

ORAL ARGUMENT PREVIOUSLY SCHEDULED MARCH 31, 2017

No. 16-5287

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Save Jobs USA,
Plaintiff-Appellant,

v.

United States Department of
Homeland Security,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA No. 15-cv-615
The Hon. Tanya S. Chutkan

**DEFENDANT-APPELLEE'S MOTION TO HOLD
PROCEEDINGS IN ABEYANCE THROUGH
DECEMBER 31, 2017**

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*Litigation, District Court Section**Counsel For Defendant-*
*Appellee*GLENN M. GIRDHARRY
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Pursuant to Fed. R. App. P. 27 and D.C. Court's Circuit Rule 27, and in response to the Court's June 23, 2017 order directing the parties to submit, by September 27, 2017, motions directed at how to proceed with this appeal, Defendant-Appellee the Department of Homeland Security (DHS) respectfully requests that this Court hold this case in abeyance through December 31, 2017.

1. This case involves an Administrative Procedure Act challenge to the Executive's legal authority to issue, through notice-and-comment rulemaking, a rule, Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284-10,312 (Feb. 25, 2015) (H-4 Rule), permitting certain aliens maintaining H-4 nonimmigrant status,¹ *see* 8 U.S.C. § 1101(a)(15)(H), to apply for, and if deemed eligible, to receive employment authorization from DHS.

2. On February 10, 2017, this Court granted a consent motion filed by DHS to hold this case in abeyance for 60 days. That motion indicated that an abeyance was requested "to allow incoming leadership personnel adequate time to consider the issues." Abeyance Motion (Feb. 10, 2017) at 3.

3. On April 3, 2017, DHS requested an abeyance of an additional 180 days. *See* Abeyance Motion (April 3, 2017) at 2-3. That motion indicated that DHS had concluded that it is appropriate to actively reconsider whether to revise the H-4

¹ H-4 nonimmigrants are spouses and children under 21 years of age of, *inter alia*, H-1B nonimmigrants. *See* 8 U.S.C. § 1101(a)(15)(H); *see also* 8 CFR 214.1(a)(2), 214.2(h)(9)(iv).

Rule through notice-and-comment rulemaking” and requested that “the Court hold this case in abeyance for 180 days to permit the Department time to reconsider the H-4 Rule and whether issuance of a notice of proposed rulemaking relating to it is appropriate.” *Id.* at 2.

4. On April 18, 2017, the President issued Executive Order 13,788, Buy American and Hire American, 82 Fed. Reg. 18837 (April 18, 2017). The Order provides that “[i]n order to create higher wages and employment rates for workers in the United States, and to protect their economic interests, it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad, including section 212(a)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(5)).” *Id.*, § 2(b). To effectuate this policy, the Order instructs the “Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security” to, “as soon as practicable, and consistent with applicable law, propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system. . . .” *Id.*, § 5.

5. Consistent with the President’s directive, DHS is assessing whether it is appropriate to issue a notice of proposed rulemaking relating to the H-4 Rule. *See* Declaration of Kevin J. Cummings, Ex. 1, ¶¶ 5-7. Although DHS previously

requested 180 days in order to make this determination, Executive Order 13,788 is an intervening event necessitating careful, considered review of all of DHS's immigration policies to ensure that the interests of U.S. workers are being protected. *Id.*, ¶ 6. Accordingly, DHS had to refocus its review of the H-4 Rule to ensure that it meets the newly announced priorities and to decide whether to undertake a new rulemaking concerning the H-4 Rule and comply with the President's Order. *Id.*

6. DHS is diligently conducting this review, evaluating next steps, and plans to announce its intentions in the fall Unified Agenda, which it expects the Office of Management and Budget (OMB) to publish by the end of the calendar year 2017. *Id.*, ¶ 7.

7. Accordingly, the Department requests the Court hold this case in abeyance through December 31, 2017, to permit it to complete the review mandated by Executive Order 13,788 and also to adequately assess how to act regarding the H-4 Rule. DHS will update the court promptly if its review is completed prior to the end of the calendar year.

8. An order holding this case in abeyance will serve judicial economy and prevent the expenditure of the resources of the Court and the parties. If the Department elects to promulgate a new rule that is different from the Rule at issue in this appeal, that may obviate the need for judicial review of the current rule.

Accordingly, Defendant-Appellee respectfully requests that the Court hold this case in abeyance through December 31, 2017.

Dated: September 27, 2017

Respectfully submitted,

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**CERTIFICATE PURSUANT TO FED. R. APP. P. 27, 32(A)(7)(C) AND
CIRCUIT RULE 27(d)(2), 32(e)**

Pursuant to Fed. R. App. P. 27 and D.C. Circuit Rule 27(d)(2), the attached motion is proportionately spaced, has a typeface of 14 points or more, and contains 740 words, not including those sections excluded from the word count under applicable rules.

s/ Erez Reuveni
EREZ REUVENI
Senior Litigation Counsel

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the appellate CM/ECF system on September 27, 2017.

s/ Erez Reuveni
EREZ REUVENI
Senior Litigation Counsel

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

	:	
SAVE JOBS USA,	:	
Plaintiff-Appellant,	:	
	:	Case No.: 16-5287
v.	:	
	:	
UNITED STATES DEPARTMENT OF	:	
HOMELAND SECURITY,	:	
Defendant-Appellee.	:	
	:	
	:	

**DECLARATION OF KEVIN J. CUMMINGS IN SUPPORT OF
DEFENDANT-APPELLEE’S MOTION TO HOLD PROCEEDINGS
IN ABEYANCE THROUGH DECEMBER 31, 2017**

I, Kevin J. Cummings, hereby state and declare as follows:

1. I am over the age of 18 and provide this declaration based upon my personal knowledge and information available to me in my official capacity as the Chief of the Business & Foreign Workers Division in the Office of Policy and

Strategy at the U.S. Citizenship and Immigration Services (USCIS), a component agency of the Department of Homeland Security (DHS).

2. I have held my current position since August 2009. In this position, I am responsible for leading the development and implementation of agency policy with respect to employment-based immigrant and nonimmigrant visa classifications. As such, my team leads the rulemaking process for these categories, including recommending policies for inclusion in regulations, negotiating policy positions, drafting and clearing regulations through the agency, and considering public feedback for possible revision to certain regulations when promulgating final rules. In addition, my team leads the development of other policy products outside the rulemaking process, and we review policies and regulations promulgated by other agencies and departments that may affect these programs. Prior to this position, I served as the Chief of Business and Trade Services in the USCIS Office of Service Center Operations (SCOPS) with oversight of all regulatory, program, and policy issues regarding employment-based immigration for nearly 2 years. During my 26 years combined with USCIS and Immigration and Naturalization Service (INS), I have served in various other roles including Deputy Branch Chief with the Fraud Detection and National Security Directorate at USCIS Headquarters, Special Assistant to the Chief of SCOPS, and as an Adjudications Officer.

3. As a result of these duties, I am well-acquainted with the final rule entitled Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284-10,312 (Feb. 25, 2015) (H-4 Rule). Additionally, I am familiar with the recent Executive Orders that have been issued, including Executive Order 13788, Buy American and Hire American, 82 Fed. Reg. 18837 (April 18, 2017) (E.O. 13788). Moreover, I am well-versed in the requirements for notice-and-comment rulemaking and notifications to the public regarding agency regulatory plans through the Unified Agenda, as well as with the general process for developing, clearing regulations at USCIS.

4. I make this declaration in support of DHS's motion to hold proceedings in abeyance through December 31, 2017 to permit DHS additional time to determine whether issuance of a proposed rulemaking relating to the H-4 Rule is appropriate. DHS currently is reviewing the H-4 Rule in accordance with E.O. 13788, in which President Trump directed DHS to review its rules.

5. E.O. 13788 announced the Administration's policy to protect the jobs and wages of U.S. workers including, when possible, offering jobs to American workers first. Specifically, section 2(b) states "to create higher wages and employment rates for workers in the United States, and to protect their economic interests, it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad,

including section 212(a)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(5)).” Further, section 5 orders the Secretary of Homeland Security, among others, to advance the stated policies “as soon as practicable, and consistent with applicable law, propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse.”

6. At the time DHS made its initial abeyance request to this Court on April 3, 2017, DHS believed that a six-month abeyance would be sufficient to meet its obligations under E.O. 13777, Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12285 (March 1, 2017) (E.O. 13777. E.O. 13788, however, was not issued until after that abeyance request. Due to the E.O. 13788 directive to review all of its immigration policies to ensure that the interests of U.S. workers are being protected, DHS had to refocus its review of the H-4 Rule to ensure that it meets the newly announced priorities.

7. DHS is diligently conducting this review, evaluating next steps, and plans to announce our intentions in the fall Unified Agenda, which we expect the Office of Management and Budget (OMB) to publish by the end of the calendar year 2017.

8. DHS is therefore seeking an extension of the order to hold proceedings in abeyance until December 31, 2017 to ensure that DHS can appropriately review and additionally consider the H-4 Rule in light of the Administration's goals "to create higher wages and employment rates for workers in the United States, and to protect their economic interests."

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on September 27, 2017
Washington, D.C.



Kevin J. Cummings
Chief, Business & Foreign Workers Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services