

No. 11-35412

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ZIXIAN LI, et al.,
Plaintiffs / Appellants

v.

UNITED STATES
Defendant / Appellee

ON APPEAL FROM THE WESTERN DISTRICT OF WASHINGTON

REPLY BRIEF OF PETITIONER

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FACTUAL BACKGROUND

As explained in Plaintiff’s Opening Brief, the statute and regulations require that an applicant cannot be allocated an immigrant visa number unless s/he appears on a “waiting list”. According to the statute: “Waiting lists of applicants for visas under this section **shall be maintained**” INA §203(e)(3), 8 U.S.C. §1153(e)(3). According to the regulations that implement this provision, immigrant visa numbers are allocated in “priority date order” to individuals who have been reported to the Visa Office for placement on the waiting list. 22 C.F.R. §42.51(b). USCIS regulations provide that an individual is not eligible for adjustment of status unless his or her name has been placed on the Department of State waiting list:

An alien is ineligible for the benefits of section 245 of the Act unless ... **[the 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). In this way – by requiring that applicants cannot receive an immigrant visa number unless they have been placed on the waiting list – the Visa Office maintains control over the use of immigrant visa numbers and ensures that immigrant visa numbers are allocated in priority date order.

For example, the monthly allocation of immigrant visa numbers in the employment-based third preference category (“EB3 category”) is

approximately 3,400. In order to ensure that immigrant visa numbers are allocated in priority date order, the Visa Office, by setting the appropriate “cut-off dates” for persons on the waiting list, allocates visa numbers to the first 3,400 individuals appearing on the EB3 waiting list.¹ In this way, the Visa Office ensures that no more visa numbers than the statutory limit are allocated during the month, and ensures that the visa numbers are allocated in priority date order.²

¹ For example, for May 2008 the allocation based on per-country limits, would have been approximately 210 visa numbers for China; approximately 230 for each of India, Mexico and the Philippines; and approximately 2,500 for applicants from the rest of the world. Visa numbers are allocated by specifying the “cut-off” dates in the Visa Bulletin. *See* Opening Brief, pp. 20-21. Individuals who have a priority date later than the cut-off date specified in the Visa Bulletin are not be eligible to receive an immigrant visa during that month and must wait until a later date for visa availability.

² In practice, not all of the 3,400 applicants will actually receive visas. After a visa number is allocated, the applicant must come in for an interview with the appropriate documents proving eligibility. Some individuals may not show up for the interview, or may be slow in obtaining the necessary supporting documents, or may turn out not to be eligible for a visa, for example because of a criminal record. Thus, in practice the Visa Office allocates more than the monthly limit of 3,400, based on historical trends showing how many applicants have been rejected, knowing that not all of the visa numbers will actually be used. This practice is permitted under INA §203(g), 8 U.S.C. §1153(g), which provides:

[T]he Secretary of State may make reasonable estimates of the anticipated numbers of visas to be issued ... and rely upon such estimates in authorizing the issuance of visas.

Plaintiffs allege – and Defendants do not dispute – that immigrant visa numbers have been allocated to individuals not on the waiting lists. In fact, during FY 2008 and FY 2009, thousands of visa numbers were allocated and used by individuals not on the waiting lists. In the spring of 2009, so many visa numbers were allocated to individuals not on the waiting lists that 100% of the EB3 quota was used up by the end of April 2009, and no EB3 visa numbers were available for the last five months of FY 2009. *See* Visa Bulletin for May 2009, District Court Docket No. 15-2, pp. 31, 33 (visa numbers unavailable for the EB3 category because “the amount of demand from Citizenship and Immigration Services Offices for adjustment of status cases with priority dates that were significantly earlier than the established cut-off dates remained extremely high”). The lack of control thus resulted in a violation of INA §201(a)(2), 8 U.S.C. §1151(a)(2) (no more than 27% can be used in any given quarter).

In addition, during this time period immigrant visa numbers were allocated to EB3 applicants from countries other than China with priority dates in February 2006, even though there were thousands of EB3 applicants from China who had priority dates before February 2006 (including, for example, Plaintiffs Zixiang Li (priority date of March 21, 2005) and Plaintiff Jun Guo (priority date of September 29, 2003)). Thus, immigrant visa

numbers were allocated in violation of INA §203(e)(1), 8 U.S.C.

§1153(e)(1) (immigrant visa numbers must be allocated in priority date order).

The Defendants assert that the overuse of immigrant visa numbers and usage of visa numbers out of priority date order occurred because of three developments: (1) in February 2008 USCIS adopted a policy of allowing approval of an application for adjustment of status without an FBI name check if USCIS's request for a name check had been pending for more than 180 days; (2) in December 2007 Congress appropriated an additional \$20 million to USCIS and the FBI to clear up the backlog of cases in name check delays; and (3) in FY 2008 and FY 2009, USCIS hired a "significant number of new adjudicators" to clear up the backlog. Defendants' Answering Brief, p. 13, n. 5. That may or may not be so. But it misses the point. Whether or not Congress allocated money for new adjudicators to adjudicate a lot of employment-based applications, Congress did not amend §201(a)(2) or §203(e). The Defendants were required to comply with the statute and the regulations, and they failed to do so.

LEGAL ARGUMENT

1. The claims of class members are not moot. Although the argument is not entirely clear, the Defendants appear to argue that this case is moot as

to all class members because, even assuming that visa numbers were allocated in violation of law during FY 2008 and FY 2009, once those years have passed there is no way the violations can be remedied. *See* Gov't Brief, pp. 20-21. That argument has no merit. For purposes of the Government's motion to dismiss, it is undisputed that the violations of law that occurred in FY 2008 and FY 2009 continue to the present. *See, e.g.*, Complaint, ER 2, ¶2; ER 9, ¶35; ER 12, ¶45; *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1 (2002) (for purposes of motion to dismiss, facts in the Complaint are assumed true). Thus, the issue is not moot. The plaintiffs seek an order from the court enjoining ongoing violations of the law.

The Government has a "heavy burden" of persuading the court that the challenged conduct cannot reasonably be expected to occur again. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000). *See also Federal Trade Commission v. Affordable Media*, 179 F.3d 1228, 1238 (9th Cir. 1999) (where the defendants voluntarily cease their activities after the lawsuit is filed, an action is not moot if the defendants would be free to return to their wrongful activities if the injunctive relief is not granted). In this case, the wrongful conduct complained of continues to the present day. The Government in this case offers no assurance that it will discontinue its policy of allocating visa numbers to individuals not on the waiting lists and

out of priority date order. The Government is simply incorrect when it argues that the controversy in this lawsuit is moot.

2. Plaintiffs have standing. The Government apparently argues that Plaintiffs do not have standing because the injuries that Plaintiffs suffered during FY 2008 and FY 2009 cannot be remedied. According to the Government, in order for a plaintiff to have standing the injury suffered must be able to be significantly redressed by a favorable decision, Gov't Brf, pp. 19-20, and in this case the court "would not be able to grant Plaintiffs any meaningful relief because the visa numbers for [FY 2008 and FY 2009] have already been used." Gov't Brf, p. 21. Visa numbers made available in one year, the Government argues, cannot be "recaptured" and used in a succeeding year. Gov't Brf, pp. 23-26.

According to the USCIS Ombudsman, there are over 159,000 immigrant visa numbers that Congress made available during the years 2001 to 2006 that were never allocated. *See* USCIS Ombudsman, "Annual Report to Congress" (June 2007), p. 34 (District Court Docket No. 15-2, p. 56). Contrary to what the Defendants assert, there is nothing in the Immigration and Nationality Act that prohibits a court from using unused visa numbers to remedy an unlawful misallocation of visa numbers. Indeed, that is exactly what was done in *Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979)

(approving the use of unused immigrant visa numbers from the years 1968 to 1976 to correct prior misallocations of visa numbers).

The Defendants assert that visa numbers from previous years cannot be “recaptured” because there are no exceptions to the statutorily created limits on visa numbers. Gov’t. Brf, p. 23. The statute states the following:

Aliens subject to the worldwide level specified in section 201(d) [approximately 140,000] for employment-based immigrants in a fiscal year shall be allotted visas as follows:

* * * *

(3) Skilled workers, professionals, and other workers

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level ...[i.e. approximately 40,040] to the following classes of aliens ... [skilled workers, professionals, and other workers].

INA §203(b), 8 U.S.C. §1153(b). Thus, according to the statute as written, each year there are approximately 140,000 employment-based immigrant visa numbers that Congress has made available. INA §201(d)(1); 8 U.S.C. §1151(d)(1). Of those 140,000 visa numbers, approximately 40,040 visas “shall be made available” each year for EB3 applicants. There is nothing in the statute that says these 40,040 visa numbers cannot be used after the end of the fiscal year or that they somehow go out of existence at the end of the fiscal year. With respect to the relief Plaintiffs are seeking, a district court can order that visa numbers that were made available during the years before (or after) FY 2008 or FY 2009 and that were never used can be allocated to

Plaintiffs to remedy the statutory violations that occurred in FY 2008 and FY 2009. Doing so would not violate any limit established by Congress.

The Defendants argue that *Silva* “is not persuasive” because in that case the Government “designed and subsequently restructured a program to recapture and reissue mis-allocated visa numbers”. Gov’t Brf, p. 27. Thus, according to the Government’s argument, the Seventh Circuit did not order the Government to “recapture” unused visa numbers, but only affirmed the Government’s decision to recapture and reissue the visa numbers. But that is a distinction without a difference. The Seventh Circuit would not have authorized the recapture of prior unused visa numbers if such relief was prohibited by statute, since it is well established that a court cannot grant equitable relief if the statute prohibits such relief. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (“[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction”); *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-398 (1946) (“[u]nless 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”). The fact that the Seventh Circuit authorized the recapture and

use of unused visa numbers is persuasive authority that such a remedy does not violate any statutory limit imposed by Congress.

In fact, the statute presupposes that applicants for permanent residence can receive and use a visa number that was made available in a prior year. Visa numbers made available in one fiscal year can, in general, be used in another fiscal year. However, there is an exception: the statute prohibits such use for individuals applying for permanent residence through the diversity lottery system.³ Specifically, section 204(a)(1)(I) states:

Aliens who qualify, through random selection, for a visa under section 203(c) [the diversity lottery program] shall remain eligible to receive such visa only through the end of the specific fiscal year for which they were selected.

INA §204(a)(1)(I)(ii)(II), 8 U.S.C. §1154(a)(1)(I)(ii)(II). In other words, visa numbers made available for the diversity lottery program in one fiscal year can be used only during that fiscal year; the visa numbers for the diversity lottery program cannot be used after the end of that fiscal year. If in general visa numbers went out of existence or could not be used after the end of the fiscal year, as Defendants maintain, then this provision in §204(a)(1)(I) would be superfluous; there would have been no need for

³ The diversity lottery system, created by the Immigration Act of 1990, allows for 55,000 visa numbers to be allocated on a random basis to individuals from certain specified countries. *See* INA §203(c), 8 U.S.C. §1153(c).

Congress to enact this provision. Yet it is a basic rule of statutory construction that no provision of law should be construed so as to render a word or clause surplusage. *See, e.g., Kungys v. United States*, 485 U.S. 759, 778 (1988) (it is a “cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant”); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-752 (1st Cir. 1985) (“All words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous”). *See also Jama v. ICE*, 543 U.S. 335, 341 (2005) (“We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply....”).

The Defendants argue that recapture is contrary to legislative history in that Congress has, on two occasions, enacted legislation that authorized the recapture of visa numbers from previous years. Gov’t Brf, pp. 24-25. However, the Supreme Court has held that legislative history does not establish what the law is unless it is implemented in some particular statutory text. *See, e.g. Shannon v. United States*, 512 U.S. 573, 579 (1994) (“courts have no authority to enforce [a] principl[e] gleaned solely from legislative history that has no statutory reference point”); *Lincoln v. Vigil*,

508 U.S. 182 (1993) (“indicia in committee reports and other legislative history as to how ... funds should or are expected to be spent do not establish any legal requirements on [an] agency); *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 686 (9th Cir.2006) (per curiam) (statutory silence, “coupled with a sentence in a legislative committee report untethered to any statutory language,” did not bring about a change in governing law).

The Government’s claim that recapturing is contrary to legislative history has no force because Congress has never enacted a provision specifically prohibiting the recapture of immigrant visa numbers (except in the context of the diversity visa lottery program). The fact that Congress has authorized recapture of visa numbers from prior years does not establish that the courts lack that authority. The legislative history cited by the Government does not point to any statutory provision that would prohibit the recapture of unused visa numbers in order to remedy prior misallocations, as was done in *Silva v. Bell*.

What the legislative history shows is that the agency has adopted a policy of not using visa numbers made available in one year for another year, and the agency will not do so on its own. Congress can instruct the agency to recapture previously unused visa numbers in subsequent years without running afoul of the established numerical limits. But the fact that

Congress has instructed the agency to recapture visa numbers says nothing about whether a court can also order that such unused visa numbers be recaptured in order to remedy clear violations of the statute.

Finally, the Defendants cite *Iddir v. INS*, 301 F.3d 492 (7th Cir. 2002) for the proposition that federal courts cannot order relief in violation of a statutory provision that prohibits such relief. Gov't. Brf, p. 28. That proposition is not controversial. But it does nothing to show that the recapture of previously unused visa numbers is *prohibited* by statute. And indeed, such relief is permissible: the statute makes a certain number of visa numbers available each fiscal year (approximately 40,040 for the EB3 category), but nowhere states that these visa numbers must be used during the same fiscal year that they are made available; the statutory provision at INA §204(a)(1)(I)(ii)(II), 8 U.S.C. §1154(a)(1)(I)(ii)(II), would have been superfluous if Congress believed that visa numbers made available in one fiscal year cannot be used or recaptured in a subsequent fiscal year; and the Seventh Circuit in *Silva v. Bell* specifically allowed the recapture of unused visa numbers in order to remedy previous misallocations.

3. The requirement to use waiting lists and allocate visa numbers in priority date order is not “committed to agency discretion by law”. The Defendants assert that the decisions of the Visa Office are “committed to

agency discretion by law” because they are authorized to make “reasonable estimates” under INA §203(g), 8 U.S.C. §1153(g). Gov’t Brief, p. 28, n. 14. However, even if the Visa Office can make use of “reasonable estimates”, the Defendants are not allowed to allocate visa numbers to individuals who are not on the waiting lists. An agency is not granted discretion to violate the statute and regulations. *See, e.g. Estep v. United States*, 327 U.S. 114, 121-22 (1946) (contrasting erroneous decisions of selective service boards with decisions not in conformity with the regulations, and deeming the latter to exceed the granted authority of the boards); *Hernandez v. Ashcroft*, 345 F.3d 824, 846 (9th Cir. 2004) (agency “has no discretion to make a decision that is contrary to law”); *Frazar v. Gilbert*, 300 F.3d 530, 551 n. 109 (5th Cir.2002) (government officials “have no ‘discretion’ to violate federal law”).

The “committed to agency discretion by law” standard applies to agency action only “in those **rare instances** where statutes are drawn in such broad terms that in a given case there is no law to apply.” *Heckler v. Chaney*, 470 U.S. 821 (1985) (emphasis added). It applies to those situations in which there is “no meaningful standard against which to judge the agency’s exercise of discretion” and consequently “it is impossible to evaluate agency action for abuse discretion.” *Id.* at 830. In this case, the

statute requires that visa numbers must be allocated in priority date order to individuals on a waiting list. INA §203(e), 8 U.S.C. §1153(e). The requirement of priority date processing, and the mandate to maintain waiting lists, are not directives that are so vague that there is “no meaningful standard against which to judge the agency’s exercise of discretion.” These are specific requirements mandated by Congress that are specific enough to be enforced by court order.

Nor does the statutory authorization in §203(g), 8 U.S.C. §1153(g) allowing the Department of State to make “reasonable estimates”, mean that the visa allocation system is wholly “committed to agency discretion by law”. Section 203(g) presupposes that the agency has complied with the requirement to maintain waiting lists, which Plaintiffs allege has not happened. “Reasonable estimates” cannot be made if the statutorily required waiting lists are not maintained.

Furthermore, the use of the word “reasonable” shows that Congress did not intend to make the agency’s decisions regarding cutoff dates to be unreviewable. When Congress intends that the agency have unreviewable discretionary authority, Congress clearly so states. *See* INA §235(b)(1), 8 U.S.C. §1225(b)(1) (designation of classes subject to expedited removal “shall be in the sole and unreviewable discretion of the Attorney General”)

and INA §236(e), 8 U.S.C. §1226(e) (the Attorney General’s “discretionary judgment [regarding release on bond] shall not be subject to review”).

Agency decisions that are required to be “reasonable” are subject to judicial review. *See, e.g. Hong Wang v. Chertoff*, 550 F.Supp. 2d 1253, 1255, 1256 (W.D. Wash. 2008) (court has jurisdiction to review whether agency delay in adjudicating an application for adjustment of status is “unreasonable”), *citing Spenser Enterprises, Inc. v. United States*, 345 F.3d 683 (9th Cir. 2003) and *ANA International, Inc. v. Way*, 393 F.3d 886 (9th Cir. 2004). The term “reasonable” is a judicial concept that provides a meaningful standard that is familiar to the courts.

4. Plaintiffs challenge “discrete agency action”. The Government argues that the Plaintiffs’ claims should be dismissed because they have not identified a “particular agency action that causes it harm”; instead, says the Government, Plaintiffs’ claims are improper because they are seeking “wholesale improvements of programs by court decree”. Gov’t Brf, p. 32, *citing Lujan v. National Wildlife Federation*, 497 U.S. 871, 892 (1990). The Defendants’ argument regarding the identification of a “particular agency action” is without merit.

In *Lujan*, the plaintiffs alleged that the Bureau of Land Management (BLM) violated the Federal Land Policy and Management Act, 43 U.S.C.

§1701, *et seq.*, in connection with the BLM’s “land withdrawal review program”. 497 U.S. at 875. The Complaint alleged that the BLM violated the statute by failing to develop and maintain land use plans for the use of public lands; failing to consider multiple uses for the disputed lands; and focusing inordinately on such uses as mineral exploitation. *Id.* at 879. The Court held that the plaintiffs’ challenge to “the entirety of [the] land withdrawal review program” did not constitute a challenge to an “agency action”. The Court explained:

The term “land withdrawal review program” ... does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA. It is no more an identifiable “agency action” – much less a “final agency action” – than a “weapons procurement program” of the Department of Defense or a “drug interdiction program” of the Drug Enforcement Administration.

Id. at 890.

But *Lujan* is easily distinguished from the Plaintiffs’ claims. In this case, Plaintiffs have not complained in general about “the entirety of [the Department of State’s visa allocation] program”; instead, Plaintiffs have identified specific agency actions that violate specific statutory and regulatory provisions, including INA 203(e), 8 U.S.C. §1153(e), 22 C.F.R.

§42.51, and 8 C.F.R. §245.1(g). During FY 2008 and FY 2009, the Defendants allocated visa numbers to individuals who were not on the required waiting lists and out of priority date order. In addition, during FY 2008 and FY 2009 the Defendants used 100% of the visa numbers that Congress made available within the first nine months of the fiscal year, in violation of INA §201(a)(2), 8 U.S.C. §1151(a)(2) (no more than 27% can be used in any given quarter). Nothing in *Lujan* prevents Plaintiffs from pursuing these specific claims against the Department of State and USCIS.

5. Defendants are legally required to use waiting lists and allocate visa numbers in priority date order. The Government argues that the remedies sought by Plaintiffs cannot be granted because Defendants are not legally required to provide such remedies. Gov't. Brf, p. 32, *citing Hells Canyon Preservation Council v. U.S. Forest Service*, 593 F.3d 923, 932 (9th Cir. 2010). In *Hells Canyon*, the plaintiffs sought to compel the U.S. Forest Service, under section 706(1) of the APA, to adjust the boundary of a designated wilderness area within which motorized vehicles were not allowed. The Ninth Circuit held that such action was not mandated by the statute:

Although ... the Hells Canyon Act and the Wilderness Act require the Forest Service to establish the wilderness area boundary and to prohibit unauthorized vehicles within that area, the Forest Service has

done precisely that. Nothing in either act requires the Forest Service to use any particular topographical feature as the boundary.

593 F.3d at 933. The court explained further: “our ability to ‘compel agency action’ is carefully circumscribed to situations where an agency has ignored a specific legislative command.” *Id.*

In this case, the statute and the governing regulations require the Defendants to allocate immigrant visa numbers to applicants who are on the waiting lists. *See* INA §203(e)(3), 8 U.S.C. §1153(e)(3); 22 C.F.R. §42.51(b); 8 C.F.R. §245.1(g). The statute also requires that visa numbers be allocated in priority date order. INA §203(e)(1), 8 U.S.C. §1153(e)(1). These provisions underscore the congressional intent that visas be allocated in an objective and fair manner, and not based on chance or arbitrary factors. An injunction requiring Defendants to use waiting lists and allocate visa numbers in priority date order is proper. It is also proper for a court to order Defendants to make its waiting lists available on an ongoing basis so that Plaintiffs can monitor visa allocations and ensure that they are treated properly.

6. An injunction against USCIS is proper. The Defendants claim that no relief can be granted as to USCIS because “8 U.S.C. §1153(e) does not even address the adjudication of applications for adjustment of status or impose any obligations on USCIS.” Gov’t Brf, pp. 33-34. However, here

the Defendants completely ignore 8 C.F.R. §245.1(g), which specifically states that an applicant is not eligible for adjustment of status unless s/he “has a priority date on the waiting list”. When USCIS uses visa numbers to approve adjustment of status for applicants who are not on the statutorily required waiting lists, USCIS violates that particular regulation.⁴

The Defendants also assert that 8 C.F.R. §245.1(g) “does not address the order in which USCIS is to adjudicate applications for adjustment of status.” Gov’t Brf, p. 33. However, the regulation – and the statute – does require that an applicant for an immigrant visa must be on the waiting list, and USCIS violates the regulation – and the statute – when it grants adjustment of status to individuals who are not on the waiting lists.

7. The district court has authority to grant additional or alternative equitable relief. In order to remedy the past and ongoing statutory and regulatory violations, Plaintiffs seek additional and/or alternative injunctive relief including: requiring the Defendants to make public the waiting lists so that Plaintiffs can monitor visa allocation; waiving fees for renewals of employment authorization and travel documents for class members whose

⁴ The Defendants’ assertion on page 33, n. 15, that this is a new claim on appeal is bogus. Plaintiffs alleged in the Complaint that Defendants, including USCIS, “have not allocated immigrant visas to eligible applicants in accordance with the visa allocation system established by the Immigration and Nationality Act”. See Complaint, ER 2, ¶2. See also *id.* at ¶35.

approvals are delayed by improper agency actions; and declaring that when Plaintiffs and class members obtain permanent resident status, such status is effective as of the date they would have received permanent resident status if the Defendants had complied with the statute. Plaintiffs maintain that courts have broad authority to grant such equitable relief. *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”); *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”); *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”).

The Defendants apparently dispute that proposition, asserting that cases stating that courts have such authority are irrelevant because they are not APA cases and they predate *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (“*SUWA*”). Gov’t. Brf, pp. 34-35.

First, it is important to note that “the requirements of equity practice” – the obligation of courts to “mould each decree to the necessities of the

particular case” – is a practice that comes with “several hundred years of history.” *Hecht v. Bowles*, 321 U.S. 321, 329 (1944). The Supreme Court in *SUWA* says nothing to indicate an intention to overturn this long-standing practice.

In *SUWA*, all three of the plaintiffs’ claims were brought under APA §706(1), based on the allegation that the agency unlawfully **withheld action** that it was required to take. *See* 542 U.S. at 61. The Court held: “a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.” 542 U.S. at 62. *SUWA* did not involve a claim under §706(2), which allows a court to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”. 5 U.S.C. §706(2). Where a claim falls under §706(2), a court has broad authority to fashion a remedy for agency action which has been taken in violation of a statute or regulation, or has otherwise been “not in accordance with law.”

In *Northwest Environmental Defense Center v. Bonneville Power Administration*, 477 F.3d 668 (9th Cir. 2007) – an APA case decided after *SUWA* – the Ninth Circuit stated:

Section 706(2) of the APA gives us the equitable power to ‘set aside’ [the agency’s] action ... if we determine that [the agency’s] action was arbitrary, capricious, or contrary to law.

447 F.3d at 680. Further, the Ninth Circuit emphasized the broad equitable powers that a district court has in fashioning relief where the agency action has been arbitrary, capricious, or contrary to law:

When a public law has been violated,⁵ we ... may exercise our equitable powers to ensure compliance with the law. *See Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir.1995) (“The court's decision to grant or deny injunctive or declaratory relief under[the] APA is controlled by principles of equity.”). Moreover, “[w]here the public interest is involved, equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.” ... [Thus], in the absence of congressional directive, federal courts retain broad equitable powers in public law matters, including the “authority to grant any ancillary relief necessary to accomplish complete justice”.

477 F.3d at 680 (citations omitted). As the Ninth Circuit’s decision in *Bonneville Power* makes clear, nothing in *SUWA* prevents the court from granting Plaintiffs additional or alternative relief in order to remedy the violations of law that have occurred.

8. The Government’s argument regarding adjudication in “strict priority date order” is irrelevant. The Government argues that Plaintiffs should be estopped from arguing that applications for adjustment of status should be adjudicated in “strict priority date order”. Gov’t. Brf, p. 35. Apparently, the Government opposes any court order that would require

⁵ When an agency acts “arbitrarily, capriciously, and contrary to law”, it violates the Administrative Procedures Act, which is a public law. *See* 477 F.3d at 679.

DOS and/or USCIS to complete the adjudication of an applicant with an earlier priority date before going on to adjudicate the next applicant in line with a later priority date. But Plaintiffs have never claimed that applications for adjustment of status need to be **adjudicated** in “strict priority date order”, and Plaintiffs are not asserting such a claim in this appeal.

Whether or not applications for adjustment of status are adjudicated in “strict priority date order” has no bearing on the claims in this lawsuit. As Plaintiffs have previously explained, **after** the cutoff dates have been established and visa numbers have been allocated to individuals on the waiting lists, applicants may be required to submit additional documents and/or appear for an interview for the final adjudication of their application. *See* Plaintiffs’ Opening Brief, Docket Entry 8, pp. 35-36.

Obviously, after visa numbers have been allocated for a given month, if one individual with an earlier priority date is tardy in submitting additional documents, or does not show up for an interview, that should not mean that a second individual with a later priority date who is more diligent has to wait for the first application to be adjudicated. Once immigrant visas have been allocated for the month, the speed of adjudication will depend on how quickly the applicant responds; there is nothing wrong with adjudicating the speedy applicant first and the tardy applicant later, even if the speedy

applicant has a later priority date. But that has nothing to do with the claims Plaintiffs assert in this lawsuit. Plaintiffs claim that the Defendants have violated the statute and regulations in the establishment of cutoff dates and in allocation of immigration visa numbers **before** applications for adjustment of status are finally adjudicated.

9. An injunction barring the Defendants from allocating visa numbers to applicants not on the waiting lists is proper. The Government argues that an injunction prohibiting USCIS or DOS from using visa numbers for the benefit of applicants not on the waiting list cannot be granted for three reasons: (1) such relief was not requested in the Prayer for Relief in the Complaint; (2) no statute or regulation has been identified imposing this duty on the Defendants; and (3) USCIS does not allocate visa numbers. Gov't Brief, pp. 37-38. There is no merit in any of these points.

First, Plaintiffs have clearly alleged that Defendants have violated INA §203(e)(3) by failing to maintain the required waiting lists. The Complaint states:

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) As a result the Visa Office has not been able to and is not able to allocate immigrant visa numbers in a manner consistent with INA §203(e), 8 U.S.C. §1153(e).

Complaint, ER 9, ¶35. And the Plaintiffs have requested the court to remedy the violation. The Prayer for Relief requests the court to:

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

* * * *

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

Complaint, ER 15-16. Defendants' argument that Plaintiffs have failed to request appropriate relief in the Prayer for Relief has no merit.

Second, Plaintiffs have clearly identified the relevant statute and regulations that the Defendants have violated. INA §203(e)(3), 8 U.S.C. §1153(e)(3) states: "Waiting lists of applicants for visas under this section shall be maintained." 22 C.F.R. §42.51(b) states that the Visa Office "shall allocate immigrant visa numbers ... based on the chronological order of the priority dates of ... applicants for adjustment of status as reported by officers of the DHS." And USCIS regulations provide that an individual is not eligible for adjustment of status unless his or her name is on the waiting list:

An alien is ineligible for the benefits of section 245 of the Act unless ... [the 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). Defendants claim that Plaintiffs have failed to identify any statute or regulation is clearly incorrect.

Third, although USCIS does not allocate visa numbers, USCIS is required to follow the governing regulation, 8 C.F.R. §245.1(g), which prohibits USCIS from granting adjustment of status (and thereby using a visa number) for applicants who are not on the waiting list. The district court has authority to issue an injunction requiring USCIS to follow the regulation. *See, e.g. Accardi v. Shaughnessy*, 347 U.S. 260, 265-266 (1954) (regulations have “the force and effect of law”, and district has authority to require the agency to comply with the governing regulations).

10. The claims of the individual Plaintiffs are not moot. The Government argues that Plaintiffs Jun Guo, Shibao Zhang and Ming Chang have moot claims because they have been approved for permanent resident status. Gov’t Brief, p. 39. First, even though these Plaintiffs have been granted permanent resident status, they have been granted status about two or three years too late. As a result, they have to wait two or three extra years before they are eligible to apply for naturalization. *See* INA §316(a)(1), 8 U.S.C. §1427(a)(1) (applicant must have five years as a permanent resident before s/he is eligible to apply for citizenship). Plaintiffs and class members are entitled to be granted permanent resident status as of FY 2008 or FY

2009, the date that they would have been granted permanent resident status if the Defendants had followed the law; and the court should grant such equitable relief for the benefit of Plaintiffs and class members who have already received permanent resident status.

In any event, even if the issue for class representatives is moot the class action still remains viable. When a proper class action is alleged but the claims of the class representatives become moot during the pendency of the litigation, the controversy remains viable with respect to absent class members even though the claims are moot with respect to the original class representatives. *See, e.g. White v. Mathews*, 559 F.2d 852 (2d Cir. 1977); *Conover v. Montemuro*, 477 F.2d 1073, 1082 (3d Cir. 1972). A plaintiff in a class action lawsuit whose claim has become moot is still entitled to appeal an adverse decision on the motion for class certification. *See, e.g. U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 404 (1980). The court may either allow substitution of new class plaintiffs, *see, e.g., Kennerly v. U.S.*, 721 F.2d 1252, 1260 (9th Cir. 1983) (case remanded to district court for substitution after named class representative died); *Wilkerson v. Bowen*, 828 F.2d 117 (3d Cir. 1987); *Hagans v. Wyman*, 527 F.2d 1151 (2d Cir. 1975), or permit the original class representatives to continue representing the class.

See Sosna v. Iowa, 419 U.S. 393, 402, n. 11 (1975); *Rosario v. Rockefeller*, 410 U.S. 752, 756, n. 5 (1973); *Berstein v. Pugh*, 420 U.S. 103 (1975).

The Government also asserts that the Plaintiffs Zixian Li and Jun Li are not proper plaintiffs because they probably would not have been allocated a visa number in FY 2008 or FY 2009 even if DOS and USCIS had followed the law. Gov't Brief, pp. 40-41, *citing* DOS A.R., pp. 9-11. Plaintiffs do not agree that these DOS Reports show that Zixian Li and Jun Li would not have been allocated a visa number in FY 2008 or FY 2009 if the Defendants had followed the law. *See* Opening Brief, p. 12, n. 5. In any event, even if Plaintiffs Zixian Li and Jun Li would not have been granted permanent resident status in FY 2008 or FY 2009, they have been harmed nonetheless. Because of the misallocations in FY 2008 and FY 2009, their applications for adjustment of status have been unlawfully delayed. If the statute had been followed, other applicants who are ahead of them in the China EB3 line would have been granted visa numbers, and Plaintiffs Zixian Li and Jun Li would have had a shorter time to wait for their immigrant visa number; they have to wait longer to receive an immigrant visa number because DOS and USCIS failed to follow the law. This is a cognizable injury that can be remedied by the courts. *See, e.g. Silva v. Bell*, 605 F.2d at 983-984.

CONCLUSION

For the foregoing reasons, the decision of the district court dismissing Plaintiffs' Complaint for lack of jurisdiction should be reversed.

Dated this 22nd day of September, 2011.

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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 6300 words.

/s/ Robert Pauw .
Robert Pauw
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 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 .