**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **ITSERVE ALLIANCE, INC., *et al.*,** | ) | |
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| **Plaintiffs,** | ) | |
| | ) | |
| **v.** | ) | **No. 1:18-cv-02350-RMC** |
| | ) | |
| **UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,** | ) | |
| | ) | |
| **Defendant.** | ) | |

**THE GOVERNMENT'S STATUS REPORT**

This Court ordered the Parties to meet and confer and report back to the Court as to "the parties' amenability to consolidating cases 18-cv-2350, 19-cv-290, and 19-300 and proposed next steps assuming the cases are consolidated." Min. Order (Feb. 11, 2019). The Parties have conferred and were unable to reach an agreement. Plaintiffs filed their Status Report earlier today and the Government responds as follows:

The Government does not believe that this case should be consolidated with the others that Plaintiffs identify.[1] Rather, the Government believes that the most efficient method of proceeding is to await a decision in this case, *ITSERVE Alliance, Inc. v. USCIS*, No. 18-cv-2350 (RMC) ("*ITSERVE*"), resolving the three threshold legal issues raised in Counts 1, 2, and 3 of the Amended Complaint. Unlike each of the other cases Plaintiffs identify, the Parties in *ITSERVE* are already briefing a dispositive motion that addresses each of these threshold legal questions.

[1] As Plaintiffs note, they simultaneously filed a status report (or a notice of a status report) in at least fifteen cases today, February 25, 2019. *See, e.g.*, *ERP Analysts v. Cissna*, 19-cv-0300 (RMC), Dkt. No. 6. For several of these cases, the Court had previously ordered the Parties to file status reports regarding their positions for next steps. *See, e.g.*, *ITServe Alliance v. Cissna*, 18-2350 (RMC), Min. Order (Feb. 11, 2019). The Government hereby files the same status report in each case, addressing Plaintiffs' proposal to consolidate each of these cases into one action.

While that matter proceeds, the Government proposes that the Parties file stay motions in each other Court in this District presiding over a case that raises similar legal questions, requesting a stay of all proceedings in those individual cases pending the resolution of these three legal questions in *ITSERVE*.[2] This approach will provide for an efficient resolution of the threshold issues and is adopted frequently by Courts in this District. *See, e.g.*, *Advocate Christ Med. Ctr. v. Azar*, No. 18-cv-2182 (RJL); *Magee-Womens Hosp. of UPMC v. Price*, No. 17-cv-1599 (EGS); *Bozemon Deaconess Hosp. v. Sebelius*, No. 13-cv-1537 (RBW). Once the threshold legal questions are resolved in *ITSERVE*, the Parties in the stayed cases will be in a better position to discuss the proper way to proceed in light of the decision in *ITSERVE*.

As noted, this approach is particularly efficient because the Government has already filed a Partial Motion to Dismiss addressing all three of these issues on February 8, 2019. *See ITSERVE*, Dkt. 7. In addition, the *ITSERVE* Court has already ruled that this Partial Motion to Dismiss should be decided before turning to the individual claims. *See id*., Min. Order (Feb. 11, 2019). Consolidating these cases will delay resolution of these threshold issues by requiring that briefing of these issues be re-started.

The three legal issues identified by ITSERVE are:

> **Count 1** – ITSERVE's facial challenge to the validity of the 1991 itinerary regulation found at 8 C.F.R. § 214.2(h)(2)(i)(B).

[2] As noted below, Plaintiffs appear to agree that it is more efficient for a single Court in this District to first address the threshold legal questions. The dispute, it seems, turns on *which* matter should lead the way. Rather than allowing *ITSERVE* to proceed first, Plaintiffs suggest that forthcoming motions for preliminary injunctions should lead the way. As discussed below, the Government believes that it is more appropriate and efficient to allow *ITSERVE* to serve as the vehicle for addressing these issues, as the Parties are already briefing a dispositive motion in that case.

**Count 2** – ITSERVE's facial challenge to the USCIS guidance memorandum referred to as PM 602-0157.

**Count 3** – ITSERVE's facial challenge to USCIS's interpretation of the phrase "up to three years" as meaning that USCIS may grant an H-1B petition for a period of up to three years, but that it is not required to do so. *See Valorem Consulting Group v. US*CIS, No. 13-1209-CV-W-ODS, 2015 WL 196304, *1 (W.D. Mo. Jan. 15, 2015) (upholding a decision by USCIS granting an H-1B petition for one year rather than the three years requested).[3]

These are facial challenges with pure questions of law that should be decided before the Court turns to reviewing individual adjudications. For example, the claim in Count 1, challenging whether the 1991 itinerary rule is *ultra vires*, should be decided before the Court decides the question of whether USCIS is properly interpreting this rule in a particular adjudication. Any other approach would result in duplicative effort and require USCIS to re-brief issues that were previously briefed in *ITSERVE*.

It is true that some of the complaints filed by Plaintiffs in this Court (and other Courts in this District) characterize the legal issues differently than ITSERVE did in its Amended Complaint and use different terminology and categorizing the claims differently. Moreover, some of the complaints filed appear to raise additional legal and factual issues not implicated by *ITSERVE*. Nonetheless, the three threshold legal issues raised by ITSERVE in its Amended Complaint, and

[3] Confusingly, Plaintiffs refer to this practice as "Short Term Denials." To be clear, Plaintiffs are not challenging USCIS's denial of H-1B petitions, but rather challenging USCIS decisions in which USCIS approved the H-1B petition, but approved it for a period of less than three years even though the petitioner requested a validity period of three years.

especially its claim in Count 3, would need to be decided before the Court could properly resolve challenges to individual adjudications.[4]

Plaintiffs disagree. They wish to have these cases decided on a consolidated motion for preliminary injunction based on exemplar administrative records in two cases: *ERP Analysts, Inc. v. Cissna*, No. 19-cv-0193 (JDB), and *VSION v. Cissna*, No. 19-cv-0423 (RMC). This approach is unworkable for four primary reasons:

1. Addressing these cases on motions for preliminary injunctions will require a fact-specific analysis, rather than a decision tailored to address the threshold legal questions (*e.g.*, whether the specific plaintiffs have demonstrated irreparable harm). Accordingly, resolution of the preliminary injunctions will not advance the resolution of the threshold legal issues.[5]
2. Plaintiff ERP Analysts has no right to preliminary relief in No. 19-cv-0193 (JDB), one of the two "exemplar" cases in which it proposes to move for a preliminary injunction. ERP Analysts already moved for a preliminary injunction in that case but voluntarily withdrew it because USCIS revised its decision and approved the relevant visa petition

[4] Plaintiffs also disagree with the Government's proposed approach because they contend that *ITSERVE* raises questions of associational standing. There is no question about whether ITSERVE has associational standing to raise the threshold legal questions in Counts 1, 2, and 3, and the Government has not contended otherwise. *See ITSERVE*, Dkt. 7 (Partial Motion to Dismiss).

[5] The Government notes also that it is an open question whether all of the cases filed are even "related" as that term is defined by the Federal Rules of Civil Procedure. Although Plaintiffs have designed many cases to be related, the only commonality appears to be legal questions, which is not a basis for designating a case related under the Local Rules. *See* LCvR 40.5(a)(3). Plaintiffs could have brought their claims in a single lawsuit, but chose not to do so. Given this choice, consolidating after the fact would raise a host of practical problems, especially given that Plaintiffs advise that they intend to continue to file motions for preliminary injunction. Were they to continue filing motions for preliminary injunctions, the consolidated docket would become cluttered with seriatim briefing on such motions, all of which the same Court overseeing the consolidated docket would be required to adjudicate.

after the motion was filed. ERP Analysts thereafter conceded that this approval "removes the immediate harm faced by Plaintiff and Beneficiary." Not. of Withdrawal (Feb. 4, 2019), *ERP Analysts, Inc. v. Cissna*, No. 19-cv-0193 (JDB), Dkt. 5. Accordingly, it is difficult to see how ERP Analysts can now claim a right to again seek preliminary injunctive relief in that case. Indeed, the Government reserves its right to argue that the entire case is moot.[6]

3. There is already a proceeding that addresses the merits of the legal questions—*ITSERVE*. These cases should be decided on the merits, rather than through a motion for preliminary injunction. A motion for preliminary injunction raises additional legal and factual questions that are not implicated by simply deciding the matter on the merits.

4. The use of certified administrative records is contrary to the Court's scheduling order in *ITSERVE*, which stated that the indexes of the certified administrative records would not be filed until 30 days after the resolution of the Partial Motion to Dismiss. *See* Min. Order (Feb. 11, 2019). Moreover, the entire point of a common question of law is that it is *not* fact dependent. Thus, there is no need to require administrative records to decide common questions of law. Rather, the Parties should proceed to address the threshold legal questions in the case that is furthest along—*ITSERVE*.

[6] The same is true of other cases Plaintiffs wish to consolidate into a single proceeding for preliminary injunction briefing. In *VSION Technologies v. Cissna*, 19-cv-0290 (RMC), the Court (Sullivan, J.) denied Plaintiffs' motion for a preliminary injunction as moot after the Government decided to extend the underlying H-1B visa. *See VSION Technologies*, 19-cv-0290, Min. Order (Feb. 6, 2019). Allowing Plaintiffs to consolidate this case into a single action for another round of preliminary injunction briefing runs counter to Judge Sullivan's determination that such a request for interim relief is moot in this case.

Finally, the Government notes that Plaintiffs proposed that the Government agree to an across-the-board delay of any visa denial implicating a client of Plaintiffs' counsel. Although Plaintiffs' counsel is correct that agreeing to such an across-the-board stay of administrative decisions may obviate the need to address motions for interim relief, Plaintiffs' criticism of the Government for rejecting such a proposal is misplaced. The Government has an orderly process for reviewing and adjudicating visa requests. Agreeing to forgo automatically that process for any visa applicant who has retained Plaintiffs' counsel and purports to have a viable claim addressing one of the legal issues identified above would throw that system into disarray. Rather, the Government's adjudication process must proceed while these legal disputes are address, despite the fact that this might require the Parties to address motions for interim relief.

WHEREFORE, the Government believes that the most expeditious path forward is to decide the Government's previously filed Partial Motion to Dismiss that addresses the three threshold legal questions raised in Counts 1, 2, and 3 of the Amended Complaint in *ITSERVE* (the first filed action by the Plaintiffs). All of the other lawsuits filed by Plaintiffs should be stayed pending resolution of these three questions. The Government is open to other approaches moving forward, but wishes to avoid re-briefing issues that have already been briefed once.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that this document(s) filed through the CM/ECF system will be sent electronically to the registered participants. There are no unregistered participants.

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