UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 97-0805-CIV-SEITZ/GARBER

CLOSED CIVIL CASE

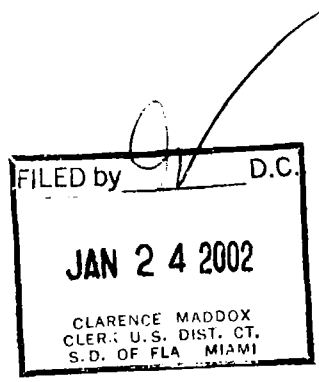
ROBERTO TEFEL, *et al.*,

Plaintiffs,

vs.

JOHN ASHCROFT, Attorney General of the United States, *et al.*,

Defendants.
_____/



ORDER GRANTING DEFENDANTS' MOTION FOR DECERTIFICATION OF CLASS AND MOTION FOR SUMMARY JUDGMENT

This immigration-related class action involving the "stop-time" rule for determining eligibility for suspension of deportation is before the Court on Defendants' Motion for Decertification of Class, Motion to Dismiss Counts III & IV for Lack of Jurisdiction, and Motion for Judgment on the Pleadings or for Summary Judgment [DE-246]. Pursuant to the Eleventh Circuit's remand, directing this Court to reconsider its certification of the class and reexamine whether any of the named Plaintiffs remain appropriate class representatives, the Court finds that because passage of recent immigration legislation afforded relief to all but one of the named Plaintiffs, and because groups within the previously defined class have different and competing claims, the class must be decertified. Moreover, as Plaintiffs' remaining due process and estoppel claims lack merit, Defendants are entitled to summary judgment as to all of Plaintiffs' remaining claims.

I

Factual and Procedural Background

A. The Illegal Immigration Reform and Immigrant Responsibility Act and the Stop-Time Rule

On September 30, 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which amended, in part, the Immigration and Nationality Act ("INA"). Prior

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to the passage of IIRIRA, an alien facing deportation could apply for suspension of deportation under INA §244 if the alien had been physically present in the United States for a continuous period of not less than ten years after becoming deportable or seven years after applying for suspension of deportation.[1] Prior to IIRIRA, time spent in deportation proceedings counted toward the alien's physical presence requirement.

Among its numerous amendments to the INA, IIRIRA repealed the suspension of deportation provision of INA §244 and replaced it with INA §240A which provided for the "cancellation of removal." See IIRIRA §304(a). IIRIRA also created a "stop-time" provision for determining an alien's eligibility for cancellation of removal. See IIRIRA §304(a)(3)(enacting INA §240A(a)). Under the new "stop-time" provision, an alien's period of residence or continuous physical presence in the United States is terminated once the government serves the alien with a notice to appear for removal proceedings or the alien commits a criminal offense under INA §244A(d)(1). See 8 U.S.C. §1229b(d)(1).[2] Shortly after Congress enacted IIRIRA, the Board of Immigration Appeals ("BIA") held, in Matter of N-J-B, Int. Dec. #3415 (BIA 1997), that due to the provision of the transitional rule embodied in §309(c)(5), the new stop-time rule applied retroactively to applications for suspension of deportation filed prior to the passage of IIRIRA.[3] Thus, once the government commences deportation proceedings, an alien's continuous period of presence in the United

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[1] Pursuant to INA §244(a)(2), the Attorney General could order "suspension of deportation" if: (1) deportation was based on certain specified grounds; (2) the alien had been physically present in the United States for a continuous period of not less than ten years after becoming deportable or seven years after applying for suspension of deportation; (3) during that time was a person of good moral character; and (4) in the opinion of the Attorney General, deporting the alien would cause exceptional and extremely unusual hardship to the alien or to the alien's spouse, parent, or child who is a United States citizen. INA §244(a)(2), 8 U.S.C. §1254(a)(2). However, even if an alien established these four factors, the Attorney General retained the discretion whether to grant suspension of deportation. See Gomez-Gomez v. INS, 681 F.2d 1347, 1349 (11th Cir. 1982).

[2] 8 U.S.C. §1229b(d)(1) provides:

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 1229(a) of this title or when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

[3] On July 10, 1997, the Attorney General, Janet Reno, vacated the BIA's decision in Matter of N-J-B and certified the case to herself for review pursuant to 8 C.F.R. §3.1(h)(1)(i).

States ends, even if the alien had applied for suspension of deportation or cancellation of removal prior to IIRIRA's effective date of September 30, 1996.[4]

B. Plaintiffs' Class Action Complaint

On March 28, 1997, Plaintiffs filed a class action Complaint challenging the BIA's interpretation of the retroactive application of the stop-time rule. The asserted class included aliens from various places such as Nicaragua, Cuba, Guatemala, El Salvador, Haiti, Malaysia, Iran, and various Eastern European countries. Although all Plaintiffs had allegedly entered the United States more than seven years earlier, the government subjected them to deportation proceedings before they had acquired seven years of continuous physical presence in the United States. Plaintiffs' Complaint alleged four counts of statutory and constitutional violations arising from the BIA's interpretation of IIRIRA's retroactive stop-time provision. Count I alleged that the BIA's interpretation of IIRIRA §309(c)(5) was arbitrary and capricious in violation of INA and the Administrative Procedures Act ("APA"). Count II alleged that the BIA's interpretation of IIRIRA §309(c)(5) and the stop-time provision violated Plaintiffs' due process and equal protection rights under the Constitution.[5] Count III, an estoppel claim against the government, alleged that the INS unlawfully induced and lured Plaintiffs and members of their class who are Nicaraguan nationals into paying substantial fees on applications for suspension, and then opposed the Nicaraguan Plaintiffs' applications. Finally, Count IV alleged that the individual alien facing deportation in the Matter of N-J-B was denied representation during her deportation hearings, and thus denied due process.[6]

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[4] IIRIRA §309(c)(5) provides:
TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.--Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence of physical presence) shall apply to notices to appear issued before, on, or after the date of enactment of this Act [i.e. September 30, 1996]. IIRIRA § 309(c)(5).

[5] Plaintiffs have voluntarily dismissed all equal protection claims under Count II. (See Tr., Nov. 8, 2001).

[6] Plaintiffs have also voluntarily dismissed Count IV. (See Tr., Nov. 1, 2001).

C. Class Certification and Injunctive Relief

On April 17, 1997, Plaintiffs moved for a temporary restraining order or preliminary injunction prohibiting the BIA from deporting any members of the Plaintiff class. Plaintiffs also sought to enjoin the INS from applying the stop-time rule retroactively. On May 20, 1997, the Honorable James Lawrence King denied the INS's motion to dismiss for lack of jurisdiction, granted "provisional class certification" of Plaintiffs' class, and appointed Ira J. Kurzban as lead class counsel.[7] The Court also granted Plaintiffs' motion for a temporary restraining order enjoining the INS from deporting any members of the Plaintiff class.[8]

D. Subsequent Legal Changes

Following the Court's granting of injunctive relief to Plaintiffs, a number of subsequent legal changes occurred. On July 10, 1997, the Attorney General vacated the BIA's decision in Matter of N-J-B. Moreover, subsequent to the entry of the preliminary injunction, Congress enacted, and the President signed into law the Nicaraguan and Central American Relief Act ("NACARA"). Pub.L. 105-100, 111 Stat. 2160 (1997). Section 203(a)(1) of NACARA amended IIRIRA §309(c)(5), changing the language "notices to appear" to "orders to show cause" which initiated deportation proceedings prior to IIRIRA.[9] In essence, NACARA clarified that "the stop-time provision applies to aliens who were facing deportation and/or had applied for suspension of deportation before IIRIRA's enactment, because it precludes any argument that

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[7] The Court identified the class as follows:
All individuals within the states of Georgia, Alabama and Florida who have been or will be denied suspension of deportation as a result of the BIA's decision to apply the transitional rule of §309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) retroactively to persons who have sought or are seeking suspension of deportation.

[8] The Court determined that Plaintiffs established a substantial likelihood of success on their claim that the BIA misinterpreted §309(c)(5) in Matter of N-J-B, and that the stop-time rule did not apply retroactively. The Court also found a likelihood of success on Plaintiffs' due process, equal protection, and estoppel claims. In addition, the Court found that Plaintiffs established the other factors required for preliminary injunctive relief. See Tefel v. Reno, 972 F. Supp. 623 (S.D. Fla. 1997).

[9] Section 203(f) of NACARA also specified that the NACARA amendments are effective as of IIRIRA's original enactment date.

the reference to 'notices to appear' suggested that Congress intended the stop-time rule to apply only to post-IIRIRA removal proceedings, which are initiated with 'notices to appear.'" Tefel v. Reno, 180 F.3d 1286, 1293 (11th Cir. 1999).

In light of NACARA's amendments to the IIRIRA, on December 22, 1997, the INS moved to dissolve the preliminary injunction and moved for summary judgment on all of Plaintiffs' claims. On February 10, 1998, the Court denied INS's motions. The Court agreed that Plaintiffs could no longer demonstrate a likelihood of success on their claim that the BIA incorrectly interpreted §309(c)(5). However, the Court reaffirmed its previous conclusion that Plaintiffs established a likelihood of success on the merits of their due process, equal protection, and estoppel claims. Although the Court acknowledged that NACARA afforded aliens from Nicaragua, Cuba, Guatemala, El Salvador, and Eastern Europe the opportunity to apply for relief, the Court noted that some unidentified class members might not qualify for relief under NACARA. The INS appealed.

E. Appeal to the Eleventh Circuit

On appeal, the Eleventh Circuit held that due to the passage of NACARA and other developments during the appeal, only two named Plaintiffs were facing "the same legal and factual situation that they faced when the district court entered its injunction in this case."[10] Tefel v. Reno, 180 F.3d 1286, 1295 (11th Cir. 1999). The Eleventh Circuit also addressed the merits of the district court's preliminary injunction. First, the Eleventh Circuit held that the district court erred in finding that Plaintiffs established a substantial likelihood of success on the merits of their constitutional equal protection and due process claims. See id. at 1298-1302. Second, the Eleventh Circuit held that the district court erred in finding that Plaintiffs established a likelihood of success on the merits of their estoppel claim. See id. at 1302-04. Moreover, the Eleventh Circuit questioned the status of Plaintiffs' class and noted that "significant issues do exist regarding

[10] As of today's date, only one named Plaintiff remains. See discussion infra Section I.F.1.

the scope and propriety of the class as certified by the district court."[11] Id. at 1304. Consequently, on July 14, 1999, the Eleventh Circuit vacated the district court's preliminary injunction and remanded this case for further proceedings.[12] See id. at 1305.

On remand, the Eleventh Circuit directed that "before any further proceedings are conducted relating to the merits of Plaintiffs' claims, the district court [must] reconsider its certification of the class and reexamine whether any of the named Plaintiffs remain appropriate class representatives. Any final determinations on the merits of this case cannot be made until Plaintiffs and their respective claims are accurately identified and defined." Id. at 1305. On December 1, 1999, Defendants moved to decertify the class, to dismiss counts III & IV for lack of jurisdiction, and for judgment on the pleadings or for summary judgment.

F. More Recent Developments

1. Remaining Named Plaintiffs

As of the date of this Order, the only remaining named Plaintiff in this action who has not been afforded complete relief is Subalecthumy Vengadasalam ("Vengadasalam"), a native and citizen of Malaysia who entered the United States on or about April 3, 1989. The INS served Vengadasalam with an Order to Show Cause and a Notice of Hearing on February 4, 1993 before she acquired seven years of continuous physical presence in the United States. On November 8, 1996, after she had accrued seven continuous years of physical presence in the United States, the Immigration Judge granted her suspension of deportation on the grounds that her removal from the United States would cause her extreme hardship. However, on October 12, 2001, pursuant to an appeal by the INS, the BIA reversed the Immigration Judge's grant of suspension of deportation, finding that due to the retroactive application of the stop-time rule, Vengadasalam

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[11] The Eleventh Circuit observed that the class appears to be overly broad, does not appear to satisfy the commonality requirement of Rule 23(a)(2), and includes groups of aliens whose deportation proceedings are governed by entirely different statutory provisions. See id. at 1304-05.

[12] This case was originally assigned to the Honorable James Lawrence King. On November 11, 1998, the case was reassigned to the undersigned District Judge.

had not accrued seven years of physical presence at the time the INS served her with an order to show cause, and is thus statutorily ineligible for suspension of deportation. By Order of the BIA, Vengadasalam had thirty (30) days from October 12, 2001 to voluntarily depart from the United States. On November 13, 2001, Vengadasalam filed, *pro se*, a petition for review of the BIA's October 12, 2001 Order with the Eleventh Circuit.[13] Vengadasalam's appeal is currently pending in the Eleventh Circuit.

2. Remaining Class Members

When Plaintiffs moved for class certification in May of 1997, Plaintiffs' documentary evidence indicated that there were hundreds of thousands of persons nationwide who would be adversely affected by INS's retroactive application of the stop-time rule. Plaintiffs presented evidence that between 130,000 and 320,000 Nicaraguans, and approximately 150,000 Salvadorans, would be adversely affected by the stop-time rule's retroactive application. (See Pl.'s Submission Pursuant to Nov. 9, 2001 Order, Exhs. F & G). Additionally, Plaintiffs presented evidence that INS determined that there were 33,914 Nicaraguans in deportation or exclusion proceedings, and that approximately 10,000 within the Miami District would become eligible for suspension of deportation under the traditional standards. (See id., Exh. H). In addition, Plaintiffs submitted evidence demonstrating that hundreds of individuals had been denied suspension of deportation by the BIA following INS' retroactive application of the stop-time provision under Matter of N-J-B. (See id., Exh. I).

Today, however, the facts have changed dramatically, as most of the individual class members within the class certified by Judge King on May 20, 1997 have been afforded relief under NACARA and the Haitian Refugee Immigration Fairness Act ("HRIFA"). Pursuant to the November 8, 2001 status conference and this Court's November 9, 2001 Order, Defendants submitted a detailed statistical analysis of the following two categories of class members, concluding that: (1) approximately sixty-six (66) aliens within the states of Florida, Georgia, and Alabama who were eligible to apply for suspension of deportation and had applications

[13] That petition for review is docketed as Case No. 01-16384D.

for suspension of deportation pending on September 30, 1996, were subsequently denied suspension of deportation solely based on the "stop-time" rule effected by IIRIRA § 309(c)(5)(A), and were not eligible for relief under NACARA and HRIFA; and (2) approximately seven (7) to nine (9) Nicaraguan aliens within the states of Florida, Georgia, and Alabama who were eligible to apply for suspension of deportation and had applications for suspension of deportation pending on September 30, 1996, were subsequently denied suspension of deportation solely based on the stop-time rule effected by IIRIRA § 309(c)(5)(A), and have not received relief under NACARA. (See Def.'s Submission of Statistical Analyses Pursuant to Court's Nov. 9, 2001 Order). It is in light of these changed circumstances that the Court must consider Defendants' motion for class decertification, motion to dismiss, and motion for summary judgment.

II

Discussion

A. Class Decertification

In order to bring a class action, the plaintiff class must establish that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. See Fed. R. Civ. P. 23(a). Based upon the changed factual circumstances in this case, the Court agrees with Defendants that the class should be decertified, as it fails to satisfy the commonality and typicality requirements for the following reasons: (1) the class as defined is overly broad; (2) Nicaraguan class members have claims different from other class members; (3) Salvadoran, Guatemalan, Eastern European, and Haitian nationals have claims different from one another and the rest of the class based on different relief available to them; and (4) the only remaining named Plaintiff and class representative, Vengadasalam, is inadequate to represent the interests of all class members.

1. The Defined Class is Overly Broad

The Honorable James Lawrence King previously granted Plaintiffs class action status and identified

the class as follows:

> *All individuals* within the states of Georgia, Alabama, and Florida *who have been or will be denied* suspension of deportation as a result of the BIA's decision to apply the transitional rule of §309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) retroactively to persons who have sought or are seeking suspension of deportation.
> Tefel, 180 F.3d at 1291 (emphasis added).

As the Eleventh Circuit cautioned, however, "[a]s defined, the class includes aliens who had applied for but been denied suspension of deportation and aliens who have never applied for suspension." Id. at 1304. Thus, because the defined class includes aliens without claims that are ripe for resolution, the inclusion of such aliens in the class is improper. See id. at 1304-05 (citing Reno v. Catholic Social Servs, Inc., 509 U.S. 43, 58-59 (1993) (holding that aliens' claims challenging the INS' regulations interpreting the "continuous physical presence" requirement for legalization under the Immigration Reform and Control Act of 1986 are not ripe until the aliens seek and are denied legalization)).[14]

2. Groups Within the Plaintiff Class Have Different and Competing Claims

As the Eleventh Circuit correctly observed, "the class does not appear to satisfy the commonality requirement of Rule 23(a)(2)." Id. 180 F.3d at 1305. The class as defined includes groups of aliens whose deportation proceedings are governed by entirely different statutory provisions. See id. For example, NACARA places the Nicaraguan plaintiffs in a legal position that differs greatly from the non-Nicaraguan plaintiffs, and essentially divides the Plaintiff class into four separate categories of aliens: (1) Nicaraguan and Cuban aliens who are eligible for relief under NACARA §202;[15] (2) Salvadoran, Guatemalan, and East

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[14] Plaintiffs rely upon Kilgo v. Bowman Transport, Inc., 789 F.2d 859, 878 (11th Cir. 1986), a sex discrimination case, for the proposition that future Plaintiffs can be added once their claims are ripe. However, Kilgo did not decide the issue of whether a class definition is proper even if it includes members whose claims are not yet ripe. Rather, Kilgo merely held that the district court did not abuse its discretion by finding that the plaintiffs had met their numerosity requirement. See Kilgo, 789 F.2d at 878.

[15] Under NACARA, Nicaraguan and Cuban nationals are eligible for adjustment of status if they have been present in the United States since December 1, 1995, and apply for such adjustment before April 1, 2000. NACARA §202(b).

European aliens who are exempt from the stop-time rule under IIRIRA §309(c)(5)[16]; (3) Haitian aliens who are eligible for adjustment under HRIFA[17]; and (4) aliens who are not eligible for any of the foregoing relief provisions. Moreover, the estoppel claim in Count III, which deals solely with Nicaraguan plaintiffs, creates a sub-group of plaintiffs whose claims differ from those of the non-Nicaraguan plaintiffs.[18]

3. Vengadasalam is an Inadequate Class Representative

To this date, all but one of the originally named Plaintiffs have received relief. Moreover, the only remaining named Plaintiff, Vengadasalam, is inadequate to represent the remaining issues in the case. See Lewis v. Casey, 518 U.S. 343, 357-58 (1996) (holding that named plaintiffs who represent a class must allege and show personal injury). As a Malaysian, Vengadasalam is an inadequate representative for any Nicaraguans, Cubans, Salvadorans, Guatemalans, Eastern Europeans, or Haitians who are eligible for alternative forms of relief. Moreover, Vengadasalam cannot prosecute the estoppel claim in Count III raised on behalf of Nicaraguan Plaintiffs and class members who are Nicaraguan nationals.

Plaintiffs argue that even if Vengadasalam is an inadequate representative, the Court should permit Plaintiffs to substitute a new class representative. See Sosna v. Iowa, 419 U.S. 393, 401 (1975) (holding that the mootness of a particular class representative's claim does not moot the entire action where the class has been previously certified). However, Sosna is inapplicable in this case, as Plaintiffs' remaining claims are without legal merit, and therefore the substitution of a new class representative would be futile. Additionally, even though Plaintiffs' claims are foreclosed under Eleventh Circuit precedent, the Court should decertify the class so as to ensure that parties who fall within the previously defined class are not

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[16] NACARA §203 provides to certain Salvadorans, Guatemalans, and Eastern Europeans an exception to the stop-time provision of IIRIRA §309(c)(5).

[17] HRIFA §902(a)(1) provides that aliens described in HRFA §902(b) may adjust their status to that of a lawful permanent resident provided that: (1) they apply for such adjustment before April 1, 2000; and (2) they are otherwise admissible to the United States, with certain exceptions.

[18] Plaintiffs contend that at the time they filed the Complaint, and until NACARA and HRIFA, all plaintiffs were equally barred from applying for a previously available form of relief. However, Plaintiffs concede that "Congress' *post hoc* creation of alternative immigration options to certain national groups in the class did solve many class members problems." (Pl.'s Opposition at 8).

forever bound by the Court's disposition of the claims in this case.

B. Plaintiffs' Remaining Claims in Counts I, II & III

1. Standard of Review

Summary judgment is appropriate when "the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Once the moving party demonstrates the absence of a genuine issue of material fact, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Applying this standard, the Court must view the record and all factual inferences therefrom in the light most favorable to the non-moving party and decide whether "'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997) (quoting Anderson, 477 U.S. at 251-52).

2. Count I- Violations of the INA and APA

In Count I, Plaintiffs allege that the Defendants have arbitrarily and capriciously interpreted section 309(c)(5) of IIRIRA as applying to Plaintiffs, and such conduct violates the INA and the APA. However, this claim lacks merit, as Congress clarified, with the passage of NACARA, that the stop-time provision under section 309(c)(5) was intended to have retroactive effect. [19] Moreover, the Eleventh Circuit has

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[19] In Tefel, the Eleventh Circuit held that the enactment of NACARA clarified §309(c)(5):

> First, NACARA §203(a)(1) amends IIRIRA §309(c)(5) and changes the language "notices to appear" to "orders to show cause." In addition, NACARA §203(f) specifies that the amendments made by NACARA §203 are effective as if originally enacted with IIRIRA. Thus, NACARA, by expressly referring to "orders to show cause," which initiated deportation proceedings prior to IIRIRA, resolves any potential linguistic ambiguity in IIRIRA §309(a)(c) with respect to the applicability of the stop-time provision of INA §240A(d). With this amendment, NACARA clarifies that the stop-time provision applies to aliens who were facing deportation and/or had applied for suspension of deportation before IIRIRA's enactment, because it precludes any argument that the reference to "notices to appear" suggested that Congress intended the stop-time rule to apply only to post-IIRIRA removal proceedings, which are initiated with "notices to appear." Tefel, 180 F.3d at 1293.

reaffirmed Tefel, holding in Al Najjar v. Ashcroft, 257 F.3d 1262 (11th Cir. 2001) that an alien's physical presence clock stops upon being served with an order to show cause, even if the order to show cause was served before the enactment of IIRIRA. Tacitly conceding this legal reality, Plaintiffs have not responded to or challenged Defendants' motion for summary judgment as to Count I. Therefore, Defendants are entitled to summary judgment as to Count I.

3. Count II- Due Process

Plaintiffs contend in Count II that Defendants' interpretation of section 309(c)(5) of IIRIRA is "contrary to, inconsistent with and violates the Immigration and Nationality Act, the IIRIRA, and the due process clause of the Fifth Amendment. . . ." However, the Eleventh Circuit in Tefel rejected Plaintiff's contention and found that Plaintiffs have not established a likelihood of success on the merits of their due process claim. 180 F.3d at 1301. First, the Eleventh Circuit held that "the failure to receive discretionary relief in the immigration context does not deprive an alien of a constitutionally protected liberty interest." 180 F.3d at 1300. Thus, Plaintiffs have no constitutionally protected interest in their expectancy of receiving suspension, and enjoy no liberty or property interest in being eligible to be considered for suspension. See id. at 1301. Second, the Eleventh Circuit rejected Plaintiffs' argument that the stop-time rule violates the general presumption against retroactive statutory provisions, and held that NACARA §203(a)(1) clearly mandates the retroactive application of the stop-time rule. See id. at 1302. Therefore, because Congress expressly provided for the retroactive application of the stop-time rule, Plaintiffs have suffered no due process violation.

Plaintiffs argue that the Supreme Court's decision in INS v. St. Cyr, 121 S. Ct. 2271 (2001), revives Plaintiffs' due process claims. However, St.Cyr is distinguishable from Tefel, as it applies to a different section of IIRIRA. The critical issue before the Court in St. Cyr was whether the language in IIRIRA clearly and specifically required the retroactive application of IIRIRA to repeal INA §212. The Court held that nothing in IIRIRA "unmistakably indicat[ed] that Congress considered the question whether to apply its repeal of §212(c) retroactively to such aliens [as St. Cyr.]" St. Cyr, 121 S. Ct. at 2293.

conclude that the government's actions and subsequent litigation position were reasonable." See Dec. 14, 1999 Order. Because Plaintiffs have not established that the Eleventh Circuit's opinion is not based on law or fact, this Court reaffirms Magistrate Judge Garber's December 14, 1999 Order and denies Plaintiffs' renewed motion for costs, fees and other expenses.

Conclusion

Based upon the foregoing reasons, it is hereby

ORDERED that:

(1) Defendants' Motion for Decertification of Class [DE-246] is GRANTED, and the previously certified class in this action is decertified;

(2) Defendants' Motion for Judgment on the Pleadings or for Summary Judgment [DE-246] is GRANTED. Summary judgment is granted in favor of Defendants as to Counts I, II & III;

(3) Defendants' Motion to Dismiss Counts III & IV for Lack of Jurisdiction [DE-246] is DENIED as MOOT;

(4) Plaintiffs's claims in Count IV, and Plaintiffs' equal protection claims in Count II are DISMISSED WITH PREJUDICE;

(5) All pending motions not otherwise ruled upon are DENIED as MOOT, and this case is CLOSED.

DONE and ORDERED in Miami, Florida, this 24th day of January, 2002.

PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

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