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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PROYECTO SAN PABLO, et al., Plaintiffs, v. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, et al., Defendants.	No. 89-00456-TUC-RCC **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL**

In Plaintiffs' Motion To Compel Compliance With Judgment And Order ("Plaintiffs's Motion"), plaintiffs attempt to relitigate issues which they lost after

fourteen years of litigation. They again ask this Court to review defendants' interpretation of the substantive eligibility requirements for legalization under the Immigration Reform And Control Act of 1986 ("IRCA"), Section 245A of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1255a. The Supreme Court and the Ninth Circuit Court of Appeals have repeatedly rejected this claim.

1. This Court is without jurisdiction to consider plaintiffs' substantive challenge to Section 245A(g)(2)(B)(i), or the waiver provision at Section 245a(d)(2). Proyecto San Pablo v. INS, 189 F.3d 1130, 1141 (9th Cir. 1999). The Ninth Circuit specifically held that this Court is "without jurisdiction to review the INS's interpretation of the substantive scope of IRCA waivers." Id. Indeed, the Ninth Circuit did suggest in one decision that this Court's order addressing the substantive eligibility requirement was "eminently reasonable," as plaintiffs quote in their motion. Plaintiffs' Motion, 11. Incredibly, however, plaintiffs omit the remainder of the Ninth Circuit's sentence. The Ninth Circuit actually held, "***Although the district court's interpretation of the statute is eminently reasonable, we must nevertheless reverse for lack of jurisdiction***." Proyecto San Pablo v. INS, 703 F.3d 1279, 1995 WL 688845, *2 (9th Cir. 1995) (unpublished opinion) (emphasis added). That remains the law of this case

2. Plaintiffs ask this Court to grant employment authorization and stays of removal to class members who have received final decisions on their legalization applications, which is another issue that has already been decided in this litigation against plaintiffs. "Congress intended that the automatic stay of deportation and the work authorization last only until the final administrative determination on the application." Proyecto San Pablo v. INS, 189 F.3d at 1143; quoting, Ortiz v. Meissner, 179 F.3d 718 (9th Cir. 1999).

3. Plaintiffs ask the Court to require the government to produce records that do not exist, and to provide interim employment authorization until the non-existent records are produced. This too is an attempt to circumvent the decision of the Ninth Circuit Court of Appeals. Proyecto San Pablo, 189 F.3d at 1143. In any event, as shown in the attached Declaration of Alice L. Wiechert, USCIS has worked diligently to provide plaintiffs their A-Files and the records of their prior deportation proceedings as ordered by this Court, and plaintiffs are provided ample opportunity to update their legalization records and file waiver applications as required by this Court's Order.

ARGUMENT

1. The Legalization Process

The IRCA, in a two-step process colloquially referred to as "legalization," permitted aliens to obtain the immigration status of temporary resident aliens, and, eventually, to qualify to become permanent legal residents of the United States. See 8 U.S.C. § 1255a. Any eligible alien hoping to gain legalization under the terms of the IRCA was required, by statute, to submit an application for legalization on or before May 4, 1988. 8 U.S.C. § 1255a(a)(1)(A). An alien seeking legalization must (1) have applied for legalization during a twelve month period beginning May 5, 1987; (2) have resided unlawfully in the United States continuously since at least January 1, 1982; (3) have been physically present in the United States continuously since November 6, 1986; and (4) have been otherwise admissible as an immigrant. See 8 U.S.C. §§ 1255a(a)(1)-(4).

This lawsuit involved the continuous unlawful residence requirement. Section 245A(g)(2)(B)(i), 8 U.S.C. § 1255a(g)(2)(B)(i), provides that "an alien shall not be considered to have resided continuously in the United States, if, during any period for which continuous residence is required, the alien was outside the United States as a

result of a departure under an order of deportation." The "period for which continuous residence is required" began on January 1, 1982. See 8 U.S.C. § 1255a(a)(2). Another section of IRCA provides that the Attorney General may, in individual cases, waive certain grounds of ineligibility for legalization. Section 245A(d)(2)(B)(i), 8 U.S.C. § 1255a(d)(2)(B)(i), provides; "Except as provided in clause (ii), the Attorney General may waive any other provision of section 1182(a) of this title in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." Plaintiff class members are aliens who applied for legalization and were denied on the basis of alleged prior deportations on or after January 1, 1982, on the basis of Section 245A(g)(2)(B)(i), because they could not establish continuous unlawful residence after January 1, 1982.

An alien applying for legalization had to submit a completed application and fee to an INS Office or to a Qualified Designated Entity.[1] Id. at § 1255a(c)(1); 8 C.F.R. § 245a.2(e). The INS granted employment authorization to an applicant if prima facie eligibility for temporary resident status was established at an interview. Id. at § 245a.2(n)(2). The Legalization Officer who conducted the interview made a recommendation regarding each complete legalization application before forwarding the application to the Regional Processing Facility ("RPF") for a final determination.

When the RPF denied an application for legalization, the applicant received a notice specifying the reasons for denial, and advising that the applicant may appeal a denial of legalization within thirty days of service of the decision to the "Legalization Appeals Unit" ("LAU") of the "Administrative Appeals Unit" ("AAU") (now called the "Administrative Appeals Office" ("AAO")). The LAU's review was based on the record, and on such newly discovered evidence as may not have been available at the time of the RPF's determination. See 8 U.S.C. § 1255a(f)(3)(B). The

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[1]/ A Qualified Designated Entity was a non-governmental organization authorized to assist aliens.

LAU's determination of eligibility was administratively final and might receive judicial review only as part of the judicial review of a separate order of deportation.[2] See id. at § 1255a(f)(4)(A).

2. District Court Jurisdiction Under IRCA

Over the past eighteen years, the courts have consistently agreed that they lack jurisdiction over plaintiffs' substantive challenge to the Government's interpretation of the IRCA eligibility requirements, and the denial of plaintiffs' legalization applications. Plaintiffs must pursue further review of their substantive legalization denials not in the district courts, but in the context of administrative appellate review and, if necessary, judicial review of a final removal order as prescribed in the IRCA. The pertinent review provision of the IRCA provides for a single level of administrative appellate review over legalization denials, INA section 245A(f)(3), 8 U.S.C. § 1255a(f)(3), and further provides that "[t]here shall be judicial review of such a denial ***only*** in the judicial review of an order of deportation under section 1105a of this title (as in effect before October 1, 1996.)" 8 U.S.C. § 1255a(f)(4)(A) (emphasis added).

After the filing of this lawsuit, the Supreme Court decided two legalization cases. The first of these two cases, McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991), established the principle that a district court has jurisdiction to examine

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[2]/ Because of the concern that information provided in connection with a legalization application might be used by the INS to commence deportation proceedings against an applicant, Congress included a confidentiality provision in the IRCA which limits the INS's use of the information. 8 U.S.C. § 1255a(e)(2). Thus, the AAO's final determination does not trigger deportation proceedings against the denied legalization applicant. Rather, the applicant returns to the status he or she had prior to applying for legalization, until the INS apprehends him or her independently and institutes deportation proceedings based upon facts and information gathered independent of the legalization application. See Reno v. Catholic Social Services, 509 U.S. 43, 54-55 (1993) ("an alien whose appeal has been rejected by the Associate Commissioner stands (except for a latent right to judicial review of that rejection) in the same position he did before he applied: he is residing in the United States in an unlawful status, but the Government has not found out about him yet.").

aliens' procedural claims under the IRCA where such claims receive no practical judicial review within the scheme established by the legalization statute.[3] The Supreme Court considered the narrow question of whether a district court had jurisdiction over the aliens' statutory and constitutional claims in spite of the limited judicial review provisions set forth in the IRCA. In its analysis, the Court noted that

> In view of the fact that the courts of appeals constitute the only fora for judicial review of deportation orders, . . . the statute plainly foreclosed any review in the district courts of individual denials of SAW status applications. Moreover, absent initiation of a deportation proceeding against an unsuccessful applicant, judicial review of such individual determinations was completely foreclosed.

498 U.S. at 486. The Court had no quarrel with the IRCA's limited judicial review provision as applied to denials of individual applications, but found that the aliens' claims were properly before the district court because their complaint attacked certain collateral procedures employed in the implementation of the program. Id. at 495. In other words, because the aliens' claims did not seek to establish their actual eligibility for SAW status and because their kinds of claims did not appear in the administrative record and could not be adequately presented for effective judicial review, the Court found that the district court had jurisdiction to hear the aliens' claims. Id. at 493, 495, 496 (commenting, e.g., that even if the aliens prevailed on the merits of the procedural objections, that fact alone would not have the effect of establishing their entitlement to SAW status).

Two years later, the Supreme Court issued its ruling in Reno v. Catholic Social Services, 509 U.S. 43 (1993) ("CSS"). In CSS the Court clarified the McNary exception as applied to cases such as this one. CSS, 509 U.S. at 56-64 (making clear that district courts lack jurisdiction to entertain aliens' lawsuits which challenge the

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[3]/ Although McNary involved the Special Agricultural Workers ("SAW") provisions of the IRCA, the judicial review provision at issue in that case is similar to the legalization provision found at section 245A(f) of the INA, 8 U.S.C. § 1255a(f).

agency's interpretation of the IRCA or its regulations in order to establish the aliens' substantive eligibility for relief). The Court explained that an alien plaintiff's challenge to the regulations becomes ripe once the agency had substantively denied his legalization application on the ground that the challenged regulation rendered him ineligible for legalization. Id. at 60. Once the alien's claim ripens, however, the IRCA's exclusive review provision, 8 U.S.C. § 1255a(f), is triggered, thereby precluding jurisdiction in the district courts. Id. This exclusive judicial review provision confines attacks upon aliens' substantive legalization eligibility to appeals of final deportation orders to the circuit courts. 8 U.S.C. § 1255a(f)(4). Thus, CSS established the principle that the appropriate means of challenging the INS's substantive interpretations of the IRCA and its regulations is not in a district court class action such as this case, but rather through individual appeals from an order of deportation pursued through the IRCA's exclusive administrative and judicial review provisions.

3. Plaintiffs' Waiver Claim is a Substantive Challenge To The INS's Interpretation Of IRCA That Is Outside This Court's Jurisdiction

Section 245a(g)(2)(B)(i) provides that any period the alien was outside the United States as a result of a departure under an order of deportation shall not be considered as continuous residence and thus the alien is not eligible for legalization under IRCA. 8 U.S.C. § 1255a(g)(2)(B)(i). Throughout this litigation, plaintiffs have urged the courts to rule that the waiver available under Section 245A(d)(2) should be interpreted by the Government to waive, not only their inadmissibility under Section 212 for having been previously deported, but also the break in continuous residence caused by their departures while under orders of deportation. Defendants, however, have consistently maintained that the waiver waives only the alien's inadmissibility for having been previously deported; there is no waiver available for the break in

continuous unlawful residence which results from the departure caused by deportation. The law quoted by plaintiffs provides that "the Attorney General may waive any other provision of section 1182(a) of this title in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C. § 1255a(d)(2). The statute does not provide that the agency or the courts may waive the requirements of Section 245A(g)(2)(B)(i).

In 1991, during the initial round of litigation, the district court ruled in favor of plaintiffs and instructed defendants to accept the waivers for the dual purpose urged by plaintiffs. Proyecto San Pablo v. INS, 784 F. Supp. 738, 747-48 (D. Az. 1991) *rev'd and remanded*, Proyecto San Pablo v. INS, 70 F.3d 1279 (9th Cir. 1995) (unpublished opinion).[4] The Ninth Circuit reversed, finding that this Court lacked jurisdiction to compel the INS to change its substantive interpretation of the "caused by" clause of 8 U.S.C. § 1255a(g)(2)(B)(i). Proyecto San Pablo, 70 F.3d 1279, 1995 WL 688845, *3. Thus, the Ninth Circuit held that plaintiffs' waiver challenge is an attack on the substantive interpretation of the IRCA over which the district court has no jurisdiction.

> In this case, neither of these circumstances (presented in CSS) is present in the district court's order regarding the INS interpretation of the "caused by" clause of 8 U.S.C. § 1255a(g)(2)(B)(i) and the district court was, accordingly, without jurisdiction to examine the aliens' claims. As we clearly stated in Naranjo-Aguilera, [v. INS, 30 F.3d 1116 (9th Cir. 1994)] the holding of Catholic Social Services "forecloses aliens from challenging INS regulations or policies interpreting IRCA's substantive eligibility criteria, except on appeal from an order of deportation." Id. at 1113. Thus, the district court lacked jurisdiction over these claims.

Id.

> The aliens in the present action must seek redress through the limited administrative review scheme of the Reform Act and then, if they are ordered deported, they may appeal directly to this Court and challenge the INS's interpretation.

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[4]/ Notably, this District Court decision is the only published Proyecto San Pablo decision cited in Plaintiffs' Motion.

Id.

In that 1995 decision, the Ninth Circuit held that there may be collateral, procedural claims that are within the district court's jurisdiction, and remanded to this Court for consideration of those issues. The Ninth Circuit held that the district court could consider plaintiffs' claims that the INS refused to accept waiver applications for filing, and failed to provide applicants adequate access to their prior deportation records. Id. at 1995 WL 688845,* 4. Because these procedures might preclude an alien from presenting an adequate record in the subsequent appeal of a deportation order, the district court might have jurisdiction over those claims. Id.

On subsequent remand, this Court granted defendants' motion to dismiss and held that it did not have jurisdiction over plaintiffs' claims. See Proyecto San Pablo v. INS, 4 F.Supp.2d 881 (D.Ariz. 1997). The Court rejected plaintiffs' procedural claims and held that plaintiffs had adequate access to their deportation records and the legalization files adequately preserved their waiver argument. Id. This Court's decision was again appealed to the Ninth Circuit, and that court again reversed and remanded. Proyecto San Pablo v. INS, 189 F.3d 1130 (9th Cir. 1999). The Ninth Circuit held in 1999 that plaintiffs' claim that they had inadequate access to their prior deportation files was a ripe procedural claim, and that the Court erred in considering that claim on the merits in consideration of a jurisdictional motion. Proyecto San Pablo, 189 F.3d at 1138. The court also held that plaintiffs' claim that the INS refused to accept their waiver applications was also a ripe procedural claim.

> Plaintiffs' challenge to the INS's refusal to accept waiver applications is clearly procedural: it challenges the INS's practice of refusing to accept waiver applications from certain people attempting to file them. The INS's refusal results in the waiver application not becoming part of the administrative record on appeal. In contesting this practice, Plaintiffs 'do not challenge the INS's interpretation of the substantive eligibility requirements for legalization, nor do they challenge the application of these requirements in any particular case.' Thus, Plaintiffs' claim does not fall within IRCA's exclusive review provisions.

Id. (citation omitted).

The Ninth Circuit again emphasized that "Plaintiffs' challenge to the practice of refusing to accept waiver applications simply does not implicate the INS's interpretation of the IRCA waiver itself." Id.

> This point bears emphasizing. In order to prevail on their claim, Plaintiffs need not show that they are entitled to IRCA waivers. If this were the gravamen of their claim, IRCA's exclusive review scheme would preclude district court jurisdiction.

Id.

Plaintiffs had argued to the Ninth Circuit that if the district court had jurisdiction to consider the agency's refusal to accept the waivers, it can take jurisdiction over the INS's interpretation of the waiver's scope. Id. at 1141. This argument the Ninth Circuit again rejected.[5]

> The INS's interpretation of an IRCA waiver's scope is an interpretation of IRCA's substantive eligibility criteria. Similarly, saying that Plaintiffs are eligible for a waiver curing all bases of their ineligibility for legalization is tantamount to saying that Plaintiffs are eligible for legalization. This the district court cannot do. We hold that the district court is without jurisdiction to review the INS's interpretation of the substantive scope of IRCA waivers. This holding is fully consistent with our holding that the district court does have jurisdiction to hear challenges to the INS's failure to notify Plaintiffs of the availability of IRCA waivers, and its refusal to accept applications for such waivers. The district court can cure flaws in the INS's IRCA-related procedures, but cannot rule on substance.

Id.

The Ninth Circuit went on to hold that the Court erred in dismissing plaintiffs' claim that they are entitled to stays of deportation and employment authorization,

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[5]/ Plaintiffs make the exact same argument they made in 1999 in the present motion when they insist: "The statute contemplates that the Court of Appeals will be able to make a final decision on the merits of the application, and will not have to remand to the agency because of procedural challenges." Plaintiffs' Motion, 9. That argument was rejected by the Ninth Circuit and is also incorrect under fundamental immigration law. If the court of appeals concludes that the agency decision was incorrect, that court must remand to the agency to otherwise consider eligibility in the first instance. See INS v. Ventura, 537 U.S. 12, 16-18 (2002).

pending judicial review of their legalization denials. Id. at 1143. Instead, the Court rejected that claim on the merits based on Ortiz v. Meissner.

> Ortiz held that 'Congress intended that the automatic stay of deportation and the work authorization last only until the final administrative determination on the application.' 179 F.3d at 723. Ortiz's construction of § 1255a(e)(2) controls here. Thus, although the district court was wrong to dismiss these claims for lack of jurisdiction, on remand it should enter judgment against Plaintiffs on the merits.

Id.

4. This Court's 2001 Order Provided Procedural Relief To Plaintiffs

Following the 1999 remand and trial in January 2001, the Court entered its Order presenting findings of fact and conclusions of law. Order, Feb 2, 2001. The Court held that the agency violated the class members' rights to procedural due process when it failed to provide access to their prior deportation files before making a decision on their legalization application. Id. at 7. The Court also held that the agency improperly "front-desked" (or did not accept) plaintiffs' waiver applications, which precluded those waiver applications from being included in the administrative record and available to a court on subsequent review of a final order of deportation. Id.

In the Judgment and Order subsequently issued on March 27, 2001, the Court issued a remedial order to address plaintiffs' claims. Judgment and Order, March 27, 2001. The Court again defined the class, and provided for notice to class members of the Court's order before the agency may take action on the class member's application. Id. at 2. The Court ordered that class members may file motions to reopen their legalization applications, and that they must be provided the records of their prior deportation proceedings. Id. at 4-5. The Order also provided that class members may file applications for waivers with the proper fee, and "such waiver application and supporting documents will be accepted and placed in the applicant's

legalization file and the waiver application shall be adjudicated in the same manner as waiver applications submitted by other legalization applications. See Matter of P-, 19 I&N Dec. 823, 828 (Comm'r 1988) (waivers should be "granted liberally"); Matter of N-, 19 I&N Dec. 760, 762 (Comm'r 1988) ("Congress intended the legalization program to be administered in a liberal and generous fashion.")." Id. at 4.

As shown in the attached Declaration of Alice L. Wiechert, the agency has provided notice of the Court's remedial order to approximately 618 class members. Wiechert, ¶ 3. One hundred and thirty-one motions to reopen have been received and included in class members' legalization files.[6] Id. ¶ 4. One hundred and twelve waiver applications have been received and adjudicated, and those records too are included in class members' legalization files. Id. The NSC has granted 118 motions to reopen, and [has] adjudicated all those reopened. Id. The NSC has adjudicated 110 waivers. Id.

5. Plaintiffs' Motion And Exhibits Present Substantive Challenges To The IRCA Eligibility Requirements And Demonstrate That USCIS Has Complied With The Court's Orders

Plaintiffs' Motion and the "Exhibits" attached to the Motion demonstrate that the agency has provided class members with their prior deportation records, and allowed class members to file waiver applications. The Court ordered defendants to accept, adjudicate, and not "front-desk" the waiver applications. Plaintiffs' argument that the waiver applications actually must be granted is just another in a long line of attempts to challenge the agency's substantive interpretation of the legalization eligibility requirements in this litigation. For example, plaintiffs' argument that putative class member B-F-'s waiver application should be granted, and that the denial

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[6]/ Notice to the class and a description of the Court's Order was subsequently included in a Federal Register notice, Implementation Of Class Action Judgment in Proyecto San Pablo v. INS, 68 Fed. Reg. 4518 (Jan. 29, 2003).

of the waiver application is a violation of the Court's Order, is clearly incorrect. The waiver application has been accepted and adjudicated, and is subject to judicial review upon review of a subsequent final order of removal in a court of appeals. Exhibit 1, see 1-31 – 1-36.[7] Plaintiffs' argument that B-F-'s waiver application should be approved on the merits because the law must be "liberally" construed is clearly outside this Court's jurisdiction. Plaintiffs' Motion, 13.

The class members represented in Exhibits 2, 3, 5, 9, 10, and 11, primarily appear to challenge the merits of their prior deportations in this proceeding. This is an issue for the court of appeals on subsequent review of any final order of removal. Counsel for Class Member Number 3 suggests that due process requires that the legalization application must be granted because there are no tapes or transcripts of the prior deportation proceedings. See 3-3, 3-4. The class members have received what records the government has. Whether the tapes were lost or never existed is a matter that will have to be handled by court of appeals in review of any final removal order. Whether or not the prior deportation was proper is an issue for a court of appeals.

The class members represented in Exhibits 1, 6, 7 and 8, argue that the government's interpretation of the statute is unfair and their waiver applications should be granted for "humanitarian" reasons. These arguments are outside the Court's jurisdiction. It appears that many of the class members who have filed waiver applications have included with their waiver applications the letter from Senators Kennedy and Brownback, which is included as Exhibit 15 to Plaintiffs' Motion. In

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[7]/ The agency decision explains one reason why the law would allow for a waiver on inadmissibility under Section 212, but not provide for a waiver of the continuous residence requirement under Section 245. See 1-36. The agency explained that the Section 212 waiver may apply to a deportation which occurred long ago, before the period in which IRCA requires continuous residence. Id. The law does not provide a waiver for a deportation during the period in which continuous residence is required by IRCA.

that letter the Senators cite to the 1991 decision of this Court which the Ninth Circuit later found to be "eminently reasonable," but outside the Court's jurisdiction. See 15-1. The Senators ask the agency to change its interpretation of the law. However, nothing has changed the Court's jurisdiction, and over this matter it has no jurisdiction.

6. The Court Did Not Order USCIS To Produce Non-Existing Records, Review Deportation Orders, Or To Continue Employment Authorization After A Final Administrative Decision

Plaintiffs' argument that defendants violate the Court's Order when the tapes and transcripts of prior deportation proceedings cannot be produced, and that their waiver applications must be granted on that basis, must also be rejected. See Plaintiffs' Motion, 18. The intent of this Court's Order was to allow class members to have access to their prior deportation records and to allow class members to file waiver applications to make a complete record upon their legalization application. In several cases presented by plaintiffs USCIS has informed the class members that tapes and transcripts do not exist. Plaintiffs' Motion, 18-21. No A-files have been destroyed as plaintiffs suggest. The tapes and transcripts simply do not exist or cannot be located. See Plaintiffs' Exhibit, 3-25. The Court did not order defendants to produce records that do not exist, and to continue stays of deportation and employment authorization until non-existent records are produced.

Plaintiffs may not present a collateral attack to their prior deportation orders in these proceedings. The AAO does not have any authority to review a prior deportation order. See Plaintiffs' Motion, at 19, 20, 21. Review of deportation and removal orders is reserved to the Executive Office of Immigration Review within the Department of Justice, and then to the exclusive jurisdiction of the courts of appeals under Section 242 of the INA, 8 U.S.C. § 1252. Plaintiffs' citation to Matter of Lopez-Estrada, A90-721-003 (BIA 2005) (Plaintiffs' Motion, at 16, Plaintiffs' Exhibit

14), does not suggest that the AAO has jurisdiction to review a prior deportation order. In that decision the Board of Immigration Appeals is properly reviewing a deportation order to determine if an alien is eligible for relief from deportation. The Board held that the alien may be eligible for the new relief, because it held a prior deportation was improper. The AAO may not make that determination. Plaintiffs know that the AAO and the BIA are not the same "agency." See Plaintiffs' Motion, at 16. Whether a class member's prior deportation order was improper is an issue that will have to be handled upon review of any final removal order. The intent of the Court's Order was to allow plaintiffs a procedure to create a record, not to collaterally attack a prior deportation order.

In the 1999 decision the Ninth Circuit rejected plaintiffs' argument that employment authorization and stays of deportation must continue until judicial review of the legalization application is completed. The court ordered that judgment should be entered against plaintiffs on the merits of that claim. Proyecto San Pablo, 189 F.3d at 1143. "Congress intended that the automatic stay of deportation and the work authorization last only until the final administrative determination on the application." Id. citing, Ortiz, 179 F.3d at 723. Plaintiffs' new argument that employment authorization and stays of deportation must be continued until non-existing tapes and transcripts are produced must similarly be rejected. The decisions of the AAO represent the final administrative determination, and employment authorization and stays of deportation must end at that point. That plaintiffs have a latent right to challenge that decision upon judicial review of a final order of deportation has always been in the contemplation of the IRCA.[8] See CSS 509 U.S. at 60. Arguing that

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[8]/ The court of appeals has jurisdiction to consider plaintiffs' argument that a prior deportation was flawed because the tapes or transcripts do not exist upon review of a final order of removal. See U.S. v. Medina, 236 F.3d 1028 (9th Cir. 2001). In that case an alien collaterally attacked his prior deportation when he was indicted for criminal reentry. Id. at 1030. The court held that if the tapes

plaintiffs have a right to employment authorization and stays of deportation until the LAU issues a decision granting the waiver because the tapes or transcripts do not exist, is "tantamount" to saying the plaintiffs are eligible for legalization. This the Court cannot do.[9]

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or transcripts are not available, the alien must still show the deportation proceeding was fundamentally unfair and he was prejudiced. Id. at 1031.

[9]/ Likewise, plaintiffs' argument that the Court should now impose a new "shifting" burden of proof is also misleading. Plaintiffs Motion, 23. The decisions of the district court and the Ninth Circuit cited by plaintiffs were subsequently vacated by the Supreme Court in light of CSS and another legalization decision. See Immigrant Assistant Project v. INS, 717 F.Supp. 1444 (W.D. Wash. 1989), *aff'd in part, rev'd in part*, 976 F.2d 1198 (9th Cir. 1992), *vacated and remanded*, 510 U.S. 107 (1993). This "shifting" burden of proof was not included in this Court's earlier orders, and plaintiffs' attempts to change those orders now must be barred by the doctrine of laches.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion To Compel Compliance must be denied.[10]

Respectfully submitted,

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Dated: April 24, 2006

[10]/ Finally, defendants note that on or about March 11, 1997, the Court directed that motions to exceed the page limit would not be considered.

CERTIFICATE OF SERVICE

I certify that on April 24, 2006, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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