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United States District Court, C.D. California.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al., Plaintiffs,
v.
IMMIGRATION AND NATURALIZATION SERVICE, et al., Defendants.

No. 87–4757–WDK(JRX). | Aug. 12, 1989.

Opinion

OPINION AND ORDER RE RELIEF

KELLER, District Judge.

***1** On July 15, 1988, this Court issued an Order granting in part plaintiffs' motion for summary judgment and granting in part summary judgment in favor of defendants. At that time, the Court ordered further briefing from the parties related to the relief available to the prevailing plaintiffs. That briefing has been submitted and the parties have had an opportunity to respond to the positions taken by their respective counterparts. Having considered the materials submitted and heard oral argument on August 11, 1988, the Court hereby ORDERS that plaintiffs' request for injunctive relief is GRANTED.

BACKGROUND

When Congress enacted the Immigration Reform and Control Act of 1986, Pub.L. No. 99–603, 8 U.S.C.A. § 1255a (West Supp.1988) (IRCA), it provided that all illegal aliens who fall within the various requirements set forth in IRCA must apply for legalization during a 12–month period to be designated by the Attorney General. 8 U.S.C.A. § 1255a(a)(1)(A). The time period designated by the Attorney General began on May 5, 1987 and ended on May 4, 1988. *See* 8 C.F.R. § 245a.2(a)(1) (1988). Both the statutory language and the regulatory language are mandatory—the alien "must apply" within the designated legalization period.

Despite these time limitations, plaintiffs in subclass one argue that declaratory relief is insufficient to remedy their injury caused by the Immigration and Naturalization Service's (INS) original policy. They contend that since the original policy was in effect between May 1, 1987 and November 17, 1987, they were deprived of roughly half of the twelve-month time period alloted to them in addition to being dissuaded from applying for legalization due to an erroneous, though substantially publicized, regulation.[1] As a consequence, plaintiffs ask this Court to grant them an extension of time to apply for legalization commensurate with the time lost. In order to minimize the tremendous impact of such an extension, plaintiffs ask that a new deadline of November 30, 1988, corresponding with the deadline accorded by Congress to agricultural workers, be created.

In support of their remedial request, plaintiffs effectively rely on three distinct, though in many ways related, principles. First, they invoke this Court's general equitable powers, arguing that it authorizes an extension of the filing deadline. Second, they contend that the INS' conduct equitably estops the agency from relying on the statutory time limit created by Congress. Finally, plaintiffs assert that the 12–month limitations period may be equitably tolled to permit further filings of legalization applications.

If plaintiffs prevail on any of these remedial theories, they further request that the INS be ordered to publicize the fact of additional time granted by the Court.

DISCUSSION

The statutory requirement that an alien apply for an adjustment of status during the 12–month period designated by the Attorney General is a jurisdictional requirement and not simply a statute of limitations. Section 1255a(a) sets forth a number of "requirements" for eligibility for legalization. An alien must establish a continuous unlawful residence in the United States since January 1, 1982, *see* 8 U.S.C.A. § 1255a(a)(2), a continuous physical presence in the United States since November 6, 1986, *see* 8 U.S.C.A. § 1255a(a)(3), and his admissibility as an immigrant. *See* 8 U.S.C.A. § 1255(a)(4). One additional requirement of the statutory scheme, indeed the first requirement, is that the alien "must apply for ... adjustment during the 12–month period beginning on a date ... designated by the Attorney General." 8 U.S.C.A. § 1255a(a)(1)(A).

***2** When it denominated the timely application a "requirement" and listed it first among various other requirements for eligibility, Congress expressly made § 1255a(a)(1)(A) a jurisdictional provision instead of a statute of limitations. *See Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393–94 (1982). Because § 1255a(a)(1)(A) is a jurisdictional requirement, "[t]he government may not be equitably barred from asserting

[it].” *Lee v. United States,* 809 F.2d 1406, 1410 (9th Cir.1987) (quoting *McIntyre v. United States,* 789 F.2d 1408, 1410–11 (9th Cir.1986)), *cert. denied sub nom. Lee v. Eklutna,* 108 S.Ct. 772 (1988). Thus, as a jurisdictional limitations period, § 1255a(a)(1)(A) may not be equitably tolled and the government may not be equitably estopped from relying upon it.[2]

Plaintiffs’ reliance on the doctrines of equitable estoppel and equitable tolling is further undermined by their failure to demonstrate affirmative misconduct by the INS. *See INS v. Hibi,* 414 U.S. 5, 8 (1973) (per curiam).[3] Mere affirmative conduct will not support equitable estoppel against the government; the challenged action must constitute affirmative *mis*conduct, and such misconduct does not contemplate simple negligence. *Morgan v. Heckler,* 779 F.2d 544, 545 (9th Cir.1985). Affirmative misconduct must also be demonstrated to invoke equitable tolling against the government. *See, e.g., Gibson v. United States,* 781 F.2d 1334, 1344–45 (9th Cir.1986), *cert. denied,* —— U.S. ——, 107 S.Ct. 928 (1987); *Hyatt v. Heckler,* 807 F.2d 376, —— (4th Cir.1986), *cert. denied sub nom. Bowen v. Hyatt,* 108 S.Ct. 79 (1987).

Many cases apparently construe misconduct to involve some type of intentional or active “misrepresentation” or “concealment,” *see, e.g., Wagner v. Director, Federal Emergency Management Agency,* 847 F.2d 515, 519 (9th Cir.1988); *United States v. Harvey,* 661 F.2d 767, 775 (9th Cir.1981), *cert. denied,* 459 U.S. 833 (1982); *United States v. Ruby Co.,* 588 F.2d 697, 704 (9th Cir.1978), *cert. denied,* 442 U.S. 917 (1979), or a “deliberate lie” or “pattern of false promises.” *Mukherjee v. INS,* 793 F.2d 1006, 1009 (9th Cir.1986). No such malfeasance has been demonstrated or even alleged by plaintiffs and cannot be presumed simply because the INS promulgated regulations which have been held to be invalid. *See INS v. Miranda,* 459 U.S. 14, 18 (1982) (per curiam); *Schweiker v. Hansen,* 450 U.S. 785, 788 (1981) (per curiam); *United States v. Browning,* 630 F.2d 694, 703 (10th Cir.1980), *cert. denied,* 451 U.S. 988 (1981). *See also* Note, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government,* 53 U.Chi.L.Rev. 1026, 1044–47 (1986).

What remains to be considered is whether this Court, when fashioning the equitable relief requested by plaintiffs in subclass one, may, despite the foregoing restrictions, enjoin the INS from refusing to accept and process legalization applications of those aliens who legitimately fall within subclass one.[4]

***3** Defendants invoke language in *United States v. Ginsberg,* 243 U.S. 472, 474 (1917), to the effect that “[a]n alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.” The issue is not, however, as defendants then assert, “whether this Court has the power to ignore the express words of the statute....” The express words of the statute are that an alien must apply for legalization “during the *12–month* period” designated by the Attorney General. 8 U.S.C.A. § 1255a(a)(1)(A) (emphasis added).[5] Defendants effectively designated a six month period for applications by those who fall within subclass one. It is the INS, therefore, which failed to obey the express words of the statute.

In essence, plaintiffs in subclass one ask that the INS be compelled to do what Congress has instructed: to designate a full 12–months during which they may apply for legalization. Rather than ignoring the express words of Congress, plaintiffs in subclass one seek to abide by them by applying within that 12–month period because, according to the class definition, they were dissuaded from doing so by the original INS policy and the fact that they did not learn of the policy’s modification until too late.[6] Consequently, the fundamental premise of defendants—*viz.,* that the applications of these plaintiffs are late and thus their consideration would dispense with one requirement for legalization—is simply incorrect. The applications are not “late” because the aliens in subclass one were not given the statutorily prescribed 12 months in which to apply for legalization.

Defendants rely heavily on *INS v. Pangilinan,* 108 S.Ct. 2210 (1988), for the proposition that permitting plaintiffs to apply for legalization would be in contravention of public policy as expressed by Congress and therefore impermissible. Defendants read *Pangilinan* much too broadly. The Supreme Court held that where an alien has “no statutory right to citizenship,” even a court sitting in equity may not confer citizenship upon that alien for equitable reasons. *Id.* at 2215–16. The Court premised its decision on the plain fact that Article I, § 8 of the Constitution permits only Congress to grant citizenship and thus where an alien does not qualify under the terms set forth by Congress, a court may not nevertheless grant citizenship by ignoring those terms. *Id.* at 2215.

This case differs from *Pangilinan* in four very important respects. First, plaintiffs here rely upon a statutory violation to support their claim for equitable relief. Second, the failure of the INS properly to adhere to the provisions of IRCA indicates that the INS’ position is not “ ‘enforcing the public policy established by Congress.’ ” *Id.* at 2215 (quoting *Hibi,* 414 U.S. at 8). Third, unlike the statute involved in *Pangilinan,* by which Congress itself established the cut-off date, IRCA merely creates a 12–month period to apply for an adjustment of status. The congressional policies differ because the former creates a final date after which Congress did not wish applications to be heard, whereas the latter focuses on a specific period of time to be allotted to legalization applications. Finally,

the Supreme Court expressly distinguished the inability of a court to confer citizenship with a court's traditional equitable powers such as injunctive relief. *See id.* at 2216 ("More fundamentally, however, the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers.").[7]

***4** Plaintiffs in subclass one do not propose that this Court grant them citizenship. *Pangilinan* suggests that even where an executive agency fails to comport with congressional policy, this form of relief is unavailable. What is available, however, and what these plaintiffs seek, is an order enjoining the INS from denying them the opportunity to apply for an adjustment of status on timeliness grounds when the untimeliness resulted from the INS' erroneous policy. This relief is meaningfully different from the relief sought in *Pangilinan* because all that is being granted here is the right to apply for an adjustment of status with the attendant possibility that the application may properly be denied.

The Court is not unaware of the fact that many illegal aliens who fall without subclass one and some of those who counsel them will view this ruling as an opportunity to gain entry into the United States by falsely declaring reliance on the INS' original policy. This inevitability cannot, however, foreclose the benefits of the congressional legalization mandate set forth in § 1255a(a)(1)(A) for those who did legitimately rely on INS statements. The Court is confident that those charged with determining reliance on the initial INS policy in individual cases will consider very carefully the claims of those who seek to avail themselves of this decision.

Accordingly, IT IS HEREBY ORDERED that summary judgment regarding the relief available to plaintiffs in subclass one shall be entered in favor of plaintiffs in subclass one,

IT IS FURTHER ORDERED that the INS is enjoined from refusing to accept applications for an adjustment of status of those aliens who fall within subclass one, beginning immediately and ending November 30, 1988, or, if defendants seek and are granted a stay of this Order, and if this Court's Order is thereafter affirmed by the Ninth Circuit, for a period of 120 days after such affirmance, PROVIDED that the alien contemporaneously provide a sworn affidavit attesting that he or she falls within subclass one, and PROVIDED FURTHER that if an alien is represented by counsel, counsel shall provide a sworn affidavit that to the best of his or her knowledge after reasonable inquiry, the alien meets the requirements of subclass one,

IT IS FURTHER ORDERED that the INS shall, consistent with the evidentiary requirements and standards of proof set forth in IRCA, and within two weeks from the date of this Order, establish appropriate procedures to determine whether an applicant claiming to fall within subclass one indeed legitimately does,

IT IS FURTHER ORDERED that the INS shall, in cooperation with qualified designated entities, take reasonable steps to disseminate this Court's ruling to aliens who may fall within subclass one. This dissemination shall include, but not necessarily be limited to, notifying qualified designated entities and issuing press releases to the INS press list immediately upon development of the procedures for determining eligibility,

***5** IT IS FURTHER ORDERED that any illegal alien apprehended by INS enforcement officials who claims to fall within subclass one shall, in lieu of immediate deportation, be given adequate time to apply for legalization, and

IT IS FURTHER ORDERED that this Court shall continue to retain jurisdiction to assure that this Order is carried out fully and completely and to provide such other and further relief or modifications as may be necessary.

IT IS SO ORDERED.

1 In their response to one request for admission, defendants indicated that, pursuant to the original policy, "it would not have been inconsistent with INS policy for INS employees ... to advise potential applicants for legalization ... that they were ineligible for legalization...."

2 Because the timely filing requirement of § 1255a(a)(1)(A) is jurisdictional, the cases cited by plaintiffs which involve merely statutes of limitation are inapposite.

3 Most cases in which equitable estoppel is asserted against the government involve the questionable acts of an individual government official rather than the official acts of a government agency. Despite this factual distinction, plaintiffs must nevertheless establish that responsible officials at the INS engaged in affirmative misconduct when they caused to be promulgated an initial regulation which this Court has held to be "inconsistent with Congress" intent when it enacted IRCA." *League of United Latin American Citizens v. INS,* No. CV 87–4657–WDK (JRx), slip op. at 15 (C.D.Cal. July 15, 1988).

4 Plaintiffs' failure to satisfy what this Court has denominated as a jurisdictional requirement—the

timely filing of a legalization application—does not divest this Court of subject matter jurisdiction. Obviously, this Court would lack subject matter jurisdiction to review the denial of an individual adjustment of status as authorized by § 1255a(f) where the alien had failed to timely file an application. *Cf. Lee v. INS,* 685 F.2d 343 (9th Cir.1982) (per curiam); *Gillespie v. Civiletti,* 629 F.2d 637, 640 (9th Cir.1980). That, however, is not the question presented by this lawsuit. Instead, plaintiffs in subclass one complain that they have not been provided with an opportunity to apply for legalization and thus satisfy this jurisdictional requirement because the INS promulgated regulations inconsistent with congressional intent, and they seek appropriate relief for the harm caused by that error. This Court clearly has subject matter jurisdiction to consider this challenge.

[5] Defendants also argue that injunctive relief is improper because Congress voted on April 28, 1988 not to extend the 12–month deadline in the face of various judicial challenges to INS regulations and other confusion. *See* 134 Cong.Rec. § 5043 (daily ed. April 28, 1988). This congressional action does not have the dispositive significance which defendants seek to attribute to it. Congress did not vote or otherwise express a desire to preclude courts from rectifying regulatory inconsistencies with its policies as manifested in IRCA for those individuals who have been injured by those policies. All Congress did was to affirm its 12–month application period as it relates to all aliens, whether or not they have been injured by those policies.

[6] The factual question of the extent of the INS' publicity of its modified policy neither precludes summary judgment regarding plaintiffs' requested relief nor supports defendants' position that the requested relief is unwarranted. Subclass one is comprised of "all persons who qualify for legalization but who were deemed ineligible for legalization ... who learned of their ineligibility on or after May 1, 1987 but did not learn about INS' modified policy ... and, relying upon information that they were ineligible, did not apply for legalization on or before May 4, 1988." Thus, no matter how extensive the publicity, these plaintiffs, by definition, did not learn of the change. The extent of the publicity is therefore irrelevant.

[7] This equitable relief would be available irrespective of whether this case is a suit at law or in equity. *See* Fed.R.Civ.P. 2; *Porter v. Warner Holding Co.,* 328 U.S. 395, 398 (1946); 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1043, at 138 (1987).