IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ITServe Alliance, Inc., 8951 Cypress Waters Boulevard Suite 160 Dallas, Texas 75019 iTech US, Inc., 20 Kimball Avenue, Suite 303N South Burlington, Vermont 05403 SmartWorks, LLC, 55 Carter Drive, Suite 107 Edison, New Jersey 08817 Saxon Global, Inc., 1320 Greenway Drive Suite # 660 Irving, Texas 75038 Plaintiffs, v. Kenneth T. (Ken) Cuccinelli, Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services; 20 Massachusetts Ave NW Washington, DC 20001 Defendant.	C/A No.: 1:20-cv-00201 COMPLAINT

Defendant ("the Agency") has unlawfully charged United States companies approximately $350 million dollars in visa fees (likely more) over the past six years. Plaintiffs now seek a refund. For the reasons below, this Court must enjoin the Agency from continuing to charge this fee and refund all payment of these fees for the past six years.

PARTIES

1. Plaintiff ITServe Alliance, Inc. ("ITServe") is a nonprofit corporation under Texas law with its principal place of business in Dallas, Texas. Its members comprise more than 1250 information technology companies throughout the United States. The three named plaintiffs below are members of ITServe.

2. Plaintiff iTech US, Inc. ("iTech") is a corporation under the laws of Texas with its principal place of business in Dallas Texas. For the past six years, iTech has had more than 50 employees, and for those six years, more than 50% of its workforce comprised foreign nationals on visas under 8 U.S.C. §§ 1101(a)(15)(H)(1)(B) or 1101(a)(15)(L).

3. Plaintiff SmartWorks, LLC ("SmartWorks") is a corporation under the laws of Texas with its principal place of business in Dallas, Texas. For the past six years, SmartWorks has had more than 50 employees, and for those six years, more than 50% of its workforce comprised foreign nationals on visas under 8 U.S.C. §§ 1101(a)(15)(H)(1)(B) or 1101(a)(15)(L).

4. Plaintiff Saxon Global, Inc. ("Saxon Global") is a corporation under the laws of Texas with its principal place of business in Dallas, Texas. For the past six years, Saxon Global has had more than 50 employees, and for those six years, more than 50% of its workforce comprised foreign nationals on visas under 8 U.S.C. §§ 1101(a)(15)(H)(1)(B) or 1101(a)(15)(L).

5. Kenneth T. (Ken) Cuccinelli, Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services, ("the Agency") is charged with enforcing all provisions of the Immigration and Nationality Act, including adjudication of all visas under 8 U.S.C. § 1101(a)(15)(H)(i)(B) and collection of all relevant filing fees.

JURISDICTION, VENUE, AND STANDING

6. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331. *Califano v. Sanders*, 430 U.S. 99, 106 (1977).

7. Under its federal question jurisdiction, this Court can hear claims under the Administrative Procedure Act ("APA").

8. Under the APA, this Court can set aside unlawful or arbitrary and capricious final agency action and compel unlawfully withheld or unreasonably delayed agency action. 5 U.S.C. § 706.

9. Under its federal question jurisdiction, this Court can also provide declaratory relief under 28 U.S.C. § 2201.

10. Plaintiffs have exhausted all administrative remedies. No statute or regulation requires Plaintiffs to request a refund. *Darby v. Cisneros*, 509 U.S. 137 (1993).

11. Venue is proper in the District of Columbia because the Agency resides in the District.

12. ITServe is a trade association, organized to meet the requirements of § 501(c)(6) of the Internal Revenue Code. Hundreds of its members have been and will be required to pay the Border Admission Fees under PL 111-230, PL 114-113, and PL 115-123 because they have more than 50 employees and more than half of their employees are on visas under 8 U.S.C. §§ 1101(a)(15)(H)(1)(B) or 1101(a)(15)(L). These are the unlawful fees ITServe seeks to enjoin.

13. ITServe has trade association standing to bring this claim on behalf of its members because its members have standing to sue in their own right, it seeks to project interests germane to the organization's purpose, and neither claim below requires the participation of the individual members. *See, e.g., Am. Rivers & Ala. Rivers All. v. FERC*, 895 F.3d 32, 42 (D.C. Cir. 2018).

14. First, ITServe 50/50 members—such as its co-plaintiffs in this suit—have standing to bring this suit because the Agency requires companies with 50 employees more than half of

which are on visas under 8 U.S.C. §§ 1101(a)(15)(H)(1)(B) or 1101(a)(15)(L) to pay Border Admission Fees under PL 114-113 and PL 115-123 for change of status petitions. If these companies do not pay these fees, the Agency will deny the relevant petition. Thus, ITServe 50/50 members—again, like the co-Plaintiffs here—have standing to challenge the legality of the Border Admission Fees under PL 114-113 and PL 115-123 for change of status petitions because the Agency's unlawful assessment of these fees in the past and future is concrete, traceable to the Agency's unlawful interpretation of PL 114-113 and PL 115-123, and an order enjoining these fees would redress ITServe 50/50 members' injuries.

15. Second, precluding the Agency from unlawfully charging millions of dollars in unlawful fees to its members is germane to ITServe's mission as it seeks to protect the interests of information technology providers and consulting companies.

16. Finally, an individual company need not participate because ITServe can properly seek to enjoin the Agency from charging the Border Admission Fees under PL 114-113 and PL 115-123 for change of status petitions and seek a refund on behalf of class members for such unlawfully charged fees for the past six years.

FACTS

17. In 2010, congress sought to enhance border security. *See* 156 Cong. Rec. H6253, H6254 (daily ed. Jul. 28, 2010) (statement of Rep. Price).

18. The House unanimously passed a bill to provide supplemental funding for border security. The supplemental funding would add $710 million to the deficit. *Id.*

19. The Senate, however, took issue with the deficit spending. *See* 156 Cong. Rec. S6838, S6838-6839 (daily ed. Aug. 5, 2010) (statement of Sen. Schumer).

20. Senator Schumer proposed an amendment to the border security bill that would generate new revenue sufficient to offset the cost of the House's bill by those using the border in high numbers. *Id.* at 6839.

21. The Schumer amendment imposed an additional $2000 border admission fee on United States companies with more than 50 employees if more than 50% of the company's workforce comprised foreign nationals on visas under 8 U.S.C. §§ 1101(a)(15)(H)(1)(B) ("H1B") or 1101(a)(15)(L) ("L") when those companies filed an application for admission for H1B workers. *Id.*

22. The Schumer amendment created so called "50/50" companies and projected to create $600 million in new revenue from September 30, 2010 to September 15, 2014, or $150 million a year. *Id.*

23. Specifically, the Schumer Amendment applied the new border admission fee to 50/50, *inter alia*, companies for "application[s] for admission" for H1B non-immigrants. *Id.* at S6843 (noting the text of the amendment). The Senate unanimously passed the bill with the Schumer Amendment.

24. The House, however, took issue with a bill generating revenue originating in the Senate. So, the House introduced a bill identical to the bill the Senate passed containing the new Border Admission Fee. The Senate approved the bill; the President signed it; and the 2010 Emergency Border took effect on September 30, 2010 as PL 111-230.

25. The Border Admission Fee required 50/50 employers to pay an additional $2000 for H1B "application[s] for admission":

> (b) Notwithstanding any other provision of this Act or any other provision of law, during the period beginning on [September 30, 2010] and ending on September 30, 2014, the filing fee and fraud prevention and detection fee required to be submitted with an *application for admission as a nonimmigrant* under section

> 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(i)(b)) shall be increased by $2,000 for applicants that employ 50 or more employees in the United States if more than 50 percent of the applicant's employees are such nonimmigrants or nonimmigrants described in section 101(a)(15)(L) of such Act.

PL 111-230, 124 Stat 2485 (Aug. 13, 2010) (emphasis added).

26. The Immigration and Nationality Act ("INA") defines an "application for admission" as: "the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa." 8 U.S.C. § 1101(a)(4).

27. The INA defines "admission" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A).

28. Thus, based on the plain language of PL 111-230 and the INA's definitions, congress intended to charge the Border Admission Fee to 50/50 companies when its H1B employees sought physical admission to the United States at a port of entry.

29. Said simply, congress sought to fund border security by taxing companies that used the border extensively.

30. But the Agency implemented the Border Admission Fee in a much broader fashion than congress intended.

31. The Agency announced the Border Admission Fee on its website. 2010 USCIS I-129 Page (attached as Ex. A). It announced that it would apply the Border Admission Fee to all 50/50 companies filing H1B applications for initial status or change of employers. *Id.*

32. The Agency in fact charged all 50/50 companies an additional $2000 for every initial *and* change of employer H1B application.

33. Similarly, the Agency started denying all initial or change of employer H1B applications for 50/50 companies that did not submit this fee.

34. The Agency charged the Border Admission Fee for both applications seeking admission in H1B status *and* applications seeking changes of status to H1B status.

35. An application seeking a "change of status" is very different than an application seeking "admission." *Compare* 8 U.S.C. § 1101(a)(3) (definition of application for admission) *with* 8 U.S.C. § 1258 (change of status).

36. A "change of status" allows a non-immigrant lawfully in the United States to change non-immigrant visa categories without traveling abroad. *See generally* 8 U.S.C. § 1258. The "change of status" statute provides in relevant part: "The Secretary of Homeland Security may, under such conditions as he may prescribe, authorize a change from any nonimmigrant classification to any other nonimmigrant classification in the case of any alien lawfully admitted to the United States as a nonimmigrant who is continuing to maintain that status and who is not inadmissible . . . ." *Id.*

37. An application for a change of status is not an application for admission.

38. The Agency, therefore, started charging United States companies the Border Admission Fee on applications where they did not use the border.

39. Even though an employer must indicate whether the H1B employee will seek admission or a change of status on the Form I-129, Petition for Nonimmigrant Worker, the portion of the Form I-129 that determined the amount of fees a United States company had to pay did not consider whether the application was for admission or a change of status. The Agency ignored the difference between these two distinct concepts and charged the Border Admission Fee to *all* H1B applications for initial status or a change of employer filed by 50/50 companies regardless of whether they were seeking admission or a change of status.

40. When PL 111-230 expired, congress passed an expansion and an increase of the Border Admission Fee. PL 114-113, 129 Stat. 2242, 3006 (Dec. 18, 2015). The new H1B Border Admission Fee doubled the fee on 50/50 companies to $4000, extended it for an additional ten years, and expanded the fee to "extensions of such status":

> (b) Temporary H-1b Visa Fee Increase-- Notwithstanding section 281 of the Immigration and Nationality Act (8 U.S.C. 1351) or any other provision of law, during the period beginning on the date of the enactment of this section and ending on September 30, 2025, the combined filing fee and fraud prevention and detection fee required to be submitted *with an application for admission* as a nonimmigrant under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(i)(b)), *including an application for an extension of such status,* shall be increased by $ 4,000 for applicants that employ 50 or more employees in the United States if more than 50 percent of the applicant's employees are such nonimmigrants or nonimmigrants described in section 101(a)(15)(L) of such Act.

Id. (emphasis added).

41. The Agency did not immediately implement the expansion of the Border Admission Fee to "extensions," but it did assess the $4000 fee to all 50/50 companies for all initial or change of employer H1B applications, regardless of whether they were seeking application for admission or changes of status from December 18, 2015 to present.

42. The Agency then extended the fee through 2027 in PL 115-123, 132 Stat. 64 (Feb. 9, 2018).

43. The Agency's assessment of the PL 111-230, PL 114-113, and PL 115-123 Border Admission Fee to applications seeking a change of status is unauthorized by congress and, in fact, contravenes congressional intent.

44. For the past six years, the Agency has unlawfully charged 50/50 companies the PL 111-230, PL 114-113, and PL 115-123 Border Admission Fees.

45. From January 17, 2014 to December 18, 2015, the Agency improperly charged 50/50 companies $2000 for every change of status application to an initial H1B visa and a change of status application to a new H1B employer.

46. From December 18, 2015 to present, the Agency improperly charged 50/50 companies $4000 for every change of status application to an initial H1B visa and a change of status application to a new H1B employer.

47. Those 50/50 companies have been harmed because they have been charged an illegal fee.

48. Upon information and belief, over the last six years, the Agency unlawfully charged and collected more than $350 million dollars in Border Admission Fees from 50/50 companies for applications seeking to change status to H1B.

49. This Court must enjoin the Agency from continuing to charge these unlawful fees and order the Agency to reimburse all unlawfully collected fees.

CLASS ALLEGATIONS

Class 1: 50/50 Petitioners facing Unlawful Fees

50. Plaintiff ITServe is a trade association with a primary mission of protecting and advocating for information technology service providers and consulting companies. Hundreds of its members are 50/50 companies that will be required to pay the unlawful Border Admission Fees for change of status petitions. iTech, SmartWorks, and Saxon Global are all members of ITServe.

51. Plaintiff iTech is a leading United States IT consulting firm. It has more than 50 employees. More than 50% of iTech's workforce comprises foreign nationals on H1B and L1 status.

52. Plaintiff SmartWorks is a leading United States IT consulting firm. It has more than 50 employees. More than 50% of SmartWorks workforce comprises foreign nationals on H1B and L1 status.

53. Plaintiff Saxon Global is a leading United States IT consulting firm. It has more than 50 employees. More than 50% of Saxon Global workforce comprises foreign nationals on H1B and L1 status.

54. Under the Agency's current and proposed interpretation of PL 114-113, the Agency requires iTech, SmartWorks, Saxon Global, and other ITServe 50/50 members to pay the Border Admission Fee for every change of status petition for initial H1B status or a change of H1B employers.

55. This fee is unlawful.

56. Pursuant to Federal Rule of Civil Procedure 23, ITServe, iTech, SmartWorks, and Saxon Global bring this action on behalf of themselves and all other similarly situated United States companies.

57. Class 1 is defined as: All 50/50 companies required to pay the Border Admission Fee under PL 114-113 or PL 115-123 when they file change of status petitions for initial H1B status or a petition to change an H1B employer.

58. Class 1 does not seek damages.

59. Rather, Class 1 seeks to enjoin the Agency from charging fees under PL 114-113 or PL 115-123 to 50/50 companies for any change of status applications.

60. This class so numerous that joinder of all members is impracticable. Though ITServe, ITech, SmartWorks, and Saxon Global do not know the total number of 50/50 companies that were required to pay the H1B Border Admission Fee for change of status applications for initial

H1B petitions or change of H1B employer petitions, the Agency reports that in FY 2018 62% of the approved H1B petitions were filed through a change of status from a foreign national in the United States.

61. Based on information from the Agency's H1B Datahub, upon information and belief, more than 550 companies qualified as 50/50 companies and acquired more than 31000 initial H1B visas in FY 2018.

62. Upon information and belief, the numbers are similar for Fiscal Years 2020, 2019, 2017, 2016, 2015 and 2014.

63. These class members all share a common question of law and fact: Whether the Agency can continue to charge 50/50 companies the Border Admission Fee under PL114-113 or 115-123 for change of status petitions for initial H1B status or change of H1B employers.

64. ITServe 50/50 members, iTech, SmartWorks, and Saxon Global are typical of members in Class 1. ITServe 50/50 members, ITech, SmartWorks, and Saxon Global know of no conflict between their interests and those of Class 1 they seeks to represent. In defending their own rights, ITServe 50/50 members, ITech, SmartWorks, and Saxon Global will defend the rights of all proposed Class 1 members. ITServe 50/50 members, ITech, SmartWorks, and Saxon Global will fairly and adequately protect the interests of Class 1.

65. ITServe 50/50 members, ITech, SmartWorks, and Saxon Global are represented by counsel that focus nearly their entire law practice on federal court immigration litigation over employment-based immigration benefits. Both have experience with class and mass litigation.

66. The Agency has acted and will act on grounds generally applicable to each member of Class 1 by unlawfully requiring each member of the class to pay the Border Admission Fee to H1B change of status applications.

67. The Agency is applying non-statutory, substantive requirements for H1B change of status applications. These are ultra vires, unlawful actions, which form the members of Class 1 by depriving them of H1B status for nonpayment of fees that are not applicable to their applications.

68. A class action is superior to other methods available for the fair and efficient adjudication of this controversy because joinder of all members of Class 1 is impracticable. Absent the relief they seek here, there would be no other way for Class 1 to individually redress the wrongs they have suffered and will continue to suffer.

Class 2: 50/50 Petitioners who have Paid Unlawful Fee

69. Plaintiff ITServe is a trade association with a primary mission of protecting and advocating for information technology service providers and consulting companies. Hundreds of its members are 50/50 companies have been required to pay the unlawful Border Admission Fees for change of status petitions for the past six years. iTech, SmartWorks, and Saxon Global are all members of ITServe.

70. iTech has been a 50/50 company for the last six years. As such, it paid the 50/50 Border Admission Fee under PL 111-230, PL 114-113, and PL 115-123 for every initial H1B application and every change of employer H1B application seeking a change of status.

71. SmartWorks has been a 50/50 company for the last six years. As such, it paid the 50/50 Border Admission Fee under PL 111-230, PL 114-113, and PL 115-123 for every initial H1B application and every change of employer H1B application seeking a change of status.

72. Saxon Global has been a 50/50 company for the last six years. As such, it paid the 50/50 Border Admission Fee under PL 111-230, PL 114-113, and PL 115-123 for every initial H1B application and every change of employer H1B application seeking a change of status.

73. These fees were unlawful and ITServe 50/50 members, ITech, SmartWorks, and Saxon Global are entitled to a refund of those fees for the past six years from the date of filing this suit, January 17, 2020.

74. Pursuant to Federal Rule of Civil Procedure 23, ITServe, ITech, SmartWorks, and Saxon Global bring this action on behalf of themselves and all other similarly situated United States companies.

75. Class 2 is defined as: All 50/50 companies that paid the Border Admission Fee for $2000 under PL 111-230 for change of status applications from January 14, 2014, to December 17, 2015, and all 50/50 companies that paid the Border Admission Fee for $4000 under PL 114-113 and PL 15-123 from December 18, 2015 to present.

76. Class 2 does not seek damages.

77. Class 2, however, seeks a refund of these filing fees.

78. Class 2 estimates the refunds to total approximately $350 million dollars.

79. This class so numerous that joinder of all members is impracticable. Though ITServe, ITech, SmartWorks, and Saxon Global do not know the total number of 50/50 companies that paid these unlawful fees for the past six years, the Congressional Budget Office projected the fees would amount to $150 million a year under PL 111-230 and $400 million a year under PL 114-113 and PL 115-123.

80. These class members all share a common question of law and fact: Whether the Agency had congressional authority to charge 50/50 companies the Border Admission Fee under PL 111-230, PL114-113 or 115-123 for change of status petitions for initial H1B status or change of H1B employers and, if not, whether they are entitled to a refund of all such fees.

81. ITServe 50/50 members, ITech, SmartWorks, and Saxon Global are typical of members in Class 2. ITServe, ITech, SmartWorks, and Saxon Global know of no conflict between their interests and those of Class 2 they seek to represent. In defending their own rights, ITServe, ITech, SmartWorks, and Saxon Global will defend the rights of all proposed Class 2 members. ITServe, ITech, SmartWorks, and Saxon Global will fairly and adequately protect the interests of Class 2.

82. ITServe, ITech, SmartWorks, and Saxon Global are represented by counsel that focus nearly their entire law practice on federal court immigration litigation over employment-based immigration benefits. Both have experience with class and mass litigation.

83. The Agency has acted and will act on grounds generally applicable to each member of Class 2 by unlawfully collecting and retaining the Border Admission Fee for H1B change of status applications.

84. The Agency is applying non-statutory, substantive requirements for H1B change of status applications. These are ultra vires, unlawful actions, which form the members of Class32 by depriving them of H1B status for nonpayment of fees that are not applicable to their applications.

85. A class action is superior to other methods available for the fair and efficient adjudication of this controversy because joinder of all members of Class 1 is impracticable. Absent the relief they seek here, there would be no other way for Class 1 to individually redress the wrongs they have suffered and will continue to suffer.

FIRST CAUSE OF ACTION
(APA – Unlawful Required Fees)

86. Plaintiffs allege all allegations stated above as though state here.

87. The Agency requires that 50/50 companies like ITServe members, iTech, SmartWorks, Saxon Global, and the members of Class 1 pay $4000 per H1B petition seeking initial status or a change of employer through change of status applications.

88. This requirement is unlawful.

89. The harm is imminent because the Agency will deny or reject any H1B petitions for a change of status for ITServe 50/50 members, iTech, SmartWorks, Saxon Global, and the members of Class 1 fi they do not include the payment.

90. ITServe, iTech, SmartWorks, Saxon Global, and the members of Class 1 therefore now challenge the active requirement as unlawful under the APA.

91. As noted above, under the APA, this Court can set aside, enjoin, or declare unlawful the Agency's requirement that ITServe 50/50 members, iTech, SmartWorks, Saxon Global, and the members of Class 1 pay the $4000 Border Admission Fee when they file H1B change of status petitions, rather than H1B applications for admission.

92. The Agency's requirement that ITServe 50/50 members, iTech, SmartWorks, Saon Global, and the members of Class 1 pay the Border Admission Fee for change of status petitions is arbitrary and capricious and must be enjoined, set aside, and declared unlawful.

SECOND CAUSE OF ACTION
(APA – Refund of Unlawfully Collected Fees)

93. Plaintiffs allege all allegations stated above as though state here.

94. The Agency charged ITServe 50/50 members, iTech, SmartWorks, Saxon Global, and the members of Class 2 unlawful fees under PL 111-230 from January 14, 2014 through December 17, 2015, for H1B change of status petitions.

95. The Agency then charged ITServe 50/50 members, iTech, SmartWorks, Saxon Global, and the members of Class 2 unlawful fees under PL 114-113 and 115-123 from December 18,2015 through present.

96. Upon information and belief, the total amount of the unlawful fees for change of status petitions is approximately $350 million dollars.

97. Under the APA, ITServe 50/50 members, iTech, SmartWorks, Saxon Global, and the members of Class 2 are entitled to a refund of those fees. ITServe 50/50 members, iTech, SmartWorks, Saxon Global, and the members of Class 2 do not seek damages. *See America's Cmty. Bankers v. FDIC*, 339 U.S. App. D.C. 364, 200 F.3d 822, 830 (2000) (distinguishing between damages and refunds); *Steele v. United States*, 200 F. Supp. 3d 217, 226 (D.D.C. 2016) ("The Court finds that it has jurisdiction under the APA to hear the monetary relief portion of this case because such relief is best characterized as "restitution," as opposed to "money damages.").

98. The Agency's collection and retention of such fees is unlawful.

99. This Court should order the Agency to pay restitution or refunds in the actual amount of unlawful fees collected for the past six years from today or back to January 14, 2014.

PRAYER FOR RELIEF

100. Take jurisdiction over this case;

101. Certify these two classes;

102. Declare as unlawful the Agency's interpretation of PL 111-230, PL 114-113, and PL 115-123 requiring 50/50 companies to pay Border Admission Fees for change of status petitions;

103. Enjoin the agency from requiring 50/50 companies to pay Border Admission Fees under PL 114-113 and 115-123 for H1B change of status petitions;

104. Order the Agency to reimburse members of Class 2 for all unlawfully charged fees submitted with change of status petitions under PL 111-230, PL 114-113, and PL 115-123 for the past six years; and

105. Award any and all other relief that justice requires.

January 27, 2020

Respectfully submitted,

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