District Judge Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERNDISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

Zixiang Li, et al., Plaintiffs vs. United States, et al. Defendants	Case No. C10-00798-RAJ PLAINTIFFS' REPLY TO DEFENDANTS' SUPPLEMENTAL BRIEF

Plaintiffs hereby submit the following response to the Supplemental Brief filed by Defendants on October 8, 2010, Docket No. 36.

1. There Are Unused Visa Numbers Available for Recapture. The Defendants agree that there are unused employment-based ("EB") visa numbers available for recapture from prior years. Gov't Brief, p. 3. As Defendants point out, unused EB visa numbers from one fiscal year can under some circumstances be used in the next fiscal year by family-based (FB") applicants. However, over the past several years the unused EB visa numbers in a given fiscal year have not in fact been used in any subsequent fiscal year. Because of the under-usage in the EB category, there are well more than 2,324 visa numbers from previous years that are available to be used by the class members of this lawsuit. *See* Declaration of Prakash Khatri, ¶4, attached hereto as Exhibit A (218,759 visa numbers are available for recapture); USCIS Ombudsman, 2007 Annual Report, Docket No. 15-2, p. 56; Gov't Brief, p. 3 (because "the number of family-based visa numbers that would have been available under the

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calculations set forth in 8 U.S.C. §1151(c)(1)(A) ... was less than 226,000, these employment-based numbers remain essentially unused").

2. This Court Has Authority to Recapture Unused Visa Numbers. The Defendants point out that Congress has taken action to recapture unused visa numbers on two occasions. *See* American Competitiveness in the Twenty-First Century Act ("AC21"), Title I of Pub. L. 106-313 (October 17, 2000) (authorizing DOS to recapture 130,107 unused visa numbers from prior years); REAL ID Act, Pub. L. 109-13, §503 (authorizing DOS to recapture 50,000 visa numbers). What the Defendants claim is that only Congress can authorize the recapture of unused visa numbers from prior fiscal years. However, the Defendants offer no statutory support or case law support for that claim. All Defendants cite to is a statement made by Senator Hutchinson in support of the REAL ID Act, and a statement by the USCIS Ombudsman that "unused visa numbers cannot be reclaimed". *See* Gov't Brief, p. 4. Plaintiffs submit that authorization to recapture unused visa numbers can come either from Congress or from the courts. *See Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979); *Marcetic v. INS*, 1998 WL 173129 (N.D. Ill. 1998) (relying on *Silva v. Bell* to reject INS's argument that an immigrant visa number from one fiscal cannot be allocated to plaintiff after the end of the fiscal year; the court "had no hesitation ... in undoing past mistakes .... [T]he INS can act if it is ordered to do so").

In the first place, courts have broad power to fashion equitable remedies where there has been a violation of the statute. The United States Supreme Court has long held that the equitable power of a federal court to remedy past wrongs cannot be taken away unless there is clear legislative intent to do so. In *Califano v. Yamasaki*, the Court stated: "Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979), *citing Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). In *Porter v. Warner*, the Court held:

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> the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

328 U.S. at 398. The Court emphasized that the "great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Id*. *See also Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 12 (1970) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); *Lemon v. Kurtzman*, 411 U.S. 192, 200-01 (1972) ("equitable remedies are a special blend of what is necessary, what is fair, and what is workable.... In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests"); *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319, 1342 (9th Cir.1979) (the court may "adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action").

In this case, the statute was violated during FY 2008 and FY 2009 and visa numbers were misallocated. It is not disputed that at least 2,324 individuals from China in the EB3 category would have received visa numbers if visa numbers had been allocated in priority date order as required by the statute. Thus, the question is how the court should fashion a remedy to correct this violation of the statute. There is no "clear and valid legislative command" directing federal courts not to recapture unused visas as a means of accomplishing equitable relief. The fact that Congress has in the past enacted legislation recapturing some unused visas does not show that by doing so Congress clearly intended to preclude courts from recapturing the remaining unused visas.

The Government relies on single remark made *en passant* by Senator Hutchinson in April 2005, stating that unused visa numbers "go out of existence and cannot be recaptured except by an act of Congress." Gov't Brief, p. 4, *citing* 151 Cong. Rec. S3887 (daily ed. April 19, 2005). However, the

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Supreme Court has held that "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). In this case, Senator Hutchison's brief remark, citing no authority, does not create "a necessary and inescapable inference" that this Court's power to fashion equitable remedies must be restricted. Senator Hutchison made this brief remark while she was proposing an uncontroversial amendment. The question whether Congress has exclusive authority to recapture unused visa numbers was never an issue or a focus of debate. Therefore, this single remark made in passing by a single legislator is not enough to preclude federal courts from exercising its equitable powers. Instead, as the Supreme Court has stated, "the full scope of [the court's equitable] jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. at 398.

The Defendants also rely on a statement made by the USCIS Ombudsman in the 2008 Annual Report that "[a]bsent special legislation, such as the American Competitiveness in the Twenty-First Century Act, unused visa numbers cannot be reclaimed." Gov't Brief, p. 4, *citing* Docket No. 15-2, p. 63, n. 82. However, that statement is taken out of context. According to Prakash Khatri, the prior USCIS Ombudsman:

> After my departure, the new Ombudsman, in his 2008 Ombudsman Report, stated that absent special legislation, such as the American Competitiveness in the Twenty-First Century Act ("AC21"), unused visa numbers cannot be reclaimed. Where the demand for visa numbers is low and not all visa numbers are used because there are not sufficient applicants, that is correct. Thus, for example, if there are 140,000 EB visa numbers available in a given fiscal year, and there are only 100,000 EB applicants, then the additional 40,000 EB visa numbers cannot be recaptured except through special legislation. However, where the demand for visa numbers exceeds the supply of visa numbers available for a given year, and where the visa numbers available are not used because the agency fails to process applications, a court should order that the unused visa numbers be recaptured. This would be consistent with Congressional intent in ensuring that all eligible applicants for employment based visas should receive available visa numbers.

Declaration of Prakash Khatri, ¶5, attached hereto as Exhibit A.

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It is important to understand the underlying causes of the backlog in the China EB3 category that led to the misallocation of visa numbers in fiscal years 2008 and 2009. During fiscal year 2001 and through December 2004, all of the EB categories were continuously current according to the Visa Bulletin. Because the priority dates for all applicants in the EB categories were current during those years, USCIS could have adjudicated and approved pending adjustment applications without delay. See INA §245(b). The pool of 218,759 unused visa numbers developed because USCIS failed to adjudicate pending applications for adjustment of status even though visa numbers were available. Declaration of Prakash Khatri, ¶8, attached hereto as Exhibit A. Moreover, USCIS had an incentive not to adjudicate pending adjustment applications as a way to generate additional revenue. A person who files an application for adjustment of status must file ancillary applications in order to receive work and travel authorization while the adjustment application is pending. The filing fees associated with these applications increased from $100 (in 2001) to $340 (in 2005), *see* 8 C.F.R. §103.7(a), and an adjustment applicant had to pay these filing fees each year. (INS granted employment authorization and travel authorization in one year increments.) These filing fees resulted in millions of dollars of revenue each year for USCIS. *Id.*, ¶10. By deciding not to adjudicate pending adjustment applications even though the visa numbers were available, USCIS was able to ensure that pending adjustment applicants would have to continue paying hundreds of dollars of filing fees each year to USCIS.

It may be correct that where there have been sufficient visa numbers available to meet demand, and all available visa numbers were not used because of a lack of applicants, then the visa numbers cannot be recaptured in following years. In such circumstances, there were not enough applicants during the fiscal year and so Congress' intent that all available visa numbers should be used if possible was not contravened. However, Congress has always intended that the visa numbers made available each year should be used if there are qualified applicants applying for a visa numbers. There is nothing

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that prevents the court from authorizing the use of unused visa numbers from prior years for the benefit of applicants who were qualified in those years and who would have received those visa numbers if the statute had been followed. That is precisely what the court did in *Silva v. Bell* and *Macetic v. INS*, *supra*.

The Defendants assert that Plaintiffs "cannot state a claim for relief that is not permitted by law". Gov't Brief, p. 5. However, the Defendants cite no statute that prevents a court from recapturing unused visa numbers. This court does have authority to "place plaintiff class members, as near as may be, in the positions they would have occupied but for the [mistaken] policy." *Silva v. Bell*, 605 F.2d at 985, n. 13, *quoting Graves v. Romney*, 502 F.2d 1062, 1064 (8th Cir. 1974), *cert denied*, 420 U.S. 963 (1975) (equitable relief should "restore the plaintiff to the enjoyment of the right which has been interfered with to the fullest extent possible"). This can be done by allocating unused visa numbers from prior years for the benefit of the class members of this lawsuit.

CONCLUSION

As explained above, Plaintiffs believe that this court has the authority to recapture some of the 218,759 employment-based visa numbers that are "available for recapture" from previous years, using the same authority that the court exercised in *Silva v. Bell*. However, if this decides not to recapture visa numbers from prior years, that does not mean that Plaintiff's lawsuit should be dismissed. There are other equitable remedies that this court can employ. First, this court can order that 2,324 employment-based visa numbers from FY 2011 are to be allocated, in priority date order, to applicants in the China EB3 category who should have been allocated visa numbers in FY 2008 or FY 2009.[1] In addition, this court certainly has the power to order that class members shall be granted employment authorization and

[1] In effect, that would put 2,324 class members in the position they would have been in if the statute had been followed. Moreover, there is no prejudice to individuals with pending adjustment applications, since they would also be in the same position that they would have been in if the statute had been followed.

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advance parole without having to pay the filing fee. *See, e.g. Proyecto San Pablo v. DHS*, Case No. 89-456 (D. Az. 2001), Docket No. 385, Judgment and Order, p. 3 (order requiring USCIS to grant class members employment authorization without fee). For all of the foregoing reasons, the Defendants' Motion to Dismiss should be denied.

Dated this *15th* day of *October*, 2010.

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