No. 11-35412

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ZIXIAN LI, et al.,
Plaintiffs / Appellants

v.

UNITED STATES
Defendant / Appellee

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ON APPEAL FROM THE WESTERN DISTRICT OF WASHINGTON

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# OPENING BRIEF OF PETITIONER

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## JURISDICTION

The district court in this case has subject-matter jurisdiction under 28 U.S.C. §1331. After a final decision was issued by the district court on March 16, 2011, the plaintiffs filed a Notice of Appeal to the Ninth Circuit Court of Appeal, which has jurisdiction under 28 U.S.C. §1291. The Notice of Appeal was filed on May 16, 2011, which is timely under Federal Rules of Appellate Procedure, Rule 4(a)(1)(B).

## STATEMENT OF THE ISSUES

This case presents the following issues:

(1) whether the District Court properly determined that Plaintiffs have failed to state an APA claim against U.S. Citizenship and Immigration Services, where Plaintiffs have alleged that USCIS has used immigrant visa numbers for adjustment of status cases in violation of the governing statute and regulations;

(2) whether the District Court has jurisdiction to "recapture" unused immigrant visa numbers from previous years for the benefit of Plaintiffs and proposed class members who, if the governing statute and regulations had been followed, would have been allocated immigrant visa numbers and would have been able to obtain permanent resident status years ago;

(3) whether the District Court has jurisdiction to grant prospective relief to correct continuing usage of immigrant visa numbers in violation of the governing statute and regulations.

## STATEMENT OF THE CASE

Plaintiffs filed this lawsuit on a class action basis challenging the procedures used by the Visa Office of the Department of State and by U.S. Citizenship and Immigration Services in allocating a limited number of immigrant visas each fiscal year. Plaintiffs and the proposed class consist of citizens of China who are eligible for employment-based immigrant visas under the "third preference category" (professionals and other workers). *See* 8 U.S.C. §1153(b)(3). Under the governing statute and regulations, immigrant visa numbers are to be allocated on a "priority date" basis – allocated first to individuals who file their applications first. *See* Section 203(e)(1) of the Immigration and Nationality Act, 8 U.S.C. §1153(e)(1). Plaintiffs allege that during fiscal year 2008 and fiscal year 2009, and continuing to the present, the Visa Office and the USCIS have failed to allocate and use immigrant visa numbers in priority date order, and thus visa numbers have been allocated to individuals other than Plaintiffs and class members when they should have been allocated to Plaintiffs and class members. Plaintiffs and class members would have received immigrant visa

numbers and would have obtained permanent resident status but for the failure of the Visa Office and USCIS to follow the statute and regulations.

The District Court dismissed the Complaint on the grounds that (1) Plaintiffs have not identified any statute violated by USCIS; (2) the District Court has no authority to "recapture" unused visa numbers from previous years for the benefit of individuals who should have received visa numbers but did not receive them because the governing statute and regulations were not followed; and (3) the District Court has no authority to grant prospective relief for the benefit of Plaintiffs and proposed class members. Plaintiffs have filed an appeal from the District Court's dismissal of the Complaint.

## STATEMENT OF THE FACTS[1]

This lawsuit has been filed on behalf of a class of citizens from China seeking permanent resident status based on their unique employment skills. These individuals challenge the manner in which immigrant visa numbers are allocated by the Department of State. Plaintiffs allege that the Visa Office of the Department of State ("VO") and the US Citizenship and Immigration Services ("USCIS") allocated visa numbers during fiscal years 2008 and 2009, and continue to allocate visa numbers, in a manner that is

[1] The facts described in this section are taken from the Complaint, which must be assumed to be true, *see, e.g. Swierkiewicz v. Sorema N. A.*, 534 U.S.

inconsistent with the statute and governing regulations. As a result, plaintiffs and class members have not been able to obtain permanent resident status as they are entitled under the statute, and they are "wait listed" for many years longer than they should be.

Congress allocates a limited number of immigrant visas each fiscal year for individuals seeking to acquire permanent resident status in the United States. For employment-based immigrants, there are approximately 140,000 immigrant visas made available each fiscal year. Employment-based immigrants are divided into five different "preference categories", described in 8 U.S.C. §1153(b)(1)-(5). The class members of this lawsuit all fall under the third preference category ("EB-3"). *See* 8 U.S.C. §1153(b)(3). The EB-3 category includes skilled workers, professional workers, and other workers (unskilled workers). Of the approximately 140,000 immigrant visas made available each fiscal year for the employment category, approximately 40,040 plus unused visas from other categories can be allocated to the EB-3 category.

Of the approximately 40,040 immigrant visas made available each fiscal year in the EB-3 category, no more than approximately 2,500 EB-3

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506, 508, n. 1 (2002), and from the Exhibits submitted to the district court in support of Plaintiffs' Motion for Preliminary Injunction.

visas can be allocated to China. This limit of 2,500 can be increased by virtue of immigrant visas unused in other preference categories.

An immigrant visa number is used up in one of two situations: (1) the U.S. Department of State uses a visa number when it issues an immigrant visa to an individual applying at a U.S. consulate overseas; and (2) USCIS uses a visa number when it approves an application for adjustment of status for a person already in the United States.[2]

Employment-based immigrant visa numbers must be allocated to eligible immigrants in "priority-date order" until the relevant numerical limitation has been met. INA §203(e)(1), 8 U.S.C. §1153(e)(1). [3] In order to control the allocation of visa numbers and ensure that visas are allocated within the numerical limits established each year and in priority date order,

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[2] If an applicant is outside the United States, s/he applies for an immigrant visa by submitting an Application for Immigrant Visa (Form DS-230) to a U.S. consular office overseas. *See* 8 U.S.C. §§1201-1202. If the applicant is inside the United States, s/he applies for an immigrant visa by submitting an Application for Adjustment of Status (Form I-485) to the appropriate USCIS office. *See* 8 U.S.C. §1255. Approximately 90% of immigrant visas numbers are used by USCIS for adjustment of status applications. *See* 2009 USCIS Ombudsman Annual Report, attached to Plaintiffs' Motion for Preliminary Injunction, D.Ct. Docket No. 15-2, p. 67.

[3] In order for an immigrant to be eligible to receive an immigrant visa number, an application for labor certification and a petition to classify the immigrant in the appropriate "preference category" must first be filed. The "priority date" for an immigrant is the date that the application for the labor certification is filed. 20 C.F.R. §656.30(a); 8 C.F.R. §204.5(d).

Congress requires the Department of State to maintain "waiting lists" of applicants; immigrant visa numbers must be allocated in priority date order to the applicants on the waiting lists . INA §203(e)(3), 8 U.S.C. §1153(e)(3).

However, throughout fiscal year 2008 and fiscal year 2009, and continuing to the present, the required waiting lists have not been maintained, and the Department of State and USCIS have used visa numbers for the benefit of applicants not on the waiting lists. Complaint, Excerpts of Record ("ER) p. 2, ¶2; ER 9, ¶35. Prakash Khatri, the USCIS Ombudsman from July 2003 to March 2008, explains:

> USCIS has acknowledged that the reports [provided by USCIS to the Visa Office for purposes of the waiting lists] do not contain an accounting of all pending employment-based I-485 applications since their systems are unable to track all pending I-485 applications in their field offices across the country .... USCIS service centers adjudicate applications for adjustment of status on a first-in-first-out basis, not in strict priority date order and each Service Center and field office will schedule applicants for approval without regard to the priority dates of other pending petitions. ... Thus, an applicant with a later priority date (who should be lower down on the waiting list) will often be adjudicated before an applicant with an earlier priority date (who should be higher up on the waiting list). The USCIS service centers have not adopted any method for processing applications for adjustment of status and for using immigrant visa numbers in priority date order. As a result, applications for adjustment of status are adjudicated out of priority date order and immigrant visa numbers are not used in priority date order.

Declaration of Prakash Khatri, ER 28, ¶10, 12. Because of the way the Defendants use visa numbers, Plaintiffs and class members have not received visa numbers in priority date order as required by statute.

The Defendants acted in violation of the statute by allocating immigrant visa numbers to individuals other than plaintiffs and class members, even though under the statute Plaintiffs and class members were entitled to receive immigrant visa numbers. Complaint, ER 10, ¶38; ER 11, ¶44. In particular, throughout fiscal year 2008 and fiscal year 2009, the Visa Office allocated visa numbers 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, there was sufficient visa demand in the China EB3 category, and the China EB3 limit had not been reached. Individuals in the EB3 category who were not on the waiting list were given immigrant visa numbers and were able to obtain permanent resident status ahead of the class members of this lawsuit, in violation of the requirement that visa numbers be allocated in priority date order. If the Defendants had complied with the relevant provisions of the statute and allocated visa numbers in the manner required by Congress, the Plaintiffs and class members of this lawsuit would have been approved for permanent resident status in fiscal year 2008 or fiscal year 2009. Complaint, ER 2, ¶3.

The district court dismissed Plaintiffs' Complaint, holding that Plaintiffs have failed to identify any statutory provision violated by USCIS; and holding that even if the Department of State violated the statute there is no relief that the court can grant because visa numbers go out of existence at the end of each fiscal year and cannot be recaptured for purposes of equitable relief.

## STANDARD OF REVIEW

The issue of whether a district court has jurisdiction to grant relief is a question of law that is reviewed de novo. *See, e.g. Xue Lu v. Powell*, 621 F.3d 944, 947 (9th Cir. 2010) (court reviews de novo district court's dismissal of complaint for failure to state a claim); *Zheng v. Ashcroft*, 332 F.3d 1186, 1193 (9th Cir. 2003).

## SUMMARY OF THE ARGUMENT

1. The District Court erred in dismissing Defendant USCIS on the grounds that Plaintiffs have identified no statutory provision violated by USCIS. The statute requires that immigrant visa numbers be used in priority date order for applicants who are on the immigrant visa "waiting lists". Specifically: "Immigrant visas made available ... shall be issued to eligible immigrants in [priority date] order", INA §203(e)(1), 8 U.S.C. §1153(e)(1), and "Waiting lists of applicants for visas shall be maintained." INA

§203(e)(3), 8 U.S.C. §1153(e)(3). The regulations implementing the statute also require that immigrant visa numbers must be used for the benefit of applicants on the waiting lists. For example, according to USCIS regulations, an applicant is not eligible for adjustment of status unless "the preference category applicant has a priority date on the waiting list". 8 C.F.R. §245.1(g) (1). Nonetheless, USCIS uses visa numbers out of priority date order for the benefit of individuals not on the waiting lists. In doing so, USCIS violates the governing statute and regulations.

2. The District Court erred in concluding that the statute does not allow the "recapture" of unused visa numbers from previous years for the benefit of individuals who would have received visa numbers if the statute had been followed. The Seventh Circuit approved the recapture of previously unused visa numbers in *Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979). The District Court attempts to distinguish *Silva* on the basis that in *Silva* the Government conceded that it had misallocated visas and as a remedial measure adopted a program that used previously unused visa numbers, whereas in this case the Government has not conceded that it has made any errors. However, that is not a basis for concluding that the district court has no authority to order, as a remedial measure, the use of previously unused immigrant visa numbers. As the Seventh Circuit has recognized,

where the statute and regulations have been violated, the district court has broad authority to grant equitable relief putting plaintiffs in the position they would have been if the statute had been followed. The recapture of previously unused visa numbers is appropriate to correct prior errors because such equitable relief is nowhere prohibited by statute. *See 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").

3. The District Court erred in denying prospective relief. The District Court denied prospective relief on the basis that Plaintiffs have conceded that there are no ongoing violations by the Department of State. However the District Court misread the Plaintiffs' position. Plaintiffs have stated that they do not object to the process by which DOS adjudicates applications for immigrant visas (Form DS-230). But the adjudication of DS-230 applications is distinct from (and occurs after) immigrant visa numbers have been allocated. Although Plaintiffs do not challenge the adjudication of DS-230 applications, Plaintiffs do maintain that the Department of State continues to violate the statute and regulations in allocating immigrant visa numbers to applicants. *See, e.g.* Complaint, ER 2, ¶2; ER 9, ¶35. Several

forms of prospective relief are available to remedy the statutory and regulatory violations, including, for example, prohibiting the Department of State and USCIS from allocating visa numbers to individuals who are not on waiting lists as required by statute and regulation; and requiring USCIS to grant Plaintiffs and class members, while they wait for their immigrant visa numbers, renewals of employment authorization and advance parole documents (travel permission) without fee.

## LEGAL ARGUMENT

### A. STATUTORY AND REGULATORY FRAMEWORK

#### 1. Visas Must Be Issued in "Priority Date" Order.

The Immigration and Nationality Act establishes a system for allocating a limited number of immigrant visas each year according to a "priority system". Immigrant visas are divided into family-based visas and employment-based visas. Approximately 226,000 family-based visas and approximately 140,000 employment based visas are available each year. INA §201(c), (d), 8 U.S.C. §1151(c), (d)). For purposes of this lawsuit, the employment-based visas are relevant.

The approximately 140,000 employment-based ("EB") visas available each year are divided into five preference categories, allocated as follows:

| | Preference Category[4] | # visas |
|---|---|---|
| EB1 | Priority workers (workers with extraordinary ability, outstanding professors and researchers, and multinational executives and managers) | 40,040 |
| EB2 | Persons with advanced degrees or having extraordinary ability | 40,040 |
| EB3 | Skilled workers, professional workers, and other workers | 40,040 |
| EB4 | Special immigrants (including religious workers) | 9,940 |
| EB5 | Investors | 9,940 |
| | TOTAL | 140,000 |

The class members of this lawsuit fall under category EB3, the employment-based third preference category, defined at 8 U.S.C. §1153(b)(3).[5]

Generally - with an exception due to "per country limits" explained below - visas are allocated in this framework strictly in a “priority date” order. According to section 203(e), the immigrant visa numbers that are available in the various preference categories

> **shall be issued** to eligible immigrants **in the order in which a petition in behalf of each such immigrant is filed** with the Attorney General.

[4] The “preference categories” are defined in INA §203(b)(1)-(5), 8 U.S.C. §1153(b)(1)-(5).

[5] The limits described above are the initial visa allocations; the limits can increase depending on the existence of certain events, such as unused visa numbers in other preference categories. Unused visa numbers in the family category in a given year “fall down” into the employment category for the next year. INA §201(d)(2)(C), 8 U.S.C. §1151(d)(2)(C). In addition, unused visa numbers can “fall up” or “fall down” from one preference category to another. *See* INA §1153(b)(1)-(5), 8 U.S.C. §1153(b)(1)-(5).

8 U.S.C. §1153(e)(1) (emphasis added). The date that the "petition in behalf of each such immigrant is filed" is called the immigrant's "priority date".

For individuals in the EB3 category, the first step in obtaining an immigration visa is to obtain a "labor certification" from the Department of Labor (Form ETA 9089) , certifying that there are no U.S. workers available to perform the relevant work. 8 U.S.C. §1182(a)(5)(A). The second step is to obtain an approval from USCIS (Form I-140), confirming that the applicant has the skills necessary to work in the EB3 category. *See* 8 U.S.C. §1154(a)(1)(F). Once the labor certification and Form I-140 have been approved, the applicant is eligible to be allocated an immigrant visa number. 22 C.F.R. §42.52(a), (b). The "priority date" is the date that an application for a labor certification is filed with the U.S. Department of Labor. *See* 8 C.F.R. §204.5(d).

Visa numbers are allocated by the Visa Office on a monthly basis, and under section 203(e) they are to be allocated within each preference category first to individuals with an earlier priority date. For example, if Applicant A and Applicant B are both on the EB3 waiting list and Applicant A has a priority date of January 1, 2004 and Applicant B has a priority date of January 1, 2005, then Applicant A is entitled to obtain an immigrant visa number before Applicant B (assuming that the underlying labor certification

and I-140 petition have been approved, and assuming that their applications for an immigrant visa or for adjustment of status have been properly filed and are documentarily complete). INA §203(e)(1), 8 U.S.C. §1153(e)(1).

**2. Waiting Lists Must Be Maintained.**

In order to ensure that visa numbers are used in priority date order, the statute requires that all applicants must be placed on a "waiting list". INA §203(e)(3), 8 U.S.C. §1153(e)(3). These waiting lists – which include both individuals who will apply for an immigrant visa at a U.S. consular office overseas and individuals who will apply for adjustment of status in the United States – are maintained by the Visa Office of the Department of State; the waiting lists rank applicants by preference category, country of chargeability, and priority date order. The waiting lists give the Department of State the ability to control the usage of visa numbers, ensuring that visa numbers are used in priority date order within the numerical limits established by Congress. 22 C.F.R. §42.51(a).

Department of State regulations require that visa numbers must be allocated only to individuals who are on the waiting list.

> Within [the numerical limits established by Congress], the Department shall allocate immigrant visa numbers for use in connection with the issuance of immigrant visas and adjustments based on the chronological order of the priority dates of visa applicants classified under INA 203(a) and (b) reported by consular

> officers ... and of applicants for adjustment of status as reported by officers of the DHS ....

22 C.F.R. §42.51(b). For individuals applying for an immigrant visa at a U.S. consular office overseas, the process for getting on the waiting list and receiving an immigrant visa is as follows: after the Department of Labor has approved the labor certification and USCIS has approved the I-140 petition for preference category classification (Form I-140), the consular office is notified; the consular office then records the visa category, country of origin, and priority date, and reports that information to the Visa Office by using Form OF-224 for placement on the waiting list. 22 C.F.R. §42.52 and §42.55. When the consular office is subsequently notified by the Visa Office that the priority date for an applicant is current, the consular office notifies the applicant to take the steps necessary to apply for an immigrant visa and appear at the consular office for an interview. 22 C.F.R. §42.54(a).

The Department of State and USCIS regulations do not specify the manner in which adjustment applicants in the United States are to be placed on the waiting lists, although it is clear that an immigrant visa number cannot be used for adjustment of status unless the applicant is on the waiting list. According to Department of State regulations, visa numbers are to be allocated in priority date order to applicants who are overseas applying for an immigrant visa at a consular office and to applicants who are in the

United States applying for adjustment of status. Individuals applying for an immigrant visa are on the waiting list by virtue of having been "reported by consular officers" and individuals in the United States applying for adjustment of status are on the waiting list by virtue of having been "reported by officers of the DHS." 22 C.F.R. §42.51(b).

Moreover, the relevant USCIS regulation states that an applicant is eligible for adjustment of status if "the preference category applicant has a priority date **on the waiting list** which is earlier than the date shown in the [Visa] Bulletin ...." 8 C.F.R. §245.1(g) (emphasis added). Thus, in order for Visa Office to maintain control over the allocation of visa numbers, visa numbers are not to be used for the benefit of applicants (whether applying for an immigrant visa or applying for adjustment of status) who are not on the waiting list required by section 203(e)(3), 8 U.S.C. §1153(e)(3).

In the example described above, Applicant A (with a priority date of January 1, 2004) should appear on the EB3 waiting list above Applicant B (with a priority date of January 1, 205). If, for example, 3,400 visas are allocated in the EB3 category in a given month, then the Visa Office establishes a "cut-off date" on the waiting list at the 3,400$^{th}$ applicant; the 3,400 applicants above the line are (if otherwise eligible) allocated an immigrant visa number to be used for an immigrant visa (if they are

overseas) or for adjustment of status (if they are in the United States).[6] All of the applicants below the cut-off line are must wait for another month to obtain an immigrant visa number.[7] If Applicant A is above the cut-off line and Applicant B is below the cut-off line, then Applicant A should be allocated an immigrant visa number and Applicant B will have to wait until more visa numbers are available.

The cut-off date does not advance evenly from month to month, and may actually retrogress from one month to the next. According to Palma Yanni, former President of the American Immigration Lawyers Association who has testified before Congress concerning the visa backlog problem, this occurs because of backlogs and irregularities in the processing times for the underlying applications. Sometimes, the Department of Labor and/or USCIS may process the underlying applications rapidly, and thus the applicant may be able to get on the DOS waiting list quickly. For other applicants, the underlying applications may be processed slowly, and so

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[6] Although an applicant for adjustment of status does not receive an immigrant visa, the applicant does use an immigrant visa number, which reduces by one the number of immigrant visas available for the fiscal year. INA §245(b), 8 U.S.C. §1255 (b).

[7] An applicant above the cut-off line does not automatically obtain the immigrant visa. An interview may be scheduled, and if it appears that the applicant is not admissible to the United States under INA §212(a), 8 U.S.C. §1182(a), the immigrant visa or adjustment of status may be denied.

those applicants get on the DOS waiting list much later even though they have an earlier priority date. When those applicants finally get on the waiting list, they will be placed ahead of other applicants with later priority dates who happened to get on the waiting list earlier because of the irregularities in USCIS processing times. If in a given month enough individuals are placed higher on the waiting list, then the cut-off date will retrogress the next month. Thus, even if Applicant B is near the top of the waiting list one month, he may not be able to obtain an immigrant visa number the next month if too many applicants with earlier priority dates get on the waiting list. In some cases, the cut-off date retrogresses and it is months or even years before the applicant gets back to the top of the waiting list again. *See* Declaration of Palma Yanni, ER 22, ¶2; ER 24, ¶8.

**3. Per-Country Limits.**

In order to ensure that no one country captures all or most of the immigrant visa numbers available each year, the statute establishes per-country limits. According to 8 U.S.C. §1152(a)(2), there is a per-country limit of 7% of the total number of visas available each year. Thus, (subject to certain exceptions) no country can receive more than a total of approximately 9,800 employment-based visas (7% of 140,000). If the demand for immigrant visas from that country is greater, then the country is

"oversubscribed" and not all of the applicants from that country will be able to obtain visas; some will have to wait until the next year.

Currently, there are four countries that are oversubscribed and subject to per-country limits: China, India, Mexico, and the Philippines. The visa numbers allocated to these countries are allocated, to the extent possible, on a pro rata basis among the various EB-categories. INA §202(e), 8 U.S.C. §1152(e). Thus, assuming a total of 140,000 EB visas for the year, the initial allocation to over-subscribed countries is as follows:

| | China[8] | India | Mexico | Philippines |
|---|---|---|---|---|
| EB1 | 2,800 | 2,800 | 2,800 | 2,800 |
| EB2 | 2,800 | 2,800 | 2,800 | 2,800 |
| EB3 | 2,500 | 2,800 | 2,800 | 2,800 |
| EB4 | 700 | 700 | 700 | 700 |
| EB5 | 0 | 700 | 700 | 700 |
| TOTAL | 8,800 | 9,800 | 9,800 | 9,800 |

These are the initial minimum number of visa numbers to be made available in each category; the initial limits can be and normally are increased each year by virtue of unused visa numbers in other categories. [9]

[8] The Chinese Student Protection Act, Pub. L. 102-404 (October 9, 1992), requires that the China annual limit be reduced by 1,000. A total of 300 numbers are deducted from the EB3 category and 700 from the EB5 category.

**4. Monthly Visa Bulletin.**

In order to ensure that visa numbers are used within the limits established by Congress and are made available in priority date order, the "waiting lists" required under section 203(e)(3) group applicants by preference category, country of chargeability, and priority date order. Each month the Visa Office determines how many visa numbers should be allocated for each preference category and for each oversubscribed country for the following month, and then establishes a "cut-off date" for each category and for each oversubscribed country. The "cut-off dates" are published in the Department of State Visa Bulletin, issued on or about the 15th of each month for the upcoming month. Beginning on the first day of the next month, immigrant visa numbers are used by consular offices overseas and by USCIS offices in the United States for the benefit of applicants with a priority dates earlier than the established cut-off date.

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[9] If an oversubscribed country does not reach its family-based immigration quota, then the unused family-based numbers can be used to increase the employment-based limits. INA §202(a)(2), 8 U.S.C. §1152(a)(2). In addition, an oversubscribed country is permitted to exceed its limit in a preference category if, in a given quarter of the fiscal year, the worldwide demand in that category is less than the worldwide limit. INA §202(a)(5)(A), 8 U.S.C. §1152(a)(5)(A). Any visas still unused in that preference category, after visas have been made available for all eligible applicants in that category, "fall down" into the next preference category. INA §203(b)(3), 8 U.S.C. §1153(b)(3).

By way of example, a copy of the Visa Bulletin for May 2008 is attached in the Excerpts of Record. ER 17. The cut-off dates for May 2008 for the EB3 category were established as follows:

| May 2008 Visa Bulletin | Worldwide | China | India | Philippines | Mexico |
|---|---|---|---|---|---|
| EB3 | Mar 1, 2006 | Mar 22, 2003 | Nov 1, 2001 | July 1, 2002 | Mar 1, 2006 |

Thus, for the month of May 2008, for EB3 applicants from countries other than China, India, Philippines and Mexico, visa numbers were made available for applicants who were on the waiting list with priority dates before March 1, 2006. On the other hand, visa numbers were made available to applicants from China only if they had a priority date before March 22, 2003. For example, an applicant from a non-over-subscribed country with a priority date of January 1, 2005 would have been allocated an immigrant visa number, while an applicant from China with a priority date of January 1, 2004 would not have been allocated an immigrant visa number, even though the applicant from China had the earlier priority date.

**B. MISALLOCATION OF IMMIGRANT VISA NUMBERS.**

Assuming that the waiting lists are accurate and visa numbers are allocated only for applicants on the lists, the appropriate number of visas will be allocated to applicants in the various preference categories in priority date order, up to the limits established by Congress. The problem, however,

is that the waiting lists are not an accurate listing of all applicants who use immigrant visa numbers. The Visa Office and USCIS use visa numbers for applicants who are not on the waiting list. Declaration of Palma Yanni, ER 23, ¶6 ("Historically, CIS has not been able to provide and has not provided accurate information to the Visa Office concerning the number of I-485 applications that it expects to adjudicate during any given month or quarter, and concerning the number of immigrant visas that it expects to use during any given month or quarter.") Because, contrary to statute and regulations, the Visa Office and USCIS use visa numbers for applicants who are not on the waiting lists, visa numbers are not used in priority date order.

USCIS does not report an applicant for the waiting list until the time the application for adjustment of status is adjudicated. At that time, if the priority date listed in the most recent Visa Bulletin is not current, then the applicant will be reported to the Visa Office to be put on the waiting list. However, if the priority date is current, then the application will be approved and a visa number will be used even though the applicant was never placed on the waiting list. Declaration of Palma Yanni, ER 23, ¶7. According to Prakash Khatri, the USCIS Ombudsman, approximately 81% of visa number usage in the EB3 category has been by USCIS for adjustment of status applicants. Declaration of Prakash Khatri, ER 26, ¶6. USCIS has no

adequate system for keeping track of all employment-based applications, and uses visa numbers for applicants even though they are not on the required waiting lists. *Id.*, ER 27-28, ¶¶9-10. "USCIS's haphazard method of accounting for pending applications ... prevents the Visa Office from knowing how many visa numbers will be used by USCIS in any given month." *Id.*, ER 28-29, ¶13

Moreover, even if applicants are on the waiting lists, USCIS has no system for adjudicating applications in priority date order. Khatri Declaration, ER 28, ¶11. Applications for adjustment of status are adjudicated at two USCIS service centers and over 70 USICS field offices. Khatri Declaration, ER 27, ¶8. The different USCIS offices have different processing times, and while one office may be adjudicating adjustment applications one month, another office may not adjudicate adjustment applications for months even though the applicants at that office have earlier priority dates.

> The variations in CIS processing times cause visa numbers to be allocated out of priority date order. ... CIS has undertaken no efforts to ensure that there is consistent and uniform processing of these applications. If the cutoff dates retrogress, then it may be months or even years before the first applicant [higher on the waiting list] is allocated a visa number and is able to obtain permanent residence.

Yanni Declaration, ER 24, ¶8. *See also* Khatri Declaration, ER 28, ¶12. As a result, "USCIS's usage of employment based immigrant visa numbers has

not been in a manner consistent with the intent of the law which requires assigning visa numbers based on the priority date." *Id.*, ER 26, ¶6.

Government reports of visa allocations for fiscal year 2008 and fiscal year 2009 confirm that immigrant visas have been allocated out of priority date order. The following chart, based on DOS reports,[10] shows the per-country limits initially established and how many EB3 visas were actually allocated for those years. The chart shows that during FY 2008 and FY 2009 China was allocated at least 2,324 fewer visa numbers than its limit.[11]

| EB3 | | China | India | Philippines | Mexico | Worldwide TOTAL |
|---|---|---|---|---|---|---|
| FY 2008 | EB3 limit | 2,957 | 3,257 | 3,257 | 3,257 | 46,533 |
| | # used | 2,058 | 3,747 | 6,156 | 5,336 | 47,204 |
| | shortfall | 899 | 0 | 0 | 0 | 0 |
| FY 2009 | EB3 limit | 2,502 | 2,802 | 2,802 | 2,802 | 40,040 |
| | # used | 1,077 | 2,306 | 5,540 | 4,566 | 39,791 |
| | shortfall | 1,425 | 496 | 0 | 0 | 249 |

[10] *See* Department of State Visa Bulletins and Department of State Reports, D.Ct. Docket No. 15-2, pp. 14, 34, 40, 47.

[11] In actual fact, the shortage was much higher. As explained above, the initial limits can be increased, and in fact the limits should have been increased in FY 2008 and FY 2009 for the China EB3 category. For example, in FY 2009, China used only 11,246 family visas out of its limit of 15,820. *See* Department of State, Report of the Visa Office 2009, D.Ct. Docket No. 15-2, p. 45. The 4,574 unused family visa numbers increase the China EB limits, *see* INA §202(e), and because China did not need these visa numbers in other EB categories, *see* INA §202(a)(5)(A), they were available to increase the EB3 limit.

This shortage occurred even though the China EB3 category was oversubscribed. In other words, during fiscal years 2008 and 2009 immigrant visa numbers were allocated to individuals from countries other than China out of priority date order; there were individuals from other countries who used an immigrant visa number even though individuals from China were higher on the waiting list.

The "haphazard" manner in which visa numbers were used caused another violation of the statute that harmed Plaintiffs and class members. Section 201(a)(2), 8 U.S.C. §1151(a)(2), requires that no more than 27% of the visa numbers available in any year can be used in any given quarter. However, shortly before April 2009, USCIS used so many EB3 visa numbers that the entire EB3 quota for FY 2009 was used up by the end of April 2009. Consequently, the EB3 visa numbers were unavailable for last five months of FY 2009. *See* Visa Bulletin for May 2009, D.Ct. Docket No. 15-2, pp. 31, 33. Similarly, in the months before May 2008, USCIS used up all of the available EB3 visa numbers for the fiscal year, and EB3 visa numbers were unavailable for July to September 2008. *See* Visa Bulletin for July 2008, D.Ct. Docket No. 15-2, pp. 7, 9. These violations of section 201(a)(2) occurred because USCIS used visa numbers for individuals not on

the waiting lists, and as a result the Visa Office lost control of visa number usage.

### C. THE DISTRICT COURT'S DECISION

The District Court dismissed Plaintiffs' Complaint for the following reasons. First, as to the Complaint against USCIS:

> [Plaintiffs] have not cited any statutory authority requiring USCIS to participate in the establishment of cut-off dates or the maintenance of waiting lists. Thus, Plaintiffs have failed to state an APA claim against USCIS ....

District Court Order, pp. 5-6, ER 34-35. As to the Department of State, the District Court held that it lacks authority to grant either retrospective relief or prospective relief. Concerning retrospective relief:

> [T]o the extent that visa numbers were allocated improperly in fiscal years 2008 and 2009, those numbers cannot be recaptured and then reallocated at this time.

District Court Order, p. 6, ER 35. Concerning prospective relief:

> Prospective relief is not possible because the court will not disturb the State Department's process by which it allocates visa numbers, particularly given that the Plaintiffs have clarified that they do not challenge that process.

District Court Order, p. 8, ER 37. As explained below, the reasons for dismissing the Complaint are all incorrect.

**1. The District Court Erred in Dismissing USCIS.**

The District Court's decision dismissing the Complaint as against USCIS is predicated on the finding that there is no statute that requires USCIS to use waiting lists, and therefore USCIS violates no statute when it uses visa numbers for the benefit of adjustment applicants outside the priority date order on the waiting lists.

In the first place, even assuming arguendo that there has been no statutory violation, USCIS has violated the regulations implementing the statute. According to 8 C.F.R. §245.1(g)(1), an applicant is not eligible for adjustment of status unless "the preference category applicant has a priority date on the waiting list". When USCIS uses visa numbers for applicants who are not on the waiting list, it violates 8 C.F.R. §245.1(g)(1), and an agency's violation of the governing regulations is actionable just as well as a violation of the governing statute. *See, e.g. Accardi v. Shaughnessy*, 347 U.S. 260, 265-266 (1954) ("[r]egulations with the force and effect of law supplement the bare bones of [the statute]"; district court has jurisdiction where the regulations "prescribe the procedure to be followed" and those procedures are alleged to have been violated); *Wong v. Department of State*, 789 F.2d 1380 (9th Cir. 1986) (district court has jurisdiction where, even though the statute grants broad authority to revoke a visa, the consular

officer "had no authority under the governing regulation to revoke the visas").

But in any event, as explained above, USCIS does violate the statute when it uses visa numbers for the benefit of adjustment applicants who are not on the waiting lists in priority date order. The statute explicitly requires that USCIS must, in approving adjustment applications, use the visa numbers that are "authorized to be issued under sections 202 [8 U.S.C. §1152] and 203 [8 U.S.C. §1153]". And section 203 authorizes visa numbers to be used only on the basis of waiting lists of applicants for visas. INA §203(e)(3), 8 U.S.C. §1153(e)(3). The statute specifically states: "Immigrant visas made available ... shall be issued to eligible immigrants in [priority date] order", INA §203(e)(1), 8 U.S.C. §1153(e)(1), and "Waiting lists of applicants for visas shall be maintained." INA §203(e)(3), 8 U.S.C. §1153(e)(3). If there was any doubt about the meaning of the statutory framework, that doubt is put to rest by the implementing regulations, which provide that an applicant for adjustment of status is not eligible unless he or she "has a priority date on the waiting list". 8 C.F.R. §245.1(g) (1).

The District Court suggests that in deciding whether USCIS has violated the statute, Plaintiffs cannot rely on "the overall structure" of the statute to determine USCIS's duties. District Court Order, p. 5, ER 34, n. 2,

*citing Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 891 (1990). However, nothing in *Lujan* precludes reliance on "the overall structure" in determining how particular provisions of a statute should be understood. To the contrary, it is beyond cavil that in discerning the meaning of a statute, the overall structure and context of the particular provision is very relevant. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning ... of certain words or phrases may only become evident when placed in context.").

*Lujan* does require that the plaintiff identify a "particular agency action" that violates the statute. But here, Plaintiffs have done so: USCIS has used visa numbers for the benefit of adjustment applicants who are not on the waiting lists; and furthermore even where applicants are on waiting lists USCIS has adjudicated adjustment applications out of priority date order. These actions violate the statutory requirement that visa numbers be used (whether by the Department of State for immigrant visas or by USCIS for adjustment applications) in priority date order. Even assuming arguendo that this statutory requirement becomes clear only by reading §203(e) in light of the overall statutory structure and in light of the implementing

regulations, that does not make the requirement any less a statutory requirement.

Thus, the District Court erred when it dismissed USCIS on the grounds that there is no statutory authority requiring USCIS to participate in the waiting list procedure.

**2. The District Court Has Authority to "Recapture" Previously Unused Visa Numbers.**

The District Court concludes that it has no power to correct the violations of law that have occurred because the Court cannot "recapture" unused visa numbers from previous years. Plaintiffs submit that the District Court's conclusion is incorrect.

Where a statute has been violated, courts undoubtedly have broad authority to grant equitable relief in order to rectify the wrong. *See, e.g. Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) ("[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies"). In particular, a federal court "does have the power to require the Executive to carry out Congress' commands." *Iddir v. INS*, 301 F.3d 492, 500 (7th Cir. 2002). The Supreme Court has "frequently articulated the great principle of public policy, applicable to all governments alike, which forbids that the public interest should be prejudiced by the

negligence of the officers or agents to whose care they are confided." *Brock v. Pierce County*, 476 U.S. 253, 260 (1986).

In this case, visa numbers – which would have been allocated to Plaintiffs and class members if the statute had been followed – were allocated to other individuals out of priority date order and in violation of statutory and regulatory requirements. Recapturing those visas is not prohibited by statute. Indeed, that is precisely what was done in the *Silva* case. *See Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979).[12]

In *Silva v. Bell*, the Seventh Circuit approved class wide relief to correct the misallocation of visa numbers that had occurred during the years 1968 to 1976. By 1976, 144,999 immigrant visa numbers had been mistakenly allocated to Cuban refugees rather than immigrants from other Western Hemisphere immigrants. In other words, there were 144,999 individuals from the Western Hemisphere who should have been granted immigrant visa numbers but did not receive the visa numbers because of the mistakes made in allocating visas. 605 F.2d at 979-982. The Immigration Service acknowledged the mistake and adopted a program to reallocate

[12] The *Silva* court noted that in a related case, *Zambrano v. Levi*, Case No. 76-C-1456 (N.D. Ill.), the 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.

unused visa numbers from previous years to the individuals who should have received visa numbers. The Seventh Circuit recognized that the visa allocation mistakes had injured class members "by delaying the processing of their visas", 605 F.2d at 983, and adopted a program to recapture and reissue wrongfully issued visa numbers. The relief was designed to "place plaintiff class members, as near as may be, in the positions they would have occupied but for the [mistaken] policy." 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").

The District Court argues that *Silva* is distinguishable because in that case the Immigration Service acknowledged that a mistake had been made and designed a plan to recapture the previously unused visa numbers, whereas in this case the Defendants have not conceded any error and have not undertaken any efforts to recapture the unused visa numbers. District Court Order, p. 7, ER 36. But that surely is not a basis for concluding that the District Court lacks jurisdiction to order relief for the benefit of the injured Plaintiffs and class members. If the government has authority, acting on its own initiative, to recapture unused visa numbers in order to correct

prior misallocations, then surely a district court can order the government to do the same. Where a statute has been violated, a district court has broad equitable powers to order relief that restores the plaintiffs to the position they would have been in had the statute been followed – unless providing such equitable relief would violate the statute. *See, e.g. Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971) ("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"). As *Silva* makes clear, recapturing visa numbers that were unused in previous years is not prohibited by statute.[13]

[13] The District Court also mentions that Representative Hutchinson remarked in April 2005, stating that unused visa numbers "go out of existence and cannot be recaptured except by an act of Congress." D.Ct. Order, p. 6, ER 35, *citing* 151 Cong. Rec. S3887 (daily ed. April 19, 2005). However, the 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 the district court has no power to fashion equitable remedies. Representative 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 District Court also argues that recapture of visa numbers is not permissible in light of *Iddir v. INS*, 301 F.3d 492, 500 (7th Cir. 2002), which held that the Immigration Service lacks the power to issue visa numbers to the plaintiffs in that case after the end of the fiscal year. However, in *Iddir* the plaintiffs were seeking immigrant visa numbers under the diversity lottery program, INA §203(c), 8 U.S.C. §1153 (c). The Seventh Circuit held that the problem with granting relief for the plaintiffs was not that the court lacked power to recapture immigrant visas. In fact, the court indicated that a district court does indeed have such power. *See* 301 F.3d at 501, n. 2 ("Allowing the INS to claim inability to issue visas at that point would impinge on the authority of the court"); *id*. at 500 (a federal court "does have the power to require the Executive to carry out Congress' commands"). The Seventh Circuit also cited with favor *Paunescu v. INS*, 76 F.Supp. 2d 896 (N.D. Ill. 1999), which specifically held that it has the authority to "order[] the INS and the State Department to procure visa numbers after the end of a fiscal year." *See* 76 F.Supp. at 902-903.

In *Iddir*, the court held that plaintiffs could not be granted relief because of 8 U.S.C. §1154(a)(1)(I)(ii), a special statutory provision that applies only to the diversity lottery program. This provision states that applicants in the diversity lottery system remain eligible for a visa number

only "through the end of the specific fiscal year for which they were selected.". Because there is no similar provision with respect to individuals applying for employment-based immigrant visas, there is therefore no reason why the District Court cannot recapture unused visa numbers from prior years and use those visa numbers for the benefit of the Plaintiffs and class members of this lawsuit.

**3. The District Court Has Authority to Grant Prospective Relief.**

The District Court concluded that prospective relief is not possible because Plaintiffs have stated that they do not challenge the process by which the Department of State is currently allocating visa numbers. District Court Order, p. 8, ER 37, *citing* Plaintiffs' Opposition to Motion to Dismiss, D.Ct. Docket No. 30, at p. 4:3-4. Here, the District Court has misread the Plaintiffs' position. What Plaintiffs stated is the following:

> Plaintiffs are not objecting to the process by which DOS adjudicates applications for immigrant visas. That is something that happens **after** the cutoff dates are established each month in the Visa Bulletin.

To clarify: Plaintiffs are not objecting to the Department of State's adjudication of applications for immigrant visas. After visa numbers have been allocated, an applicant who is outside the United States must apply for an immigrant visa on form DS-230, and that application is adjudicated by the consular office overseas. Even though an applicant has been allocated a

visa number and is therefore eligible to apply for the immigrant visa, the consular office may refuse to grant the immigrant visa under INA §212(a), 8 U.S.C. §1182(a) (for example because the applicant has a disqualifying criminal conviction). Plaintiffs do not object to the Department of State's adjudication of the DS-230 forms.

But Plaintiffs do object to the process by which the Department of State allocates visa numbers. Plaintiffs maintain that, in allocating visa numbers, the Department of State has in the past violated the governing statute and regulations, **and continues to do so**. *See, e.g.* Complaint, ER 2, ¶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"); ER 9, ¶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)) (emphasis added). Thus, the District Court is simply incorrect in its assertion that Plaintiffs do not challenge the process by which the Department of State currently allocates visa numbers.

For purposes of the Motion to Dismiss, it must be assumed that the Defendants have violated the statute in the past and that they continue to do

so.[14] Under these circumstances, Plaintiffs submit that the District Court has authority to grant prospective relief to remedy the unlawful conduct of the agency. In particular, the District Court can grant prospective relief including the following:

(1) prohibiting the Department of State and USCIS from allocating visa numbers to individuals who are not on waiting lists as required by statute and regulation;

(2) prohibiting USCIS from granting adjustment of status out of priority date order;

(3) requiring that the Defendants make public, on an ongoing monthly basis, copies of the waiting lists required under the statute and reports concerning the actual usage of immigrant visa numbers, so that Plaintiffs and class members can monitor visa allocation;

(4) requiring USCIS to grant, for the benefit of Plaintiffs and class members, renewals of employment authorization and advance parole documents (travel permission) without fee while such individuals wait for an immigrant visa number.

There is no reason why the District Court cannot grant such relief.

## CONCLUSION

For the foregoing reasons, the District Court's Order dismissing the Plaintiffs' Complaint should be reversed.

[14] *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1 (2002) (when the court reviews a motion to dismiss, "we must accept as true all of the factual allegations contained in the complaint").

Dated this *22nd* day of *September*, 2011.

*/s/ Robert Pauw*
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## Certificate of Compliance

Pursuant to Local Rule 32 of the Rules of this Court, counsel for petitioner states that this brief is proportionally spaced using 14-point Times New Roman and contains not more than 8400 words.

*/s/ Robert Pauw* .
Robert Pauw
Attorney for Appellant

## Statement of Related Cases

Pursuant to Local Rule 28-2.6 of the Rules of this Court, counsel for petitioner states that he is not aware of any related cases pending in this Circuit.

*/s/ Robert Pauw* .
Robert Pauw
Attorney for Appellant

## CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2011, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/ Robert Pauw* .