

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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ZIXIANG LI, et al.,	)	
	)	
Plaintiffs,	)	CASE NO. C10-00798RAJ
	)	
v.	)	SEATTLE, WASHINGTON
	)	September 27, 2010
UNITED STATES OF AMERICA,	)	
et al.,	)	
	)	MOTION TO DISMISS
Defendants.	)	
	)	

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VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE RICHARD A. JONES  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:           ROBERT PAUW, ROBERT GIBBS

For the Defendant:         AARON GOLDSMITH, REBECCA COHEN

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1 September 27, 2010

2:00 p.m.

PROCEEDINGS

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3 THE CLERK: We're here in the matter of Li, et al.,  
4 v. United States, Cause No. C10-798RAJ. Counsel, please make  
5 your appearances for the record.

6 MR. GOLDSMITH: Your Honor, Aaron Goldsmith on behalf  
7 of the government.

8 THE COURT: Good afternoon.

9 MS. COHEN: Rebecca Cohen from the U.S. Attorney's  
10 Office, also on behalf of the defendants, Your Honor.

11 THE COURT: Good afternoon.

12 MR. PAUW: Robert Pauw on behalf of the plaintiffs.

13 MR. GIBBS: Robert Gibbs on behalf of the plaintiffs.

14 THE COURT: Good afternoon to you as well.

15 Counsel, we have three matters for consideration this  
16 afternoon, and they include a motion to dismiss, a motion for  
17 a preliminary injunction, and a motion for class  
18 certification. I'd like you to confine your remarks and  
19 arguments to just the motion to dismiss this afternoon.

20 As I see it, there are two significant issues that the  
21 parties need to address in their arguments to this court:  
22 The standing and mootness issue, and whether a viable claim  
23 exists against USCIS.

24 Now, counsel, the normal practice would be to allow the  
25 moving party to go forward, but under the circumstances of

1 what's been raised, I think it would be more helpful for the  
2 court if we began with the plaintiffs in this case, with the  
3 court asking you a series of questions and certainly the  
4 defense having an opportunity to respond. Counsel, the  
5 parties will have a maximum of 20 minutes to respond to the  
6 court's questions, and I ask that you confine your remarks to  
7 that time period.

8 So with that, we'll begin. On behalf of plaintiffs,  
9 counsel, if you'd step to the lectern. Good afternoon.

10 MR. PAUW: Good afternoon, Your Honor.

11 THE COURT: Counsel, let's begin. As I read the  
12 briefing, it gave the appearance that the defendants appeared  
13 to be in somewhat of a quandary in terms of the specific type  
14 of relief that you were seeking. It appears that you  
15 clarified that to some degree in your response brief, and  
16 then it seemed like once the issues were framed, it was more  
17 beneficial for the court to understand exactly where you were  
18 going and what you were seeking. So let me begin with: What  
19 kind of prospective relief are you actually seeking?

20 MR. PAUW: Well, there are a couple of different  
21 types of relief that, I think, the court has some discretion  
22 in fashioning the relief we're looking for.

23 First of all, we're looking to allocate the number of  
24 immigrant visas to the individuals in the plaintiff class.  
25 Some -- we're asking for 2,400 visas to be allocated.

1 THE COURT: How many, Counsel?

2 MR. PAUW: I think the exact number is 2,324.

3 THE COURT: Okay.

4 MR. PAUW: We think that's -- at a minimum, there are  
5 that many people in the class that have been harmed by the  
6 misallocation of visas.

7 THE COURT: And, Counsel, you'd agree that that would  
8 exceed the number that's allocated by Congress for the  
9 particular years, correct?

10 MR. PAUW: No. No, I don't think that's correct.  
11 Well, let's see. If you're asking if we granted that number  
12 of visas, let's say, for example, this year, would that  
13 exceed the number, China's limit? And I think the answer to  
14 that is, no, it would not, because of the way the per country  
15 limits are calculated.

16 And in particular, I'm thinking of Section 202(a)(5)(A),  
17 which will allow the -- so we're talking about the Employment  
18 Based Category 3, what we call an EB3 category. Because the  
19 other employment categories, EB1 and EB3 and EB4 and EB5, are  
20 undersubscribed, under Section 202(a)(5)(A), those visas can  
21 be allocated without counting the numbers against China's  
22 cap. So in answer to your question, I believe that those  
23 numbers can be allocated, the 2,324 visas can be allocated  
24 without exceeding China's per country limit.

25 There's maybe a further question that you're raising, and

1 that is, could those visas be allocated this year, fiscal  
2 year 2010? And that, it's not clear to me. There's a  
3 worldwide cap, approximately 140,000 visas worldwide. We  
4 don't have the information from the immigration services,  
5 from the Department of State, as to how many of these visa  
6 numbers are left over this year.

7 There was a notice, the most recent submission made by the  
8 defendants, indicate that no more visas can be allocated for  
9 adjustment of status purposes, suggesting that the total  
10 number has been reached. But what I would point out is, that  
11 was a notice sent by the Department of State to the USCIS,  
12 saying that they should not allow any more adjustments for  
13 status. It does not affect the number of visas that are  
14 allocated at the consular offices overseas. And there may be  
15 some -- we know there are some returns. The immigration  
16 Department of State allocates visas overseas, and some of  
17 those come back. We don't know whether or how many of those  
18 visas may be available. I don't expect that it would be  
19 2,000, but it may be a handful, it may be a couple hundred  
20 that are returned after they're allocated out to the consular  
21 posts.

22 THE COURT: Counsel, let's go back a little bit in  
23 terms of the context of the briefing submitted to the court.

24 First of all, you're not disputing that visa numbers for  
25 fiscal years 2008 and 2009 have already been issued, correct?

1 MR. PAUW: Those have been issued, that's correct.

2 THE COURT: And you agree that Congress created a  
3 worldwide per country visa limit; would you agree with that  
4 as well?

5 MR. PAUW: That's correct.

6 THE COURT: And under what authority do you rely to  
7 support your claim that the State Department has the  
8 authority to reallocate a visa number from a previous year to  
9 a later year?

10 MR. PAUW: Primarily that was what was done in *Silva*  
11 *v. Bell*, the Seventh Circuit case where the court -- the  
12 court or the immigration service agreed to recapture numbers  
13 from previous years. So if -- so under *Silva v. Bell*, and  
14 generally speaking, I think, under the court's equitable  
15 ability to remedy past violations of a statute, this court  
16 can go back and reach unused visa numbers from prior years.

17 THE COURT: Well, counsel suggests that and then  
18 replied that *Silva* appears to no longer be good law, or it's  
19 not clear that that's exactly what the case posited. So  
20 could you address their reply in that regard? I'm referring  
21 specifically to pages 5 and 6 of the reply.

22 MR. PAUW: Yes. I think they're relying on a  
23 subsequent Seventh Circuit case called *Iddir*.

24 THE COURT: Correct. That's I-d-d- --

25 MR. PAUW: I-r, yes.

1           That case, indirectly, reaffirms the holding in *Silva v.*  
2 *Bell*. It actually cites with approval two district court  
3 cases that talk about recapturing visas, and those cases  
4 specifically rely on *Silva v. Bell*.

5           THE COURT: Counsel points out -- not to interrupt  
6 you -- but counsel points out that, as previously noted by  
7 the defense, the *Iddir* opinion is different from the present  
8 case because it involves a different visa program, adversity  
9 visa program. So aren't we dealing with apples and oranges  
10 under these circumstances?

11           MR. PAUW: In the other words, the *Iddir* case  
12 specifically wasn't holding that the court did not have  
13 authority to recapture the prior visas. The *Iddir* case was  
14 dealing with a diversity visa program. And what I would  
15 point out is that, under that program, which is different  
16 than the EB program that we're talking about here, under the  
17 diversity visa program, the statute specifically says -- here  
18 I'm looking at 8 U.S.C., Section 1154, 8 U.S.C., Section  
19 1154(a)(1), and the statute specifically says those people in  
20 the diversity visa lottery program, they will remain eligible  
21 to receive their visas only through the end of the specific  
22 fiscal year. Subsection -- that's 1154 (a)(1)(L), I believe  
23 it is.

24           Again, those individuals in the diversity congressional  
25 statute, those individuals are eligible to get their visas

1 only through the specific fiscal year. That provision does  
2 not apply in the context of the EB applicants, the  
3 employment-based applicants that we're talking about here.

4 And so *Iddir* specifically reaffirms the authority of a  
5 court to recapture visas, but then says, well, but you can't  
6 use them in this case because of this particular provision.

7 THE COURT: So that's a provision, Counsel, that you  
8 believe will allow the State Department to recapture a visa  
9 number that's already been used or issued?

10 MR. PAUW: Correct. Now, there's a further question  
11 there about whether or not the State Department can recapture  
12 visa numbers that have already been used.

13 THE COURT: Okay. Well, Counsel, the statute you  
14 just referenced, does that language specifically reference  
15 the State Department as having that specific authority?

16 MR. PAUW: Let's see. Which one are you talking  
17 about?

18 THE COURT: The statute you just referenced, 1154.

19 MR. PAUW: Yes.

20 THE COURT: Okay. Could you point that specific  
21 provision out?

22 MR. PAUW: Section 1154(a)(1). Sorry. It's  
23 1154(a)(1)(I).

24 THE COURT: That's the very first provision under  
25 1154(a)?

1 MR. PAUW: Capital A, B, C, all the way down to  
2 capital I.

3 THE COURT: Okay. I'm with you.

4 MR. PAUW: And then I'm looking at subparagraph small  
5 Roman numeral two, then big numeral two. It says, "Aliens  
6 who qualify for random selection under this lottery system  
7 shall remain eligible to receive such visa, a diversity visa,  
8 only through the end of the specific fiscal year for which  
9 they were selected."

10 THE COURT: Counsel, I still have to ask you the same  
11 question: How does that authorize the State Department to  
12 recapture a visa number that's already been used?

13 MR. PAUW: Okay. Well, I guess the argument is this:  
14 There is no statutory provision that prevents the court from  
15 doing so. You know, the court has general equitable powers  
16 to accomplish equitable relief where a statute has been  
17 violated.

18 In the *Silva* case, the Seventh Circuit recognized that  
19 district courts have the power to do that, unless there's  
20 some statutory provision that prevents it.

21 THE COURT: Counsel, I think you have to agree that  
22 courts are reluctant to trample upon the responsibility of  
23 the role of Congress. If Congress had the clear, express  
24 intention that that was the authority to be allowed, wouldn't  
25 the court be in a better position to make a determination if

1 Congress hadn't expressed a clear intent that that's what  
2 they wanted to have done, as opposed to the court just  
3 assuming the court has the authority to engage in that type  
4 of process?

5 MR. PAUW: Well, the issue is Congress hasn't spoken  
6 one way or the other as to how to remedy a situation where  
7 the statute has been violated. Congress has left that issue  
8 open, I guess, and ultimately for the courts to decide how to  
9 remedy a violation of the statute.

10 THE COURT: Well, aren't we getting into a  
11 legislative role as opposed to a judicial role?

12 MR. PAUW: No, I don't believe so.

13 I would also -- I would point out -- the other thing I  
14 would point out is that the immigrant visas can be allocated  
15 in a fiscal year. There's a cap for each fiscal year, but  
16 there's no requirement that these visas actually be used  
17 during that fiscal year.

18 THE COURT: Well, these visas were already issued.  
19 You already agreed those visas were issued in 2008 and 2009.  
20 So my question is: How are we supposed to recapture, and  
21 under your proposal, to be judicially mandated to recapture  
22 the visa numbers. Is that what you're asking the court to  
23 do?

24 MR. PAUW: Yes. The recaptured part recaptures visas  
25 that have not been used before. We submit that there are --

1 and the documents and evidence that we have submitted to the  
2 court shows that there are visas available for recapture.

3 If you look at the ombudsman's report that we have  
4 provided to the court --

5 THE COURT: But aren't those in specific, defined  
6 areas, Counsel?

7 MR. PAUW: Specific, defined areas?

8 THE COURT: Of recaptured opportunity.

9 MR. PAUW: They can be recaptured. You know, they're  
10 available. These are visa numbers that have not been used.  
11 There are approximately 218,000 visa numbers that have not  
12 been used in the previous years that are, quote, available  
13 for recapture.

14 THE COURT: And is there any authority, other than  
15 that one specific statutory reference that you rely upon to  
16 support that proposition?

17 MR. PAUW: Well, I guess two other points: One is  
18 that we are relying on the court's general equitable powers  
19 to remedy a statutory violation. We think that's well  
20 supported, and that's exactly what happened in the *Silva v.*  
21 *Bell* case.

22 Also I would point out that visas -- there are, of course,  
23 numerical limits each fiscal year on visas to be made  
24 available, but there's no -- the statute does not say those  
25 visas, if they are not used, cannot be made available in a

1 subsequent fiscal year. All right? The statute authorizes  
2 the allocation of immigrant visas, and there's nothing in the  
3 statute that precludes a court from -- or the Department of  
4 State from using those visas in a subsequent fiscal year.

5 THE COURT: Doesn't your proposal require the court  
6 to go and take visas from other individuals who have already  
7 been recipients of the same?

8 MR. PAUW: No, that's not correct. And that's where  
9 we're relying on this report from the CIS ombudsman. And I'm  
10 looking at, in our materials, in Exhibit 15-2, pages 55 and  
11 56, and it specifically says, quote, employment preference  
12 numbers available for recapture, and it accounts for over  
13 218,000 employment-based preference numbers that are  
14 available, quote, for recapture. It's those that can be  
15 recaptured. So we're not talking about going back and using  
16 these visa numbers that have already been used.

17 THE COURT: And under your theory, that would not  
18 exceed any congressionally-limited numbers on a per country  
19 basis?

20 MR. PAUW: Correct.

21 If I may make just one other point, and then maybe I can  
22 reserve time for rebuttal.

23 THE COURT: Certainly. I still have a couple other  
24 questions.

25 MR. PAUW: Okay. I'm sorry.

1 THE COURT: Counsel, just so we're clear, your  
2 present lawsuit only deals with the allocation year of 2008  
3 and 2009, and not 2010; is that correct?

4 MR. PAUW: Well, the issues in the preliminary  
5 injunction deal with 2008 and 2009 and making whole the  
6 people who were harmed then. We think there are issues that  
7 are ongoing relating to how the immigrant visa numbers are  
8 calculated and allocated.

9 Part of another problem, another violation of the statute  
10 that we think is ongoing is the fact that the Department of  
11 State uses these lists to allocate visas, as it's supposed to  
12 do under the statute, but CIS is -- there's a hidden demand  
13 out there. CIS is using those visa numbers without getting  
14 onto the list. And so there's no way for the Department of  
15 State to do a proper calculation of how many visas are going  
16 to be allocated each month.

17 What the problem is -- what the violation is, is that CIS  
18 is grabbing these immigrant visa numbers without having the  
19 applicant get onto that waiting list or onto that IVAMS list,  
20 what they currently call an IVAMS list. So when the  
21 Department of State says, okay, we will -- I think one of the  
22 examples they give is, we'll allocate 3,000 visas this month,  
23 and we have this list of applicants. We look at the list,  
24 and we cut off at 3,000 applicants by priority date. So they  
25 set the priority date at a certain date.

1           The problem is, there's not just the 3,000 people on the  
2 list, but there may be another 3,000 people that are not on  
3 the list who are going to start grabbing those visa numbers  
4 out of priority date order. So that's another issue.

5           I guess to answer your questions, there are some ongoing  
6 issues, and I think this is a problem that continues into  
7 2010 and beyond.

8           THE COURT: Counsel, for the court's benefit, any  
9 time I engage in statutory interpretation, the first thing I  
10 have to do is look at the language of the specific statute  
11 and what the authority provides by that statute.

12           Can you point to where in the statute that you rely upon  
13 that requires USCIS to maintain the department of state's  
14 waiting list or establish cut-off dates for the department of  
15 state's visa bulletin?

16           MR. PAUW: We're not saying that CIS is supposed to  
17 be the agency establishing cut-off dates. Where CIS's  
18 obligation comes from, I think there are a couple of points:  
19 First of all, the whole statutory framework is set up to  
20 ensure that visas are allocated on a priority-date basis.  
21 Where CIS's obligation comes in, two places: First of all,  
22 with respect to adjustment of status, Section 245(b) requires  
23 CIS to use visas that are authorized under Section 202 and  
24 203; in other words, use visa numbers that are authorized  
25 under the priority date system.

1 THE COURT: But, Counsel, aren't these  
2 responsibilities committed solely to the Department of State  
3 in accordance with 8 U.S.C., 1154(e)(3) and 1153(g)? Because  
4 as I read those two statutes -- and I have it right here,  
5 Counsel, if you don't have it before you -- it gives the  
6 appearance that that's not the area of responsibility for the  
7 agency that you're suing.

8 MR. PAUW: Well, again, we agree CIS does not have  
9 the responsibility of establishing the cut-off dates. But  
10 what it does have to do is two things: Section 245(b)  
11 requires it to obtain the immigrant visa numbers under the  
12 priority date system; in other words, Congress puts that  
13 there in order to ensure the adjustment of status also occurs  
14 in priority date order.

15 And then the second thing I would point to is a  
16 regulation, and I'm looking at 22 CFR, Section 42.51(b),  
17 22 CFR, 42.51(b). And what that requires -- that's a  
18 Department of State regulation. What it says is that, "The  
19 visa office shall allocate immigrant visa numbers for use,  
20 not only by the Department of State, but also for use in  
21 connection with the issues of adjustment of status." So  
22 that's CIS. And in particular, it's required that it's based  
23 on priority dates reported by CIS.

24 THE COURT: But is there any obligation in that CFR  
25 for the Department of State to maintain a waiting list or

1 establish cut-off dates?

2 MR. PAUW: Yes, I think so. I mean, that's exactly  
3 what it says. It says, "The visa office shall allocate visa  
4 numbers for use of the immigrant visas and adjustments based  
5 on priority dates reported by the consular officers and CIS."  
6 So that's the requirement. It says it shall allocate visa  
7 numbers that way; in other words -- and the reason for doing  
8 that is so there's a centralized system to control the  
9 allocation of the immigrant visa numbers.

10 The way that they're set up is that people have to get on  
11 that list. I mean, as Congress requires, there has to be  
12 waiting lists. The way the system operates is that you get  
13 on that waiting list, and then the Department of State, the  
14 visa office, can determine how to allocate those month by  
15 month. That gives control over the numbers.

16 The problem here is that CIS is using those numbers  
17 without having gotten on that list. So when the visa office  
18 says, okay, we'll let 3,000 people get their visa number this  
19 month by setting up a cut-off date, there are another 3,000  
20 people who aren't on the list that start grabbing those, and  
21 then the system goes haywire because visas get allocated out  
22 of priority date order.

23 THE COURT: All right. Counsel, the last thing I  
24 wanted to ask you questions about deals with the viability of  
25 the claims against CIS. Now, Counsel, I direct your

1 attention to page 9 of the defendant's reply. They argue  
2 that the only source of CIS's legal duty that you identified  
3 is 8 U.S.C. 1153(e), and it's my understanding, just based  
4 upon your last argument, that the CFR in Section 245(d) are  
5 the two source authorities that you rely upon that imposes a  
6 duty on CIS; is that correct?

7 MR. PAUW: Yes, that's correct. I guess as well I  
8 would point to the overall statutory framework, which is set  
9 up -- you know, Congress's intention is to allocate these  
10 visas on a priority basis. So if you look -- in addition, if  
11 you would just look at the overall structure of the statute,  
12 I would point to that as well.

13 THE COURT: All right. Thank you, Counsel.

14 MR. PAUW: Thank you, Your Honor.

15 THE COURT: Counsel for the defendants, good  
16 afternoon.

17 MR. GOLDSMITH: Good afternoon, Your Honor.

18 THE COURT: Counsel, let's start first with: You  
19 provided notice of intent to reply on additional authority  
20 and oral argument. If you could identify what's the  
21 significance of the urgent, urgent, urgent reference you  
22 provided to this court?

23 MR. GOLDSMITH: Yes, Your Honor. That is a document  
24 that was issued by the Department of State, and it was handed  
25 down to USCIS to advise as to the allocation of visa numbers

1 for this fiscal year, which ends on Thursday. It was in  
2 regards to the motion for preliminary injunction, which Your  
3 Honor asked us not to address. We won't address that here  
4 today. It does not relate to our motion to dismiss.

5 THE COURT: And, Counsel, you just heard the court  
6 have an exchange with counsel for the plaintiffs. Counsel  
7 appears to rely upon, as statutory authority, Section 245(b)  
8 and the 22 CFR reference. Do you wish to respond to  
9 recommendations he's made as the source of authority upon  
10 which he relies?

11 MR. GOLDSMITH: Yes, Your Honor. I would  
12 respectfully invite the court to consider the *Norton* case,  
13 *Norton v. SUWA*. It says that the nondiscretionary obligation  
14 that can support a claim under the APA, and specifically  
15 706(1), has to be found in a statute, not in a regulation.

16 And secondly, the statutory provision that was cited, I  
17 don't believe it requires USCIS to maintain a waiting list.  
18 I think it's clear that the waiting list requirement is --  
19 that is something that's committed to the Department of  
20 State. And instead of having USCIS also have its own waiting  
21 list, a more effective and efficient manner of addressing  
22 this is the manner in which they currently use: The  
23 information is directly inputted into the department of  
24 state's database system, the IVAMS system.

25 THE COURT: Counsel also suggests to this court,

1 there appears to be a vortex of opportunity for a large  
2 number of visas to be recaptured. Could you respond to that  
3 proposition?

4 MR. GOLDSMITH: Yes, Your Honor. That's a difficult  
5 issue to respond to, but I would begin by pointing or  
6 respectfully inviting the court to consider the *Campesinos*  
7 *Unidos* decision. This is a decision, it's not an immigration  
8 case. It's involving the award of grant money. And the  
9 Ninth Circuit considered claims by an applicant that was  
10 challenging how this grant number was disbursed in prior  
11 years. In that case, the applicant said, well, even if you  
12 can't do anything for these prior years, at least you can  
13 give us prospective relief as to future years. And the court  
14 in the Ninth Circuit said, well, they really can't, because  
15 they have to follow the requirements in those future years.

16 And what Congress has authorized and told the Department  
17 of State to do is to make reasonable estimates as to basic  
18 demand, and to allocate visas based on those estimates.

19 And if this court orders the Department of State to do  
20 something different, to allocate visa numbers in some other  
21 manner in an effort to redress an alleged harm from a prior  
22 year, we're acting contrary to what the statute says.

23 And I -- you know, if the allegation is that we  
24 inadvertently made mistakes in making predictions in 2008 and  
25 2009, the answer can't be that we are required to

1 intentionally disburse visa numbers in some other manner.  
2 Now, that's kind of a background.

3 Now, as to the specific allegation that there are these  
4 additional unused visa numbers, I'm not sure what to say,  
5 other than we're not aware of any secret cache of visa  
6 numbers, and I don't understand how that can exist under the  
7 law as written.

8 Because what happens if a visa number were not used, it  
9 would be incorporated into the formula used for the next  
10 fiscal year; for example, if there are unused -- this is a  
11 hypothetical -- unused family visa numbers at the end of a  
12 fiscal year, that number would be added to 140,000, and that  
13 would establish a worldwide limit for employment visas for  
14 the following fiscal year.

15 So it's not as though visa numbers simply disappear.  
16 That's why the whole intention of -- I'm not sure how to put  
17 it -- of extra visa numbers does not make sense to me.

18 As to the specific numbers for this year, I can address  
19 that. That's what Your Honor is asking me.

20 THE COURT: Counsel, the focus I'm looking at is,  
21 counsel suggests to the court there's an opportunity to  
22 recapture visas, and he also suggests to the court that there  
23 are meaningful differences within the EB categories. And as  
24 a result, there are different cells, so to speak, of the  
25 opportunity to recapture visas, in which case the government

1 should be free to re-disburse these visas to the named  
2 plaintiffs in the case.

3 MR. GOLDSMITH: Yes. We see it differently. We  
4 don't think there's an extra group of visas that are  
5 available for us to reallocate; that we have -- that, for  
6 example, for this current year, the limit, the congressional  
7 limit, is 2,716 visas through China, and we estimate there  
8 are 600 visa numbers that will fall down from the family visa  
9 category, less than 600, so closer to the 3,300 limit. We've  
10 already incorporated that number in setting visa cut-off  
11 dates and in allocating visas. There's not an extra source  
12 of visa numbers that we can tap into in order to try to  
13 redress an alleged harm in the following year.

14 THE COURT: Then how do you balance that with  
15 priority?

16 MR. GOLDSMITH: Sorry, Your Honor. I apologize.

17 THE COURT: Counsel argued to the court that there  
18 should be prioritization. How does that fit into your  
19 analysis of the facts?

20 MR. GOLDSMITH: That they -- I'm sorry. That they  
21 should be given preference based on what happened in the  
22 past?

23 THE COURT: Correct.

24 MR. GOLDSMITH: Well, no, we don't see it that way.  
25 We think we have to allocate visas based on the cut-off

1 dates, based on our reasonable estimates, because that's what  
2 the statute says: That we cannot prioritize visa numbers for  
3 a particular group based on prior years, because that's not  
4 consistent with the statute.

5 And we'd respectfully ask the court to consider the  
6 consequence of a contrary rule; that if different groups can,  
7 after the fact, go back and look at the estimates that the  
8 Department of State has made and say -- point to those  
9 estimates that proved to be inaccurate, and obtain additional  
10 visa numbers from the court, what you're going to have is a  
11 system in which different immigrant groups are pitted against  
12 each other. It would be like a run on the bank, because each  
13 group would want to get its visa numbers for its group as  
14 soon as possible, before visa numbers run out, before those  
15 visa numbers are awarded by a different court to some other  
16 different group. And we would just ask the court to consider  
17 that in its ruling.

18 THE COURT: Is there any prioritization that carries  
19 over from year to year? In other words, if you're not in  
20 2008 and 2009, is there any carryover effect into 2010, which  
21 would prioritize you for that year?

22 MR. GOLDSMITH: I don't believe so, no, Your Honor.

23 THE COURT: And, Counsel, the plaintiffs in this case  
24 have also advanced the differences between *Iddir* and *Silva*.  
25 Can I receive your response to the arguments they advanced

1 today in terms of *Iddir* complementing *Silva*?

2 MR. GOLDSMITH: Yes, Your Honor. We recognize the  
3 two cases are different. *Iddir* is a diversity visa case.  
4 But we cited it for a simple proposition that -- an  
5 uncontroversial proposition -- that when Congress has  
6 established a limit, a court can't order an agency to violate  
7 that limit.

8 Now, the *Iddir* limit was a time-based limitation in that  
9 they had to be used within one year. Here, it's a numerical  
10 limitation. There is a cap on the number of visa numbers  
11 that can be allocated. And that same principle applies, even  
12 though it's a different program.

13 THE COURT: Okay. Counsel, that's all the questions  
14 I have. Do you wish to make additional argument?

15 MR. GOLDSMITH: Yes. We recognize that when it comes  
16 to a violation of the Constitution, courts have more than  
17 equitable powers to grant relief, and that's because the  
18 Constitution is a fundamental law and fundamental values of  
19 our society. But this is not a constitutional law case.  
20 This is an APA case. And the Supreme Court has said that  
21 judicial review of agency action under the APA is, quote,  
22 narrow. And if you look at the applicable provision,  
23 5 U.S.C. 706(2), that provides for judicial review of agency  
24 action that's arbitrary and capricious, and the remedy that  
25 is provided is that the agency action will be set aside. And

1 the courts interpreting this have said that in the ordinary  
2 course, this means remand back to the agency, not the  
3 granting -- and we would say that's different than granting  
4 the prospective relief.

5 Now, we recognize that there are circumstances -- I think  
6 rare circumstances is the way it's referred to -- in which  
7 the court can remand, with instructions, back to an agency.  
8 But whether it's remanded with instructions or without  
9 instructions back to the agency to redo its visa cut-off  
10 dates or its visa bulletins from 2008 or 2009, that still  
11 won't grant relief to the proposed class, because the visa  
12 numbers for those two years have already been allocated. So  
13 in sum -- well, if I may make one more point?

14 THE COURT: Certainly, Counsel.

15 MR. GOLDSMITH: I would simply state that, in terms  
16 of the claims against USCIS, this is a complicated case in  
17 some respects. But the one thing that is clear is  
18 responsibility for maintaining the commitment from the  
19 Department of State, and not USCIS. And under *Norton*, a  
20 claim under 706(1), the APA can only receive where the  
21 plaintiff asserts an agency failed to take discrete action  
22 that it is required to take.

23 And so, in sum, we would say that, first, there is no  
24 standing for the plaintiffs to assert these claims, because  
25 there is no longer a live case or controversy as to the

1 allocation of visa numbers in 2008 and 2009. And then  
2 prospective relief is inappropriate for the reasons that we  
3 have outlined.

4 Thank you, Your Honor.

5 THE COURT: Thank you, Counsel. Just so we're clear,  
6 Counsel, the court leapfrogged over the normal protocol.  
7 Counsel, this is your motion, so I will give you the  
8 opportunity for the final say in this matter. Counsel, it's  
9 your chance to respond.

10 MR. PAUW: Thank you, Your Honor. Just three points  
11 that I would like to make by way of response.

12 First of all, counsel talks about this IVAM system, which  
13 is a list. In other words, when CIS is handling these  
14 adjustment applications, it will put the applicant's name on  
15 this list that the Department of State then uses, it looks  
16 down this list and cuts off at 3,000 applicants or whatever.

17 The point I want to make is -- and this is very clear in  
18 the evidence -- that there are many applicants for adjustment  
19 of status that are using those visa numbers that never get on  
20 that IVAMS list; in other words, CIS is using these visa  
21 numbers without putting the names of the applicants on that  
22 list. And that's many, maybe even most of the applicants.  
23 The evidence shows that up to 90 percent of the immigrant  
24 visa numbers, the employment-based immigrant visa numbers,  
25 are being used by adjustment of status by the CIS. And of

1 those numbers used by CIS, at least for the first four months  
2 of the fiscal months of 2010, there were -- half of those  
3 were not on the IVAMS list. So we're talking about huge  
4 numbers of individuals who are getting adjustment of status  
5 without being on that IVAMS list.

6 The second point that I would like to make is about the  
7 *Campesinos* case. That case involved certain funds that had  
8 been allocated for purposes of federal grants. Those funds  
9 were all used up. The question, I guess, is: Whether there  
10 are immigrant visa numbers that are still remaining,  
11 available to recapture, or have they all been used up?

12 Counsel talked about immigrant visa numbers from one year  
13 being rolled over into the next year, and their argument was  
14 so there really aren't any visa numbers available, but that's  
15 not correct, we submit.

16 The documentation that we have show that -- the ombudsman  
17 report -- there were over 218,000 immigrant visa numbers that  
18 were available to be recaptured. Those numbers were not  
19 there. There may be some rollover from year to year, but  
20 those numbers were certainly not reused.

21 If you look at fiscal year 2008, for example, the total  
22 number of visas available for employment-based was 162,000.  
23 So it's very clear that those visa numbers that were  
24 available for recapture were not rolled over. Those visa  
25 numbers are still available for recapture.

1 THE COURT: So you're saying those visas are not  
2 restricted on a per country basis?

3 MR. PAUW: Those are not -- what I would suggest  
4 is -- so if we go back into a prior year and recapture those  
5 numbers, you should also look at, I think to be fair to the  
6 statute, you would look at the number of visas that had been  
7 allocated to the China EB3 category, and then make sure you  
8 don't exceed, for that fiscal year, the per country limits.  
9 So I think there would be -- in fairness, there would be  
10 another calculation. That would have to be a question that  
11 would have to be looked at.

12 THE COURT: So in your theory, Counsel, there is no  
13 cap on a per country basis. So if a country wanted to make  
14 application for these 218,000, and they had 120,000 which  
15 were eligible, in your theory there is no per country base  
16 cap, and one country could apply and use that many?

17 MR. PAUW: No, no. That was not the argument. The  
18 argument was that those can be -- that when you allocate  
19 those -- you know, let's say you're recapturing those from  
20 the fiscal year 2006, or whatever. You have to look at the  
21 fiscal year 2006 and look at the per country limits for that  
22 year and make sure that you're not exceeding the per country  
23 limits for that year.

24 But it's very clear that the China EB3 category would not  
25 be up against its limit that year, and so those additional

1 visas can then be used in the subsequent year for the China  
2 applicants.

3 THE COURT: So in your theory, what's the per country  
4 cap that involves China? What cap do they have?

5 MR. PAUW: The cap for China in the employment-based  
6 category varies year to year, but it's approximately 9,800.

7 So you would go back to the -- let's say, for example, the  
8 fiscal year 2006, see how many visas had been allocated in  
9 the China employment category, and then if there are only  
10 5,000 that had been allocated in the China category, you  
11 could exceed that, you can use up to that many for China on  
12 applicants now.

13 THE COURT: And your third point, Counsel?

14 MR. PAUW: Yes. Third point: It's just in response  
15 to the government's argument that the allocation of these  
16 unused visa numbers from prior years, the court would be  
17 acting contrary to statute. I think I said a couple of times  
18 where it's not consistent with the statute.

19 But what I would point out is: Counsel pointed to no  
20 statutory provision that precludes the court from doing that.  
21 I think that's clear, in light of *Silva*, because if there was  
22 a statutory provision that prohibited that, the court, in  
23 *Silva*, could not have reallocated those visas from prior  
24 years.

25 THE COURT: Okay. Thank you. Counsel?

1 MR. GOLDSMITH: Your Honor, I'm going to try to be  
2 brief.

3 First of all, with respect to the issue of visas -- unused  
4 visas that aren't used in a particular year, incorporated  
5 into the calculation of the total of the next year, we would  
6 submit that's by operational statute. I don't have the  
7 statute, but it's Section 1151 and 1153, as read together.  
8 It sets out 140,000, plus the other visa numbers for the  
9 family limit. And so that's just as a matter of law with the  
10 way it works and the way it's supposed to work.

11 And with respect to *Silva*, I'd point out that immigration  
12 law was different back then, and the issue there was in terms  
13 of calculation of the limit, and the issue was the Department  
14 of State calculated the wrong limit in terms of how it  
15 incorporated two different statutes that were passed at  
16 different times by Congress.

17 That's really all I have to add. Thank you, Your Honor,  
18 for your time.

19 THE COURT: Thank you. All right. Counsel, thank  
20 you very much for your participation and responses that  
21 you've provided to this court. It's been very helpful to be  
22 able to focus in on the areas that are of utmost importance  
23 to this court so I can make a resolution.

24 Thank you, and have a good afternoon. We'll be in recess.

(THE PROCEEDINGS CONCLUDED.)

## C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 30th day of September 2010.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR  
Official Court Reporter