on behalf of themselves as individuals and on behalf of others similarly situated,

Plaintiffs,

v.

United States of America; and U.S. Department of State; Hilary Rodham Clinton, Secretary of State; U.S. Department of Homeland Security; Janet Napolitano, Secretary of Department of Homeland Security;U.S. Citizenship and Immigration Services; and Alejandro Mayorkas, Director of Citizenship and Immigration Services,

Defendants.

NO. 10-cv-798

COMPLAINT

CLASS ACTION

I. INTRODUCTION

1. This is a class action lawsuit brought on behalf of a class of individuals from China who are seeking to acquire permanent resident status pursuant to INA §203(b)(3),8 U.S.C. §1153(b)(3), (the "EB-3 preference category", which includes professionals, skilled workers and other workers). The

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Seattle, WA 98104
206-682-1080

individuals in the proposed class have been harmed by the failure of the Defendants to comply with the provisions of the Immigration and Nationality Act relating to the allocation of immigrant visas.

2. During fiscal year 2008 and fiscal year 2009, and continuing through the present, the Defendants have not allocated immigrant visas to eligible applicants in accordance with the visa allocation system established by the Immigration and Nationality Act, INA §201, et seq., 8 U.S.C. §1151, et seq. According to statute, INA §203(e), 8 U.S.C. §1153(e), immigrant visas are to be allocated to eligible immigrants in "priority-date order", i.e. on a first-come, first-served basis, based on the date that the petition for the immigrant visa was filed. The immigrant visa allocation process has not operated in a lawful, predictable and transparent manner. The Defendants have not maintained a complete and accurate list of applicants who are eligible for immigrant visas. As a result, immigrant visas have been made available to eligible applicants out of priority-date order and in violation of INA §203(e), 8 U.S.C. §1153(e).

3. The individuals in the proposed class would have been approved for permanent resident status in fiscal year 2008 (October 1, 2007 to September 30, 2008) or in fiscal year 2009 (October 1, 2008 to September 30, 2009), or would obtain permanent resident status on an earlier date, but for the unlawful conduct of Defendants who have made immigrant visas available to individuals from countries other than China in violation of INA §203(e), 8 U.S.C. §1153(e).

4. Plaintiffs seek an order granting declaratory and injunctive relief for class members, including but not limited an order requiring the Defendants to issue immigrant visas and approve applications for adjustment of status in proper priority-date order; an order allowing class members to obtain employment authorization and advance parole documents (travel authorization) without having to pay filing fees; and other equitable relief.

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1000 Second Avenue, Suite 1600
Seattle, WA 98104
206-682-1080

II. JURISDICTION

5. This court has jurisdiction pursuant to 28 U.S.C. §1331 (federal question jurisdiction); 28 U.S.C. §1651 (the All Writs Act); and 28 U.S.C. §1361 (jurisdiction over actions for mandamus). The Administrative Procedures Act, 5 U.S.C. §701 et seq. applies to this lawsuit.

6. Declaratory judgment is sought pursuant to 28 U.S.C. §2202.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because defendants are officers or employees of U.S. agencies acting in their official capacities and numerous plaintiffs and class members reside in this district.

Plaintiff information is removed for privacy purpose here.

13. Defendant United States of America is responsible for the adjudication of the applications for adjustment of status that the Plaintiffs and the class members they represent have filed or will file.

14. Defendant U.S. Department of State (USDOS) is responsible for the oversight, management and allocation of immigrant visas under the Immigration and Nationality Act, and for implementation of the INA at U.S. consulates abroad.

15. Defendant Hilary Rodham Clinton is the Secretary of State. She is sued in her official capacity only. She has ultimate responsibility for the oversight, management and allocation of immigrant visas under the INA, and for the implementation of the INA at U.S. consulates abroad.

16. Defendant Department of Homeland Security (DHS) is an executive agency of the United States. Since March 1, 2003, DHS has been the agency primarily responsible for implementing the Immigration and Nationality Act in the United States.

17. Defendant Janet Napolitano is the Secretary of DHS and as such is charged with the responsibility for the administration and enforcement of the INA. She is sued in her official capacity.

18. Defendant U.S. Citizenship and Immigration Services (USCIS) is the administrative agency of the United States that is responsible for the adjudication of the applications for adjustment of status and granting permanent resident status to individuals who are in the United States. USCIS is a bureau within the Department of Homeland Security.

19. Defendant Alejandro Mayorkas is the Director of USCIS. He is sued in his official capacity. He is the person with ultimate responsibility for the adjudication of the applications for adjustment and granting permanent resident status to individuals who are in the United States.

IV. BACKGROUND

20. There is a limited number of immigrant visas available each fiscal year for individuals seeking to acquire permanent resident status in the United States. For employment-based immigrants, there are approximately 140,000 visas made available each fiscal year. INA §201(d), 8 U.S.C. §1151(d). The U.S. Department of State ("USDOS") is responsible for allocating immigrant visas and

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1000 Second Avenue, Suite 1600
Seattle, WA 98104
206-682-1080

monitoring the issuance of such visas to ensure that visas are allocated in accordance with the provisions established by statute.

21. Employment-based immigrants are divided into five preference categories, described in INA §203(b)(1)-(5), 8 U.S.C. §1153(b)(1)-(5). The class members of this lawsuit fall under the "employment-based third preference category" ("EB-3"), INA §203(b)(3), 8 U.S.C. §1153(b)(3). The EB-3 category includes skilled workers, professional workers, and other workers (unskilled workers).

22. The spouse and minor children of an EB-3 immigrant (called "derivative beneficiaries") are allowed to obtain an immigrant visa in the same status and in the same order of consideration as the EB-3 immigrant. INA §203(d), 8 U.S.C. §1153(d).

23. In order for an EB-3 immigrant to acquire permanent resident status in the United States, there must be a U.S. employer who intends to offer permanent, full-time employment to the immigrant in an appropriate job.

24. An employer who intends to offer employment to an EB-3 immigrant must first obtain a certification from the U.S. Department of Labor ("USDOL") on behalf of such immigrant stating that there are not sufficient workers who are able, willing, qualified, and available to perform the work that the EB-3 immigrant intends to perform. INA §212(a)(5), 8 U.S.C. §1182(a)(5). The employer obtains this certification by filing an application for a labor certification (previously ETA Form 750, currently ETA Form 9089) with the USDOL. The date that the application for a labor certification is received by USDOL is the "priority date" for the immigrant on whose behalf the application was filed. 8 C.F.R. §204.5(d).

25. If a labor certification is granted by USDOL, then the employer who intends to offer employment to an EB-3 immigrant must file a petition (Form I-140) with the U.S. Citizenship and

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Seattle, WA 98104
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Immigration Services ("USCIS") so that the EB-3 immigrant can be classified in the employment-based third preference category. INA §204(a)(1)(F), 8 U.S.C. §1154(a)(1)(F).

26. Of the approximately 140,000 employment-based immigrant visas made available each fiscal year, no more than 28.6% (approximately 40,040) plus unused visas from other categories can be allocated to the EB-3 category. INA §203(b)(3), 8 U.S.C. §1153(b)(3).

27. Of the approximately 140,000 employment-based immigrant visas made available each fiscal year, no more than 7% (approximately 9,800) can be allocated to any given country, subject to certain adjustments. INA §202(a)(2), 8 U.S.C. §1152(a)(2).

28. Of the approximately 40,040 employment-based immigrant visas made available each fiscal year in the EB-3 category, no more than approximately 2,800 can be allocated to any given country, subject to certain adjustments. No more than 2,500 EB-3 visas can be allocated to China, subject to certain adjustments. This limit of 2,500 can be increased by virtue of immigrant visas unused in other preference categories.

29. Employment-based immigrant visas must be made available to eligible immigrants in priority-date order until the relevant numerical limitation has been met. INA §203(e), 8 U.S.C. §1153(e).

30. In order to comply with the requirement to make visas available in priority-date order, the Secretary of State is required to maintain waiting lists of applicants who are eligible for immigrant visas. INA §203(e)(3), 8 U.S.C. §1153(e)(3); 22 C.F.R. §42.52(a).

31. The Visa Office of the USDOS makes estimates each quarter of the fiscal year of the numbers of immigrant visas that are anticipated to be issued in the various preference categories. During each of the first three quarters of any given fiscal year, USDOS can use no more than 27% of the total immigrant visa numbers to be used during the entire fiscal year. INA §201(a)(2), 8 U.S.C.

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206-682-1080

§1151(a)(2). Immigrant visas numbers are made available on a monthly basis, based on these estimates.

32. In order to ensure that visas are allocated in priority-date order and within the numerical limits established by Congress, each month the Visa Office establishes "cut-off dates" for eligible immigrants in the various preference categories. For the next month, immigrant visa numbers are then made available only to eligible applicants who have priority dates before respective cut-off date established for that category, and subject to any per country limitation. Individuals with priority dates later than the cut-off date must wait for a visa until the priority date is current. The cut-off dates for the respective preference categories and for oversubscribed countries are announced each month in the USDOS Visa Bulletin.

33. An eligible immigrant obtains permanent resident status in one of two ways. If the immigrant is outside the United States, s/he obtains permanent resident status by applying for an immigrant visa at a U.S. consulate overseas when s/he is notified that his or her priority date is current. Upon the issuance of the immigrant visa, the immigrant visa is "charged" to the appropriate preference category and country, and the total number of visas available for that preference category and country is reduced by one.

34. If the eligible immigrant is inside the United States, s/he obtains permanent resident status by applying for adjustment of status with USCIS pursuant to INA §245(a), 8 U.S.C. §1255(a). An individual cannot apply for adjustment of status unless an immigrant visa is "immediately available", in other words unless the applicant's priority date is current according to the most recent Visa Bulletin during the month of application. The immigrant visa for such an applicant is not counted as "used," and the visa numbers for the appropriate preference category and country are not reduced at the time

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206-682-1080

the application for adjustment of status is filed, but only after USCIS approves the adjustment of status application. INA §245(b), 8 U.S.C. §1255(b); 8 C.F.R. §245.2(a)(5)(ii).

35. Throughout fiscal year 2008 and fiscal year 2009, and continuing to the present, the Visa Office has failed to maintain an adequate registration list as required by INA §203(e)(3), and has failed to adequately monitor USCIS usage of immigrant visa numbers, in part or in whole because the Visa Office does not have accurate information from USCIS concerning the number of applications pending and concerning USCIS demand for immigrant visa numbers. As a result the Visa Office has not been able to and is not able to allocate immigrant visa numbers in a manner consistent with INA §203(e), 8 U.S.C. §1153(e).

36. Throughout fiscal year 2008 and fiscal year 2009, the Visa Office established cut-off dates in such a way that EB-3 visas were made available to individuals from countries other than China even though such individuals had priority dates after the priority dates of the class members of this lawsuit, and even though the China EB3 limit had not been reached while there was sufficient visa demand in the China EB3 category. As a result, such other individuals were able to obtain permanent resident status ahead of the class members of this lawsuit, in violation of INA §203(e), 8 U.S.C. §1153(e). If §203(e) had been properly and lawfully followed, the class members of this lawsuit and their derivative beneficiaries would have been approved for permanent resident status in fiscal year 2008 or fiscal year 2009.

37. During fiscal year 2008 and fiscal year 2009, and continuing to the present, there has been sufficient demand in the China EB3 category to use immigrant visas up to the limits established by the statute. The Visa Office established cut-off dates in such a way that the rest of the world was able to use immigrant visas up to its limit in the EB3 category, but the China EB3 category was not able to use immigrant visas up to its limit even though there was sufficient demand. The Defendants violated

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1000 Second Avenue, Suite 1600
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the statute by failing to establish China EB3 cut-off dates in such a manner as to allow China EB3 to use up its limit throughout fiscal year 2008 and fiscal year 2009.

38. During fiscal year 2008 and fiscal year 2009, the Visa Office established cut-off dates and USCIS used visa numbers in such a way that EB-3 immigrant visa numbers were entirely used up during the first three quarters of the fiscal year. These actions constitute a violation of INA §201(a)(2), 8 U.S.C. §1151(a)(2). There were no EB-3 immigrant visa numbers available for the last quarter of the fiscal year, and no visa numbers were allocated for individuals in the China EB-3 category during the last quarter of these fiscal years. As a result, during these fiscal years the class members of this lawsuit who would have obtained permanent resident status if the statute had been followed were not able to obtain permanent resident status and to date have not been able to obtain permanent resident status.

39. The class members of this lawsuit and their derivative beneficiaries have not yet been approved for permanent resident status, even though they would have been approved for permanent resident status in fiscal year 2008 or fiscal year 2009 if the Defendants had complied with the relevant provisions of the Immigration and Nationality Act.

40. During the months of October through June of fiscal year 2008, USCIS adjudicated applications for adjustment of status without regard to priority date order. USCIS approved applications for adjustment of status for EB-3 applicants who were not from China, even though such individuals were not eligible for immigrant visas under INA §203(e), 8 U.S.C. §1153, and the adjustment applications were approved in violation of 8 C.F.R. §245.2(a)(5)(ii). As a result, in July 2008 immigrant visas for the EB-3 category became unavailable for the rest of the fiscal year and Chinese applicants received only 2,058 EB-3 visas in fiscal year 2008, far fewer than would have been granted if the Defendants had complied with the provisions of the INA.

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1000 Second Avenue, Suite 1600
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41. Because of the USCIS failure to adjudicate applications for adjustment of status in a lawful manner, many class members of this lawsuit and their derivative beneficiaries were unable to obtain permanent resident status in fiscal year 2008. Many class members of this lawsuit and their derivative beneficiaries would have obtained permanent resident status in fiscal year 2008 but for the unlawful actions of the Defendants.

42. During the months of October through April of fiscal year 2009, USCIS adjudicated applications for adjustment of status contrary to priority date order. USCIS approved applications for adjustment of status for EB-3 applicants who were not from China, even though such individuals were not eligible for immigrant visas under INA §203(e), 8 U.S.C. §1153, and the adjustment applications were approved in violation of 8 C.F.R. §245.2(a)(5)(ii). As a result, in May 2009 immigrant visas for the EB-3 category became unavailable for the rest of the fiscal year and China received only 1,077 EB-3 visas in fiscal year 2009, far fewer than would have been granted if the Defendants had complied with the provisions of the INA.

43. Because of the USCIS failure to adjudicate applications for adjustment of status in a lawful manner, many class members of this lawsuit and their derivative beneficiaries were unable to obtain permanent resident status in fiscal year 2009. Many class members of this lawsuit and their derivative beneficiaries would have obtained permanent resident status in fiscal year 2009 but for the unlawful actions of the Defendants.

44. Throughout fiscal year 2008 and fiscal year 2009, the USCIS failed to provide to the Visa Office accurate information to the Visa Office concerning individuals who are eligible for employment-based immigrant visas. As a result, during fiscal year 2008 and fiscal year 2009, the Visa Office did not esbablish cut-off dates in a proper and lawful manner to ensure compliance with INA §203(e), 8 U.S.C. §1153(e), and visas were made available to applicants not in priority date order. As

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206-682-1080

a result, EB-3 visas were made available to applicants in violation of INA §203(e), 8 U.S.C. §1153(e), when such visas should have been made available to the class members of this lawsuit and their derivative beneficiaries.

45. USCIS continues to fail to provide to the Visa Office complete and accurate information concerning individuals who are eligible for employment-based immigrant visas. As a result, the class members of this lawsuit and their derivative beneficiaries suffer ongoing harm.

V. CLASS ACTION ALLEGATIONS

46. Plaintiffs bring this action on behalf of themselves and all other persons similarly situated pursuant to F.R.C.P. Rules 23(a) and 23(b). The proposed class is defined as follows:

> All individuals (including the derivative beneficiaries of such individuals)
> (1) For whose benefit an Application for Labor Certification has been or will be approved;
> (2) For whose benefit a Petition for Alien Worker (From I-140) under INA §203(b)(3), 8 U.S.C. §1153(b)(3) has been or will be approved;
> (3) Who are chargeable under INA §202(b), 8 U.S.C. §1152(b) to mainland China; and
> (4) Who have not yet been approved for permanent resident status.

47. The requirements of Rules 23(a) and 23(b)(2) are met in that the class is so numerous that joinder of all members is impracticable (plaintiffs estimate that there are thousands of class members); there are questions of law and fact common to the class (including but not limited to whether the Defendants have complied with INA §203(e), 8 U.S.C. §1153(e) in making immigrant visas available to eligible applicants); the claims of the representative parties are typical of the claims of the class; the representative parties will fairly and adequately represent the interests of the class (plaintiffs are represented by counsel with extensive expertise in class action litigation regarding the rights of immigrants); and the party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

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VI. IRREPARABLE INJURY

48. Because of policies and practices of the Defendants as described throughout this Complaint, Plaintiffs and the members of the plaintiff class, have suffered and will suffer irreparable harm, including but not limited to unjustified delay in obtaining permanent resident status, loss of employment opportunities, inability of spouses and children to obtain employment authorization, impairment of ability to travel, and delay in ultimately obtaining U.S. citizenship. Plaintiffs and class members have been unable to obtain permanent resident status and will continue to be unable to obtain permanent resident status because of the unlawful policies and practices of Defendants.

VII. CAUSES OF ACTION

A. First Cause of Action

49. All preceding paragraphs are incorporated herein.

50. By issuing immigrant visas to applicants out of priority date order, even though the China EB-3 preference category had not reached the per-country limit established pursuant to INA §202(b), 8 U.S.C. §1152(b), the U.S. Department of State has violated and continues to violate INA §203(e), 8 U.S.C. §1153(e).

B. Second Cause of Action

51. All preceding paragraphs are incorporated herein.

52. By approving applications for adjustment of status for individuals out of priority date order, even though the China EB-3 preference category had not reached the per-country limit established pursuant to INA §202(b), 8 U.S.C. §1152(b), USCIS has violated and continues to violate INA §203(e), 8 U.S.C. §1153(c).

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1000 Second Avenue, Suite 1600
Seattle, WA 98104
206-682-1080

C. Third Cause of Action

53. All preceding paragraphs are incorporated herein.

54. By approving applications for adjustment of status out of priority date order even though the Visa Office has not made immigrant visa numbers available for such adjustments, USCIS has violated and continues to violate INA §245(b), 8 U.S.C. § 1255(b), and 8 C.F.R. §245.2(a)(5)(ii).

D. Fourth Cause of Action

55. All preceding paragraphs are incorporated herein.

56. By failing to establish a complete and accurate system for monitoring the priority dates of individuals who are applying for immigrant visas, the Defendants have abused discretion, acted in a manner that is arbitrary and capricious, and otherwise taken actions that are not in accordance with law.

E. Fifth Cause of Action

57. All preceding paragrpahs are incorporated herein.

58. By failing to provide and maintain a system adequate to account for the number of immigrant petitions (Form I-140) and adjustment of status applications (Form I-485) that are pending, the Defendants have acted in an arbitrary and capricious manner and contrary to law, and have violated and continue to violate the Immigration and Nationality Act, including, *inter alia*, INA §203(e), 8 U.S.C. §1153(e); INA §245(b), 8 U.S.C. §1255(b); and INA §201(a)(2), 8 U.S.C. §1151(a)(2).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

1. Assume jurisdiction over this case;

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1000 Second Avenue, Suite 1600
Seattle, WA 98104
206-682-1080

2. Certify this case as a class action lawsuit, as proposed herein;

3. Issue declaratory judgment that the actions of the Defendants as described herein have violated and continue to violate the Immigration and Nationality Act, the Administrative Procedures Act, and governing regulations;

4. Issue an order granting equitable relief for the benefit of plaintiffs and class members of this lawsuit, such equitable relief to include but not be limited to the issuance of employment authorization documents and advance parole documents without fee and issuance of immigrant visas as soon as possible;

5. Issue a preliminary and permanent injunction requiring Defendant USCIS to provide complete and accurate information to the Visa Office concerning the immigrants eligible to receive immigrant visas, including the number of such eligible immigrants, the preference catetory, country of chargeability, and priority date for such eligible immigrants;

6. Issue a preliminary and permanent injunction requiring Defendant Department of State to make public all relevant information contained on the waiting lists maintained pursuant to INA §203(e)(3), 8 U.S.C. §1153(e)(3), all relevant information concerning the system and procedures used for allocating immigrant visa numbers for individuals on the waiting lists, except such information as may be protected because of privacy concerns;

7. Issue a preliminary and permanent injunction requiring the Defendants to grant immigrant visas and adjustment of status in proper priority date order, as required by INA §203(e), 8 U.S.C. 1153(e);

8. Issue an order requiring that immigrant visa numbers be made available for the class members of this lawsuit so that such individuals can obtain immigrant visas and/or adjust status (in priority date order) before the end of the fiscal year.

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Seattle, WA 98104
206-682-1080

9. Award plaintiffs their costs and reasonable attorneys' fees;

10. Grant any other relief that this Court deems just and proper to remedy the injuries suffered by the plaintiffs and their class members;

Dated this 12th day of May, 2010.

Respectfully submitted,

/s/ Robert Pauw
Robert Pauw
Robert Gibbs
Gibbs Houston Pauw
1000 Second Ave., Suite 1600
Seattle, WA 98104
(206) 682-1080
Attorneys for Plaintiffs