

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

HERGUAN UNIVERSITY, ET AL.,	)	Case No.: C 12-04403 PSG
	)	
Plaintiffs,	)	<b>ORDER DENYING PLAINTIFFS’</b>
v.	)	<b>MOTION FOR TEMPORARY</b>
	)	<b>RESTRAINING ORDER</b>
IMMIGRATION AND CUSTOMS	)	
ENFORCEMENT (ICE), ET AL.,	)	<b>(Re: Docket No. 1)</b>
	)	
Defendants.	)	

Plaintiffs Herguan University (the “University”) and Jerry Yun Fei Wang (“Wang”) (collectively, “Plaintiffs”) move for a temporary restraining order. Defendants Immigration and Customs Enforcement (“ICE”) and Student and Exchange Visitor Program (“SEVP”) (collectively, “Defendants”) oppose the motion. Earlier this afternoon, the parties appeared for hearing.<sup>1</sup> Having reviewed the papers and considered the arguments of counsel,

IT IS HEREBY ORDERED that Plaintiffs’ motion for TRO is DENIED.

In a predecessor case, Judge Davila clearly articulated the legal standards applicable to a TRO motion,<sup>2</sup> and the court will not repeat them here. Nor will the court repeat the background provided by Judge Davila in his order. Turning to the merits of the pending motion in this case, at

<sup>1</sup> Pursuant to 28 U.S.C. §636(c)(1), the parties have consented to magistrate judge jurisdiction. See Docket Nos. 4 and 7.

<sup>2</sup> See *Herguan University, et al. v. Immigration and Customs Enforcement, et al.*, Case No. C 12-04364 EJD, Docket No. 9.

1 this preliminary stage of the case, and on the very limited record assembled to date, the court is not  
2 persuaded that any TRO is warranted. Plaintiffs have not established that they are likely to succeed  
3 on the claim that Defendants have violated rights redressible under the Administrative Procedure  
4 Act by terminating Wang's SEVIS ID and password prior to withdrawal of the University's I-17  
5 certification. Even if this termination were a "final agency action,"<sup>3</sup> the regulation at issue gives  
6 the government discretion to terminate access on the date it sees fit.<sup>4</sup> While this discretion may not  
7 be exercised arbitrarily, unconstitutionally or otherwise in violation of the APA,<sup>5</sup> Plaintiffs have  
8 not yet shown any evidence suggesting this was the case. Wang is under federal indictment based  
9 on activities squarely implicated by SEVIS, and the University is at the heart of the charges for  
10 which the grand jury and the court have found probable cause. The same is true regarding  
11 Plaintiffs' claim challenging the 30-day response period to the government's Notice of Intent to  
12 Withdraw. Nor have Plaintiffs established any likelihood of success on their mandamus claim. This  
13 writ applies only to ministerial actions, and the discretion plainly provided by regulation renders  
14 the writ inapplicable.<sup>6</sup> As for Plaintiffs' claim under the Declaratory Judgment Act, "the  
15 Declaratory Judgment Act does not itself confer federal subject-matter jurisdiction."<sup>7</sup> Under these  
16 circumstances, the court cannot say that the degree of irreparable harm Plaintiffs may suffer is so  
17 great that it compensates on the Ninth Circuit's "sliding scale" standard.<sup>8</sup>

18  
19 <sup>3</sup> See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61-62 (2004) (quoting 5 U.S.C. §704).

20 <sup>4</sup> See 8 C.F.R. 214.4(i)(2) ("In most situations, SEVP will not determine a SEVIS access  
21 termination date for that school until the appeals process has concluded and the initial denial or  
22 withdrawal has been upheld unless a school whose certification is withdrawn or whose  
recertification is denied is suspected of criminal activity or poses a potential national security  
threat.").

23 <sup>5</sup> See 5 U.S.C. §706.

24 <sup>6</sup> See *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1998) ("Mandamus is an extraordinary remedy and  
25 is available to compel a federal official to perform a duty only if: (1) the individual's claim is clear  
26 and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to  
be free from doubt, and (3) no other adequate remedy is available.").

27 <sup>7</sup> See, e.g., *Nationwide Mutual Insurance Company v. Liberatore*, 408 F.3d 1158, 1161 (9th Cir.  
2005).

28 <sup>8</sup> See *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IT IS FURTHER ORDERED that the parties shall meet and confer on a briefing and hearing schedule on any preliminary injunction motion Plaintiffs intend to file and any discovery that might need to be taken. If an agreement on these matters cannot be reached, the parties shall submit a single, joint filing outlining their respective proposals.

**IT IS SO ORDERED.**

Dated: 8/22/2012

  
\_\_\_\_\_  
PAUL S. GREWAL  
United States Magistrate Judge