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United States District Court, E.D. New York.

Ime Archibong ETUK, et al., Plaintiffs,
v.
William S. SLATTERY, et al., Defendants.

No. 89 CV 3265. | April 30, 1992.

Attorneys and Law Firms

The Legal Aid Society (Kathleen A. Masters, Esq., Margaret H. McDowell, Esq., and Manuel D. Vargas, Esq., of counsel), New York City, for plaintiffs.

Andrew J. Maloney, U.S. Atty. (Scott Dunn, Special Asst. U.S. Atty., of counsel), Brooklyn, N.Y., for defendants.

Opinion

MEMORANDUM AND ORDER

NICKERSON, District Judge,

***1** Plaintiff class, permanent resident aliens in the United States, brought this action seeking declaratory and injunctive relief. They allege that the defendants, officials of the Immigration and Naturalization Service (INS), are violating plaintiffs' rights under federal law and the United States Constitution by withholding permanent resident alien cards, Form I–151 or I–551, ("green cards" in the vernacular) or adequate replacements for the cards.

In *Etuk v. Blackmun,* 748 F.Supp. 990 (E.D.N.Y.1990), familiarity with which is assumed, this court held that the INS, under the pertinent statutory provisions, must issue to permanent residents, who have lost their green cards or have had them taken pending deportation proceedings, at least a temporary substitute in lieu of a green card complying with the requirements of 8 U.S.C. § 1324a(b)(1)(B)(v) and containing no information casting doubt on the bearer's status as a lawful permanent resident. The court held that the INS's Form I–94 Departure Record, Form I–94 Arrival Record, and the Form I–688B did not meet these requirements.

The court reserved decision on whether the same ruling should apply to those in exclusion proceedings who had been paroled into the United States.

On November 28, 1990, this court issued an order, familiarity with which is assumed, implementing the above Memorandum and Order, and directing that "Defendants shall provide temporary proof of status no later than twenty-one business days after the date of application and a receipt on the day of application." (¶ 6).

The Second Circuit upheld the September 27, 1990 decision in general, directed this court to modify one part of the order, and remanded for clarification or further consideration the adequacy of the "I–94 Arrival Record" issued by INS as a temporary substitute for a green card. *Etuk v. Slattery,* 936 F.2d 1433 (2d Cir.1991).

In a December 16, 1991 Memorandum and Order, familiarity with which is assumed, this court modified the November 28, 1990 order as directed by the Court of Appeals. This court also explained why the I–94 Arrival Record was an inadequate temporary substitute and declined to modify its order accordingly.

The court then considered the issue reserved in its September 27, 1990 Memorandum and Order, namely the matters concerning permanent residents placed in exclusion proceedings and paroled into the United States.

The INS says it provides those in exclusion proceedings who have been paroled with Form I–688B or I–94. The court had held in its September 27, 1990 order that these forms were inadequate as to those in deportation proceedings. But the court held that the INS may, under 8 U.S.C. § 1125(b), stop at the border any alien not "clearly and beyond doubt entitled" to enter, and the Attorney General may set such conditions on aliens paroled into this country as the Attorney General in his discretion deems in the public interest.

The court therefore held that the INS need not furnish "the same evidence of authorization" for employment as is required for those in deportation proceedings.

***2** Plaintiffs now move to reargue this section of the court's December 16, 1991 Memorandum and Order and seek to include lawful permanent residents in exclusion proceedings in the certified class subject to this court's order of November 28, 1990. The defendants oppose this motion.

In separate motions, plaintiffs also seek an order adding to paragraph six of this court's November 28, 1990 order the sentence: "Defendants shall provide the replacement permanent resident card (Form I–551) no later than 90 days after the day of application"; an order striking defendants' supplemental statement of facts pursuant to Rule 3(g) of the Local Rules of the court; and an order striking the entire declaration of Roseanne Sonchik, the J.F.K. International Area Port Director for the INS, regarding the implementation of a memorandum issued

by INS Commissioner Gene McNary concerning paroled aliens in exclusion proceedings, and various paragraphs in the Declaration of INS Senior Special Agent and Employer and Labor Relations Officer Bruce Lupion regarding employer compliance with the immigration laws, and in the Declaration of INS Special Agent John P. Woods regarding the files of the named plaintiffs.

Defendants oppose these motions and cross-move to modify paragraph 6 of the November 28, 1990 order to permit INS to issue a temporary proof of status within ninety rather than twenty-one days, and to permit INS to issue a receipt of application within three business days instead of on the day of application. Defendants also move to strike the affirmations of Manuel D. Vargas regarding the inadequacy of the original I–94 Arrival Record, of Robert Belfort regarding the insufficiency of the I–94 Record for purposes of the Social Security Administration, of Daniel Jean Pierre regarding the difficulty of gaining employment without a replacement green card, and several paragraphs in Jill Davidson's affidavit regarding the insufficiency of the I–94 Arrival Record to satisfy employers and obtain government benefits.

I. Motions to Strike

The court declines to strike any of the declarations or affidavits and will accord them such weight and consideration as is appropriate.

II. Paroled Aliens in Exclusion Proceedings and Temporary Proof of Status

Plaintiffs say that the court erred in its December 16, 1990 Memorandum and Order when it distinguished between two sets of legal permanent resident aliens. As the court stated in its December 16, 1991 Memorandum and Order, the distinction made by INS in the kind of evidence of authorization of employment to be furnished to those in deportation and those in exclusion proceedings who are paroled seems at best strange. But plaintiffs have submitted nothing suggesting that the statutes permit this court to impose its own conditions for parole.

Permanent resident aliens who return from abroad and are stopped at the border have statutory rights to challenge their exclusion. Moreover, they have due process rights. But this court is not persuaded that the INS violates such due process rights simply by substituting for green cards other documents pending completion of the exclusion proceedings even though those documents do not meet the same standards required for those in deportation proceedings.

III. Modification of the November 28, 1991 Order

***3** Both parties seek modification of paragraph six of this court's November 28, 1990 order. That paragraph reads: "Defendants shall provide temporary proof of status no later than twenty-one business days after the date of application and a receipt on the day of application."

Plaintiffs wish to append to the end of the paragraph: "Defendants shall provide the replacement permanent resident card (Form I–551) no later than 90 days after the day of application." Defendants oppose this modification and cross-move to modify paragraph six of the order so that the word "ninety" replaces the word "twenty-one". Defendants justify this change on the basis of 8 C.F.R. § 274a.2(b)(1)(vi) *as amended by* 56 Fed.Reg. 41784 (1991), promulgated during the course of this lawsuit. Defendants also seek to replace "on the day" with "within three business days" to enable INS to issue a receipt of application within three days.

A. Temporary Proof of Status

1. Twenty-one Business Days for Issuance

As amended, 8 C.F.R. § 274a.2(b)(1)(vi) reads in relevant part,

If an individual is unable to provide the required document or documents [to establish employment authorization] within the time periods specified ..., the individual must present a receipt for the application of the replacement document or documents within three business days of the hire and present the required document or documents within 90 business days of the hire.

56 Fed.Reg. 41784 (Aug. 23, 1991).

For a lawful permanent resident alien, employment eligibility documents include an unexpired foreign passport with an INS stamp and attached Form I–94, INS Form I–151 or I–551 with attached color photograph, and INS Form I–688 or I–688A. 8 C.F.R. § 274a.2(b)(1)(v)(A).

The only change in 8 C.F.R. § 274a.2(b)(1)(vi) as amended is that the time for an individual alien to present an employment authorization document changed from twenty-one to ninety days.

Although the amended regulation speaks only of what the alien is required to do and extends the time for the alien to comply, defendants nonetheless argue that the regulation warrants modifying what the defendants must do under paragraph 6 of this court's November 28, 1991 order so

that their time to provide temporary proof of permanent residence is extended from twenty-one days to ninety days.

8 C.F.R. § 274a.2(b)(1)(vi) relates only to employment authorization. This court has found that legal permanent resident aliens require proof of their lawful status for numerous other reasons, including a statutory requirement that aliens possess proof of their status in order to avoid arrest, to establish eligibility for government programs such as food stamps, housing assistance, Aid to Families with Dependent Children, Medicaid, and the like, to use as an entry document when returning to the United states, and to obtain other documents such as social security cards. *Etuk,* 748 F.Supp. at 992, 936 F.2d at 1437.

***4** In addition, plaintiffs "demonstrated to the district court that the INS failed to provide them with proof of their [legal permanent resident] status despite repeated requests for such documentation". 936 F.2d at 1440. This delay, coupled with the importance of such documentation to lawful permanent resident aliens, has often resulted in severe hardships for the plaintiffs. *See* slip op. at 9 (Dec. 16, 1991).

This court did not rely upon 8 C.F.R. § 274a.2(b)(1)(vi) when it ordered the INS to provide an adequate temporary substitute document "no later than 21 business days, inclusive of the day of application". *Etuk,* 748 F.Supp. at 999. The court based the twenty-one day period upon INS's own representation that it "usually" issued temporary documentation within three weeks of receipt of the alien's application for a replacement document. *Id.* at 993. The court also considered the importance of such documentation for government benefits, the need to establish employment eligibility, and the severe hardships caused by extended deprivation of proof of lawful status.

Defendants say that ninety days are now necessary to issue employment authorization because of the increased number of applications which INS must process. 56 Fed.Reg. 41782 (Aug. 23, 1991). Paragraph six of the court's November 28, 1992 order does not affect the time period for issuance of green cards. The order requires INS to provide temporary proof of status. The order is not limited to employment authorization, nor does it require permanent replacement of the employment authorization documents listed in 8 C.F.R. § 274a.2(b)(v)(A) within twenty-one days. The order simply requires the INS to issue within twenty-one days a temporary document so that a lawful permanent resident alien may prove his status.

Except for some unarticulated aversion to deadlines in general, it is difficult to understand how INS will be harmed by a twenty-one day requirement. It currently issues a temporary proof of registration (Temporary I–551) to aliens "within 14–15 days". Brooks Decl., INS Superv.Info.Off., at ¶ 2. The court's order merely requires INS to conform the temporary proof of status it already issues to the standards articulated by this court. 748 F.Supp. at 999.

The court declines to replace "twenty-one" with the word "ninety" in paragraph 6 of its November 28, 1991, and finds that a period of twenty-one days continues to be a reasonable accommodation between the plaintiffs' needs and defendants' administrative requirements.

2. Receipt on the Day of Application

Defendants also seek modification of paragraph six so that the INS has three business days in which to issue a receipt of an application to replace a green card. Def.Mem. of Law in Supp. of Mod. of Nov. 28 Ord. at 11.

Contrary to defendants' assertion, the court obviously did not base this judgment on 8 C.F.R. § 274a.2(b)(1)(vi), which at the time of the order allowed three business days for the alien to present a receipt of his or her application for employment verification. At any rate, defendants have submitted no reason or offered any evidence to show that issuing a receipt on the day of application impairs the interests of the INS. Plaintiffs, by comparison, are subject to criminal fine or imprisonment for not having on their person either an alien registration or alien registration receipt card. 8 U.S.C. § 1304(e). The court finds that requiring INS to issue a receipt on the day of application for proof of status continues to be reasonable from the perspective of both the alien applicant and the INS.

3. Receipt of application

***5** In their brief, plaintiffs challenge the sufficiency of the application receipt issued by INS in the form of a "call-in notice" in that it does not state that it is a "receipt" of an application for a new green card, nor does it indicate payment of a fee, required by regulation, as a receipt normally would. Plaintiffs also complain that such receipt is only relevant for employment applications and does not address the other needs plaintiffs have for temporary proof of status.

At oral argument, the court indicated that it would inspect the receipt. Mot.Tr. at 7–8 (Feb. 14, 1992). Neither party has furnished examples of the call-in notice. Upon receipt of them, the court will rule on this issue.

B. Ninety Days to Issue Green Card Replacement

Plaintiffs move to append to the end of paragraph six the sentence, "Defendants shall provide the replacement permanent resident card (Form I–551) no later than 90 days after the day of application" so that INS must issue a replacement green card within 90 days.

Defendants say that they have never been required to issue a replacement green card by a date certain. *Compare* 56 Fed.Reg. 41773 (Aug. 23, 1991) ("No specified time limit exists in which the [Immigration and Naturalization] Service must issue a replacement [employment] document to an alien") *with* 8 C.F.R. § 274a.2(b)(1)(vi) *as amended by* 56 Fed.Reg. 41784 (Aug. 23, 1991) (requiring alien to submit employment document within 90 days of application). Defendants also say that while they ordinarily issue replacement documents within ninety days, they occasionally need additional time because of various problems associated with adjudicating and processing the applications. Marotta Decl., Rec. and Info. Serv. Mgr. of INS N.Y. Dist. Off. at ¶ 2; Mot.Tr. at 8–10 (Feb. 14, 1992).

Plaintiffs respond that INS itself stipulated that it takes "about three months" for them to issue a new green card. Stip. at ¶ 6 (Apr. 25, 1990). And in an effort to illustrate the importance of a green card and the insufficiency of temporary documents, plaintiffs also cite federal, state, and city studies which conclude that employers require actual green cards before hiring aliens, fearing that temporary documents are either invalid or that the aliens are only temporary residents. U.S. GAO, *Immigration Reform: Employer Sanctions and the Question of Discrimination,* 43 (Mar. 29, 1990); N.Y.S. Inter–Agency Task Force on Immig. Aff., *Immigration in New York State: Impact and Issues,* 17–18 (Feb. 23, 1990); N.Y.C. Comm. on Hum. Rights, *Tarnishing the Golden Door: A Report On The Widespread Discrimination Against Immigrants And Persons Perceived To Be Immigrants Which Has Resulted From The Immigration Reform And Control Act Of 1986,* 33–34 (Aug.1990).

The court recognizes the administrative burdens faced by INS in enforcing the immigration laws of the United States generally and issuing replacement green cards specifically. Absent a showing of affirmative misconduct by the INS, *I.N.S. v. Miranda,* 459 U.S. 14, 103 S.Ct. 281 (1982), the court will not impose a ninety day deadline for replacement of green cards. So ordered.

***6** A Memorandum and Order of Honorable Eugene H. Nickerson, United States District Judge, having been filed on May 5, 1992 memorializing findings of fact, decisions and holdings made in: (1) *Etuk v. Blackman,* 748 F.Supp. 990 (E.D.N.Y.1990); (2) a September 27, 1990 Memorandum and Order; (3) a November 28, 1990 Memorandum and Order; and (4) a December 16, 1991 Memorandum and Order; declining to strike any of the declarations or affidavits submitted by the plaintiffs in this case; declining to modify the December 16, 1991 Order and Memorandum as requested by the plaintiffs; and declining to modify the November 28, 1990 Order and Memorandum as requested by both plaintiffs and defendants, it is

ORDERED and ADJUDGED that upon review of the record, the Court declines to strike any of the declarations or affidavits submitted by the plaintiffs in this case; declines to modify the December 16, 1991 Order and Memorandum as requested by plaintiffs; and declines to modify the November 28, 1990 Order and Memorandum as requested by plaintiffs and defendants.