District Judge Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KICHUL LEE; NAGHAM ALMENAR; SAM TA; ASHWIN PRASAD; MOHAMMED AL AMIRI; ABDUL AL-TAMIMI; and HALIMA AL-MAMAR,

Plaintiffs,

v.

JOHN ASHCROFT, Attorney General of the United States; TOM RIDGE, Secretary of the Department of Homeland Security; and ROBERT J. OKIN, Interim District Director of United States Citizenship and Immigration Services, Department of Homeland Security,

Defendants.

No. C04-0449L

PLAINTIFFS' MOTION TO CERTIFY CLASS

NOTED FOR CONSIDERATION ON:

June 4, 2004

Plaintiffs move this Court to certify a class as follows:

> All persons who are statutorily eligible to naturalize and who have applied or will apply for naturalization in the jurisdiction of the Seattle District Office, and who have been or may be denied on or after May 4, 1998 on the basis of a lack of good moral character, or whose application remains pending for more than 120 days after the initial examination.

The definition describes a Washington class of naturalization applicants or future applicants who are subjected to unwarranted delays, improper denials, and insufficient notices and procedures concerning their rights under the naturalization laws. It is these class members who have had or will have the challenged procedures applied to their applications.

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I. INTRODUCTION

Plaintiffs challenge the policies and procedures used by the United States Citizenship and Immigration Services ("USCIS") to adjudicate applications for naturalization, and for determining whether naturalization applicants have good moral character. Plaintiffs maintain that the agency improperly and unlawfully denies applicants for lack of good moral character, fails to inform applicants of the legally correct "good moral character" standard, fails to apply the legally correct standard, fails to inform applicants of the need to submit character reference documentation, and fails to consider such documentation when submitted. The agency without good cause fails to timely adjudicate applications, often taking in excess of the 120 days prescribed by the law, and fails to notify applicants at interview of their right to take their application to federal court for adjudication after 120 days. These practices interfere with the applicants' statutory and constitutional rights to citizenship and to due process in these determinations. These practices also interfere with applicants' right to administrative and judicial review, by the lack of fair notice, and the failure to create an adequate record for administrative review

The courts have repeatedly certified classes consisting of those persons subject to immigration service practices or policies challenged as unlawful,[1] including practices and policies under the citizenship laws,[2] and the IRCA legalization programs.[3]

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[1] ***See, e.g., National Center for Immigrants' Rights, Inc. v. INS***, Civ. No. 83-7927-KN (C.D. Cal.) (order issued July 9, 1985, certifying a nationwide class of all persons subject to an INS regulation under challenge); ***Illinois Migrant Council v. Pilliod***, 540 F.2d 1062, 1072 (7th Cir. 1976), ***modified***, 548 F.2d 715 (7th Cir. 1977); ***Flores v. Meese***, No. 85-4544RJK (C.D. Cal., August 11, 1988) (class of children in INS Western Region); ***Haitian Refugee Center v. Smith***, 676 F.2d 1023, 1026 n.1, 1033 (class of Haitian political asylum applicants denied by the INS District in Miami, Florida); ***Orantes Hernandez v. Smith***, 541 F. Supp. 351, 371 (C.D. Cal., 1982).

[2] ***Gorbach v. Reno***, 219 F.3d 1087 (9th Cir. 2000)

[3] ***LULAC v. INS***, No. 87-4757-WDK (C.D. Cal., July 15, 1988) (class of persons eligible for legalization who, in reliance on INS, failed to file application by deadline), *aff'd sub nom.* ***Catholic Soc. Servs., Inc. v. Thornburgh***, 956 F.2d 914 (9th Cir.1992), *vacated sub nom. on other grounds,* ***Reno v. Catholic Soc. Servs., Inc.***, 509 U.S. 43 (1993); ***Zambrano et al. v. INS***, No. S-88-455-EJG (E.D. Cal., August 9, 1988) (class of aliens who were discouraged from filing or denied legalization because of INS regulations on "publi charge"), *aff'd* 972 F.2d 1122 (9th Cir. 1992), *vacated on other grounds*, 509 U.S. 918 (1993); ***Haitian Refugee Center v. Nelson***, 694 F.Supp. 864 (S.D. Fla. 1988) (class of farmworker legalization applicants denied due process as a result of several INS procedures), *aff'd* 872 F.2d 1555 (11th Cir. 1989), *aff'd sub nom.* ***McNary v. Haitian Refugee Center, Inc.***, 498 U.S. 479 (1991).

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II. THIS ACTION SATISFIES THE REQUIREMENTS OF RULE 23(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

In order to be certified for class treatment, an action must be shown to satisfy the four requirements of Rule 23(a) of the Federal Rules of Civil Procedure. ***Morgan v. Laborers Pension Trust Fund, etc.***, 81 F.R.D. 669, 675 (N.D. Cal. 1979). The instant case meets these criteria.

A. Numerosity and Impracticability of Joinder

Rule 23(a)(1) requires that the class be "so numerous that joinder is impractical." The proposed class in this action consists of all persons to whom the agency has applied or will apply its challenged practices. Defendants' policies affect thousands of individuals. Compl. ¶ 14.

1. Numerosity

Courts generally find the numerosity requirement of Rule 23(a)(1) satisfied even when relatively few class members are involved. ***See, e.g., Jordan v. County of Los Angeles,*** 669 F.2d 1311, 1319 (9th Cir. 1982); ***Carey v. Greyhound Bus Co***., 500 F.2d 1372, 1381 (5th Cir. 1974) (number of class members assumed to be 28); ***Arkansas Education Ass'n v. Board of Education***, 446 F.2d 763, 765-66 (8th Cir. 1971) (class membership of 20 persons). ***See generally*** 3B Moore's Federal Practice 23.05[1] at 23-154 to 23-155 (1978).

It is not necessary to establish the exact size of the class in order to satisfy Rule 23(a)(1), especially when plaintiffs are unable to identify the names of class members with reasonable diligence. ***In re Financial Securities Litigation***, 69 F.R.D. 24, 34 (S.D. Cal. 1975); 7 Wright & Miller, ***Federal Practice and Procedure,*** Civil section 1762. Here defendants are knowledgeable as to the actual numbers of class members of naturalization applicants who have been denied for good moral character reasons, as well as the number of applications that are pending for over 120 days after interview. The District reported in October and December that there were over 300 applicants delayed awaiting name checks. Additionally, over the past six years there have been many naturalization applications that have been denied for lack of good moral character. On information and belief, counsel believes it to be well in excess of several thousand class members. "Where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied."

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Orantes-Hernandez v. Smith, 541 F. Supp. 351, 371 (C.D. Cal. 1982).

2. Impracticability of Joinder

A number of factors, other than class size, may be considered in determining whether joinder would be impracticable, including the geographical diversity of class members, the ability of plaintiffs to identify individual class members, the ability of individual claimants to institute separate suits, and the type of review sought.[4] Each of these factors shows the impracticability of joinder in the present case.

a. The plaintiff class is geographically dispersed.

The geographical location of class members in this case makes joinder impracticable.[5] The class definition includes all naturalization applicants under the jurisdiction of the Seattle District, which includes all of Washington State. Thus, some class members reside in Eastern Washington. Joinder of all class members would be impractical.

b. Members of the proposed class are not specifically identifiable

The fact that members of the proposed class are not specifically identifiable further supports certification of this class, since "joinder of unknown individuals is certainly impracticable."[6] ***In this case, the identities of the proposed class members are currently unknown to Plaintiffs counsel by reason of the privacy protections of federal law.*** Plaintiffs do not have access to a published list of potential class members, e.g. a customer or shareholders list.

c. Members of the proposed class are unable to initiate individual action

The ability of individual class members to institute separate suits is also an important factor

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[4] A trial court "should not be so rigid as to depend upon mere numbers as a guideline on the practicability of joinder; a determination of practicability should depend upon all the circumstances surrounding a case." ***Demarco v. Edens***, 390 F.2d 836, 845 (2d Cir. 1968). Thus, other factors may make joinder impractical for the purpose of satisfying Rule 23(a)(1), even when the proposed class is relatively small in size. ***See, Jordan***, 669 F.2d at 1319-20.

[5] ***See Zeidman v. J. Ray McDermott & Co., Inc.***, 651 F.2d 1030, 1038 (5th Cir. 1981); ***see also Newberg on Class Actions*** 2d at § 3.06; ***Council of the Blind v. Regan***, 709 F.2d 1521, 1543-4, n.48 (D.C. Cir. 1983) (Robinson, C.J., dissenting on other grounds).

[6] ***Jack v. American Linen Supply Co***., 498 F.2d 122, 124 (5th Cir. 1974).

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in determining impracticability of joinder.[7] The proposed class members of this lawsuit, by reason of financial ability, poverty, fear of challenging the government, or lack of understanding that a cause of action exists, are unable to pursue their claims individually. Many of the class members were not educated in the United States and have no experience in using the courts to vindicate rights. Most do not have the financial ability to afford assistance from an attorney. These reasons all show the importance of maintaining the present suit as a class action in order to ensure that such individuals obtain a fair adjudication of their rights.[8]

d. When the relief sought is injunctive and declaratory in nature, plaintiffs are held to a less strict standard

When plaintiffs seek injunctive or declaratory relief, rather than damages, the requirements of Rule 23 are less strictly applied.[9] In particular, the numerosity requirement of Rule 23, is liberally construed such that smaller classes are less objectionable.[10] Furthermore, the burden on plaintiffs to identify the class members represented is substantially reduced.[11] Plaintiffs here challenge INS regulations, policies and practices, and plaintiffs seek declaratory and injunctive relief on behalf of members of the proposed class. Because plaintiffs have effectively satisfied the (stricter) numerosity requirement of Rule 23(a)(1), ***a fortiori***, they meet the requirements of the rule when liberally construed.

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7 ***Paxton v. Union Nat'l Bank***, 688 F.2d 552, 559 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); ***see also Council of the Blind v. Regan***, 709 F.2d 1521, 1543-4, n. 48 (D.C.Cir. 1983) (Robinson, C. J. dissenting on other grounds) (practicability of joinder includes consideration of ability of individual claimant institute separate suits).

8 ***See Morgan v. Sielaff***, 546 F.2d 218, 222 (7th Cir. 1976) ("Only a representative proceeding avoids a multiplicity of lawsuits and guarantees a hearing for individuals, such as many of the class members here, wh by reason of ignorance, poverty, illness or lack of counsel may not have been in a position to seek one on the own behalf.").

9 ***Horn v. Ass'n of Wholesale Groceries***, 555 F.2d 270, 275 (10th Cir. 1977).

10 ***Jones v. Diamond***, 519 F.2d 1090, 1100 (5th Cir. 1975).

11 ***See Charleston Area Medical Center, Inc***., 529 F.2d at 645 ("where the only relief sought for the class is injunctive and declaratory in nature . . . even 'speculative and conclusory representations' as to the size of t class suffice as to the requirement of many" (quoting ***Doe v. Flowers***, 364 F.Supp. 953, 954 (N.D.W.Va. 1973), *aff'd. mem.*, 416 U.S. 922 (1974)).

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B. Common Questions of Law or Fact

Rule 23(a)(2) requires that there be "questions of law *or* fact common to the class." ***Rodriquez v. Swank***, 318 F. Supp. 289, 293-4 (N.D. Ill. 1970), ***aff'd*** 403 U.S. 901 (1971) (common legal question satisfies Rule 23[a][2]); ***see also Ali v. Ashcroft***, 213 F.R.D. 390, 409 (W.D. Wash. 2003), ***aff'd*** 346 F.3d 873 (9th Cir. 2003). In the instant case *both* questions of law and fact are common to the claims of the proposed class members and the named plaintiffs. Factual differences between cases are insufficient to prevent proof of this element. ***Gorbach v. Reno***, 145 F.3d 1032, 1045-46 (9th Cir. 1998); ***Ali***, 213 F.R.D. at 409.

Issues of fact common to the class include whether defendants have failed to inform class members of their right to file a federal court action to obtain their citizenship, failed to promptly adjudicate applications after an interview which demonstrates that the applicant meets all eligibility requirements, failed to request positive character evidence in conjunction with negative character evidence, failed to consider positive evidence, failed to notify the applicant of all the facts and reasons for denial of their applications, and failed to properly apply the "good moral character" standard by requiring perfect moral character.

Common questions of law presented in this proposed class action include whether defendants' challenged policies and regulations violate the Immigration and Nationality Act as amended by IRCA and the equal protection guarantee and due process clause of the Fifth Amendment to the United States Constitution.

A lawsuit challenging a pattern and practice of allegedly illegal conduct presents common question of law and fact. ***See e.g. LaDuke v. Nelson***, 762, F.2d 1318, 1332 (9th Cir. 1985); ***Illinois Migrant Council v. Pilliod***, 540 F.2d at 1066-67, 1072; ***Medrano v. Allee***, 347 F.Supp. 605, 610 (S.D. Tex. 1972), ***modified***, 416 U.S. 802 (1974). Even where there are individual variations in the facts or legal issues as they relate to a particular named plaintiff or proposed class member, the commonality requirement is satisfied so long as the class shares some common question of law or fact. ***See, e.g., Eisen v. Carlisle and Jacqueline***, 391 F.2d 555, 562 (2d Cir. 1968).

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C. Typicality of Claims

Rule 23(a)(3) requires that the claims of the named plaintiffs be "typical of the claims . . . of the class." Meeting this requirement usually follows from the presence of common questions of law or fact. Thus, courts have construed subdivisions (a)(2) and (a)(3) to be largely duplicative. ***See*** 3B Moore's Federal Practice 23.06-2, at 23-325.[12]

In ***Gonzalez v. Cassidy***, 474 F.2d 67, 71 n. 7 (5th Cir. 1973), the court found the named plaintiff to have claims typical of the class within the meaning of Rule 23(a)(3) because he did not have interests which conflicted with those of the class, and because his claims for relief were based on the same legal or remedial theory. Plaintiffs here have absolutely no interests that conflict with those of the proposed class. The named plaintiffs and class members have the same legal theories and the named plaintiffs seek injunctive and declaratory relief for themselves and for the class as a whole. Plaintiffs seek to vindicate the rights of unnamed class members, rights that have been or will be violated through the application of policies and practices by defendants.

In analyzing the typicality requirement, "it must be kept in mind what the basic thrust of the action concerns." ***Davy v. Sullivan***, 354 F.Supp. 1320, 1325 (M.D. Ala. 1973). The "basic thrust" of the action herein is a challenge to the procedures used by defendants in adjudicating naturalization applications. Professor Moore has noted, "[T]he allegation that defendant engaged in a scheme common to all members of the class has been held to support the finding that the claims of the representative parties are typical." 3B Moore's Federal Practice, 23.06-2, at 23-189 to 23-190.

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[12] ***See also Ali***, 213 F.R.D. at 409 ("typicality is not defeated if there are legal questions common to all class members."); ***Orantes-Hernandez v. INS***, 541 F.Supp. at 371; ***American Airlines, Inc. v. Transport Workers Union,*** 44 F.R.D. 47, 48 (N.D. Okla. 1968) (holding (a)(3) met by representatives "sharing common with the class any claim or defense it has"); ***Mersay v. First Republic Corp.***, 43 F.R.D. 465, 468-69 (S.D. N.Y. 1968) (allegation that defendants engage in scheme common to all members of class held to support finding that claims of representative party typical). As set forth above, common questions of law and fact exist in the case at bar.

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D. Adequacy of Representation

The final requirement, Rule 23(a)(4), is that the named plaintiff "will fairly and adequately protect the interest of the class." The two principal elements of this requirement are: (1) that the class representative's interests be co-extensive and not antagonistic to the class members' interests; and (2) that counsel for the named representatives be qualified. ***Johnson v. Georgia Highway Express, Inc.***, 417 F.2d 1122, 1124-25 (5th Cir. 1969).

Both of these elements are met in this case. The interest of the class representatives here are not antagonistic to those of the proposed class members. Their mutual goal is to declare defendants' challenged practices unlawful and to enjoin further violations. ***Cf. Hanberry v. Lee***, 311 U.S. 32 (1940); ***Bailey v. Ryan Stevedoring, Inc.***, 528 F.2d 551 (5th Cir. 1976). Plaintiffs' attorneys have litigated numerous class actions in the federal courts involving the rights of aliens, e.g. ***Immigrant Assistance Project v. INS,*** 306 F.3d 842, (9th Cir. 2002); ***Proyecto San Pablo v. INS,*** 189 F.3d 1130 (9th Cir. 1999); ***Gorbach v. Reno,*** 219 F.3d 1087 (9th Cir. 2000); ***Walters v. Reno*** 145 F.3d 032 (9th Cir. 1998); ***Gete v. INS,*** 121 F.3d 1285 (9th Cir. 1997); ***Catholic Social Services v. Reno.***206 F.R.D. 654 (E.D.Cal. 2002.)

III. THIS ACTION SATISFIES THE REQUIREMENTS OF RULE 23(b)(2)

In addition to satisfying the four requirements of Rule 23(a), a certifiable class action must meet one of the requirements of Rule 23(b). This action meets the requirements of 23(b)(2): "the party opposing the class has acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Analysis of the requirements of subsection (b)(2) reveals "that the party opposing the class does not have to act directly against each member of the class. As long as his actions would affect all persons similarly situated, his acts apply generally to the whole class." 7A Wright & Miller, ***Federal Practice and Procedure***, § 1775 at 19.

In ***Jones v. Diamond***, 519 F.2d 1090, 1100 (5th Cir. 1975), the court held that this requirement is satisfied if "the conduct or lack of it which is subject to challenge [is] premised on

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a ground that is applicable to the entire class." The court further noted that the "23(b)(2) class is an effective weapon for an across-the-board attack against systematic abuse." ***Id.***

In this case the defendants have implemented procedures applied in adjudicating naturalization applications. These policies and procedures are generally reflected in defendants' regulations and decisions. The defendants have followed policies of refusing to adjudicate the applications of eligible applicants pending completion of a nonstatutory "name check", failing to notify applicants of their right to go to federal court in the event of delay more than 120 days, denying applications for lack of perfect moral character, refusing to consider positive evidence of good moral character, and interfering with plaintiffs' statutory and constitutional rights to naturalization under the law. The proposed class in this case has been created by defendants' challenged policies and procedures; hence, the requirements of subsection (b)(2) have been met.

IV. CONCLUSION

The focus of the factual inquiry into the propriety of class certification is whether there is sufficient evidence to support a "reasonable judgment" that the requirements of Rule 23 have been met. ***Blackie v. Barrack***, 524 F.2d 891, 900-01 (9th Cir. 1975), ***cert. denied*** 429 U.S. 816 (1976). It is clear in this case that plaintiffs meet all the requirements of class certification pursuant to Rule 23. ***See generally*** 3B Moore's Federal Practice, § 23.50 at 23-434 to 23-435.

Accordingly, the class as proposed herein should be certified.

DATED: May 20, 2004

Respectfully submitted,

/s/ Robert Gibbs
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1 CERTIFICATE OF SERVICE

2 I hereby certify that on May 20, 2004, I electronically filed the foregoing with the Clerk of

3 the Court using the CM/ECF system which will send notification of such filing to the

4 following CM/ECF participants:

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