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MEHTA V. DEPT. OF STATE: WHY PLAINTIFFS FAILED IN OBTAINING INJUNCTIVE RELIEF IN THE CLASS ACTION COMPLAINT?

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As we previously projected in our recent article/blog posting, MEHTA V. DEPT. OF STATE: WILL PLAINTIFFS BE SUCCESSFUL IN OBTAINING THE INJUNCTIVE RELIEF IN THE CLASS ACTION COMPLAINT?, the United States District Court for the Western District of Washington at Seattle on October 7, 2015, denied the Motion for Injunctive Relief (Temporary Restraining Order) by a group of high-skilled immigrants that would have forced the Department of Homeland Security ("DHS") to accept Adjustment of Status Applications ("AOS") as per the "Filing Date" chart contained in the originally issued October 2015 Visa Bulletin by the Department of State ("DOS").

Without wasting too much ink (and time) discussing how the October 2015 Visa Bulletin was transformed by the DOS (when it was originally released on September 9th, 2015), and how the Priority Dates were revised only four (4) days before its effective date, this supplementary blog posting/article seeks to analyze the very important question of why the Plaintiffs in the Class Action Complaint failed to prove *"Irreparable Harm"* in obtaining the Injunctive Relief (TRO) from the United States District Court in Seattle.

Injunctive Relief consists of a special court order called an "injunction" which is a form of equitable relief, requiring an individual to do or not do a specific action. Because it is an *extraordinary remedy*, the courts utilize the injunction (or other equitable relief) in special cases where the preservation of the status quo (or taking some specific action) is required in order to prevent a possible injustice.

So what needs to be proved by a plaintiff in order to obtain Injunctive Relief? Federal Court rules set forth four (4) criteria that must be satisfied before an interlocutory or preliminary injunction can be issued: (1) likelihood of "success on the merits"; (2) *potential* for *"irreparable harm"* in the absence of an injunction; (3) "balance of the equities" or, said another way, harm to the plaintiff if the injunction is not granted versus harm to the defendant if the injunction is granted; and (4) public policy considerations. Each of these criteria must be satisfied.

We stated in our blog posting/article that:

> *"Even assuming that the Plaintiff in the Class Action Complaint will be able to prove the likelihood of success on the merits, proving Irreparable Harm will likely be the toughest requirement for the*

> *Plaintiffs to satisfy in order to obtain Injunctive Relief. That brings us to the next question, why?*
>
> *"Irreparable harm" is defined as an injury that cannot adequately be compensated for by a monetary payment. This could be for two reasons: (1) the harm could not be measured well enough to pick a price or value; or (2) the harm might be of a kind for which money was not a socially acceptable payment. The first one can be referred as "immeasurability" and the second one as "incommensurability".*
>
> *Further, in order to obtain Injunctive Relief the Plaintiffs must also show that the harm is imminent and that the nature of the expected harm is such that an award of money damages against the Respondent, at a later date, will not make the Petitioner whole. The biggest obstacle to satisfying this requirement is that the courts often conclude that money damages are sufficient to make a Petitioner whole*[1].

As projected by us earlier, and as confirmed by the Court that the *"Plaintiffs have a slight chance of obtaining the Injunctive Relief"*, the United States District Court held that the Plaintiff failed to meet their burden of this[2] element.

Before we further analyze why Plaintiffs failed to obtain Injunctive Relief, as we set forth in our prior article/blog posting, let us pause a bit and analyze this through the testimony of J.K. Rowling[3] when she had sued the author of the "Harry Porter Lexicon." In her testimony, Ms. Rowling stated that the publication of the lexicon would destroy her *"will or heart to continue with writing"* a Harry Potter encyclopedia of her own. She did not testify that absent an injunction she would not write her own encyclopedia because the defendant would have undercut her market and she would earn nothing from her work, even though she had plenty of money already. Thus, basing an argument for Injunctive Relief primarily on compensatory or money damages does not win the day in Court.

Let's analyze why proving *Irreparable Harm* became an uphill battle for the Plaintiffs in the Class Action Complaint for obtaining the Injunctive Relief. To begin, first and foremost it is important to revisit the first Preliminary Statement of the Class Action

[1] For instance money damages are not being treated being sufficient where market share will be permanently lost absent an injunction; where a trade secret will become known to competitors or the general public absent an injunction; or where a person may be permanently physically injured absent an injunction.
[2] Likelihood of Irreparable Harm.
[3] Novelist best known as the author of the Harry Potter fantasy series.

Complaint that was filed. Further, it is also important to analyze Paragraph 9, and the Portion, Parties, of the Compliant which explained in detail the financial hardships suffered by each Plaintiff in preparing his/her AOS Application.

The preliminary statement categorically stated that:

> *"This case is about what happens when thousands of law-abiding, highly skilled immigrants **spend millions of dollars preparing to apply for green cards in reasonable reliance** on an agency's binding policy statement, only to find out at the last minute that a hapless federal bureaucracy has abruptly, inexplicably, and arbitrarily reneged on its promise."*

Further, Paragraph 9 of the Amended Complaint specifically states that:

> *"In the absence of such relief, Plaintiffs and class members, **who have spent thousands of hours and millions of dollars preparing adjustment applications in reasonable reliance** on the binding agency policy statements DOS published, will be irreparably harmed and left without any remedy for Defendants' unlawful actions."*

Analysis of the preliminary statement, Paragraph 9 and then the portion of the Lawsuit that explained the various expenses incurred by Plaintiffs in preparing AOS applications resulted in a basic argument: "*Not maintaining the status quo as was then proposed in the originally issued October 2015 visa bulletin will result in Irreparable Harm, among others.*"

As predicted, because the argument was couched in monetary (compensatory) terms, it became an uphill battle for the Plaintiff's Attorneys to prove "*Irreparable Harm*" in obtaining the Injunctive Relief. Finding holes in the Plaintiff's argument and agreeing with the Defendant, the Court stated that:

> *"Considering the failure of Plaintiff to provide any citation to its claims of harm, the fact that most if not all of the harm cited has already occurred, and the **apparent reparability of Plaintiffs economic damages should they ultimately prevail at trial**, the Court finds that Plaintiffs fail to meet their burden on this element."*

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Taking lesson from the R.K. Rowling example above, and as hinted in the Order denying the Motion[4], *had the argument been premised on non-monetary (non-compensatory) terms such as losing the "Security", " Stability", and/or "Freedom" which was contained in the originally issued Visa Bulletin, the Plaintiffs would likely have a better chance of success in proving "Irreparable Harm"*.

In this context, it is important to quote the excerpts from The White House announcement that was made in July 2015, after an extensive inter-agency coordination and consultation[5]:

> *"Later this year, State, in consultation with DHS, will revise the monthly Visa Bulletin to better estimate immigrant visa availability for prospective applicants,* ***providing needed predictability to nonimmigrant workers seeking permanent residency****. The revisions will help ensure that the maximum number of available visas is issued every year, while also minimizing the potential for visa retrogression.* ***These changes will further allow more individuals seeking LPR status to work, change jobs, and accept promotions. By increasing efficiency in visa issuance, individuals and their families who are already on a path to becoming LPRs will have increased security that they can stay in the United States, set down roots, and more confidently seek out opportunities to build lives in our country."***

Although the Class Action Complaint quoted the above-mentioned White House statement and emphasized certain portions, *it failed to capitalize on this* and other similar announcements and memoranda issued by the Department of Homeland Security (DHS) and the President.

In spite of detailing and focusing on the financial hardships suffered by individual Plaintiffs, the Class Action Complaint should have primarily and predominately focused on the "Loss of Security, Stability, and/or Freedom" that tens of thousands of immigrants pursuing employment-based Green Card will now face by not knowing: (1) when they could freely travel to their home countries to meet their parents and family members; (2) when they could leave the shadows of their employers and go out on their own to start their own entrepreneurial ventures; and (3) when they could be forced to

[4] While discussing Irreparable Harm, the District Court noted that: ….*Plaintiffs also argue, again without citation, that "at least one Plaintiff* ***whose parent is currently suffering from cancer in China, will be unable to take advantage of the benefits conferred by accepting adjustment applications****..."*

[5] And based on approximately 1,650 responses received pursuant to the Request for Information published in the Federal Register.

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depart the United States upon getting fired or laid-off while in nonimmigrant status, etc. Further, the Plaintiffs in the case ***should*** also have argued that such loss of Security, Stability, and/or Freedom cannot (and should not) be measured and compensated in terms of a money value, and therefore, such loss amounts to nothing less than "*Irreparable Harm*".