90-5590

NO. 90-5590

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ZULEMA PERALES, et al
Plaintiffs - Appellees

v.

RICHARD CASILLAS, et. al.
Defendants - Appellants

APPEAL FROM ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

BRIEF FOR APPELLEES

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v.	NO. 90-5590
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CERTIFICATE OF INTERESTED PERSONS PURSUANT TO LOCAL RULE 28.2.1

The undersigned counsel of record certifies that the below listed persons have an interest in the outcome of the case.

APPELLANTS

Richard Casillas

Scott Robertson

Gary Rennick

Immigration and Naturalization Service

APPELLEES

Jose Santos Zavala

Zulema De la Garza Perales

Jose Luis Hernan Duran

All similarly situated individuals

ATTORNEYS

Plaintiffs

Barbara Hines

Lee J. Teran

Defendants

Jack Moynihan

Gregory Ball

Marshall Golding

Mary K. Doyle

LEE J. TERAN

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STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully submit that oral argument should be scheduled in this case. This case raises important questions regarding the award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412 (EAJA), including issues of substantial justification, bad faith, the hourly rate appropriate for cost of living increases, attorney's expertise in immigration law, and the appropriate forum for resolution of EAJA issues.

LEE J. TERAN

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STATEMENT OF JURISDICTION

This Court's jurisdiction arises pursuant to 28 U.S.C. 1291. Defendants, officials of the Immigration and Naturalization Service (hereinafter INS), appeal a judgment awarding attorney's fees, costs, and expenses in favor of Plaintiffs, a class of alien relatives of U.S. citizens and permanent residents, who sought authorization to work in the United States.

STATEMENT OF THE ISSUES

1. Whether Defendants timely objected to the U.S. Magistrate's findings.

2. Whether this case should be remanded to the District Court, in light of the Fifth Circuit's decision in this case.

3. Whether the Fifth Circuit's vacation of part of the District Court's injunction on the merits has a bearing on the issue of Defendants' substantial justification for purposes of an attorney's fees award under Section 2412(d)(1)(A) of the Equal Access to Justice Act (hereinafter EAJA).

4. Whether the District Court correctly awarded fees, costs, and expenses, under 28 U.S.C. 2412(b) based on Defendants' bad

faith in light of the Fifth Circuit's decision in this case.

5. Whether counsels' expertise in immigration law and knowledge of the Spanish language warranted an enhanced fee.

6. Whether the District Court correctly set an enhanced fee based on an increase in the cost of living.

7. Whether the District Court erred in denying an increased fee based on the limited availability of attorneys.

STATEMENT OF THE CASE

1. Course Of Proceedings

Plaintiff-appellees are the alien relatives of United States citizens and permanent residents who are in the process of applying for immigrant status at United States consulates abroad. Pending adjudication of their applications for immigrant visas, they have each requested pursuant to regulation, 8 C.F.R. 274a.12[1] and 8 C.F.R. 242.5(a)(2),[2] voluntary departure and authorization to work from the Immigration and Naturalization Service. For a period of two years before and for approximately one year after the lawsuit was filed, Defendants failed to adjudicate the vast majority of requests made by Plaintiffs or, in some instances, denied their requests based on factors not found in the regulations.

Plaintiffs sought declaratory, mandamus, and injunctive relief regarding INS practices relating to employment authorization and

[1] Formerly 8 C.F.R. 109.1.

[2] The regulations provide that in order to obtain employment authorization, the alien must have be granted voluntary departure status. Voluntary departure allows an otherwise deportable alien to remain in the United States until a fixed date. 8 C.F.R. 242.5; R1:139.

voluntary departure. Shortly after filing the lawsuit, Plaintiffs amended the complaint to include a claim for class-wide relief. (Record at Volume 4, p.836, hereinafter R4:836)[3] A second amended complaint was filed to include a First Amendment retaliation claim when Defendants instituted deportation proceedings against certain named Plaintiffs and class members. (R2:447).

Plaintiffs moved for a preliminary injunction and class certification. (R4:780, 790). On January 6, 1988, following an evidentiary hearing, the request for class certification was granted. (R2:290). The class is defined as follows:

> All immigrant visa applicants who reside within the San Antonio, Texas INS District and are immediate relatives of United States citizens or within sixty days of visa availability and who have applied or will apply for employment authorization and (1) whose applications for employment authorization have been or will be denied, or (2) whose applications for employment authorization have not been timely adjudicated.

On March 30, 1988, Plaintiffs moved for a temporary restraining order following a sudden change in INS policy. (R2:286). The motion was granted April 1, 1988. (R2:275). The temporary restraining order was extended until the non-jury trial, conducted July 25-26, 1988. (R2:269).

On November 14, 1988, the District Court granted Plaintiffs' requests for relief and entered a permanent injunction on four points, as set forth in the court's order. (R1:129-131).

[3] The record consists of three volumes relating to Plaintiffs' request for fees, costs, and expenses, and an additional ten volumes which were prepared for the appeal of the merits portion of the case (89-5515). Appellees will follow the same form of citation as Appellants. See Brief for Appellants/Cross-Appellees, p.5, n.3.

Plaintiffs filed their motion for attorney's fees, costs and expenses on December 5, 1988 (R1:125), as directed by the District Court, and on June 26, 1989, the District Court referred the matter to the U.S. Magistrate (R1:236 (90-5590)). On October 11, 1989, and November 20, 1989, hearings were held before the Magistrate. Prior to the November 20, 1989 setting, Plaintiffs moved for continuance to await the Fifth Circuit's decision on Defendants' appeal of the merits, filed after Plaintiffs filed their motion for fees. (R1:196 (90-5590)). Defendants opposed the continuance and the Magistrate denied the motion. (R1:190-191 (90-5590)).

On March 14, 1990, the Magistrate ordered that Plaintiffs be awarded fees, costs, and expenses. (R1:108 (90-5590)). Defendants filed objections to the Magistrate's report on April 2, 1990 (R1:36 (90-5590)); on the same day, Plaintiffs filed a motion to extend the time for submitting objections and their objections. (R1:8 (90-5590)). On April 16, 1990, the District Court affirmed the order of the U.S. Magistrate. Defendants filed a notice of appeal on June 14, 1990; Plaintiffs submitted their cross-appeal on June 27, 1990.

In the meantime, on January 13, 1989 (R1:1), Defendants appealed two portions of the merits injunction to this Court. (Case No. 89-5515). Defendants did not appeal the portion of the District Court's order enjoining the INS from failing to adjudicate requests for employment authorization and voluntary departure within sixty days, and requiring INS to provide written denials of employment authorization and voluntary departure, in lieu of an

Order to Show Cause.[4] Defendants only appealed the prohibition against the use of factors outside the regulations and the injunction against deportation of class members. In Perales v. Casillas, 903 F.2d 1043 (5th Cir. 1990), this Court vacated those portions of the injunction appealed by Defendants.

2. Statement Of Facts

Plaintiffs, relatives of United States citizens or permanent residents, are beneficiaries of approved visa petitions, and are awaiting the final issuance of their immigrant visas. During the processing of their applications for permanent residence, they seek employment authorization from the INS.[5]

Although Plaintiffs and the class they represent are illegally present in the United States, it has long been the policy of the INS to forego deportation proceedings against such relatives of

[4] The Order to Show Cause is the document which begins the deportation proceedings. 8 U.S.C. 1252(b); 8 C.F.R. 242.1.

[5] Plaintiffs and class members are beneficiaries of visa petitions (forms I-130), filed by their United States citizen or permanent resident relatives, and approved by the INS. Because they have entered the United States without inspection or are out of status, and thus, ineligible to adjust their status in the United States pursuant to 8 U.S.C. 1255, the visa petitions are forwarded to U.S. embassies or consulates abroad for scheduling of an immigrant visa appointment.

Normal processing time for immigrant visas varies, but generally the spouse of a United States citizen will wait 9 months to one year from filing of the I-130 until scheduling of the appointment for visa issuance. Relatives of permanent residents usually must wait longer periods of time because they are subject to visa quotas. The Department of States visa availability bulletin is published monthly and must be consulted to ascertain when a particular applicant is expected to be eligible for a visa appointment. The class included those within sixty days of visa availability according to the latest State Department bulletin. (R6:2-145 - 2-155).

U.S. citizens and permanent residents who have approved visa petitions. (Exs.25, 25A).[6] For many years, and until August, 1984, INS would routinely grant voluntary departure, pursuant to 8 C.F.R. 242.5(a)(2), and employment authorization, pursuant to 8 C.F.R. 109, now recodified as 8 C.F.R. 274a.12. Various procedures were used, and different branches within the INS issued the employment authorization, but in most cases, the authorization was provided promptly and routinely. (R6:2-108-112; Ex.14, 14A). At times employment authorization was issued automatically even if the alien did not request it. (R6:2-111).

In August, 1984, the INS suddenly ceased processing any new requests for employment authorization, and announced that henceforth the agency would institute a two-step process. First, the alien relative had to make a request for voluntary departure, 8 C.F.R. 242.5(a)(2), with the Investigations Branch of the INS, and then the alien could request employment authorization, 8 C.F.R. 109 (now 8 C.F.R. 274a.12), from the Deportation Branch. From August, 1984, until well after the filing of this case, the Investigations Branch failed to adjudicate any requests for voluntary departure, despite numerous requests from class members. (R6:2-112-2-113; 2-123-124; 2-159; Ex.26). The Deportation Branch refused to provide work authorization to any applicant who did not have voluntary departure, and those who did have such status were

[6] This citation relates to exhibits from the case on the merits, 89-5515. Citation to exhibits from the fees portion will contain the appellate action number, 90-5590, following the exhibit number.

often denied employment authorization based upon a number of grounds which Plaintiffs charged were not authorized by the regulations. (R7:3-32, 3-35-37).

During the period of time that the INS refused to provide employment authorization, employers began to require that undocumented alien employees provide proof of authorization to work from the INS. (R6:2-99-100; R8:160-161). In November, 1986, in the midst of the lawsuit, Congress passed the Immigration Reform and Control Act of 1986 (IRCA) of which a major component was an employer sanctions provision prohibiting the hiring of aliens who were not authorized to work by the INS. 8 U.S.C. 1324A. The employer sanctions prohibition went into effect June 1, 1987, and, thereafter, any employer who hired an alien without employment authorization became subject to civil and criminal penalties. (R7: 3-98; 3-117; R9:82-83). At that point, Plaintiffs and class members were generally unable to work. (R6:2-118). Class members were forced to rely on family members for support and those who found employment had to work illegally.

Class members' lack of employment authorization also created obstacles to the successful processing of their visa application. U.S. consulates require that aliens who have been present in the United States demonstrate a satisfactory employment history to overcome excludability under 8 U.S.C. 1182(a) (15). An applicant for an immigrant visa may be excluded if "likely to become a public charge". This exclusion provision is one of the most common grounds for denial of an immigrant visa. (Ex.30, p.48). Consular

officers frequently require pay stubs and tax returns to prove the alien has been able to support himself and his family. (R6:2-118-119, 2-157; Ex.60). Without authorization to work while in the United States, Plaintiffs were unable to obtain work and obtain the documentation required by the consulate. (R6:2-114).

At the class certification hearing, Plaintiffs showed that potentially hundreds of individuals had requested authorization to work or would do so in the future. (R2:291-296; R6:2-123). Many applicants ceased to apply because the process was futile. (R6:2-179; R2:295). From August, 1984 until the lawsuit was filed, the vast majority of class members who did apply were unable to obtain any authorization to work. (R6:2-117, 161: R2:295). The class certified by the court included persons living in a large geographical area of Texas; the San Antonio INS District encompasses an area from Waco east to Corpus Christi, south to Laredo, and west to Del Rio.

After the lawsuit was brought, Defendants still refused to adjudicate requests for employment. Then in August, 1986, INS summoned Plaintiff Zavala for an interview concerning his request for voluntary departure and work authorization. (Ex.7). Both requests were denied and instead Mr. Zavala was arrested, placed in deportation proceedings and his release was conditioned on posting a $3,000.00 bond. (Ex.7-A). Plaintiff Zavala was detained under a bond because, as Defendant Rennick testified, Plaintiff was unemployed and had not pursued his visa. (R5:1-45-46). Although many class members filed numerous unanswered requests for

employment authorization before Mr. Zavala made his application, INS only responded to Mr. Zavala's request. (Ex.26). The District Court found that Defendants retaliated against Plaintiff Zavala and certain other class members for the exercise of their rights to redress in violation of the First Amendment. (R1:171).

Only after Plaintiffs filed their motion for preliminary injunction, almost three years after INS ceased processing requests for employment authorization, did the INS begin adjudicating such applications. (R7:3-75). Nonetheless, the INS still instituted deportation proceedings against many class members who appeared at the INS in pursuit of work authorization. (R7:3-110-112; R8:136-141; Ex.48, 51, 52). None of the individuals placed in deportation proceedings were given written notice of the denial of their requests for employment authorization or told why they were being deported. (R6: 2-21, Ex.48, 51, 52).

The District Court permanently enjoined the INS from failing to adjudicate class members' requests for employment authorization and from failing to do so within sixty days. The lower court also enjoined INS to provide written denials and held that an Order to Show Cause did not constitute a "written denial". Although Defendants appealed two sections of the four part injunction, they did not appeal the parts of the injunction which have had the greatest benefit for the vast majority of the class, and have resulted in prompt adjudication of requests for employment authorization and voluntary departure.

SUMMARY OF ARGUMENT

Defendants waived any objections to the U.S. Magistrate and District Court's Order awarding attorneys fees. Assuming objections were not waived, the District Court is the proper forum for the determination of attorney's fees under EAJA, specifically questions of substantial justification, bad faith, and the hourly rate. If this case is properly before the Circuit Court, the District Court's order should be affirmed.

Defendants failed to timely object to the order of the U.S. Magistrate, and made no effort to extend the filing deadline. They have thus waived their objections. Defendants conceded Plaintiffs are the prevailing party, and that Plaintiffs are entitled to fees for the issues on which they prevailed. Defendants have failed to meet their evidentiary burden of showing substantial justification in their defense of the whole case, despite the Fifth Circuit's decision in their favor on two issues. Defendants were not justified in their refusal to adjudicate requests for employment authorization presented by class members and their attorneys for a period of almost three years. In addition, their refusal to adjudicate such requests within any reasonable time was not justified. Defendants conceded their position on these issues was unreasonable.

The appellate decision does not affect the District Court's award of fees based on Defendants' bad faith in failing to adjudicate claims for close to three years, and in placing Plaintiffs and class members in deportation proceedings. The

initiation of deportation proceedings against Plaintiffs and the class violated INS policy and practice.

Finally, assuming a market rate fee is inappropriate under a bad faith theory, an enhanced fee is warranted due to increases in the cost of living, counsel's expertise in immigration law, and the limited availability of representation in the San Antonio area.

ARGUMENT

I. DEFENDANTS FAILED TO TIMELY OBJECT TO THE MAGISTRATE'S FINDINGS

This appeal follows a District Court order which is itself based on findings made by the United States Magistrate, following extensive hearings. Defendants have waived any objections they may have to the rulings of the United States Magistrate because they failed to file timely objections under 28 U.S.C. 636(b)(1). See also, Rule 72(a), (b) F.R. Civ. P.; Appendix C, Local Rule 4.

On June 26, 1989, the District Court referred Plaintiffs' motion for fees to the U.S. Magistrate, pursuant to 28 U.S.C. 636(b)(1), which requires that objections be made within ten days. (R1:236 (90-5590)). Following hearings and extensive briefing, the Magistrate issued his order[7] on March 14, 1990. (R1:53-54 (90-5590)). Defendants' objections were not filed until April 2, 1990

[7] The Magistrate entitled the findings an "order", instead of "recommendation" and some confusion arose as to the standard of review. See, District Court Order,(R1:11 (90-5590)). Nonetheless, the referral to the Magistrate was specifically made under 636(b)(1), and Defendants also submitted their untimely objections pursuant to 636(b)(1). (R1:36 (90-5590)).

(R1:36 (90-5590)), three days after the March 30, 1990 deadline.[8] See District Court Order (R1:11-12 (90-5590)).

The statute, federal rules and local rules of the Western District are clear that any objections to a magistrate's findings under 636(b)(1) must be filed within ten (10) days of the decision. Failure to do so is a waiver of Defendants' right to appeal from the order. Thomas v. Arn, 474 U.S. 140, 150 (1985); U.S. v. Lewis, 621 F.2d 1382, 1386 (5th Cir. 1980); Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982) en banc; Abeshouse v. Ultragraphics, Inc., 754 F.2d 467, 473 (2nd Cir. 1985).

Defendants were on notice that the referral to the Magistrate rested on Section 636(b)(1) and, in fact, relied on that section when they filed their untimely objections. At no time did Defendants request an extension to file their objections.[9]

Defendants objected to the Magistrate's findings as to bad faith, cost of living, fees for those issues appealed by Defendants, fees for fees, and expert witness fees. Appeal of these issues were waived by the untimely objections. Most significantly, Defendants conceded in their objections that Plaintiffs were entitled to fees for the two issues not appealed. (R1:49 (90-5590)). Moreover, Defendants' objections did not include any reference to the issue of substantial justification,

[8] Defendants were allowed ten days, plus an additional six days for postal service.

[9] Upon receipt of Defendants' objections and to protect their own objections, Plaintiffs requested and received an extension of time. Plaintiffs' motion for extension and objections were filed April 2, 1990. (R1:29 (90-5590)).

which is the primary thrust of Defendants' arguments in their appellate brief. Therefore, even if Defendants' objections could be considered timely, the questions of substantial justification and fees for the issues upon which Plaintiffs prevailed were never preserved by any objection, and cannot now be raised.

II. THIS CASE SHOULD BE REMANDED TO THE DISTRICT COURT

In the event this Court holds that Defendants have not waived their objections, the appellate court is an inappropriate forum to determine the attorney's fees award in this case. While Plaintiffs maintain that they are entitled to the entire fee award, assuming arguendo, that a fee adjustment should be made, such a determination should be decided by the District Court. The issues of substantial justification, the hourly rate and bad faith require a factual determination which the District Court must make in the first instance.[10] Pierce v. Underwood, 457 U.S. 552 (1988); U.S. v. 329.73 Acres, Grenada and Yalobusha Counties, 704 F.2d 800, 811-812 (5th Cir. 1983), en banc. Even if this Court adopts Defendants' arguments that fees should be reduced, this evaluation should also be made by the District Court. Devine v. Sutermeister, 733 F.2d 892, 896 (Fed. Cir. 1984).

[10] The procedural posture of this case is peculiar in that the fee determination was made by the lower court before the Fifth Circuit's decision regarding the merits of the case. Plaintiffs were instructed to file the fee motion within twenty days of the District Court order, and the local rules also so required. Local Rule 300-10. Plaintiffs filed a motion for continuance with the Magistrate to postpone the hearing on fees. R1:196 (90-5590). The government opposed the motion and it was denied by the Magistrate. R1:190-191 (90-5590). All of the cases cited herein involve situations in which the decision awarding fees was made after the appellate court had rendered its decision.

III. STANDARD OF REVIEW

In the event this Court reviews the decision of the lower court regarding the appropriate hourly fee and Defendants' bad faith, these issues must be reviewed on an "abuse of discretion" standard. Pierce v. Underwood, supra; Natchez Coca Cola Bottling Co. v. N.L.R.B., 750 F.2d 1350, 1352-1353 (5th Cir. 1985). In the instant case, based on the evidence presented at the lengthy hearing on attorney's fees, the District Court did not abuse its discretion in awarding fees at the rate of $125 per hour.

IV. PLAINTIFFS ARE PREVAILING PARTIES

The government concedes that Plaintiffs are prevailing parties in this litigation. (Defendants' brief at 17). Texas State Teacher's Ass'n v. Garland Independent School Dist., 109 S. Ct. 1486 (1989). Plaintiffs prevailed on two very important issues: 1) the unjustified refusal by Defendants to adjudicate requests for employment authorization and voluntary departure and 2) the failure to provide written denials in response to such requests.

The injunctive relief that Plaintiffs obtained was extremely significant. Defendants must now adjudicate all requests for voluntary departure and employment authorization simultaneously within sixty days. The practical applications of this portion of the injunction have provided crucial benefits to the class. Before this suit, no class member could even obtain a response to his or her request for employment authorization. (R1:140; R3:660-775). Many class members did not apply because they believed it was futile. (R6:2-179; R2:295). The few requests for employment

authorization that INS responded to were denied by one branch of INS because another branch would not issue voluntary departure. (R1:152-155, 174). Since this litigation, more than 80% of all requests have been granted by the INS. (903 F.2d at 1046; Defendants' brief at 5) The record contains ample evidence of the paramount importance of employment authorization for the class. (R1:173-175; Defendants' brief at 4). Without employment authorization, class members cannot work or must do so illegally because of the employer sanctions provisions of IRCA. They cannot support their families and they may be denied a permanent resident visa because of "public charge excludability". (R1:173;Defendants' brief at 4; 903 F.2d at 1046).

The permanent injunction requiring INS to provide written notice of denials is also a substantial victory for the class. Plaintiffs vindicated regulatory rights under 8 C.F.R. 274a.13(c), which Defendants had refused to adhere to. While the court found for Plaintiffs on non-constitutional grounds, the regulation requiring a written denial of employment authorization is based on well established principles of due process and the Administrative Procedures Act. An agency is required to articulate a rational basis for its decision making. Natchez Coca Cola Bottling Co. Inc v. N.L.R.B., supra at 1353, citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Flores v. I.N.S., 524 F.2d 627 (9th Cir. 1975)(INS abused its discretion in failing to provide reasons for denial of extension of voluntary departure). In this case, the permanent injunction forced INS to refrain from arbitrary

denials not reduced to writing. It also ended INS's practice of issuing Orders to Show Cause[11] commencing deportation proceedings, in lieu of a written denial. The sum effect of this part of the injunction was to end arbitrary deportation proceedings begun in response to a request for employment authorization. Written denials also provide applicants with notice of deficiencies in their requests so that they can take steps to correct them.

The government erroneously asserts that the relief granted Plaintiffs was merely what was encompassed by the 8 C.F.R. 274a.13 (d) and (c). This argument ignores the fact that Defendants had violated 8 C.F.R. 109.1, the predecessor regulation, for almost three years. This argument also disregards the problem of obtaining voluntary departure, 8 C.F.R. 242.5(a)(2) (vi), which is a prerequisite for employment authorization under 8 C.F.R. 109.1, recodified as 8 C.F.R. 274a.12(c)(12). Throughout this litigation, Defendants maintained that employment authorization and voluntary departure were two separate and distinct benefits that should be granted by different branches of the INS, based on different standards. (R1:153-155, R2:256, R2:346 #4 and #5). The regulations promulgated in May, 1987, did not address the grant of voluntary departure. Without the Court's injunction, Defendants would have continued to use the lack of voluntary departure as a subterfuge to deny employment authorization. At trial, the Defendants

[11] While the Order to Show Cause notifies the alien of the charges against him, and the time and place of the hearing, the document does not comply with the requirement of written notice, mandated by due process, and 8 C.F.R. 274a.13(c). Cf. 8 C.F.R. 103.3(a)(1).

contended that class members had no need for voluntary departure. (R1:153; 222, Proposed Finding of Fact #35; R2:266). The inability of Plaintiffs to obtain employment authorization unless requests for voluntary departure were adjudicated simultaneously was recognized by Deputy District Director John Abriel. (Ex.N; R2:353 #9). Defendants later reneged on Mr. Abriel's offer to Plaintiffs and returned to their earlier position that voluntary departure and employment authorization were to be decided separately. (R1:182-183; R1:190-191).

Equally important was the prohibition against Defendants' actions in denying relief through the issuance of an Order To Show Cause which failed to apprise class members of the reasons for the denial. Based on Defendants' practices of denying voluntary departure and thus precluding eligibility for employment authorization, and issuing Orders to Show Cause against class members, these two sections of the injunction cannot be characterized as "lesser relief". (Defendants' brief at 19). Greater L.A. Council on Deafness v. Community T.V. of Southern California, 813 F.2d 217, 220 (9th Cir. 1987).

V. SUBSTANTIAL JUSTIFICATION

A. Legal Standards For Substantial Justification

Plaintiffs are entitled to fees as the prevailing party unless the Defendants can show that its position was "substantially justified". 28 U.S.C. 2412(d)(1)(A). The government's position must be measured against both the agency's actions leading to the litigation and government's litigation position. 28 U.S.C. 2412(d)

(2)(D); State of Louisiana, ex. rel. Guste v. Lee, 853 F.2d 1219, 1221-1222 (5th Cir. 1988); Russell v. National Mediation Board, 775 F.2d 1284 (5th Cir. 1985), aff'd. 805 F.2d 552 (5th Cir. 1986).

The burden of proof is on the government to establish a "strong showing" regarding substantial justification. S&H Riggers and Erectors, Inc. v. O.S.H.R.C., 672 F.2d 426, 430 (5th Cir.1982). The test for substantial justification is one of reasonableness in law and fact. Commissioner, I.N.S. v. Jean, 110 S. Ct. 2316, 2319, n.6 (1990); Russell v. National Mediation Board, supra, at 1288. If the underlying agency conduct is unreasonable, Plaintiffs are entitled to fees, notwithstanding the reasonableness of the government's litigation postition. Commissioner, I.N.S. v. Jean, supra at 2319, n.7. It would defeat the purposes of EAJA to deny fees when "an unjustifiable agency action forces litigation and the agency then rides (sic) to avoid such liability by reasonable behavior during litigation". H.R. Rep. No. 120 (pt.1) at 11, 1985 U.S. Code Cong. & Ad. News 140; Russell v. National Mediation Board, supra at 1291. The 1985 amendments to EAJA were designed to ... "enable those oppressed by unreasonable government action to vindicate their rights without having to worry about attorneys fees." Id. at 1291. Thus, attorney's fees should be awarded for the entire case in situations in which the underlying agency action is unjustified, even if the litigation position is substantially justified. Russell v. National Mediation Rd., supra at 1291. See also, City of Brunswick, Georgia v. U.S., 661 F. Supp. 1431, 1442 (S.D. Ga. 1987). Cf.Powell v. C.I.R., 891 F.2d 1167, 1169 (5th

Cir. 1990).

B. Defendants Did Not Object To The District Court's Findings Regarding Plaintiffs Entitlement To Fees For Two Successful Issues Nor Substantial Justification.

Defendants have conceded that Plaintiffs are entitled at minimum, to fees for Plaintiffs two successful claims. In Defendants' Objections to the Magistrate's Order, the government stated that it had no objection to paying fees for the issues not appealed (R1:49 (90-5590)). While Plaintiffs strongly object to the Defendants' arbitrary allocation of 40% of the total fee award for the prevailing claims, Defendants are bound by their previous position which recognized Plaintiffs' entitlement to fees.

Additionally, the government did not meet its burden of proof regarding substantial justification. Accordingly, the District Court found that Defendants were not substantially justified (R1:188). The Defendants never challenged this determination. They submitted no evidence at the hearing before the Magistrate on this issue and they did not object to the court's finding on substantial justification. (R1:36 (90-5590)). Because Defendants never contested the lower court's findings, they have waived an appeal on this issue.

C. Defendants' Conduct Was Not Substantially Justified

1. Defendants' Pre-Litigation Conduct

Assuming that this court may review the issue of the substantial justification, the District Court's factual findings should be reviewed deferentially on an "abuse of discretion" standard. Pierce v. Underwood, supra at 557-560. In the instant

case, the actions of the INS which led to this litigation were clearly not justified. Russell v. National Mediation Board, supra. See also, City of Brunswick, Georgia v. U.S., supra at 1442. For two years before Plaintiffs filed suit, Defendants purposely ignored the regulations which allowed Plaintiffs to apply for employment authorization and voluntary departure and refused to adjudicate applications. While Plaintiffs were not entitled to an automatic grant of such relief, Defendants were obligated to consider such requests and follow their own regulations. U.S. ex. rel. Accardi v. Shaughnessy, 347 U.S. 250, 266-267 (1954); Jarecha v. I.N.S., 417 F.2d 220 (5th Cir. 1969); 5 U.S.C. 555(b); 5 U.S.C. 706(1); United States v. Nixon, 418 U.S. 603 (1974).[12]

When Plaintiffs' attorneys attempted to resolve Defendants' failure to adjudicate without resort to litigation, their efforts were rebuked by the INS District Director, Richard Casillas. Mr. Casillas informed counsel that acceding to Plaintiffs' request that the regulations be adhered to would "be disruptive of our priorities and be tantamount to the abdication of our prosecutorial discretion". He furthered stated that INS did not "intend to be intimidated by you or anybody else". (Appendix A).[13]

[12] While this Court cited Arzanipour v. I.N.S., 866 F.2d 743, 746 (5th Cir. 1989), cert. denied, 110 S. Ct. 63 (1989), for the proposition that not all violations of agency regulations result in a violation of due process, 903 F.2d at 1050, an agency's failure to follow its own regulations is relevant to whether its actions are "substantially justified".

[13] The correspondence comprising Appendix A is not part of the record. Since the District Court found that Defendants were not substantially justified and Defendants have never, until now, challenged that finding, Plaintiffs did not submit this evidence.

Defendants have offered no justification for their illegal pre-litigation actions. They admitted in the pre-trial order that they had failed to adjudicate requests (R10: #4 of Agreed Facts, Pre-Trial Order)[14] and conceded in their briefs that Plaintiffs were entitled to relief on this issue. In Defendants' opening brief on appeal of the merits of this case, Defendants stated as follows:

> If the injunction had been limited to its first two paragraphs..., there would have been no appeal. Failure to consider an application for discretionary relief is, we acknowledge, an abuse of discretion.Cf.Cuevas-Ortega v. I.N.S., 588 F.2d 1274, 1278 (9th Cir. 1979); see also 5 U.S.C. 706(1) (reviewing court empowered to "compel agency action unlawfully withheld or unreasonably delayed"). In light of our concession in our proposed findings of fact and conclusions of law that INS totally failed to adjudicate requests for pre-hearing voluntary departure between August, 1984 and May, 1987 (R.222), we cannot say that it was "clearly erroneous" for the court to find that a 60 day time limitation on adjudication of voluntary departure requests (the same time period in which, by current regulation, employment authorization requests must be adjudicated) is an appropriate remedy to cure this past abuse of discretion. (Defendants' brief on appeal, No. 89-5515, p.10-11). (emphasis added)

In their brief in the instant appeal, Defendants make the same admission concerning their deliberate failure to adjudicate and concede that a "substantial justification" defense in regards to the failure to adjudicate would be "more difficult". Defendants' brief at 23, see also, Defendants' brief at 23, n.18 and n.19.

If this case is remanded to the lower court, Plaintiffs would submit Apendix A as additional proof of Defendants' unreasonable pre-litigation conduct.

[14] Volume 10 of the record is not paginated. Citations are to specific paragraphs of the Agreed Pre-Trial Order found in Volume 10.

Thus, it is undisputed that the INS' actions which forced Plaintiffs to file suit were not substantially justified.

2. Defendants' Litigation Position

Defendants' litigation conduct was also not substantially justified. For a period of one year after suit was filed, Defendants refused to adjudicate the requests of Plaintiffs and the class. The District Court characterized the adjudication process as "Kafkaesque". (R1:140). Defendants continued to maintain that voluntary departure and employment authorization were separate procedures. The result was that one branch of INS routinely denied employment authorization because another branch failed to adjudicate requests for voluntary departure. The District Court characterized this posture as "meritless". (R1:174).

Defendants selected the named Plaintiff Jose Zavala out of order and instead of adjudicating his request for employment authorization, arrested him and placed him in deportation proceedings. While this Court vacated the class-wide injunction against deportation of class members, it did not address the actions of Defendants vis-a-vis Mr. Zavala individually. 903 F.2d at 1053. Although the appellate court objected to classwide relief for an individual problem, it did not consider whether Defendants' conduct was substantialy justified.

In issuing the injunction, the District Court found that Defendants had acted in bad faith against Plaintiff Zavala and retaliated against him for both his participation in the lawsuit

and his request for employment authorization. (R1:169-171, 188).[15] In the Court's order awarding fees, the District Court specifically found retaliation in response to both forms of protected conduct access to the court;s and administrative requests for relief, (R1: 62 (90-5590)). Defendants conceded that it was not their normal procedure to place class members in deportation procedures. (R1:169, R1:190). Moreover, their actions contravened 8 C.F.R. 242.5 and Operations Instruction 242.10a and 242.1(a)(23) the internal procedures which govern the agency. (Exs.25, 25A; R1:135). If Defendants acted in bad faith against Mr. Zavala and other class members who were placed in deportation proceedings, then a fortiori, their conduct was not substantially justified. Even if the District Court's finding of bad faith was not proper, the Defendants did not establish any reasonable explanation for their departure from their established practice and procedure which led to the initiation of deportation proceedings against Plaintiff Zavala and other class members. Thus, Defendants' position

[15] The appellate court concluded that the lower court had only found retaliation in response to Plaintiffs' requests for employment authorization. 903 F.2d at 1052. Plaintiffs respectfully urge that this interpretation of the district court's injunction is incorrect. See generally, Appellees' Petition for Rehearing, pp. 7-8. The lower court enjoined INS from "initiating deportation proceedings against class members in retaliation for their requests for relief. (R1:130-131). A reasonable interpretation of the phrase "requests for relief" includes participation in this lawsuit itself, Alabama Nursing Home Ass'n v. Harris, 617 F.2d 385, 388 (5th Cir. 1980). This interpreation is supported by the findings of the District Court. Throughout its order, the lower court discussed Plaintiffs' retaliation claim in terms of protection for participation in the lawsuit and requesting employment authorization. (R1:148-149, 154, 167-168, 171). The findings in the attorney's fees order, as to retaliation on both issues further support this interpretation (R1:62 (90-5590).

regarding this issue was not substantially justified.

Defendants infer that the lawsuit would have ended sooner if Plaintiffs had only urged the issues which Defendants did not appeal. This argument is baseless and is irrelevant to the issue of "substantial justification". The Defendants incorrectly claim that if Plaintiffs had only raised a claim relating to Defendants' failure to adjudicate, this suit would have ended sooner. (Defendants' brief at 19,23). Defendants' eleventh hour assertions that they never contested the failure to adjudicate requests and their recent concession that Plaintiffs were entitled to relief all along is a clear misstatement of Defendants' litigation stance in the lower court. Contrary to Defendants' current conciliatory position on this issue, throughout this case, they strenously resisted any affirmative responsibility to adjudicate requests for employment authorization and voluntary departure. Although Defendants conceded that they had failed to adjudicate requests for almost three years, they denied any duty to remedy this violation. Defendants' pretrial statement included the following:

> 3. The Defendants claim that they have no duty to adjudicate requests by aliens who are not members of a class eligible for the benefit.[16] Defendants have made timely and reasonable adjudications of requests for employment authorization...
>
> Assuming arguendo (sic) that Defendants failed to adjudicate requests for employment authorization, even without voluntary departure or employment authorization, illegal aliens can leave the United States without the

[16] Defendants maintained that without voluntary departure, an alien was not eligible for employment authorization. They refused to grant voluntary departure and thus precluded class members from obtaining employment authorization (See discussion supra at 6,21.

stigma of deportation.

(R10:Agreed Pre-Trial Order #3).

Despite a factual concession that Defendants had failed to adjudicate claims for almost three years (R10:Defendants' Contested Issues of Fact, #4, Undisputed Facts #4), the contested issues of law and fact involved whether Defendants had a duty to adjudicate requests for voluntary departure and employment authorization simultaneously and whether Defendants could permissibly deny employment authorization, because a class member did not have voluntary departure. (R10:Plaintiffs' Contested Issues of Law, #2, 3, 4: Defendants' Contested Issues of Law, #2 and 3; Defendants' Contested Issues of Fact #3 and 6).

Defendants also maintained that class members were not eligible for employment authorization because they did not have voluntary departure that they had no duty to adjudicate requests for pre-hearing voluntary departure within any period of time whatsoever, and that voluntary departure was not necessary for class members. (R10: Defendants' Contested Issues of Fact, #3, 7 and 11).

Defendants' unreasonable litigation position prolonged this litigation since Defendants refused to concede liability, despite their factual admission of the agency's failure to adjudicate, and follow its own regulations. United States ex. rel. Accardi v. Shaughnessy, supra at 267; Haitian Refugee Center v. Meese, 791 F.2d 1489, 1499-1500 (11th Cir. 1986), aff'd in part, rev'd in part on rehearing, 804 F.2d 1573 (11th Cir. 1986).

Other facets of Defendants' litigation conduct were also unreasonable. For example, Defendants raised the issue of mootness for the first time during final arguments after the close of the evidence. (R1:141). Defendants did not submit a brief citing authority for this argument and other jurisdictional challenges until after the completion of the trial on the merits. (R1:189-201). Defendants' mootness argument was not reasonable in either fact or law. The evidence at trial, as the District Court correctly found, established that Defendants began to adjudicate requests only after suit was filed. (R1:142). The Defendants reneged on the assurances of the Deputy District Director that requests for voluntary departure and employment authorization would be adjudicated simultaneously within sixty days. (Ex.N R1:154, n.10, 181-182, 186-191). Each INS officer testified as to his own personal interpretation of the regulations and how employment authorization should be adjudicated. (R1:142-144). Similarly, Defendants' mootness arguments had no basis in law. (R1:142-143). United States v. Realty Multi List, Inc., 629 F.2d 1351, 1387-88 (5th Cir. 1980); United States v. Oregon State Medical Society, 343 U.S. 326, 33 (1952).[17]

Defendants' sovereign immunity defense was described by the lower court as a "jurisdictional challenge at the thirteenth hour", which was "hard to take seriously" (R1:144-145). The cases cited in the District Court's order make clear that this argument had no

[17] See generally the cases cited in the District Court's decision. (R1:142-143).

legal basis. (R1:145-156). Thus, this position was not substantially justified.

The court also rejected the government's standing arguments and the court correctly distinguished this case from the Supreme Court's decision in Los Angeles v. Lyons, 461 U.S. 95 (1983). Although the court's rejection of the government's arguments does not conclusively establish that these arguments were unjustified, such a rejection is indicia of the unreasonableness of such a position. It is significant that the government did not appeal any of the jurisdictional arguments. Defendants' failure to appeal is another factor which is relevant to determining the issue of substantial justification.

D. Substantial Justification Must Be Determined In Reference To The Issues Upon Which Plaintiffs Prevailed.

Defendants' admission that Plaintiffs are the prevailing party contradicts their argument regarding substantial justification. While Plaintiffs prevailed on two issues, Defendants argue that "substantial justification" must be determined based solely on the issues which Defendants successfully appealed. This argument directly contradicts Defendants' position which recognized Defendants' entitlement to fees for their successful claims. (R1:49 (90-5590)). Defendants' newest analysis would render EAJA fees meaningless since Plaintiffs would be denied fees altogether, despite their success on other claims. Since "prevailing party" is the first threshold determination for EAJA fees, "substantial justification" should be measured in terms of the issues Plaintiffs prevailed on.

The Government's reliance on Commissioner, I.N.S. v. Jean, supra is misplaced. The issue resolved by the Supreme Court in Jean was that of "fees for fees", that is, whether the issue of "substantial justification" must be decided separately for an award of fees for the merits of the case and fees for the request for attorneys fees. The Supreme Court held that if the government's litigation position at trial is not "substantially justified", the prevailing party is entitled to fees for the fee litigation, without consideration as to whether the government is "substantially justified" in opposing the fee award. The Court's admonition that substantial justification must be a "threshold determination" means that once it is determined that the position of the government was not substantially justified, a party is entitled to fees for legal work on both the merits of the case and the fee request. The Supreme Court did not address the issue of how fees are to be awarded when the plaintiffs prevail on portions of their lawsuit, but did note that once a party prevails, a reasonable fee should be set, according to the standards articulated in Hensley v. Eckerhart, 461 U.S. 424, 433-437 (1983). Id. at 2320.[18]

A more appropriate analysis must focus on established caselaw

[18] Moreover a review of Commissioner, I.N.S. v. Jean, supra in the lower courts establishes that plaintiffs received fees under EAJA, even though they did not prevail on every issue in the lawsuit. Jean v. Nelson, 863 F.2d 759, 771-772 (11th Cir. 1988). Thus, if the dicta in Commissioner, I.N.S. v. Jean, supra, is binding, it stands for the proposition that EAJA fees are to be awarded when a party prevails on certain, but not all of the issues in a case.

which is directly on point. While the Government relies heavily on the case of Battles Farm Co. v. Pierce, 806 F.2d 1078 (D.C. Cir. 1986), vacated on another ground, 487 U.S. 1229 (1988), this decision is an isolated one which departs from precedent in both the D.C. circuit and other circuits. Additionally, Battles Farm was vacated by the Supreme Court and thus has no precedential value. The Defendants never relied on Battles Farm previously and as stated previously, were willing to pay partial fees to Plaintiffs. (R1:49 (90-5590)).

The Defendants inexplicably omit all cases on point other than Battles Farm and thus, fail to inform this court of the numerous other cases which hold to the contrary. The Third, Eighth, Ninth, Eleventh, Federal and D.C. Circuits[19], as well as the Court of Claims, have all ruled that when a plaintiff prevails on some, but not all issues, the government's justification must be evaluated vis-a-vis each disputed claim and that fees shall be awarded, at minimum, for those issues for which the government was not "substantially justified". Myers v. Sullivan, 916 F.2d 659, 666, n.5 (11th Cir. 1990); Hudson v. Secretary of Health and Human Services, 839 F.2d 1453, 1456, n.3, (11th Cir. 1988), aff'd, 109 S. Ct. 2248 (1989); Alphin v. National Transportation Safety Board, 839 F.2d 817, 822 (D.C. Cir. 1988); Granville House Inc. v. Dept. of H.E.W., 813 F.2d 881, 884 (8th Cir. 1987); Greater L.A. Council on Deafness v. Community T.V. of Southern California, supra;

[19] Battles Farm is at odds with other decisions of the D.C. circuit. See discussion, infra.

Haitian Refugee Center v. Meese, supra at 1500; Porter v. Heckler, 780 F.2d 920, 922 (11th Cir. 1986); Cinciarelli v. Reagan, 729 F.2d 801, 809 (D.C.Cir. 1984); Martin v. Lauer, 740 F.2d 36, 44 (D.C. Cir. 1984); Devine v. Sutermeister, supra at 896; Ellis v. U.S., 711 F.2d 1571 (Fed. Cir. 1983); Matthew v. U.S., 713 F.2d 677, 683-184 (11th Cir. 1983); Goldhaber v. Foley, 698 F.2d 193 (3rd Cir. 1983); Skip Kirchdofter, Inc. v. U.S., 16 Cl. Ct.27 (1988); Esprit Corp, Inc. v. U.S., 15 Cl. Ct. 491 (1988); United Construction Co., Inc. v. U.S., 12 Cl. Ct. 514, 517 (1987).[20] None of these cases suggest that "substantial justification" should depend on the relative importance of each cause of action, as Defendants claim.[21]

These cases reason that it would defeat the fee shifting purposes of EAJA to allow plaintiffs to be denied fees for portions of a lawsuit in which the government maintains an unreasonable position. Goldhaber v. Foley, supra at 197. "Partial awards will induce government counsel to evaluate carefully each of the various claims they might assert and assert only those that are substantially justified." Cinciarelli v. Reagan, supra at 805, quoting Spencer v. N.L.R.B., 712 F.2d. 539, 557 (D.C. Cir. 1983), cert. denied 466 U.S. 936 (1984); Goldhaber v. Foley, supra at 197.

[20] Given the number of cases on this precise issue, it is difficult to understand why Defendants fail to cite any authority which differs with Battles Farm.

[21] If the relative importance of each claim is a pertinent factor, it relates to whether a plaintiff is a "prevailing party", since that determination requires a review of the extent and significance of the relief obtained.

Under this analysis, it is not sufficient for the government to show that some of its earlier positions or arguments were valid. Unless the government can establish that all of its positions were substantially justified, the claimant is entitled to fees." (emphasis in original) Myers v. Sullivan, supra at 666, n.5, citing Hudson v. Secretary of Health and Human Services, supra at 1456, n.3. It is incumbent upon the government to abandon its opposition to the other party as soon as it becomes apparent that its litigation stance is not justified. Porter v. Heckler, supra at 9, citing Environmental Defense Fund, Inc. v. Watt, 722 F.2d 1081, 1086 (2nd Cir. 1985).[22]

The Defendants' sole reliance on Battles Farm also fails to reconcile the holding of that case with contrary decisions of the D.C. Circuit. Prior to and even after Battles Farm, that Circuit, like all other circuits, has ruled that a prevailing party is entitled to partial EAJA fees for its successful claims. Alphin v. National Transportation Safety Board, supra at 922; Cinciarelli v. Reagan, supra, at 805; Martin v. Lauer, supra, at 44; Spencer v. N.L.R.B., supra at 557, 581, 586. See also, Public Citizens Health Research Group v. Young, 700 F. Supp. 581 (D.C. Cir. 1988). Battle Farms stands alone and should not be adopted by this Circuit.

Although the Fifth Circuit has not ruled directly on the issue of fees when plaintiffs prevail on a portion of a lawsuit, the holdings in other related EAJA cases provide a useful analysis.

[22] Thus, Defendants' appellate admission that its position on the two parts of the injunction not appealed was an abuse of discretion does not serve to deprive Plaintiffs of fees.

This Court has consistently reviewed the position of defendants at each stage of the litigation to determine "substantial justification". Aerron v. Bowen, 788 F.2d 1127 (5th Cir. 1988); Natchez Coca-Cola Bottling Co., Inc. v. N.L.R.B., supra at 1352 (5th Cir. 1985). In Martin v. Heckler, 754 F.2d 1262 (5th Cir. 1985), this Court held that the U.S. is not exempt from payment of fees and expenses merely because it prevailed at some point in the judicial process. Id. at 1264. Accord, Tyler Business Services, Inc. v. N.L.R.B., 695 F.2d 73 (4th Cir. 1982).

As discussed herein, it is Plaintiffs' position that under this court's decision in Russell, supra, Plaintiffs are entitled to fees for the entire case, since the agency's action causing the litigation was unreasonable. Alternatively, analagous decisions of this Circuit, as well as the overwhelming authority in other circuits, provide support for the fee award in this case.

Assuming, arguendo, that this court is persuaded by the rationale of Battles Farm, Plaintiffs are still entitled to fees. Battles Farm recognized various situations in which a plaintiff may recover fees when the government defeats some of the claims in a lawsuit. Where two defenses stand on "different footing", each claim will be analyzed separately to determine "substantial justification". Battles Farm Co. v. Pierce, supra at 1104-1105. If necessary, the District Court should redetermine the Defendants' position on each claim.

E. How Fees Should Be Calculated

Having established Plaintiffs' entitlement to fees, it must

still be determined how to apportion attorney's fees, in light of the government's partial success on appeal. As discussed herein, this determination should be made by the District Court which is intimately familiar with the entire record, including the evidence presented, settlement conferences, pretrial activities and the conduct of both parties. Pierce v. Underwood, supra at 560. Additionally, any apportionment will necessitate a review of the time sheets of Plaintiffs' attorneys to determine what work corresponds to which claim. Additional evidence not presented at the attorney's fees hearing might be required, because at the time of the hearing, Plaintiffs had won on all four claims.

In the event that attorney's fees should be apportioned, the courts have developed several approaches to this issue. When the issues are severable, the court may award fees for those claims upon which the plaintiffs prevailed. See, e.g., Alphin v. National Transportation Safety Board, supra; Granville House, Inc. v. Dept. of H.E.W., supra; Matthews v. U.S., supra; Haitian Refugee Center v. Meese, supra at 1498; Goldhaber v. Foley, supra.

However, when the time spent on all claims is intertwined, courts have awarded fees for all of the work spent on the case. Jean v. Nelson, supra at 771-772 (11th Cir. 1988); Baeder v. Heckler, 826 F.2d 1345, 1347 (3rd Cir. 1987); Haitian Refugee Center v. Meese, supra at 1300; City of Brunswick, Georgia v. U.S., supra. The Supreme Court's approach in Hensley v. Eckerhart, supra at 437 (1983), in setting a reasonable fee should be utilized. Commissioner, I.N.S. v. Jean, supra at 2320. Cf. Russell v.

National Mediation Board, supra, at 1291-92. Even though a plaintiff does not succeed on all counts in a complaint, when successful and unsuccessful claims are based on the same set of facts, attorneys' fees may be awarded for all time spent unless "the time spent on any single claim was unproductive toward or unrelated to the ultimate favorable disposition of the suit." (emphasis in original), City of Brunswick, Georgia v. U.S., supra at 1446. In cases in which a lawsuit "cannot be viewed as a series of discrete claims, the attorneys should be fully compensated for their work on the case as a whole" Haitian Refugee Center v. Meese, supra at 1500, quoting Hensley v. Eckerhart, supra at 435. "Litigants in good faith may raise alternative legal grounds for a desired outcome and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what mattered." Hensley v. Eckerhart, supra at 435; Greater L.A. Council on Deafness v. Comm. T.V. of Southern California, supra at 222. Thus, Plaintiffs should not automatically have their fees reduced on a claim by claim basis. Keely v. Merit Systems Protection Bd, 793 F.2d 1273 (Fed. Cir. 1986); Louis v. Nelson, 624 F. Supp. 836 (S.D. Fla. 1985). See also, Texas State Teachers v. Garland, supra.

In the instant case, Plaintiffs' goal was to obtain employment authorization for the hundreds of members of the class through the large San Antonio INS District. Employment authorization allows Plaintiffs to become gainful members of society, support their families and eventually immigrate to the U.S. as lawful permanent

residents. Plaintiffs also sought to stop deportations of class members in contravention of INS' stated policy of allowing them to remain in the U.S. pending visa processing. Since Defendants refused to adjudicate claims altogether, the use of arbitrary adjudication standards only affected the few class members whose requests were actually considered. While this Court found that there was not sufficient evidence to sustain a class wide injunction against retaliatory deportations, the injunction requiring written denials and prohibiting the use of an Order to Show Cause as a written denial effectively stopped the deportations. After the lawsuit was filed, Defendants began to adjudicate requests and granted over 80% of all requests. Thus, Plaintiffs achieved their primary objective: employment authorization for class members.

In this case, much of the work on the case was useful for at least three of the claims: failure to adjudicate, use of factors not related to the regulations, and the requirement of written denials. Trial preparation, briefing and testimony included evidence concerning the purposes of the relevant immigration statutes, how they had been administered by INS in the past, and INS past and present policies and conduct concerning all of these issues. Thus, the attorney's fees award should remain intact.

VI. THE DISTRICT COURT FINDING AS TO BAD FAITH IS CORRECT

The District Court awarded attorneys fees under Section 2412(b) which provides that the government may be liable for fees, costs, and expenses "to the same extent that any other party would

be liable under the common law ...." The District Court determined that Defendants acted in bad faith, and thus awarded fees at the market rate of $125 per hour. While the Fifth Circuit thereafter vacated the two parts of the injunction appealed by Defendants, the District Court's finding as to bad faith is not affected by the outcome of the appeal. Even assuming that the decision at the Fifth Circuit is relevant to the question of bad faith, this issue must be decided by the District Court.

It is well established that the "liable under common law provision" of Section 2412(b) supports an award of attorney's fees to a prevailing party when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129; See also, Knights of the K.K.K. v. East Baton Rouge, 679 F.2d 64, 67 (5th Cir. 1982); Baker v. Bowen, 839 F.2d 1075, 1082 (5th Cir. 1988); Brown v. Sullivan, 916 F.2d 492, 495 (9th Cir. 1990). The Court may consider conduct both during and prior to the litigation, although the award may not be based solely on the conduct which led to the substantive claim. Sanchez v. Rowe, 870 F.2d 291, 295 (5th Cir. 1989).[23] The question of bad faith is committed to the discretion of the District Court, and can be reversed only upon a finding of abuse of discretion. Kinnear-Weed Corp. v. Humble U.S. & Refining Co., 441 F.2d 631, 636 (5th Cir. 1971); U.S. v. 2116 Boxes of Boned Beef, 726 F.2d 1481, 1488(10th Cir.1984) cert. denied 469 U.S. 825;

[23] In contrast to "bad faith" fees, attorney's fees under 28 U.S.C. 2412(d)(1)(A) may be awarded based on the agency's conduct underlying the substantive claim. See discussion, supra.

Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1117 (9th Cir. 1988).

Courts which have determined the question of bad faith have looked to conduct which is in disregard of the judicial and regulatory process, Baker v. Bowen, supra (the agency lost and then concealed the loss of administrative tapes) Brown v. Sullivan, supra (failure of the agency to consider and produce transcript of critical testimony); callous and abusive conduct, Vaughan v. Atkinson, 369 U.S. 527 (1962) (refusal to provide injured seaman with support, forcing him to seek counsel); or defiant, recalcitrant behavior, J.T. Gibbons v. Crawford Fitting Co., 760 F.2d 613, 616 (5th Cir. 1985) cert, dism. 474 U.S. 890 (refusal to cooperate during discovery). This case comes squarely within the categories of agency disregard of regulation, abuse of process, as well as agency defiance.

There is ample support for the District Court's finding that Defendants acted in bad faith. In callous disregard for Plaintiffs need to work and support their families, as well as complete disregard of INS regulations, Defendants refused to consider requests for employment authorization for two years before Plaintiffs were forced to bring suit. Thereafter, Defendants stubbornly continued their refusal to adjudicate class members' applications. Defendants' actions contravened established caselaw. U.S. ex. rel. Accardi v. Shaughnessy, supra; 5 U.S.C. 706(1). Defendants contested Plaintiffs' claims vigorously throughout trial, but then did not appeal. In an attempt to avoid liability for fees, Defendants now concede they violated Plaintiffs' rights.

Although many applications for employment authorization were pending, Defendants selected named Plaintiffs Zavala and Gonzalez[24] out of order and called them in under the guise of responding to their requests for employment authorization. Instead, Defendants retaliated against them. Plaintiff Zavala was arrested and detained for deportation proceedings, an action unheard of by experts. (R6:2-115, 174; Ex.30 p.35-36). Although Zavala was later released,[25] Defendants did not begin to adjudicate class members' requests until after Plaintiffs filed for a preliminary injunction, and seven months after passage of IRCA and its employer sanctions provisions.[26] Thereafter, again Defendants responded to several class members requests for employment authorization by placing the applicant in deportation proceedings, in opposition to Defendants' own policy to allow individuals like Plaintiffs' class to remain in the United States.[27] Defendants failed to rebut any of

[24] Plaintiff Gloria Gonzales thereafter withdrew as a named plaintiff.

[25] Plaintiff Zavala was released on his own recognizance and later his deportation case was dismissed (as improvidently begun), only after his attorney called attention to Mr. Zavala's plight. (Ex.8, 10, 10-1).

[26] Defendants assert that they began to adjudicate work authorization requests in response to IRCA and the regulations at 8 C.F.R. 274a.12. Yet, 8 C.F.R. 274a.12 was simply an amendment to 8 C.F.R. 109 which had been effect since well before August, 1984. Notwithstanding the date when Defendants began adjudication area, no applications for employment authorization were granted from August, 1984 until June, 1987, following hearings on Plaintiffs request for preliminary injunction. (R7:3-110-113).

[27] Again, these applicants for work authorization against whom deportation proceedings were instituted were not deported only because of intervention by their lawyers. (R9:77-82; Ex.48).

Plaintiffs' evidence supporting these points, and provided no explanation as to why Plaintiffs were selected out of order and against established policy. (R1:168-171).

The District Court found that the Defendants had ignored INS' regulations and policies and abused the deportation process in responding Plaintiffs and class members' requests for employment authorization.(R1:62-63 (90-5590). For their protection, Plaintiffs sought relief which would best protect the interests of the class, although the Fifth Circuit later vacated the District Court injunction as being overly broad. Nonetheless, the decision of the Fifth Circuit with regard to the injunction against deportations does not bear on the District Court's distaste for Defendants' conduct and finding as to bad faith for the attorney's fees award.

Moreover, the District Court's bad faith finding does not rest solely on Defendants' initiation of deportation proceedings against Plaintiffs.

> First, they continued their course of conduct, in failing to timely adjudicate plaintiffs' requests and in denying voluntary departure for impermissible reasons, for almost one year after this lawsuit was filed, rejecting the opinion of their own Deputy District Director that the process was flawed, Second, after agreeing to change this policy, they again began denying requests and delaying adjudication without justification. (R1:62 (90-5590)).

For two years, individual aliens, their spouses, and attorneys requested authorization for employment, pursuant to INS regulations, 8 C.F.R. 109.1. The record includes a number of examples of applicants and their families, desperate for permission to work, and whose requests were wholly ignored. (R7:3-86, Ex.26).

For close to a year after the lawsuit began and seven months after IRCA employer sanctions had passes, INS still ignored the requests. The INS' failure to act, necessitating litigation, is analagous to the situation in Vaughan v. Atkinson, supra, where a seaman, ill and unable to work, sought "maintenance and cure" from his ship owner. For two years the ship owner did nothing although he had a clear duty to act. The Supreme Court affirmed the award of attorney's fees based on bad faith because of the recalcitrant conduct of the ship owner which forced the seaman to go to court. Subsequently, the Supreme Court has construed the Vaughan case as an example of bad faith in civil litigation. F.D. Rich Co. v. Industrial Lumber, supra at 116, 129 n.17. Bad faith conduct has since been found a number of times when government agencies like INS, fail to act. See, Lear Seegler Inc. v. Lehman, supra; Fairley v. Patterson, 403 F.2d 598, 606 (5th Cir. 1974); Burnaman v. Bay City Independent School District, 445 F. Supp. 927, 939 (S.D. Tx. 1978); Sims v. Amos, 340 F. Supp. 691, 693-94 (M.D. Ala 1972), aff'd., 409 U.S. 942 (1972).[28]

Once promulgated, the INS was required to follow to its own regulations and consider requests for employment authorization.

[28] The recent holding in Sanchez v. Rowe, supra does not alter the principle that pre-litigation conduct may serve as a basis for a finding of bad faith. The issue in Sanchez was whether the agency action, a beating by a Border Patrol officer, alone could be termed bad faith conduct. The Fifth Circuit declined to make such extension, but reiterated that a response to legal claims made before litigation could serve as bad faith conduct. Here, the course of Defendants conduct in refusing to adjudicate Plaintiffs claims for employment authorization spanned two years before and almost one year after the litigation.

Failure to do so is an abuse of discretion. U.S. ex. rel. Accardi v. Shaughnessy, supra; Jarecha v. I.N.S., supra; Confederated Tribes and Bands of Yakima Indian Nation v. Fed. Energy Regulatory Comm., 746 F.2d 466, 474 (9th Cir. 1984), cert. denied 105 S. Ct. 23 58 (1985). Defendants acknowledge that their failure to act was an abuse of discretion. See, Defendants' Brief on appeal, No. 89-5515, p.10-11. Despite a clear duty to act, the INS persisted in forcing Plaintiffs to expend continuous efforts.[29]

In addition to the District Court finding that the INS had disregarded its own regulations, the court also found that Defendants had abused the deportation process. The Court found that Defendants had retaliated against Plaintiff Zavala and a number of class members for their participation in the lawsuit and their filing of requests for voluntary departure and employment authorization.

> This blatant abuse of the immigration process and flagrant disregard of this judicial proceeding constitutes bad faith and warrants an award of attornneys' fees at the market rate under Section 2412(b). (R.1:62-65 (90-5590)).

The District Court findings on retaliation in order to grant injunction relief are distinct from the factual determinations made as to bad faith for fees. For the retaliation claim, questions as to propriety of injunctive relief against an agency, scope of the class, specificity of the order, and factors under Wilson v. Thompson, supra, were present. The Fifth Circuit vacated the

[29] Plaintiffs attempted to resolve the problem before filing the lawsuit, but were met with a defiant response from the District Director. See App. A, footnote 13, supra.

injunction primarily because it considered the District Court order to be over-broad, and not because, as Defendants here assert, that Defendants' conduct was appropriate.

> The district court's fundamental error is the attempt to issue a class-wide restraint on the basis of a quintessentially individual problem.

903 F.2d at 1053.

At the the trial on the merits, the District Court was concerned with the issuance of a class wide injunction.[30] However, at the attorney's fee stage, the court was concerned with the defiant and illegal conduct exhibited by Defendants to weaken and disable Plaintiffs. The Magistrate specifically found that Defendants had initiated deportation proceedings in retaliation for both participation in the lawsuit and for filing requests for employment authorization. (R1:62 (90-5590)). In contrast, Defendants rely on the Fifth Circuit discussion, 903 F.2d at 1052, concerning motivation for instituting deportation proceedings: "Improperly motivated institution of deportation proceedings cannot be inferred simply because plaintiffs had come to INS' attention only as a result of their appearance to request voluntary departure or employment authorization." This quote is found within the Court's discussion as what INS contended, and, thus, is not a holding by the Court. Even if it were a view taken by the panel,

[30] There is also some question during the merits phase as to the whether the District Court enjoined retaliation only for filing employment authorization or from requests for employment and the filing of the lawsuit. See note 12, supra. The discrepancies in the language of the District Court' memorandum and the injunction undoubtedly raised problems as to the scope of the injunction.

it is dicta, and as discussed above, not the primary holding nor the basis for vacation of the injunction.

The deportation proceedings brought against Plaintiff Zavala and class members, resulted in increased cost, anxiety, and inconvenience to Plaintiff, the class, and counsel, and was an abuse of agency process. Even one retaliatory deportation has a potential grave consequence. The injury which Plaintiff Zavala and class members would have, and actually did, suffer is substantial. Deportation has been described as a "draconian measure" and the equivalent of "banishment". Tim Lok v. I.N.S., 548 F.2d 37, 39 (2nd Cir. 1977). Plaintiffs' deportation would have resulted in separation of families, loss of income and "all that makes life worth living". Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). In addition, deportation would cause potential ineligibility for an immigrant visa. 8 U.S.C. 1182(a)(16).

The court's finding that INS recalcitrance, defiance, and abuse of the deportation process was in bad faith has not been shown to be an abuse of the court's discretion and thus the fee award should be affirmed.

VII. ATTORNEY EXPERTISE WARRANTS AN ENHANCED FEE

The District Court abused its discretion when it refused to enhance the fees due to counsel's expertise. The Supreme Court has held that specialization in a unique field of law or foreign language ability justify a higher fee award. Pierce v. Underwood, supra at 572. Both counsel speak Spanish and are Board Certified in Immigration and Nationality Law by the State Bar of Texas. Each

has served in a number of professional organizations and conducted training in immigration law. (R1:42, 67). Plaintiffs provided evidence through their expert witnesses, that specialized knowledge of immigration law and Spanish language ability were required for this lawsuit, that complicated cases of this type cannot be litigated absent attorneys with such qualifications who can only be obtained at rates in excess of $75 per hour. (R2:114, 118). Pierce v. Underwood, supra; Jean v. Nelson, supra at 774. The Second Circuit has eloquently described the complexity of the practice of immigration law.

> We have had on occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in Ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges...(Congress) apparently confident of the aphorism that human skill properly applied can resolve any enigma that human inventiveness can create has enacted a baffling skein of provisions for the I.N.S. and the courts to disentangle.

Tim Lok v. I.N.S., supra at 38. Several courts have recognized immigration law as a specialty for an enhanced EAJA award. See, Jean v. Nelson, supra; Pollgren v. Morris, 911 F.2d 527, 538 (11th Cir. 1990); Nadler v. I.N.S., 737 F. Supp. 658 (D.D.C. 1989).

It is not necessary that Plaintiffs prove both a limited availability of representation for immmigrants in this area, together with proof of expertise and knowledge of a foreign language. In several recent cases, an enhanced fee has been awarded solely on the basis of the attorneys' expertise. In Jean v. Nelson, supra, the Eleventh Circuit held expertise in

immigration law and foreign language ability may be considered special factors to warrant a higher fee. Likewise, in another immigration case, Abela v. Gustafson, 888 F.2d 1258, 1261, (9th Cir. 1989), counsel were awarded $125 per hour due to "the expertise of counsel and complexity of the area of law involved." See, also Nadler v. I.N.S., supra (Enhanced fee justified due to the expertise of Sam Bernsen, an immigration expert); Hoopa Valley Tribe v. Watt, 569 F. Supp. 943, 947 (Higher fee warranted due to expertise in Native American Law); De Allende v. Schultz, 709 F. Supp. 18, 25-26 (D. Mass. 1989) ($175 per hour warranted for constitutional law, scholar and litigation). Cf.Powell v. C.I.R., supra at 1173 (tax law is a specialty area in which few attorneys participate).

VIII. COST OF LIVING INCREASE IS WARRANTED

The District Court properly awarded fees at $95 per hour, based on an increased cost of living. An increase in fees based on a cost of living is specifically provided for under Section 2412(d)(2)(A). This Court has held that except in unusual circumstances, an increase should be granted. Baker v. Bowen, supra at 1084.

The District Court also properly distinguished EAJA fees from the holding of Library of Congress v. Shaw, 478 U.S. 310 (1986). (R1:66-67 (90-5590)). Section 2412(d)(2)(A) provides a statutory exception to the sovereign immunity doctrine and allows for a cost of living increase to compensate for delay in payment. Baker v.

Bowen, supra.[31] A cost of living adjustment is based upon sound economic principles. Graves v. Barnes, 700 F.2d 220, 223 (5th Cir. 1983), citing Coreland v. Marshall, 641 F.2d 880, 883 (D.C. Cir. 1980) (en banc).

Defendants' argument that the increase in fees should be based on the cost of living increase in the year that legal services were rendered was properly rejected by the lower court. (R1:67 (90-5590)). EAJA cost of living adjustments are routinely awarded based on the current CPI index, e.g. Jean v. Nelson, supra at 773-774, without regard to the year the legal services were performed. State of Louisiana Ex. Rel. Guste v. Lee, supra at 1226; Baker v. Bowen, supra; Allen v. Bowen, 821 F.2d 963 (3rd Cir. 1987); Hirshey v. F.E.R.C., 777 F.2d 1 (D.C. Cir. 1985); Action of Smoking and Health v. C.A.B., 724 F.2d 211, 218 (D.C. Cir. 1984); Bielec v. Bowen, 675 F. Supp. 200, 202 (N.J. 1987).

Responding to the argument that fees should be based on prevailing rates at the time legal services were rendered, this court noted that the prevalent practice is "to use current rates, rather than historic rates and thus compensate counsel for inflation and delay in payment". Copper Liquor, Inc. v. Adolph Coors Company, 684 F.2d 1087, 1096, n.26 (5th Cir. 1982). Cf. Missouri v. Jenkins, 110 S. Ct. 1651 (1989) (Section 1988 attorneys' fees should be based on current rather than historic rates, to compensate for the delay in payment). The precise

[31] Significantly, State of Louisiana Ex. Rel. Guste v. Lee, supra (5th Cir. 1988) and Baker v. Bowen, supra was decided after Library of Congress v. Shaw, supra.

argument raised by Defendants was also soundly rejected by the D.C. Circuit. Hirschey v. F.E.R.C., supra at 5.

Defendants argue that any delay in payment was due to Plaintiffs' position in this suit. As discussed herein, Defendants refused to settle two claims which they now admit having no defense to. At no time did Defendants pay Plaintiffs reasonable attorneys' fees for the portions of the injunction which they did not appeal, although they admitted Plaintiffs were entitled to those fees. (R1: 49 (90-5590)). Additionally, since established caselaw holds that Plaintiffs are entitled to, at minimum, attorneys' fees for its successful claims, a cost of living increase is justified under EAJA.

IX. THE DISTRICT COURT FINDING AS TO LIMITED AVAILABILITY IS INCORRECT

The Magistrate found, and the District Court affirmed, that there was not a limited availability of representation in the San Antonio area to individuals litigating immigration related issues. Plaintiffs filed timely objections to such findings, and assert that the Court's finding was clearly erroneous. Powell v. C.I.R., supra (finding of fact subsidiary to fee award reviewed under clearly erroneous standard). The overwhelming evidence from those most closely connected with the representation of immigrants was that there is a very limited availability of attorneys to represent immigrants in the San Antonio, Texas INS district, and that by raising the hourly fee above $75 per hour, more attorneys will be available to represent immigrants in federal court. (R2:30 (90-5590)). Pierce v. Underwood, supra; Baker v. Bowen, supra.

Plaintiffs' witnesses included attorneys who organize pro-bono panels (R2:61 (90-5590)), who have represented immigrants for many years (R2:13 (90-5590)), and who engage in federal litigation for the Mexican American Legal Defense and Education Fund (MALDEF) (R2:105 (90-5590)). The preponderance of the testimony showed that there is a large number of immigrants in the San Antonio district who are unable to obtain representation for even routine cases, and certainly not for complex litigation, like the case at hand. (R2:65-66 (90-5590)). Norma Cantu, general counsel for MALDEF, testified they do not have enough attorneys and funding to do any more than what they can do now, and that is one case in the El Paso region involving special agricultural workers. (R2:109-110 (90-5590)). Nonetheless, MALDEF is contacted frequently by individuals requesting assistance with these cases. (R2:111-114 (90-5590)).

The testimony of Defendants' witnesses should be accorded little credence as they either had a very limited knowledege of the area (R3:92-93 (90-5590)), or of immigration (R3:135 (90-5590)); or are employed by the Defendants. (R3:95 (90-5590)).[32] In addition, Defendants' witnesses acknowledged that there is a shortage of representation for indigents. (R3:101 (90-5590)). One witness who testified on behalf a pro-bono project in San Antonio admitted that the project was closing its doors for lack of funding. (R3:90 (90-5590)).

The Magistrate found that there is a shortage of immigration

[32] It should be noted that Mr. John Carte, who testified for Defendants, has left the now defunct pro-bono project in San Antonio, and is employed by the INS.

lawyers for nonpaying clients, even though there is adequate representation for paying clients. (R1:76 (90-5590)). In addition, the Magistrate's conclusions do not account for the large number of immigrants who need assistance in federal litigation. The proper focus is not on whether there are enough attorneys willing and able to enter the immigration field to do routine visa processing and deportation cases, but on whether there are enough attorneys willing to handle the complex federal court work for those clients, and whether increasing the rate above $75 per hour would encourage lawyers to take these cases. It was also improper for the Magistrate to use Plaintiffs counsel's willingness to bring the instant case as evidence of the availability of representation. (R1:77 (90-5590)). There was ample testimony from the witnesses that an increased fee would encourage more attorneys, including immigration practitioners, to take on federal cases.

The Magistrate incorrectly found that there was no demand for federal litigation and in doing so completely ignored the evidence on that issue. Norma Cantu did not testify that MALDEF was doing one case because that is all that is needed, but on the contrary, stated that MALDEF can do only one case, in spite of a great demand, because they have no additional staff and funding and such cases are very expensive. (R1:110 (90-5590)). Moreover, in answer to Defendants' query as to those who had been unable to find representation because of the limited availability of attorneys, Plaintiff responded with ten specific issues, including denial of employment authorization for asylum applicants, the plight of

unaccompanied alien juveniles who are detained and deported without counsel or appointment of guardians, INS' failure to respond to requests by immigrants to view their files under the Freedom of Information Act, the illegal enforcement of immigration law by local police, and the violation of the Fourth Amendment by the INS during the arrest and detention of individuals of Hispanic origin. (Ex.9, Int. 2 (90-5590)). None of the above described cases have been litigated in federal court because there are not enough attorneys in the area able to take on the representation. (R2:18 (90-5590)).

CONCLUSION

For all the foregoing reasons, Plaintiffs request that the order of the District Court be affirmed, or in the alternative that the case be remanded to the District Court.

Respectfully submitted,

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By 
LEE J. TERAN

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 1991, I served the foregoing Brief for the Appellees/Cross-Appellants by causing copies to be sent by overnight delivery to:

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APPENDIX

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Board Certified
Immigration and Nationality Law
Texas Board of Legal Specialization

MAR 17 1986

February 21 1986

Mr. Richard Casillas
District Director
Immigration and Naturalization Service
727 E. Durango
San Antonio, Texas 78206

Dear Mr. Casillas:

I am writing as a matter of courtesy to inform you of a potential lawsuit which Lee Teran and I contemplate filing at this time. As you are aware, since some time in 1984 the District Office has not granted work authorization to the beneficiaries of immediate relative petitions for whom there is less than a 60-day wait for a visa interview. Although we have requested work authorization for many of our clients upon the filing of the I-130 and subsequent to the approval, we have never received work authorization nor any response to these requests. Under 8 C.F.R. 109, these beneficiaries are entitled to consideration for voluntary departure and work authorization.

If the District Office is unwilling to begin to process in a timely manner requests for work authorization, we will file suit within 30 days. Of course, we hope that we can reach a solution to this matter without litigation. However, because we feel that these beneficiaries are entitled to at minimum a consideration of their applications for work authorization, we will file suit in federal court if we are unable to resolve this matter.

Please contact me if you have any questions. Thank you for your attention.

Sincerely,

Barbara Hines

BARBARA HINES and LEE J. TERAN

BH:md

cc: Gregory Ball
Chief Legal Officer

U.S. DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

727 E. Durango Suite A 301
San Antonio, Texas 78206

MAR 21 1986

March 20, 1986

Ms. Barbara Hines
Attorney at Law
611 S. Congress, Suite 315
Austin, Texas 78704

Dear Ms. Hines:

This is in reference to your threatened lawsuit contained in your letter of February 21, 1986, and postmarked on March 15, 1986. To accede to your request would be disruptive of our priorities and be tantamount to the abdication of our prosecutorial discretion in immigration matters. We are the Agency charged with enforcement of immigration laws and do not intend to be intimidated by you or anybody else.

Very truly yours,

Richard M. Casillas
District Director

cc: Gregory Ball, District Counsel