

MEHTA V. DEPT. OF STATE: WILL PLAINTIFFS BE SUCCESSFUL IN OBTAINING THE INJUNCTIVE RELIEF IN THE CLASS ACTION COMPLAINT?

By: Michael Phulwani, Esq., David H. Nachman, Esq., and Rabindra K. Singh, Esq.

Without wasting too much ink (and time) discussing how the October 2015 Visa Bulletin was transformed by the Department of State (DOS) when it was originally released on September 9th, 2015, and how the Priority Dates (PD) were revised only four (4) days before its effective date, this article seeks to analyze the very important question of whether the Plaintiffs in the Class Action Lawsuit can obtain Injunctive Relief from the United States District Court for the Western District of Washington in Seattle.

Injunctive Relief consists of a special court order called an "injunction" which is a form of equitable relief, requiring an individual to do or not do a specific action. Because it is an extraordinary remedy, the courts utilize the injunction (or other equitable relief) in special cases where the preservation of the status quo (or taking some specific action) is required in order to prevent a possible injustice.

So what needs to be proved by a plaintiff in order to for obtain Injunctive Relief? Federal court rules set forth four (4) criteria that must be satisfied before an interlocutory or preliminary injunction can be issued: (1) likelihood of "success on the merits"; (2) potential for "irreparable harm" in the absence of an injunction; (3) "balance of the equities" or, said another way, harm to the plaintiff if the injunction is not granted versus harm to the defendant if the injunction is granted; and (4) public policy considerations. Each of these criteria must be satisfied.

Even assuming that the Plaintiff in the Class Action Complaint will be able to prove the likelihood of success on the merits, proving Irreparable Harm will likely be the toughest requirement for the Plaintiffs to satisfy in order to obtain Injunctive Relief. That brings us to the next question, why?

"Irreparable harm" is defined as an injury that cannot adequately be compensated for by a monetary payment. This could be for two reasons: (1) the harm could not be measured well enough to pick a price or value; or (2) the harm might be of a kind for which money was not a socially acceptable payment. The first one can be referred as "immeasurability" and the second one as "incommensurability".

Further, in order to obtain Injunctive Relief the Plaintiffs must also show that the harm is imminent and that the nature of the expected harm is such that an award of money damages against the Respondent, at a later date, will not make the Petitioner whole.

The biggest obstacle to satisfying this requirement is that the courts often conclude that money damages are sufficient to make a Petitioner whole¹.

Before we discuss, why the Plaintiffs have a slight chance to obtain Injunctive Relief, let's pause for a bit and analyze this through the testimony of J.K. Rowling² when she had sued the author of the "Harry Potter Lexicon." In her testimony, Ms. Rowling stated that the publication of the lexicon would destroy her "*will or heart to continue with writing*" a Harry Potter encyclopedia of her own. She did not testify that absent an injunction she would not write her own encyclopedia because the defendant would have undercut her market and she would earn nothing from her work, even though she had plenty of money already. Thus, basing an argument for Injunctive Relief primarily on money damages will not win the day in Court.

Let's analyze why proving *Irreparable Harm* would be an uphill battle for the Plaintiffs in the Class Action Complaint for obtaining the Injunctive Relief. To begin, first and foremost it is worth noting the first Preliminary Statement of the Class Action Lawsuit that was filed, Paragraph 9, and the Portion, Parties, which endeavors to explain the financial hardships suffered by each Plaintiff who prepared to submit the Adjustment of Status (AOS) Application.

The preliminary statement categorically states that:

"This case is about what happens when thousands of law-abiding, highly skilled immigrants spend millions of dollars preparing to apply for green cards in reasonable reliance on an agency's binding policy statement, only to find out at the last minute that a hapless federal bureaucracy has abruptly, inexplicably, and arbitrarily reneged on its promise."

Further, Paragraph 9 of the Amended Complaint specifically states that:

"In the absence of such relief, Plaintiffs and class members, who have spent thousands of hours and millions of dollars preparing adjustment applications in reasonable reliance on the binding agency policy statements DOS published, will be irreparably harmed and left without any remedy for Defendants' unlawful actions."

¹ For instance money damages are not being treated being sufficient where market share will be permanently lost absent an injunction; where a trade secret will become known to competitors or the general public absent an injunction; or where a person may be permanently physically injured absent an injunction.

² novelist best known as the author of the Harry Potter fantasy series.

Analysis of the preliminary statement, Paragraph 9 and then the portion of the Lawsuit that explains the various expenses incurred by Plaintiffs in preparing AOS applications results in a basic argument: *“Not maintaining the status quo as was then proposed in the originally issued October 2015 visa bulletin will result in Irreparable Harm, among others.”*

Because the argument is couched in monetary (compensatory) terms, it will be an uphill battle for the Plaintiff’s Attorneys to prove *“Irreparable Harm”* to obtain the Injunctive Relief. Taking lesson from the R.K. Rowling example above, had the argument been premised on losing the *“Security”* which was contained in the originally issued Visa Bulletin, the plaintiffs would likely have a better chance of success in proving *“Irreparable Harm”*.

In this context, it is important to quote the excerpts from white House announcement that was made in July 2015, after an extensive inter-agency coordination and consultation³:

*“Later this year, State, in consultation with DHS, will revise the monthly Visa Bulletin to better estimate immigrant visa availability for prospective applicants, **providing needed predictability to nonimmigrant workers seeking permanent residency.** The revisions will help ensure that the maximum number of available visas is issued every year, while also minimizing the potential for visa retrogression. **These changes will further allow more individuals seeking LPR status to work, change jobs, and accept promotions. By increasing efficiency in visa issuance, individuals and their families who are already on a path to becoming LPRs will have increased security that they can stay in the United States, set down roots, and more confidently seek out opportunities to build lives in our country.**”*

Although the Class Action Complaint quoted the above-mentioned White House statement and emphasized certain portions, *it failed to capitalize on this* and other similar announcements and memoranda issued by the Department of Homeland Security (DHS) and the President. In spite of detailing the financial hardships of the individual Plaintiffs, the lawsuit should have primarily and predominately focused on the *“Loss of Security”* that tens of thousands of immigrants pursuing employment-based Green Card would face by not knowing: (1) when they could freely travel to their home countries to meet their parents and family members; (2) when they could leave the

³ and based on approximately 1,650 responses received pursuant to the Request for Information published in the Federal Register.

shadows of their employers and go out on their own to start their own entrepreneurial ventures; and (3) when they could be forced to depart the United States upon getting fired or laid-off while in nonimmigrant status, etc. Further, the Plaintiffs could also have argued that such a loss of security cannot and should not be measured and compensated in terms of a money value, and, thus such loss amounts to “*Irreparable Harm*”.