



1           In determining whether to grant a prohibitory injunction, the Ninth Circuit  
2 considers: (1) the likelihood of plaintiffs' success on the merits; (2) the possibility of irreparable  
3 injury to plaintiffs if an injunction is not issued; (3) the extent to which the balance of hardships  
4 favors plaintiffs; and (4) whether the public interest will be advanced by the injunction. See  
5 Miller v. Cal. Pac. Med. Ctr., 19 F.3d 449, 456 (9th Cir. 1994); Los Angeles Mem'l Coliseum  
6 Comm'n v. Nat'l Football League, 634 F.2d 1197, 1201 (9th Cir. 1980). The analysis is often  
7 compressed into a single continuum where the required showing of merit varies inversely with  
8 the showing of irreparable harm. See Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.,  
9 204 F.3d 867,874 (9th Cir. 2000). Thus, plaintiffs may be entitled to preliminary relief if they  
10 are able to show either (1) probable success on the merits and the possibility of irreparable harm  
11 or (2) the existence of serious questions going to the merits and a fair chance of success thereon,  
12 with the balance of hardships tipping sharply in favor of an injunction. Miller, 19 F.3d at 456.

13           Although plaintiffs' request for an injunction against further accrual of unlawful  
14 presence time and/or unauthorized employment is prohibitory in nature, the same cannot be said  
15 of some of the other forms of relief requested. The "last uncontested status which preceded the  
16 pending controversy" did not involve the acceptance of applications for adjustment of status or  
17 the acceptance of applications for new employment authorizations. See GoTo.com, Inc. v. Walt  
18 Disney Co., 202 F.3d 1199, 1210 (9th Cir. 2000). A demand for affirmative conduct on the part  
19 of defendants – such as the acceptance of applications that are not authorized by existing  
20 policies – is subjected to heightened scrutiny by the Court. A mandatory injunction will "not be  
21 issued unless the facts and law clearly favor the moving party." Dahl v. HEM Pharms. Corp., 7  
22 F.3d 1399, 1403 (9th Cir. 1993) (citing Anderson v. United States, 612 F.2d 1112, 1114 (9th  
23 Cir. 1980)).

24           Having reviewed plaintiffs' motion and the remainder of the record, the Court  
25 finds as follows:

1 (1) Plaintiffs are not challenging the agency's discretionary decision to grant or deny an  
2 application for adjustment of status. Instead, plaintiffs are challenging CIS' refusal to accept  
3 applications that, plaintiffs allege, are authorized by 8 U.S.C. § 1255(a). The Court has  
4 "jurisdiction to decide, as a matter of law, whether an alien is statutorily eligible for adjustment  
5 of status." Ortega-Cervantes v. Gonzales, 501 F.3d 1111, 1113 (9th Cir. 2007) (internal  
6 citations omitted).

7 (2) Plaintiffs allege that CIS' policy of not accepting concurrently-filed petitions for  
8 immigration visas and applications for adjustment of status violates the governing statute,  
9 discriminates against certain classes of immigrants based on their religion, and violates the  
10 Religious Freedom Restoration Act ("RFRA"), the First Amendment, the Due Process clause,  
11 and the Equal Protection clause. Second Amended Complaint at ¶¶ 59-63. Plaintiffs argue that  
12 they are likely to succeed in showing that the class members are statutorily eligible to apply for  
13 adjustment of status, that CIS' policy infringes on the free exercise of religion, and that CIS is  
14 treating similarly-situated individuals differently. Plaintiffs have raised serious legal and/or  
15 factual questions regarding their statutory, RFRA, and Equal Protection claims.<sup>2</sup> Based on the  
16 limited record currently available, the Court finds that plaintiffs have a fair chance of success on  
17 the merits of each of these claims. The Court cannot, however, conclude that the facts and law  
18 on any of these claims favor plaintiffs to such an extent that mandatory injunctive relief is  
19

---

20 <sup>2</sup> The Court urges defendants to alter their briefing practices as suggested by the Honorable  
21 Richard A. Jones, United States District Judge, in Abdalla v. Mukasey, C07-1767RAJ (Dkt. # 16).  
22 Repeating a losing argument without acknowledging that the Court has already addressed the issue  
23 reflects a lack of care or lack of candor toward the tribunal that cannot be condoned. In response to  
24 plaintiffs' Equal Protection argument, for example, defendants again assert that the claim must fail  
25 because aliens are not a suspect classification. Opposition at 18. The Court rejected this argument in  
26 April because it mischaracterizes plaintiffs' claims, and yet defendants do not even mention the Court's  
prior ruling in their memorandum. To the extent defendants feel they must raise every argument at every  
opportunity in an effort to avoid a waiver, an appropriately-placed footnote noting the Court's ruling but  
reserving the issue for appeal would adequately reflect and protect the record.

1 justified.

2 (3) In order to obtain a prohibitory injunction, plaintiffs must also show that the balance  
3 of hardships tips sharply in favor of enjoining the further accrual of unlawful presence time  
4 and/or unauthorized employment for all class members during the course of this litigation. The  
5 status of the named plaintiffs and their family members is currently fixed by Court order. See  
6 Dkt. # 48 and # 69. The unnamed class members, however, are not so protected and have been  
7 accruing or will accrue unlawful presence time following the expiration of their visa status.

8 Being out of status for even one day has adverse implications for class members  
9 and their families. The most direct and potentially irremediable effects are the reduction in the  
10 grace period Congress provided for this class of alien and the increased possibility of detention  
11 or deportation for being out of status. If defendants delay the adjudication of employer petitions  
12 for immigration visas long enough, class members will have to depart from the United States  
13 before they can even file an application for adjustment of status. Defendants state, without any  
14 explanation, that being forced to depart from the United States is not an injury. Opposition at 7.  
15 The Court is hard-pressed to imagine a more traumatic and irreparable harm than being uprooted  
16 from your job, home, and community for an undetermined length of time. By maintaining the  
17 status of each class member as it currently exists, the Court will have the opportunity to  
18 determine whether defendants' policy against concurrent filings is lawful without risking  
19 irreparable (and potentially unjustified) harm to the class members. The Court finds that halting  
20 the accrual of unlawful presence time and/or unauthorized employment for all class members  
21 during the pendency of this litigation will continue the *status quo ante litem*, will prevent  
22 irreparable harm to class members and their families, and will not cause defendants any undue  
23 hardship.

24 For all of the foregoing reasons, the accrual of unlawful presence/unauthorized  
25 employment time against the class members is hereby STAYED until this litigation is resolved  
26

1 or further order of this Court. No security shall be required.  
2

3 Dated this 21st day of August, 2008.  
4

5 

6 Robert S. Lasnik

7 United States District Judge  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26