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

Cesar PERALES et al., Plaintiffs,
Linda Loe, Susan Soe, Mary Moe, Fran Foe, and Zelda Zoe, individually, on behalf of their minor children, and on behalf of all others similarly situated and their minor children,
Plaintiff–Intervenors
v.
Edwin MEESE, III, et al., Defendants

88 CIV 2265(KC). | March 29, 1989.

Opinion

MEMORANDUM AND ORDER

KENNETH CONBOY, District Judge:

I. CLASS CERTIFICATION

***1** Plaintiffs seek certification of a class composed of:

> [a]11 undocumented aliens residing in New York State who may be excludable from the Legalization Program established by IRCA as "likely to become public charges" under the standards set forth in INS regulations 8 C.F.R. §§ 245a.1(i), 24 5a.2(d)(4) and 245a.2(k)(4) based in whole or in part upon the receipt of public cash assistance by the applicant's U.S. citizen or legal permanent resident family members, including but not limited to those individuals who were deterred from filing applications for legalization under the Legalization program.

(complaint ¶ 15 at 8–9). Most of the factors asserted by plaintiffs in support of class certification are not challenged by defendants and need only be discussed briefly.

23(a)

NUMEROSITY

Plaintiffs' reasonable estimates about the size of the class, as well as the class's relative isolation and dispersement, indicate that joinder is impractical.

COMMONALITY There is at least one question of law common to all proposed class members. That is whether, as undocumented aliens whose family members receive public cash assistance, they were subject to unduly restrictive eligibility regulations. Furthermore, each class member was confronted with the same allegedly deficient dissemination efforts on the part of the Immigration and Naturalization Service ("INS").

TYPICALITY

Defendants' most significant objections are (or should be) directed at the atypicality of the proposed class representatives. They argue that each proposed class member's right to relief will depend on unique facts, the most important of which is the class member's subjective state of mind. In addition to potential differences in the effect of the government's actions or inactions on each class member's state of mind, there will likely be differences between the exact information each class member received; the source of such information (e.g. from the regulations themselves, from government officials, or from third parties); if received from a third party, whether the information was misstated; and the extent of the class member's efforts to obtain accurate information. While the existence and extent of an individual class member's reliance on erroneously or inadequately disseminated information, as well as the extent of the class member's efforts to obtain accurate information, may affect his or her right to relief, it does not mean that class certification is inappropriate. Where, as here, the proposed representatives' claims arise from the same course of conduct and are based on the same legal theories, unique defenses or individual fact differences do not render the proposed representatives' claims atypical. 1 H. Newberg, *On Class Actions,* §§ 3.13 to 3.16 (2d ed.1985); *see also In re Am International. Inc. Securities Litigation,* 108 F.R.D. 190, 194 (S.D.N.Y.1985) (fact that individualized questions of reliance in securities fraud action may exist is not sufficient to defeat class certification). If necessary, separate trials can be held on issues that require individualized treatment.

ADEQUACY OF REPRESENTATION

***2** Plaintiffs are represented by experienced and resourceful counsel and the plaintiffs have no apparent conflicts with other potential class members. Accordingly,

the Court finds that the named plaintiffs will adequately represent the class.

23(b)
Certification is clearly appropriate under 23(b)(2). Plaintiffs seek declaratory and injunctive relief arising out of the government's actions and inactions in its promulgation and dissemination of eligibility standards under IRCA. In effect, this lawsuit involves allegations that the government has acted or refused to act on grounds generally applicable to the proposed class. Accordingly, class certification is granted.[1]

II. SUMMARY JUDGMENT
Plaintiffs move for partial summary judgment, seeking a ruling that 1) defendants' "public charge" regulations facially violate IRCA and the Equal Protection component of the Fifth Amendment 2) defendants' failure to disseminate accurate eligibility standards to the public and their issuance of regulations that were at best ambiguous and misleading violate IRCA and the Fifth Amendment, and 3) that equitable tolling of the May 4 deadline (or similar relief) will be available to those class members who can demonstrate that they were deterred from applying for legalization by defendants' illegal policies. The defendants oppose the motion in all respects and cross-move for summary judgment, seeking a ruling that a) the public charge regulations are legal and were properly and clearly disseminated, and b) the Court has no power to grant the type of relief sought, regardless of the merits of the claims, in light of the expiration of the amnesty period on May 4, 1988. The Court will deal with this last contention first.

In arguing that the Court has no power to extend the application period, regardless of the merits of plaintiffs' attack on the INS's administration of the legalization program, defendants rely principally on *INS v. Pangilinan,* 108 S.Ct. 2210 (1988). Although the parameters of the Court's power to grant the type of relief sought here is by no means clear, I do not accept the broad reading of *Pangilinan* asserted by defendants. In this regard, the Court concurs with the reasoning of *League of United Latin American Citizens v. INS,* No. 87 Civ. 4557 slip op. (C.D. Cal., Aug. 12, 1988). I would add only a few brief points. Contrary to defendants' assertion that the *Pangilinan* Court must have concurred in the Ninth Circuit's finding that the statute at issue there had been violated, the clear import of the opinion was that the challenged actions were at all times consistent with congressional intent. Not only was there no specific statutory mandate to maintain a naturalization officer in the Philippines during the relevant period, but, as the Court observed, noncitizen Filipino servicemen fared better on balance in the implementation of the 1942 amendments to the Nationality Act than noncitizen servicemen from other parts of the world. Here, in contrast, it is alleged that the INS violated specific congressional mandates by promulgating unduly restrictive regulations and inadequately and/or misleadingly disseminating information about the same. It is also significant that *Pangilinan* separately discussed two constitutional attacks on the implementation of the 1942 amendments after ruling that the courts had no power to confer citizenship in violation of a clear congressional policy. if the Court were positing a per se rule that the expiration of an application cut-off date absolutely precludes judicial remedies, regardless of the theory supporting relief, it would have been simpler and more logical to avoid any discussion of the merits of the plaintiffs' claims. Finally, as the Court reasoned, it would have been absurd to conclude that consideration of applications under the 1942 amendments, filed 30 years after the deadline, would be consistent with congressional intent when Congress enacted subsequent legislation that effectively led to the denial of citizenship to Filipinos who filed *timely* applications under those amendments.

***3** As to the remaining issues, the Court declines to grant summary judgment for either side. Although the complexity and importance of a case is not in all instances an obstacle to summary adjudication, i find that the circumstances here favor forbearance until a full record is developed on all material issues. *Cf. Kennedy v. Silas Mason Co.,* 334 U.S. 249 (1948); *McWhirter Distributing, Co. v. Texaco, Inc.,* 668 F.2d 511 (1981); *Elliot v. Elliot,* 49 F.R.D. 283 (S.D.N.Y.1970).

III. INTERVENTION
The motion for intervention is granted.

SO ORDERED

[1] Defendants also contend that the governmental plaintiffs lack *parens patriae* standing to maintain this action. Because at least one of the individual plaintiffs has standing, it is unnecessary to consider this issue. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 264 n.9 (1977).