

District Judge Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERNDISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

Zixiang Li, et al.,)	
Plaintiffs)	Case No. C10-00798-RAJ
)	
vs.)	
)	MOTION FOR PRELIMINARY
United States, et al.)	INJUNCTION
Defendants)	
)	NOTE FOR: July 16, 2010

A. INTRODUCTION

This motion is filed on behalf of class members who have been harmed because of the unlawful delay and systemic errors made in processing their applications for immigrant visas. Many class members and their derivative beneficiaries would have been granted lawful permanent resident status in 2008 or 2009 if the Department of State Visa Office and Citizenship and Immigration Services had followed the statute. Instead, these individuals are still waiting to obtain permanent resident status and may have to wait for several more years. Derivative beneficiary children of the principal beneficiaries have reached or will reach the age of 21 and become ineligible for a derivative permanent residence visa as a result of the improper practices of Defendants. Plaintiffs seek interim relief for these individuals.

Plaintiffs have filed concurrently a Motion for Class Certification. Plaintiffs seek preliminary relief for the benefit of the following class members:

- All individuals (including the derivative beneficiaries of such individuals)
- (1) For whose benefit an Application for Labor Certification has been approved;
 - (2) For whose benefit a Petition for Alien Worker (Form I-140) under INA §203(b)(3), 8 U.S.C. §1153(b)(3) has been filed and has not been finally denied;

- 1 (3) Who have filed or who will file an application for adjustment of status or an application
- 2 for an immigrant visa that has not been finally denied;
- 3 (4) Who are chargeable under INA §202(b), 8 U.S.C. §1152(b) to mainland China; and
- 4 (5) Who have not yet been approved for permanent resident status.

5 **B. STANDARDS FOR PRELIMINARY INJUNCTION**

6 The standards for injunctive relief in this circuit are well known. Two interrelated tests have
7 been articulated. Under the “traditional test”, the district court may issue a preliminary injunction when
8 (1) the moving party has demonstrated that it will probably prevail on the merits, (2) the moving party
9 will suffer irreparable injury if injunctive relief is not granted, (3) in balancing the equities, the non-
10 moving party will not be harmed more than the moving party is helped by the injunction, and (4)
11 granting the injunction is in the public interest. *Martin v. International Olympic Committee*, 740 F.2d
12 670, 674-675 (9th Cir. 1984).

13
14 Under the “alternative test”, the court may issue a preliminary injunction when the moving party
15 demonstrates “either a combination of probable success on the merits and the possibility of irreparable
16 injury or that serious questions are raised and the balance of hardships tips sharply in his favor.” *Id.*
17 The two prongs of the alternative test are not separate tests, but rather “are the ends of a continuum; the
18 greater the relative hardship to the moving party, the less probability of success must be shown.”
19 *National Center for Immigrants' Rights v. INS*, 743 F.2d 1365, 1369 (9th Cir. 1984). Under either test,
20 plaintiffs here should be granted a preliminary injunction.

21
22 There is no doubt that the Defendants have not correctly applied the controlling statute and the
23 class members of this lawsuit have been substantially harmed. *See, e.g. Chada v. INS*, 634 F.2d 408 (9th
24 Cir. 1980), *aff'd*, 462 U.S. 919, 936 (1983) (delay in obtaining permanent resident status results in delay
25 in obtaining citizenship, which is an “obvious detriment” that gives plaintiff standing); *Roshandel v.*
26 *Chertoff*, 554 F.Supp.2d 1194, 1200-01 (W.D. Wash. 2008) (recognizing that delay in obtaining
27
28

1 citizenship is a substantial injury); *Hong Wang v. Chertoff*, 550 F.Supp.2d 1253, 1259 (W.D. Wash.
 2 2008) (recognizing that delay in processing application for adjustment of status burdens both economic
 3 interests and health and welfare interests); *Galvez v. Howerton*, 503 F.Supp. 35, 39 (C.D. Cal. 1980) (six
 4 month delay in processing an application for LPR was unreasonable, warranting estoppel of the agency
 5 from denying the plaintiff a visa). As explained below, plaintiffs should be granted interim relief.

7 C. STATUTORY AND REGULATORY FRAMEWORK

8 1. Visas Issued in “Priority Date” Order.

9 The Immigration and Nationality Act establishes a system for allocating a limited number of
 10 immigrant visas each year according to a “priority system”. Visas are divided into family-based visas
 11 and employment-based visas. Approximately 226,000 family-based visas are available each year, and
 12 approximately 140,000 employment based visas. See INA §201(c), (d), 8 U.S.C. §1151(c), (d)). For
 13 purposes of this lawsuit, the employment-based visas are relevant.
 14

15 The approximately 140,000 employment-based (“EB”) visas available each year are divided into
 16 five preference categories, allocated as follows:
 17
 18

	<u>Preference Category</u> ¹	<u># visas</u>
20	EB1 Priority workers (workers with extraordinary ability, outstanding professors and researchers, and multinational executives and managers)	40,040
21	EB2 Persons with advanced degrees or having extraordinary ability	40,040
22	EB3 Skilled workers, professional workers, and other workers	40,040
23	EB4 Special immigrants (including religious workers)	9,940
24	EB5 Investors	9,940
25		
26		
27		
	TOTAL	140,000

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

1
2 The class members of this lawsuit fall under category (3), the employment-based third preference
3 category (“EB3”), defined at INA §203(b)(3), 8 U.S.C. §1153(b)(3).

4 The limits described above are the initial visa allocations; the limits can increase pursuant to the
5 statute depending on the existence of certain events, such as unused visas in other preference categories.
6 Unused visas in the family category in a given year “fall down” into the employment category for the
7 next year. INA §201(d)(2)(C), 8 U.S.C. §1151(d)(2)(C). Thus, for example, at the end of FY 2007
8 unused visas in the family category fell down to the employment category increasing the total EB limit
9 to 162,704 for FY 2008. *See* Visa Bulletin for September 2008, attached as Exhibit 3, page 14 of
10 Plaintiffs’ Exhibits (“Exh. 3, p. 14”).
11

12 In addition, unused visa numbers can “fall up” or “fall down” from one preference category to
13 another. For example, if in a given year 7,940 visas are used in the EB4 category and 1,940 visas are
14 used in the EB5 category, then there are 10,000 unused visa numbers in the EB4 and EB5 categories;
15 these unused numbers “fall up” to the EB1 category, thereby increasing the limit available for the EB-1
16 category to 50,040. Similarly, unused EB1 visas fall down to the EB2 category and unused EB2 visas
17 fall down to the EB3 category. *See* INA §1153(b)(1)-(5), 8 U.S.C. §1153(b)(1)-(5).
18

19 Generally - with an exception due to "per country limits" explained below - visas are allocated in
20 this framework strictly in a “priority date” order. According to section 203(e), the immigrant visas that
21 are available in the various preference categories
22

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

25 INA §203(e), 8 U.S.C. §1153(e). The date that the “petition in behalf of ... such immigrant is filed” is
26 called the immigrant’s “priority date”. For individuals in the EB3 category, there is a three step process
27 for obtaining permanent resident status: (1) an employer files an application for labor certification
28

1 requesting the Department of Labor to certify that there are no qualified U.S. workers available for the
2 job opening; (2) once the labor certification is approved, the employer files a Petition for Alien Worker
3 (Form I-140), requesting USCIS to approve the foreign individual in the third preference category; and
4 (3) the applicant either files an application for an immigrant visa (Form DS-230) with the Department of
5 State (“DOS”) or s/he files an application for adjustment of status (Form I-485) with Citizenship and
6 Immigration Services (“USCIS”).² The “priority date” is the date that an application for a labor
7 certification is filed with the Department of Labor. *See* 8 C.F.R. §204.5(d).

8
9 Visas are allocated by the Visa Office on a monthly basis, and according to section 203(e) they are to be
10 allocated first to individuals with an earlier priority date. For example, if Applicant A has a priority date
11 of January 1, 2004 and Applicant B has a priority date of January 1, 2005 (and if their labor
12 certifications and I-140 forms are approved and if their applications for an immigrant visa or for
13 adjustment are properly filed and documentarily complete), then Applicant A should be entitled to
14 obtain an immigrant visa before Applicant B.
15

16 **2. Waiting Lists.**

17
18 According to INA §203(e)(3), 8 U.S.C. §1153(e)(3), the Department of State is required to
19 maintain “waiting lists” (or “registration lists”) to ensure that visas are allocated in priority date order.
20 The waiting lists rank applicants by preference category and country of chargeability, in priority date
21 order. In the above example, Applicant A appears on the EB3 waiting list above Applicant B. If, for
22 example, 3,400 visas are allocated in the EB3 category in a given month, then a “cut-off date” on the
23

24
25 ² If an applicant is outside the United States, s/he applies for the immigrant visa at a consular office
26 overseas. *See* INA §§221-222, 8 U.S.C. §§1201-1202. If the applicant is inside the United States, s/he
27 applies for the immigrant visa by applying for adjustment of status with the U.S. Citizenship and
28 Immigration Services. *See* INA §245, 8 U.S.C. §1255. Approximately 90% of the immigrant visas are
used up by adjustment of status applications, adjudicated by USCIS. 2009 USCIS Ombudsman Annual
Report, Exh. 12, p. 67.

1 waiting list is established at the 3,400th applicant; the 3,400 applicants above the line are (if otherwise
2 eligible) issued an immigrant visa (or, if they adjust status within the United States, use an immigrant
3 visa number);³ all of the applicants below the line must wait for another month to obtain permanent
4 resident status.⁴ If Applicant A is above the cut-off line and Applicant B is below the cut-off line, then
5 Applicant A should obtain an immigrant visa and Applicant B will have to wait until more visas are
6 available.
7

8 The cut-off date does not advance evenly from month to month, and may actually retrogress
9 from one month to the next. This may occur because of backlogs at USCIS and irregularities in the
10 USCIS processing times for the underlying applications. *See, e.g.* Declaration of Palma Yanni, Exh. 16,
11 p. 75 (“The variations in processing times can be significant and arbitrary, and an applicant has no
12 control over these variations in processing times”). For example, sometimes USCIS may process I-140
13 or I-485 applications rapidly and thus the applicants may be able to get on the DOS waiting list quickly.
14 Other applications may be processed slowly, and so those applicants get on the DOS waiting list later
15 even though they have an earlier priority date. When those applicants finally get on the waiting list, they
16 will be placed ahead of other applicants with later priority dates who happened to get on the waiting list
17 earlier because of the irregularities in USCIS processing times. If in a given month enough individuals
18 are placed higher on the waiting list, then the cut-off date will retrogress the next month. Thus, even if
19 Applicant B is near the top of the waiting list one month, he may not be able to obtain an immigrant visa
20 the next month if too many applicants with earlier priority dates get on the waiting list. In some cases,
21
22
23

24
25 ³ Although an applicant for adjustment of status does not receive an immigrant visa, the applicant does
26 use an immigrant visa number, which reduces by one the number of immigrant visas available for the
27 fiscal year. INA §245(b), 8 U.S.C. §1255(b).

28 ⁴ 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.

1 the cut-off date retrogresses and it is months or even years before the applicant gets back to the top of
 2 the waiting list again. *See, e.g.* Declaration of Palma Yanni, Exh. 16, p. 77.

3 **3. Per-Country Limits.**

4 In order to ensure that no one country captures all or most of the immigrant visas available each
 5 year, the statute establishes per-country limits. According to INA §202(a)(2), 8 U.S.C. §1152(a)(2),
 6 there is a per-country limit of 7% of the total number of visas available each year. Thus, (subject to
 7 certain exceptions) no country can receive more than a total of 25,620 immigrant visas per year (15,820
 8 family visas plus 9,800 employment visas). If the demand for immigrant visas from that country is
 9 greater, then the country is “oversubscribed” and not all of the applicants from that country will be able
 10 to obtain visas; some will have to wait until the next year. Currently, there are only four countries that
 11 are oversubscribed and subject to the per-country limits: China, India, Mexico, and the Philippines. The
 12 visas allocated to an “oversubscribed country” are allocated, to the extent possible, on a pro rata basis.
 13 INA §202(e), 8 U.S.C. §1152(e). Thus, assuming a total of 140,000 EB visas for the year, the annual
 14 per-country limits by preference category for oversubscribed countries are initially as follows:
 15
 16

	<u>China</u> ⁵	<u>India</u>	<u>Mexico</u>	<u>Philippines</u>
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

17
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28 ⁵ 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.

1
2 These initial limits can be increased by virtue of unused visas in other visa categories. First, if an
3 oversubscribed country does not reach its family-based immigration quota, then the unused family-based
4 numbers can be used to increase the employment-based limits. For example, the per-country limit for
5 family-based visas is 15,820 (7% of 226,000, the worldwide limit for family-based visas). If China uses
6 only 11,820 family-based visas in a given year, then the 4,000 unused family-based visa numbers “fall
7 down” and increase China’s employment-based limit by 4,000. *See* INA §202(e), 8 U.S.C. §1152(e).
8 Similarly, if China does not use all of the 2,800 visas available in the EB1 category, then these unused
9 visas can “fall down” and increase the limits in the EB2 category, and can again “fall down” from the
10 EB2 to the EB3 category. The only limitation is that the total number of visas allocated to China (total
11 EB2 to the EB3 category. The only limitation is that the total number of visas allocated to China (total
12 family visas and employment visas) must remain less than 25,620, i.e. less than 7% of the total
13 worldwide level. INA §202(a)(2), 8 U.S.C. §1152(a)(2).
14

15 In addition, an oversubscribed country is permitted to exceed its limit in a preference category if
16 the worldwide demand in that category is less than the worldwide limit in a given quarter. For example,
17 there is a worldwide limit of 40,040 visas available for the EB2 category, or 10,010 for any given
18 quarter. If the total worldwide demand for EB2 visas is less than 10,010 for a given quarter, then after
19 the initial allocation is made, the unused EB2 visas “fall across” to oversubscribed countries and the
20 unused visas can be used to allow oversubscribed countries to exceed its initial limit for that quarter.
21 According to the statute, the visas made available to the oversubscribed countries “shall be issued
22 without regard to the [per-country numerical limitation] for the remainder of the calendar quarter.” INA
23 §202(a)(5)(A), 8 U.S.C. §1152(a)(5)(A). Any visas still unused after visas have been made available for
24 all applicants in the EB2 category will “fall down” to the EB3 category. INA §203(b)(3), 8 U.S.C.
25 §1153(b)(3).
26
27
28

1 In order to ensure that visas are made available in priority date order, the “waiting list” required
2 under §203(e)(3) groups applicants by preference category, country of chargeability, and priority date
3 order. Each month the Visa Office determines how many visa numbers should be allocated for each
4 preference category and for each oversubscribed country for the following month, and then establishes a
5 “cut-off date” for each category and for each oversubscribed country. The “cut-off dates” are published
6 in the Department of State Visa Bulletin, issued on or about the 15th of each month for the upcoming
7 month. Beginning on the first day of that month, immigrant visa numbers are used (either by the
8 consular offices overseas or by USCIS for adjustment of status in the U.S.) for the benefit of applicants
9 on the “waiting list” with a priority dates earlier than the established cut-off date. No visa numbers are
10 made available for visa issuance / adjustment of status for applicants with a priority date after the cut-off
11 date. If the waiting list is accurate, then the appropriate number of visas will be allocated to individuals
12 with approved petitions in the various preference categories in priority date order.
13
14

15 **D. LEGAL ARGUMENT**

16 **1. Misallocation of Immigrant Visa Numbers.**

17
18 Government reports of visa allocations for the past two years demonstrate that immigrant visas
19 have been allocated out of priority date order. In FY 2008, there was a total of 162,704 visas available
20 in the EB category, and in FY 2009 a total of 140,000 EB visas. *See* Visa Bulletin (September 2008),
21 attached as Exh. 3, p. 14, and Visa Bulletin (September 2009), attached as Exh. 7, p. 34. The following
22 chart, based on those DOS reports, shows the per-country limits initially established⁶ and how many EB3
23 visas were actually allocated for those years. The chart shows that China used 2,324 less than its limit.
24 This occurred even though China was oversubscribed, and the EB3 waiting list for China was heavily
25 backlogged. *See, e.g.* CIS Inventory (August 28, 2009), Exh. 13, p. 70. Thus, it is clear that there were
26
27

28

⁶ As explained above, these initial limits can be increased by virtue of unused visas in other categories.

many China EB3 applicants whose applications were ready for visa issuance but who did not receive immigrant visa numbers because of an improper allocation by defendants.

EB3		<u>China</u>	<u>India</u>	<u>Philippines</u>	<u>Mexico</u>	<u>Worldwide TOTAL</u>
FY 2008	EB3 limit	2,957	3,257	3,257	3,257	46,533
	# used ⁷	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 ⁸	1,077	2,306	5,540	4,566	39,791
	shortfall ⁹	1,425	496	0	0	249

In other words, during 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.

This is borne out by the Department of State Visa Bulletins. For example, during the spring of 2008 and the spring of 2009, cut-off dates for the EB3 category were established as follows:¹⁰

	<u>Worldwide</u>	<u>China</u>	<u>India</u>	<u>Philippines</u>	<u>Mexico</u>
May 2008 Visa Bulletin	Mar 1, 2006	Mar 22, 2003	Nov 1, 2001	July 1, 2002	Mar 1, 2006
Mar 2009 Visa Bulletin	May 1, 2005	Oct 22, 2002	Oct 15, 2001	Mar 15, 2003	Mar 15, 2003

⁷ See Department of State, Report of the Visa Office 2008, Table V, Exh. 8, p. 40.

⁸ See Department of State, Report of the Visa Office 2009, Table V, Exh. 9, p. 47.

⁹ The shortage shown here is a minimum shortage. As explained above, the initial limits can be increased and in fact should have been increased in fiscal year 2009 for the China EB3 category. In fiscal year 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, Table V, Exh. 9, 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.

¹⁰ See Department of State, Visa Bulletin (May 2008), Exh. 1, p. 2; Visa Bulletin (March 2009), Exh. 4, p. 20.

1 Plaintiffs Ming Chang and Shibao Zhang have EB3 priority dates of November 20, 2003 and
2 September 15, 2003, respectively. *See* Declaration of Ming Chang, Exh. 22; Declaration of Shibao
3 Zhang, Exh. 21. They filed their I-485 applications for adjustment of status on September 10, 2004 and
4 September 20, 2007, respectively. Although they were on the EB3 waiting list, had approved I-140
5 petitions, and were otherwise ready for approval throughout FY 2008 and 2009, Plaintiffs Chang and
6 Zhang were not granted permanent resident status pursuant to their long-pending I-485 applications,
7 even though China had not reached its EB3 limit,
8

9 In May 2008, immigrant visa numbers were allocated to individuals from other countries with
10 priority dates up to March 1, 2006 (lower down on the waiting list), even though Plaintiffs Chang and
11 Zhang were ready and qualified for their immigrant visas. Similarly, in March 2009 immigrant visa
12 numbers were allocated to other individuals with priority dates up to May 1, 2005 (lower down on the
13 waiting list), in violation of the statutory requirement that visas be allocated in priority date order. To
14 date, Plaintiffs Chang and Zhang have still not been able to obtain permanent resident status because the
15 cut-off dates established by the Visa Bulletin have retrogressed. *See also* Declarations of Zixiang Li,
16 Exh. 18, Jun Li, Exh. 19, and Jun Guo, Exh. 20. Thus, but for the unlawful allocation of immigrant visa
17 numbers out of priority date order, class members of this lawsuit would have already been approved for
18 permanent resident status.
19
20

21 **2. Failure to Maintain Waiting Lists as Required by Statute.**

22 In addition, visas have been allocated improperly because USCIS has not kept appropriate lists
23 of pending EB I-140 petitions and I-485 applications. USCIS has not been able to provide an accurate
24 accounting of the number of petitions pending by preference category, country of chargeability, and
25 priority date. *See, e.g.* CIS Ombudsman, 2007 Annual Report, Exh. 10, p. 57 (“gaps in USCIS’
26 accounting of cases”); 2008 Annual Report, Exh. 11, p. 63 (“USCIS did not know precisely how many
27
28

1 employment-based applications it held by visa preference category, priority date, or country of
2 chargeability (and this impacted DOS' ability to estimate priority date cutoffs)"); 2009 Annual Report,
3 Exh. 12, p. 67 ("Lacking such data, USCIS has difficulty finding and adjudicating cases in response to
4 the visa availability changes reflected in the Visa Bulletin"). As Prakash Khatri, the CIS Ombudsman,
5 explains:

6
7 Because USCIS has no adequate system for keeping track of pending employment based
8 applications at all of its offices nationwide that use immigrant visa numbers, the Visa Office at
9 DOS has not had accurate information concerning expected immigrant visa number usage in
10 priority date order. As a result, cutoff dates have not been established properly, and immigrant
11 *visa numbers have not been used in priority date order.*

12 Declaration of Prakash Khatri, Exh. 17, p. 82 (emphasis added). According to Palma Yanni, former
13 President of American Immigration Lawyers Association:

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

19 Declaration of Palma Yanni, Exh. 16, p. 77.

20 For example, shortly before April 2009, CIS demand for immigrant visas was extremely and
21 unexpectedly high. CIS used so many EB3 immigrant visa numbers that the entire EB3 quota for FY
22 2009 was used up by the end of April 2009, in violation of INA §201(a)(2). Consequently, no further
23 visas were available for the EB3 category for last five months of FY 2009. As the Visa Bulletin
24 explained in May 2009:

25 [T]he amount of demand received from Citizenship and Immigration Services Offices for
26 adjustment of status cases with priority dates that were significantly earlier than the established
27 cut-off dates remained extremely high. As a result, these annual limits have been reached and
28 both categories have become "Unavailable".

29 Visa Bulletin for May 2009, Exh. 6, p. 33. The overuse by CIS during this time period constitutes a
30 violation of INA §201(a)(2) (no more than 27% of visas available can be issued in any given quarter).

1 In addition, because of CIS's improper allocation of EB3 immigrant visa numbers during this
2 time period, visa numbers were used out of priority date order. By using up all of the visa numbers in
3 the spring of 2009, CIS took visa numbers and used them for individuals lower down on the waiting list
4 (individuals with priority dates as late as May 1, 2005) that would otherwise have been used for the class
5 members of this lawsuit who were higher up on the waiting list (e.g. Plaintiffs Ming Chang and Shibao
6 Zhang had priority dates of November 20, 2003 and September 15, 2003, respectively).

8 USCIS's haphazard method of accounting for pending applications, as described above, prevents
9 the Visa Office from knowing how many visa numbers will be used by USCIS in any given
10 month. ... The information that USCIS provides to the Visa Office concerning pending
11 immigrant visa applicants continues to be inaccurate and ***the Visa Office is not able to establish***
12 ***cutoff dates in a manner to ensure that immigrant visas are used in priority date order.***
13 Declaration of Prakash Khatri, Exh. 17, pp. 84-85 (emphasis added). But for USCIS's unlawful conduct
14 during fiscal year 2009, many class members of this lawsuit (and their derivatives) would have already
15 been approved and granted permanent resident status, and other class members would accordingly have
16 a much shorter wait time to obtain permanent resident status.

17 A similar violation occurred during FY 2008. Because of CIS failure to accurately monitor
18 pending I-140 petitions and I-485 applications, all EB3 visas were used by the end of June, and no EB3
19 visas were available during the last quarter of FY 2008. *See* Visa Bulletin for July 2008, Exh. 2, p. 9.
20 This constitutes a violation of §201(a)(2) and also resulted in visa numbers being allocated out of
21 priority date order. Individuals with priority dates as late as March 1, 2006 were using EB3 visa
22 numbers even though class members of this lawsuit were on the waiting list with priority dates in 2003
23 and 2004. These class members would have been approved and granted permanent resident status
24 during FY 2008, but for CIS's improper use of immigrant visa numbers during that year.
25
26
27
28

3. Equitable Relief.

1
2 Courts have not hesitated to provide equitable relief for individuals who have been harmed when
3 Defendants have misallocated visa numbers under the preference system. In *Silva v. Bell*, 605 F.2d 978
4 (7th Cir. 1979), the Seventh Circuit class wide relief for the misallocation of visas by -the Department of
5 State. In 1968 Congress had established a numerical limit on Western Hemisphere immigrants of
6 120,000 per fiscal year. During the years 1968 to 1976, immigrant visas granted to Cuban refugees were
7 mistakenly charged against the Western Hemisphere immigration quota. By the time the mistake was
8 noticed and corrected, 144,999 Cuban immigrants had been charged against the Western Hemisphere
9 quota; in other words, there were 144,999 individuals from the Western Hemisphere who should have
10 obtained their permanent resident status but were unable to do so because of the mistakes made in
11 allocating visas. 605 F.2d at 979-982.

12
13
14 The Seventh Circuit recognized that the visa allocation mistakes had injured class members “by
15 delaying the processing of their visas”, 605 F.2d at 983, and adopted a program to recapture and reissue
16 wrongfully issued visa numbers. The relief was designed to “place plaintiff class members, as near as
17 may be, in the positions they would have occupied but for the [mistaken] policy.” 605 F.2d at 985, n.
18 13, quoting *Graves v. Romney*, 502 F.2d 1062, 1064 (8th Cir. 1974), *cert denied*, 420 U.S. 963 (1975)
19 (equitable relief should “restore the plaintiff to the enjoyment of the right which has been interfered with
20 to the fullest extent possible”).

21
22 In *Fei Wang v. Chertoff*, 2009 WL 790165 (D. Id. 2009), Mr. Wang had applied for an
23 employment-based second preference immigrant visa (EB2 visa). He had a priority date of October 31,
24 2005. His employer filed the I-140 petition on March 13, 2006. Because of USCIS delay in processing
25 the petition, his employer filed a second I-140 petition on February 16, 2007, which was approved. Mr.
26 Wang then filed an application for adjustment of status (Form I-485) on June 19, 2007 based on the
27
28

1 approved second I-140 petition. On August 7, 2008, USCIS denied the first I-140 petition, and also
2 denied the application for adjustment of status, because of the denial of the first I-140, not noticing that
3 the second I-140 had been approved. At that time, Mr. Wang's priority date was current according to
4 the Department of State Visa Bulletin, i.e. there was an immigrant visa number available for him.
5 Thus, he would have been granted adjustment of status on August 7, 2008, but for the fact that USCIS
6 made a mistake by overlooking the approved second I-140 petition. After August 2008 the EB2 cut-off
7 date retrogressed and accordingly an immigrant visa number was no longer available for Mr. Wang after
8 that date.
9

10 The court held that it has jurisdiction under the Mandamus Act to fashion appropriate relief.
11 2009 WL 790165, at *11. Although the court decided that it did not have authority to order USCIS and
12 the Department of State to issue a visa number when one is not statutorily available, *id.* at 22, the court
13 did hold that Mr. Wang was harmed by the mistakes made by USCIS and granted equitable relief. The
14 court ordered USCIS to adjudicate Mr. Wang's application for adjustment of status within ten days of
15 the date a visa number becomes available for him. *Id.* at 25.
16

17 In *Paunescu v. INS*, 76 F.Supp.2d 896 (N.D.Ill. 1999), the plaintiffs had filed for adjustment of
18 status under the Diversity Visa Lottery Program, under which 55,000 visas are available each fiscal year
19 for individuals from certain designated countries who are selected by lottery. The lottery visa numbers
20 are available only for the relevant fiscal year, and thus a winning applicant must use his or her
21 immigrant visa number by the end of the fiscal year or lose the chance to become a permanent resident.
22 Plaintiffs filed their applications for adjustment of status on November 5, 1997, well before the end of
23 the 1998 fiscal year on September 30, 1998. However, because of USCIS processing delays, no visa
24 number was issued to him before the end of the fiscal year in September. Accordingly, on September 23,
25 1998 the Paunescu's filed a lawsuit for mandamus and declaratory judgment seeking to compel the
26
27
28

1 Immigration Service to make immigrant visa numbers available for them before the end of the fiscal
2 year.

3 After the fiscal year had ended on September 30, the defendants argued that they had no legal
4 authority to issue immigrant visa numbers to the plaintiffs because the diversity-based visas for that
5 year had expired. The court rejected that argument, holding that there is jurisdiction under the
6 Mandamus Act to grant relief. According to the court, “[t]heir applications would have been complete
7 and they would have received visas but for defendants’ error.” 76 F.Supp. 2d at 903. Consequently, the
8 court ordered the defendants to “process plaintiffs’ applications and to grant plaintiffs all relief to which
9 they would have been entitled had defendants processed their applications in a timely fashion.” *Id.*
10

11 In this case, Plaintiffs are seeking relief for class members who have been harmed by the
12 mistakes made in the visa allocation process by Defendants during fiscal years 2008 and 2009. Some of
13 these individuals would have already obtained permanent resident status if the statute had been properly
14 followed. Others are harmed because they are further from the front of the waiting list than they would
15 have been if the statute had been followed. As in *Silva v. Bell* and *Fei Wong*, class members should
16 receive equitable relief that will “place plaintiff class members, as near as may be, in the positions they
17 would have occupied but for the [mistaken] policy.” *Silva v. Bell*, 605 F.2d at 985, n. 13.
18

19 Plaintiffs maintain that the following relief for the benefit of class members will place them, as
20 nearly as possible, in the positions they would have been if the statute had been followed:
21

22 1. Immigrant visa numbers should be made available immediately on a priority date basis for
23 class members who should have been allocated an immigrant visa number during fiscal year 2008 or
24 2009. As explained above, during those years a minimum of 2,324 visas should have been made
25 available to individuals in the China EB3 category who were on the waiting list. Plaintiffs seek an order
26 that immigrant visa numbers in that amount will be made available to class members who have a priority
27
28

1 date of on or before March 1, 2006, and who either (a) filed an application for adjustment of status with
2 CIS (CIS Form I-485) on or before December 31, 2007 or (b) for class members outside the United
3 States who would have processed through a consular office, had their I-140 petition approved on or
4 before December 31, 2007.¹¹ In May and June 2008 the worldwide cut-off date advanced to March 1,
5 2006. During those months applicants from outside China with priority dates before March 1, 2006
6 were being allocated immigrant visas. Class members with priority dates before March 1, 2006 were
7 also on the waiting list in the same place or ahead of those people who were being issued immigrant
8 visas. According to the statute, INA §202(e), immigrant visa numbers should have been issued in
9 priority date order. Because the China EB3 limit had not been reached during these months, individuals
10 from China on the waiting list above the March 1, 2006 cut-off date should also have been issued
11 immigrant visas, just like applicants from other countries were, up to the per-country limit.
12
13

14 For class members who are outside the United States and whose I-140 petitions were approved
15 on or before December 31, 2007, DOS should be required to schedule an interview and make a decision
16 on the application for an immigrant visa within a reasonable time of not more than sixty (60) days. For
17 class members who are in the United States and who have filed an application for adjustment of status,
18 CIS should be required to adjudicate the application and make a decision on the application for
19 adjustment of status within a similar period of time. Any derivatives who have aged out since their
20 eligibility date should have their applications adjudicated as if they were still under the age of 21 at the
21 eligibility date. Granting such relief for class members and their derivative family members now will
22 put all applicants in the same position that they would have been in if there had been no violation of the
23 statute.
24
25

26
27 ¹¹ Persons who are outside the United States applying for an immigrant visa at a consular office are not
28 able to affirmatively file the application for an immigrant visa (Form DS-230). Instead, shortly before
the priority date is current the National Visa Center notifies the applicant to file Form DS-230, and then
after receiving such notification the applicant is allowed to file the application.

1 2. In the alternative, if immigrant visa numbers are not made available now to class members
2 who should have been approved during fiscal year 2008 or fiscal year 2009, then this Court should
3 require Defendants to provide, on a monthly basis for the remainder of the fiscal year, copies of the
4 waiting lists required under §203(e), and reports concerning the actual usage of immigrant visa numbers.
5 To the extent that there are any unused EB3 visa numbers that are still available at the end of this fiscal
6 year, this Court should order that such unused EB3 visa numbers are to be made available for the class
7 members of this lawsuit on a priority date basis.
8

9 3. Finally, class members and their derivative family members with pending applications for
10 adjustment of status should be granted renewals of their employment authorization and advance parole
11 documents (travel permission) without having to pay the filing fee for such applications, while they wait
12 till their applications for permanent resident status are adjudicated.
13

14 An order requesting such relief is attached hereto.
15

16 Dated this 18th day of June, 2010.
17
18

19 /s/ Robert Pauw
20 Robert Pauw
21 Robert Gibbs
22 GIBBS HOUSTON PAUW
23 Attorneys for Plaintiffs
24
25
26
27
28