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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ARZHANG ALIMORADI, Plaintiff, v. U.S. CITIZENSHIP & IMMIGRATION SERVICES, A BUREAU OF THE DEPARTMENT OF HOMELAND SECURITY, Defendants.	Case No. CV 08-02529 DDP (JCx) **ORDER DENYING MOTION TO DISMISS** [Motion filed on July 7, 2008]

In this matter, Arzhang Alimoradi challenges Defendant United States Citizenship and Immigration Services' ("USCIS") decision to deny him status as a lawful permanent resident. Before the Court is Defendant's motion to dismiss; the issue presented is whether the regulation used to reject Mr. Alimoradi's application - which does not allow USCIS, in its discretion, to ignore minor, non-criminal immigration violations in the interest of national security and public safety - is a permissible construction of its authorizing statute. After reviewing the materials submitted by

the parties and considering the arguments therein, the Court finds the regulation impermissible, and therefore DENIES the motion.

I. BACKGROUND[1]

Plaintiff Arzhang Alimoradi, Ph.D., is a native and citizen of Iran and the subject of an approved I-140 visa petition certifying him as an "Outstanding Professor or Researcher" pursuant to 8 U.S.C. § 1153(b)(1)(B). This qualifies him as a "priority worker[]" who is at the top of the list (assuming other prerequisites are met) to obtain legal permanent residency in the United States. Id. § 1153(b)(1). Dr. Alimoradi is a senior researcher who specializes in Earthquake Engineering. He completed his Ph.D. in this area at the University of Memphis in December 2004. (A.R. 79.) Among his many accomplishments, Dr. Alimoradi has been involved with earthquake research at several prestigious universities, is a successful science and engineering professor, and, perhaps most notably, has "been the southern California backup person for a major northern California earthquake clearinghouse procedure. A clearinghouse is the focal point of coordinating post-earthquake investigations between researchers and organizations from around the globe in the aftermath of a major earthquake." (A.R. 80.) He has published articles in numerous academic journals, and his "state-of-the-art" research "helps civil engineers to design an earthquake resistant building structure" to a degree that other researchers had not to this point succeeded.

[1] Unless otherwise noted, all facts are either undisputed or taken from Dr. Alimoradi's allegations, because, on a motion to dismiss for failure to state a claim, this Court must assume a plaintiff's allegations to be true.

(A.R. 107.) In other words, Dr. Alimoradi's entire illustrious career revolves around helping communities to build safely and to prepare successfully for earthquakes, and he would like to live in Southern California - an earthquake center.

This case arose because Dr. Alimoradi inadvertently let his employment status lapse. Dr. Alimoradi joined the research and development department of John A. Martin & Associates ("JAMA") as a senior research engineer on January 3, 2005. He was authorized to work in the United States at this time on an Optional Practical Training visa, which was valid until January 2, 2006. JAMA sent Dr. Alimoradi to consult with its General Counsel, Dr. Farzad Naeim, in order "to handle" his immigration matters and extend his work visa. (A.R. 79.) To facilitate this process, on February 22, 2005, Dr. Naeim filed an I-140: Immigration Petition for Alien Worker (outstanding professor/researcher), which was approved by USCIS on August 18, 2005. The I-140 was the first step in obtaining legal permanent residency (or, a "green card") for Dr. Alimoradi.

At the same time, Dr. Naeim filed an I-129: Petition for Nonimmigrant Worker (H1B visa). The H1B visa grants temporary work status (but not a green card) to certain individuals. As part of preparing the I-129 petition, Dr. Naeim filed a Labor Condition Application (ETA 9035E), which was certified by the Department of Labor for the period August 1, 2005 through July 31, 2008. In other words, Dr. Alimoradi, with the help of Dr. Naeim and JAMA, applied for an H1B visa and his green card concurrently, as two alternate means of obtaining legal work status.

Once the I-140 petition was approved in August 2005, certifying that a permanent resident visa was available for him, Dr. Alimoradi took the next step in the green card process by filing an I-485 Application to Adjust Status from that of a non-immigrant to a lawful permanent resident of the United States. Because the green card application seemed to be progressing quickly and with success, Dr. Naeim did not pursue the H1B visa route any further. (A.R. 86.) Dr. Naeim believed, and told Dr. Alimoradi, that the combination of the approved Labor Condition Application obtained through the H1B process, the approved I-140, and the pending I-485 permitted him to work at JAMA until the expiration of the approved Labor Condition Application in July 2008. (A.R. 86.) Dr. Naeim believed "that the mere filing of I-485 would provide Dr. Alimoradi yet one more source of authorization to work," in addition to the approved Labor Condition Application. (A.R. 86. (emphasis added).) In fact, however, Dr. Alimoradi was required to file a different application for employment in conjunction with his I-485: the I-765 Application for Employment Authorization. See 8 C.F.R. § 274a.12(c)(9). According to Dr. Alimoradi, he relied on Dr. Naeim's explanation of the prerequisites for legal employment; as a result, Dr. Alimoradi was unaware that the Labor Condition Application was insufficient, and that he needed instead to file an I-765 and to obtain a valid Employment Authorization Document ("EAD").

On August 1, 2007, USCIS sent Dr. Alimoradi a "Request For Evidence" questioning whether he had been properly authorized to work after February 2, 2006. Dr. Naeim, at that point, began to conduct further research and discovered the need for an EAD. (A.R.

86.) He informed Dr. Alimoradi of this fact, explained how to file the I-765, obtained the filing fee for Dr. Alimoradi from JAMA, and urged Dr. Alimoradi to seek outside legal counsel. (A.R. 86-87.) Dr. Alimoradi immediately filed the I-765, which was received by USCIS on August 13, 2007. Dr. Naeim has submitted a declaration attesting, inter alia, that "[n]either JAMA nor Dr. Alimoradi has ever had any intention of employment without authorization for any duration at all." (A.R. 87.)

On October 10, 2007, USCIS sent Dr. Alimoradi an "Intent to Deny" his I-485 application on the ground that he had worked in the United States without authorization for more than 180 days. (A.R. 4-7.) Dr. Alimoradi challenges that determination in the instant complaint, and Defendant USCIS has moved to dismiss.

II. ANALYSIS

A. Jurisdiction

Defendant first moves to dismiss under Federal Rule of Civil Procedure 12(b)(1), arguing that this Court lacks subject matter jurisdiction because neither the Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201, nor the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, "confer independent jurisdiction over this matter." (Mot. To Dismiss at 10.) The Court rejects this argument because the Ninth Circuit has long held that district courts have jurisdiction under 28 U.S.C. § 1331 over "challeng[es resulting from the] . . . denial of . . . applications for adjustment of status." Chan v. Reno, 113 F.3d 1068, 1071 (9th Cir. 1997); see

also Tang v. Reno, 77 F.3d 1194, 1196 (9th Cir. 1996). Accordingly, Defendant's Rule 12(b)(1) motion is DENIED.[2]

B. Failure to State a Claim

Defendant also moves to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The Court rejects this argument as well.

"A Rule 12(b)(6) motion tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). A court can dismiss a claim only when no cognizable legal theory exists to support the plaintiff's claim, or when the plaintiff has not alleged sufficient facts to support a cognizable legal theory. See id. When considering a 12(b)(6) motion, the Court accepts all material allegations in the complaint as true, and draws all reasonable inferences in favor of the nonmoving party. See id. As such, a claim will be dismissed under Rule 12(b)(6) "only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (internal quotation marks omitted).

1. Statutory Framework

Section 245 of the Immigration and Nationality Act ("INA") sets forth when an individual is eligible to apply for adjustment of status. An individual is not, "subject to subsection (k) of this section," eligible to apply for adjustment of status if he, as

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[2] It is of no consequence that Plaintiff's complaint invokes the APA and DJA as jurisdiction, rather than specifically mentioning 28 U.S.C. § 1331. Subject matter jurisdiction either exists, or it does not. That Plaintiff failed to name precisely the correct language does not divest this Court of the jurisdiction it rightfully holds. Moreover, the APA and DJA provide jurisdiction under § 1331 because they are federal statutes. Defendant's argument to the contrary is without merit.

relevant here, "has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States." 8 U.S.C. § 1255(c)(2) (emphasis added). Subsection (k) excuses an individual from the requirements of § 1255(c)(2) if, as relevant here, he is "eligible to receive an immigrant visa" as an outstanding professor or researcher under § 1153(b), and if

> (1) the alien, on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission;
> (2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days –
> (A) failed to maintain, continuously, a lawful status;
> (B) engaged in unauthorized employment; or
> (C) otherwise violated the terms and conditions of the alien's admission.

Id. § 1255(k). There is no dispute that Dr. Alimoradi would qualify for the exemption in § 1255(k) except that, because of the confusion over his I-765 application, he "engaged in unauthorized employment" for "an aggregate period exceeding 180 days." Accordingly, in order to successfully challenge USCIS's determination that he is ineligible to apply for adjustment of status, Dr. Alimoradi must show that his failure to maintain lawful employment status was "through no fault of his own or for technical reasons."

2. Application

a. Applicability of the "No Fault of His Own or Technical Reasons" Exception

The parties devote most of their briefing to debating whether or not Dr. Naeim's misinformation constituted ineffective assistance of counsel such that Dr. Alimoradi's unlawful employment status came about "through no fault of his own." The Court emphasizes that, in light of the dire consequences for Dr.

Alimoradi, Dr. Naeim's failure to conduct a thorough and accurate investigation into the requirements for obtaining legal work status is truly deplorable. However, the Court need not reach the question of ineffective assistance of counsel, because it finds that, assuming all allegations in the complaint are true, Dr. Alimoradi's mistake was "through no fault of his own or for technical reasons" within the meaning of the INA, and that therefore it did not render him ineligible to apply for adjustment of status.[3]

The phrase, "no fault of his own or for technical reasons" is not defined in the statute. It is, however, defined in the implementing regulations, and those regulations "limit" its application to four categories, which both parties agree do not fit this case.[4] Instead, Plaintiff Alimoradi argues that limiting the

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[3] Although Dr. Alimoradi's briefing does not focus on the "technical reasons" clause, a fair reading of his argument reveals his contention that he falls into either exception - "no fault of his own" or "for technical reasons"; essentially, he argues that the mistake was minor and unintentional, and that he diligently attempted to comply with all immigration requirements. Moreover, the implementing regulations define the clauses as a whole, suggesting they should be analyzed as one.

[4] The exceptions are:

> (i) Inaction of another individual or organization designated by regulation to act on behalf of an individual and over whose actions the individual has no control . . .; or
> (ii) A technical violation resulting from inaction of the Service . . . [; or]
> (iii) A technical violation caused by the physical inability of the applicant to request an extension of nonimmigrant stay . . . [; or]
> (iv) A technical violation resulting from the Service's application of the maximum five/six year period of stay for certain H-1 nurses . . . .

8 C.F.R. § 1245.1(d)(2).

applicability of the exception to four narrow categories violates the APA, which "commands reviewing courts to 'hold unlawful and set aside' agency action that is 'arbitrary, capricious, an abuse or discretion, or otherwise not in accordance with law." Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) (quoting 5 U.S.C. § 706(2)(A)). The Court agrees.

Under Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837, 844 (1984), courts must defer to agency regulations as interpretations of their governing statutes "unless they are arbitrary, capricious, or manifestly contrary to the statute." Here, the narrow construction imposed by the regulation is manifestly contrary to the plain language of the statute, which provides that any individual whose disqualifying activity occurred "through no fault of his own or for technical reasons" shall not be rendered ineligible for adjustment of status. Nothing in the statute allows for the regulatory interpretation that only certain individuals who fall into unlawful status through no fault of their own or for technical reasons may qualify for this exception.

The Court can find almost no case law interpreting this provision. However, Mart v. Beebe, CIV. 99-1391, 2001 WL 13624 (D. Or. Jan. 5, 2001) (unpublished), is instructive. There, the plaintiff was admitted to the United States as a non-immigrant (B-2 visa), and then applied with her husband for political asylum. She was "not aware" that she was required to apply to extend her B-2 visa while the asylum application was pending, and therefore fell out of lawful status. Id. at *2. Her I-485 application was denied on that basis, and she, along with her family, filed suit in

federal district court. Judge Jones found that the "lapse of lawful status" was a "mere technical violation," and that the regulation requiring a determination to the contrary

> defies Congress' intent that individuals such as the plaintiffs, who have diligently endeavored to obey the law and have contributed substantially to the United States . . . since their arrival, not be precluded from adjustment because they were unaware of their duty to keep their non-immigrant visas current while awaiting the INS' decision on their request for asylum.

Id at *5.

Similar logic applies in this case. Assuming all Dr. Alimoradi's allegations are true, he was not aware that he needed to file a separate application for employment authorization. Instead, he relied on Dr. Naeim, who told him that the approved Labor Condition Application, in combination with an approved I-140 and the pending I-485, would suffice. It is not as if Dr. Alimoradi failed to apply for any employment authorization; he simply failed to apply for the right kind.[5] As soon as he realized his error, he filed the appropriate I-765 application. Because he already had employment approval of some kind, his mistake, like that at issue in Mart, amounts to a "mere technical violation." Essentially, Dr. Alimoradi mixed up the paperwork - not difficult to do in this maze of statutes and regulations.

The Court further finds that the implementing regulation is arbitrary and capricious because it fails to provide an exception for individuals who are crucial to our national interest and security, and it therefore presents a serious public safety risk.

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[5] Defendant asserts that Dr. Alimoradi was in fact aware of the need to file a separate employment authorization application. When considering a motion to dismiss for failure to state a claim, however, the Court assumes that Plaintiff's allegations are true.

Especially in California, the threat of a massive and destructive earthquake is a constant. The 1994 Northridge earthquake in Southern California left 57 people dead and more than 1,500 people seriously injured, and damaged several major freeways. Days later, 9,000 homes and businesses were without electricity, 20,000 were without gas, and more than 48,500 had little to no water.[6] The 1989 Loma Prieta earthquake in Northern California killed 62, injured 3,757, left more than 12,000 homeless, destroyed portions of the Bay Bridge, and caused three billion dollars in damage.[7] The 1906 San Francisco earthquake killed hundreds and left nearly half of the city's 450,000-person population homeless as miles "burned and crumbled into a windswept desert of desolation."[8] Experts are seriously concerned about the devastation that a large earthquake could cause in the near future, and the United States Geological Survey has recently stressed the need for concerted efforts "to avoid an earthquake catastrophe" because "[t]he question is not *if* but *when* southern California will be hit by a major earthquake - one so damaging that it will permanently change lives and livelihoods in the region."[9]

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[6] See http://www.lafire.com/famous_fires/940117_NorthridgeEarthquake/quake/01_EQE_exsummary.htm (last accessed August 20, 2008).

[7] See http://www.sfmuseum.org/alm/quakes3.html (last accessed August 20, 2008).

[8] See http://www.sfmuseum.org/1906_eq_quests/eq.htm (last accessed August 20, 2008).

[9] See Suzanne Perry et al, The ShakeOut Earthquake Scenario - A Story that Southern Californians Are Writing, U.S. Geological Survey Circular 1324, Cal. Geological Survey Special Report 207 (2008), available at http://pubs.usgs.gov/circ/1324/.

Dr. Alimoradi is, by all accounts, a talented and innovative researcher in the area of earthquake science. His work could save the lives and livelihoods of thousands of Americans in the event of a serious earthquake. The United States Government has not only recently warned that we must do everything in our power to prepare for such a quake, but has specifically certified Dr. Alimoradi as one of the crucial individuals who will help accomplish this task. As far as the Court can discern, the United States should be jumping at the chance to offer Dr. Alimoradi lawful permanent residency. It would be the very definition of arbitrary and capricious to hold him ineligible to remain in the United States because he inadvertently failed to file a second application for employment authorization even though the approved Labor Condition Application that he had already obtained was, as far as he knew, still valid.

The Immigration and Nationality Act leaves ample room for the Attorney General, in his discretion, to pass regulations that would forgive minor, technical violations when it is in the interest of national security or public safety. Instead, USCIS has interpreted its governing statute in a manner that effectively leaves it paralyzed. As a result, the agency has allowed itself no flexibility to act in this country's best interests. Such a reading arbitrarily eschews common sense, and creates a fundamental tension not only with the statute's plain language, but with its larger purpose in creating priority worker visas, which, by their very definition, are designed to make it easier for those skilled individuals for whom we have a great need to become permanent residents. See 8 U.S.C. § 1153(b)(1). Congress's goal of

encouraging priority workers to stay in the United States is directly undermined if USCIS refuses to offer these special individuals relief from innocent mistakes.[10]

This Court is mindful of the various roles our Constitution designed for each branch of government. It in no way intends by this ruling to intrude on the province of the executive branch. USCIS may draft reasonable regulations that articulate how the "no fault of his own or technical reasons" exception should be applied, including how to account for serious public safety or national security risks. Rather, the Court's holding is limited to the conclusion that the regulation as it stands does not work. Under the circumstances in this case, the regulation as applied to preclude Dr. Alimoradi - whose work is vital to public safety and national security - from immigrating to the United States because of an innocent mistake, is an impermissible construction of its governing statute, and therefore cannot stand.

b. Applicability of 180-day Bar

Defendant argues that even if Dr. Alimoradi qualifies for the "no fault of his own or for technical reasons" exception, he is nevertheless not eligible to adjust his status to that of a lawful permanent resident because he worked out-of-status for more than 180 days. The Court disagrees with this statutory construction.

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[10] Dr. Alimoradi provides an excellent example of the consequences of this impermissibly narrow regulation, but imagine even more dramatic examples. Under the current regulation, the United States would be forced to export, due to minor, noncriminal, and unintentional immigration violations, the world's leading experts on nuclear physics, biological terrorism, or chemical warfare. Such a result is beyond arbitrary and capricious; it is inimical to public safety.

8 U.S.C. § 1255(c)(2) reads, as relevant here, that "subject to subsection (k) of this section, an alien . . . who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States" is ineligible for adjustment of status. Subsection (k), of course, provides an exception to ineligibility under subsection (c)(2); those aliens with extraordinary ability, such as outstanding researchers or professors, may adjust status even if they worked unlawfully so long as, inter alia, they did not work unlawfully for longer than 180 days.

Defendant urges the following construction: Section 1255(c)(2) proscribes adjustment of status for individuals who work unlawfully, except for those whose mistake was through no fault of their own or for technical reasons. However, that exception is subject to the requirements of subsection (k), and as such is limited to those individuals whose mistakes lasted less than 180 days.

The Court rejects this construction because it turns congressional intent on its head by imposing additional requirements on immigrants with outstanding skills or talents that are not imposed on individuals with no such ability. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Nat'l Ass'n of Home Builders v. Def. of Wildlife, 127 S. Ct. 2518, 2534 (2007) (internal quotation marks omitted). Through the plain language of the Immigration and Nationality Act, it is clear that Congress intended to grant immigrants such as Dr. Alimoradi special

treatment in obtaining legal immigrant status by labeling them "priority workers." See 8 U.S.C. § 1153(b)(1) ([Employment] "Visas shall first be made available . . . to qualified immigrants," including outstanding professors or researchers (emphasis added)). This intent is underscored by § 1255(k), which provides for these individuals with special skills an escape from the sanctions imposed for certain immigration violations that is not available to the average individual seeking lawful permanent residency.

The following example well illustrates the backwardness of Defendant's argument: Assume that an individual fails to maintain lawful status because he was ill and physically unable to request an extension of non-immigrant stay. He would qualify for the "no fault of his own or technical reasons" exception set forth in § 1255(c)(2), even under the narrow interpretation laid out in the implementing regulations. See 8 C.F.R. § 1245.1(d)(2)(iii). Now further assume that because of his illness, the individual was unable to request an extension of his stay for 220 days. Under Defendant's construction, if this individual does not qualify as a priority worker with outstanding ability under § 1153(b), he can make use of the exception in § 1255(c)(2) no matter how long he worked out of status because § 1255(k) does not apply to him. However, if, like Dr. Alimoradi, he does qualify as a worker with outstanding talents, he cannot make use of the exception in § 1255(c)(2), even if the circumstances that rendered the individuals unlawful were identical. In short, under Defendant's construction, the statute is less forgiving for special applicants called "priority workers," whom Congress has explicitly placed at the front of the line for obtaining visas, than for a random individual

with no special skills whatsoever. It is axiomatic that courts "must avoid [statutory] interpretations that would produce absurd results," and Defendant's argument clearly does just that. Azarte v. Ashcroft, 394 F.3d 1278, 1288 (9th Cir. 2005).

Instead, the Court finds that, in the context of the entire statutory framework, § 1255 provides more flexibility for priority workers than for regular individuals. In context, the thrust of § 1255(c)(2) is that it prohibits adjustment of status for most people whose legal status has lapsed. The thrust of § 1255(k) is that it provides a special, unique exemption for priority workers, so long as they were not out-of-status for more than 180 days. Thus, § 1255(c)(2) is "subject to" § 1255(k) in that it offers an extra exemption for priority workers not offered to regular applicants.

In addition, § 1255(c)(2) provides an exemption for those individuals whose status lapses through no fault of their own or for technical reasons. Unlike § 1255(k), this exemption is not limited to priority workers, and it does not impose a bar on adjustment of status for those individuals who worked out of status for more than 180 days, as long as the mistake came about "through no fault of [their] own or for technical reasons." In other words, a priority worker whose status lapses receives an automatic 180-day grace period. After the 180 days has passed, to obtain relief he must demonstrate that he falls into the "no fault of his own or for technical reasons" exception, which provides relief for any eligible individual.

Accordingly, consistent with congressional intent to provide priority workers with priority treatment, the Court finds that Dr.

Alimoradi's invocation of the "no fault of his own or for technical reasons" exception is not subject to a 180-day limit that would not have been imposed on a non-priority worker. Having further determined that the applicable regulation interprets the "no fault of his own or for technical reasons" exception in an impermissibly narrow fashion, the Court concludes that, construing the facts of this case in the light most favorable to Dr. Alimoradi, he may invoke this exception because his work is crucial to public safety and the national security of the United States.

III. CONCLUSION

Based on the foregoing analysis, the motion to dismiss is DENIED.

IT IS SO ORDERED.

Dated: August 29, 2008

DEAN D. PREGERSON
United States District Judge