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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 02-0245 DOC (ANx) Date: July 24, 2002

Title: Buhran Akhtar, Rechy Monzon Sese, Emerson Angeles v. Michael D. Heston, District Director of the Missouri Service Center of the Immigration and Naturalization Service; The Immigration and Naturalization Service; James Ziglar, Commissioner of the Immigration and Naturalization Service; and John Ashcroft, Attorney General of the United States.

DOCKET ENTRY

[I hereby certify that this document was served by first class mail or Government messenger service, postage prepaid, to all counsel (or parties) at their respective most recent address of record in this action on this date.]

Date:_____ Deputy Clerk: _____

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Kristee Hopkins	Not Present
Courtroom Clerk	Court Reporter

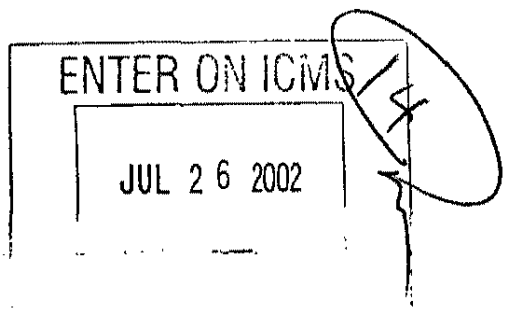
ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
NONE PRESENT	NONE PRESENT

PROCEEDING (IN CHAMBERS): DENYING MOTION TO TRANSFER VENUE AND DENYING MOTION TO DISMISS

Before the Court are Defendants Michael D. Heston, the Immigration and Naturalization Service (INS), James Ziglar, and John Ashcroft's motion to dismiss and Defendants' motion to transfer venue to the Western District of Missouri. The Court finds that the matters are appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local Rule 7-15. After reviewing the moving, opposing and replying papers, and for the reasons set forth below, the Court DENIES the motion to transfer and DENIES the motion to dismiss.

I. BACKGROUND

This case is brought by three individuals, citizens of other countries, who are currently awaiting United States visas authorizing them to enter and remain in the United States as legal



permanent residents. A summary of the process for obtaining a visa is necessary to the understanding of Plaintiffs' claims.

United States citizens and lawful permanent residents may request a visa petition on behalf of specified relatives to gain them lawful permanent residency in the United States. The application form is known as the I-130 form and its filing date is generally used to determine priority for obtaining a visa. It often takes several years after an I-130 form is filed for the applicant to get a visa number, as the number of family-sponsored immigrants that are granted visas each year is strictly limited.[1] Congress has therefore set up a detailed system to govern visa petitions, with preference categories for different types of relatives.

The first preference category is for unmarried sons and daughters of United States citizens.[2] The second preference category, which is the subject of this action, relates to the family of legal permanent residents. It is divided into two subsections. The "2A" subcategory is for the spouses and children of lawful permanent resident aliens. Children are defined as unmarried and under the age of twenty-one. The second subcategory, "2B," is for unmarried sons and daughters, over the age of twenty-one, of lawful permanent resident aliens. If a child under 2A turns twenty-one before a visa number becomes available, then he or she is transferred to the 2B waiting list. A third preference category is for married sons and daughters of United States citizens and a fourth for the brothers and sisters of United States citizens. Married sons and daughters of legal permanent residents are not placed in any preference category. Thus, if an unmarried son or daughter on the 2B list marries, his or her petition is automatically revoked.

The Department of State administers a waiting list based upon these preference categories and the quotas set by Congress. Each month the Department issues a Visa Bulletin apprising applicants of the approximate waiting period for a visa petition. The Bulletin publishes the cut-off date for receiving a visa number for each country. For example, the June 2002 Bulletin shows that visa numbers are available to preference category 2A applicants with a priority date earlier than March 1, 1997 for all countries except the Phillippines (March 15, 1997) and Mexico (November 8, 1994). In other words, individuals in category 2A currently wait five years for a visa number.

In December 2000, President Clinton signed two separate bills encompassing the Legal Immigration Family Equity Act (LIFE) Act, which was approved by Congress in November of that year. Among other provisions, the LIFE Act added 8 U.S.C. § 1101(a)(15)(V) which grants some

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[1] 8 U.S.C. § 1151(c)(1)(A) limits the total worldwide number of family-sponsored immigrants to 480,000 per fiscal year.

[2] Immediate relatives of United States citizens--spouses, parents, and children under the age of twenty-one--are eligible for immediate immigrant visas and are not placed in a preference category.

family members a temporary visa, known as the V-Visa, to enter the country while they await the outcome of the visa petition, explained above. Individuals eligible for V-Visas are those that meet the definition of preference category 2A. *See* 8 U.S.C. § 1101(a)(15)(V) (granting the temporary visa to "an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of a petition to accord a status under section 1153(a)(2)(A) of this title"); *see also* 8 U.S.C. § 1153(a)(2)(A) (defining as qualified immigrants those "who are the spouses or children of an alien lawfully admitted for permanent residence"). In other words, spouses or children, under the age of twenty-one, of legal permanent residents. V-Visa holders are entitled to a number of benefits, including employment authorization while they reside in the United States.

Family members for all three Plaintiffs filed I-130 forms on their behalf, seeking visas to enter this country. All three were under the age of twenty-one, and thus in preference category 2A, when the forms were originally filed: on September 3, 1997 for Burhan Akhtar, on October 8, 1996 for Rechy Monson Sese, and on May 8, 1997 for Emerson Angeles. All three entered the country under the V-Visa procedures of the LIFE Act shortly before their twenty-first birthdays. After entering the United States, and reaching the age of twenty-one, Plaintiffs applied for work authorization that is granted to holders of V-Visas. The INS denied their applications on the basis that they had reached the age of twenty-one,[3] stating in two of the three denials: "You are now over 21 years old and no longer meet the definition of "child" in Section 101(b) of the Act. For this reason, this application cannot be approved, and must be denied. There is no appeal to this decision. This decision is final." The INS has stated that Plaintiffs have overstayed their authorized period of admission and concedes that any application for an extensions of stay would be denied.

Plaintiffs claim that INS regulations that terminate V-Visa benefits when the V-Visa holder reaches the age of twenty-one are contrary to the intention of the LIFE Act and deprive them of their Fifth Amendment right to due process. Plaintiffs contend that the LIFE Act only provides for the termination of a V-Visa in three specified circumstances, none of which refer to reaching the age of majority. Therefore, Plaintiffs request a judicial declaration that the INS regulations provide an incorrect interpretation and implementation of the LIFE Act and that denial of an application for employment authorization or any other limit on the V-Visa based upon reaching the age of twenty-one is contrary to and inconsistent with the Fifth Amendment and the Immigration and Naturalization Act. Additionally, Plaintiffs seek injunctive relief compelling Defendants to approve Plaintiffs' employment authorization applications, extending the term of Plaintiffs' V-Visas, and allowing Plaintiffs to remain temporarily in the United States awaiting the approval of their visa petitions.

Defendants argue that this action should be transferred to the Western District of Missouri and, generally, that Plaintiffs have failed to state a claim. Defendants contend that Plaintiffs have included an improper party, that the Court lacks jurisdiction over the action, and that Plaintiffs' legal arguments are without merit.

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[3] Akhtar's application was denied on December 14, 2001, Angeles' application on October 19, 2001, and Sese's application was denied on September 26, 2001.

II. DISCUSSION

A. Venue

Defendants have moved to transfer venue to the Western District of Missouri, where the INS Service Center responsible for adjudicating employment authorization applications is located. Plaintiffs oppose, pointing to the presumption in favor of their choice of forum and the convenience of the parties.

A court may transfer the action to any other district where it might have been brought "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). In ruling on a motion to transfer pursuant to §1404(a), the Court must evaluate three elements raised by section 1404(a): (1) convenience of the parties; (2) convenience of the witnesses; and (3) interests of justice. *Guthy-Renker Fitness, L.L.C. v. Icon Health & Fitness, Inc.*, 179 F.R.D. 264, 269 (C.D. Cal. 1998). Once the court determines that venue is proper, the movant must present strong grounds for transferring the action, otherwise, the plaintiff's choice of venue will not be disturbed. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

A plaintiff's choice of forum is accorded substantial weight in proceedings under 28 U.S.C. §1404(a). *STX, Inc. v. Trik Stik, Inc.*, 708 F. Supp. 1551, 1555-56 (N.D. Cal. 1988) (citing *Shutte v. Armco Steel Corp.*, 431 F. 2d 22, 25 (3d Cir. 1970)). Thus, a transfer is not appropriate merely to shift the inconvenience from one party to another. *Plasco*, 1995 WL 354870, at *6. While there is a preference to retain the action in the district of plaintiff's choice, a defendant can overcome this by a strong showing that transfer will "prevent the waste of 'time, energy, and money' and 'protect litigants, witnesses and the public against unnecessary inconvenience and expense.'" *Lung v. Yachts Int'l, Ltd.*, 980 F. Supp. 1362, 1369 (D. Haw. 1997) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 616, 84 S. Ct. 805, 809 (1964)). Section 1404(a) is essentially "a codification of the common law doctrine of forum non conveniens." *Lung*, 980 F. Supp. at 1370 (holding, however, that the district court's "discretion to transfer under §1404(a) is broader than its discretion to dismiss for forum non convenient.").

Defendants stress that the Missouri Service Center is located in Lee's Summit, Missouri and that the individuals responsible for processing Plaintiffs' work authorization forms work and reside in Missouri. Therefore, Defendants argue, the convenience of the witnesses and location of the evidence weighs in favor of transferring the action to the district court in Kansas City, Missouri. This argument is unavailing. Plaintiffs' action is premised upon the assertion that the INS regulations are contrary to the LIFE Act. Factual testimony from administrative INS agents regarding Plaintiffs' particular applications will be minimally, if at all, material. All three Plaintiffs reside in Southern California and they have chosen to bring this suit in the Central District of California. This is clearly an instance where the transfer of venue would simply shift the inconvenience from one party to another. Defendants have not shown that transfer to Missouri will prevent the waste of time, energy and money and have not overcome the strong presumption in favor of Plaintiffs' choice of venue.

Accordingly, the motion to transfer venue is DENIED.

B. Proper Party

Plaintiffs concede that they named the former District Director of the Missouri Service Center (Michael Heston) as a defendant instead of the current Director (James Burzynski). They have lodged a proposed Second Amended Complaint, omitting Heston and adding Burzynski to correct the error. As the Second Amended Complaint is otherwise identical to the First Amended Complaint, the Court orders it filed, making Defendants' motion to dismiss on this ground MOOT.

C. Subject Matter Jurisdiction

Defendants argue that the Court lacks jurisdiction over this action due to the jurisdictional limits in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Defendants assert that § 1252(g) "denies jurisdiction to the Court to hear any alien case seeking to stop the Attorney General from commencing proceedings on the removal of an alien." (Defs.' Mot. at 16 (citing 8 U.S.C. § 1252(g)).) Defendants' position, however, is an overly broad reading of the statute that has been explicitly rejected.

Section 1252(g) states: "Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." In *Reno v. American-Arab Anti-Discrimination Committee*, the Supreme Court examined this jurisdictional clause in detail. 525 U.S. 471, 119 S. Ct. 936 (1999). The Court found it "implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings." *Id.* at 482, 119 S. Ct. at 943. Section 1252(g) was designed to offer protection to INS discretionary determinations, including "no deferred action" decisions. *Id.* at 485, 119 S. Ct. at 944. Therefore, the Court held, it applies only to claims based upon the Attorney General's "'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id.* at 484, 119 S. Ct. at 943.

Recent Ninth Circuit cases have reiterated this narrow reading of § 1252(g) and applied it to situations analogous to the one currently before the Court. In *Walters v. Reno*, the alien plaintiffs brought an action against the INS, alleging that they were denied due process because controlling INS policies denied them adequate notice of deportation proceedings. 145 F.3d 1032, 1036 (9th Cir. 1998). The plaintiffs sought to enjoin the future deportation of aliens who were given inadequate notice and the defendants argued that the court lacked jurisdiction to order the relief due to § 1252(g). *Id.* The Circuit first noted that the defendants could not argue that the district court "was without jurisdiction to hear the claims brought by plaintiff" because the terms of the statute do not prevent the district court from hearing the merits of plaintiff's due process claims. *Id.* at 1052. Further, the court found that the plaintiffs' claims did not arise from a decision or action of the Attorney General to commence

proceedings, adjudicate cases, or execute removal orders. *Id.* As any removal orders would simply be a consequence of INS violations and not themselves the basis for plaintiffs' claims, § 1252(g) did not apply. *Id.* at 1052-53. The district court could hear the claims and order the appropriate remedial relief. *Id.* at 1053. Similarly, in *Catholic Social Services, Inc. v. INS*, the Ninth Circuit affirmed the exercise of jurisdiction over claims challenging INS regulations and policies as inconsistent with the governing statute. 232 F.3d 1139, 1141,1150 (2000); *see also Barahona-Gomez v. Reno*, 167 F.3d 1228 (9th Cir. 1999).

Here, as in *Walters*, any removal order would be a consequence of INS regulations that Plaintiffs contend are contrary to controlling law and unconstitutional. Plaintiffs' claims are not based upon an INS discretionary decision to commence proceedings, adjudicate cases or execute removal orders. Rather, they are based upon INS regulations interpreting and enforcing the LIFE Act. The Court finds that not only does it have jurisdiction to hear Plaintiffs' claims, but it has jurisdiction to order injunctive relief if that is the necessary and appropriate remedy.

D. Due Process Claim

Defendants contend that aliens have no constitutional right to enter or remain in this country and, thus, Plaintiffs' due process claim is without merit. Without considering the merits of the specific due process claim in this case, the Court rejects Defendants' general assertion. Unquestionably, the United States has broad authority to regulate in the area of immigration. *E.g., Walters*, 145 F.3d at 1037. It is also well-established, however, that aliens facing the possibility of deportation are entitled to due process rights under the Fifth Amendment. *Id.* As the Court stated in *Landon v. Plasencia*, "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly." 459 U.S. 21, 32, 103 S. Ct. 321, 329 (1982). More specifically, the Court acknowledged that resident aliens "stand[] to lose the right 'to stay and live and work in this land of freedom.'" *Id.* at 34, 103 S. Ct. at 330 (quoting *Bridges v. Wixon*, 326 U.S. 135, 154, 65 S. Ct. 1443, 1452 (1945)). The Court additionally recognized the right to join immediate family residing in the United States that may be jeopardized when due process rights are violated. *See id.* Thus, Plaintiffs' have a colorable argument that they have due process rights--as nonimmigrants lawfully admitted to this country and currently residing in the United States--that touch upon their ability to stay, live and work in the United States in the company of immediate family. Any further determination is more appropriately resolved at summary judgment, discussed *infra*.

E. Failure to State a Claim

The remainder of Defendants' motion to dismiss is essentially a motion for summary judgment, calling for a determination on the merits that involves facts and materials extrinsic to the pleadings. The ultimate issue in this case--the propriety and constitutionality of the INS regulations governing V-Visas--heavily involves congressional intent and statutory history. While the key issues may be resolved through statutory interpretation, Plaintiffs have requested an opportunity to develop the factual record, including the legislative history of the LIFE Act. Due to the novelty and complexity

of Plaintiffs' claims, the Court, in its discretion, declines to reach the merits at this stage. *See Baker v. Cuomo*, 58 F.3d 814, 818-19 (2d Cir. 1995) (noting that "Rule 12(b)(6) dismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development"). Motions to dismiss have a limited nature and purpose; "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974), *abrogated on other grounds by Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727 (1982). Thus, the Court finds it appropriate to hold its ultimate decision in abeyance pending cross-motions for summary judgment. At summary judgment the record will be complete and both parties will have ample opportunity to argue and support their positions. This case was only recently initiated and a short delay will not significantly prejudice either party. It does appear, however, that only a brief discovery period is needed and that it is in the best interests of all parties to resolve the action in an expedited fashion. Plaintiffs' ability to remain in the United States may depend upon the Court's ruling. Therefore, the parties shall file any motions for summary judgment within thirty days of the date of this order and shall set the matter for hearing on a mutually agreed-upon date that conforms with Local Rule 7.

Accordingly, Defendants' motion to dismiss is DENIED.

III. DISPOSITION

For the reasons set forth above, the Court DENIES Defendants' motion to transfer venue and DENIES Defendants' motion to dismiss. Plaintiffs' Second Amended Complaint is ordered filed. The parties shall file any intended motions for summary judgment within thirty days of the date of this order.

The Clerk shall serve this minute order on all parties to the action.