

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, et al.,
Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND
IMMIGRATION SERVICES, et al.,
Defendants.

No. 2:17-cv-00094-JCC

DEFENDANTS’ MOTION TO
TRANSFER VENUE

HON. JOHN C. COUGHENOUR

NOTE ON MOTION CALENDAR:
Friday, March 24, 2017

I. INTRODUCTION

Plaintiffs filed this putative class action in the Western District of Washington based on the residence of Abdiqafar Wagafe, one of the two named Plaintiffs, in this District. *See* Amended Complaint, ECF No. 17, at ¶ 13. On February 22, 2017, U.S. Citizenship and Immigration Services (“USCIS”) approved Plaintiff Wagafe’s Form N-400, *Application for Naturalization* (“Form N-400”), mooted his individual-capacity claims. The Form I-485, *Application to Register Permanent Residence or Adjust Status* (“Form I-485”) of the only other named Plaintiff, Medhi Ostadhassan, remains pending. Plaintiff Ostadhassan is a resident of Grand Forks, North Dakota, and his Form I-485 is being processed at USCIS’s St. Paul Field Office in Minnesota. Accordingly, Defendants

1 respectfully request that the Court order this case transferred to the U.S. District Court for
2 the District of North Dakota, Eastern Division. *See* 28 U.S.C. § 1404(a).

3 II. LEGAL STANDARD

4 The party seeking to transfer venue bears the burden of showing that convenience
5 and justice require transfer. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d
6 270, 279 (9th Cir. 1979); *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834,
7 843 (9th Cir. 1986) (“The defendant must make a strong showing of inconvenience to
8 warrant upsetting the plaintiff’s choice of forum.”), *superseded by statute on other*
9 *grounds by* 28 U.S.C. § 1391. The decision to transfer lies within the sound discretion of
10 the trial judge. *See Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 639 (9th Cir. 1988)
11 (citing *Savage*, 611 F.2d at 279).

12 III. BACKGROUND

13 On January 23, 2017, Plaintiffs filed a Complaint alleging that USCIS unlawfully
14 delayed adjudication of Plaintiffs’ applications for immigration benefits under a policy
15 that, *inter alia*, had not been subject to notice-and-comment rulemaking procedures and
16 was inconsistent with various statutory and regulatory provisions. *See generally*
17 Complaint, ECF No. 1. On January 27, 2017, the President issued Executive Order
18 13769 invoking 8 U.S.C. § 1182(f), to, *inter alia*, temporarily suspend entry of immigrant
19 and non-immigrant visa holders from countries identified in 8 U.S.C. § 1187(a)(12). *See*
20 *Protecting the Nation from Foreign Terrorist Entry Into the United States*, 82 Fed. Reg.
21 8977 (Jan. 27, 2017). On February 1, 2017, Plaintiffs filed an Amended Complaint,
22 adding several causes of action related to Executive Order 13769, but subsequently
23 suggested in their Notice of Related Cases, ECF No. 22, that USCIS’s construction of the
24 Executive Order mooted those additional claims. Plaintiffs filed a Motion for Class
25 Certification, ECF No. 26, on February 9, 2017.

26 The two named Plaintiffs are Abdiqafar Wagafe, a resident of SeaTac,
27 Washington, who complained of delay in adjudication of his Form N-400, and Medhi
28 Ostadhassan, a resident of Grand Forks, North Dakota, who complained of delay in

1 adjudication of his Form I-485. *See* Amended Complaint, ECF No. 17 at ¶¶ 14-15. On
 2 February 22, 2017, USCIS approved Wagafe’s naturalization application. *See* Form N-
 3 652, *Naturalization Interview Results*, attached hereto as Exhibit A. The next day, USCIS
 4 scheduled him to take the oath of allegiance on March 2, 2017. *See* Form N-445, *Notice*
 5 *of Naturalization Oath Ceremony*, attached hereto as Exhibit B. As of the date of this
 6 filing, Plaintiff Ostadhassan’s I-485 remains pending.

7 IV. ARGUMENT

8 The Interests of Justice Require the Case Be Transferred 9 to the District of North Dakota

10 Two statutes may govern a motion to dismiss or transfer a case on the basis of
 11 venue: “(1) where venue is improper, a court must dismiss or transfer under 28 U.S.C.
 12 § 1406; (2) where venue is proper, the court may transfer to another district, for
 13 convenience, pursuant to 28 U.S.C. § 1404.” *Abrams Shell v. Shell Oil Co.*, 165 F. Supp.
 14 2d 1096, 1102 (C.D. Cal. 2001). Here, Defendants agree that at the time this action was
 15 filed, venue was proper under 8 U.S.C. § 1391 in the Western District of Washington.
 16 *See, e.g., In re LimitNone, LLC*, 551 F.3d 572, 575 (7th Cir. 2008) (“There may often be
 17 multiple proper venues, although one . . . may be superior to the rest.”). Accordingly,
 18 Defendants respectfully request the Court to transfer the case for the convenience of the
 19 parties, under Section 1404(a).

20 In determining whether a transfer of venue under Section 1404(a) is warranted, the
 21 Court considers: (1) the plaintiff’s choice of forum; (2) the convenience of the parties; (3)
 22 the convenience of the witnesses; and (4) the interests of justice. 28 U.S.C. § 1404(a);
 23 *Los Angeles Mem’l Coliseum Comm’n v. NFL*, 89 F.R.D. 497, 499 (C.D. Cal. 1981).

24 In analyzing the “interests of justice,” a number of factors are relevant, including:
 25 (1) the location where relevant agreements (if any) were negotiated and executed, (2) the
 26 state that is most familiar with the governing law, (3) the plaintiff’s choice of forum, (4)
 27 the respective parties’ contacts with the forum, (5) the contacts relating to the plaintiff’s
 28 cause of action in the chosen forum, (6) the differences in the costs of litigation in the two

1 forums, (7) the availability of compulsory process to compel attendance of unwilling
 2 non-party witnesses, and (8) the ease of access to sources of proof. *Stewart Org. v. Ricoh*
 3 *Corp.*, 487 U.S. 22, 29–30 (1988); *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498–
 4 99 (9th Cir. 2000). Other factors that can be considered are: the enforceability of the
 5 judgment; the relative court congestion in the two forums; and which forum would better
 6 serve judicial economy. 17 Moore’s Federal Practice § 111.13[1] [c] (3d ed. 1997).

7 **A. Without a Resident Plaintiff, Plaintiffs’ Choice of Forum In a Putative**
 8 **Class Action Is Entitled to Minimal Weight**

9 The first factor, Plaintiffs’ choice of forum, can only favor Plaintiffs. However,
 10 this factor is not entitled to great weight in the present circumstances because the only
 11 remaining named Plaintiff does not reside in the Western District of Washington, and his
 12 application to adjust status is not being processed in the Western District of Washington.
 13 See Declaration of Leslie D. Tritten, attached hereto as Exhibit C, ¶ 5; *CBD v.*
 14 *Kemphorne*, No. 07-cv-0894, 2007 WL 2023515, *3 (N.D. Cal. July 12, 2007) (“The
 15 degree to which courts defer to the plaintiff’s venue choice is substantially reduced where
 16 the plaintiff’s venue choice is not its residence or where the forum lacks a significant
 17 connection to the activities alleged in the complaint.” (internal quotation marks and
 18 citation omitted)); *Exact Identification Corp v. Feldman Sherb & Co., P.C.*, No. 05-cv-
 19 2116, 2006 WL 236921, at *2 (E.D. Cal. Jan. 31, 2006) (“[W]hile courts generally afford
 20 considerable weight to [a] plaintiff’s choice of forums, the deference is considerably less
 21 where [the] plaintiff does not reside in the forum where the action was commenced.”).

22 Moreover, choice of forum is accorded little weight in class actions where the
 23 events or omissions giving rise to the claims occurred elsewhere. Here, Plaintiffs have
 24 filed a putative class action and seek to certify two nationwide classes; thus, many of the
 25 relevant events and omissions necessarily occurred outside the Western District of
 26 Washington. See *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) (“Although great
 27 weight is generally accorded plaintiff’s choice of forum . . . when an individual . . .
 28 represents a class, the named plaintiff’s choice of forum is given less weight.”); cf. *Foster*

1 v. *Nationwide Mut. Ins. Co.*, No. 07-cv-04928, 2007 WL 4410408, at *3 (N.D. Cal. Dec.
2 14, 2007) (according “no deference” to the plaintiffs’ choice of forum because, among
3 other reasons, the lawsuit was a class action and the “operative facts [had] not occurred
4 within the forum”). Because the only named Plaintiff with a live individual-capacity
5 claim resides in the District of North Dakota, the events or omissions giving rise to his
6 claim did not occur in this District, and the events or omissions giving rise to the majority
7 of the putative class members’ claims did not occur in this District, Plaintiffs’ choice of
8 forum carries very little weight in favor of maintaining the action in the Western District
9 of Washington.

10 **B. The Interests of Justice Weigh in Favor of Transfer**

11 As noted above, factors relevant to the “interests of justice” include: (1) the
12 location where relevant agreements (if any) were negotiated and executed, (2) the state
13 that is most familiar with the governing law, (3) the plaintiff’s choice of forum, (4) the
14 respective parties’ contacts with the forum, (5) the contacts relating to the plaintiff’s
15 cause of action in the chosen forum, (6) the differences in the costs of litigation in the two
16 forums, (7) the availability of compulsory process to compel attendance of unwilling
17 non-party witnesses, and (8) the ease of access to sources of proof. *Stewart Org.*, 487
18 U.S. at 29–30. Other factors that can be considered are: the enforceability of the
19 judgment; the relative court congestion in the two forums; and which forum would better
20 serve judicial economy. 17 Moore’s Federal Practice § 111.13[1] [c] (3d ed. 1997). With
21 respect to the first and second factors, there are no relevant agreements, and the
22 governing law is federal, not state law. Thus, the first and second factors appear neutral.

23 As discussed above, the Plaintiffs’ choice of forum is entitled to only minimal
24 weight – if any – given that there are now no named Plaintiffs who reside in this District,
25 a named Plaintiff who resides elsewhere, and operative facts underlying the claims of
26 putative class members scattered across the country.

27 The fourth and fifth factors – the respective parties’ contacts with the forum and
28 contacts relating to the Plaintiffs’ cause of action in the chosen forum – weigh in favor of

1 Defendants. Plaintiff Ostadhassan has no known contacts with the Western District of
 2 Washington and Defendants have no more contact with this District than any other.
 3 Instead, the conduct giving rise to Plaintiff Ostadhassan's claims occurred in North
 4 Dakota, where he resides, and Minnesota, where his application is pending. These
 5 factors weigh clearly in favor of transfer.

6 Differences in cost of litigation weigh in favor of transfer as well. It is obviously
 7 less expensive and less time-consuming for government personnel in Minnesota to travel
 8 to North Dakota than to Seattle. The cost of meals and accommodation is less, as well.¹
 9 And, if it becomes necessary, it will be far more convenient for Plaintiff Ostadhassan to
 10 remain in North Dakota than to travel to Seattle.²

11 The seventh factor, availability of compulsory process, weighs heavily in favor of
 12 Defendants. If Defendants require the attendance of nonparty witnesses at trial, their
 13 attendance can only be procured by subpoena if the trial is within 100 miles of where the
 14 person resides, is employed, or regularly transacts business. *See* Fed. R. Civ. P.
 15 45(c)(1)(A). Defendants would be unable to compel unwilling non-party witnesses,
 16 including Plaintiff Ostadhassan's wife,³ to attend a trial in Seattle. *Rubio v. Monsanto*
 17 *Co.*, 181 F. Supp. 3d 746, 763-64 (C.D. Cal. 2016); *Saleh v. Titan Corp.*, 361 F. Supp. 2d
 18 1152, 1165-66 (S.D. Cal. 2005).

19 The final factor in considering the interests of justice, ease of access to proof, also
 20 favors Defendants. Plaintiff Ostadhassan's A-file is located in Minnesota, he was

21 _____
 22 ¹ The rates established by the General Services Administration for 2017 reflect lodging of \$167 to \$240 per night
 23 depending on the month, and \$74 per day for meals and incidental expenses, in Seattle, Washington. For both
 24 Grand Forks and Fargo, North Dakota -- the two locations where court is held in the Eastern Division of the District
 of North Dakota -- the accommodation costs are \$91 year round and \$51 for meals and incidental expenses. *See*
<http://www.gsa.gov/perdiem>.

25 ² The U.S. District Court for the District of North Dakota, Eastern Division maintains an unstaffed courthouse in
 26 Grand Forks. *See* <http://www.ndd.uscourts.gov/>. The main courthouse for the Eastern Division in Fargo is
 approximately 80 miles, or just over an hour's drive, away.

27 ³ Plaintiff Ostadhassan's wife filed a Form I-130, *Petition for Alien Relative* ("Form I-130") seeking to classify
 28 Ostadhassan as her immediate relative. *See* Tritten Decl., Ex. C, ¶ 5; Amended Complaint, ECF. No. 17, ¶ 131. As
 approval of the Form I-130 is a necessary precondition to approval of Ostadhassan's Form I-485, *see* 8 U.S.C. §§
 1151(b)(2)(A)(i) & 1255(a); 8 C.F.R. § 245.2(a)(2)(i)(B)-(C), she is a necessary witness, especially given the prior
 questions about her marriage to Ostadhassan and, thus, his eligibility to adjust status. *See* Tritten Decl., Ex. C, ¶ 6-7.

1 interviewed in Minnesota, and his application is being processed in Minnesota. *See*
2 Tritten Decl., Exhibit C, ¶ 5, 6, 9; *Harms v. Experian Info. Solutions, Inc.*, No. 07-cv-
3 0697, 2007 WL 1430085, at *2 (N.D. Cal. May 14, 2007) (reasoning that the location of
4 records in a different district weighed in favor of transfer “since it appears that access to
5 proof will be easier” in the transferee district); *Saleh v. Titan Corp.*, 361 F. Supp. 2d at
6 1166 (finding this factor to weigh in favor of transfer where “much of the documentary
7 evidence” was more easily accessed in the transferee forum due to its location and the
8 effectiveness of subpoena power). Evidence and witnesses in Minnesota would be more
9 easily accessed from North Dakota than from Washington. Plaintiffs may suggest that
10 advances in technology have rendered this consideration obsolete. But USCIS still
11 maintains A-files in paper. *See* Tritten Decl., Exhibit C, ¶ 8. Moreover, “the issue is the
12 ‘ease of access’ to the source of proof, not whether the evidence would be unavailable
13 absent the transfer.” *Saleh*, 361 F. Supp. 2d at 1166.

14 Taken as a whole, the interests of justice clearly weigh in favor of transfer.
15 Plaintiff’s choice of forum is entitled to only minimal deference in this case, the
16 remaining named Plaintiff has no demonstrable contacts with this District; the cost of
17 litigation is less in North Dakota; it is more convenient to the evidence maintained in
18 Minnesota; and Defendants will not have access to compulsory process if a trial is held
19 here.

20 **C. The Convenience of Parties and Witnesses Weigh in Favor of Transfer**

21 “The convenience of witnesses is often the most important factor in resolving a
22 motion to transfer.” *Bunker v. Union Pac. R.R. Co.*, No. 05-cv-045059, 2006 WL
23 193856, at *2 (N.D. Cal. Jan. 23, 2006). This factor favors transfer because agency
24 adjudicators and officials that might be relevant witnesses are located in Minnesota, and
25 as noted, the only remaining named Plaintiff resides in North Dakota.⁴

26
27
28 ⁴ “The convenience of counsel is not a factor to be considered” in weighing a transfer of venue. *Bunker v. Union Pac. R.R. Co.*, No. 05-cv-045059, 2006 WL 193856, at *2 n.1 (N.D. Cal. Jan. 23, 2006).

1 In sum, Plaintiffs' choice of forum is entitled to minimal weight given that the
2 only named Plaintiff with a connection to this District no longer has a live claim in his
3 individual capacity and the action is brought as a putative class action; the interest of
4 justice weighs in favor of transfer because the remaining Plaintiff resides in North
5 Dakota, that district would have easier access to witnesses and evidence in North Dakota
6 and Minnesota and would be a less expensive forum in which to litigate, and would
7 permit Defendants subpoena power over non-party witnesses. Finally, the Western
8 District of Washington would not be a convenient forum for the remaining parties and
9 witnesses.

10 **V. CONCLUSION**

11 For the foregoing reasons, the Court should order this action transferred to the
12 U.S. District Court for the District of North Dakota, Eastern Division, pursuant to
13 28 U.S.C. § 1404(a).

14 Dated: March 2, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 2, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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s/ Aaron R. Petty
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