IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VENTURE CAPITAL ASSOCIATION, et al.,

Plaintiffs,

v.

KIRSTJEN M. NIELSEN,[1]
Secretary of Homeland Security, et al.,

Defendants.

Civil Action No.: 1:17-cv-01912-JEB

PLAINTIFFS' MOTION FOR DISCOVERY REGARDING DEFENDANTS' COMPLIANCE WITH THE COURT'S JUDGMENT

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[1] Under Fed. R. Civ. P. 25(d), Secretary Kirstjen M. Nielsen, in her official capacity, is substituted for her predecessor, Elaine C. Duke.

PLAINTIFFS' MOTION FOR DISCOVERY REGARDING DEFENDANTS' COMPLIANCE WITH THE COURT'S JUDGMENT

Plaintiffs respectfully request that this Court grant them leave to conduct discovery as to whether Defendants are complying with this Court's judgment of December 1, 2017, and to grant any other relief that the Court deems appropriate. Plaintiffs submit that this requested relief is essential to ensure enforcement of this Court's judgment.[2]

STATEMENT

On December 1, 2017, the Court issued a final judgment in this case, vacating defendants' unlawful delay of the International Entrepreneur Rule (IER). *See Nat'l Venture Cap. Ass'n v. Duke*, No. CV 17-1912 (JEB), 2017 WL 5990122, at *8 (D.D.C. Dec. 1, 2017). In particular, the Court vacated the *International Entrepreneur Rule: Delay of Effective Date*, 82 Fed. Reg. 31,887 (July 11, 2017) (Final Delay Rule). Defendants did not appeal. By virtue of that Order, the IER program is now legally effective. On December 14, 2017, U.S. Citizenship and Immigration Services (USCIS) posted instructions and the form to apply for parole under the Rule. Hughes Decl. ¶ 1.

Plaintiffs have grave concerns as to whether Defendants have chosen to disregard the Court's Order. Not only have Defendants failed to take action on Plaintiffs' applications, but—most troublingly—USCIS has made certain public statements that suggest it is not implementing the IER program.

Plaintiffs filed three separate IER applications in December 2017. Not one of those applications has been adjudicated. *See* Hughes Decl. ¶ 2-3.

On April 4, 2018, USCIS Director L. Francis Cissna stated that Defendants "have not approved any parole requests under the International Entrepreneur Final Rule at this time." Hughes

[2] Plaintiffs asked the government's position on this motion earlier today, May 9, 2018, at around 9:40am. Plaintiffs have not received a reply during this admittedly short window.

Decl. ¶ 4. In that same letter, Cissna confirmed Defendants' intent to rescind the rule at some time in the future. *Id*.

On April 24, 2018, Bloomberg published an article relating to the IER. Hughes Decl. ¶ 5. In that article, USCIS spokesperson Carter Langston is identified as saying that the agency has no timeline for resolving IER applications and he is quoted as saying that foreign-born entrepreneurs should "consult an immigration attorney and find an alternative vehicle." *Id*.

ARGUMENT

Plaintiffs are concerned as to whether Defendants are complying with the Court's Order: (a) Plaintiffs' applications have not been processed, (b) the USCIS Director has stated as a blanket matter that no IER applications have been approved, and (c) an agency spokesman has said that foreign-born entrepreneurs should "consult an immigration attorney and find an alternative vehicle." In particular, the statement from the USCIS spokesperson—which informs the public that qualified entrepreneurs should *not* use the IER program, and those who have applied should seek other relief—appears to indicate that USCIS is not processing these applications in good faith. If that is so, Defendants are continuing to adhere to the Final Delay Rule, notwithstanding this Court's Order vacating it.

The Court has broad, inherent authority to enter orders to ensure compliance with its final judgment: "Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen v. United States*, 517 U.S. 820, 823 (1996).

Plaintiffs respectfully request the Court grant permission to take discovery as to whether Defendants are continuing to apply (or functionally apply) the Final Delay Rule. In particular, Plaintiffs seek to discover whether USCIS has adopted any policies or practices with respect to the IER that circumvent this Court's judgment, which includes whether Defendants are in fact

processing IER applications in good faith. Plaintiffs respectfully request that the Court enter any additional relief it deems appropriate.

CONCLUSION

Plaintiffs respectfully request that the Court allow them to take discovery regarding whether Defendants are complying with the Court's Order, and that the Court enter any other relief that it deems appropriate.

Respectfully submitted,

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Dated: May 9, 2018

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing to be filed via the Court's CM/ECF system on May 9, 2018, which will send notice of filing to all counsel of record registered with the system.

/s/ Paul W. Hughes
Paul W. Hughes

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VENTURE CAPITAL ASSOCIATION, ATMA KRISHNA, ANAND KRISHNA, OMNI LABS, INC., and PEAK LABS LLC d/b/a OCCASION,

Plaintiffs,

v.

ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security, U.S. DEPARTMENT OF HOMELAND SECURITY, JAMES MCCAMENT, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services, and U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants.

Civil Action No.: 1:17-cv-01912-JEB

DECLARATION OF PAUL W. HUGHES

1. On December 14, 2017, U.S. Custom and Immigration Services (USCIS) issued a press release announcing the implementation of the IER Program. At the same time, USCIS issued a final application form (designated form I-941), as well as an instruction for that form.

2. Plaintiffs have filed three separate applications for International Entrepreneur Rule (IER) status. These applications were filed in December 2017. I am personally counsel of record for two of the IER applications.

3. Although these applications were received and acknowledged by U.S. Customs and Immigration Services, as of May 9, 2018, plaintiffs have received neither an adjudication of their applications nor any further updates as to their status.

4. On April 4, 2018, L. Francis Cissna, the Director of USCIS, sent a letter to Senator Grassley. A copy of that letter is attached as Exhibit A. In that letter, Director Cissna states:

> We are also drafting a proposed rule to remove the International Entrepreneur Rule (IER), as announced in the regulatory agenda. Due to the court order which invalidated the IER delay rule, the International Entrepreneur Rule is currently in effect. We have not approved any parole requests under the International Entrepreneur Final Rule at this time.

5. On April 24, 2018, Bloomberg published an article regarding the International Entrepreneur Rule. A copy of that article is attached as Exhibit B. That article states the following:

> Carter Langston, a spokesman for the U.S. Citizenship and Immigration Services, said the agency has no timeline for resolving those applications or starting the process to rescind the rule. He suggested foreign-born entrepreneurs "consult an immigration attorney and find an alternative vehicle."

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 9, 2018.

By: 

Paul W. Hughes

Exhibit A

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

April 4, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley:

I am writing to update you on some of the efforts of U.S. Citizenship and Immigration Services (USCIS) to ensure the integrity of the immigration system, specifically the nonimmigrant worker programs. As you may be aware, USCIS is reviewing existing regulations, policies, and programs and developing a combination of rulemaking, policy memoranda, and operational changes to implement the "Buy American and Hire American" Executive Order (E.O.).[1] These initiatives aim to protect the economic interests of United States workers and prevent fraud and abuse in the immigration system.

One area where we are focusing significant attention is on strengthening the integrity of the H-1B program. For example, USCIS recently published a policy memorandum clarifying existing regulatory requirements relating to H-1B petitions filed for workers who will be employed at one or more third-party worksites.[2] The updated guidance makes clear that employers must provide itineraries when the H-1B petition indicates that the worker will work at more than one location. It also makes clear that USCIS may request detailed documentation, including contracts relating to the employment or assignment of such workers, to ensure that a legitimate employer-employee relationship will be maintained and that the beneficiary will be performing H-1B specialty occupation work for the entire time requested in the petition.

When H-1B beneficiaries are placed at third-party worksites, petitioners must demonstrate that they have specific and non-speculative qualifying assignments in a specialty occupation for that beneficiary for the entire time requested. While an H-1B petition may be approved for up to three years, USCIS will, in its discretion, generally limit the approval period to the length of time demonstrated that the beneficiary will be placed in non-speculative work and during which the petitioner will maintain the requisite employer-employee relationship.

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[1] *See* E.O. 13788, Buy American and Hire American, 82 Fed. Reg. 18837 (April 18, 2017).
[2] *See* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf.

Further, we now have dedicated email addresses to make it easier for the public to report suspected fraud and abuse in the H-1B and H-2B programs.[3] Other steps that USCIS has previously announced include establishing a more targeted approach in our H-1B employer site visit program.[4] We initiated these targeted site visits to help us determine, among other things, whether H-1B-dependent employers are actually paying their workers the statutorily required salary to qualify for an exemption from recruitment attestation requirements.

USCIS is also expanding its administrative site visit program to include L-1B petitions. We are initially focusing on employers petitioning for L-1B specialized knowledge workers who will primarily work offsite at another company or organization's location to ensure that they are complying with the requirements from the L-1 Visa Reform Act of 2004. These requirements were meant to help prevent United States workers from being displaced by foreign workers.

In addition, USCIS has published policy guidance clarifying issues regarding L-1 qualifying relationships and proxy votes,[5] and also clarifying that TN nonimmigrant economists be defined by qualifying business activity.[6]

We also published a policy memorandum that instructs officers to apply the same level of scrutiny to both initial petitions and extension requests for nonimmigrant visa categories.[7] The guidance applies to all nonimmigrant classifications filed using Form I-129, Petition for a Nonimmigrant Worker. The previous policy instructed officers to give deference to the findings of a previously approved petition, as long as the key elements were unchanged and there was no evidence of a material error or fraud related to the prior determination. The updated policy guidance rescinds the previous policy. Under the law, the burden of proof in establishing eligibility for the visa petition extension is on the petitioner, regardless of whether USCIS previously approved a petition. The adjudicator's determination is based on the merits of each case, and officers may request additional evidence if the petitioner has not submitted sufficient evidence to establish eligibility.

With regard to regulations, our plans include proposing regulatory changes to remove H-4 dependent spouses from the class of aliens eligible for employment authorization, thereby reversing the 2015 final rule that granted such eligibility.[8] We announced this intention earlier this year in the semiannual regulatory agenda of the Department of Homeland Security.[9] Such action would comport with the E.O. requirement to "propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system ..." As with other

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[3] ReportH1BAbuse@uscis.dhs.gov and ReportH2BAbuse@uscis.dhs.gov.

[4] *See* https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/combating-fraud-and-abuse-h-1b-visa-program.

[5] *See* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-12-29-PM-602-0155-L-1-Qualifying-Relationships-and-Proxy-Votes.pdf.

[6] *See* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-1120-PM-602-0153_-TN-Economists.pdf.

[7] *See* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf.

[8] *See* Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10283 (February 25, 2015).

[9] *See* Unified Agenda of Federal Regulatory and Deregulatory Actions, 83 Fed. Reg. 1872 (January 12, 2018).

revisions to regulations, the public will have an opportunity to provide feedback during a notice and comment period.

USCIS has also announced that it is working on two proposed regulations to improve the H-1B program. The first regulation proposes to establish an electronic registration program for petitions subject to numerical limitations for the H-1B nonimmigrant classification. This rule is intended to allow USCIS to more efficiently manage the intake and lottery process for these H-1B petitions.[10] The second regulation will propose to revise the definition of specialty occupation, consistent with INA § 214(i), to increase focus on obtaining the best and the brightest foreign nationals via the H-1B program, and to revise the definition of employment and employer-employee relationship to better protect U.S. workers and wages. In addition, DHS will propose additional requirements designed to ensure employers pay appropriate wages to H-1B visa holders.[11]

We are also drafting a proposed rule to remove the International Entrepreneur Rule (IER), as announced in the regulatory agenda. Due to the court order which invalidated the IER delay rule, the International Entrepreneur Final Rule is currently in effect.[12] We have not approved any parole requests under the International Entrepreneur Final Rule at this time.

USCIS always stands ready and appreciates the opportunity to provide appropriate technical assistance on legislative proposals for the H-2B program as well as any other area of our responsibility. More details about how our agency is implementing E.O. 13788 can be found on our website.[13]

If you have questions or would like additional information, please have your staff contact the USCIS Office of Legislative Affairs at (202) 272-1940.

Respectfully,

L. Francis Cissna
Director

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[10] *See* Unified Agenda of Federal Regulatory and Deregulatory Actions, 83 Fed. Reg. 1872 (January 12, 2018).
[11] *See* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1615-AC13
[12] On July 11, 2017, DHS published a final rule with request for comment to delay the effective date of the IE Final Rule to March 14, 2018. *See* 82 Fed. Reg. 31887. On December 1, 2017 the U.S. District Court for the District of Columbia vacated the July 11, 2017 rule.[12] *See Nat'l Venture Capital Assoc. v. Duke*, No. 17-1912 (D.D.C. December 1, 2017).
[13] *See* https://www.uscis.gov/legal-resources/buy-american-hire-american-putting-american-workers-first.

Exhibit B

Technology

Only 10 People Have Applied for Obama-Era Startup Visa

After the immigration program survived a court battle, the Trump administration is killing it with bureaucracy.

By Lizette Chapman
April 24, 2018, 6:00 AM EDT

The U.S. startup visa, passed with much fanfare during the twilight of Barack Obama's presidency, was supposed to draw thousands of foreign entrepreneurs. Instead, just 10 people have applied.

A big reason for the shortfall is that the year-old program has been constantly under assault since the election of President Donald Trump, whose agenda revolves around tightening immigration rules and dismantling Obama-era policies. The Homeland Security Department has twice delayed implementation of the program but agreed to leave the application process open after venture capitalists won a court challenge in December. No one has been granted a visa, and Homeland Security said last year that it's working on a plan to kill the rule entirely.

Saving the program, which allows foreigners who secure venture funding to spend as many as five years in the U.S. working on their businesses, is a top priority for venture capitalists. The National Venture Capital Association, the industry's lobbying firm, said it's tapping old friends

now in the Trump administration and working on cultivating new ones. Michael Kratsios, a former employee of Peter Thiel who was appointed a technology adviser to the president, will join Trump policy and economic advisers at a summit in Washington next month organized by the VC trade group. Partners from as many as 100 venture firms are set to attend the annual conference on May 16, where the startup visa will be a major topic of discussion.

"We've been meeting with different groups within the White House during the past two weeks," said Bobby Franklin, president of the lobbying firm. "The White House has the ultimate power over what the agencies do."

The technology industry views immigration as existential to American innovation. Immigrants helped start Intel Corp., Google and Tesla Inc. and account for 30 percent of entrepreneurs in the U.S., according to the Ewing Marion Kauffman Foundation, which promotes entrepreneurship. In 1996, U.S. startups received more than 90 percent of venture capital globally. By 2016, international companies sucked up almost half, according to data from research firms PitchBook and PwC. Countries looking to cultivate their own little Silicon Valleys, particularly Canada <https://www.bloomberg.com/news/features/2018-04-20/h-1b-workers-are-leaving-trump-s-america-for-the-canadian-dream> , are seizing on America's restrictive immigration policies as a way to lure talent.

VCs celebrated in 2016 when Obama signed the the International Entrepreneur Rule into law to create the startup visa. The H-1B, a skilled-labor visa that's popular with tech companies, doesn't work for entrepreneurs because it relies on an established employer for sponsorship. In July, when Homeland Security first delayed the rule's implementation, the department predicted 2,940 people would apply for the startup visa each year.

Despite victories last year on tax issues, including favorable treatment for stock options and carried interest, VCs have come to realize that immigration is "tough," said Scott Kupor, chairman of the VC trade group and a managing partner at Andreessen Horowitz. To avoid getting lost in the larger debate around border security <https://www.bloomberg.com/news/features/2018-04-09/the-race-to-cash-in-on-trump-s-invisible-high-tech-border-wall> , Kupor said he tries to focus the conversation around what the Trump administration has said it wants: highly skilled workers contributing to economic growth. The debate is a test case for the political sway of the VC industry, which spent $2.2 million on lobbying during the past year, according to data compiled by Bloomberg.

Meanwhile, the 10 startup visa applicants are left in limbo. Carter Langston, a spokesman for the U.S. Citizenship and Immigration Services, said the agency has no timeline for resolving

those applications or starting the process to rescind the rule. He suggested foreign-born entrepreneurs “consult an immigration attorney and find an alternative vehicle.”

Peter Roberts, an immigration lawyer, said he fielded inquiries from hundreds of people eager to use the startup visa after it was first approved. With legal and application fees running as much as $5,000 and no guarantee the U.S. will ever grant a visa under the program, he tells clients not to bother: “It’s a waste of time and money.”

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KIRSTJEN M. NIELSEN,[1]
Secretary of Homeland Security, et al.,

Defendants.

Civil Action No.: 1:17-cv-01912-JEB

[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR DISCOVERY REGARDING DEFENDANTS' COMPLIANCE WITH THE COURT'S JUDGMENT

Plaintiffs National Venture Capital Association, Atma Krishna, Anand Krishna, Omni Labs, Inc., and Peak Labs LLC d/b/a Occasion have moved for post-judgment discovery.

The Court has reviewed Plaintiffs' Motion for Discovery Regarding Defendants' Compliance with the Court's Judgment. The Court ORDERS that Plaintiffs' Motion GRANTED.

IT IS SO ORDERED.

Dated: _____

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Hon. James E. Boasberg
United States District Court
District of Columbia

[1] Under Fed. R. Civ. P. 25(d), Secretary Kirstjen M. Nielsen, in her official capacity, is substituted for her predecessor, Elaine C. Duke.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing to be filed via the Court's CM/ECF system on May 9, 2018, which will send notice of filing to all counsel of record registered with the system.

/s/ Paul W. Hughes
Paul W. Hughes