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February 10, 2015

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 accordance with your Honor's Individual Practices and Rules.

I. Defendants Are Estopped From Personal Jurisdiction Argument

Counsel for defendants has brought a new argument with respect to the jurisdictional issues before this Court. Specifically, it is argued that even if this Court may have subject matter jurisdiction, this action should be dismissed since *in personam* jurisdiction was not acquired until *after* defendant USCIS reopened the administrative proceeding. Dckt. No. 22.

Opposing counsel claims that the administrative proceeding was reopened on November 4, 2015. However, as the attached document clearly shows, the administrative proceeding was not reopened until December 2, 2015. Exhibit "A," Screen Capture of USCIS Case Tracking Portal for Receipt Number EAC1413551877.

Therefore, defendants' argument with respect to the date of reopening is of no meaning since service was completed prior to December 4, 2015. Furthermore, even if defendants' claim that

defendant USCIS reopened the administrative proceeding on November 4, 2015, was correct, the doctrine of equitable estoppel precludes defendants from this argument.

With respect to the party estopped, the elements of equitable estoppel are "(1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts." *In re Vebeliunas*, 332 F.3d 85, 94 (2d Cir. 2003) (citations omitted).

The parties asserting estoppel must show with respect to themselves: (1) lack of knowledge and of the means of knowledge of the true facts; (2) reliance upon the conduct of the party to be estopped; and (3) prejudicial changes in their positions

At bar, Senior Immigration Attorney Ronald Kish specifically requested, in writing, that "It would be appreciated if you could hold off effecting service for a while so as to facilitate this review process…Thank you for your cooperation and patience.--Ron." Exhibit "B," Email from Ronald W. Kish to Plaintiff's Counsel, October 22, 2015.

In asserting estoppel, plaintiff shall argue that it lacked knowledge that the request of Mr. Kish to refrain from service "for a while" was done in order to permit the reopening of the administrative action to permit defendants to subsequently claim that personal jurisdiction was not obtained until after the administrative proceeding was already reopened. Plaintiff relied upon the representations of Mr. Kish by cooperating out of professional courtesy. Said reliance caused a prejudicial change in plaintiff's position, since now defendants are arguing that service was not complete until the middle of November, which they claim was after the administrative action was reopened.

To permit defendants from asserting this argument is against fair dealing and good conscience. It also would have the result of precluding cooperation between the parties outside of formal proceedings before this, or any other Court. Defendants' actions, if allowed, would have a chilling effect on parties engaging in professional courtesies and dialogue which are a mainstay of professional conduct amongst attorneys. "Equitable estoppel is grounded on notions of fair dealing and good conscience and is designed to aid the law in the administration of justice where injustice would otherwise result." *In re Ionosphere Clubs, Inc.*, 85 F.3d 992, 999 (2d Cir.1996).

II. Plaintiff's Forthcoming Motion to Supplement the Complaint

Furthermore, plaintiff intends to bring a motion to supplement the complaint pursuant to Fed. R. Civ. P. 15(d). The basis for this motion would be that the decision of defendant USCIS to sua sponte reopen the administrative proceeding is not one that is committed to agency discretion by law.

In *Chehazeh v. Attorney General of U.S.*, 666 F.3d 118, 128 (3d Cir. 2012), the Third

Circuit Court of Appeals addressed an issue similar to that presented here – whether there was a difference between an agency's *sua sponte* reopening of a proceeding as opposed to its *declining* to *sua sponte* reopen a proceeding.

The agency in *Chehazeh* was the Board of Immigration Appeals ("BIA") and the regulation was 8 C.F.R. § 1003.2(a). "The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision." 8 C.F.R. § 1003.2(a).

8 C.F.R. § 1003.2(a) is analogous to 8 C.F.R. § 103.5(a)(5) ("Motion by Service officer"). While it is acknowledged that BIA and USCIS are distinct agencies, there exist no decisions which state if any standards or criteria are to be followed when USCIS *sua sponte* reopens a case. In fleshing out the standards of the BIA for reopening a case, the *Chehazeh* Court cited to *In re J-J-*, 21 I. & N. Dec. 976, 984 (BIA 1997), a precedential BIA decision. "[T]he Board retains limited discretionary powers under the regulations to reopen or reconsider cases on our own motion. That power, however, allows the Board to reopen proceedings sua sponte in exceptional situations not present here. The power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent regulations, where enforcing them might result in hardship." *Chehazeh v. Attorney General of U.S.*, 666 F.3d at 128.

In anticipation of defendants' counsel's claims that *Chehazeh* was from the Third Circuit and not binding upon this Court, plaintiff cannot dispute. However, it was noted in that case that no precedential decision addressing such an issue exists from *any* Circuit Court in this country. "The government acknowledges that no precedential opinion - in this Circuit or any other - has decided whether decisions to reopen are unreviewable, but it argues that there is 'no principled basis' for distinguishing 'denials of reopening…from grants of reopening.' (Letter Brief of Appellee at 2 (July 22, 2011).) We disagree." *Id.*

Therefore, plaintiff plans to supplement the complaint with a cause of action related to defendant USCIS' reopening of the administrative proceeding. It may be argued by plaintiff that since there are no regulations, standards or criteria which guide how defendant USCIS applies 8 C.F.R. § 103.5(a)(5), defendant USCIS' decision to do so in the present instance is arbitrary, capricious and contrary to law. Further clarification will inevitably be made when plaintiff makes its motion.

III. Defendants' Argument that Plaintiff Cited to Non-Binding Cases

With respect to opposing counsel's argument that the undersigned cited to cases from Courts of Appeals outside of the Second Circuit, which are not binding upon this Court, opposing counsel is correct. That opposing counsel did the same thing in citing to District Court cases from California in its letter to the Court should not cause this Court to disregard their arguments. Dckt. No. 20. It is expected and understood that where there exists a paucity of decisions which are completely on point with facts before it, attorneys may cite to cases from other Districts or Circuits.

What matters, and why this nation's federal courts are a global model of excellence, is that our learned Justices take the time to review decisions made elsewhere in our country along with the principles underlying those cases. District Judges are accorded the great responsibility of making decisional law based upon the powers rightly accorded them.

IV. Conclusion

Returning lastly to the questions of jurisdiction and opposing counsel's argument that defendant USCIS can so simply remove jurisdiction from a federal court, plaintiff points out that specific statutes exist which were created to strip jurisdiction from courts. *Ahmad v. Lynch*, No. 14-cv-3793 (PKC) (E.D.N.Y., Dec. 23, 2015) ("Under the jurisdiction-stripping provision of the Immigration and National Act ('INA'), 8 U.S.C. § 1252(a)(2)(B)(ii), courts lack jurisdiction to review decisions specifically committed to the discretion of the Attorney General or Secretary of Homeland Security."). Had it been the intention of Congress to eliminate any judicial review of agency decisions with respect to non-immigrant employment applications, it is believed that such a similar jurisdiction-stripping provision would exist which defendants could rely upon.

Thank you in advance for your courtesies.

Very truly yours,

Spencer Sheehan

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

EXHIBIT A

egov.uscis.gov

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Case Was Reopened

On December 2, 2015, we reopened your Form I-129, Petition for a Nonimmigrant Worker, Receipt Number EAC1413551877, and mailed you a notice. Please follow the instructions in the notice. If you do not receive your reopening notice by January 1, 2016, please go to www.uscis.gov/e-request to request a copy of the notice. If you move, go to www.uscis.gov/addresschange to give us your new mailing address.

EXHIBIT B

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

Kish, Ronald W <Ronald.W.Kish@uscis.dhs.gov> Thu, Oct 22, 2015 at 1:44 PM
To: Spencer Sheehan <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

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