In the
United States District Court
for the
District of Columbia

ITServe Alliance, Inc., *Plaintiff*, *v.* Department of Homeland Security, *Defendant*.	Case No. 1:20-cv-03855-TNM

Brief *Amicus Curiae* of the Immigration Reform Law Institute

Argument

As an initial matter, *Amicus* brings to the Court's attention the ongoing problem of cases being misfiled with the nature of suit specified as "465 Immigration: Other" when the actual nature of the case is properly "899 Administrative Procedure Act/Review or Appeal of Agency Decision." Cases filed under 465 are supposed to be for an "Action (Immigration-related) that do not involve Naturalization Applications or petitions for Writ of *Habeas Corpus*, such as complaints alleging failure to adjudicate an application to adjust immigration status to permanent resident." This is not a trivial complaint because misfiling a case in this way negatively impacts the public.

Our courts are supposed to be open to the public. See *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944). But when a case is filed under 465—as here—it is automatically sealed. Thus, when a party misfiles a case that affects the public at large in this way, the public does not have access to the court documents without the intervention of lawyer who is a member of the court. This is a nationwide problem and hopefully the courts can establish some process where a member of the public, who is not a member of the bar, can request that the nature of the suit be changed when it has been improperly specified so that the public can gain access to documents in cases that seek to make changes to the immigration system at large.

I. Federal Agencies are faced with fraud on a massive scale in the H-1B visa program.

The H-1B visa program is notorious for its rampant fraud. The last compliance audit found that 13.4% of approved H-1B visas were fraudulent. U.S. Citizenship and Immigration Services, *H-1B Benefit Fraud & Compliance Assessment*, Sept. 2008, p. 8. In addition to its frequency, H-1B fraud takes

place on a massive scale, often involving thousands of foreign workers and millions of dollars. *E.g.*, Ethan Baron, *H-1B: Chinese woman, in U.S. on visa, indicted over alleged visa fraud involving thousands of foreign citizens*, San Jose Mercury-News, July 26, 2019;[1] Press Release, *Wright State University Agrees to Pay Government $1 Million for Visa Fraud*, U.S. Dep't of Justice, November 16, 2018.[2]; Rachel Weiner, *Va. man behind $20 million H-1B visa fraud faces deportation after prison*, Washington Post, Dec. 28, 2017.[3] These are typical examples of an extensive problem.

In all of the above cases, the non-immigrants were not working where they were supposed to be. In one, for example, Raju Kosuri "launched over a dozen businesses that claimed to provide information technology services out of Danville, Va. In fact, he admitted, they existed merely as vehicles to get visas for Indian nationals who would actually work elsewhere." Weiner, *supra*; *see also United States v. Prasad*, No. 2:16-cr-00244-KJM, 2018 U.S. Dist. LEXIS 130971, at *1-2 (E.D. Cal. Aug. 2, 2018) (Defendant "submit[ted] more than 100 phony H-1B visa applications" with nonexistent job locations.); *United States v. Guntipally*, No. 16-CR-00189-LHK-1, 2019 U.S. Dist. LEXIS 38898, at *8 (N.D. Cal. Mar. 8, 2019) (Defendant submitted more than 100 visa petitions for jobs that did not exist).

One can see that, in order to efficiently weed out the existing rampant H-1B fraud, there is a need for the Department of Homeland Security to know the location where each H-1B non-immigrant is supposed to be work-

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[1] Available at https://www.mercurynews.com/2019/07/26/h-1b-chinese-woman-in-u-s-on-visa-indicted-over-alleged-visa-fraud-involving-thousands-

[2] Available at https://www.justice.gov/usao-sdoh/pr/wright-state-university-agrees-pay-government-1-million-visa-fraud

[3] Available at https://www.washingtonpost.com/local/public-safety/va-man-behind-20-million-visa-fraud-faces-deportation-after-prison-sentence/2017/12/22/61007138-e729-11e7-833f-155031558ff4_story.html

ing. For example, if the employer has stated on the H-1B visa petition that the non-immigrant will be working at 52 Chambers St. in New York, a DHS investigator verifying compliance should be able to go to that address during business hours on a weekday and find the non-immigrant there. *Cf. In re Simeio Solutions, LLC*, 26 I. & N. Dec. 542, 543–44, (B.I.A. April 9, 2015) (U.S. Customs and Immigration investigators conducted a site visit to verify H-1B employment and found the employer had vacated the location two months earlier).

II. Congress has severely restricted the Department of Labor's role in the H-1B visa program.

The first step for an employer seeking a non-immigrant worker on an H-1B visa is to file a Labor Condition Application with the Department of Labor. 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Department of Labor is required to approve all Labor Condition Applications within seven days unless there are obvious errors or inaccuracies. 8 U.S.C. § 1182(n)(1). The Department of Labor is also prohibited from reviewing Labor Condition Applications after approval. 8 U.S.C. § 1182(n)(2)(G)(v). Through these enactments, Congress has expressly limited the Department of Labor's authority in the H-1B application process to one thing only: *it may verify that Labor Condition Application forms are filled out correctly*. 8 U.S.C. 1182(n)(1). For decades, every Department of Labor Inspector General's semiannual report to Congress has complained that the agency lacks a meaningful role in the foreign labor certification process. *E.g.*, *Semiannual Report to Congress*, Oct. 1, 2020–Mar. 31, 2021, pp. 69–70. For now, the approval of an H-1B Labor Condition Application simply means that the Department of Labor has certified the form was filled out correctly. 8 U.S.C. § 1182(n)(1).

The Department of Labor's only substantive role in the H-1B program is enforcement. 8 U.S.C. § 1182(n)(2). Even in that role, the Department of Labor's authority is severely restricted to specific circumstances. *Id*. "[T]he Department [of Labor] cannot verify employers' attestations to the H-1B certifications unless a complaint is filed. Such is unlikely, as foreign workers are generally reluctant to do so for fear of retaliation and losing their jobs." *Semiannual Report*, p. 70.

III. A Labor Condition Application does not identify a worker.

The Labor Condition Application, form (ETA-9035) (attached hereto as an appendix) merely asks for the description of a job and does not identify any specific worker. In fact, the employer can specify that the application applies to any number of workers. In other words, the Labor Condition Application does not specify *who* will be working *where*.

The actual petition for a visa is made to U.S. Citizenship and Immigration Services on the form I-129.[4] This is the first point in the visa process where the Labor Condition Application gets matched to a specific alien worker. A copy of the Labor Condition Application is filed with the visa petition. *Instructions for Petition for Nonimmigrant Worker*, Form I-129;[5] *Optional Checklist for Form I-129 H-1B Filings*, Form M735.[6] Nonetheless, the I-129 visa petition duplicates much of the information already in the Labor Condition Application, including the job, place of employment, and wage to be paid.

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[4] Available at https://www.uscis.gov/sites/default/files/document/forms/i-129.pdf

[5] Available at https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf.

[6] Available at https://www.uscis.gov/sites/default/files/document/forms/m-735.pdf

IV. The approval of a subsequent Labor Condition Application cannot constitute approval to move a worker because Labor Condition Applications do not identify workers and the Department of Labor has no knowledge of where non-immigrants are working on H-1B visas.

After an H-1B visa is approved, the employer can file a new Labor Condition Application specifying a different work location. Form ETA-9035. The Department of Labor must then give perfunctory approval of that application within seven days as long as the form is filled out correctly. 8 U.S.C. § 1182(n)(1). Like the initial Labor Condition Applications, the new application contains nothing that identifies the non-immigrant workers who might work under it. The filing and approval of a Labor Condition Application does not mean that anyone will actually work under it.

When an employer seeks to change the work location of an H-1B non-immigrant there at least two concerns. First, was the original work location a *bona fide* job to begin with? *See Franchitti v. Cognizant Tech. Sols. Corp.*, No. 3:17-cv-06317, 2021 U.S. Dist. LEXIS 155008, at *6–7 (D.N.J. Aug. 17, 2021) (alleging the practice of applying for H-1B visas for non-existent jobs to maintain a stockpile of such workers to be used when work becomes available). Second, does the new Labor Condition Application reflect *bona fide* employment for the non-immigrant? *See Prasad, supra (*defendant employer had submitted over 100 H-1B petitions for non-existent jobs).

Neither of these issues is within the Department of Labor's investigative or approval authority. 8 U.S.C. § 1182(n). The Department of Labor has no information on which aliens will work under a Labor Condition Application or, indeed, whether *any* aliens at all will actually work under a particular application. *See* Form ETA-9035. The Department of Labor's sole role in the change of location process is to ensure the Labor Condition Application form

is filled out correctly. 8 U.S.C. § 1182(n)(1). Its investigative power over such a transfer is limited to whether the employer complied with the terms of the Labor Condition Application. 8 U.S.C. §1182(n)(2). Consequently, the Department of Labor has no authority *and no ability* to ensure that the alien actually worked at the location specified on the original Labor Condition Application; to determine whether the non-immigrant is qualified to work under the new application; or to ensure that the non-immigrant actually works at the new location. *Id*. That authority belongs with the Secretary of Homeland Security who has enforcement authority over 8 U.S.C. §§ 1101–1537. 8 U.S.C. § 1103(a)(1); *see, e.g.*, Press Release, *Tracy California resident convicted on multiple counts of "H-1B" visa fraud, aggravated identity theft*, U.S. Immigrations and Customs Enforcement, Aug. 6, 2019 (case investigated by Homeland Security Investigations where the convict had filed H-1B petitions for nonexistent jobs).

Conclusion

Given the Department of Labor's *extremely* limited authority under the H-1B program, and given the need to combat widespread fraud on American workers, the Court should conclude that the Department of Homeland Security has the authority to require an amended visa petition when a non-immigrant changes work locations.

Respectfully submitted, September 22, 2021,

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