

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. :
: :
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Washington, D. C.
October 3, 2002
12:15 p.m.

Preliminary Injunction Hearing

* * * * E X C E R P T * * * *

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

APPEARANCES:

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

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

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* * * * E X C E R P T * * * *

THE COURT: Before the Court is plaintiff's motion for a preliminary injunction. Plaintiffs, Suhail Qumri, an Israeli-born alien, and Qumri's employer, the Evangelical Lutheran Church in America, bring this action to challenge two actions by the Immigration and Naturalization Service.

First, plaintiffs claim that the INS erroneously endorsed Qumri's I-94 card and failed to correct the error.

Second, they challenge the INS's decision to deny the Evangelical Lutheran Church in America's untimely application for an extension of Qumri's stay in the United States as an H-1B nonimmigrant.

Section 8, Code of Federal Regulations, Section 214.1(c)(4), the provision governing H-1B visa extensions, provides that an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. However, if the applicant shows the expiration was due to extraordinary circumstances beyond his or her control and the INS finds that the delay was commensurate with the circumstances under Section 214.1, the INS has discretion to waive an applicant's ineligibility.

Here, ELCA submitted a late extension of stay petition. Plaintiffs claim, however, that defendant's failure to utilize the safety valve provisions of Section 214.1(c)(4) violated the Administrative Procedures Act as well as other statutory and constitutional provisions.

Plaintiffs request a preliminary injunction to enjoin the INS to, one, retroactively amend Qumri's I-94 form and, secondly, to allow Qumri to remain in the United States and continue his employment without any adverse actions or interference by defendant, pending the final outcome of this lawsuit.

Having considered the plaintiffs' motion, the opposition thereto, the record of this case, and the argument of counsel this morning, the Court concludes that the motion must be granted in part and denied in part.

Before addressing the substantive issues raised by the motion, the Court must first determine whether the Illegal Immigration Reform and Immigration Responsibility Act of 1996 divests this Court of jurisdiction to review this controversy. Defendant argues that 8 U.S.C., Section 1252(a)(2)(b)(ii), enacted under the Act, precludes this Court from reviewing the Service's discretionary decision, and cites as authority the opinion of the Sixth Circuit in *CDI Information Services, Inc. v. Reno*.

After analysis, the Court rejects this view and concludes that, although the question is a close one, the Court has jurisdiction here. The Court is influenced by ample case law which supports the view that Section 1252(a)(2)(B)(ii) applies only to final orders of removal and does not preclude review of other discretionary decisions.

In addition, the Court finds that the statute's legislative history evinces a congressional intent for

Section 1252(a)(2)(B) only to apply in the removal, exclusion, and deportation contexts. Again, on the basis of this analysis and authority, the Court concludes that it has jurisdiction over the instant action.

It is well established that a preliminary injunction should only be granted if plaintiff has a likelihood of success on the merits of its case; irreparable harm will occur if the injunction is not granted; injunctive relief would not impair the rights of other parties; and that injunctive relief would be in the public interest. These factors interrelate on a sliding scale and must be balanced against each other. However, some showing of irreparable injury is always required.

With respect to plaintiffs' I-94 claim, there is no question that the INS inspector erred when he stamped Qumri's I-94 form with an improper validity date of April 27, 2001. Even defendant concedes that Qumri's stay was, and always has been, lawful until November 1, 2001. Under such circumstances, defendant's failure to grant the requested relief -- or even acknowledge plaintiffs' valid request any time before the filing of this lawsuit -- was quite likely arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law in violation of the Administrative Procedures Act.

Plaintiffs, therefore, have a substantial likelihood of success on the merits.

However, in regard to this claim, plaintiffs have not shown that in the injunction's absence they will suffer

irreparable harm because even if the card had been stamped with the November date, that date is long passed. Absent a showing of at least some continuing or threatened injury as a result of defendant's violation, the Court is not free to grant plaintiffs' request for preliminary relief. Therefore, plaintiffs' request for injunctive relief with respect to the I-94 claim is denied.

Turning to INS's denial of Qumri's petition for an extension of stay, plaintiffs assert that this denial was arbitrary and capricious, again in violation of the Administrative Procedures Act. Defendant, on the other hand, takes two inconsistent positions.

First, defendant argues that under the relevant Code of Federal Regulations, 8 C.F.R 214.1(c)(4), the Service had discretion to admit Qumri, notwithstanding his late filing, and the Service properly exercised its discretion, failed to find extraordinary circumstances warranting waiver, and consequently denied plaintiffs' request. At other times, however, defendant argues that it was unable to exercise its discretion to admit plaintiff Qumri because Qumri failed to include a valid Labor Condition Application in its application for an extension of stay, in violation of Section 214.2(h)(15)(ii)(B)(1).

The Court reviews the INS's denial of plaintiffs' request for an extension of stay to determine whether the INS's denial was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Of course, this review is quite deferential, especially in this

context because the INS's power over aliens is political in nature.

While the review is deferential, the D.C. Circuit has established that in order to uphold an agency's decision a court must be able to discern the basis for that decision. If an agency merely parrots the language of a statute without providing a rational -- much less reasoned -- explanation for its result, the agency has not met its burden.

In this case, defendant has never cogently explained whether, one, the INS had discretion and exercised it or, two, had no discretion and acted accordingly. Moreover, the record never demonstrates that, even assuming the INS had discretion, it evaluated plaintiffs' claim under the appropriate standard as set out in Section 214.1(c)(4). Without such an explanation the Court cannot evaluate and, therefore, cannot uphold the agency's decision. Thus, plaintiffs have demonstrated a likelihood of success on the merits.

With respect to the question of irreparable harm, the Court agrees with the plaintiffs' position in this regard as articulated in its papers and argument this morning.

With respect to the third factor, the INS has not argued that the issuance of a preliminary injunction would substantially interfere with the rights of other interested parties. Indeed, the Court concludes that it would not.

The fourth factor to be considered is that of the public interest. The INS is surely correct that the public has an interest in ensuring that persons who enter the United States lawfully as immigrants but whose status has become unlawful are properly subject to removal proceedings consistent with the applicable laws and regulations as well as the agency's priorities. The public also has an interest, however, in ensuring that agency decisions rest on a rational basis. Thus, this factor is in equipoise.

These factors balanced clearly favor the issuance of a preliminary injunction and, therefore, the injunction shall issue.

The Court, therefore, denies plaintiffs' request for a preliminary injunction to require the INS to remedy its erroneous processing of Qumri's I-94 form but grants plaintiffs' request for a preliminary injunction to enjoin the INS from instituting removal proceedings during the pendency of this litigation. That is, Plaintiff Qumri may remain in the United States until this matter is resolved and the Evangelical Lutheran Church in America may continue to employ him without any adverse effect. That is the Court's ruling.

Counsel, the Court will set a briefing deadline for motions for dispositive relief now. I will entertain your suggestion as to if these deadlines are agreeable. It seems to me that essentially what should happen is that there should be cross-motions for summary judgment. The way

I will do this is to require the defendant to file its motion for summary judgment by no later than November 4.

MS. LYONS: Your Honor, I can't possibly make that deadline. I'm sorry. I have two trials.

THE COURT: You were quick.

MS. LYONS: I made a mistake last month when a judge set a deadline for me and I'm going to pay for it this month.

THE COURT: All right. When then? And let me just tell you that this is what I have in mind, counsel. To have the defendant file its motion for summary judgment. The plaintiff to file an opposition and cross-motion for summary judgment. A reply. And then I'll have to see.

As a matter of fact, the way I'll do it is motion, opposition, cross-motion, reply. And I will not set a deadline for the filing of a cross-reply. If the plaintiff believes that would be appropriate under the circumstances you will have to file a motion to do so.

MS. IGO: Your Honor, if I could just clarify. The government will have an opportunity to oppose the plaintiff's cross-motion in conjunction with the reply?

THE COURT: I'm trying to keep down the briefing. Yes, indeed.

MS. IGO: Okay.

MS. LYONS: How about November 15, Your Honor?

THE COURT: Mr. Lataif, do you have any objection to that?

MR. LATAIF: No, Your Honor.

THE COURT: All right. On November 15 the government must file its motion for summary judgment. How much time would you want to file your opposition and cross-motion for summary judgment?

MR. LATAIF: With Thanksgiving coming in that time period, Your Honor, perhaps by December 15.

THE COURT: Let's say December 20.

MR. LATAIF: Very well.

THE COURT: Well, you said December 15.

MS. LYONS: That's a Sunday, Your Honor.

THE COURT: December 16. Counsel for the defendant?

MS. LYONS: January 6, Your Honor.

THE COURT: January 6 for the opposition to the plaintiff's cross-motion for summary judgment and reply to the opposition of the plaintiffs. Again, in the absence of a court order permitting any further briefing, that will be it.

MR. LATAIF: Would Your Honor contemplate having a hearing on those motions or would you decide that after you've seen them?

THE COURT: To answer your question directly, no, I don't contemplate having a hearing but I can change my mind.

MR. LATAIF: Very well. And there is one other matter. I assume that in due course Your Honor will be issuing a written order with respect to today's ruling.

THE COURT: Yes.

MR. LATAIF: May we have leave, either before or after seeing the order, to ask that additional provisions be included which are not inconsistent with the oral ruling you just made from the bench.

THE COURT: What I will instruct you to do is to submit an order for my signature. And I think that the appropriate thing to do is to contact the other side, Ms. Igo, and see whether these other things that you would want to have included in the order, that are in your view not inconsistent with the Court's ruling, would be consented to.

Now, the record is absolutely clear that the defendant does not believe, first of all, that the Court has jurisdiction to make the ruling; does not have jurisdiction over the case in the first place and that it does not --

MR. IGO: Your Honor, I'm sorry to interrupt. I know that the plaintiffs took that position and the Court has accepted it. We never argued that. Just so the Court understands. We didn't argue that. And to the extent that it's included in your ruling, we didn't. We are not taking that position. I just wanted to make that clear.

THE COURT: All right. Check with the other side and then present a proposed order for my signature. That should be done very quickly, however, because I will be leaving the city after 5 o'clock tomorrow.

MR. LATAIF: Your Honor, we're flying back tonight to Florida and we won't get back until about midnight. We could submit something by noontime tomorrow to the two counsel for the defendants.

THE COURT: Counsel, what I'm going to do is give you my E-mail address and then, first of all, you can E-mail it to me in Word Perfect or Microsoft Word format.

MR. LATAIF: This case is an electronic filing case in any event, Your Honor.

THE COURT: I understand that, but listen to me here. I understand that. The proposed order should be E-mailed to me, not electronically filed. So it should not be sent to me in portable document format. Send it to me in either Microsoft Word or Word Perfect format. And that should be done by no later than 1 o'clock on tomorrow.

MS. IGO: Your Honor, how should we resolve this if we are not able to agree?

THE COURT: That's the problem.

MS. IGO: Why can't he just tell us now what he wants included and we can do it right now.

THE COURT: Can you do that?

MR. LATAIF: Very unartfully but, yes, I think I can, Your Honor. The two most important things are that the order say that Mr. Qumri can use your order as evidence of his lawful status in the United States until further order of the Court.

The reason for that is if this man is walking around, if he's stopped by a police officer, if he gets into an accident, if he goes to a hospital, if he needs to apply for government benefits, if he needs to show the Israeli government that he's here lawfully so that they can extend his Israeli identity card, he has nothing to show any

government agency, any government official inside the INS or outside.

I believe it's probably true that as a matter of law your order would be usable for that purpose. But for the sake of the world at large that may not realize that, we would appreciate it if your order could simply make that recitation. And also indicate that likewise the church can use your order as evidence of its lawful employment of Mr. Qumri until further order of the Court.

Those would be the two main factors because this is an evolving situation. He's now an applicant for permanent residence. I don't imagine he's got any plans to leave the United States. But I can imagine that if he wants to take a domestic flight some airline is going to ask for proof of his lawful status here. And while your injunction may in fact be that, if it could recite that it's usable for any lawful purpose to show he's here legally it would certainly I think help make his life a lot easier.

THE COURT: Counsel, do you have any response that you want to make now?

MS. IGO: I absolutely object, Your Honor. Plaintiffs want this Court on a motion for preliminary injunction -- this isn't even a merits hearing -- to declare that this man is legally in the United States. That's within the purview of the Immigration and Naturalization Service. The question here is --

THE COURT: Ms. Igo, I'm going to stop you. Counsel, what you should do is submit your order. I

understand that the United States is going to object to that kind of language. I think I understand your position as well. I'm not going to have argument on this at this time. All right. Good day. And do make sure you get my E-mail address.

[Whereupon at 12:40 p.m., the hearing adjourned.]