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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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EVANGELICAL LUTHERAN :
CHURCH IN AMERICA, :
:
Plaintiff, :
:
vs. : Case No.
: CA 02-1297
:
IMMIGRATION AND :
NATURALIZATION SERVICE :
OF THE UNITED STATES OF :
AMERICA, :
:
Defendant. :
:
----- X

Washington, D. C.
October 3, 2002
9:30 a.m.

Preliminary Injunction Hearing
Before the Honorable Henry H. Kennedy, Jr.
United States District Judge

APPEARANCES:

For the Plaintiff: LAWRENCE LATAIF, ESQ.
DAVID PAKULA, ESQ.

For the Defendant: ALLISON IGO, ESQ.
JANE LYONS, ESQ.

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P-R-O-C-E-E-D-I-N-G-S

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2 THE CLERK: Evangelical Lutheran Church in
3 America vs. Immigration and Naturalization Service
4 of the United States of America, Civil Action
5 02-1297, Lawrence Lataif and David Pakula for the
6 plaintiff; Allison Igo and Jane Lyons for the
7 defendant.

8 THE COURT: Good morning to everybody.
9 This case is here for a hearing on the plaintiff's
10 motion for a preliminary injunction. Mr. Lataif, I
11 assume that you will be arguing the motion on
12 behalf of your client.

13 MR. LATAIF: Yes, Your Honor.

14 THE COURT: How long do you think you will
15 need to put your position before the Court?

16 MR. LATAIF: Your Honor, I don't know what
17 the Court's normal practice is. I would think, 20
18 to 30 minutes, perhaps.

19 THE COURT: All right. Ms. Igo? Is that
20 how --

21 MS. IGO: Yes, Your Honor; Igo. Depending
22 on what the plaintiff has to say, I don't think any
23 more than about 15 minutes.

24 THE COURT: All right. Mr. Lataif?

25 MR. LATAIF: Your Honor, with respect to

1 the preliminary injunction, I'd like to address
2 first the issue of irreparable injury which we feel
3 in this case is overwhelming in favor of the
4 plaintiffs. If an injunction is not granted in
5 this case, Mr. Qumri can be arrested, imprisoned,
6 removed from the United States, and subject to a
7 10-year bar on reentry.

8 We believe there are at least five types
9 of injury in this case, any one of which would
10 justify the issuance of a preliminary injunction:
11 The threat of arrest; the threat of imprisonment;
12 the threat of going through a deportation or
13 removal proceeding; separation from a United States
14 citizen wife and a United States citizen child in
15 utero; and loss of employment.

16 In this case, Your Honor, we have all five
17 of those factors, any one of which would be
18 sufficient to constitute irreparable injury. In
19 addition, as of a few days ago, Mr. Qumri is the
20 beneficiary of an application for permanent
21 residence, which was filed in Chicago by his U.S.
22 citizen wife.

23 Under immigration law, if he leaves the
24 United States, he abandons that application.
25 Furthermore, his three affidavits which are apart

1 of this record indicate clearly that if he goes
2 back to Israel -- he is not an Israeli citizen; he
3 is not a citizen of any country -- his wife may or
4 may not be permitted to join him, and the 10-year
5 bar from the United States would effectively exile
6 him from any possibility of returning.

7 Interestingly enough, Your Honor, as
8 recently as September 23, a little over a week ago,
9 the INS, in a letter to us, left open the distinct
10 possibility that they may be planning to arrest him
11 and charge him in a deportation proceeding. And
12 they said in that September 23 letter, rather
13 ominously, that they would notify this Court if any
14 action is taken against him.

15 So for all we know, Mr. Qumri might be
16 arrested today, he might be arrested tomorrow, or
17 at some point in the future. In addition, if he
18 were forced to leave the United States, his ability
19 to prosecute this suit, aside from any arguments
20 that the INS might advance as to mootness, his
21 ability to coordinate and cooperate with counsel
22 would effectively be extinguished.

23 The second factor with respect to a
24 preliminary injunction that I'd like to address is
25 the likelihood of success on the merits. And to do

1 that, Your Honor -- because I'm sure the Court is
2 very familiar with the fact that there are a lot of
3 dates and time periods set forth in this record.

4 Essentially, there are, at least prior to
5 January of this year, 19 months at issue: 17
6 months relating to the error made on the I-94, and
7 two months from November 1 of last year until
8 January 3 of this year, when the H-1B petition was
9 being prepared based on excusable neglect.

10 Now, it is interesting and, frankly, a
11 little frustrating to look at the defendant's
12 position on this because they are all over the
13 ballpark, if you will. Now for the first time, on
14 August 14, in the pleading they filed with this
15 Court, Opposition to Plaintiff's Motion to
16 Preliminary Injunction, they are confessing error
17 as to 17 of the 19 months.

18 They say on page 10, The Service
19 recognizes and recognized in its decisions denying
20 Plaintiff Qumri an extension of stay that the
21 regulation required Mr. Qumri to be admitted to the
22 United States for the validity of the H-1B petition
23 and that "his presence in the United States until
24 November 1, 2001, was lawful."

25 If they had said this before this suit was

1 filed, we wouldn't be here today. But they never
2 said this before. In fact, to go back, the first
3 thing --

4 THE COURT: Why do you say that?

5 MR. LATAIF: Because of the unlawful
6 presence rule, Your Honor, that if an alien has
7 accumulated less than six months of unlawful
8 presence, there is no bar to his reentry into the
9 United States.

10 So if they had admitted earlier in this
11 case that he was lawful until November 1 of last
12 year, Mr. Qumri could have left the United States
13 even though there was a question about his status
14 from November 1 until January 3. And he could have
15 come back in because he would not have been
16 unlawful for six months.

17 THE COURT: All right. Go ahead.

18 MR. LATAIF: Now, in the government's
19 answer, in Paragraph 43, they said the I-94 was
20 erroneous but still controlling. So they didn't
21 admit, until August 14 of this year, that Mr. Qumri
22 was lawfully here until November 1, 2001.

23 Now, in the administrative proceedings,
24 their position was even more draconian and
25 erroneous. On March 6, in a written decision,

1 which is page 66 of the administrative record
2 before this Court, they summarized our position
3 with respect to the error made on entry and said,
4 counsel further asserts that, according to Service
5 operating instructions, an immigration officer
6 shall admit an H-1B beneficiary for the duration of
7 the underlying petition approval.

8 Then they go on to state, Your Honor,
9 "However, courts have held that the Service's
10 operating instructions are only internal guidance
11 for INS personnel and neither confer upon
12 petitioner's substantive rights nor provide
13 procedures upon which they may rely." This was in
14 response to our motion to reopen the proceedings,
15 which they granted, and then, of course, reaffirmed
16 the initial denial.

17 So they had before them the lengthy letter
18 which the church filed in support of its H-1B
19 petition. And they had the even lengthier motion
20 to reopen, which we filed with the affidavits of
21 both the general counsel of the Worldwide Church
22 and of Mr. Qumri. And they basically said at that
23 point he was unlawful from April of 2001, when the
24 defective and erroneously endorsed I-94 expired,
25 until November 1, 2001.

1 So now they have clearly confessed error
2 and have admitted before this Court that Mr. Qumri
3 was in the United States lawfully up until November
4 1, 2001. As to the remaining two months at issue --
5 and, of course, I know Your Honor realizes that we
6 still have the issue of the time from January 3
7 until today. But in terms of freezing the tape as
8 of the day the H-1B petition was filed, the Service
9 blatantly and stubbornly and erroneously refused to
10 exercise its discretion.

11 They tenaciously clung to the idea that
12 because Mr. Qumri filed late -- which is oxymoronic
13 because the regulation on which we relied
14 presupposes that you filed late; that's what it's
15 all about. It's a regulation to excuse a late
16 filing. But they clung to the position that
17 because he filed late, they would not even consider
18 the extraordinary circumstances.

19 And because the church's H-1B petition did
20 not have a labor condition application approved
21 retroactively, they could not get to the question
22 of whether there were extraordinary circumstances
23 or what is commonly referred to as the excusable
24 neglect argument.

25 That position also is not contained in the

1 regulations and is what we have described as an
2 impossible to meet requirement, because if the
3 church was aware in November to the point where
4 they could have obtained a labor condition
5 application -- because you cannot get a labor
6 condition application retroactively -- if they had
7 known enough to apply for a new labor condition
8 application in November, they would have filed a
9 new H-1B petition in November.

10 So the Service took, in its January 7
11 written decision, the position that the beneficiary
12 in this case failed to maintain the status
13 previously accorded because his authorized period
14 of stay expired more than two months prior to the
15 filing of this petition. Well, that's stating the
16 obvious. We conceded that.

17 Then they go on to say, Petitioner claims
18 that the lapse in the beneficiary status was
19 allegedly due to some confusion on the part of the
20 beneficiary and that the petitioner, which is the
21 church, declares it was not advised of the due date
22 for filing an extension. And they say,
23 "Nevertheless, it is the alien's responsibility to
24 maintain a valid non-immigrant status while
25 remaining in The United States," as if the

1 excusable neglect regulation didn't exist.

2 Furthermore, the start date of the
3 validity period of the petition, which we requested
4 start November 1, 2001, does not correspond with
5 the date specified on the labor condition
6 application. "Therefore, we are unable to approve
7 the requested stay on the beneficiary's behalf."

8 Now, we claim, Your Honor, that they
9 didn't exercise any discretion, but found him
10 ineligible, because there was no mention of the
11 factors set forth in the H-1B petition application;
12 namely, that his practical training expired in May
13 of 1999 and the H-1B petition ended up getting
14 approved in April of 1999. And in his mind, it was
15 for three years, so he had until April of 2000.

16 I will just say here in parentheses a
17 rather interesting point: That due to some what I
18 believe is a failure on the part of the Immigration
19 thinking on petitions, the alien does not sign the
20 H-1B petition, even when he is requesting a change
21 of status, as happened in 1998, or an extension of
22 stay, as happened in 2002. Only the church as
23 petitioner signs an H-1B petition.

24 That is very relevant to the excusable
25 neglect argument because what Mr. Qumri has been

1 saying through his affidavits and through the
2 church is that when he was last plugged in to his
3 own immigration status, he got practical training
4 from his college, which is work authorization for a
5 one-year period. That practical training ended in
6 May 1999. He knew that the lawyers and the church
7 were asking for three years, and he knew that the
8 petition was eventually approved in April 1999. So
9 in his mind, he had a three-year period where he
10 was okay.

11 He never had to sign a single piece of
12 paper that was filed with the INS. There was no
13 mention in the January 7 immigration decision that
14 the church had no calendaring system in place; that
15 they were not using their own attorney; that they
16 had a very small number of foreign national
17 employees; that they were very inexperienced with
18 H-1B petitions; and that they had taken steps to
19 rectify all of those problems immediately upon
20 learning that Mr. Qumri's status had been allowed
21 to lapse.

22 There was no mention in the January 7 INS
23 decision as to the two-month period and whether it
24 was commensurate with the extraordinary
25 circumstances that the church was arguing. There

1 was no mention, as also required by the
2 regulations, of the fact that, aside from this
3 oversight, Mr. Qumri had not otherwise violated his
4 immigration status, which is a factor right in the
5 excusable neglect regulation, so that the Service
6 has the opportunity to give an alien credit if he
7 is otherwise an alien in good standing when they
8 are evaluating a request for excusable neglect.

9 In the January 7 decision, Your Honor, the
10 word "discretion" never appears. Now, we
11 characterize that as a decision by the immigration
12 service to find that Mr. Qumri is not eligible for
13 consideration of excusable neglect. The defendants
14 are now telling you otherwise. But what is also
15 interesting, Your Honor, is to look at the words
16 out of their own mouths on January 7, 2002.

17 THE COURT: The Court's decision has to be
18 made on what was the rationale, to the extent there
19 was a rationale, given on the administrative
20 record. The review here is of the administrative
21 record, not the positions taken at this point.

22 MR. LATAIF: Exactly, Your Honor. And in
23 the administrative record, in the approval notice
24 of January 7, where they approved the petition and
25 denied the extension of stay, out of their own

1 mouths, they say, "It has been determined that the
2 named worker is not eligible for the requested
3 extension of status." That's their words, not
4 ours.

5 The next sentence says, "Since the worker
6 has been found ineligible for the extension of
7 stay, we are sending the notice of approval to the
8 consulate." And in the May 6 approval notice,
9 which was also a denial of the extension of stay,
10 that precise wording is repeated.

11 So if we want to know what was going on in
12 the minds of the defendants and how they viewed
13 the case at the time they made the administrative
14 decisions, their position was, you're not eligible.
15 Why are you not eligible? Because you were out of
16 status, even though the regulation presupposes
17 that, and you're not eligible for us to even
18 consider exercising our discretion because you
19 didn't have a labor condition application that was
20 retroactive to November 1 -- another condition that
21 was impossible -- and two conditions that are
22 nowhere set forth in the excusable neglect
23 regulation.

24 THE COURT: Mr. Lataif, why don't you end
25 your argument now and reserve whatever time you

1 have left after the argument of Ms. Igo.

2 MR. LATAIF: Very well, Your Honor. Thank
3 you.

4 THE COURT: Ms. Igo?

5 MS. IGO: Good morning, Your Honor.
6 Allison Igo from the Department of Justice on
7 behalf of the Immigration and Naturalization
8 Service. I'd like to address something that the
9 plaintiffs here have not addressed. And that's
10 the Court's jurisdiction to grant the relief that
11 they are seeking. Although the plaintiffs have
12 spent a lot of time arguing the merits of the
13 case, the fact is that they are here requesting a
14 preliminary injunction from you. And that
15 preliminary injunction is asking this Court to
16 prevent the Immigration and Naturalization Service
17 from commencing removal proceedings against Mr.
18 Qumri.

19 There is a law at 8 USC, Section 52(G)
20 that prevents any court from interfering with a
21 decision by the Attorney General to commence
22 removal proceedings. So, in fact, this Court
23 cannot grant the relief that the plaintiffs are
24 seeking.

25 The second question of jurisdiction is the

1 fact that the decision on a waiver for a motion for
2 an extension of stay is a discretionary decision.
3 There is at least one court that has held that,
4 because that is submitted to the Attorney
5 General's discretion for a decision, no court can
6 review that decision.

7 THE COURT: Assuming the Court has
8 jurisdiction -- and I understand the government's
9 position with respect to that -- what the
10 plaintiff says is that there was a failure to
11 exercise discretion.

12 MS. IGO: I will address that, Your Honor.
13 But I just wanted to -- I didn't want to waive that
14 argument because the plaintiffs had not addressed
15 it. I just wanted to make sure that the Court
16 understood that it is the government's position
17 that the Court cannot grant at least the relief
18 that the plaintiffs are seeking on preliminary
19 injunction. The plaintiff talked about irreparable
20 harm.

21 THE COURT: Your position is the one --
22 with respect to jurisdiction, is the one that you
23 set forth in your papers?

24 MS. IGO: It is. It is set forth in the
25 papers.

1 Nothing in addition to that, yes.

2 THE COURT: All right.

3 MS. IGO: Let me just first address the
4 irreparable harm argument. The plaintiffs keep
5 pounding on this 10-year bar. We have said in our
6 papers, and I will repeat again here, the INS
7 recognizes that Mr. Qumri was legally in the
8 United States until November 11, 2001. We have
9 said that, we said it in our papers, and I'm
10 restating it again. He is not subject to a 10-year
11 bar.

12 He is, however, subject to a three-year
13 bar because he is coming up -- I mean, he has been
14 here longer than 180 days, and he is continuing to
15 accrue illegal presence. So when he passes
16 November 11, 2002, he is going to be subject to a
17 10-year bar unless he either leaves the country or
18 unless the Court rules in his favor. So I want to
19 clear that up. The plaintiffs keep talking about a
20 10-year bar.

21 The INS is conceding the 10-year bar does
22 not apply to this plaintiff. We are conceding here
23 and now that he was legally in the country until
24 November 11, 2001. But the fact is that what this
25 case is about is a church that has almost 500

1 employees; a man who is here on a non-immigrant
2 visa, which carries with it certain
3 responsibilities; a man who is educated. He is a
4 senior financial systems analyst.' He is technical
5 person.

6 Neither one of these plaintiffs could
7 manage to meet the time limitations that millions
8 of immigrants in this country are required to
9 meet. They sought a waiver. It wasn't granted
10 because they didn't give the proper grounds. And
11 for that reason, they have come to this court.

12 First of all, the plaintiffs are talking
13 about arrest. He would be subject to a notice to
14 appear. He is not necessarily subject to arrest.
15 The way that removal proceedings are begun against
16 most non-criminal aliens who are here illegally is
17 by being served with a notice to appear, requiring
18 that person to appear in immigration court before
19 an immigration judge. A man in Mr. Qumri's
20 position is unlikely to be detained.

21 I think that these plaintiffs realize
22 that, having practiced immigration law, that
23 somebody who is here on a work visa is very
24 unlikely to be detained pending his removal
25 proceedings. So that is not a realistic harm that

1 this man is facing.

2 He talked about separation from his wife.

3 Since these papers were filed, the plaintiff's
4 wife has become a U.S. citizen. She is free to
5 come and go as she wishes. She can accompany her
6 husband to Israel, stay for whatever period of
7 time, and come back.

8 Their position, when they first filed the
9 papers, was that she was awaiting her
10 naturalization. And because she was a legal
11 permanent resident, leaving the country, she would
12 forfeit that position. She is no longer a legal
13 resident; she is now a United States citizen. So
14 she is free to accompany her husband. So
15 separation should be a question in this case.

16 He talks about losing his employment. The
17 fact is that his employment is not legal at this
18 point. He was given two-and-a-half years. He was
19 late in requesting an extension of his stay. He is
20 illegally employed at this point. So his argument
21 that he will not be able to work -- he's asking to
22 be able the work in a position to which he is not
23 entitled at this very moment.

24 Let me just backtrack for a moment. The
25 H-1B petition is not at issue here. The INS

1 granted that. Even though the request for an
2 extension of that petition was late, the INS did
3 grant that. So that petition is not at issue. The
4 only question is Mr. Qumri's status; his
5 individual status.

6 They also talked about -- They also
7 suggested to the Court that if Mr. Qumri left,
8 that his status as a petitioner -- he would
9 abandon his petition for legal permanent resident
10 status. That is not true. Mr. Qumri is not the
11 petitioner in this case. His wife is the
12 petitioner. She remains here. She is a United
13 States citizen. If her husband were brought in
14 out of the country, she could file an application
15 for him. His leaving the country will not affect
16 her application for his adjustment of status to
17 legal permanent resident based on her citizen
18 status.

19 Finally, they argue that he is not a
20 citizen of Israel, that he can't go back there.
21 Mr. Qumri came here on a non-immigrant visa. Part
22 of the agreement in applying for and being granted
23 a non-immigrant visa is the representation to the
24 Immigration Service that you do not have an
25 immigrant intent; that your intent is non-immigrant

1 in nature and that you will leave at the end of
2 your period of time.

3 So my question for the plaintiffs is that,
4 in arguing that you can't go back, perhaps your
5 intent in seeking a non-immigrant visa, when you
6 knew you had no intention of leaving -- that
7 perhaps your intent was fraudulent. I don't think
8 that's what they are saying. But that is the
9 effect of the argument by saying, I have no place
10 to go, because when he applied for this status,
11 when he represented to the INS that he wanted a
12 non-immigrant visa, he was representing to the INS
13 that at the end of his lawful period, he would
14 leave and that he had a place to go back to.

15 I would like to address this letter that
16 sounded so ominous to the plaintiffs, and I would
17 like to offer the letter into evidence, if the
18 Court would accept it.

19 MR. LATAIF: No objection, Your Honor.

20 MS. IGO: There has been a concern on the
21 plaintiffs part --

22 THE COURT: This is the --

23 MS. IGO: This is the September 23 letter
24 that the plaintiffs referred to that the INS
25 responded to some of the requested stipulations by

1 the plaintiff. One of the stipulations was that
2 the INS would not initiate removal proceedings.
3 What the INS said was that as of September 23, the
4 INS had not initiated removal proceedings.

5 I guess it was really a courtesy and for
6 the convenience of the Court, the INS went on to
7 say that they will promptly notify the Court if
8 there is a change in status to give the Court the
9 opportunity --

10 THE COURT: One of the things I tried to
11 do is, frankly, not hold this hearing today but to
12 actually hold it sometime in the future and
13 actually make a final decision. But, as you had a
14 perfect right to do, you insisted upon having this
15 hearing today.

16 MS. IGO: I'm not sure that it was the
17 government that insisted on having a hearing.

18 THE COURT: Yes. Well, the question was
19 whether or not there could be kind of a holding of
20 the status quo until there could be a reasoned
21 resolution of the entire case.

22 MS. IGO: In fact, Your Honor, the status
23 quo has been maintained. What the INS said was
24 that we cannot promise to bind the Attorney
25 General's discretion in initiating removal

1 proceedings. But, in fact, Mr. Qumri is not in
2 removal proceedings. He is continuing to work
3 illegally; however, he is continuing to work. The
4 INS knows where he is. They have not initiated
5 removal proceedings.

6 My point in referencing the letter is that
7 the plaintiffs suggested that this was somehow a
8 threat by the INS that we would go and pick him
9 up. I just want to make clear to the Court that
10 this representation in this letter was purely for
11 the Court's convenience and for the plaintiffs'
12 convenience in that we said, should something
13 happen, we will promptly notify you. It was not
14 meant as a threat. There are no plans, as far as I
15 know, to initiate removal proceedings against Mr.
16 Qumri.

17 Even if Mr. Qumri were put into removal
18 proceedings today, as the plaintiffs well know as
19 immigration lawyers, that process is a very, very
20 lengthy process. During that process, he will have
21 many opportunities to request relief from the
22 immigration court. So he has another forum. As I
23 said, I doubt that he would even be given a bond.
24 He would probably be given personal recognizance to
25 just to show up. He would be allowed to request

1 whatever relief is available to him, including
2 asking the immigration judge to stay those
3 proceedings pending the application of his wife's
4 I-140. So he has the possibility of that relief.

5 In most cases of which I am aware where a
6 plaintiff has a pending I-140 for which he or she
7 is a beneficiary and removal proceedings are
8 commenced, in general, the immigration judges stay
9 the proceedings pending the outcome of that I-140.
10 So Mr. Qumri would have that opportunity to ask an
11 immigration judge to stay the proceedings. Should
12 the I-140 be granted and he be adjusted, the
13 immigration proceedings would terminate at that
14 point.

15 So Mr. Qumri -- not only is he not in
16 removal proceedings at this point; he also has
17 administrative remedies that would completely take
18 care of the concerns that he has raised here. And
19 he should really have to resort to those
20 administrative remedies before coming to this
21 Court.

22 I would like to address the likelihood of
23 success on the merits. We said in our papers --
24 and I need to reiterate here -- the plaintiffs are
25 misreading this regulation. The Immigration and

1 Naturalization Service's decision in this case was
2 absolutely correct. The fact is that when somebody
3 seeks a motion for an extension of stay, they have
4 to be in lawful status when they seek an extension
5 of stay.

6 The plaintiffs have suggested that that is
7 a ridiculous thought; that of course not, there
8 wouldn't be a rule if you were in legal status.
9 But there is, because had Mr. Qumri realized on
10 September 30 or October 15 that his legal status
11 was about to expire at that point, and that his
12 petition, the H-1B petition extension, would not be
13 adjudicated before his status expired, he could
14 have gone in and sought an extension of his stay.
15 He would have still been in legal status, and he
16 would have been entitled to seek an extension of
17 stay.

18 And the way the rule reads, the rule says
19 an extension of stay may not be approved for an
20 applicant who failed to maintain his status. So
21 you are not eligible for an extension of stay
22 unless you are in lawful status. So when the
23 Immigration and Naturalization Service said that
24 Mr. Qumri was not eligible for an extension of
25 stay, they were absolutely correct in that. He

1 was, however, eligible for a waiver. He was
2 eligible to seek a waiver of the ineligibility
3 grounds, which is that he allowed his status to
4 expire. And that is what he was seeking. The
5 Immigration and Naturalization Service recognized
6 that.

7 And, in fact, they did address it. They
8 did not address his arguments for a discretionary
9 waiver in lengthy terms. They did, however,
10 address it sufficiently to make Mr. Qumri
11 understand why they were denying it. They said,
12 the petitioner claims that the lapse in his status
13 was allegedly due to some confusion on the part of
14 the beneficiary concerning the duration of the
15 previous petition's approval. That was their
16 argument: that we didn't understand it because of
17 the dates. We didn't have the right lawyer. We
18 didn't look at it. All of those arguments. They
19 may have put it into one sentence, but they were
20 recognizing that argument.

21 And, further, the petitioner declares it
22 was not advised of the due date for filing an
23 extension of the beneficiary stay. They are
24 recognizing argument. This is the argument on the
25 waiver of the ineligibility grounds for an

1 extension of stay.

2 They went on to say, it is his
3 responsibility to maintain his status. They are
4 rejecting his argument as extraordinary because in
5 order to be eligible for a waiver of the grounds
6 for an extension of stay, you have to show
7 extraordinary grounds. And what this plaintiff has
8 said basically is, we just didn't have it
9 together. We hired the wrong lawyer. We just
10 didn't look. In my mind, I thought that I was
11 here. The plaintiffs used that expression on two
12 different occasions.

13 In his mind, he thought he had three
14 years.

15 That's fine. A lot of immigrants, in
16 their mind, think they have a certain status. This
17 is a country of laws. It was very clear on the
18 petition that he was given two-and-a-half years.
19 The Court can't decide on what was in Mr. Qumri's
20 mind. The petitioner in this case, the
21 Evangelical Lutheran Church, was advised that the
22 H-1B petition duration was for two-and-a-half
23 years.

24 And again, the plaintiffs argue, well, he
25 wanted three years. He may have wanted three

1 years, but there is no guarantee. It is up to the
2 discretion of the INS. For a total of six years,
3 maximum, they can grant for whatever period of
4 time. He is not entitled to three years because
5 he requested it.

6 On the record of this case, the
7 Immigration and Naturalization Service decided
8 that two-and-a-half years was appropriate. That
9 is what -- They notified the church clearly. The
10 plaintiffs don't dispute that that date appears on
11 the grant of the petition, and they were
12 responsible for seeking an extension. Despite the
13 fact that they went over, as I said earlier, the
14 INS did extend for another, I believe, three
15 years. So the H-1B petition extension was
16 granted.

17 I can understand the plaintiffs trying to
18 represent this decision in this light because they
19 did not allege extraordinary circumstances.
20 Basically, they alleged they were negligent, that
21 they did not keep up with their paperwork, which
22 was extraordinary circumstances. So they have to
23 argue that somehow this decision was wrong. But if
24 you read the regulation and you put this decision
25 next to it, you realize that this decision is

1 absolutely legally correct.

2 The second point that the plaintiffs make
3 is that the INS somehow changed the regulation by
4 saying that there was an additional basis for
5 denying his motion for an extension of stay, which
6 was that the labor condition application had not
7 been approved. In our papers, we cited to the
8 Court the regulation.

9 There is a separate regulation; not the
10 regulation controlling the motion for extension and
11 waiver. But the regulation that is found at 8 CFR,
12 Section 214.2(H)(15)(ii)(b)(1). And that
13 regulation specifically precludes the INS from
14 granting an extension of stay where the labor
15 condition application had not been granted.

16 So Mr. Qumri was ineligible on two
17 grounds. He was ineligible because he allowed his
18 status to expire. He was ineligible because he did
19 not get his labor condition application approval
20 before the required date. And despite that, the
21 INS also went on to address his discretionary
22 waiver, in a separate, albeit a very brief,
23 reference. But they did address his discretionary
24 waiver argument.

25 If I could just have one moment.

1 (Pause)

2 MS. IGO: Just very briefly, Your Honor,
3 even though the plaintiffs didn't raise the
4 question of public interest. This is a situation
5 where the plaintiffs were -- and they concede that
6 in the case of the H-1B petition, they were
7 notified of the date of the expiration, which they
8 let lapse. And to allow them to excuse that lapse
9 just on the basis of negligence, I think, does not
10 work in the public interest.

11 Furthermore, as far as Mr. Qumri's
12 extension of stay, Mr. Qumri is arguing that I
13 thought I should have been here until November 11.
14 On November 11, he didn't get up and leave. If he
15 was confused by his date and he thought he should
16 have been here until November 11, 2001, then he
17 knew that his legal status expired at that time.
18 And yet, he still didn't leave. He didn't leave,
19 or they didn't take any steps to do anything until
20 December or January, until they finally filed the
21 --

22 THE COURT: I thought that the position
23 was that he thought that his status would have
24 been -- that he had until April 2002.

25 MS. IGO: I guess he has to make that

1 argument because otherwise the question arises,
2 why didn't you then leave in November 2001, when
3 the H-1B petition expired? Because, on the one
4 hand, he is arguing I had legal stay until the
5 expiration of the H-1B petition, which clearly
6 expired on November 1, 2001, and he is given ten
7 days. But he still stayed illegally.

8 So to cover that period of time, he's
9 saying, in my mind, I thought, because I asked for
10 three years, that I could be here until April 2002.
11 But the fact is that the grant of the H-1B petition
12 clearly states that it ran only until November 1,
13 2001.

14 THE COURT: I think I understand your
15 position.

16 MS. IGO: Thank you.

17 MR. LATAIF: With the Court's permission,
18 could Mr. Pakula deliver the rebuttal?

19 THE COURT: Yes.

20 MR. LATAIF: Thank you.

21 MR. PAKULA: Good morning, Your Honor.
22 May it please the Court. I'd like to first
23 address the issue of jurisdiction. The provision
24 of the INA that the defendants are citing, saying
25 that there is a lack of jurisdiction over the

1 injunction, is Section 242(G). 242(G) says that
2 federal courts don't have jurisdiction to review
3 the Attorneys General to commence removal
4 proceedings, to adjudicate removal cases, and to
5 execute removal orders.

6 The Reno vs. Arab-American discrimination
7 case, which they cite as somehow allowing a bar of
8 federal court jurisdiction in this case, actually
9 was a narrowing of jurisdiction. And the
10 interpretation of 242(G) that the Supreme Court
11 gave in that decision was that that provision,
12 242(G), only applies to the three specific orders
13 that are mentioned in 242(G) and not to any other
14 orders that are issued by the Attorney General.

15 Now, in this case, the government has
16 represented that as of today's date, no removal
17 proceedings have been commenced against Mr. Qumri.
18 We are not seeking review of a removal order.
19 What we are seeking review of is a decision that
20 did not give Mr. Qumri a requested extension of
21 stay.

22 If there is no jurisdiction to review an
23 order like this because of 242(G), then I would
24 say that, according to the government's position,
25 basically there is no jurisdiction to review any

1 immigration decisions made by the Attorney General
2 because almost any decision that the Attorney
3 General makes in an immigration case could
4 potentially lead to removal proceedings.

5 I have cited cases in our memorandum of
6 law in our reply that specifically address this.
7 These are all cases subsequent to the Reno vs.
8 AADC case. And they all say that notwithstanding
9 242(G), federal courts do have jurisdiction to
10 review the Attorney General's decisions which
11 precede removal cases.

12 In other words, a vast array of decisions,
13 including decisions on H-1B petitions, extensions
14 of stay, on green card applications, et cetera, all
15 these things: If the Attorney General decides I'm
16 not going to grant your application for H-1B, the
17 next step could be a removal proceeding. That's
18 the kind of situation we're in here. But the
19 federal courts have unanimously said that there is
20 federal court jurisdiction to review these
21 decisions because they don't fall within the narrow
22 categories that are set forth in 242(G).

23 Once the federal court has jurisdiction
24 over an order because it does not fall within one
25 of three orders that are specified in 242(G), the

1 federal court does have the jurisdiction to grant
2 preliminary injunctive relief. And I have cited at
3 least three or four cases that have that precise
4 holding.

5 The government has not cited you any cases
6 to support their position; only the Reno case
7 which, as I said, was actually a narrowing of the
8 interpretation of 242(G) to not bar review of
9 decisions such as the one that we are seeking
10 review here today.

11 The other jurisdictional argument -- and
12 I'm a little surprised, Your Honor, that they are
13 making this argument at this point because in their
14 answer, they did not claim that jurisdiction is
15 lacking because of a discretionary decision. They
16 really didn't explicitly make that argument in any
17 of their memorandum that they filed with the
18 Court. And now they are suggesting that you lack
19 jurisdiction over this case because a discretionary
20 decision was made.

21 If I heard correctly, I think the
22 government is saying here that they are only
23 arguing what's in the papers, but now they're --
24 I'm not sure exactly to what extent they're going.
25 But let's, for a moment, assume that they are

1 arguing that there is no jurisdiction because a
2 discretionary decision was made by the Attorney
3 General.

4 To begin with, the federal courts are
5 split on is issue as to whether that section that
6 they are referring to in Section 242 of the INA
7 applies outside of the context of removal
8 proceedings. The provision that they are speaking
9 of is actually in a section of the INA that's
10 titled "Review of Removal Orders." Several federal
11 courts have said that it only applies in the
12 context of removal proceedings. There is one court
13 I think they are referring to, the Sixth Circuit, I
14 believe, that said recently, within the past year,
15 that it applies outside of the removal context.

16 However, even if that is true and this
17 Court tended to agree with that decision, what we
18 have here is not a discretionary decision by the
19 Attorney General, but an absence of discretion; a
20 failure to exercise discretion. I believe that's
21 why the government has not been more aggressive in
22 trying to argue that there is no jurisdiction over
23 this case.

24 I think they recognize that this is not an
25 allegation that we're making that there was an

1 abuse of discretion. We're arguing that there was
2 a complete failure to exercise discretion in
3 violation of the INS's own regulations.

4 Moving on to the merits of the case: If
5 nothing else, Your Honor, what they've done --
6 it's kind of strange how the INS changes its
7 position over time. But if nothing else, what we
8 have accomplished by filing this lawsuit is to
9 obtain a confession of error from the government.
10 They now confess that Mr. Qumri was here in lawful
11 status until November 1, 2001.

12 As said in the opening argument, if they
13 had admitted that back in January of this year or
14 in March of this year or even in May of this year,
15 Mr. Qumri could have returned to Israel. He would
16 not have accrued six months of unlawful presence,
17 and he could have returned to the United States in
18 H-1B status, and we would not be here today.

19 So if nothing else, it's very clear that
20 we are likely to prevail in obtaining relief for
21 the period from January 1 until the present -- the
22 time that we have been trying to get the government
23 to make this confession of error. If you think of
24 it in terms of blocks of time, they have now said
25 that Mr. Qumri is lawful until November 1. We then

1 have a two-month period from November 1 until
2 January of 2002, which deals with the excusable
3 neglect argument. We then have a third block of
4 time which runs from January of this year until the
5 present.

6 It seem a forgone conclusion that -- Now
7 that the government has flip-flopped and they have
8 now admitted that Mr. Qumri was lawful until
9 November 1, it would seem that this Court should
10 exercise its jurisdiction to impose on the
11 government to declare that Mr. Qumri's stay was
12 lawful during the period of time that we were
13 litigating this case and during the time that we
14 were requesting administratively for them to
15 acknowledge their error when they erroneously said
16 that Mr. Qumri was only admitted to the U.S. until
17 April of 2000.

18 So, therefore, we are substantially likely
19 to prevail on all but two months, even if we only
20 prevail on the issue that they have conceded error
21 on. So it seems a forgone conclusion that we are
22 likely to prevail on the merits of this case in
23 obtaining relief that the government is still
24 unwilling to grant to us; that is, the period from
25 January until the present. They still will not

1 stipulate to us to grant Mr. Qumri lawful status
2 from January until the present.

3 And there lies the problem, because Mr.
4 Qumri has now accrued enough unlawful presence,
5 even since January, so that it's impossible for
6 him to return without being subject to a reentry
7 bar into the United States.

8 Now, touching on the issue of irreparable
9 harm: The defendants suggest that there is no harm
10 because Ms. Qumri, who is a United States citizen,
11 can now return to Israel with Mr. Qumri, and
12 everything will be fine. However, that's really
13 not acceptable, Your Honor.

14 Ms. Qumri is now a United States citizen.
15 It's true, she has filed a petition on behalf of
16 her husband, Mr. Qumri, so that he can become a
17 lawful permanent resident of the United States.

18 Mr. Qumri has also himself filed an
19 application for a green card, which is a separate
20 application. They're filed together, but they're
21 two separate applications. If Mr. Qumri is forced
22 to leave the United States at this juncture, he
23 will have abandoned his application for a green
24 card. Ms. Qumri, who is a United States citizen,
25 is being told that, well, you can go back to

1 Israel and accompany your husband who now will be
2 unable to return for 10 years: they are effectively
3 saying, now we are exiling a U.S. citizen in
4 addition to exiling Mr. Qumri, who has an
5 application for a green card pending.

6 So they say that there is no irreparable
7 harm. It's okay. They can go and live in Israel
8 together. Well, even skipping over the fact that
9 they can now arrest him and detain him and all
10 that, ~~the card he has that this gentleman~~ with his wife
11 and his newborn (sic) child, who also is not born
12 yet, but when he is born, he will be a U.S.
13 citizen, and that now he has to live in Israel,
14 too, with his parents, and they can all be one
15 happy family in Israel. Well, that's just not
16 acceptable, Your Honor.

17 The INS further says that, well, we're
18 probably not going to detain this gentleman; he has
19 all kinds of remedies in the context of removal
20 proceedings; and he could get bond, he could do
21 this, he could do that. But the reality is,
22 Judge, that if that's so true that Mr. Qumri has
23 virtually no chance of being arrested or detained
24 or removed within the foreseeable future, then why
25 won't they just stipulate to allow him to remain

1 here without the threat hanging over his head every
2 day of being arrested and detained and removed?
3 They have to take a position one way or the other.

4 I'm sure Ms. Igo can't speak for the
5 100,000 INS employees throughout the country who
6 have no idea what her intent is. At any given
7 time, they can institute removal proceedings
8 against Mr. Qumri. They can detain Mr. Qumri.
9 They can arrest him. They can subject him to any
10 of the things that are possible to happen.

11 We weren't suggesting in our argument that
12 the September 23 letter was a direct threat. What
13 we're saying is, that letter leaves open the
14 distinct possibility that Mr. Qumri can be arrested
15 and detained and removed. They've never said
16 otherwise. It's easy for them to feel comfortable
17 with the due process that occurs in removal
18 proceedings and the alleged unlikelihood of being
19 arrested and detained. But for our client, it's
20 not acceptable to be living with that threat on a
21 daily basis.

22 And there are no guarantees, as things
23 stand right now, that he won't be arrested and
24 detained and removed. So the intervention by this
25 Court is necessary to maintain the status quo and

1 to prevent this irreparable harm from occurring to
2 Mr. Qumri.

3 THE COURT: You should wrap up your
4 argument.

5 MR. PAKULA: Okay, Your Honor. On the
6 merits, it is amazing to me that, to this day, the
7 INS is still taking the position that an H-1B
8 applicant who does not have a retroactive approval
9 of a labor condition application is not eligible
10 for excusable neglect relief. They still are
11 taking that position, notwithstanding the fact that
12 we've explained many times in abundant detail that,
13 by taking that position, they are effectively
14 revoking the regulation because there's no such
15 thing as an alien who is applying for extraordinary
16 circumstances relief who has a retroactive LCA,
17 labor condition application.

18 It's true that there's a separate
19 regulation that says the H-1B petition should be
20 approved for the same duration of the labor
21 condition application. But clearly, the excusable
22 neglect regulation is an exception to that general
23 rule. And if that regulation is to mean anything
24 at all, it must be interpreted as an exception to
25 the general rule that you need an LCA to be

1 concurrent with your H-1B status.

2 So the government is still effectively
3 revoking this regulation and making it impossible
4 for an alien to avail himself or herself of
5 extraordinary circumstances relief. It's curious
6 that now they are arguing all the reasons why they
7 don't believe that we've alleged extraordinary
8 circumstances. But none of that appears in any of
9 the correspondence that we received from the INS
10 administratively when they were deciding this case.
11 This is an after-the-fact rationalization that
12 they're making now.

13 If you look, Your Honor, at the letters
14 that they sent us that are in the administrative
15 record, none of them discuss the factors that
16 constitute extraordinary circumstances, whether
17 those circumstances were commensurate with the
18 delay or any of the other factors. We don't know
19 what the INS was thinking because they didn't tell
20 us. All they told us was that you are ineligible
21 for this relief, and you failed to maintain your
22 status, and your LCA was not approved
23 retroactively. That makes it impossible for
24 federal court review. I can represent to Your
25 Honor that the government in the past has approved

1 extraordinary circumstances relief in circumstances
2 that fall way below what they are arguing now is
3 the standard. And in order for the federal courts
4 to be able to monitor the INS to make sure that
5 they are applying the law consistently, that
6 they're following the regulations, they have to
7 tell us in their written decision, and it's
8 required by the Administrative Procedures Act --
9 they have to tell aliens why they're denying relief
10 specifically so that there can be federal court
11 review.

12 Not only did they not tell us, but the
13 reasons at they did give us were unlawful and
14 makes it impossible for anyone, regardless of their
15 circumstances, to avail themselves of the relief
16 that is specifically afforded to aliens under this
17 extraordinary circumstances regulation.

18 THE COURT: Mr. Pakula, I'm going to stop
19 you right there.

20 MR. PAKULA: Thank you, Your Honor.

21 THE COURT: Counsel, you should return at
22 12:15. I anticipate issuing my ruling from the
23 bench at that time.

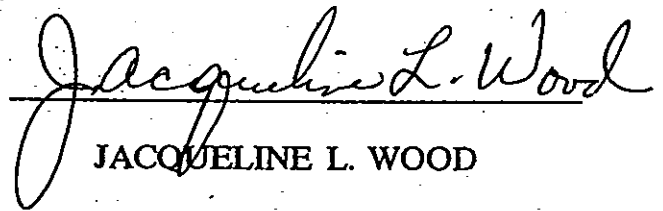
24 (Recess.)

25 [An excerpt of the proceedings at 12:15

1 was previously prepared in transcript form.]

C E R T I F I C A T E

I, JACQUELINE L. WOOD, the Official Court Reporter for Miller Reporting Company, Inc., hereby certify that I recorded the foregoing proceedings; that the proceedings have been reduced to typewriting by me, or under my direction and that the foregoing transcript is a correct and accurate record of the proceedings to the best of my knowledge, ability and belief.


JACQUELINE L. WOOD