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United States District Court, W.D. Washington.

Maria WALTERS, et al., Plaintiffs,
v.
Janet Reno, Attorney General of the United States, et al., Defendants.

No. C94–1204C. | March 13, 1996.

Opinion

ORDER ON CROSS–MOTIONS FOR SUMMARY JUDGMENT, MOTION FOR CLASS CERTIFICATION, AND RELATED MOTIONS

COUGHENOUR

***1** This matter is before the Court on the parties' cross-motions for summary judgment, plaintiffs' motion for class certification, plaintiffs' motion for a preliminary injunction, and various discovery motions. Having reviewed the pleadings, memoranda, exhibits and other documents on file, and having heard oral argument, the Court now finds and concludes as follows:

I. BACKGROUND

In 1990, Congress enacted legislation designed to curb the use of fraudulent documents by illegal immigrants. Although employer sanctions had been in place since 1983, Congress found that these sanctions were not effective in reducing illegal immigration. The new law was aimed directly at illegal aliens who use fake social security cards, birth certificates, driver's licenses, and the like to obtain employment in the United States. The law not only leads to civil monetary penalties, it effects the deportation and permanent exclusion of aliens, even those who would be entitled to stay in the United States with their families under other provisions of the immigration laws.

This is an action for declaratory and injunctive relief brought by several non-citizens on behalf of a similarly situated class of aliens subject to final orders pursuant to Section 274C of the Immigration and Naturalization Act of 1990, 8 U.S.C. § 1324c. An alien who is the subject of a final order under § 274C is permanently excludable and deportable, subject to perhaps a few small exceptions. The plaintiffs allege that the INS' notification procedures and procedures for obtaining waivers of rights under the statute are unconstitutional. Plaintiffs seek class certification, declaratory judgment, and injunctive relief. They also seek an order requiring INS to reopen their § 274C cases and give them hearings.

There are several motions pending. Plaintiffs move for the entry of a preliminary injunction. Plaintiffs also move for certification of a class of a few thousand aliens subject to final orders under § 274C. Both parties move for summary judgment, and plaintiffs seek the entry of a final injunction. There are also several discovery motions. Defendants move for a protective order barring certain depositions. Plaintiffs move to compel production of documents and witnesses. Finally, defendants move to strike certain declarations and move for permission to file certain exhibits late.

II. FACTUAL AND LEGAL BACKGROUND

Section 274C of the Immigration Act of 1990, 8 U.S.C. § 1324c, makes it unlawful to possess, make, or use false documents for the purpose of satisfying immigration requirements. 8 U.S.C. § 1324c(a). The penalties for violating the statute range from $250 to $5,000 for each document so used. 8 U.S.C. § 1324c(d)(3). Further, the entry of a final order renders an alien deportable and permanently excludable. 8 U.S.C. § 1251(a)(3)(C). Deportation is automatic unless the alien qualifies for one of several narrow exceptions, such as voluntary departure under § 1254(e). After deportation, there are few, if any, waivers to inadmissibility available to the alien.

***2** Final orders under § 274C may be entered without a hearing only if the respondent is provided with notice and an opportunity of not less than 30 days to request a hearing. 8 U.S.C. § 1324c(d)(2). If the alien does not request a hearing, the final order is not appealable.

Under the applicable INS regulations, an alien served with notice of charges under § 274C has 60 days to request a hearing. Yet, despite the severe immigration consequences of the entry of a final order without a hearing, many aliens either do not request hearings or affirmatively waive their rights to hearings. Indeed, even aliens with valid legal defenses to the charges, or aliens with strong claims to continued residence because they have resided here for many years or because they have spouses and children who are citizens or permanent residents, have failed to seek hearings or have waived their right to hearings.

In this lawsuit, plaintiffs challenge the notice procedures employed by the INS in document fraud cases, arguing that they fail to adequately apprise respondents of their rights and the consequences of waiving them. Both the INS' standard forms, and the way those forms are generally used, are at issue.

A. Forms Used by the INS in Document Fraud Cases

The INS implements § 274C using several forms. When an alien is charged with document fraud in violation of § 274C, he or she is given a Notice of Intent to Fine (NIF). The standard NIF form, Form I–763C (06/26/92), provides, in part that "it is the intention of the [INS] to order you to cease and desist from such violation(s) and to pay a civil money penalty.... " The NIF further provides that the alien has the right to contest the NIF, and that to do so, he or she must

> [f]ile a written request for a hearing before an administrative law judge within 60 days from the service of this Notice. A written request for a hearing is deemed filed when it is either received by the Service Office designated below, or addressed to such office, stamped with the proper postage, and postmarked within the 60 day period.

The NIF also provides that the alien may, but is not required to, submit a written response to the allegations, that the alien has a right to counsel at no expense to the government, and that any statements may be used against the alien. Finally, the NIF provides that "[i]f a written request for a hearing is not timely filed, the Service will issue a final and unappealable order directing you to pay a fine in the amount specified in this Notice and to cease and desist from such violation(s)." The NIF does not provide any information about other consequences of a final order under § 274C, including deportability and excludability. The NIF form is written entirely in English.

When the NIF is served, the INS also frequently serves the alien with a Notice of Rights/Waiver form (NOR/W). Form I–822 (06/26/92). This form, also exclusively in English, bears the title "Notice of Rights Pursuant to Section 274C of the Immigration and Nationality Act" at the top of the form. It then includes a description of rights as follows:

> ***3** You have been served with a Notice of Intent to Fine (NIF) (Form I–763C) for violation of Section 274C of the Immigration and Nationality Act ("the Act"), which provides for civil penalties for certain specified acts involving document fraud.
>
> Under this law, you have the following rights:
>
> • the right to be represented by an attorney at your own expense;
>
> • the right to file with the INS a written request for a hearing before an administrative law judge; failure to file a request for a hearing within 60 days of the service of a NIF will result in the issuance of an unappealable Final Order; a request for a hearing is not deemed to be filed until received by the Service office designated in the NIF or addressed to such office, stamped with the proper postage, and postmarked within the 60–day period;
>
> • the right to pre-hearing process, including the right to discovery;
>
> • the right to an evidentiary hearing before an administrative law judge on the charges contained in the NIF;
>
> • the right to appeal the decision of the administrative law judge to an Office of the Chief Administrative Hearing Officer, and the right to seek judicial review therefrom.

At the close of this list of rights, the NOR/W provides:

> If you are not a citizen of the United States, you are further advised that, as an alien subject to a Final Order for violation of Section 274C of the Act, you will be excludable pursuant to Section 212(a)(6)(F) of the Act, and deportable pursuant to Section 241(a)(3)(C) of the Act.

The NOR/W further provides a waiver section, which reads as follows:

> If you wish to waive the 60–day period in which to request a hearing, and accept the issuance of an unappealable Final Order before the 60–day period expires, you may execute this waiver. By executing this waiver, you give up the above-stated rights and admit that the charges contained in the NIF are true. You further admit that you have violated section 274C of the INA, and accept the issuance of a Document Fraud–Final Order (Form I–764C) on these charges.
>
> I acknowledge that I have (read) (had interpreted and explained to me in the —— language) and understand the contents of this document, a copy of which I have received. I further understand that I waive the right to request a hearing before an administrative law judge,

> and agree to pay the penalty amount, as specified in the Final Order. I understand that this waiver shall result in the entry of a Final Order for a violation of Section 274C of the Act from which there is no appeal.

The NOR/W, as noted, is an English-only document. However, some INS offices or agents also provide the alien with a version of the form translated into English. The version of this document submitted to the Court bears no standard INS form number. The INS concedes that it has no official translated version of this form, and that individual offices using translated versions have prepared the translations on their own.

***4** An alien served with an NIF and an NOR/W, may also receive an Order to Show Cause and Notice of Hearing (OSC). Form I–221 (Rev.6/12/92) N. This form orders the alien to show cause why he or she should not be deported. The OSC form advises the alien that the INS alleges that the alien is not a citizen and that the person is subject to deportation for a specific reason, such as entering without inspection. The form advises the alien that he or she is being ordered to appear before an immigration judge to show why he or she should not be deported, and further either advises the alien of the date and time of the hearing, or, more likely, advises the alien that the date and time for the hearing will be mailed to the alien at the address he or she provides at the time of service. The form further provides a lengthy description of the hearing process, the alien's rights, and the consequences of allowing a deportation order to be entered in his or her absence. The OSC form, which is several pages long, is translated, line for line, into Spanish. On pages containing only information explaining the alien's rights, the form is in a dual-column format, so the Spanish translation appears side-by-side with the English explanation of rights.

In addition, the alien may receive a form entitled "Request for Disposition." Form I–827A (August 26, 1992). This form provides two options: One option the alien may check provides: "I request a hearing before an immigration judge to determine whether or not I may remain in the United States." The second option consists of an admission of illegal alien status and waives the right to a hearing. This INS also uses a version of this form that is completely translated into Spanish. Despite the general language of the request-for-hearing option on Form I–827A, the form is treated by the INS as a request only for a hearing on the deportation allegations in the OSC; requesting a hearing by checking the box and signing this form does not constitute a request for a hearing on the § 274C document fraud charges.

B. Non–Citizen Experiences in Document Fraud Cases

The overwhelming majority of persons charged under § 274C are non-citizens. Nationwide, about 4,000 non-citizens have been charged under § 274C. According to the plaintiffs, only about 10% of the persons charged have timely requested hearings, despite the severe immigration consequences. About 21% of the individuals charged have executed waivers within the 60–day period, a percentage which has risen significantly since May of 1995.

The evidence demonstrates that a confluence of factors renders it unlikely that a non-English speaking alien will understand the consequences of either executing a NOR/W or failing to request a hearing. First, INS fails, in most cases, to provide NIF and NOR/W forms translated into Spanish. The few offices that do provide translations have done so on their own, not in response to any INS directive or policy. Second, a number of INS agents' testimony indicates that the agents themselves do not understand or cannot explain the immigration consequences of a final order under § 274C, or both. Agents who cannot explain the consequences to non-English speaking aliens are quite clearly unable to rectify any inadequacies in the forms. Third, the NIF and NOR/W forms do not provide, in language clear to laypersons with little or no knowledge of the law, the consequences of a final order under § 274C, the consequences of failing to request a hearing, or the consequences of executing the NOR/W. The forms fail to indicate in clear, simple terms that a document fraud final order leads to immediate deportation with almost no chance of readmission, as opposed to a mere fine. Fourth, the practice of serving the NIF and NOR/W simultaneously with the OSC and the Request for Disposition leaves many aliens with the false impression that the deportation hearing will also address the document fraud charge, or with the false impression that the charge in the OSC is the only charge for which the alien is deportable.

***5** Thus, although document fraud charges against aliens may be handled in a variety of different ways, the end result is often the same: the non-citizen charged under § 274C is not informed that he or she must request a hearing in writing, separately from the hearing on the deportation charge, and that the failure to request a hearing or the waiver of the right to a hearing effectively disposes of all issues related to deportation and exclusion.

III. MOTION FOR CLASS CERTIFICATION

Plaintiffs move for certification, pursuant to Fed.R.Civ.P. 23, of a class consisting of "all non-citizens who have or will become subject to final § 274C orders based on their failure to request a hearing."

Rule 23(a) allows a case to proceed as a class action if (1)

the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the named plaintiffs' claims or defenses are typical of the claims or defenses of the class, and (4) the named plaintiffs will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a). In addition, plaintiffs must also meet the requirements of Rule 23(b), which provides, in relevant part, that an action may be maintained as a class action only if prosecution of separate actions would create a risk of inconsistent adjudications resulting in incompatible standards of conduct for defendants, or if the defendants have acted or refused to act on grounds generally applicable to the class, making injunctive or declaratory relief with respect to the class as a whole appropriate.

There is no genuine dispute on the issues of numerosity and typicality. Defendants focus on commonality, adequacy of representation by the class representatives, and the 23(b) requirements.

A. Commonality

Rule 23(a)(2) requires that there be questions of law or fact common to the class before the action may be certified as a class action. The commonality requirement does not mean that all questions of law and fact must be common to the class. *Jordan v. County of Loss Angeles,* 669 F.2d 1311, 1320 (9th Cir.), *vacated on other grounds,* 459 U.S. 810, 103 S.Ct. 35 (1982), *on remand,* 713 F.2d 503 (1983). A single issue of law or fact common to the class members may be sufficient. *Blackie v. Barrack,* 524 F.2d 891, 904 (9th Cir.1975), *cert. denied,* 429 U.S. 816, 97 S.Ct. 57 (1976).

The INS argues that there is a lack of commonality among the class members claims because (a) the plaintiffs' allegations focus, in part, on oral representations made to individual plaintiffs, and (b) some INS offices, such as the Dallas office, have a policy of not using or accepting the English-only NOR/W forms and of not serving an OSC based on a document fraud charge on the same day that the NIF is served. The Court agrees with the INS that the plaintiffs cannot show that all of their cases share a common factual basis. Some of the putative class members claim that INS agents misrepresented to them the consequences of waiving their rights or the consequences of a final order, while others claim simply that the INS agents did not provide adequate written or oral notice. Some members of the putative class were issued NIF forms by offices that refuse to use the English-only NOR/W or, like the Dallas office, that do not accept waivers. Obviously, a plaintiff who admits that he understood what the waiver form meant, refused to sign it, and simply failed to request a hearing in time is on different footing than a plaintiff who did not understand the waiver form and signed it believing it was inconsequential.

***6** These differences, however, do not defeat the motion for class certification. A class action may be maintained on the basis of common issues of law, including the adequacy of English-only NIF and NOR/W forms and the adequacy of notice when the OSC is served at the same time as the NIF and NOR/W. So long as there is an overriding common issue of law, certification of the class under 23(b)(2) is appropriate. As explained in *International Molders' & Allied Workers' Local 164 v. Nelson,* 102 F.R.D. 457, 462 (C.D.Cal.1983), subsection (b)(2) was designed largely to permit maintenance of class action lawsuits as a vehicle for the redress of civil rights violations. Thus, even though the individual factual circumstances may vary among class members, the commonality requirement is satisfied in a suit such as this where it is alleged that the defendants have acted in a uniform manner with respect to the class. *Id.; see also Alliance to End Repression v. Rochford,* 565 F.2d 975, 979 (7th Cir.1977); *Orantes–Hernandez v. Smith,* 541 F.Supp. 351, 370 (C.D.Cal.1982). The existence of a policy of providing information not reasonably calculated to apprise non-english speakers of their rights would, if such a policy exists, affect all members of the proposed class.

Moreover, allowing the INS to rely on the fact that some of its own offices do not use the English-only NOR/W forms and will not accept waivers to defeat class certification would lead to a twisted result—a government agency charged with a practice or pattern of violation of civil rights could escape declaratory and injunctive relief on a class-wide basis by showing that certain individual agents or offices took measures expressly to avoid violating the civil rights of immigrants. The Court is unwilling to conclude that class certification is inappropriate because certain INS offices have taken steps to protect the rights of aliens charged with document fraud.

B. Adequacy of Representation

The adequacy of representation prerequisite to class certification is satisfied if the Court finds that the representative class members are represented by qualified counsel and that the named representatives' interests are not antagonistic to the interests of the class. *Jordan,* 669 F.2d at 1323. There is no dispute concerning the adequacy of legal representation, and the Court is of the opinion that the legal representatives of the class members are well qualified.

The defendants argue that the plaintiffs here are not adequate class representatives for several reasons. During the pendency of this action, defendants deposed the class representatives under grants of immunity from criminal

prosecution. Most of the class representatives admitted in their depositions that they used false documents. This fact alone, according to the INS, renders them inappropriate representatives of the class.

The Court disagrees. First, this argument is actually litigation on the merits, rather than on the class certification issue. The actual outcome of future hearings on document fraud charges is not at issue here. It is possible, even likely, that some members of the class will seek to have their document fraud proceedings reopened only to discover that they cannot mount an effective defense to the charge. That some members of the class are not entitled to ultimate relief on the charges of document fraud is not, however, dispositive of the issue of whether there exists a class of aliens who did not receive adequate notice of their rights and the consequences of waiving those rights. Second, even though the remedy here may only be a further opportunity to petition to reopen the document fraud proceedings, the plaintiffs and the class members have gained a form of relief. Finally, the Court sees no legitimate issue concerning whether the class representatives are adequate in the sense that they are interested and involved in obtaining relief. The proper analysis of adequacy of representation focuses on whether the class representatives' interests are antagonistic to those of the class, such that the rights of other class members will be harmed by having their interests put forward by the class representatives. Defendants misapprehend the nature of an adequacy inquiry when they argue that the class representatives are inadequate simply because they might not ultimately succeed in defending against charges of document fraud.

***7** The INS also argues that the plaintiffs suffer from issues concerning their credibility. The INS bears a heavy burden in attempting to demonstrate that the testimony the class representatives gave under oath is untrue. The Court is persuaded, from its review of the record, that this argument is, in fact, baseless. The INS complains of little more than the ordinary minor inconsistencies common in deposition testimony. Indeed, many of the credibility issues the INS purports to be concerned about are most likely the product of language barriers and confusion about the legal process. Most of the plaintiffs, like most of the putative class, have little formal education and either speak only Spanish or speak very little English.

Finally the INS argues that the class representative are inadequate because of their "obvious willingness to disregard the law." This reference to the fact that some members of the class entered the United States without inspection and used false documentation to obtain employment is, again, an unfair attack. The INS' reasoning would all but preclude judicial review of INS procedures related to the handling of aliens at the borders and during deportation proceedings.

C. Incompatible Standards or Declaratory & Injunctive Relief

Defendants argue that plaintiffs have not shown that there is either a risk of incompatible standards being established or that defendants acted or refused to act on grounds generally applicable to the potential class. Class certification under Rule 23(b)(2) requires that "the party opposing the class has either acted or failed to act on grounds generally applicable to the class." This has been interpreted as requiring that the opposing party "has acted consistently towards members of the class or has established a regulatory scheme common to all members of the class, and not that every member of the class has actually been injured by the opposing party." *Perez–Funez v. District Director, INS,* 611 F.Supp. 990, 998 (C.D.Cal.1984).

The Court agrees with plaintiffs that certification is appropriate under 23(b)(2). The use of standardized forms in § 274C cases shows that the INS has acted on grounds generally applicable to the class, even though not every alien has received the NOR/W solely in English. The only appropriate remedy, if these allegations are established, is declaratory judgment and final injunctive relief.

D. Class Definition

Plaintiffs' propose a class defined as "all non-citizens who have or will become subject to final § 274C orders based on their failure to request a hearing." Defendants argue that this class definition is overly broad and inconsistent with the class originally defined in the complaint. Defendants argue that the class definition should be limited to include, in essence: (1) persons who received inadequate notice because the standard English-only forms did not properly advise them of their rights and the consequences of waiving their rights or failing to request a hearing, (2) persons whose cases arose in an INS office that uses the NOR/W forms, and (3) persons who executed the NOR/W forms and waived their right to a hearing.

***8** The Court agrees with defendants that the class, as proposed, may be somewhat broader than the class as originally proposed. More importantly, the definition proposed by plaintiffs may inappropriately include individuals charged with document fraud who received notice of rights that was not constitutionally inadequate. The focus of this litigation is, and should remain, adequacy of the notice procedures. Failure to request a hearing does not, in and of itself, indicate that a person did not receive adequate notice.

The Court therefore concludes that the class to be certified shall consist of:

> All non-citizens who have or will become subject to a final order under Section 274C of the Immigration and Naturalization Act because they received notice forms that did not adequately advise them of their rights, of the consequences of waiving their rights or of the consequences of failing to request a hearing.

Plaintiff's motion to certify the class, so narrowed in definition, is GRANTED.

IV. MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). Under the Rule, summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986).

Plaintiffs challenge four central features of the INS procedures under § 274C. First, they challenge the written NIF and NOR/W forms on the ground that they do not adequately apprise aliens of their rights. Second, plaintiffs challenge INS' practice of serving deportation forms, including the OSC and Request for Disposition, at the same time as they serve § 274C forms, on the ground that this is inherently confusing to the charged aliens. Third, plaintiffs challenge INS' practice of obtaining waivers of rights on the day of arrest, before aliens have a chance to consult with counsel. Finally, plaintiffs argue that they are entitled to have their § 274C proceedings reopened. Defendants argue that the class representatives cannot show prejudice, because they have admitted to using false documents. They also argue that the notice forms and procedures are constitutionally adequate.

A. Prejudice

As a threshold matter, defendants argue that the class representatives cannot show that they were prejudiced by any violations of their due process rights, because they subsequently admitted in their depositions, under grants of immunity, that they used false documents. The Court rejects this argument.

The Ninth Circuit has repeatedly held that an alien is entitled to redress for violations of constitutional rights only where he or she can show prejudice. *See, e.g., Barraza Rivera v. INS,* 913 F.2d 1443, 1447–48 (9th Cir.1990). Prejudice is found where an alien's rights are violated "in a manner so as potentially to affect the outcome of the proceedings." *Id.* (quoting *United States v. Cerda–Pena,* 799 F.2d 1374, 1379 (9th Cir.1986)).

***9** The parties appear to agree that the INS can take advantage of this rule only if it can show that none of the named plaintiffs suffered any prejudice. This the INS cannot do. Plaintiffs argue that each one of the named plaintiffs can show that the violations of his or her rights had a potential to affect the outcome of the § 274C proceedings. However, it is sufficient for purposes of this motion to conclude that at least one of the plaintiffs can show prejudice. The Court concludes that Ninfa Guerrero de Adames suffered prejudice as a result of the issuance of a final order under § 274C without a hearing.

Ninfa Guerrero de Adames testified that she used false documents only when she obtained work at Jack Brown Cleaners, which was prior to the effective date of § 274C and not chargeable. The INS asserts that Adames signed a statement while in custody and without representation that she used the documents later, after the effective date of the Act, when she got a job at National Linen. However, the National Linen I–9 form supports Adames' testimony, confirming that she did not present any documents when she started working there. Adames, furthermore, testified that the statement she gave in custody was based on a misunderstanding with the agent, who did not speak Spanish.

Adames never had an opportunity to testify before an administrative law judge and attempt to show that the document fraud charge was ex post facto. Contrary to the INS' assertion that Adames cannot show prejudice because she admits to having had false documents, Adames has indeed shown prejudice, because she has never had the chance to demonstrate that she did not use false documents after the effective date of the Act. No judge has had the opportunity to review the competing claims and judge Adames' credibility. The absence of a hearing was, therefore, prejudicial to Adames, because the outcome might have been different had she received a hearing.

The Court also notes that class-representatives Antonio Santana–Alvarez can show prejudice. He was charged under § 274C only because he falsely made out an I–9 employer verification form. The Office of the Chief Administrative Hearing Officer has held, however, that as a matter of law this is not a violation of § 274C. *United States v. Remileh,* 1995 WL 139207 (O.C.A.H.O. Feb. 7, 1995).

Defendants' argument is unpersuasive for another reason as well. The INS asserts that the class representatives cannot show prejudice because they have admitted that they used false documents. This argument presumes, without demonstrating, that the *only* issue of any relevance in a § 274C proceeding is whether the documents were false. The plaintiffs have attempted to gather evidence that the INS attorneys sometimes drop charges when an individual alien requests a hearing, that the INS settles some cases, and that an immigration judge may, in unusual circumstances, grant some type of relief to the alien. The INS has steadfastly resisted discovery directed to its internal policies concerning § 274C enforcement, and there is for that reason no evidence in the record.[1] On the record before the Court, the INS deserves no presumption that it completely lacks discretion. Indeed, were the Court to indulge a presumption, it would of necessity be in favor of plaintiffs' position that agency attorneys have the discretion to dismiss or settle § 274C cases, just as law-enforcement agency attorneys have such discretion in other matters.

B. Adequacy of Notice and Procedures

***10** There is no disagreement about the basic proposition that aliens, even those who have entered the United States unlawfully, are entitled to the protections of the Due Process Clause of the Fifth Amendment. *Mathews v. Diaz,* 426 U.S. 67, 77, 96 S.Ct. 1883, 1890 (1976). Further, the parties agree that the adequacy of the NIF and NOR/W forms is to be determined according to the balancing test of *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893 (1976). The factors to be balanced include: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

(1) Private Interest at Stake

There can be no serious dispute that the private interest here is great, *see, e.g., Bridges v. Wixon,* 326 U.S. 135, 154, 65 S.Ct. 1443, 1452–53 (1945), and the Court for that reason does not belabor it. Aliens who are the subject of final orders issued respondent of his or her right to a hearing. Due process requires that a person facing governmental deprivation of life, liberty or property receive adequate notice and an effective opportunity to defend. *Goldberg v. Kelly,* 397 U.S. 254, 267–68, 90 S.Ct. 1011, 1019–1020 (1970). Notice satisfies due process if it is of such a nature as reasonably to convey the necessary information. *Schneider v. County of San Diego,* 28 F.3d 89, 92 (9th Cir.1994), *cert. denied,* 115 S.Ct. 1112 (1995). The information provided must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 13 (1978). The Supreme Court has repeatedly reiterated that due process is a flexible concept, and that notice must be "tailored to the capacities and circumstances" of the intended recipient. *Goldberg,* 397 U.S. at 268–69, 90 S.Ct. at 1021.

Plaintiffs argue that the NIF and NOR/W forms are not adequate because (1) they are provided in English only, (2) they are unnecessarily legalistic and technical, and (3) they fail to apprise respondents of the immigration consequences of a final order under § 274C. The Court agrees.

The evidence shows that nearly all recipients of the NIF and NOR/W forms are non-citizens, and a substantial majority of them are native Spanish speakers. In some parts of the country where many § 274C charges are processed, the overwhelming majority of the respondents are native Spanish speakers. And, although some of the respondents may understand some English, many others so not understand or speak English at all. Also, the respondents, as a group, are relatively uneducated, whether in English or Spanish. Yet the NIF and NOR/W forms authorized for use by the INS are prepared in English only.

***11** The NIF and NOR/W forms employ highly technical, legalistic language. The NIF states that "it is the intention of the Service to order you to cease and desist" and to "pay a civil money penalty." The NIF advises the respondent that he or she may receive a "final and unappealable order" to pay a fine and be ordered "to case and desist" from violations. The NOR/W uses similar terms, such as "civil penalties for certain specific acts involving document fraud," a right to "pre-hearing process," and the "issuance an unappealable Final Order." The NOR/W also includes the one and only reference to the fact that "as an alien subject to a Final Order for violation of Section 274C of the Act, you will be excludable pursuant to Section 212(a)(6)(F) of the Act, and deportable pursuant to Section 241(a)(3)(C) of the Act." Aside from this single reference to the terms "deportable" and "excludable," there is no mention whatever in the forms of immigration consequences of a final order under § 274C. Rather, the forms repeatedly mention the fact that the alien is subject to a fine.

The confusing nature of this language, whether in English or Spanish, is manifestly evident from the record. Most, if not all, of the aliens who testified stated that they did not understand the forms, and did not realize that they faced permanent exclusion. This is proof enough of the

confusing nature of the language used. However, the record also demonstrates that many INS agents do not understand the forms, either. INS agents who testified were unable to explain the hearing process or the proper procedure for requesting a hearing. Some of the agents did not themselves realize that there are severe immigration consequences from a final order, and that the consequences are, by and large, permanent. One agent testified that so long as the alien pays the fine, there are no consequences at all. This is, of course, completely false. Giving such advice to an alien would obviously be an encouragement to waive his or her rights and pay the fine.

The technical, legalistic nature of the NIF and NOR/W documents is profoundly exacerbated when they are used contemporaneously with the deportation OSC, which is carefully written in plain English, plain Spanish, and goes to great lengths to advise the respondent of what lies ahead. As explained above, aliens being served with NIF and NOR/W forms are often served at or near the same time with an Order to Show Cause why the alien should not be deported, often for some other reason. The OSC can add to the confusion created by the NIF and NOR/W in several ways. First, an alien may check the box to request a hearing on the Request for Disposition served with the OSC in the mistaken belief that this hearing will also address the § 274C charges. This situation is caused in part by the fact that the OSC and Request for Disposition are written in plain language, in both English and Spanish. Both of these forms advise the alien that he or she will get a chance to argue to a judge why he or she should be allowed to stay in this country. Although the deportation hearing is different from the NIF hearing, this is not apparent from the NIF, NOR/W and the OSC. In fact, the language of the hearing request on the Request for Disposition on the deportation charge strongly suggests that the hearing will cover any and all matters affecting whether the alien will be deported. Thus, many members of the class believed, erroneously, that their request for a deportation hearing also applied to the document fraud charges. In reality, their failure to request a hearing (or waiver of the right) on the § 274C charges rendered their deportation hearing requests completely futile, because they were subject to a final orders on the § 274C charges. The very fact that many members of the class have done exactly this forecloses any serious argument that they have been adequately apprised of their rights: a non-citizen who understood the consequences of executing the NOR/W would not waive on one form all of his or her rights while requesting a deportation hearing on another form.

***12** Even aliens who request voluntary departure instead of a deportation hearing suffer if they fail to request a hearing on the § 274C charge. Voluntary departure is a benefit that allows an alien to leave the U.S. without being subject to the five-year moratorium on returning to the U.S. that comes with a formal order of deportation. 8 U.S.C. § 1182(a)(6)(B). In some cases, aliens who elect voluntary departure are served with NIF and NOR/W forms. If the alien fails to request a hearing on the § 274C charge, he or she will be subject to a final order and rendered permanently excludable. This has the effect of nullifying the benefit of taking voluntary departure.

Finally, serving the OSC and Request for Disposition, which explain serious immigration issues in Spanish, leaves many aliens with the false impression that the NIF and NOR/W forms, served in English only, are inconsequential documents. Even aliens who understand some English are susceptible to this misimpression, because the NIF says nothing about deportation or other immigration consequences, and because the terms "deportation" and "exclusion" are buried on the NOR/W in a mountain of inaccessible legal terminology and citations to the INA.

Defendants' arguments that the NIF and NOR/W adequately apprise non-citizens of their rights are unpersuasive. The Court notes, at the outset, that several INS offices have, acting on their own, either translated the NIF and NOR/W forms into Spanish to increase the likelihood that respondents will understand them, or have decided not to accept waivers of rights at all. This fact alone is potent evidence of the experience of agents in the field who have witnessed non-citizens taking the utterly inconsistent steps of requesting a deportation hearing on the Request for Disposition form while waiving their rights to the § 274C hearing on the NOR/W.

Nor do the relevant authorities compel the conclusion that the notice provided here, considering all the circumstances, is adequate. There is, of course, no binding authority that stands for the proposition that notice must always be provided in the language of the intended recipient. On the other hand, courts have long recognized that due process is a flexible concept; to be adequate, the form of notice must be tailored to the capabilities and peculiarities of the recipient audience. Courts have frequently held that adequate notice requires accommodation of both the language limitations of a non-citizen audience and the educational limitations of the intended recipients. *See, e.g., Padilla–Augustin v. INS,* 21 F.3d 970, 976 (9th Cir.1994) (explaining that when the alien is representing himself and has language difficulties, "a high degree of clarity should be a part of the process accorded"); *Orantes–Hernandez v. Smith,* 541 F.Supp. 351 (C.D.Cal.1982) (issuing preliminary injunction requiring that Salvadoran refugees receive notice of their rights in English and Spanish); *David v. Heckler,* 591 F.Supp. 1033, 1042–43 (E.D.N.Y.1984) (holding that highly technical review notices provided to members of class of elderly Medicare beneficiaries did not provide adequate notice).

***13** Defendants' reliance on *Kirk v. INS,* 927 F.2d 1106 (9th Cir.1991), for the proposition that the NIF provides a respondent with adequate notice is particularly misplaced. In *Kirk,* the persons charged with document fraud were two United States citizens, owners of Kirk Enterprises, who were charged under the Section 274A, 8 U.S.C. § 1324a, which addresses document fraud on the part of employers. There was, in *Kirk,* no issue concerning whether the notice was constitutionally deficient because it was in English or because it was highly technical and used legal terminology. Rather, the due process issue concerned the propriety of service on the Kirks' attorney.

The Court concludes that the standard INS NIF and NOR/W forms do not adequately apprise respondents of their rights to hearings and of the consequences of failing to do so. First, the use of English-only forms in a context in which it is uncontestable that most respondents speak primarily or only Spanish is simply unacceptable, particularly where, as here, the consequences are grave and the situation in which the forms are provided suggests either that a different hearing will address the charges, or that the consequences of a final order are minimal. Second, the use of highly technical legal terminology in the forms does not provide fair notice. The use of non-technical language in the OSC and Request for Disposition forms, far from alleviating the problem, actually makes it worse. And using complicated references to the statute in the one sentence that does address deportation and exclusion almost guarantees that an alien who is not proficient in English and American law will fail to understand the consequences of a final order. Finally, contemporaneous service of the OSC and its relatives along with the NIF and NOR/W increases the already great risk of erroneous deprivation of rights.

(3) Burden on the INS

The Court is further persuaded that the burden on the INS to provide greater procedural protections is quite small. Obviously, the one-time expense incurred in redrafting and translating the NIF and NOR/W is not great. Defendants argue that if the INS is required to translate the NIF and NOR/W for the benefit of Spanish-speaking aliens, then presumably the agency will be required to translate the forms into any language spoken by an alien. These dramatic concerns are unfounded, and the Court is not persuaded that an injunction requiring translation of two forms into Spanish will leave the INS perched upon the slippery slope. The Court notes that the INS has already chosen to translate OSC forms and Requests for Dispositions into Spanish. This demonstrates an awareness that, under the prevailing circumstances, Spanish translation is a component of notice "reasonably calculated" to apprise individuals of their rights. Most immigrants facing § 274C charges speak Spanish. Accommodating the needs of the many need not lead to a requirement that INS accommodate the needs of the very few.

***14** The Court also notes that the INS can avoid the expense of redrafting and translating the NOR/W altogether just by discontinuing its use. The INS is under no statutory duty to seek a waiver of the right to a hearing. The policy decision to do so brings with it greater burdens, as discussed in more detail in the next section. A significant portion of the risk of ill-informed waivers can be avoided by not seeking them, and leaving it up to the alien charged under § 274C to timely request a hearing.

Finally, the Court agrees with plaintiffs that there is no undue burden on the INS to ensure that, if the NIF and NOR/W are to be served at or near the same time as the OSC and the Request for Disposition, the INS must ensure that the forms adequately apprise the respondent that the two proceedings are completely different and that the alien must, in fact, request two separate hearings in order to protect his or her rights.

C. Adequacy of Procedures for Obtaining Waivers

The plaintiffs also argue that the INS' procedures for obtaining waivers at the time of arrest on the document fraud charges violates due process because the waivers are not knowing and intelligent. A waiver is effective if it is clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, (1938); *United States v. Lopez–Vasquez,* 1 F.3d 751, 753 (9th Cir.1993).

Plaintiffs argue that, under *Mathews,* obtaining a waiver at the time of arrest, before the alien has had a chance to consult with counsel, attempt to understand the forms, or obtain a translation, creates an unacceptable risk that the waivers are unknowing and unintelligent. The Court agrees that, for all of the reasons explained above, there is a serious risk that an alien charged under § 274C and presented with NIF and NOR/W forms will execute the waiver without understanding that the consequences of a final order include deportation and exclusion. The risk of this error is greatly exacerbated by the presentation of the NIF and NOR/W at the same time the Spanish language OSC and Request for Disposition are served.

The risk of erroneous waivers is, as plaintiffs argue, one that the INS has created for itself by instituting a policy of seeking waivers. Nothing in the statute requires, or even suggests, that the INS seek waivers from aliens charged under § 274C. When no waiver is sought, of course, the alien simply has 60 days in which to request a hearing, or suffer the consequence of the entry of a final order without a hearing. The INS could sit idly by and wait for respondents to not request hearings. However, having

chosen to seek affirmative waivers, the INS places upon itself the greater burden of demonstrating that such waivers are obtained under the exacting "knowing, voluntary, and intelligent" test.

Nonetheless, the Court cannot agree with plaintiffs that fundamental due process requires that the NIF and NOR/W never be served at the same time as the OSC and the Request for Disposition. The INS has legitimate administrative interests in serving these documents at the same time, particularly where the alien opts for voluntary departure. The Court concludes that whatever problems are presented by the contemporaneous service of these forms can be remedied by the entry of an injunction requiring appropriate translation of plain-speaking forms that will adequately apprise a Spanish-speaking respondent of the nature of the § 274C charge, his or her rights, including the right to counsel, and the consequences of the final order and of waiving the right to a hearing.

D. Reopening Procedures

***15** Plaintiffs urge the Court to order the INS to reopen the § 274 proceedings for each of the class members. The INS argues that because the agency orders are final and unappealable under the statute, the proceedings cannot be reopened. 8 U.S.C. § 1324c(d)(2)(B); 8 C.F.R. §§ 270.2(f) and (g). The Court rejects this argument. Congress expressly provided that notice be provided to the § 274C respondent prior to the entry of a final, unappealable order. Thus, an order obtained through unconstitutional measures may be set aside altogether. *Mendez v. INS,* 563 F.2d 956 (9th Cir.1977); *Wiedersperg v. INS,* 896 F.2d 1179 (9th Cir.1990). The Court concludes that the INS must provide the class members with, at a minimum, the opportunity to petition the INS, or file a motion, to reopen their proceedings based on the lack of notice.

E. Conclusion

Plaintiffs' motion for summary judgment is GRANTED IN PART and DENIED IN PART. The Court concludes that the INS' standard procedures in document fraud cases violate due process by failing to inform class members of their right to a hearing, by failing to inform class members of the consequences of a final order under § 274, by failing to inform class members of the consequences of waiving their rights, and by failing to adequately explain the differences between the deportation-related forms, such as the OSC and the Request for Disposition, and the NIF and NOR/W. The Court further concludes that serving the forms in their current configuration, that is, in highly technical, legalistic English, fails to adequately apprise the typical respondent of his or her rights. Finally, the Court concludes that serving the NIF and NOR/W forms, as they are written now, at or near the time the OSC and Request for Disposition are served violates due process. Plaintiffs shall be entitled to petition the appropriate INS authority to reopen their cases.

To the extent the plaintiffs seek an injunction barring the INS from seeking waivers, however, the motion for summary judgment is DENIED.

The plaintiffs' request for the entry of an injunction is GRANTED. Plaintiffs are directed to submit a proposed form of injunction within 30 days of the date of this order. As the parties were advised at oral argument, the Court encourages the parties to attempt to agree on the form of injunction. If the parties are unable to agree on a form of injunction, they are directed to notify the Court of this at the time plaintiffs' submit the proposed form of injunction, and the Court will set a briefing schedule.

V. MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs sought the entry of a preliminary injunction at essentially the same time they filed a motion for summary judgment. The Court concludes that, under all the circumstances present here, including the parties' earlier agreement to a considerable stay in order to pursue settlement, that a preliminary injunction is not warranted. The motion for a preliminary injunction is therefore DENIED.

VI. OTHER MOTIONS

***16** In light of the Court's determination on the merits, the remaining discovery motions are MOOT. Defendants' motion to file certain exhibits late is GRANTED.

SO ORDERED this 11 day of March, 1996.

[1] There are pending motions to compel certain discovery related to precisely these issues. As the parties are aware, the Court tentatively concludes that these motions are moot, in light of the conclusions expressed here. The Court notes, however, that its commentary on the resistance to discovery is not intended to suggest how the Court would rule on those issues. The Court's analysis of the absence of evidence in the record on these issues is directed solely toward the issue of whether INS has discretionary policies regarding enforcement, and does not reflect any conclusion on the propriety of refusing to disclose those policies.