

District Judge Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERNDISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

Zixiang Li, et al., Plaintiffs)	Case No. C10-00798-RAJ
)	
vs.)	PLAINTIFFS' REPLY TO
)	DEFENDANTS' OBJECTION TO
United States, et al., Defendants)	PRELIMINARY INJUNCTION
)	
)	ORAL ARGUMENT REQUESTED

As an initial matter, it is important to note that Defendants do not dispute the following claims:

1. The statute requires that visa numbers be allocated in priority date order. INA §203(e)(1).¹
2. In order to ensure that visa numbers are allocated in priority date order, the statute requires that waiting lists of applicants be maintained. INA §203(e)(3).
3. During FY 2008 and FY 2009, USCIS failed to keep track of pending applications for adjustment of status, and failed to provide accurate information to Visa Office regarding CIS's expected usage of visa numbers; as a result there were many applicants who were not on the waiting lists. Declaration of Prakash Khatri, ¶¶6, 11, 13, attached as Exhibit 17 to Docket No. 15-2 ("Dkt. No. 15-2, pp. 82-85"); Declaration of Palma Yanni, ¶¶6, 7, Dkt. No. 15-2, p. 76.
4. During FY 2008 and FY 2009, the China EB3 category received at least 2,324 fewer visa numbers than the limit established by statute. Dkt. No. 15, p. 10; DOS AR 15.
5. During FY 2008 and FY 2009, visa numbers in the EB3 category were allocated to applicants from other countries who had priority dates later than applicants from China, even though the China EB3 category had not reached its statutory limit. Dkt. No. 15, pp. 10-11; DOS AR 20.
6. During FY 2008 and FY 2009, the Defendants violated INA §201(a)(2) by using more than 27% of the available visas during the first three quarters of the fiscal year. See Exhibit 23, attached hereto as Plaintiffs' Exhibit, pp. 94-95.²

¹ The citations throughout this brief are to the Immigration and Nationality Act, §201 to §204. The parallel citations in the U.S. Code are found at 8 U.S.C. §1151 to §1154.

² The Exhibits attached hereto are numbered sequentially after Exhibits attached to Docket No. 15-2.

1 7. There are at least 2,324 individuals in the China EB3 category whose applications were pending
 2 during FY 2008 and FY 2009 with priority dates before the priority dates of individuals from
 other countries who were allocated visa numbers. *See* Exhibit 24, attached hereto.

3 In sum, the Defendants really have no response to Plaintiffs claims that during FY 2008 and FY 2009, at
 4 least 2,324 individuals from China in the EB3 category would have received visa numbers if visa
 5 numbers had been allocated in priority date order as required by the statute. Instead, the Defendants
 6 argue that (A) they **currently** have in place a system for making “reasonable estimates” of anticipated
 7 usage of visa numbers, *see* Gov’t Brief, pp. 15-16; Declaration of Bryan Christian, Docket No. 22-1,
 8 ¶¶8-15 (describing how USCIS currently processes applications for adjustment of status, but not
 9 contesting the fact that during FY 2008 and FY 2009 USCIS had no adequate system for keeping track
 10 of pending applications); and (B) there is no injunctive relief that can appropriately be granted for the
 11 benefit of class members who were injured during FY’s 2008 and 2009.
 12
 13

14 ARGUMENT

15 A. The Defendants Violated INA §203(e) During FY 2008 and FY 2009.

16 1. “Reasonable Estimates” – INA §203(g).

17 The Government asserts that the cutoff dates established in FY 2008 and FY 2009 were based on
 18 “reasonable estimates” regarding the demand for visas. Gov’t Brief, p. 15. However, the Government
 19 does not provide any evidence of the waiting lists that were used during that time³ or of the data
 20 provided by USCIS or used by the Visa Office in making such “reasonable estimates”; and it does not
 21 controvert the evidence offered by Plaintiffs showing that there was no system in place to account for
 22 pending adjustment applicants, and that many visa applicants simply were not on the waiting lists. *See*
 23 Khatri Declaration, ¶6, Dkt. No. 15-2, p. 82. The fact that CIS failed to provide required waiting lists is
 24 significant, given that up to 81% of the visa numbers were used by CIS-administered adjustment
 25
 26
 27
 28

³ The waiting lists provided in the Administrative Record are for July 19, 2010. *See* DOS AR 37-146.

1 applicants, and of those as many as 2/3 (i.e. more than 1/2 of all visa applicants) may have been
2 unaccounted for during FY 2008 and FY 2009. *See* Khatri Declaration, ¶¶6, 13, Dkt. No. 15-2, pp. 82,
3 84-85. Because there were no proper waiting lists of applicants as required by statute, it was not
4 possible to make “reasonable estimates” of the anticipated numbers of visas to be issued during FY 2008
5 and FY 2009. Moreover, the Defendants violated the statute by using up all of the EB3 visas during the
6 first three quarters of those fiscal years. *See* INA §201(a)(2). As a result of this violation of the statute,
7 although the worldwide usage of EB3 visas was 100% of its limit in FY 2008 and FY 2009, the China
8 EB3 usage was only 70% and 43%, respectively, of its limit. *See* Exhibit 23, attached hereto.

9
10 The Government also argues that during FY 2008 and FY 2009, the VO allocated visa numbers
11 in excess of the limit in the China EB3 category; the problem, according to the Government, was that
12 China visa numbers were not used because applicants failed to appear for an interview or were found to
13 be ineligible at the time of the interview. Gov’t Brief, p. 8; DOS AR 12. However, that does not
14 respond to the fact that USCIS failed to keep track of pending applications, and used all the visa
15 numbers in the first three quarters of FY 2008 and FY 2009, in violation of §201(a)(2). And it does not
16 justify the allocation of visa numbers out of priority date order, in violation of §203(e).
17
18

19 2. “Unexpectedly High Demand” in FY 2008 and FY 2009.

20 The Defendants aver that visa numbers were not allocated in priority date order because there
21 was an “unexpectedly high demand” for visa numbers in FY 2008 and FY 2009. Gov’t Brief, p. 16.
22 The term “unexpectedly high demand” is merely a euphemism for the fact that USCIS did not keep track
23 of pending applications. The “unexpectedly high demand” did not occur because new applicants came
24 forward and filed applications for adjustment of status. Rather, the “unexpectedly high demand”
25 occurred because USCIS adjudicated applications that were pending but were unaccounted for. *See*
26
27
28

1 Khatri Declaration, ¶6, Dkt. No. 15-2, p. 82. If the applications were on a waiting list as required by
 2 statute, CIS would not have used all the visa numbers 4 or 5 months before the end of the fiscal year.⁴

3 The Government explains the “unexpected” high usage of visa numbers by USCIS in FY 2008
 4 because of three events: (1) in December 2007 Congress appropriated \$20 million to eliminate the
 5 backlog of pending FBI background checks; (2) USCIS changed its eligibility policy, and as a result a
 6 large number of applicants who were waiting for an FBI background check became eligible for
 7 adjustment; and (3) in FY 2008 USCIS hired an additional 1,199 adjudicators. Gov’t Brief, pp. 16-17.
 8 In offering this explanation, the Government does not contest the fact that during FY 2008 and FY 2009
 9 it had **no system** of accounting for the pending adjustment applications and that these pending
 10 adjustment applications were not on the required waiting lists. Furthermore, these events did not
 11 authorize USCIS to use up all of the EB3 visa numbers in the first three quarters of the fiscal year in
 12 violation of §201(a)(2). In short, the Government’s explanation fails to counter Plaintiffs’ evidence that
 13 during FY 2008 and FY 2009, visa numbers were issued out of priority date order in violation of INA
 14 §202(e).
 15
 16

17
 18 3. Adjustment of Status Applicants Are Subject to §203(e).

19 Defendants argue that INA §203(e) does not govern adjustment of status applications and
 20 “imposes no burden on USCIS”. Gov’t Brief, p. 18. This misguided interpretation may explain CIS’s
 21 failure to provide information required for the waiting lists, and it may account for CIS’s “haphazard
 22 method of accounting for pending applications”, *see* Khatri Declaration, ¶13, Docket No. 15-2, p. 84.
 23

24 But it not consistent with Congressional intent that adjustment of status, like the issuance of immigrant

25
 26 ⁴ As a result of the violation of §201(a)(2), visa numbers for the EB3 category ran out three months
 27 early in FY 2008 and five months early in FY 2009. From the statistical information available to the
 28 Visa Office, *see* Exhibit 23, attached hereto, it was clear by the end of the second quarter that the China
 EB3 category was not receiving enough visas to meet its limit, unlike other countries. If §202(a)(2) had
 not been violated and visa numbers were available throughout the year, additional visa numbers could
 have been allocated to the China EB3 category before the fiscal year ended.

1 visas, occur in priority date order. The adjustment statute, INA §245, 8 U.S.C. §1255, specifically
 2 requires that adjustment of status can be granted only if an immigrant visa number is “authorized to be
 3 issued under sections 202 and 203”. INA §245(b), 8 U.S.C. §1255(b). Immigrant visa numbers are
 4 authorized under §203 only in priority date order. INA §203(e). Moreover, the Visa Office certainly
 5 understands that §203(e) imposes a burden on USCIS. According to the Visa Office, visa numbers
 6 allocated in priority date order are for adjustments of status as well as visa issuance – i.e. adjustments of
 7 status are supposed to occur in priority date order. *See* “The Operation of the Immigrant Numerical
 8 Control System”, DOS AR 4. Thus, contrary to the litigation position taken by the Government, §203(e)
 9 does indeed control adjustment of status and requires CIS to keep track of pending applications.
 10

11 **B. Granting a Preliminary Injunction Is Appropriate.**

12 Plaintiffs submit that it is appropriate to grant injunctive relief for the benefit of class members
 13 who would have been granted permanent resident status during FY 2008 or FY 2009, if the statute had
 14 been lawfully followed. Plaintiffs have requested that 2,324 visas be made available before September
 15 30, 2010 – the end of this fiscal year – for the benefit of class members who have a priority date of on or
 16 before March 1, 2006.⁵ According to the Government, the IVAMS system currently provides a list, in
 17 priority date order, of all visa applicants whose applications (either application for an immigrant visa or
 18 application for adjustment of status) have been reviewed and who have been determined to be qualified
 19 for an immigrant visa. All of the plaintiffs’ names have been entered into the IVAMS system, *see*
 20 Declaration of Bryan Christian, ¶23, Dkt. No. 22-1, pp. 7-8, and the IVAMS system should – according
 21 to USCIS – contain the names of all qualified class members. Thus, the visa numbers that Plaintiffs
 22
 23
 24

25
 26
 27 ⁵ The cutoff dates for the worldwide EB3 category advanced to March 1, 2006 in FY 2008. If visa
 28 numbers had been issued in priority date order, individuals from China in the EB3 category with priority
 dates before March 1, 2006 would have been eligible to obtain a visa number during FY 2008.

1 request can be allocated in priority date order through the IVAMS system. As explained below, contrary
2 to the Government's claims, granting these visa numbers would not violate INA §202(a)(2).

3 In the alternative, Plaintiffs request that the Defendants make available for class members any
4 employment-based visa numbers that remain unused at the end of FY 2010. According to Defendants,
5 each month there are visa numbers that are returned as unused; these visa numbers are then available for
6 further allocation. *See, e.g.* Gov't Brief, p. 6; DOS AR 6; DOS AR 34 (so far for FY 2010, out of
7 36,397 EB3 visas allocated, 3,154 have been returned, at the rate of approximately 200 to 300 every
8 month). Plaintiffs request that any visa numbers returned as unused during the month of September be
9 allocated for the benefit of the class members of this lawsuit. If these visas are allocated through the
10 IVAMS system, they can be allocated immediately in priority date order, without the requirement of a
11 further interview by CIS. *See* Christian Declaration, ¶15, Dkt No. 22-1, p. 5. In addition, Plaintiffs
12 request that class members who are not allocated a visa be granted extensions of work authorization and
13 travel authorization ("advance parole") without charge while they wait for a visa to be allocated.
14

15
16 The alternative form of relief requested by Plaintiffs is clearly appropriate. The visa numbers to
17 be allocated are visa numbers that have gone unused because the applicant to whom allocated has failed
18 to show for an interview or is otherwise ineligible for the visa. *See* Gov't Brief, p. 8 (visa numbers are
19 returned when the applicant fails to show for an interview or is found to be ineligible). These visa
20 numbers are used for the benefit of people who would have been granted permanent resident status in
21 FY 2008 or FY 2009 if the law had been followed, and who are still waiting for their permanent resident
22 status. Delaying permanent resident status, when the applicant should already have been granted
23 permanent resident status, constitutes harm, *see Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980), *aff'd*, 462
24 U.S. 919, 936 (1983) ("[t]he most obvious detriment is that he would be required to wait longer in order
25
26
27
28

1 to be eligible for citizenship status”), and the harm is irreparable. Thus, injunctive relief is appropriate
 2 to ensure that these visa numbers are used before they are lost at the end of the year.

3 1. Granting a Preliminary Injunction Would Not Violate §201(a)(2).

4 The Government objects that granting 2,324 “extra” visas for the benefit of individuals in the
 5 China EB3 category would exceed the per-country limit in INA §202(a)(2) (no individual country can
 6 receive more than 7% of the overall immigrant visas available in the fiscal year). Gov’t Brief, p. 10.
 7 There are two responses to that objection: (1) §202(a)(2) is not violated because this court can order the
 8 “recapture” of visa numbers that were wrongfully issued in previous years, rather than using the visa
 9 numbers for FY 2010; and (2) even if visa numbers are used from FY 2010 for the benefit of class
 10 members, the China EB3 category would not exceed its limit under §202(a)(2).
 11

12 (a) Visa numbers wrongfully issued in prior years can be recaptured. Where a statute has been
 13 violated, courts undoubtedly have authority to grant equitable relief in order to rectify the wrong. In
 14 particular, a federal court “does have the power to require the Executive to carry out Congress’
 15 commands.” *Iddir v. INS*, 301 F.3d 492, 500 (7th Cir. 2002). The Supreme Court has “frequently
 16 articulated the great principle of public policy, applicable to all governments alike, which forbids that
 17 the public interest should be prejudiced by the negligence of the officers or agents to whose care they are
 18 confided.” *Brock v. Pierce County*, 476 U.S. 253, 260 (1986). In this case, visa numbers – which would
 19 have been issued to plaintiffs and class members if the statute had been followed – were wrongfully
 20 issued to other individuals out of priority date order. Recapturing those visas is not prohibited by
 21 statute; indeed, that is what was done in the *Silva* case. *See Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979).⁶
 22
 23
 24

25 The Government argues that recapture of visa numbers is not permissible in light of *Iddir*, which
 26

27 ⁶ The *Silva* court noted that in a related case, *Zambrano v. Levi*, Case No. 76-C-1456 (N.D. Ill.), the
 28 district court ordered INS to recapture wrongfully issued visa numbers. 605 F.2d at 982. Subsequently
 in the *Silva* litigation INS agreed to recapture visa numbers for a class of applicants. *Id.* at 985.

1 post-dated *Silva* and “clarified what relief federal courts could order.” Gov’t Brief, pp. 10-11. The
2 Government has badly misread *Iddir*. In *Iddir*, the plaintiffs were seeking immigrant visa numbers
3 under the diversity lottery program, INA §203(c). The Seventh Circuit held that the problem with
4 granting relief for the plaintiffs was not that the court lacked power to recapture immigrant visas. In
5 fact, the court indicated that a district court does indeed have such power. 301 F.3d at 500 (a federal
6 court “does have the power to require the Executive to carry out Congress’ commands”); *id.* at 501, n. 2
7 (“Allowing the INS to claim inability to issue visas at that point would impinge on the authority of the
8 court”). Moreover, *Iddir* cited with favor *Paunescu v. INS*, 76 F.Supp. 2d 896 (N.D. Ill. 1999), in which
9 the district court specifically held that it has the authority to “order[] the INS and the State Department
10 to procure visa numbers after the end of a fiscal year.” 76 F.Supp. at 902-903. In *Iddir*, the court held
11 that plaintiffs could not be granted relief because of a special statutory provision that applies only to the
12 diversity lottery program. The relevant statutory provision, INA §204(a)(1)(I)(ii), states unequivocally
13 that applicants in the diversity lottery system remain eligible for a visa number only “through the end of
14 the specific fiscal year for which they were selected.” There is no similar provision with respect to
15 individuals applying for employment-based immigrant visas, and accordingly there is no reason why this
16 Court cannot recapture 2,324 visas for the benefit of the class members of this lawsuit.
17
18
19

20 (b) Allocation of 2,324 visa numbers will not cause China to exceed the per-country limit. The
21 Government assumes that if visa numbers from FY 2010 are allocated to China, then China will exceed
22 its per country limit in violation of INA §202(a)(2), 8 U.S.C. §1152(a)(2). That assumption is nowhere
23 justified. For FY 2010, there is a total worldwide EB limit of 150,657. *See* September 2010 Visa
24 Bulletin, p.1, attached hereto as Exhibit 28. Accordingly, the initial China EB3 limit is 2,716. *See* Dkt.
25 No. 15, p. 7; Exhibit 27, attached hereto. However, as explained in Plaintiffs’ Motion for Preliminary
26 Injunction, Dkt. No. 15, pp. 8, 10, this is only an initial limit. The initial limit is increased by virtue of
27
28

1 unused visas in other categories. First, unused China family visas “fall down” and increase China’s
2 employment-based limit. *See* INA §202(a)(2). The Defendants do not provide information concerning
3 the expected “fall down” of China family visas for FY 2010, but China’s family limit for FY 2010 is
4 15,820, *see* Exhibit 26, attached hereto, and last year China used only 11,246 family visas. *See* Exhibit
5 25, attached hereto. If the usage is approximately the same this year, several thousand unused family
6 visas will “fall down” and can be used to increase China’s employment-based limit.
7

8 In addition, the initial China EB3 limit is increased by operation of INA §202(a)(5)(A).
9 Throughout FY 2010, the Visa Bulletin has listed categories EB1, EB4 and EB5 as “current.” That
10 means that the total number of visas available in these categories has exceeded the number of qualified
11 applicants, *see* DOS AR 4, so all applicants in those categories can be issued visa numbers “**without**
12 **regard to the [per-country] numerical limitation**” in §202(a)(2). Consequently, 2,324 “extra” visas
13 can be allocated to the China EB3 category without exceeding the 7% per-country limit; the visas
14 allocated in the China EB1-1, EB4, and EB5 category need not be counted against the per-country limit.
15

16 The Defendants have not provided enough information to calculate exactly how much the initial
17 limit can be increased under INA §202(a)(2) and §202(a)(5)(A), but Plaintiffs believe that an additional
18 2,324 additional visas can be allocated to the China EB3 category without exceeding the limit
19 established by Congress, taking into account the adjustments under §202(a)(2) and §202(a)(5)(A).
20

21 2. A Preliminary Injunction Would Not Disturb the Status Quo.

22 Defendants object that the injunctive relief requested by Plaintiffs alters the status quo in
23 violation of the APA, 5 U.S.C. §705. Gov’t Brief, pp. 12-13, *citing Salt Pond Associates v. U.S. Army*
24 *Corps of Engineers*, 815 F.Supp. 766, 775-776 (D. Del. 1993). In making this argument, the Defendants
25 distort the proper test for injunctive relief.
26
27
28

1 Preliminary injunctive relief is available to a party who demonstrates either (1) a combination of
2 probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are
3 raised and the balance of hardships tips in its favor. *See, e.g. Sammartano v. First Judicial District*
4 *Court*, 303 F.3d 959, 965 (9th Cir. 2002). Each of these two formulations requires an examination of the
5 potential merits of the asserted claims and the harm or hardships faced by the parties; functionally,
6 “these two formulations represent two points on a sliding scale in which the required degree of
7 irreparable harm increases as the probability of success decreases.” *Id.* at 965. Where the public interest
8 is involved, the court must also consider whether granting the injunction is in the public interest. *Id.*
9 There is no rule that preliminary injunctive relief must be denied if it alters the status quo. *See, e.g.*
10 *Chicago United Industries, Ltd., v. City of Chicago*, 445 F.3d 940, 944 (7th Cir. 2006) (“Preliminary
11 injunctive relief is properly sought only to avert irreparable harm. ... Whether and in what sense the
12 grant of relief would change or preserve some previous state of affairs is neither here nor there. To
13 worry these questions is merely to fuzz up the legal standard.”)

14
15
16 With respect to evaluating the likelihood of success on the merits, plaintiffs have shown that the
17 statute was violated in FY 2008 and FY 2009, and that at least 2,324 class members would have been
18 granted visa numbers if the statute had been followed. The Government has not offered any evidence to
19 rebut these claims. Moreover, plaintiffs have proven irreparable harm: plaintiffs continue to suffer
20 harm on an ongoing basis because they are denied the benefit of permanent resident status which they
21 should have received years ago. If no injunction is granted, the continuing delay, and hence substantial
22 injury, will continue and will be irreparable. *Cf. Ross-Simons of Warwick, Inc., v. Baccarat, Inc.*, 102
23 F.3d 12, 18 (1st Cir. 1996) (when plaintiff suffers “substantial injury that is not accurately measurable or
24 adequately compensable by money damages, irreparable harm is a natural sequel”). Granting an
25 injunction does not harm the public interest. Indeed, granting an injunction is presumptively in the
26
27
28

1 public interest because it accomplishes what Congress intended to accomplish in enacting the statute.
2 Where an injunction's reach is narrow and affects only the parties with no impact on nonparties, "the
3 public interest will be at most a neutral factor in the analysis rather than one that favors granting or
4 denying the preliminary injunction." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). In
5 this case, this injunction is aimed at preserving the uniform and fair status quo *before* the Government's
6 mismanagement of the visa numbers.
7

8 The Defendant's reliance on *Salt Pond Associates v. U.S. Army Corps of Engineers*, 815 F.Supp.
9 766 (D. Del. 1993), Gov't Brief, pp. 12-13, is misplaced. In *Salt Pond*, the Court stated that "[i]n fact,
10 the legislative history is completely void of any discussion on the scope of relief authorized by section
11 705." *Salt Pond*, 815 F.Supp. at 775, n.25. In that case, the Court, after reading the plain language of
12 APA §705, held that it had jurisdiction to postpone the date of the Government's action. *Id.* It did not,
13 however, hold that such relief is the only relief that a court can legally grant.
14

15 In *Tang v. Chertoff*, the Plaintiff's were seeking a decision on a delayed application for
16 adjustment of status. The Court granted the Plaintiff's motion for preliminary injunction and ordered
17 CIS to complete adjudication of the application in seven days. *Tang v. Chertoff*, 2007 WL 2462187
18 (E.D. Ky., 2007). In *San Diego Minutemen v. California Department of Transportation*, 570 F.Supp.2d
19 1229 (S.D.Cal.,2008), the court granted a preliminary injunction requiring the agency to reissue to
20 plaintiffs a permit under the "Adopt-A-Highway" program. In *Silva v. Bell*, a case involving
21 redistribution of wrongfully issued visa numbers, the District Court did not limit itself to either
22 postponing agency decision or preserving the status quo. Rather, after discovery and hearing, it granted
23 relief and ordered the processing of the class members' applications. *See Silva v. Bell*, 605 F.2d 978,
24 983 (7th Cir. 1979). There is no substance to the Government's argument that this court lacks the
25 authority to grant a preliminary injunctive relief as requested by Plaintiffs.
26
27
28

Dated this 16th day of August, 2010.

/s/ Robert Pauw
Robert Pauw
Robert Gibbs
GIBBS HOUSTON PAUW
Attorneys for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28