Zambrano v. INS

United States District Court for the Eastern District of California

August 9, 1988, Decided ; August 9, 1988, Filed

Civ. No. S-88-455 EJG

Reporter: 1988 U.S. Dist. LEXIS 17592

MARTA ZAMBRANO, MARGARITA RODRIGUEZ, GRACIELA LOPEZ, ANDREA RUIZ, MARTHA OZUNA, and JORGE PERDOMO, for themselves and for all others similarly situated, Plaintiffs, v. IMMIGRATION AND NATURALIZATION SERVICE, et al., Defendants

Judges: [*1] Edward J. Garcia, United States District Judge.

Opinion by: GARCIA

Opinion

MEMORANDUM OPINION AND ORDER

This matter was before the court on May 3, 1988 for hearing on plaintiff's motions for preliminary injunction and class certification. Beth Zacovic, Pauline Gee, Jennifer Wright and Susan Balliet appeared on behalf of plaintiffs. Robert Kendall, Eileen Corty, Sharon Greespan, Special Assistant U.S. Attorney Glyndell Williams and Assistant U.S. Attorney Greg Hollows appeared on behalf of defendants. After hearing the arguments of counsel, the court requested additional briefing and ordered the matter submitted upon receipt of the briefs. Now, having read and considered all the materials filed by the parties, the court makes the following findings and conclusions.

This lawsuit was filed April 12, 1988 by six named plaintiffs, all of whom are illegal aliens, on behalf of themselves and all others similarly situated, seeking to enjoin the defendants from applying allegedly illegal regulations. Plaintiffs are members of classes of persons whose applications for legalization ("amnesty") were recommended for denial or who were discouraged from applying for amnesty based on defendants' implementation of [*2] the alleged illegal regulations.

Plaintiffs' class action lawsuit seeks declaratory and injunctive relief and poses a constitutional challenge to regulations promulgated by the Immigration and Naturalization Service ("INS") which implement the legalization provisions of the Immigration Reform and Control Act of 1986 ("IRCA"). IRCA was signed into law in November 1986 and reflects an attempt by Congress to
reform the nation's immigration laws. Generally speaking, the legislation had two main objectives: 1) reduction of undocumented aliens by imposing employer sanctions, thereby reducing the attractiveness of employment in this country; and 2) stabilizing the status of undocumented aliens already living in the United States by offering a broad legalization or amnesty program. This lawsuit concerns one aspect of the legalization program. In order to be eligible for amnesty, an alien must satisfy four requirements: 1) a timely application [1]; 2) unlawful residence in the United States since 1982; 3) continuous presence in the United States since IRCA's enactment; and 4) admissibility as an immigrant. *See*8 U.S.C.A. § 1255a(a) (1-4) (West Supp. 1988).

[*3] Plaintiffs' lawsuit challenges regulations directed at the admissibility standards under § 1255a(a)(4). At issue is the test for determining whether an alien is "likely to become a public charge". Such a finding is grounds for exclusion under the Immigration and Nationality Act ("INA") and continues in effect under the legalization provisions of IRCA. *See8 U.S.C.A. § 1182(a)(15)* and 8 U.S.C.A. § 1255a(d)(2)(iii) (West Supp. 1988). However, according to plaintiffs, what has changed is the basis on which the public charge determination is made. *Section 1182(a)(15)* provides in pertinent part: "Except as otherwise provided in this chapter, the following classes of aliens . . . shall be excluded from admission into the United States; . . . aliens who, . . . in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charges."

One factor considered in determining whether an alien is likely to become a public charge is the alien's past or present receipt of welfare benefits. The gist of plaintiffs' complaint is that, traditionally, the receipt of welfare, by itself, does not establish a public charge finding. Instead, public [*4] charge determination is a prospective test based on the totality of the circumstances existing at the time of the alien's application for legalization. *See Matter of Perez,* 15 I. & N. Dec. 136, 137 (BIA 1974) ("the fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge").

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[1] The "window" provided by IRCA for amnesty applications was intended to extend twelve months, from May 5, 1987 through May 4, 1988.

Plaintiffs allege that the legalization provisions of IRCA incorporate the pre-existing standards of *§ 1182(a)(15)* and have, in effect, liberalized the public charge test. The "Special Rule for determination of public charge" embodied in IRCA provides:

An alien is not ineligible for adjustment of status under this section due to being inadmissible under *section 1182(a)(15)* of this Title if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.

8 U.S.C.A. § 1255(d)(2)(B)(iii) (West Supp. 1988). Simply stated, plaintiffs argue that this language suggests a two-tiered evaluation. First, the public charge determination is made under *§ 1182(a)(15)*, employing the traditional totality of the circumstances test. If the alien is found ineligible under *§ 1182(a)(15)*, [*5] an alternative, second step comes into play under the "Special Rule", quoted above. This second tier allows an alien already deemed likely to become a public charge under *§ 1182(a)(15)* to overcome that barrier to admissibility by demonstrating a "history of employment in the United States evidencing self-support without receipt of public assistance." § 1255a(d)(2)(B)(iii), *supra.*

At issue in this case is whether regulations implement defendants which purport to interpret the legalization provisions of IRCA are invalid since they appear to impose stricter standards on aliens that the statute itself. According to plaintiffs, one of the challenged regulations, entitled "Proof of Financial Responsibility", attempts to replace the two-tiered process of the statute with a single, more restrictive standard. *See*8 C.F.R. § 245a.2(d)(4)(1988). Another regulation defines public cash assistance to include money received by the alien *or* his family members. *See*8 C.F.R. § 245a.1(i)(1988). Plaintiffs argue that this policy of attributing other family members' income to the alien for purposes of making the public charge determination violates IRCA.

Plaintiffs also seek certification [*6] of two Ninth Circuit wide classes of persons who have been affected by defendants' regulations. Proposed relief includes invalidating the regulations, reconsideration of all applications whose denials were based on these regulations, and extension of the application deadline to allow class members who were discouraged from applying an opportunity to apply.

Before responding to the merits of plaintiffs' motions, the court must address defendants' motion to dismiss, which, although not properly calendared for hearing, has been addressed by plaintiffs and is appropriate for resolution at this time. Defendants contend this case is not justiciable, that some plaintiffs lack standing to sue and that the case is not ripe for review as to other plaintiffs. In addition, defendants assert that plaintiffs' failure to exhaust administrative and statutory review procedures precludes judicial review.

Exhaustion

Defendants contend that judicial review is inappropriate unless and until plaintiffs' applications for legalization are denied. Furthermore, when entertained, judicial review of application denials should be concurrent with similar review of deportation orders. *See*8 U.S.C.A. § 1255a(f) [*7] (West Supp. 1988). Defendants argue that since exclusive review of deportation orders lies with the courts of appeal, jurisdiction in this court is inappropriate. These contentions are not persuasive since plaintiffs' lawsuit is not challenging denial of an individual alien's application, nor is it seeking review of a deportation order.

Plaintiffs' lawsuit is challenging the validity of regulations implemented and enforced by defendants. This court has jurisdiction to review such a claim under *28 U.S.C. § 1331*. *See e.g., National Center for Immigration Rights v. Immigration and Naturalization Services,* 743 F.2d 1365, 1369 (9th Cir. 1984) (hereafter *NCIR v. INS*). In addition, 8 U.S.C. § 1329 confers jurisdiction on the district courts of all causes of action arising under Subchapter II of the INA, in which § 1255a is contained. Moreover, because this is not a challenge to an agency order denying an individual application for legalization, the statutory requirements of IRCA providing for limited judicial review are inapplicable. In addition, the doctrine of exhaustion is not jurisdictional but is a matter within the court's discretion. *See Kale v. United States,* 489 F.2d 449 (9th Cir. 1974). [*8]

Ripeness

Although raised as a separate issue, ripeness seems to be a re-characterization of defendants' exhaustion argument. Defendants contend that three of the named plaintiffs have filed applications which, if denied, should be administratively appealed. Defendants argue that, pending final administrative action these plaintiffs' applications, judicial review is premature. [2]

These arguments misconstrue the nature of plaintiffs' complaint. Plaintiffs have not asked the court to insert its judgment for that of the INS and grant plaintiffs temporary resident status. Rather, the ultimate relief sought in this

[2] At the hearing on May 3, 1988 plaintiffs stated that five of the six named plaintiffs had filed applications and the remaining plaintiff was expected to file prior to the May 4, 1988 deadline.

lawsuit is a declaration that the challenged regulations are invalid. The regulations plaintiffs challenge have been in place since May 1, 1987 and are currently being enforced. Defendants have not indicated a willingness [*9] to disregard or modify these regulations. [3] Therefore, this case is ripe for review. *See NCIR v. INS. supra* at 1369 (challenge to agency regulation is for decision if "the regulation is presently being enforced is unquestionably final").

Standing

Defendants contend that plaintiffs who have not yet applied for legalization have [*10] not been injured and therefore have standing to sue. At the time defendants' brief was filed raising this issue, several named plaintiffs had not filed applications. However, at the hearing on May 3, 1988, counsel for plaintiffs represented to the court that five of the six named plaintiffs had filed applications and that the remaining named plaintiff was expected to file by May 4, 1988. To the extent all named plaintiffs have made application, the issue of standing is moot. However, the issue will be analyzed to the extent one of plaintiffs' proposed classes contains persons who have not yet filed applications. [4]

The elements of standing include an actual or threatened injury which is traceable to defendants' conduct and which is likely to be redressed by a favorable judicial decision. *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464 (1982). [*11] Plaintiffs who have yet to file an application have alleged a threatened injury if they can demonstrate that their reliance on defendants' alleged invalid regulations resulted in their failure to file applications by the May 4, 1988 deadline. While the complaint and supplemental affidavits allege that defendants' conduct cause the injuries complained of, persons seeking to join this class will have to demonstrate that they were otherwise eligible for adjustment of status but for implementation and enforcement of the challenged regulations.

Unless plaintiffs are allowed to sue to invalidate the regulations, they will lose their legal entitlement under IRCA to have their status changed from aliens, to aliens lawfully admitted for temporary residence. *See*8 U.S.C.A. § 1255a(a) (West Supp. 1988). In terms of actual or threatened injury, this translates into an inability to work legally in this country and a constant threat of deportation. Therefore, the court finds that class members who have yet to file applications and who are able to meet the rigorous standards of proof necessary for class membership, have standing to sue since there is a causal link between plaintiffs' threatened [*12] injuries and defendants' conduct which is likely to be remedied by the court if plaintiffs prevail on the merits.

Plaintiffs' Motion for Preliminary Injunction

The standards in the Ninth Circuit for a preliminary injunction require the moving party to show either: 1) a strong likelihood of success on the merits and the possibility of irreparable injury; or 2) that serious questions are raised and the balance of hardships tips sharply in its favor. *Los Angeles Memorial Coliseum v. National Football League,* 634 F.2d 1197, 1201 (9th Cir. 1980). Plaintiffs meet their burden under the first prong.

The Merits

It is clear that, to be valid, regulations have to be consistent with the statute under which they were promulgated. *United States v. Larionoff,* 431 U.S. 864 (1977). In addition, an agency's interpretation of a statute cannot supercede the language chosen by Congress. *Mohasco Corp. v. Silver,* 447 U.S. 807, 825 (1980).

The primary regulation challenged by defendants, Proof of Financial Responsibility, 8 C.F.R. § 245a.2(d)(4), provides in pertinent part:

An applicant for adjustment of status . . . is subject to the [*13] provisions of *section [1182(a)(15)]* . . . unless the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.

Plaintiffs contend that this regulation facially conflicts with the language of 8 U.S.C. § 1255a(d)(2)(B)(iii), the statutory provision the regulation is supposed to implement. Application of the regulation seems to short cut the statutory two-tier process for making the public charge determination. Plaintiffs' argument that the statute requires a finding of inadmissibility under the traditional

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[3] The court notes that defendants apparently have reached some concession regarding enforcement of these regulations in a similar lawsuit. *See Perales v. Meese.* No. 88-265 KC (S.D.N.Y. April 27, 1988) (Lexis, Genfed Library). In denying a motion for preliminary injunction, Judge Conboy stated that the INS had conceded ambiguity in its regulations, had taken steps to clarify the meaning of public charge and was attempting to locate applicants "who were erroneously excluded under the more restrictive 'public charge' standard." *Id.* However, in this lawsuit, defendants have not made any such concessions nor taken any such corrective measures to the court's knowledge

[4] The court's ability to afford relief to class members who have not applied by May 4, 1988 raises a separate issue which is discussed at pages 18-24, *infra.*

standards of *§ 1182(a)(15)* before evaluating an alien's employment history and receipt of public assistant, is persuasive. The language of the regulation makes no such allowance and seems to indicate that the public charge determination will be based solely on an alien's past receipt of public assistance and his employment history in the United States.

The court is loath to interfere with an agency's interpretation of a statute that the agency was authorized to administer. *See generally, INS v. Cardoza Fonseca,* 107 S.Ct. 1207, 1220-22 (1987); *Chevron USA Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-45 (1984). [*14] Moreover, Congress expressly delegated authority to the INS, through the Attorney General, to create the regulations which plaintiffs now challenge. *See*8 U.S.C.A. § 1255a(g). In such a situation, it is inappropriate for the court to substitute its own statutory interpretation for that of the agency. *See Chevron,* 467 U.S. at 842; *INS v. Jong Ha Wang,* 450 U.S. 139, 144 (1981).

Clearly, the INS is entitled to deference. However, reciting that standard of judicial review does not resolve the question of whether, under such a deferential standard, the INS has complied with its congressional mandate. It is axiomatic that a court cannot defer to an agency's regulation where that regulation conflicts with the statute it is supposed to implement. *See State of Washington v. Bowen,* 815 F.2d 549, 554 (9th Cir. 1987); *Vista Hill Foundation, Inc. v. Heckler,* 767 F.2d 556, 559-60 (9th Cir. 1985). Where the agency's interpretation of a statute, as evidenced by its regulations, is inconsistent with a statutory mandate or frustrates congressional policy, the court must enforce the statute notwithstanding the agency's [*15] interpretation. *See Federal Election Commission v. Democratic Senatorial Campaign Committee,* 454 U.S. 27, 32 (1981).

The legislative history of IRCA seems to support the conclusion that Congress intended to incorporate traditional standards for excludability under *§ 1182(a)(15)* into IRCA. The purpose of the Special Rule for Public Charge Determination set forth in the statute was "to incorporate in the language of the bill a provision which demonstrates more flexibility than we have historically had in connection with the application of the immigration law." 130 Cong. Rec. H5908 (daily ed. June 15, 1984) (statement of Rep. Brown). Congress intended the "legalization program [to] be implemented in a liberal and general fashion . . . and expects the INS to incorporate flexibility into the standards for legalization eligibility . . ." H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5649, 5676-77.

Plaintiffs also urge the court to give only limited deference to defendants' regulations because of the inconsistent positions taken by the INS and the various clarifications issued concerning the challenged regulations. [*16] From the time the regulations took effect on May 1, 1987, INS has "clarified" its interpretation of their meaning at least three times. [5] These clarifications add support to plaintiffs' argument concerning the invalidity of the regulations. For example, the Slattery letter states that although alien-applicants receive AFDC payments on behalf of their United States citizen children, the parents are *not* considered to have received public cash assistance, nor is public charge status conveyed to them in this situation. The letter contains similar statements regarding attribution of Social Security Income ("SSI"). Yet the regulation which defines public cash assistance states that the term includes needs based monetary assistant and SSI received by the alien *or* his family members. *See*8 C.F.R. § 245a.1(i) (1988).

[*17] This inconsistency in INS' position combined with plaintiffs' declarations that they were either discouraged from applying for legalization or in fact had their applications recommended for denial based solely on their receipt of AFDC or SSI payments on behalf of their United States citizen children, indicates that otherwise eligible applicants may have been denied a benefit to which they were entitled due to defendants' conduct. Based on the foregoing, the court concludes that plaintiffs have demonstrated a likelihood of success on the merits.

Irreparable Injury

Plaintiffs' proposed preliminary injunction seeks to: 1) enjoin defendants from applying the allegedly invalid regulations to pending applications; 2) order defendants to reconsider applications previously recommended for denial; and 3) continue taking applications from those who were previously discouraged from filing applications. If the preliminary injunction is not issued pending a trial on the merits, plaintiffs claim they will be denied the right to work legally in this country, and will face a constant threat of deportation.

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[5] On September 23, 1987, INS, through its National Commissioner, Richard Norton, issued a memo entitled "Guidelines for Determining Public Charge Issues under the Legalization Provisions of [IRCA]", the stated purpose of which was to "clarify the standards" for the public charge determinations (hereafter referred to as "Norton memo # 1). On February 12, 1988 additional clarifications appeared in a letter written by William Slattery, INS' Assistant Legalization Commissioner. The letter provides a detailed discussion of the definition of "Public Cash Assistance" (hereafter referred to as "Slattery letter"). Finally, on April 21, 1988, INS issued a memo entitled "The Effect of the Receipt of AFDC Benefits on Eligibility for Legalization" (hereafter referred to as "Norton memo #2).

Defendants argue that court intervention at this stage is unnecessary since IRCA itself [*18] provides a mechanism for relief. Defendants contend that plaintiffs whose applications were recommended for denial can apply for a waiver of the public charge provision. *See*8 U.S.C.A. § 1255a(d)(2)(B)(i) (West Supp. 1988). This argument is not persuasive. First, it does not address the class of plaintiffs who were otherwise eligible for amnesty but who nonetheless failed to file application for reliance on the alleged restrictive interpretation of the statute contained in the regulations. Second, as plaintiffs point out, the granting of waivers is discretionary, unlike the legal entitlement for adjustment of status contained in § 1255a(a), and provides no assurance that plaintiffs' applications will be granted. Third, as discussed and rejected earlier, the availability of administrative review under IRCA for denials of applications is not the issue in this case. Plaintiffs contend that the irreparable harm lies in the continued enforcement of allegedly invalid regulations. Pursuing administrative remedies is a course of action open to only some of the plaintiffs and will not remedy the situation, but will merely delay the harm as long as defendants continue to apply the challenged [*19] regulations. Although in a similar lawsuit defendants have apparently conceded the ambiguity in the regulations and are making attempts to "locate applicants who were erroneously excluded under the more restrictive 'public charge' standard", *Perales, supra,* they have made no such concession in this case and, to the court's knowledge, their position remains unchanged from that stated at the hearing on May 3, 1988 which was that no inconsistency exists between the statute and the regulations and that the regulations are a correct interpretation of the statute.

The Ninth Circuit has previously held that the hardship to an alien from being unable to work to support oneself and one's family is beyond question. *See NCIR v. INS,* 743 F.2d at 1369. *See also,* Catholic Social Services v. Meese, 664 F.Supp. 1378, 1388 (E.D. Cal. 1987). Plaintiffs have made a showing of irreparable harm and the motion for preliminary injunction is granted.

Plaintiffs' Motion for Class Certification

Plaintiffs seek to certify two classes of persons defined below. The court has modified the class definitions to comport with the statement made by counsel at the May [*20] 3rd hearing.

1. All persons residing within the Ninth Circuit whose applications for legalization, filed between May 5, 1987 and May 4, 1988, have been or will be denied on the basis that they are likely to become a public charge.

2. All persons residing within the Ninth Circuit who were otherwise eligible for adjustment of status under 8 U.S.C. § 1255a but who had not applied for legalization by May 4, 1988 because they had been discouraged from applying by the INS or by any qualified designated entity ("QDE") because of the regulations defining Proof of Financial Responsibility and Public Cash Assistant.

Initially, the court notes that plaintiffs are properly moving for certification at this time. The Ninth Circuit has held that in the absence of class certification, a preliminary injunction only cover named plaintiffs. *NCIR v. INS,* 743 F.2d at 1371.

Proposed Class No. 1

Proposed class no. 1 meets the prerequisites of *Fed.R.Civ.P. 23(a)* and, in addition, meets the definition of class under *Fed.R.Civ.P. 23(b)(2)* for the reasons discussed below. Although the exact size of the class is unknown, plaintiffs estimate that it encompasses approximately 4000 persons. [*21] The May 3d and May 12th, 1988 declaration of Joseph Thomas, director of the INS' western regional processing facility, which attempt to show that the actual size of the class is deminimus, are not compelling reasons to deny class certification. *Rule 23* provides for modification of certification orders and decertification of class actions if additional information is gleaned which makes class relief inappropriate. According to plaintiffs, INS is still processing applications, thus the total number of denials based on public charge grounds is unknown. If new information reveals that the number of persons effected is sufficiently small to make joinder possible, the class can be decertified. The typicality and commonality prerequisites are also met since the legal issue raised -- the validity of the regulations -- is the same for every class member. Adequacy of representation is also satisfied since the named plaintiffs have interests identical to those of the class as a whole. The second component of adequate representation concerning the qualifications of plaintiffs' attorneys, is not disputed.

The proposed class definition also meets the requirements of *Fed.R.Civ.P. 23(b)(2)*, that [*22] is, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Id.* In this case, plaintiffs have demonstrated that defendants have acted or will act consistently toward all class members by applying and continuing to apply the challenged regulations. In other words, plaintiffs have shown that an established regulatory scheme has or will be applied to all class members. [6] Defendants' actions have not been shown to be so individualized or varied as to make the relief sought valid as to some members of the class and invalid as to others. In sum, certification of proposed class no. 1 is appropriate at this time.

Proposed Class No. 2

At the hearing on May 3, 1988, the [*23] court questioned the parties about the court's ability to grant relief to plaintiffs who had not and would not file their applications by the May 4, 1988 deadline. Since neither party had addressed the issue in their initial briefs, additional briefing was requested. After reviewing the materials submitted by the parties, the court finds that it does have the power to grant relief to class members who, in reliance on defendants' regulations, were discouraged from applying for legalization by the INS or any qualified designated entity ("QDE") [7] and who failed to file an application by May 4, 1988, and who otherwise would have been eligible for adjustment of status. However, the standards of proof required to show membership in this class must, by necessity, be stringent.

Defendants contend [*24] that this court does not have jurisdiction as to plaintiffs who had not applied for legalization as of May 4, 1988. To the extent all named plaintiffs have submitted applications by May 4, 1988, the question of this court's jurisdiction is moot. However, plaintiffs' proposed class no. 2 includes persons who were discouraged from applying and therefore, persons who failed to apply by the May 4th deadline. Defendants take the position that the statutorily imposed time limit for filing applications operates to bar anyone who failed to file by May 4, 1988. Defendants claim the deadline is jurisdictional and, unlike exhaustion, is a requirement which cannot be waived.

The court finds itself in a quandary concerning defendants' position on the issue. In their briefs and argument before *this* court, defendants firmly adhered to the position that the court has no authority to certify a class containing persons who did not submit timely applications. Yet, in a similar lawsuit involving the same defendants, virtually identical factual and legal issues, and seeking similar relief, defendants reach a seemingly contradictory conclusion. In *Perales, supra,* Judge Conboy based his decision [*25] to deny preliminary injunctive relief on, in part, defendants' concessions concerning availability of relief after a determination on the merits.

It is now clear that persons who may have been disqualified after having applied, or were discouraged from applying by qualified designated entities (QDEs) . . . may now have a wholly new basis to apply based on these clarifications. *Because the government concedes that the Commissioner has authority,* under conventional administrative powers, *to find that constructive filing has occurred* with respect to such applicants *after the expiration of the amnesty period on May 4, 1988,* . . . intervention at this time is not necessary.

Perales, supra (emphasis added). Although the basis for the government's concession in *Perales* is not explained in detail, Judge Conboy's finding seems imminently relevant to this case and worth further exploration.

Plaintiffs suggest that this court's equitable powers are broad enough to fashion a remedy encompassing the requested relief. *See Pangilinan v. INS,* 786 F.2d 1091 (9th Cir. 1986), *rev'd* U.S. , No. 86-1992 (June 17, 1988). However, plaintiffs' reliance [*26] on *Pangilinan,* as support for this argument is misplaced in light of the Supreme Court's recent reversal of the Ninth Circuit. [8] Alternatively, plaintiffs argue that the one year time limit imposed by IRCA is akin to a statute of limitations and can be tolled. *See Bowen v. City of New York,* 106 S.Ct. 2022 (1986). The Supreme Court approaches the problem of determining whether a time limitation requirement is jurisdictional by analyzing the structure of the statute, the underlying congressional policy and the reasoning of prior cases. *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393 (1982).

[*27]

Section 1329 of Title 8 of the United States Code gives district courts jurisdiction over all actions arising under the provisions of the subchapter in which that section is contained. Section 1255a is within that subchapter. Nothing in § 1255a conditions jurisdiction under § 1329 on timely filed applications. Moreover, the timely application provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district

[6] Defendants have failed to contradict plaintiffs' evidence on this point, notwithstanding the concessions apparently made by defendants in *Perales. See* footnote 3, *supra.*

[7] Congress selected certain organizations, known as qualified designated entities (QDE), to assist aliens in the application process. *See generally,* 8 U.S.C.A. § 1255a(c) (1-4) (West Supp. 1988) and 8 C.F.R. 245a.1(1) (1988).

[8] The Supreme Court's decision in *Pangilinan* to reject a court's invocation of its equitable powers to confer citizenship on aliens who failed to meet congressionally mandated filing deadlines does not adversely affect this court's decision to apply the doctrine of equitable tolling. That issue was not addressed in *Pangilinan* nor was the relief sought the same as in this case.

courts." *Zipes*, 455 U.S. at 393. Therefore, the statutory structure itself does not support defendants' argument that a timely filed application is a jurisdictional prerequisite.

On the other hand, the congressional policy underlying the one year time limit for receiving legalization applications clearly demonstrates that Congress intended a "one time only" amnesty program limited to twelve months. However, the thrust of plaintiffs' lawsuit is that applicants who were discouraged from applying by reliance on allegedly illegal regulations have been denied the twelve month application period Congress intended. Plaintiffs' opening and supplemental briefs contain numerous exhibits detailing the many changes and clarifications [*28] defendants have made since the regulations were first adopted regarding the definition of public cash assistance. In fact, the latest such clarification embodied in Norton memo # 2 was not disseminated to INS regional offices until April 21, 1988, less than two weeks prior to the filing deadline. Plaintiffs also submit declarations of many QDE staff members who state their reliance on the May, 1987 regulations in counseling aliens whether or not to apply for amnesty.

If plaintiffs can prove the allegations of their complaint, it appears that Congress' intent to provide a one year window for receipt of amnesty applications will have been frustrated by the interpretations given the regulations prior to the recent clarifications. If more people are eligible for admission based on the clarifications than would have been prior to their recent dissemination, it seems clear that congressional intent will be furthered, not abrogated, by tolling of the May 4, 1988 filing deadline.

The final factor in the analysis of whether a time limitation is jurisdictional, is the reasoning of prior cases. Unfortunately, because of the recent enactment of IRCA, case authority is not extensive. However, [*29] at least three courts have pending cases which challenge the validity of regulations implemented under IRCA. In *Perales v. Meese, supra,* the court found that plaintiffs who ultimately prevail on the merits may be entitled to relief from the May 4th deadline under the equitable tolling doctrine. In *Ayuda v. Meese,* No. 88-625 (D.D.C. May 4, 1988) Judge Sporkin allowed plaintiffs in specified situations who can demonstrate their failure to file by May 4, 1988 was due to action or inaction of the INS or QDEs, until August 31, 1988 to seek judicial relief. On June 10, 1988, Judge Karlton of this district ordered the INS to accept legalization applications through November 30, 1988 from certain class members covered by the court's previous orders. *Catholic Social Services v. Meese,* No. 86-1343 LKK (E.D. Cal. June 10, 1988). In none of these cases do the courts question their jurisdiction to adjudicate claims by persons whose amnesty applications were filed after the statutory deadline.

The analysis above demonstrates that the timely application language of § 1255a should not be construed as a jurisdictional bar and is instead subject to the principles of equitable tolling. Furthermore, [*30] equitable tolling is consistent with Congress' intent in enacting § 1255a and "does not undermine the purpose of the [one year] limitations period when viewed in connection with the underlying statute." *See* *Bowen v. City of New York,* 106 S.Ct. 2022, 2030 (1986).

The fact that Congress may have been aware of litigation concerning the bill to extend the May 4th deadline does not affect this court's jurisdiction. In fact, one of the reasons offered in opposition to the extension was the inherent equitable powers of the court to remedy the situation should it find the need to do so.

[T]he proponents [of the extension bill] argue that certain court decisions recently handed down now make some 75,000 persons eligible for the legalization program. There may very well be equitable reasons to allow these individuals to apply; but there is no doubt that the courts are well equipped to evaluate equitable considerations.

134 Con. Rec. S5041 (daily ed. April 28, 1988) (statement of Sen. Grassley).

In this case, "the equities in favor of tolling are compelling." *See* *Bowen v. City of New York,* 106 S.Ct. at 2030. Plaintiffs allege they were discouraged [*31] from applying by the INS and its selected representatives. All class members who relied on this information had no reason to doubt its veracity. It would be unfair to deny adjustment of status under IRCA to those who are otherwise entitled to it but for the actions of defendants.

In addition, class no. 2 meets the requirements of *Fed.R.Civ.P. 23(a)* for essentially the same reasons as class no. 1 with two exceptions. If, in fact, all named plaintiffs have applied for amnesty by May 4, 1988, proposed class no. 2 has no class representative. However, plaintiffs have informed the court of their intent to amend the complaint to add a class representative for the second class. Should plaintiffs fail to take this action or should their motion to amend be denied, the preliminary injunction is subject to modification to delete proposed class no. 2. In addition, plaintiffs allege the second class is even larger than the first, thus satisfying the numerosity requirement. Once again, the court notes that should information come to light in the future which makes joinder of all class members feasible, modification or decertification may be appropriate. Accordingly, plaintiffs motion for certification [*32] of class no. 2 is granted.

ORDER

The parties are instructed to meet and confer concerning the structure of an order implementing the court's decision. A joint proposed order shall be filed within 20 days of the date of this memorandum opinion. The order should enjoin defendants from applying the challenged regulations to all applications which have been filed but not yet acted upon. In addition, the order should require defendants to establish a procedure for identifying all members of class no. 1 whose applications were denied or recommended for denial based on a finding that they were likely to become a public charge as determined by application of the regulations defining proof of financial responsibility, 8 C.F.R. § 245a.2(d)(4), and public cash assistance, 8 C.F.R. § 245a.1(i). These class members should be notified that their applications will be re-opened and may be reconsidered based on defendants recent "clarifications" of the challenged regulations. The order should also suggest procedures for identifying members of class no. 2 as well as criteria for establishing strict evidentiary requirements and standards of proof to be imposed on these persons in order to demonstrate [*33] their right to relief under the terms of the lawsuit should plaintiffs prevail on the merits. The court is not inclined to grant further preliminary relief to proposed class no. 2 until it is satisfied that these evidentiary requirement will be effective in identifying potential class members.

In addition, the court orders that plaintiffs are not required to post a bond or other security during the pendency of this action. Plaintiffs are indigent and have previously been granted *in forma pauperis* status. Requirement of security in such a situation is within the court's discretion. *See People ex rel. Van De Kamp v. Tahoe Regional Planning Agency,* 766 F.2d 1319*modified on other grounds,*775 F.2d 998 (9th Cir. 1985).

IT IS SO ORDERED.