

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**

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Pursuant to Fed. R. App. P. 27 and D.C. Circuit Rule 27, and in response to the Court's November 2, 2017 order directing the parties to submit, by January 2, 2018, 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 pending resolution of DHS's Notice of Proposed Rulemaking (NPRM) "to remove from its regulations certain H-4 spouses of H-1B nonimmigrants as a class of aliens eligible for employment authorization," as announced through DHS's Unified Agenda. Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization, Unified Agenda (2017), *available* at <https://www.reginfo.gov/public/Forward?SearchTarget=Agenda&textfield=1615-AC15>. In support of this request, DHS states as follows:

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.

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).

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 (Apr. 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 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 September 27, 2017, DHS requested an abeyance through December 31, 2017. *See* Abeyance Motion (Sept. 27, 2017). That motion indicated that DHS required additional time to assess the H-4 Rule in light of Executive Order 13,788, Buy American and Hire American, 82 Fed. Reg. 18837 (April 18, 2017), which instructed all executive agencies 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.” Abeyance Motion (Sept. 27, 2017) at 2.

5. Consistent with the President's directive, DHS completed its review and announced, through publication of its Unified Agenda by the Office of Management and Budget (OMB), its intentions with the H-4 Rule as follows: "On February 25, 2015, DHS published a final rule extending eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants who are seeking employment-based lawful permanent resident (LPR) status. DHS is publishing this notice of proposed rulemaking to amend that 2015 final rule. DHS is proposing to remove from its regulations certain H-4 spouses of H-1B nonimmigrants as a class of aliens eligible for employment authorization." Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization. The announcement indicated that DHS is working toward issuing a rescission NPRM in February 2018.

6. Accordingly, the Department requests that this Court hold this case in abeyance, to permit it to begin the NPRM process with respect to the H-4 Rule in February 2018. DHS will update the court promptly when the NPRM is published in the Federal Register and when the proposed rulemaking is complete, and will provide the Court with an update in any event by July 1, 2018.

7. An order holding this case in abeyance will serve judicial economy and prevent the expenditure of the resources of the Court and the parties. The Department has announced its intention to propose rescission of the H-4 Rule in its current form

and “remove from its regulations certain H-4 spouses of H-1B nonimmigrants as a class of aliens eligible for employment authorization.” Such action may obviate the need for judicial review of the current rule, and will potentially moot this appeal, as the new rulemaking will supersede the current rule. *See, e.g., Wash. Alliance of Tech. Workers v. United States Dep’t of Homeland Security*, 650 Fed. Appx. 13, 14 (D.C. Cir. May 13, 2016) (dismissing appeal as moot and explaining that appeal challenging agency regulation is “moot” when the challenged regulation “is no longer in effect”).

Accordingly, Defendant-Appellee DHS respectfully requests that the Court hold this case in abeyance pending completion of the NPRM process at DHS.

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Dated: December 22, 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 802 words, not including those sections excluded from the word count under applicable rules.

s/ Erez Reuveni
EREZ REUVENI
Assistant Director

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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 December 22, 2017.

s/ Erez Reuveni
EREZ REUVENI
Assistant Director

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