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3 **UNITED STATES DISTRICT COURT**  
4 **NORTHERN DISTRICT OF CALIFORNIA**  
5 **SAN JOSE DIVISION**

7 TALECE INC.,  
8 Plaintiff,

9 v.

10 ZHENG ZHANG,  
11 Defendant.

Case No. 20-cv-03579-BLF

**ORDER VACATING OCTOBER 15,  
2020 HEARING ON MOTION TO  
REMAND; AND DENYING MOTION  
TO REMAND**

[Re: ECF 17]

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13 Plaintiff Talece Inc. (“Plaintiff”) sued Defendant Zheng Zhang (“Defendant”) for breach of  
14 fiduciary duty, unjust enrichment, conversion, and accounting. See Ex. A, Compl. (“Compl.”),  
15 ECF 1-1. Defendant removed the action from the Santa Clara County Superior Court on diversity  
16 grounds. See Not. of Removal, ECF 1. Plaintiff now moves to remand based on its assertion that  
17 Defendant is in the process of obtaining legal permanent resident status and is domiciled in  
18 California, thereby destroying diversity jurisdiction under 28 U.S.C. § 1332(a)(2). See Mot. 3–7,  
19 ECF 17.

20 The Court finds the motion to be suitable for decision without oral argument. See Civ. L.R.  
21 7-1(b). Accordingly, the hearing on Plaintiff’s motion to remand, currently scheduled for October  
22 15, 2020 at 9:00 a.m., is VACATED. For the reasons discussed below, Plaintiff’s motion to  
23 remand and request for attorney’s fees are DENIED.

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25 **I. BACKGROUND**

26 Plaintiff filed the present action against Defendant, its former CEO, in Santa Clara County  
27 Superior Court on May 18, 2020. See Compl. ¶ 3, 9. Plaintiff accused Defendant of embezzling  
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1 the corporation's capital funds and stealing the corporation's software and codes, among other  
2 allegations. Compl. ¶ 14–19. Plaintiff alleged four separate causes of action for breach of fiduciary  
3 duties, unjust enrichment, conversion, and accounting. Compl. ¶ 21–41. Defendant removed the  
4 action to federal court on the basis of diversity jurisdiction pursuant to 28 U.S.C. §§ 1332, 1441,  
5 and 1446 on May 28, 2020. Not. of Removal 2.

6 Plaintiff now brings a Motion to Remand pursuant to 28 U.S.C. § 1447(c), contending  
7 removal was improper because there is not complete diversity between the parties and therefore a  
8 lack of federal subject matter jurisdiction. Mot. 2–3. Plaintiff is a corporation and citizen of the  
9 State of California. Plaintiff argues that complete diversity is lacking because Defendant, though  
10 now on a H-1B visa status, may soon become a legal permanent resident and is domiciled in  
11 California. Mot. 2.

12 Defendant filed an opposition to Plaintiff's motion to remand. See Opp'n to Mot.  
13 ("Opp'n"), ECF 18. In this opposition, Defendant submitted a Declaration, asserting that he has  
14 been on a temporary worker H-1B visa status since October 2019, never applied for permanent  
15 residence, and does not intend to do so. See Decl. of Zheng Zhang ("Zhang Decl.") ¶¶ 6–8, ECF  
16 18. Plaintiff did not file a reply in support of its motion.

## 17 18 **II. LEGAL STANDARD**

19 Federal courts have limited subject matter jurisdiction and may only hear cases falling  
20 within their jurisdiction. Generally, a defendant may remove a civil action filed in state court if the  
21 action could have been filed originally in federal court. 28 U.S.C. § 1441. The removal statutes are  
22 construed restrictively so as to limit removal jurisdiction. See *Shamrock Oil & Gas Corp. v.*  
23 *Sheets*, 313 U.S. 100, 108-09 (1941), superseded by statute on other grounds as recognized in  
24 *Breuer v. Jim's Concrete, Inc.*, 538 U.S. 691, 697 (2003). The Ninth Circuit recognizes a "strong  
25 presumption against removal." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (internal  
26 quotation marks omitted). Any doubts as to removability should be resolved in favor of remand.  
27 See *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003). The  
28 defendant bears the burden of showing that removal is proper. See *Valdez v. Allstate Ins. Co.*, 372

1 F.3d 1115, 1117 (9th Cir. 2004).

2 If at any time before final judgment it appears that a district court lacks subject matter  
3 jurisdiction over a case that has been removed to federal court, the case must be remanded. 28  
4 U.S.C. § 1447(c). Federal courts have diversity jurisdiction only where there is complete diversity  
5 of citizenship and the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332(a); see *Yokeno v.*  
6 *Sekiguchi*, 754 F.3d 649, 652 (9th Cir. 2014).

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8 **III. DISCUSSION**

9 **A. Complete Diversity Requirement**

10 Complete diversity of citizenship exists between a citizen of State and a citizen of a foreign  
11 state under 28 U.S.C. § 1332(a)(2). See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 580 n.2  
12 (1999). However, complete diversity does not exist between citizens of a State and citizens of a  
13 foreign state who (1) are lawfully admitted for permanent residence in the United States and (2)  
14 are domiciled in the same State. 28 U.S.C. § 1332(a)(2).

15 For purposes of diversity jurisdiction, courts have turned to immigration case law to define  
16 “lawfully admitted for permanent residence” under § 1332(a)(2). See *Foy v. Schantz, Schatzman*  
17 *& Aaronson, P.A.*, 108 F.3d 1347, 1349 (11th Cir. 1997); *Filmkraft Prods. India Pvt, Ltd. v.*  
18 *Spektrum Entm't, Inc.*, No. 2:08-CV-1293 JCM (GWF), 2011 U.S. Dist. LEXIS 38687, \*8 (D.  
19 Nev. Apr. 8, 2011) (“Being ‘lawfully admitted for permanent residence’ [under § 1332(a)(2)]  
20 means the status of having been lawfully accorded the privilege of residing permanently in the  
21 United States as an immigrant in accordance with the immigration laws.”); see also *Walker v.*  
22 *McCarty*, No. EDCV 19-627 JGB (SHKx), 2019 WL 3818218, at \*2 (C.D. Cal. Aug. 14, 2019)  
23 (“Defendant has no legal [immigration] status in the United States. This action thus does not fall  
24 within the exception for permanent residents residing in the same state [under § 1332(a)(2)].”). A  
25 person who has not yet obtained legal permanent resident immigrant status is not deemed  
26 “lawfully admitted for permanent residence.” See *Mor v. Royal Caribbean Cruises Ltd.*, No. 12  
27 Civ. 3845(JGK), 2012 WL 2333730, at \*1 (S.D.N.Y. June 19, 2012) (citing *Kato v. Cty. of*  
28 *Westchester*, 927 F. Supp. 714, 716 (S.D.N.Y. 1996)) (“[A]liens who have been accorded lawful

1 permanent resident status under the immigration laws are considered aliens ‘admitted for  
2 permanent residence,’ while aliens admitted to the United States on temporary nonimmigrant visas  
3 are not.”). Therefore, foreign citizens living in the U.S. on nonimmigrant visas meet the  
4 requirements for diversity jurisdiction. See, e.g., Walker, 2019 WL 3818218, at \*2 (“Because this  
5 action is between a citizen of California and a citizen of a foreign state who is not a lawful  
6 permanent resident, diversity jurisdiction is present.”); Asare-Antwi v. Wells Fargo, No. SACV  
7 19-00887 JVS (KESx), 2019 WL 3073942, at \*3 (C.D. Cal. July 15, 2019) (finding complete  
8 diversity exists because “[a]lthough [British citizen] Plaintiff contends that having a primary U.S.  
9 residence in California makes him a California citizen, absent a showing that he is an LPR, that  
10 argument fails”); De La Cruz v. Virgin Islands Water & Power Auth., No. CIV. 07-CV-09, 2010  
11 WL 1484237, at \*5 (D.V.I. Apr. 12, 2010) (holding that diversity jurisdiction between parties was  
12 satisfied given the Plaintiff’s status as a nonresident alien).

13 The Court understands that the parties do not contest Defendant’s current citizenship and  
14 immigration status. See Mot. 2; Opp’n 2–3. In his Notice of Removal, Defendant claims there is  
15 complete diversity of citizenship under 28 U.S.C. § 1332(a) because Plaintiff is a citizen of the  
16 United States and the State of California and Defendant is a citizen of the People’s Republic of  
17 China. See Not. of Removal 3–4. In its Motion to Remand, Plaintiff argues that there is a lack of  
18 diversity jurisdiction because Defendant—although a citizen of the People’s Republic of China  
19 and currently on H-1B visa status in the United States—is in the process of becoming a legal  
20 permanent resident and is domiciled in California. Mot. 2, 5–6.

21 Defendant has submitted a Declaration stating that he has not applied for legal permanent  
22 residency and does not intend to do so. See Zhang Decl. ¶ 8.<sup>1</sup> Meanwhile, Plaintiff has not  
23 submitted any materials supporting its allegations that Defendant has applied for permanent  
24 residency in the U.S., as stated in its Motion to Remand. See Mot. 2, 5. Nor has Plaintiff submitted  
25 a reply in support of its Motion to Remand. Therefore, Plaintiff’s motion is merely speculative.

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28 <sup>1</sup> Defendant submitted objections to statements in Plaintiff’s motion. Because they exceed the ten-  
page limit in the Court’s Standing Order, see Standing Order Re Civil Cases ¶ IV.A.4, the Court  
strikes these excess pages and declines to rule on the objections.

1 Since Defendant is not a legal permanent resident and is instead a foreign citizen in the United  
 2 States on H-1B visa status, diversity jurisdiction is satisfied under § 1332(a)(2). See Walker, 2019  
 3 WL 3818218, at \*2; Asare-Antwi, 2019 WL 3073942, at \*3; De La Cruz, 2010 WL 1484237, at  
 4 \*5.

5 Even if Defendant filed for legal permanent residence recently, diversity jurisdiction would  
 6 still exist as the court assesses diversity of citizenship at the time an action is filed. Freeport–  
 7 McMoRan, Inc. v. K N Energy, Inc., 498 U.S. 426, 428 (1991); see also De La Cruz, 2010 WL  
 8 1484237, at \*5 (“There was complete diversity between the parties because Plaintiff was a  
 9 nonresident alien at the time that he filed the instant lawsuit.”). Defendant was on H-1B visa status  
 10 at the time of filing suit according to his Declaration. See Zhang Decl. ¶¶ 6–7. Diversity  
 11 jurisdiction exists even if an application for permanent resident status is pending when a suit is  
 12 filed. See Chan v. Mui, No. 92 CIV. 8258 (MBM), 1993 WL 427114, at \*1 (S.D.N.Y. Oct. 20,  
 13 1993) (plaintiff was citizen of Hong Kong for diversity purposes although he lived in Oklahoma  
 14 and his application for permanent resident status was pending when suit was filed).

15 **B. Amount in Controversy Requirement**

16 In addition to the complete diversity requirement, the amount in controversy must also  
 17 exceed \$75,000 for the Court to have jurisdiction under 28 U.S.C. § 1332(a). Here, Plaintiff  
 18 acknowledges that the complaint meets this requirement and alleges over \$75,000 in damages.  
 19 Mot. 3. Accordingly, the Court finds that the amount in controversy requirement is satisfied.

20 **C. Attorney’s Fees under 28 U.S.C. § 1447(c)**

21 Plaintiff argues that this Court should award it costs and actual expenses and attorney’s  
 22 fees for Defendant’s improper removal. Mot. 2. The Supreme Court has held that, “[a]bsent  
 23 unusual circumstances, courts may award attorney’s fees under § 1447(c) only where the  
 24 removing party lacked an objectively reasonable basis for seeking removal.” Martin v. Franklin  
 25 Capital Corp., 546 U.S. 132, 141 (2005). That is, even if a removing party’s arguments are  
 26 determined to be “losers,” they are “not objectively unreasonable solely because [they] lack  
 27 merit.” Lussier v. Dollar Tree Stores, Inc., 518 F.3d 1062, 1065 (9th Cir. 2008).

28 Here, the Court finds that removal was proper, and Plaintiff’s request for attorney’s fees

1 and costs is therefore DENIED.

2 **D. Conclusion**

3 The requirements for diversity jurisdiction under 28 U.S.C. § 1332(a) have been satisfied  
4 by Defendant. Since the Court has established subject matter jurisdiction, the Court does not reach  
5 Defendant's federal question jurisdiction assertions. See Opp'n 7-8.

6 As the Court has concluded that the requirements for diversity jurisdiction are satisfied and  
7 Defendant had an objectively reasonable basis for seeking removal, the Court DENIES Plaintiff's  
8 motion to remand and request for attorney's fees. The Court also DENIES Defendant's request for  
9 attorney's fees as requested at pages 8-9 of the opposition on the basis that the motion to remand  
10 was not frivolous. Merely losing a motion is not sufficient for a fee award, and the Court has not  
11 considered arguments related to conduct outside of the present motion.

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13 **IV. ORDER**

14 For the foregoing reasons, IT IS HEREBY ORDERED that Plaintiff's motion to remand is  
15 DENIED.

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17 Dated: September 8, 2020



18  
19 **BETH LABSON FREEMAN**  
United States District Judge

United States District Court  
Northern District of California

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