IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BIRD TECHNOLOGIES GROUP, INC.
30303 Aurora Road, Solon, OH 44139,

Plaintiff,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, 20 Massachusetts Avenue NW, Washington DC 20529; and L. FRANCIS CISSNA, Director of U.S. Citizenship and Immigration Services, in his official capacity, 20 Massachusetts Avenue NW, Washington DC 20529, Washington, DC 20529,

Defendants.

Civil Action No. _____

COMPLAINT

Introduction

1. Plaintiff Bird Technologies Group, Inc., a multinational company headquartered in Ohio, challenges the unlawful denial of an employment-based immigrant visa petition seeking to classify one of its employees, Augusto Fantinato Filho, as a multinational manager under 8 U.S.C. § 1153(b)(1)(C).

2. Despite record evidence demonstrating that Plaintiff directly employed Mr. Fantinato Filho in Brazil for nearly nine years, Defendant U.S. Citizenship and Immigration Services erroneously denied the visa petition because it found that the company did not qualify as a "corporation" absent incorporation in, or the existence of a subsidiary or affiliate in Brazil.

3. Under the plain language of 8 U.S.C. § 1153(b)(1)(C), and implementing regulations at 8 C.F.R. § 204.5(j)(3)(i), Plaintiff—a multinational company with several U.S. and foreign subsidiaries—need not be incorporated in, or have a subsidiary or affiliate in Brazil to

petition for an immigrant visa classification for a manager it has employed directly for the statutorily-specified time period.

4. Defendants' contrary interpretation, and corresponding denial of Plaintiff's immigrant visa petition conflicts with the plain language of the statute and regulations and violates the prohibition against agency actions that are arbitrary and capricious and contrary to law under the Administrative Procedure Act. As such, the Court should vacate the denial and order Defendants to approve Plaintiff's immigrant visa petition.

Jurisdiction and Venue

5. This case arises under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.* and the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* This Court has jurisdiction pursuant to 28 U.S.C. § 1331, as a civil action arising under the laws of the United States, and 28 U.S.C. § 1361. This Court also has authority to grant declaratory relief under 28 U.S.C. §§ 2201-02, and injunctive relief under 5 U.S.C. § 702, and 28 U.S.C. § 1361. The United States has waived sovereign immunity under 5 U.S.C. § 702.

6. Venue is proper in this judicial district under 28 U.S.C. § 1391(e)(1)(A) because this is a civil action in which the Defendants are an agency of the United States and an officer of the United States, acting in his official capacity, and they reside in this District.

Parties

7. Plaintiff Bird Technologies Group, Inc. (BTGI) is headquartered in Solon, Ohio. BTGI is the parent company of several U.S. and foreign subsidiaries, and as a group, manufactures equipment and sells an innovative portfolio of radio frequency (RF) management solutions, including hardware, software, components and services. BTGI has employed Augusto

Fantinato Filho (Mr. Fantinato Filho) directly in managerial positions for more than twelve years.

8. Defendant U.S. Citizenship and Immigration Services (USCIS) is a component of the U.S. Department of Homeland Security (DHS), 6 U.S.C. § 271, and an "agency" within the meaning of the APA, 5 U.S.C. § 551(1). USCIS is responsible for the adjudication of immigration benefits applications, including immigrant visa petitions, and denied BTGI's immigrant visa petition. The Nebraska Service Center and the California Service Center are two USCIS offices that adjudicate petitions and applications for immigration benefits.

9. Defendant L. Francis Cissna is the Director of USCIS. In this role, he oversees the adjudication of immigration benefits and establishes and implements governing policies. He has ultimate responsibility for the adjudication of BTGI's petition and is sued in his official capacity.

Legal Framework

10. Congress established two primary bases for immigration under the current system: promoting family unity and attracting workers with various skill sets to bolster the economy.

11. The INA provides for the allocation of immigrant visas to five preference categories of noncitizen beneficiaries based on their employment. 8 U.S.C. §§ 1153(b)(1)-(5).

12. Classification under one of these five employment-based categories is obtained by filing an immigrant visa petition with USCIS on Form I-140. 8 U.S.C. §1154(a)(1)(F). An approved visa petition constitutes a determination that the beneficiary is "eligible for preference under subsection (a) or (b) of section 203 [relating to family and employment-based visa classifications]". 8 U.S.C. §1154(b). Petition approval is a prerequisite to obtaining lawful permanent resident status.

13. The employment-based first preference category, relevant here, covers priority

workers, which includes individuals with extraordinary ability, outstanding professors and researchers, and certain multinational executives and managers. 8 U.S.C. § 1153(b)(1).

14. To qualify as a "multinational," the U.S. employer, or its subsidiary, or its affiliate, must "conduct[] business in two or more countries, one of which is the United States." *See* 8 C.F.R. § 204.5(j)(2) *Definitions*.

15. Prioritization of the immigration of multinational executives and managers recognizes the need for the United States to remain competitive in an increasingly global economy by allowing a company to employ in the United States a manager or executive who already has experience with the company's multinational operations, goals, policies, procedures, operations and the like.

16. With respect to this category, subsection (C) of 8 U.S.C. § 1153(b)(1) specifically provides for the allocation of immigrant visas to "Certain multinational executives and managers," as follows:

> [A foreign national] is described in this subparagraph if the [foreign national], in the 3 years preceding the time of the [foreign national's] application for classification and admission into the United States … has been employed for at least 1 year by a firm or *corporation* or other legal entity or an affiliate or subsidiary thereof and the [foreign national] seeks to enter the United States in order to continue to render services to *the same employer* or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

8 U.S.C. § 1153(b)(1)(C) (emphasis added). Under the plain language of the statute, a foreign national may qualify for an immigrant visa under § 1153(b)(1)(C) if he has been employed as a manager or executive abroad by a "corporation" "for at least 1 year" and will be employed, or continue to be employed, by "the same employer" in the United States.

17. The implementing regulations similarly recognize that a multinational corporation may directly employ a manager or executive abroad and subsequently petition for an immigrant visa classification, requiring the petitioning company to demonstrate that:

> (B) If the [foreign national] is already in the United States working for *the same employer* or a subsidiary or affiliate of the firm or *corporation*, or other legal entity by which the [foreign national] was employed overseas, in the three years preceding entry as a nonimmigrant, the [foreign national] was employed by the entity abroad for at least one year in a managerial or executive capacity;
>
> (C) The prospective employer in the United States is *the same employer* or a subsidiary or affiliate of the firm or *corporation* or other legal entity by which the [foreign national] was employed overseas.

8 C.F.R. §§ 204.5(j)(3)(i)(B) and(C) (emphasis added).

Factual Allegations

18. BTGI, headquartered in Solon, Ohio, employs 260 people in the United States. BTGI, its U.S. and foreign subsidiaries, as a group manufacture Radio Frequency (RF) measurement and management equipment and systems, provide educational solutions and other RF communications services, and sell these products and services through a global network of distributors and sales representatives.[1] Markets include broadcast, cellular, government, land mobile radio, medical, military and semiconductor.

19. BTGI in Solon, Ohio hired Mr. Fantinato Filho to work directly for the company in Brazil in October 2005 in the managerial position of Latin America Sales Manager. He held this position until November 2013, when BTGI promoted him to International Sales Manager.

20. In April 2014, BTGI filed a nonimmigrant visa petition (Form I-129) with the USCIS California Service Center (CSC) on behalf of Mr. Fantinato Filho, to classify him as a

[1] The company's products include applications for extended coverage of radio communications networks, radio infrastructure components and antennas, RF streaming products, field sensors, and RF test and measurement equipment.

manager and transfer him to work temporarily in the United States in L-1A status. *See* 8 U.S.C. §§ 1101(a)(15)(L) and 1184(c)(1)-(2); 8 C.F.R. § 214.2(*l*).

21. On July 28, 2014, CSC approved BTGI's petition, with a validity period from October 1, 2014 through September 30, 2017. In approving this petition, CSC found that Mr. Fantinato Filho met the statutory requirements of an L nonimmigrant classification, including that "within 3 years preceding the time of his application for admission into the United States," he had been continuously employed in a managerial capacity for one year by a "corporation" and sought to "continue to render his services to the same employer." 8 U.S.C. § 1101(a)(15)(L).

22. The U.S. Department of State subsequently issued Mr. Fantinato Filho an L-1 nonimmigrant visa, and after his admission to the United States, he began working for BTGI in Solon, Ohio in October 2014, continuing in his role as International Sales Manager.

23. As his spouse, Mr. Fantinato Filho's wife, Alda Hermelinda Prado Fantinato, also came to the United States in the nonimmigrant L-2 classification.

24. In September 2015, BTGI promoted Mr. Fantinato Filho to the more senior managerial position of Director of Sales, as he continued in his employment in L-1A status in the United States.

25. On March 7, 2016, BTGI filed an immigrant visa petition (Form I-140) and supporting documentation on his behalf with USCIS. The petition, which USCIS assigned to the Nebraska Service Center (NSC), sought an EB-1(C) immigrant visa classification as a multinational manager in the Director of Sales position.

26. In support of the petition, the company provided a letter from Linda M. Nagorski, Director, Human Resources, which: (a) stated that Mr. Fantinato Filho had worked in Brazil, from October 2005 until his transfer to the United States, as a direct employee of BTGI;

(b) described Mr. Fantinato Filho's managerial duties in Brazil, as Latin America Sales Manager, and as International Sales Manager; and (c) described the managerial duties of the Director of Sales position in the United States. BTGI also provided organization charts as further evidence of Mr. Fantinato Filho's managerial role.

27. In addition, BTGI submitted evidence that it qualifies as a multinational, as defined in 8 C.F.R. § 204.5(j)(2), because it conducts business, through a subsidiary, in two or more countries, one of which is the United States. This evidence included:

- Company letter describing BTGI's multinational operations, including its ownership of a Swedish subsidiary, Deltanode Solutions AB, through two intervening subsidiaries, Bird Technologies Europe AB and TXRX Systems, Inc.;
- 2015 Annual Report of Bird Technologies Europe AB, which identifies itself as: owner (100%) of Deltanode Solutions AB, registered in Stockholm, Sweden; itself (Europe AB) owned (100%) by TXRX Systems, Inc., a U.S. company; and BTGI as the parent company;
- Deltanode Solutions AB invoices for products shipped to Canada and the United States; and
- Page printed from BTGI's website listing the Deltanode office in Stockholm, Sweden, among other foreign offices.

28. In April 2017, NSC issued a Request for Evidence (RFE) to BTGI seeking further information about the managerial nature of Mr. Fantinato Filho's employment abroad, and of the Director of Sales position in the United States, and evidence that BTGI was "the same employer" that employed Mr. Fantinato Filho abroad.

29. BTGI responded to the RFE with additional documentation, including: (a) a second company letter; (b) an organizational chart for the sales functions that Mr. Fantinato Filho managed when employed in Brazil; (c) organizational charts of the BTGI management team, and of the global sales and marketing function; and (d) 2016 Form W-2s for the managers or professionals who are Mr. Fantinato Filho's direct reports.

30. Significantly, the second company letter, submitted in response to the RFE, and signed by BTGI's Human Resources Director, expressly confirmed that Mr. Fantinato Filho had been employed directly by BTGI in Brazil. BTGI also provided to NSC proof that it had paid Mr. Fantinato Filho directly during his employment in Brazil by submitting pay records for February 2013 through March 2014 (i.e., at least one year in the three years immediately preceding his transfer to the United States). These pay records listed wire transfers to pay his salary, monthly payments for car and medical allowances, office rent, and in certain pay records, non-recurring payments, such as expense report reimbursements, and a bonus payment.

31. On May 12, 2017, Mr. Fantinato Filho and Ms. Prado Fantinato filed applications to adjust their status to lawful permanent residents (Form I-485) based on BTGI's immigrant visa petition pending with USCIS.

32. On July 17, 2017, NSC denied the immigrant visa petition on the sole ground that BTGI "provided no evidence that [it] is incorporated in, has a subsidiary in, or has an affiliate in Brazil." Decision, Exhibit 1, at 2. According to NSC, BTGI did not show "the existence of two entities that operate under the same corporate name; one entity must physically exist in a foreign country and the other entity must physically exist in the United States." *Id.*

33. On July 20, 2017, BTGI filed with the CSC another petition (Form I-129) to extend Mr. Fantinato Filho's L-1A nonimmigrant status, which otherwise would have expired on September 30, 2017. Also on July 20, 2017, Ms. Prado Fantinato filed with CSC an application to extend her L-2 status, corresponding to the requested extension of Mr. Fantinato Filho's L-1A status.

34. On August 24, 2017, CSC approved BTGI's I-129 petition and Ms. Prado Fantinato's application and extended their L-1A and L-2 status, respectively, until September 30, 2019.

35. Due to BTGI's timely filing of the petition to extend Mr. Fantinato Filho's L-1A nonimmigrant status, and the subsequent petition approval by CSC, Mr. Fantinato Filho has continued in his employment with BTGI as Director of Sales in the United States. *See* 8 C.F.R. § 214.2(*l*)(15).

36. Mr. Fantinato Filho's ability to remain in the United States in L-1A status is limited. The maximum total period of stay in the United States in L-1A status is seven years, with extensions in two-year increments. *See* 8 U.S.C. § 1184(c)(2)(D)(i); 8 C.F.R. § 214.2(*l*)(15)(ii). BTGI is precluded from employing Mr. Fantinato Filho beyond the seven-year limit, which will be reached on or about September 30, 2021.

37. Unless the Court vacates USCIS' denial of BTGI's immigrant visa petition, BTGI will lose one of its longtime employees who holds a key, senior managerial position. Such a loss would unduly burden and disrupt BTGI's business operations.

Exhaustion

38. USCIS' July 17, 2017, denial of BTGI's immigrant visa petition constitutes a final agency action under the APA, 5 U.S.C. § 701, *et seq*. Neither the INA nor DHS regulations at 8 C.F.R. § 103.3(a), require an administrative appeal of the denial. Accordingly, BTGI has no administrative remedies to exhaust.

39. Under 5 U.S.C. §§ 702 and 704, BTGI has suffered a "legal wrong" and has been "adversely affected or aggrieved" by agency action for which there is no adequate remedy at law.

CAUSE OF ACTION

COUNT I

Administrative Procedure Act Violation (5 U.S.C. § 706)

40. Plaintiff incorporates the allegations of the preceding paragraphs as if fully set forth herein.

41. Defendants' denial of Plaintiff's immigrant visa petition constitutes a final agency action that is arbitrary and capricious, an abuse of discretion, and not in accordance with the law.

42. USCIS' contention that BTGI must be incorporated in, or have a subsidiary or affiliate in Brazil to qualify as the "same employer" violates the plain language of 8 U.S.C. § 1153(b)(1)(C) and 8 C.F.R. § 204.5(j)(3)(i).

43. Under the plain language of § 1153(b)(1)(C), Mr. Fantinato Filho was directly employed abroad in a managerial capacity for the requisite statutory period by Plaintiff BTGI—a "corporation"—and would continue to render managerial services to BTGI—"the same employer"—in the United States. The regulations at 8 C.F.R. § 204.5(j)(3)(i) similarly authorize a U.S.-based company to directly employ a manager abroad and then petition for an immigrant visa classification so that the employee can continue to render managerial services in the United States.

44. The arbitrary and capricious nature of Defendants' denial of the immigrant visa petition is underscored by the agency's approval of BTGI's petitions for a nonimmigrant L-1A classification for Mr. Fantinato Filho before BTGI filed the immigrant visa petition and again after the agency denied the immigrant visa petition. The identical requirements of a "corporation" and "the same employer" appear in 8 U.S.C. § 1101(a)(15)(L) as in 8 U.S.C. § 1153(b)(1)(C).

45. As a result of Defendants' unlawful decision, BTGI has suffered, and will continue to suffer, injury from the denial of its immigrant visa petition, by depriving BTGI of Mr. Fantinato Filho's services after the expiration of his nonimmigrant status. In addition, he and Ms. Prado Fantinato will suffer from being unable to qualify for lawful permanent resident status.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests that this Court grant the following relief:

1. Declare that Defendants' interpretation of "same employer" in 8 U.S.C. § 1153(b)(1)(C) as requiring two entities that "physically exist" violates the APA, the INA, and federal regulations;

2. Vacate Defendants' denial of the immigrant visa petition BTGI filed on Mr. Fantinato Filho's behalf;

3. Order Defendants to promptly approve the immigrant visa petition;

4. Award Plaintiff its costs in this action; and

5. Grant any other relief that this Court may deem just and proper.

Dated: November 7, 2017

Respectfully submitted,

Leslie K. Dellon

Leslie K. Dellon (D.C. Bar #250316)

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