

The Honorable Richard A. Jones

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ZIXIANG LI, JUN LI, JUN GUO, SHIBAO
ZHANG and MING CHANG, on behalf of
themselves as individuals and on behalf of
others similarly situated,

Plaintiffs,

v.

United States of America; U.S. Department of
State; HILLARY RODHAM CLINTON,
Secretary of State; U.S. Department of
Homeland Security; JANET NAPOLITANO,
Secretary of Department of Homeland Security;
U.S. Citizenship and Immigration Services; and
ALEJANDRO MAYORKAS, Director of
Citizenship and Immigration Services,

Defendants.

No. C10-00798-RAJ

DEFENDANTS' SUPPLEMENTAL BRIEF
IN SUPPORT OF THEIR MOTION TO
DISMISS

NOTED ON MOTION CALENDAR:
October 15, 2010

In this action, plaintiffs challenge the allocation of employment-based third preference (“EB-3”) visa numbers in fiscal years 2008 and 2009. Defendants moved to dismiss on the grounds, *inter alia*, that plaintiffs lack standing to challenge, at this late date, the allocation of visa numbers in these two years. There is no mechanism by which the U.S. Department of State (“Department of State”) can undo its allocation of EB-3 visa numbers for these two years or recapture visa numbers that have already been used by other applicants. As a result, plaintiffs’ claims should be dismissed for lack of subject matter jurisdiction.

1 At oral argument on September 27, 2010, plaintiffs' counsel raised – for the first time – a
2 new argument. Rather than argue that plaintiffs are entitled to an order compelling the
3 Department of State to recapture visa numbers that have already been used by other applicants,
4 plaintiffs' counsel argued that plaintiffs are entitled to an order requiring the Department of State
5 to recapture unused visa numbers from prior years for employment-based categories
6 *other than EB-3* so that these visa numbers may be allocated to the plaintiffs.

7 By order dated October 5, 2010 (Dkt. 35), this Court granted the parties leave to file a
8 supplemental brief addressing this one discrete issue. As more fully set forth below, this new
9 argument is insufficient to save plaintiffs' claims from dismissal because the Department of State
10 is not permitted to recapture visa numbers from prior years in the absence of express
11 Congressional authorization. *See* Dkt. 15-2, Exhibit 11, p. 20, n. 82 (“Absent special
12 legislation . . . unused visa numbers cannot be reclaimed”); 151 Cong. Rec. S3887 (daily ed. Apr.
13 19, 2005) (statement of Sen. Hutchinson) (explaining that visa numbers “cannot be recaptured
14 except by an act of Congress”). Plaintiffs cannot point to any legal authority to the contrary. As
15 a result, this Court cannot properly order such relief under the Administrative Procedure Act
16 (APA) or otherwise.

17 **Factual Background**

18 As the undersigned counsel noted at oral argument, any unused employment-based visa
19 numbers are incorporated into the formula for determining the limit on the number of family-
20 based visa numbers in the following fiscal year. *See* 8 U.S.C. § 1151(c)(3)(C). But there are
21 situations in which these unused employment-based visa numbers are not actually used in the
22 following fiscal year due to a Congressionally-created minimum on the number of family-based
23 visa numbers. *See* 8 U.S.C. § 1151(c)(1)(B)(ii). This outcome is the result of the formula
24 created by Congress. Specifically, the limit on family-based visa numbers is calculated by
25 subtracting from 480,000 the number of certain categories of aliens processed in preceding years.
26 *See* 8 U.S.C. § 1151(c)(1)(A). These categories include immediate relatives issued visas in the
27 preceding year, aliens born to an alien lawfully admitted for permanent residence during a
28 temporary visit abroad, and parolees processed in the second preceding year. *See id.*; *see also*, 8

1 U.S.C. §§ 1151(b)(2); 1151(c)(4). The number of unused employment-based visas from the prior
 2 fiscal year is then added to this number to calculate the total number of family-based visa
 3 numbers available. *See* 8 U.S.C. § 1151(c)(3)(C). But another provision establishes 226,000 as
 4 the minimum number of family-based visa numbers available in a given year. 8 U.S.C.
 5 § 1151(c)(1)(B)(ii). Since in many years the number of family-based visa numbers that would
 6 have been available under the calculations set forth in 8 U.S.C. § 1151(c)(1)(A) (which includes
 7 unused employment-based visa numbers from the prior fiscal year) was less than 226,000, these
 8 employment-based visa numbers remain essentially unused.

9 Recently, Congress has twice expressly authorized the Department of State to recapture
 10 these unused visa numbers for the benefit of applicants seeking employment-based visa
 11 numbers.¹ On October 17, 2000, Congress enacted Section 106(d) of the American
 12 Competitiveness in the Twenty-First Century Act of 2000 (Title I of Pub. L. 106-313). This
 13 legislation authorized the recapture of unused visa numbers from fiscal years 1999 and 2000,
 14 creating a “pool” of 130,107 numbers which could be allocated to applicants in the employment-
 15 based first, second, and third preference categories once the annual employment-based numerical
 16 limits had been reached.² *See* Declaration of Charles W. Oppenheim (“Oppenheim Decl.”) ¶ 3,
 17 attached as Exhibit 1. All available visa numbers authorized under Pub. L. 106-313 have been
 18 recaptured, allocated, and used by visa applicants. Oppenheim Decl. ¶ 3.

19 On May 11, 2005, Congress enacted Title V, Section 502 of the REAL ID Act of 2005
 20 (Division B of Pub. L. 109-13). This legislation authorized the recapture of 50,000 employment-
 21 based visa numbers that were unused in fiscal years 2001 through 2004. *See* Pub. L. 109-13,
 22 Section 502 amending Section 106(d)(2)(B) of the American Competitiveness in the Twenty-
 23 First Century Act of 2000 (“MAXIMUM.-- The total number of visas made available under
 24 paragraph (1) from unused visas from the fiscal year 2001 through 2004 may not exceed

25
 26 ¹ On neither occasion did Congress authorize recapture of visa numbers for the benefit of a particular
 nationality.

27 ² Under Title I of Pub. L. 106-313, Section 106(d)(2)(C), nothing in this provision is to be construed
 28 as affecting the application of 8 U.S.C. § 1151(c)(3)(C) which provides that unused employment-based
 visa numbers are added to the total number of family-based visa numbers in the following year.

1 50,000”); *see also* Oppenheim Decl. ¶ 4. Recaptured visa numbers were made available to
 2 employment-based immigrants described in the Department of Labor’s Schedule A (occupations
 3 exempt from labor certification) and their accompanying spouses and children. *See* Pub. L. 109-
 4 13, Section 502. As Senator Hutchinson explained in support of her amendment (Amendment
 5 No. 379):

6 Mr. President this is an amendment to recapture unused EB-3 visas . . . These
 7 visas go out of existence and cannot be recaptured except by an act of Congress.
 8 They have already been authorized. We need to recapture the unused visas from
 2001 to 2004, add to the number of nurses we can bring to our country, as well as
 the EB-3 engineers and educated workforce that are waiting in the wings.

9 151 Cong. Rec. S3887 (daily ed. Apr. 19, 2005) (statement of Sen. Hutchinson).³ All available
 10 visa numbers authorized under Pub. L. 109-13 have been recaptured, allocated, and used by visa
 11 applicants. Oppenheim Decl. ¶ 4.

12 Currently, Congress is considering authorizing an additional recapture of unused visa
 13 numbers from fiscal years 1992 through 2007 but has, to date, not acted on this proposal. *See*
 14 S.B. 1085, 111th Cong. (1st Sess. 2009).

15 Argument

16 Absent express Congressional authorization, the Department of State may not recapture
 17 unused visa numbers from prior years. *See* U.S. Citizenship and Immigration Services
 18 Ombudsman Annual Report 2008 submitted by plaintiffs to the Court at Dkt. 15-2, Exhibit 11, p.
 19 63, n. 82 (“Absent special legislation, such as the American Competitiveness in the Twenty-First
 20 Century Act, unused visa numbers cannot be reclaimed”); 151 Cong. Rec. S3887 (daily ed. Apr.
 21 19, 2005) (statement of Sen. Hutchinson) (unused visa numbers “cannot be recaptured except by
 22 an act of Congress”). The fact that on two recent occasions Congress has authorized recapture
 23 under certain circumstances (and is currently considering authorizing an additional recapture of
 24 visa numbers) confirms, by negative implication, that it is Congress’ understanding that the
 25 Department of State is not permitted to recapture visa numbers from prior years without express
 26 authorization. *See generally, Omni Capital Intern., Ltd. v. Rudolf Wolffe & Co.*, 484 U.S. 97,

27 _____
 28 ³ This amendment, as modified, was agreed to by a voice vote. *See* 151 Cong. Rec. S3888 (daily ed.
 Apr. 19, 2005).

1 106 (1987) (Congressional authorization of nationwide service of process under some provisions
2 in an Act but not under another provision argues forcefully that it was not Congress' intent to
3 permit nationwide service of process under a provision that did not authorize such service).

4 Moreover, in 2005, Congress expressly limited the number of visa numbers that may be
5 recaptured to 50,000. *See* Division B of Pub. L. 109-13; Oppenheim Decl. ¶ 4. These 50,000
6 visa numbers have already been recaptured, allocated, and used by applicants (Oppenheim Decl.
7 ¶ 4) and the Department of State is not permitted to allocate additional visa numbers in violation
8 of this Congressionally-created numerical limitation.

9 Under the APA, plaintiffs cannot state a claim for relief that is not permitted by law.
10 Under 5 U.S.C. § 706(1), a plaintiff can only state a claim for agency action unlawfully withheld
11 or unreasonably delayed if it can assert that an agency failed to take a discrete action that it is
12 required to take by statute. *See* 5 U.S.C. § 706(1); *Norton v. Southern Utah Wilderness Alliance*,
13 542 U.S. 55, 64 (2004). Here, plaintiffs cannot assert that the Department had a statutory duty to
14 recapture unused visa numbers because the Department of State is not permitted, let alone
15 required by statute, to recapture visa numbers from prior years absent Congressional
16 authorization. And plaintiffs cannot state a claim under 5 U.S.C. § 706(2) based on its allegation
17 that the Department of State's cut-off dates were arbitrary and capricious in fiscal year 2008 and
18 2009 because even if these cut-off dates were set aside and the matter remanded back to the
19 Department of State, the Department of State would be unable to grant plaintiffs any prospective
20 relief because it lacks the authority to recapture visa numbers from prior years in the absence of
21 express Congressional authorization. *See generally, Renee v. Duncan*, 573 F.3d 903, 912 (9th
22 Cir. 2009) (on redressability); *PPG Industries, Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir.
23 1995) (when a court reviewing agency action determines that the agency erred, as a general rule
24 the case must be remanded to the agency for further action). For these reasons, plaintiffs' claims
25 should be dismissed.

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2 Respectfully submitted this 8th day of October, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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