

Sheehan & Associates, P.C.

Attorneys at Law  
891 Northern Boulevard  
Suite 201  
Great Neck, NY 11021  
Telephone: (516) 303-0552  
Facsimile: (516) 234-7800  
spencer@spencersheehan.com

---

January 15, 2016

*Via ECF and First-Class Mail*

Honorable Ann M. Donnelly  
United States District Court Judge  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

Re: 6801 Realty Co., LLC v. USCIS et al.  
Docket No. 1:15-cv-05958 (AMD)

Dear Hon. District Judge Donnelly:

This firm is counsel to plaintiff 6801 Realty Co., LLC (“plaintiff”) in the above-entitled action. This letter is written in response to defendants’ letter requesting a promotion conference. Dkt. No. 20.

The basis for defendants’ motion is inconsistent with established law. Defendants state that on December 16, 2015 a (second) Request for Evidence (“RFE”) was sent to plaintiff. As a result, defendants argue that their reopening of the application renders its decision “non-final” and thereby removes jurisdiction from this Court. In so doing, defendants rely upon 8 CFR § 103.5(a)(5), “Motion by Service officer.” That the second RFE issued by defendants was procedurally improper is an issue that may be addressed in another correspondence.

It is the position of plaintiff that defendants’ invocation of 8 CFR § 103.5(a)(5) was improper under the circumstances. Following defendants’ arguments to their conclusion, if an agency has the power to alter a final decision under judicial review, it can potentially strip the reviewing court of its jurisdiction, which is limited by Article III. It was this issue which the Seventh Circuit Court of Appeals addressed in *Doctors Nursing & Rehab. Center v. Sebelius*, 613 F.3d 672 (7th Cir. 2010). That court ruled that if an agency could *sua sponte* reopen any decision which was

subject to review by a court, “its decision, and motivation, would effectively be unreviewable because the courts would have no jurisdiction over the case once a final decision had been reopened.” *Doctors Nursing & Rehab. Center v. Sebelius*, 613 F.3d at 679-680. The result of such an affirmance, the Seventh Circuit concluded “would give the agency the unreviewable power to manipulate federal jurisdiction without any guarantee of efficiency.” *Id.*

A district court reviewing a final agency action “sits as an appellate tribunal.” *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999) (quoting *PPG Indus., Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995)). “The filing of a notice of appeal is *an event of jurisdictional significance* – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58-59 (1982) (per curiam)(emphasis added). Analogizing the “notice of appeal” quoted in *Griggs* to actions seeking to overturn agency action, it is the filing of the complaint which is “an event of jurisdictional significance.”

While defendants cite *Net-Inspect, LLC v. US Citizenship and Immigration Services*, No. C14-1514JLR (W.D. Wash. Feb. 28, 2015) and *True Capital Management, LLC v. United States Department of Homeland Security*, No. 13-261 JSC (N.D. Cal. June 20, 2013) for the proposition that defendant USCIS can, *sua sponte*, reopen a decision and thereby divest a district court of jurisdiction, those decisions were based on factors which are not present in the instant action.

Moreover, a closer review of *True Capital Management, LLC* provides a contrary interpretation to that claimed by defendants. Specifically, the court in *True Capital Management, LLC* relied upon *Gao v. Gonzales*, 464 F.3d 728 (7th Cir. 2006) to attempt to distinguish it from the conclusions of the court in *Doctors Nursing & Rehab. Center v. Sebelius*.

The *True Capital Management, LLC* court claimed that the Seventh Circuit distinguished *Gao v. Gonzales* from other relevant cases, including *Doctors Nursing & Rehab. Center v. Sebelius*. Furthermore, the court in *True Capital Management, LLC* stated that *Doctors Nursing & Rehab. Center v. Sebelius* was not based on the APA but on 42 USC § 405(g). However, a review of the decision of *Doctors Nursing & Rehab. Center v. Sebelius* stated clearly why *Gao v. Gonzales* was inapplicable. The reasons were that:

*Gao* was fundamentally a mootness case: because the petitioner had challenged only the agency's refusal to reopen his case, there was no more relief that the court could have granted once the agency itself decided to give the petitioner the very thing he was asking of the court. Second, *Gao* did not establish a general rule that agencies may divest courts of jurisdiction by reopening final decisions.

*Doctors Nursing & Rehab. Center v. Sebelius*, 613 F.3d at 678.

The Court in *Doctors Nursing & Rehab. Center v. Sebelius* went on to state that if an agency

“became concerned that a Court of Appeals – or even the Supreme Court – might issue a decision adverse to its interests, it could reopen its proceedings and yank the case out of the courts,” allowing “the agency to manipulate federal jurisdiction to frustrate litigants by increasing the time and expense required to pursue claims, and prevent or at least postpone into perpetuity unfavorable precedent.” 613 F.3d at 679.

*Net-Inspect, LLC v. US Citizenship and Immigration Services* is additionally inapposite since it relied upon *Cabaccang v. U.S. Citizenship & Immigration Servs.*, 627 F.3d 1313 (9th Cir. 2010). Indeed, this argument was addressed in the complaint at ¶ 62 (“The court in True Capital Mgmt. relied upon the holding of Cabaccang v. USCIS, 627 F.3d 1313 (9th Cir. 2010) to conclude that USCIS may essentially remove jurisdiction from a reviewing court through a sua sponte reopening of the petition in question. However, in Cabaccang, removal proceedings already had been commenced against the plaintiff therein, fundamentally altering the jurisdictional analysis.”). Dckt. No. 1.

The reason the complaint addressed these jurisdictional questions was with the expectation that defendants would immediately take the actions they have taken here, which would essentially insulate agency decisions from judicial review.

Another reason why defendant agencies cannot and should not be permitted to interfere with judicial review is that such interference with judicial proceedings jeopardizes our constitutional structure by undermining judicial authority. The finality requirement in the APA serves a critical purpose – it preserves the separation of powers in the administrative context. The doctrines of finality and ripeness are closely related; agency action is not “ripe” for judicial review until it is final. *See American Petroleum Institute v. E.P.A.*, 683 F.3d 382, 386 (D.C. Cir. 2012); *see also Wheaton College v. Sebelius*, F.Supp.2d, 2012 WL 3637162 (D.D.C. Aug. 24, 2012).

The ripeness/finality requirements preserve the proper role of federal courts under Article III by ensuring that courts do not review tentative agency decisions, preventing courts from “entangling themselves in abstract disagreements over administrative policies, and ... protect[ing] the agencies from judicial interference” in an ongoing decision-making process. *American Petroleum Institute v. E.P.A.*, 683 F.3d at 386 (*quoting Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)).

A corollary to the finality principle is that once an agency has taken final action and that action has been challenged in federal court, an agency cannot unilaterally decide to take a different action because doing so undermines separation of powers. If defendants wished to review the present application *sua sponte*, defendants could have done so in the time between the denial of the application and the filing of the present complaint.

Counsel for defendants is correct in stating that the undersigned notified Mr. Ronald Kish, an attorney with USCIS, of the filing of the present action before service of process. It was Mr. Kish though who requested this office refrain from service. The reason for notifying Mr. Kish was out of professional courtesy and with the hope and expectation that an adequate resolution could have been

reached without having to print out over 14,000 pages and arrange for service of same. An “adequate resolution” would have been an approval of the application or at the very least, a fair review of the complaint and accompanying proofs. I informed Mr. Kish that if defendant USCIS merely reopened the application and issued additional RFEs, I would subsequently have no choice to litigate this case. All correspondence between the undersigned and Mr. Kish is annexed hereto as Exhibit “A.”

Lastly, now that defendants have requested a premotion conference, plaintiff respectfully requests that this Honorable Court direct defendants to lodge the Certified Administrative Record so that plaintiff may move accordingly.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Spencer Sheehan', written in a cursive style.

Spencer Sheehan

cc: *Via ECF*  
Mr. Scott Dunn, Esq.

# EXHIBIT A



Spencer Sheehan <spencer@spencersheehan.com>

## Immigration Question

1 message

**Spencer Sheehan** <spencer@spencersheehan.com> Fri, Oct 16, 2015 at 11:47 AM  
To: ronald.kish@dhs.gov, Ronald Kish <ronald.w.kish@uscis.dhs.gov>

Dear Mr. Kish,

My name is Spencer Sheehan and I'm an attorney on Long Island. I highly doubt you remember but we had a very pleasant conversation on the phone about one year ago wherein I discussed certain issues with respect to the processing of a client's I-129 in the summer of 2014.

I had spent much of the past year working on other legal issues but recently had the chance to finalize the complaint and other documents which I filed via ECF last night.

You had mentioned the possibility when we spoke last year of looking into this matter for me which I thought incredibly gracious and demonstrative of the utmost professionalism which is consistent with every attorney and other personnel representing our federal government with whom I have had the privilege to work with.

The filing of the complaint - Case No. 15-5958 - was done to summarize the record and provide clarification. It is my understanding, perhaps mistaken, that government email accounts cannot download pdfs from emails which are sent from non-government addresses.

If I am incorrect, please let me know and I will attach the relevant documents in an email for you or I will have them dispatched by courier to your office.

Lastly, I left you a voicemail at (212) 264-3475 requesting that you kindly give me a call back at your convenience. The best number to reach me at today is my mobile phone, (516) 236-6456 as I am between a few different courts on Long Island. Thank you again and I hope you have been well.

Very truly yours,

Spencer Sheehan

--

Spencer Sheehan, Esq.  
Sheehan & Associates, P.C.  
891 Northern Blvd  
Suite 201  
Great Neck, NY 11021  
Office: (516) 303-0552  
Mobile: (516) 236-6456  
Facsimile: (516) 234-7800  
[spencer@spencersheehan.com](mailto:spencer@spencersheehan.com)

Notice To Recipient: This e-mail is meant for only the intended recipients, and may be a communication that is confidential, private and privileged by law. If you are not an intended recipient, or if any part of the content or title of this email shows that you received this e-mail in error, any continued review by you of the email, or use, dissemination, distribution, or copying of this e-mail, is strictly prohibited. Please notify us immediately of any error in sending this email by return e-mail, and please delete this message and all copies from your system. Thank you for your cooperation.



Spencer Sheehan <spencer@spencersheehan.com>

---

## 6801 Realty Co. LLC v. USCIS et al.

1 message

---

**Spencer Sheehan** <spencer@spencersheehan.com> Mon, Oct 19, 2015 at 2:49 PM  
To: Ronald Kish <ronald.w.kish@uscis.dhs.gov>

Dear Mr. Kish,

Thanks for spending a few minutes on the phone with me just a few minutes ago.

Attached is the civil complaint, exhibits and cover sheet filed in the above-referenced action.

I only filed this just to basically memorialize my thoughts and arguments on this issue. My intent is not to be adversarial and if we can resolve this matter I would have no problems discontinuing it as soon as possible. It hasn't been served yet and was only filed this past Thursday.

Feel free to reach me via email or on my cell phone, [\(516\) 236-6456](tel:5162366456).

Thank you again for your courtesies and professionalism.

Very truly yours,

Spencer Sheehan

--

Spencer Sheehan, Esq.  
Sheehan & Associates, P.C.  
891 Northern Blvd  
Suite 201  
Great Neck, NY 11021  
Office: [\(516\) 303-0552](tel:5163030552)  
Mobile: [\(516\) 236-6456](tel:5162366456)  
Facsimile: [\(516\) 234-7800](tel:5162347800)  
[spencer@spencersheehan.com](mailto:spencer@spencersheehan.com)

Notice To Recipient: This e-mail is meant for only the intended recipients, and may be a communication that is confidential, private and privileged by law. If you are not an intended recipient, or if any part of the content or title of this email shows



that you received this e-mail in error, any continued review by you of the email, or use, dissemination, distribution, or copying of this e-mail, is strictly prohibited. Please notify us immediately of any error in sending this email by return e-mail, and please delete this message and all copies from your system. Thank you for your cooperation.



**6801 Realty v. USCIS et al. complaint.pdf**  
19230K



Spencer Sheehan <spencer@spencersheehan.com>

---

## Following up - 6801 v. USCIS et al. - 15-5958

4 messages

---

**Spencer Sheehan** <spencer@spencersheehan.com> Wed, Oct 21, 2015 at 4:40 PM  
To: Ronald Kish <ronald.w.kish@uscis.dhs.gov>, Ronald Kish  
<ronald.kish@dhs.gov>

Dear Mr. Kish,

I hate to be a nuisance as I know you have many, many responsibilities. However I realized after I sent you the filed complaint, exhibit and civil cover sheet that it was close to twenty megabytes (mb). This was after I reduced the size of the original pdf document. Some email programs have difficulty with attachments of that size. I could not even send the original document since it was over twenty-five mb which my email program (Google Apps) does not support.

With that in mind, I reduced the size of the document to approximately sixteen mb. The quality of the document may be reduced slightly and also any color has been removed.

I'm also including a Dropbox link so can have the option to get the file from there if you choose.

<https://www.dropbox.com/s/ntcxa7we9sa7wjp/6801%20v.%20USCIS%20et%20al..pdf?dl=0>

I haven't begun to arrange for official service of process yet. I would prefer to resolve this matter without that, partly to avoid printing the many thousands of pages for the numerous copies which each defendant would get.

If you would like to discuss this, please do not hesitate to call me or email me at your convenience. Thank you very much.

Very truly yours,

Spencer Sheehan

--

Spencer Sheehan, Esq.  
Sheehan & Associates, P.C.

891 Northern Blvd  
Suite 201  
Great Neck, NY 11021  
Office: (516) 303-0552  
Mobile: (516) 236-6456  
Facsimile: (516) 234-7800  
[spencer@spencersheehan.com](mailto:spencer@spencersheehan.com)

Notice To Recipient: This e-mail is meant for only the intended recipients, and may be a communication that is confidential, private and privileged by law. If you are not an intended recipient, or if any part of the content or title of this email shows that you received this e-mail in error, any continued review by you of the email, or use, dissemination, distribution, or copying of this e-mail, is strictly prohibited. Please notify us immediately of any error in sending this email by return e-mail, and please delete this message and all copies from your system. Thank you for your cooperation.

---

 **6801 Realty v. USCIS et al. complaint.pdf**  
16787K

---

**Kish, Ronald W** <[Ronald.W.Kish@uscis.dhs.gov](mailto:Ronald.W.Kish@uscis.dhs.gov)> Thu, Oct 22, 2015 at 1:44 PM  
To: Spencer Sheehan <[spencer@spencersheehan.com](mailto:spencer@spencersheehan.com)>

Good afternoon, Spencer. In an effort to resolve this matter through administrative action, I have forwarded your complaint to the appropriate reviewing authority in USCIS. It would be appreciated if you could hold off effecting service for a while so as to facilitate this review process. As the allegations are detailed and the documentation extensive, it may take USCIS two or three weeks to complete its evaluation and make a determination as to how to proceed. Thank you for your cooperation and patience.--Ron

Ron Kish, Sp. AUSA, EDNY

[212-264-3475](tel:212-264-3475)

**From:** Spencer Sheehan [<mailto:spencer@spencersheehan.com>]  
**Sent:** Wednesday, October 21, 2015 4:41 PM  
**To:** Kish, Ronald W; Kish, Ronald W  
**Subject:** Following up - 6801 v. USCIS et al. - 15-5958

Dear Mr. Kish,

I hate to be a nuisance as I know you have many, many responsibilities. However I realized after I sent you the filed complaint, exhibit and civil cover sheet that it was close to twenty megabytes (mb). This was after I reduced the size of the original pdf document. Some email programs have difficulty with attachments of that size. I could not even send the original document since it was over twenty-five mb which my email program (Google Apps) does not support.

With that in mind, I reduced the size of the document to approximately sixteen mb. The quality of the document may be reduced slightly and also any color has been removed.

I'm also including a Dropbox link so can have the option to get the file from there if you choose.

<https://www.dropbox.com/s/ntcxa7we9sa7wjp/6801%20v.%20USCIS%20et%20al..pdf?dl=0>

I haven't begun to arrange for official service of process yet. I would prefer to resolve this matter without that, partly to avoid printing the many thousands of pages for the numerous copies which each defendant would get.

If you would like to discuss this, please do not hesitate to call me or email me at your convenience. Thank you very much.

Very truly yours,

Spencer Sheehan

--

Spencer Sheehan, Esq.  
Sheehan & Associates, P.C.  
891 Northern Blvd  
Suite 201  
Great Neck, NY 11021  
Office: (516) 303-0552  
Mobile: (516) 236-6456  
Facsimile: (516) 234-7800  
[spencer@spencersheehan.com](mailto:spencer@spencersheehan.com)

Notice To Recipient: This e-mail is meant for only the intended recipients, and may be a communication that is confidential, private and privileged by law. If you are not an intended recipient, or if any part of the content or title of this email shows that you received this e-mail in error, any continued review by you of the email, or use, dissemination, distribution, or copying of this e-mail, is strictly prohibited. Please notify us immediately of any error in sending this email by return e-mail, and please delete this message and all copies from your system. Thank you for your cooperation.

||

---

**Spencer Sheehan** <[spencer@spencersheehan.com](mailto:spencer@spencersheehan.com)> Thu, Oct 22, 2015 at 2:30 PM  
To: "Kish, Ronald W" <[Ronald.W.Kish@uscis.dhs.gov](mailto:Ronald.W.Kish@uscis.dhs.gov)>

Dear Mr. Kish,

Thank you for your response. I am fortunate enough to have considerable patience, likely attributed to my years of service in the United States Marine Corps, where it seemed we often spent extensive periods of time in a desert just waiting.

Please understand that my goal has never been to depict USCIS or any other

agency or individual within our government in a negative light. The reasons for the depth of the complaint were several.

The first was because based on other actions similar to this in district courts throughout our nation, complaints are often threadbare. While that is permitted and sometimes it is necessary to plead in such a way, I decided against that here. I wanted to do a complete review of almost everything from the ground up.

Secondly, I was aware that in many cases similar to this one, the plaintiff will either move for summary judgment and/or the defendants will seek to dismiss the action. Therefore, I basically included everything that would have went in a summary judgment motion.

Third, I really enjoy writing and researching. I wanted to produce a work that would have value in its critical and substantive analysis of immigration law and how the law is applied. I wanted to tie up every legal loose end that might have existed to the best of my ability. Sometimes this thoroughness can be a negative but it's just my personality. I must have read all of the AAO decisions on I-129 applications for the past ten years along with other materials. I enjoyed digging into things and wanted to go to the original sources (Matter of Ling, Michael Hertz, etc.) instead of only reading analysis that was derivative in nature.

I'll be honest and please consider this paragraph off record. What happened in my opinion was just an oversight by USCIS. I understand and appreciate that the individuals there work very hard under tight deadlines and always with budgetary limitations. There was no conceivable way the initial petition could have been reviewed in the few hours time between its receipt by USCIS and the denial. The hard working men and women at the Vermont Service Center have tens (or maybe hundreds?) of thousands of petitions to review in very short amounts of time. No individual or agency is perfect. We all make mistakes.

Based upon when a resolution could be reached, plaintiff would consider waiving any claim for attorney's fees but that is an issue to discuss at another time. Provided any review by USCIS is consistent with the allegations I have set forth in the complaint, any new order regarding the approval of the petition should be sent to my office.

In the interim, I have many other legal projects I am happy to resume work on. And I will gladly refrain from service until I have received an update from your office. I'll check back in no sooner than two weeks from today. Thank you again for your service, professionalism and courtesies.

Very truly yours,

~WRD000.jpg

1K



Spencer Sheehan <spencer@spencersheehan.com>

---

## 6801 Realty v. USCIS et al.

1 message

---

**Spencer Sheehan** <spencer@spencersheehan.com> Wed, Nov 4, 2015 at 5:07 PM

To: Ronald Kish <ronald.kish@dhs.gov>, Ronald Kish  
<ronald.w.kish@uscis.dhs.gov>

Dear Mr. Kish,

I received an automatic notification that the nonimmigrant employment application which is the subject of the above-captioned action has been reopened for reconsideration. I presume that this is a formality in order to ultimately approve the application.

If I am incorrect, and this reopening results in additional Requests for Evidence and at some point a denial, I will argue to the Court that such action should be considered a nullity. This is because an action was filed with a Court of appropriate jurisdiction and that any decision on this application should be made by the Court.

Furthermore, there is no indication in the notification of reopening that the legal record, which now includes the complaint and by incorporation, the entire administrative record, would be the basis upon which any subsequent decision should be made. If the reopening notification only allows for standard boilerplate notifications, that is fine as long as you can tell me that the appropriate record will be reviewed.

I only mention any of this since I'm not that knowledgeable regarding the inner workings of a large governmental agency. If this reopening is merely a formality in order to approve the petition, based on the record filed with the Court, then I have no issues and I express my appreciation for your courtesies. Thank you very much.

Very truly yours,

Spencer Sheehan

--

Spencer Sheehan, Esq.  
Sheehan & Associates, P.C.  
891 Northern Blvd



Suite 201  
Great Neck, NY 11201  
Office: (516) 303-0552  
Mobile: (516) 236-6456  
Facsimile: (516) 234-7800  
[spencer@spencersheehan.com](mailto:spencer@spencersheehan.com)

Notice To Recipient: This e-mail is meant for only the intended recipients, and may be a communication that is confidential, private and privileged by law. If you are not an intended recipient, or if any part of the content or title of this email shows that you received this e-mail in error, any continued review by you of the email, or use, dissemination, distribution, or copying of this e-mail, is strictly prohibited. Please notify us immediately of any error in sending this email by return e-mail, and please delete this message and all copies from your system. Thank you for your cooperation.

Sent from my iPhone