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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-728-GW(SHx)	Date	August 9, 2012
Title	*Althea Pobre Dayo, et al. v. Janet Napolitano, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Anne Kielwasser	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
David M. Sturman	Regan Hildebrand, USDOJ

PROCEEDINGS: APPLICATION FOR SETTLEMENT APPROVAL

Based on the Tentative circulated and attached hereto, and for reasons stated on the record, the above-entitled action is dismissed pursuant to the settlement as of today's date.

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Dayo, et al. v. Napolitano, et al., Case No. CV-11-0728
Tentative Ruling on Application for Settlement Approval

I. Background

Plaintiffs are individuals who sought I-765 employment authorization from the United States Citizenship and Immigration Services ("USCIS") under 8 C.F.R. § 274a.12(c)(9) ("Section 274a.12(c)(9)") but were denied such authorization. At the time Plaintiffs' employment authorizations were denied, they all allegedly had I-485 applications for adjustment of status to lawful permanent resident ("adjustment applications") pending before the immigration court. Plaintiffs assert that USCIS found Plaintiffs ineligible for employment authorization under Section 274a.12(c)(9)[1] based on an erroneous determination that their adjustment applications were no longer pending at the time employment authorization was sought. *See, e.g.*, First Amended Compl., Docket No. 23, ¶ 1.

In particular, each named plaintiff was a beneficiary of an I-140 immigrant visa petition based on his or her employment (or status as a spouse) and filed an adjustment application with Defendant USCIS. USCIS proceeded to deny the adjustment application, and each plaintiff was consequently placed in removal proceedings before the immigration court. In those removal proceedings, each plaintiff then renewed his or her adjustment application before the immigration court. Upon renewing his or her adjustment application in removal proceedings, the plaintiff then sought to renew his or her employment authorization with USCIS under Section 274a.12(c)(9) by filing an I-765 form. However, USCIS erroneously determined that the plaintiff's adjustment application was no longer pending despite the renewal of said application in the removal proceedings before the immigration court, and thereafter denied employment authorization. *See* FAC ¶¶ 7-26, 36-65.

As a result, Plaintiffs sought injunctive, declaratory and mandamus relief to compel Defendant: (1) to properly interpret Section 274a.12(c)(9) and thereby find that Plaintiffs are entitled to employment authorization while their adjustment applications are pending before the immigration court; and (2) to compel the Executive Office for Immigration Review ("EOIR") to issue some type of confirmatory receipts to individuals who have renewed adjustment applications before the immigration court, so that individuals like Plaintiffs can prove they have renewed their adjustment applications when seeking employment authorization under Section 274a.12(c)(9) with USCIS. FAC ¶ 1.

Plaintiffs moved for class certification on October 4, 2011, which Defendants opposed. Docket No. 24. However, ongoing settlement discussions led the parties to stipulate to continue the hearing date on the class certification motion numerous times, and the case has now settled without the class certification motion having been heard by this Court. *See* Docket No. 41 (notice of settlement).

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[1] Under the relevant language of Section 274a.12(c)(9) effective through November 28, 2011, an alien should apply for work authorization and will not be deemed an "unauthorized alien" if "his or her properly filed Form I-485 application is pending final adjudication" at the time he or she seeks employment authorization.

The parties now seek this Court's approval of the settlement. *See* Docket No. 42 ("the Settlement").

II. Analysis

The parties do not seek certification of a settlement class. Indeed, there is no memorandum of law and authorities, or any briefing, submitted in support of the "application" for settlement approval; the parties have simply filed with the Court a copy of the settlement agreement. *See* Docket No. 42. Nevertheless, before approving the settlement, the Court would consider two matters: (1) the substance of the settlement; and (2) the extent to which the Court must review the terms of the settlement pursuant to Fed. R. Civ. P. 23(e) ("Rule 23(e)") or any other applicable standard, given that the class claims were settled and voluntarily dismissed with prejudice prior to class certification without a request for certification of a settlement class.

1. Settlement Terms

The pertinent terms of the Settlement are as follows. While Defendant denies all liability (Settlement ¶ 47), the settlement appears to provide to Plaintiffs all of the injunctive relief sought in the FAC, most importantly the provision that "USCIS recognizes that an I-485 properly renewed with the Immigration Court by an alien in removal proceedings constitutes a 'pending' application for purposes of 8 C.F.R. § 274a.12(c)(9)." Settlement ¶ 25. As for the individual named Plaintiffs, their claims are settled and dismissed with prejudice. Settlement at 4. Plaintiffs' counsel declares that the conditions of the settlement are "fair, reasonable, and in the best interests of the Plaintiffs, the putative Class, and the putative class members." *Id.* Thus, it appears that Plaintiffs, at least as to their individual claims, have for the most part garnered all that they could wish for from this settlement agreement.

However, there is one exception: the Court would note that the FAC, while in general challenging the above-described policies of the USCIS and the immigration court, also sought the Court to issue various orders implementing a change in that policy. For instance, Plaintiffs sought an order that would require Defendants "to reopen, sua sponte, reconsider and approve applications for employment authorization filed by Plaintiffs and members of the Class and wrongfully denied . . ." FAC, Prayer ¶ 7. The Settlement does not include this request for what appears to be retroactive application of the changed policies. The Court would ask the parties as to how this request played into the negotiations; without the benefit of briefing from either party, the Court cannot assess the reasonableness of a Settlement that provides only prospective relief for absent class members. For instance, the Notice of Settlement (discussed in detail below) appears to provide relief to absent class members only for "future applications." Settlement, Exh. 1. The Court would ask the parties what the outcome would be if an absent putative class member's application was denied prior to the Settlement; is any relief available to such an applicant?

Plaintiffs did not seek any monetary relief in the FAC, though they did seek attorneys' fees and costs. FAC, Prayer for Relief. The Settlement provides that Defendants will pay attorneys' fees in the amount of $70,000, and will pay costs in the amount of $350. Settlement ¶ 48.

What is slightly unclear is how the Settlement impacts the absent putative class members.

The Settlement does not envision the certification of a settlement class, and provides that Plaintiffs will withdraw with prejudice the motion for class certification. Settlement ¶ 41. However, the Settlement includes absent class members to a certain extent:

> Applicants who currently are pursuing federal court actions related to USCIS's denial of an I-765 employment authorization claim arising under, but not limited to, the Administrative Procedure Act, 5 U.S.C. § 701 et seq., the Mandamus Act at 28 U.S.C. § 1361 and the Declaratory Judgment Act at 28 U.S.C. § 2201, *may benefit from the provisions of the settlement* only if they agree to voluntary dismissal of their federal court claims within sixty (60) days after the Approval Date.

Settlement ¶ 19 (emphasis added). In other words, if there are other federal cases filed by putative class members raising claims identical to those settled here, those absent putative class members can effectively "opt in" to the Settlement, so long as they dismiss their own actions. The release language of the settlement applies only to the named Plaintiffs, however, in that only Plaintiffs are barred from bringing any of the settled claims against the Defendants. Settlement ¶¶ 41-42.

The Settlement envisions that notice be provided to the putative class members in the following manner. First, the seven named Plaintiffs will receive notice of the settlement within ten business days following this Court's approval thereof. Settlement ¶ 18. As for the absent putative class members, the "UCIS will provide public notice of settlement to potential class members by posting the Notice of Settlement [setting forth its terms] . . . on USCIS's website and by disseminating" it through the Office of Communication and Office of Public Engagement. *Id.* In addition, the notice of settlement will be posted at the Los Angeles Immigration Court in public areas for one year. *Id.* These provisions seem acceptable in terms of providing notice to absent putative class members, but the Court would enquire at the hearing as to whether the "dissemination" to be conducted by the Office of Communications would include affirmative mailings to persons likely to fall under the purview of the Settlement, or whether it simply means a different variety of public posting.

The Notice of Settlement, in turn, provides the following proviso as to who is eligible to "opt in" to the Settlement by defining "Which Applicants are Included" as, essentially, those applicants in the same position as Plaintiffs, which gave rise to the lawsuit in the first place. Settlement, Exh. 1. Thus, the Notice of Settlement implies that the Settlement *includes* all applicants who had an I-485 Application pending for renewal, and then had an I-765 application for employment denied for lack of evidence of an I-485. *Id.* This seems reasonable, because the injunctive relief obtained by Plaintiff, namely the revision of certain USCIS and immigration court policies, applies equally to everyone, not just Plaintiffs. But that, of course, begs the question of whether any certification motion is required here. Moreover, the Notice of Settlement provides:

> **If you fit all of the above requirements, and have filed an individual action in federal court seeking review over USCIS's denial of your employment authorization claim, please note that USCIS cannot adjudicate your application under the settlement agreement. To benefit from the settlement adjudication benchmarks, you must voluntarily dismiss your action. The**

> **effective result of the agreement is that the Los Angeles Immigration Court will be able to provide you with proof of renewed filing of an adjustment application in order to support any I-765 application that is properly filed with USCIS in the future. Should your future application filed under the settlement agreement be denied, you would be able to refile your individual action against USCIS. In addition, should your application be denied, you are not barred from bringing a case against USCIS after exhaustion of any administrative remedies.**

Settlement, Exh. 1.

All in all, it is clear that (1) there is no monetary relief provided by this Settlement, (2) Plaintiffs have obtained all of the injunctive relief they sought; and (3) the Settlement does in some way impact the rights of the absent class members (albeit indisputably positively).

2. Rule 23(e) Generally Does Not Apply to Pre-Certification Settlements, but the Court must Still Evaluate the Fairness of the Settlement

In the current incarnation of Rule 23, if no class has been certified, the requirements of Rule 23(e) do not apply. *See* Fed. R. Civ. P. 23(e), adv. comm. notes, 2003 amdts. ("The new rule requires approval only if the claims, issues, or defenses of a *certified* class are resolved by a settlement") (emphasis added); *Mahan v. Trex*, No. 5:09-cv-00670 JF/PVT, 2010 U.S. Dist. LEXIS 130160, at *8-11 (N.D. Cal. Nov. 22, 2012). However, even if the Court is not mandated to apply the procedures of Rule 23(e), the Court may in its discretion "require . . . giving appropriate notice to some or all class members," Fed. R. Civ. P. 23(d)(1)(B), and may consider "whether the proposed settlement and dismissal are tainted by collusion or will prejudice absent putative members with a reasonable 'reliance' expectation of the maintenance of the action for the protection of their interests." *See Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1407 n.3 (9th Cir.1989); *Lewis v. Vision Value, LLC*, No. 1:11-cv-01055-LJO-BAM, 2012 U.S. Dist. LEXIS 99854, at *8-12 (E.D. Cal. Jul 18, 2012) . The Court also may "inquire into possible prejudice from . . . lack of adequate time for class members to file other actions, because of a rapidly approaching statute of limitations." *Diaz*, 876 F.2d at 1408 (citation omitted).

However, regardless of whether Rule 23 applies in a formal sense, the Court must still conduct an inquiry into the fairness of the settlement agreement. In fact, the Ninth Circuit recently specified that even in cases of pre-certification settlements, a review of the eight *Churchill* factors is required. *In re Bluetooth Headset Products Liability Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (quoting *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). The Ninth Circuit went on to specify:

> [p]rior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement. Accordingly, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair.

In re Bluetooth Headset Products Liability Litig., 654 F.3d at 946 (citations omitted). However, crucially, in *Bluetooth Headset*, the parties sought certification of a settlement class at the same time as the application for settlement approval. *Id.* at 939-940. Moreover, in *Bluetooth Headset*,

the class members were to receive monetary compensation, thus increasing the possibility of collusion between Plaintiff's counsel and Defendants as to fees, or unfairness to the absent class members as to payment structures. Thus it is possible, despite *Bluetooth Headset*, that no review of the *Churchill* factors is necessary here, as Plaintiffs have obtained all of the injunctive relief they sought, Plaintiffs did not seek monetary relief, and the attorney's fees awarded are to be paid by Defendants and are somewhat modest ($70,000).

In fact, without the benefit of any briefing from the parties, it is difficult, if not impossible, for the Court to run through the *Churchill* factors in an informed manner. Those factors are:

> (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement.

Churchill, 361 F.3d at 947; *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). That said, the presence of a governmental participant is self-evident, and thus militates in favor of approval. *See Touhey v. United States*, No. EDCV 08-01418-VAP (RCx), 2011 U.S. Dist. LEXIS 81308, at *20-21 (C. D. Cal. July 21, 2011) (presence of a governmental participant weighs in favor of class action settlement approval). The fact that Plaintiffs appear to have obtained all of the injunctive relief they sought in the FAC also reassures the Court that the settlement is fair and reasonable to them; the burden on the government, as discussed *infra*, is not so high as to be inherently unfair. Thus, based on the terms and context of the settlement, it appears that none of the *Churchill* factors raise red flags. However, the Court would inquire of the parties at the hearing as to what level of review it is necessary for this Court to undertake before approving the Settlement; if it was substantive, the Court would inquire as to why no briefing whatsoever was provided to the Court in support of the application for approval of the Settlement.

As for collusion or prejudice to absent class members, as discussed, no plaintiff in this action, named or absent, is receiving any monetary relief. Thus the possibility of collusion or prejudice is very low. *See Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003) ("Our inquiry [in reviewing settlement approval] . . . focuses primarily upon . . . the particular aspects of the decree that directly lend themselves to pursuit of self-interest by class counsel and certain members of the class-namely, attorneys' fees and the distribution of any relief, particularly *monetary relief*, among class members") (emphasis added). It appears that so long as notice is provided adequately, which it appears it will be, absent class members are not prejudiced because they will benefit from the new USCIS/immigration court policies to the same extent as the named plaintiffs.

III. Conclusion

The Court would APPROVE the settlement.