



U.S. Department of Justice

*United States Attorney
Eastern District of New York*

*Mailing Address: 271 Cadman plaza East
Brooklyn, New York 11201*

January 16, 2016

BY ECF AND INTEROFFICE MAIL

Honorable Ann M. Donnelly
United States District Judge
Eastern District of New York
Brooklyn, New York 11201

Re: *6801 Realty Co., LLC v. USCIS, et al.*
CV 15-5958

Dear Judge Donnelly:

This letter is written to respectfully request a pre-motion conference in the above-referenced matter. For the reasons stated herein, this action should be dismissed for lack of subject matter jurisdiction.

On July 30, 2014, the United States Citizenship and Immigration Services(USCIS) denied a petition filed by Plaintiff under 8 U.S.C. § 1101(a)(15)(H)(i)(b). The petition sought to temporarily employ a foreign national in a specialty occupation. Complaint, ¶ 24 and exhibit F. On October 15, 2015, Plaintiff filed a complaint with this Court, seeking review of the denial of the petition primarily under the Administrative Procedure Act(APA), but did not serve Defendants. Discussions between USCIS and Plaintiff's counsel then followed. Counsel was informed that USCIS intended to reopen the case so that it could reconsider it. Plaintiff responded to that information by serving Defendants with the complaint. Indeed, on November 4, 2015, the decision was vacated, the case reopened, and a request for additional evidence sent to Plaintiff. *See* Notice, annexed hereto.

Federal courts are of limited jurisdiction, possessing only the power authorized to them by statute and by the Constitution. *Kokonon v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 376 (1994). A court should presume that a cause lies outside its limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction. *Id.* For that reason, courts must police subject-matter delineations on their own initiative. *See* Fed. R. Civ. P. 12(h). *Lyndonville Savings Bank and Trust Co. v. Lussier*, 211 F.3d 697, 700 (2d Cir. 2000))"failure of subject matter jurisdiction is not waivable and may be raised by a party or the court *sua sponte*").

When a party moves to dismiss pursuant to Rule 12(b)(1), it is the court's duty to resolve disputed jurisdictional facts. *See Cargill International S.A. v M/T Pavel Dyenko*, 991 F.2d 1012, 1019 (2d Cir. 1993). A court may fulfill its duty by reference to evidence outside the pleadings. *See Zappia Middle East Contr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000). Furthermore, in resolving a challenge to subject matter jurisdiction, a court does not draw inferences in favor of the plaintiff. *See Newsom-Lang v. Warren Int'l*, 129 F. Supp. 2d 662, 664 (S.D.N.Y. 2001). If the court determines that jurisdiction is lacking, the court cannot proceed at all, and its sole remaining duty is to state that it lacks jurisdiction and dismiss the case. *See Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 94 (1998).

As a threshold matter, before an agency action can be challenged under the APA, there must be final agency action. 5 U.S.C. § 704. "As a general matter, two conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow." *Top Choice Distributors v. United States Postal Serv.*, 138 F.3d 463, 466 (2d Cir. 1998)(quoting *Bennett v. Spear*, 520 U.S. 154, 178(1997); *see also Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992)("An agency action is not final if it is... tentative. The core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties.")(quotation marks and citation omitted).

Consistent with the above, courts have uniformly held that once USCIS reopens its decision denying an application, a federal court does not have jurisdiction over a complaint challenging the denial of the application, even though the complaint was filed before the case was reopened. Indeed, courts have so held in cases involving, as here, (H)(i)(b) denials. *See Net-Inspect, LLC v. USCIS*, 2015 WL 880956 (W.D. Wash 2015)(dismissing for lack of jurisdiction where (H)(i)(b) decision reopened); *True Capital Management LLC v. USDHS*, 2013 WL 3157904 (N.D. Cal. 2013)(same); *German Language Center et al. v. United States, et al.*, 2010 WL 3824636 (S.D. Texas 2010)(reopening of nonimmigrant visa denial); *Gizzo v. INS*, 510 F. Supp. 2d 210 (S.D.N.Y. 2007)(reopening of naturalization denial).

In addition to the above, this action is also barred by the doctrine of ripeness, a concept similar to administrative finality which is designed to prevent premature judicial intervention in the administrative process. *See Public Citizen Health Research Group v. FDA*, 740 F.2d 21, 30(D.C. Cir. 1984); *Seafarers In't'l v. United States Coast Guard*, 736 F.2d 19, 26 (2d Cir. 1984). Under the ripeness doctrine, the Court must determine (1) whether the issues before the Court are sufficiently developed to be fit for judicial determination; and (2) whether withholding a judicial determination will cause substantial hardship to the parties. *Texas v. United States*, 523 U.S. 296, 300-01(1998); *United States v. Balon*, 384 F.3d 38, 46 (2d Cir. 2004).

As a threshold matter, as the case has been reopened, the previous denial "is not the agency's 'last word on the matter.' To the contrary, further decision making can be expected." *Net-Inspect*, 2015 WL 880956 at *4. Accordingly, the case is not sufficiently fit for judicial determination at this point.

Further, as the agency's decision remains open for consideration, any adverse effect is contingent on further administrative review. *German Language Center*, 2010 WL 3824636 at *3. As such, withholding judicial determination at this point will not pose hardship to Plaintiff. Nor can Plaintiff argue

that delay will cause it hardship. Indeed, Plaintiff did not even bring this action until over fourteen months after the decision denying the petition was made.

Thank you for your consideration. Defendants remain ready to further discuss this matter. Independent of a conference, the Court may wish to decide this motion on the pre-motion conference papers or set a briefing schedule.

Respectfully submitted,

ROBERT L. CAPERS
UNITED STATES ATTORNEY

By: *Scott Dunn*

Asst. U.S. Attorney
(718) 254-6029

cc: Spencer Sheehan Esq.
Sheehan and Associates
891 Northern Blvd.
Suite 201
Great Neck, NY 11021

December 16, 2015

U.S. Department of Homeland Security

U.S. Citizenship and Immigration Services
Vermont Service Center
30 Houghton St (VSC Premium Processing)
St. Albans, VT 05478-2399

6801 REALTY CO LLC
c/o SPENCER ISAAC SHEEHAN
SHEEHAN AND ASSOCIATES PC
15 MORRIS LANE
GREAT NECK, NY 11024



**U.S. Citizenship
and Immigration
Services**

Beneficiary: POULAKIS, DIMITRIOS
I-129, Petition for a Nonimmigrant Worker



EAC1413551877

PREMIUM PROCESSING

IMPORTANT: THIS NOTICE CONTAINS YOUR UNIQUE NUMBER. THIS PAGE MUST BE SUBMITTED WITH THE REQUESTED EVIDENCE. MAIL THIS NOTICE AND YOUR RESPONSE TO THE ADDRESS ABOVE.

You are receiving this notice because U.S. Citizenship and Immigration Services (USCIS) requires additional evidence to process your form. Please provide the evidence listed on the attached page(s). Include duplicate copies if you are requesting consular notification. **Your response must be received in this office by March 12, 2016.**

Please note that you have been allotted the maximum period allowed for responding to a Request For Evidence (RFE). The time period for responding cannot be extended. 8 CFR 103.2(b)(8)(iv). Because many immigration benefits are time sensitive, you are encouraged to respond to this request as early as possible, but no later than the deadline provided above. If you do not respond to this notice within the allotted time, your case may be denied. The regulations do not provide for an extension of time to submit the requested evidence.

You must submit all requested evidence at the same time. If you submit only some of the requested evidence, USCIS will consider your response a request for a decision on the record. 8 CFR 103.2(b)(11).

If you submit a document in any language other than English, the document must be accompanied by a full and **complete** English translation. The translator must certify that the translation is accurate and he or she is competent to translate from that language to English. **If you submit a foreign language translation in response to this request for evidence, you must also include a copy of the foreign language document.**

Processing of your form or benefit request will resume upon receipt of your response. If you have not



Service Center (NCSC) at 1-800-375-5283. If you are hearing impaired, please call the NCSC TDD at 1-800-767-1833.

Responses (for Premium Processing cases only) may be faxed to (802)-860-6900. Include a copy of this notice. The Premium Processing e-mail address (vsc-premium.processing@dhs.gov) may only be used for inquiries. Do not send responses to the e-mail address.

United States Citizenship and Immigration Services (USCIS) is in need of additional evidence regarding your Petition for a Nonimmigrant Worker (Form I-129) you originally filed on April 2, 2014, in which you sought to classify the beneficiary as a Residential Market Research Analyst under section 101(a)(15)(H) of the Immigration and Nationality Act.

The original evidence you submitted with your petition included:

- A letter of support addressing the services your company provides, a description of the position and the beneficiary's qualifications;
- A copy of the petitioner's resume;
- A copy of the beneficiary's foreign college transcript (untranslated);
- A copy of a letter of reference from the beneficiary's prior foreign employer;
- A copy of the beneficiary's Greek passport;
- Incorporation documents for your company; and
- Bank statements for your company;

In the first Request for Evidence (RFE) issued on May 5, 2014, it was requested you submit evidence describing the duties of the proffered position in greater detail, evidence establishing the position required the services of a person performing a specialty occupation (i.e. the holder of at least a baccalaureate degree in a related field), documentation describing your business, advertising documentation if you publicized the position, and an evaluation of the beneficiary's education and experience.

In response to the RFE, you submitted a letter of support from your attorney, dated July 27, 2014, which provided the following:

- An overview of your company;
- A more detailed list of the responsibilities of the position which included:
 - A list of the information sources the beneficiary would purportedly use to fulfill his responsibilities;
 - What appears to be a textbook overview of the microeconomic, macroeconomic and other forms of analysis which you state will be part of the beneficiary's responsibilities;
 - Enhanced descriptions of the initial job responsibilities, including the information to be conveyed by the "Mid quarterly and Quarterly Reports" the beneficiary would produce;
- The percentage of time devoted to each duty;
- An explanation of the beneficiary's foreign educational credentials;
- A chart comparing the duties of the proffered position to the duties of the beneficiary's previous positions, the academic courses which you purport to be applicable to the duties, and the percentage of time he is projected to spend on each duty; and
- A presentation of how the beneficiary's educational credentials qualify and meet the criteria for a specialty occupation.

In addition to the information provided in the letter of support, you submitted the following documents:

- Previously submitted evidence including a letter of support from the petitioner, incorporation



- Previously submitted evidence including a letter of support from the petitioner, incorporation documents, bank statements, the beneficiary's resume, and letters from his previous employers;
- New evidence including insurance information, a miscellaneous income tax form, a letter from your insurer, an article pertaining to the utilization of data in business, what appear to be advertisements for software services to analyze data, job postings from March of 2014 for your proffered position, an English translation of the beneficiary's degree and transcripts, an evaluation of the beneficiary's foreign degree, and evaluations of the proffered position.

In response to the evidence submitted, USCIS issued a denial of your Form I-129 on July 30, 2014. The denial stated that the evidence you submitted failed to establish that the proffered position qualified as a specialty occupation, and specifically that the evidence failed to meet any of the four criteria as provided under 8 CFR 214.2(h)(4)((iii)(A), which are the following:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, evidence that this particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

On November 4, 2015, your case was reopened by USCIS per 8 C.F.R. § 103.5(a)(5)(ii), and you are hereby being provided additional time under that regulation to submit a brief or further evidence of your eligibility.

Additional evidence is needed before a final decision will be made on your case.

Place of Employment

A search of publicly available Internet resources reveals that the place of employment as stated on your petition and supporting LCA, 8201 7th Avenue, Brooklyn, NY 11228, exists in a residential dwelling in a residential neighborhood. This raises questions as to whether it is a place of employment that can accommodate the beneficiary, as well as other employees. Note that this also applies to another address, 6801 Colonial Road, Brooklyn, NY 11220, which is listed on other documents you submitted, such as the letter from New York State Insurance Fund. Although the accuracy of Internet resources is not always guaranteed, the information summarized above casts significant doubt upon the legitimacy of your business and the validity of the employment offered.

Please provide additional evidence to rebut this information, and evidence to support your contention that the residence listed in the petition is a fully functioning place of employment that can accommodate your current employees, as well as the beneficiary of this petition. Such information should include:

- photographs of the business property and operations;
- a list of all your employees, including their job titles and date of hire, currently working at 8201 7th Avenue, Brooklyn, NY;
- your company's organizational chart;
- affidavits attesting to your business operating at 8201 7th Avenue address from neighbors, other businesses, civic organizations, local government entities and/or customers (including



- Any other evidence to support your claim that this is a bona fide workplace, employer and an ongoing business entity.

Indicate whether your business property is owned or leased. If owned, submit documentation to establish the owner(s) and the relationship to your petitioning business. If leased, submit a copy of the lease or rental agreement; the lease or rental agreement must clearly specify the date the lease began, subsequent renewal dates, the amount of space rented, and the monthly charge.

Submit a copy of your municipal business license. Provide documentation from the local municipal authority to establish that employees are permitted to work at your business location.

Submit evidence that you have registered your business within the last year with the authority in the state(s) in which you operate.

Nature and Scope of Business

You describe the business as “residential building rental or leasing” on the Form I-129. However, your attorney’s cover letter in response to the RFE, dated July 27, 2014, describes the company as a residential real estate company that focuses on transforming aging New York City housing into updated units, with the goal of expanding its market presence to neighborhoods that lack affordable housing options. Please provide evidence of the specific nature and scope of your business to resolve this apparent discrepancy, including:

1. A detailed description of your past and current residential development projects;
2. A description of how many residential development projects you complete each year;
3. Copies of your corporate tax returns;
4. A list of the residential buildings you currently rent or lease to others; and
5. Any other evidence you believe substantiates the nature and scope of your business and resolves this apparent discrepancy.

