IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ITServe Alliance, Inc., 8951 Cypress Waters Boulevard Suite 160 Dallas, Texas 75019 Advansoft International, Inc. 135 E. Algonquin Road, Suite B Arlington Heights, Illinois 60005 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.: 19-3681 (APM) FIRST AMENDED COMPLAINT

Defendant ("the Agency") has unlawfully charged United States companies approximately $350 million dollars in visa fees (likely more) over the past six years. In this class complaint, Plaintiff Advansoft International, Inc. seeks to set aside all visa denials based on the nonpayment of this unlawful fee. For the reasons below, this Court must set aside visa denials based on the non-payment of this unlawful fee for change of status petitions.

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. Co-Plaintiff Advansoft is a member of ITServe.

2. Plaintiff Advansoft International, Inc. ("Advansoft") is a corporation under the laws of Illinois with its principle place of business in Arlington Heights, Illinois.

3. 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. It is difficult to determine who is in charge of the Agency at this time. This defendant is automatically substituted for the prior defendant under Federal Rule of Civil Procedure 25.

JURISDICTION, VENUE, AND STANDING

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

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

6. 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.

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

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

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

10. ITServe is a trade association, organized to meet the requirements of § 501(c)(6) of the Internal Revenue Code. Upon information and belief, hundreds of its members have been denied visas for nonpayment of the Border Admission Fee Border Admission Fees under PL 114-113 and PL 115-123 for change of status petitions over the last six years. These are the denials ITServe seeks to have set aside.

11. 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).

12. First, ITServe members—such as its co-plaintiff in this suit—have standing to bring this suit because denials for nonpayment of the Border Admission Fee under under PL 111-230, PL 114-113, and PL 115-123 for change of status petitions are unlawful. Thus, ITServe—again, like the co-Plaintiff here—has standing to challenge the legality of denials based on the nonpayment of the Border Admission Fees under PL 114-113 and PL 115-123 for change of status petitions.

13. Second, setting aside unlawful denials of visas for its members is germane to ITServe's mission as it seeks to protect the interests of information technology providers and consulting companies.

14. Finally, an individual company need not participate because ITServe can properly seek to set aside visa denials for non-payment of the Border Admission Fees under PL 111-230, PL 114-113, and PL 115-123 for change of status petitions for the past six years. Nevertheless, Advansoft is such a company and it is a party to this case.

FACTS

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

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

17. 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).

18. 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.

19. 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.*

20. 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.*

21. 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.

22. 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.

23. 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).

24. 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).

25. 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).

26. 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.

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

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

29. 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.*

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

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

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

33. 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).

34. 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.*

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

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

37. 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.

38. 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).

39. 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.

40. Congress then extended this heightened fee through 2027 in PL 115-12, 132 Stat. 64 (Feb. 9, 2018)

41. 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.

42. 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.

43. 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.

44. 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.

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

46. Further, 50/50 companies or those the Agency mistakenly characterizes as 50/50 companies who are denied for non-payment of the Border Admission Fee for change of status petitions are suffering adverse consequences.

47. 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.

48. All such fees for change of status petitions were unlawful. And any denials based on the nonpayment thereof are likewise unlawful.

CLASS ALLEGATIONS

Class #1: H1B Denials Based on Non Payment of Unlawful Fee

49. 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 have been denied H1B visas based on nonpayment of the Border Admission Fee for change of status petitions. Advansoft is a member of ITServe.

50. Plaintiff Advansoft filed a change of status application seeking an initial cap H1B on behalf of Kiran Kumar Janga on April 11, 2019. The Agency assigned it receipt number WAC1919451351.

51. At the time of the application, Mr. Janga was in the United States on valid F1 student status. If approved, the H1B visa petition would change his status from F1 to H1B. To acquire this change of status, Mr. Janga would not seek admission at a port of entry. Rather, his status would be changed as a matter of law without a new admission to the United States.

52. Despite the application seeking a change of status, the Agency denied the petition for failing to pay the 50/50 Border Admission Fee. Advansoft did not file an application for admission for its H1B worker; rather, it filed a change of status.

53. Similarly, Advansoft filed a change of status application seeking an initial cap H1B on behalf of Vivek Reddy Gunna on April 11, 2019. The Agency assigned it receipt number WAC1919354243.

54. At the time of the application, Mr. Gunna was in the United States on valid F1 student status. If approved, the H1B visa petition would change his status from F1 to H1B. To acquire this change of status, Mr. Gunna would not seek admission at a port of entry. Rather, his status would be changed as a matter of law without a new admission to the United States.

55. Despite the application seeking a change of status, the Agency denied the petition for failing to pay the 50/50 Border Admission Fee.

56. Pursuant to Federal Rule of Civil Procedure 23, Advansoft brings this action on behalf of itself and all other similarly situated individuals.

57. Class 1 is defined as: All companies that have filed H1B change of status applications or will file H1B change of status applications that have been or will be denied for non-payment of the Border Admission Fees under either PL 111-230 or PL 114-113.

58. Class 1 does not seek damages.

59. Rather, Class 1 seeks to set aside all H1B change of status applications that have been denied for non-payment of the Border Admission Fee for the past 6 years.

60. This class so numerous that joinder of all members is impracticable. Though Advansoft does not know the total number of H1B change of Status applications that have been denied for nonpayment of the Border Admission Fee, the Agency reports that non-payment of all required fees was one of the top ten reasons for a request for evidence in FY 2018; the Agency denied 56,564 H1B petitions seeking initial H1B status in FY 2018; and 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. If 62% of the denials were for change of status and the 10th most common reason for denials was non-payment of fees, upon information and belief, the Agency denied hundreds of H1B change of status petitions based on nonpayment of the Border Admission Fee 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 charge the Border Admission Fee for H1B change of status applications.

64. ITServe members and Advansoft are typical of Class 1. Advansoft knows of no conflict between its interests and those of Class 1 it seeks to represent. In defending their own rights, Advansoft will defend the rights of all proposed Class 1 members. Advansoft will fairly and adequately protect the interests of Class 1.

65. ITServe members and Advansoft is 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 on grounds generally applicable to each member of Class 1 by unlawfully charging the Border Admission Fee to H1B change of status applications and denied otherwise approvable H1B change of status petitions.

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.

FIRST CAUSE OF ACTION
(APA – Arbitrary and Capricious Denials)

69. Plaintiffs re-plead all allegations as though restated herein.

70. Federal courts have authority to hear challenges to final agency actions, and hold unlawful actions that are:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute…

5 U.S.C. § 706.

71. Agency actions that are not authorized by statute are unlawful. *See United States v. Mead Corp.,* 533 U.S. 218 (2001) (lack of statutory authority to make rules with the force and effect of law led to invalidation of agency regulations). Agency actions that contradict the statute are unlawful. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) (When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute). Federal courts have authority to hear challenges to final agency actions.

72. The Agency's denials of Advansoft and the members of Class 1 are unlawful because they are based on the Agency's unlawful interpretation of PL 111-230, PL 114-113, and 115-123.

73. The statutes clearly and unambiguously state the fees under PL 111-230, PL 114-113, and 115-123 are only applicable to H1B applications for admission, not H1B change of status applications.

74. The agency, without legal authority, demanded ITServe members, Advansoft and the members of Class 1 pay these fees.

75. The agency's denials of H1B change of status petitions for nonpayment of the Border Admission Fees are unlawful and must be set aside.

76. Further, ITServe and Advansoft reserves the right to identify further reasons why the Agency's denials are arbitrary and capricious after the Agency produces the certified administrative record.

77. The Agency's denials of ITServe members, Advansoft's petition, and the members of Class 1 are arbitrary and capricious and substantially unjustified.

PRAYER FOR RELIEF

78. Take jurisdiction over this case;

79. Certify all this class;

80. 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;

81. Set aside all denials for members of this class in line with this declaration; and

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

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Respectfully submitted,

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