No. 16-5287

In the

United States Court of Appeals

for the

District of Columbia Circuit

Save Jobs USA,

Appellant,

v.

United States Department of Homeland Security,

Appellee.

On appeal from an order entered
in the United States District Court
for the District of Columbia
1:15-cv-615
The Hon. Tanya S. Chutkan

Response to Order to Show Cause

IMMIGRATION REFORM
LAW INSTITUTE
Attorneys for Appellant
25 Massachusetts Ave. N.W.
Suite 335
Washington D.C. 20001
(202) 232-5590

On the brief:
JOHN M. MIANO
CHRISTOPHER HAJEC

ARGUMENT

Presumably, this Court's order to show cause, triggered by the status report filed by the U.S. Department of Homeland Security (DHS) on September 10, is in response to DHS's suggestion that future rulemaking will make this appeal moot. DHS Resp. Br. 36–37.

Any such future rulemaking, however, remains as much a mirage as it was when this Court ordered this appeal out of abeyance on December 17, 2018. According to DHS's status report, DHS submitted its proposed rule for White House review on February 20, 2019. Remarkably, in that status report, DHS does not even claim, or give any reason to think, that this review will result in approval of the proposed rule. These omissions are telling. If DHS could have made that claim, or given such reasons, it would have done so.

This appeal should move forward, for this and a host of other reasons:

I. As just mentioned, there has been no significant change in circumstances since this Court removed the case from abeyance last year. DHS's status report gives no assurance, and does not even assert, that a proposed rescission rule will ever be published, and its links to the Office of Information and Regulatory Affairs

web site show no activity since May 1st. DHS Letter, Sept. 10, 2019. Again, these omissions are telling. If rescission of the H-4 Rule were at all likely, DHS would have said so. It follows, of course, that such rescission is distinctly *un*likely.

II. "Justice delayed is justice denied." *Rohr Indus., Inc. v. Wash. Metro. Area Transit Auth.*, 720 F.2d 1319, 1327 (D.C. Cir. 1983) (quoting *U.S. v. Brennan*, 134 F. Supp. 42, 54 (D. Minn. 1955)). This case has already gone through protracted delay brought on by DHS's earlier representations, and a postponement of oral argument will only produce much more. "'Whenever possible courts should avoid duplicated or drawn-out proceedings. The efficient administration of justice demands it.'" *Id.* (quoting *Breen Air Freight v. Air Cargo, Inc.*, 470 F.2d 767, 774 (2d Cir. 1972)).

1. Oral argument in this case was originally scheduled on March 31, 2017. Order, Jan. 10, 2017. This Court placed the case in abeyance and granted three subsequent DHS motions in response to repeated assurances from DHS that a rescission of the H-4 Rule[1] would be forthcoming. *E.g.*, Defendant-Appellee's Motion to Hold Proceeding in Abeyance, Dec. 22, 2017 (stating that DHS will begin the Notice of Proposed Rulemaking process in February 2018).

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[1] Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015)

2. After nearly two years of delay and no proposed rule having been published, this Court granted Save Jobs USA's motion to remove the case from abeyance. Order, Dec. 17, 2018.

3. Nine months later, DHS still has not even published a proposed rule. Based upon unfulfilled promises of new rulemaking, this Court has already granted DHS nearly three years of delay.

4. If oral argument is postponed indefinitely, this delay will continue much longer. In order for there to be any possibility of completely eradicating the effects of the H-4 Rule the following still have to take place: (1) DHS must publish a proposed rule; (2) the proposed rule must go through notice and comment; (3) DHS must publish a final rule; and (4) the final rule must survive all legal challenges and go into effect.

5. Legal challenges to any rescission of the H-4 rule are a certainty. *E.g.*, Laura D. Francis, *Immigration Lawyers to Trump: See You in Court*, Bloomberg, July 25, 2018 (describing how the American Immigration Lawyers' Association has formed a task force to litigate Trump administration regulations and that a rescission of the H-4 Rule is a likely subject of that litigation)[2]; Greg Siskind, "Get ready for a court battle—Trump administration has plans to wipe out work permits for H-1B spouses," Twitter,

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[2] Available at https://news.bloomberglaw.com/daily-labor-report/immigration-lawyers-to-trump-see-you-in-court

Nov. 17, 2017.[3] The former president of the American Immigration Lawyers Association stated, "I absolutely expect a lawsuit challenging the rescission rule." Stewart Anderson, *Latest On The Court Cases That Could Restrict Immigration, OPT And H-1B Spouses*, Forbes, July 10, 2019.

6. *Every* attempt by the current administration to rescind a work authorization made under the same claim of unlimited authority to permit alien employment through regulation has been blocked by the federal courts. *E.g.*, *Regents of the Univ. of Cal. v. United States Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018); *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5 (D.D.C. 2017).

7. Even if DHS published a proposed rule rescinding H-4 employment tomorrow, there are likely to be years of notice and comment and legal wrangling before a final rule would actually go into effect. A decision by this Court would come long before DHS could get a final regulation in effect. Meanwhile, American workers continue to suffer from increased competition from foreign labor.

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[3] Available at https://twitter.com/gsiskind/status/931655653332082688

III. Even assuming the speculative chain of events required to put in place a rescission of H-4 employment were to occur at some time in the future, the capable of repetition exception applies.

1. Voluntary cessation of challenged activity does not moot a case. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). "Defendants face a heavy burden to establish mootness in such cases because otherwise they would simply be free to 'return to their old ways' after the threat of a lawsuit had passed." *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 72 (1983) (quoting *W.T. Grant*, 345 U.S. at 632. A court may find voluntary cessation has made a case moot only if "(1) 'there is no reasonable expectation that the alleged violation will recur' and (2) 'interim relief or events have completely or irrevocably eradicated the effects of the alleged violation.'" *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

1. DHS has not disclosed the provisions of its might-be-proposed rule, nor has DHS made any representations that it would eradicate injury by completely eliminating H-4 employment.

2. The issue of dispute in this case is whether DHS has the sweeping (indeed, apparently unlimited) authority to permit alien employment that it claims. Op. Br. xiii. Thus, in order for this case to be moot, there must be no reasonable expectation that DHS will

permit alien employment through regulation again. *See United Bhd. of Carpenters & Joiners of Am. v. Operative Plasterers' & Cement Masons' Int'l Ass'n of the United States*, 721 F.3d 678, 688–89 (2013) ("The question [] is whether the [plaintiffs] are reasonably likely to suffer this legal wrong again."). Yet the announcement of the yet-to-be-proposed rescission of H-4 employment reasserts DHS's claim to apparently limitless authority.[4] Furthermore, the H-4 Rule is just one of several regulatory actions taken by DHS that permit alien employment in Save Jobs USA's job market. Op. Br. 33. It is entirely probable that DHS will use its claim of limitless authority again to authorize alien employment in Save Jobs USA's labor market.

IV. Consequently, the public interest exception also applies. "When controversies present what are essentially recurring issues of public interest they are not mooted because the most recent particular occasion for consideration of the issue has come and gone." *Women Strike for Peace v. Hickel*, 420 F.2d 597, 604 (D.C. Cir. 1969). The question of whether DHS has the untrammeled authority it claims to permit alien employment has recurred for years without a final decision from the courts. Op. Br i–ii.

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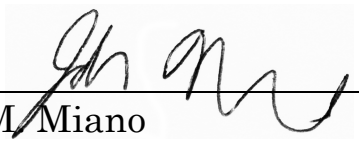
[4] Available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1615-AC15

CONCLUSION

For the foregoing reasons, this Court should hold oral argument as scheduled.

Respectfully submitted,
September 16, 2019

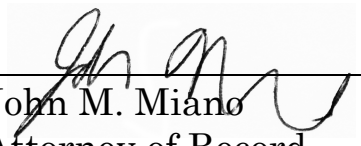


John M. Miano
D.C. Bar No. 1003068
N.J. Bar No. 020012005
Attorney of Record for Save Jobs USA
(908) 273-9207
miano@colosseumbuilders.com

Christopher Hajec
Immigration Reform Law Institute
25 Massachusetts Ave., N.W.
Suite 335
Washington, D.C. 20001
(202) 232-5590

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

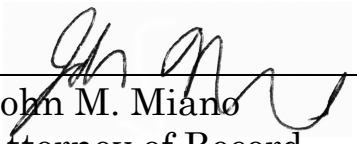
This brief complies with this Court's order because this brief contains 1,279 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 using 14 pt. Century Schoolbook.



John M. Miano
Attorney of Record
Save Jobs USA

CERTIFICATE OF SERVICE

I certify that on September 16, 2019, I filed Plaintiff-Appellant's Response to Order to Show Cause with the Clerk of the Court using the CM/ECF system that will provide notice and copies to all parties' attorneys of record.



John M. Miano
Attorney of Record
Save Jobs USA