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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

WALKER MACY LLC, XIAOYANG
ZHU, and all others similarly situated,

Case No. 3:16-cv-00995-SI

Plaintiffs,

MOTION FOR PRELIMINARY
INJUNCTION

v.

U.S. CITIZENSHIP AND IMMIGRATION
SERVICES, and LORI SCIALABBA,
Acting Director, U.S. Citizenship and
Immigration Services,

Defendants.

CERTIFICATE OF COMPLIANCE

Pursuant to LR 7-1(a)(1)(A), undersigned counsel certifies that the parties made a good faith effort to resolve the dispute by conferring by telephone and email, and have been unable to do so.

MOTION

Plaintiffs respectfully move the Court, pursuant to Fed. R. Civ. P. 65(a), and LR 65, for a preliminary injunction. Specifically, Plaintiffs request this Court enjoin Defendants from conducting a random computer generated lottery for distribution of Fiscal Year 2018 (FY2018) quota limited H-1B visas or status, until a decision is made on the merits.

MEMORANDUM OF LAW IN SUPPORT OF MOTION

I. This Motion Meets the Preliminary Injunction Standards

In the Ninth Circuit, under the “serious questions” test, a preliminary injunction may be issued if there is a likelihood of irreparable injury to plaintiff, there are serious questions going to the merits, the balance of hardships tips sharply in favor of the plaintiff, and the injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011)

A. There is Likelihood of Irreparable Injury

If Defendants are permitted to conduct their lottery, Plaintiffs will likely be injured when the numerically limited H-1B visas or status are distributed to petitioners who filed later than Plaintiffs. As to likelihood, the chances of securing a visa or status in the H-1B lottery is low, around 25%, and the chances of not securing a number are correspondingly high, around 75%. It is therefore more likely than not that Plaintiffs will be injured. Additionally, because H-1B visas or status cannot be taken back and redistributed to Plaintiffs after they have been distributed to other employers and beneficiaries by lottery, the impending harm is irreparable.

In Defendants’ Reply in Support of Motion to Dismiss, Defendants claimed that Plaintiffs’ claims were not redressable and were moot because the Court had, “no ability to go

back in time to recapture and reallocate those visas during the current fiscal year.” Def. Reply, p. 9, ECF No. 16. The Defendants argued that those FY 2017 numbers were no longer available, and quoting the *Li* case, “[o]nce [one of these limited] visa number[s] is gone, it cannot be recaptured absent an act of Congress.” Def. Reply., p. 9-10, ECF No. 16 (Quoting *Zixiang Li v. Kerry*, 710 F.3d 995, 1002 (9th Cir. 2014). By Defendants’ own admission, if they are allowed to distribute the visas according to lottery, they are gone and cannot be recaptured. On March 31, 2017, employers nationwide will be filing petitions that took 4-6 weeks to prepare, for filing during the April 3 – 7, 2017 filing window. Immediately thereafter, Defendants will select the recipients of the FY 2018 quota numbers by random computer based lottery without regard to previous filings, and allow first-time filers to have visa numbers which should be apportioned in order of filing date to those who filed earlier.¹ Once that lottery is conducted, very likely in the two or three business days after the filing window, those numbers will be “gone and cannot be recaptured.” *Id.* This impending situation constitutes imminent, irreparable harm.

B. There Are Serious Questions Going to the Merits

Plaintiffs submit that they are likely to succeed on the merits, based on the substantial written and oral arguments conducted in this case to date. Under the “serious questions” test, however, Plaintiffs are not *required* to show that they are likely to prevail on the merits if the balance of hardships tips “sharply” in their favor, and instead may show that there are serious questions going to the merits of the claim.

The statute at issue provides for the orderly distribution of such visas or status - in 8 U.S.C. § 1184(g)(3) the statute requires that,

“Aliens who are subject to the numerical limitations of paragraph (1) shall be issued visas (or otherwise provided nonimmigrant status) *in the order in which petitions are filed for such visas or status.*” (emphasis supplied).

The plain language of the statute requires that H-1B visas or status be provided in the

¹ Defendants conducted the random lottery last year on April 12, 2016, the third business day after the five day window ended April 7, 2016.

order in which petitions are filed. This plain language raises at least serious questions about Defendants' practice of issuing visas or status not in the order in which petitions are filed, but rather through random lottery. The parties' extensive briefing and oral argument shows that there are at least serious questions going to the merits.

C. Balance of Hardships Tips Sharply in Favor of Plaintiffs

If Defendants conduct the random lottery and distribute visas and status based on their game of chance, those visas and status grants to others will not be recoverable. This will result in irreparable harm to Plaintiffs and class members who filed in prior years and should be accorded visas or status in the order in which their petitions were filed. This is an extreme hardship which will result in harm that cannot be remedied, including the loss of employment, loss of services of employees, and forced departure from the United States for employees and their families.

On the other hand, if Defendants are ordered not to conduct their lottery and distribute the visas or status until a decision can be made on the merits, there will only be a hold placed on the distribution. That is because Defendants' April 2017 lottery is used to distribute visas or status that do not become available in any event until the beginning of the upcoming Fiscal Year 2018, which starts October 1, 2017. There is no compelling interest in the government hastily conducting a lottery within days after the filing window, when they could just as easily wait to distribute such visas or status once the Court is prepared to rule on the merits of the case. There is a span of six months between April and October during which there is no necessity of a lottery distribution.

At the current time, the FY 2018 numbers that can be utilized for visas or status beginning on October 1, 2017 are not spoken for. They are not irrevocably distributed. They are available for use during the FY 2018 time-frame, from October 1, 2017 until September 30, 2018. This present situation is the *status quo*, and Defendants soon will disturb this through conducting a lottery and irrevocably distributing those numbers randomly. That Defendants

have conducted a lottery in past years to distribute numbers does not render the lottery system the *status quo* for this upcoming Fiscal Year, when numbers have not yet been distributed. Plaintiffs position is strengthened by seeking to preserve, rather than alter, the status quo. *Rodde v. Bonta*, 357 F.3d 988, 999, n.14 (9th Cir. 2004).

D. The Injunction is in the Public Interest.

The public interest will be served by issuing an injunction. Congress expressed a policy of fairness in the issuance of H-1B visas or status when it enacted the statute providing for distribution “*in the order in which petitions are filed for such visas or status.*” 8 U.S.C. § 1184(g)(3). United States employers who utilize the H-1B program to secure global talent have an interest in being able to rely upon a system which is not arbitrary, and which rewards advance planning and early filing. To reward large companies which can file 15,000 petitions in order to secure 5,000 workers in the random lottery, knowing the odds are that they will receive the needed 5,000 workers, is against the public interest. Allowing petitioners to “cut in line” is also against the public interest. Such abuses of the program flow from the lottery system, and injure employers who seek to petition for a few key employees to supplement their U.S. workforce.

II. CONCLUSION

Plaintiffs respectfully request the Court grant an injunction preventing Defendants from distributing FY 2018 H-1B visas or status according to a lottery system until a decision on the merits is issued.

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2017, I electronically filed the foregoing MOTION FOR PRELIMINARY INJUNCTION with the Clerk of the Court for the District of Oregon by using the CM/ECF system, in accordance with Local Rule 5-1. Notice of this filing will be sent out to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

s/ Brent W. Renison
Brent W. Renison