CONTRERAS DE AVILA v. BELL

United States District Court for the Northern District of Illinois Eastern Division
February 27, 1980
No. 78 C 1166

Reporter: 1980 U.S. Dist. LEXIS 10368
IMELDA CONTRERAS DE AVILA, et al., Plaintiffs, v. GRIFFIN B. BELL, et al., Defendants.

Opinion by: [*1] MARSHALL

Opinion

MEMORANDUM DECISION

In this class action for injunctive and declaratory relief, plaintiffs, who are Mexican visa applicants and their United States citizen or permanent resident sponsors, sought recapture of visas allegedly incorrectly charged to the yearly quota for Mexico in fiscal year 1977. In our memorandum decision of May 18, 1979, we held that the State Department had interpreted the 1976 Amendments to the Immigration and Nationality act incorrectly and that 9,565 additional visas should be awarded to Mexican immigrants.We certified a class for liability issues but held that the class had to be divided into subclasses, with separate counsel, before we could grant relief. On September 17, 1979, we certified two subclasses, and on December 21, 1979 and on January 18, 1980, we entered a temporary restraining order and a modified temporary restraining order enjoining the Immigration and Naturalization Service (INS) from deporting certain immigrants who may be entitled to recaptured visas.We are now prepared to rule on plaintiffs' motion for final judgment and permanent injunctive relief.

DISTRIBUTION OF RECAPTURED VISAS

The 1976 Amendments established a [*2] per country quota of 20,000 permanent resident visas per fiscal year. 8 U.S.C. § 1152. Although the fiscal year begins on October 1, and the 1976 Amendments did not become effective until January 1, 1977, the State Department charged visas awarded between October 1, 1976 and January 1, 1977 against the fiscal 1977 quota. We held that the State Department should not have begun charging visas against the per country quota until January 1, 1977, the effective date of the 1976 Amendments, and that the quota should have been applied pro rata to the three-fourths of fiscal 1977 remaining after the effective date of the statute. Thus 15,000 visas, or 9,565 additional visas, should have been issued to Mexican immigrants between January 1, 1977 and September 30, 1977.

The 1976 Amendments established a preference scheme for distributing the per country quota. 8 U.S.C. § 1153(a). Each of the preference categories is allocated a percentage of the per country quota. An eighth category, the "nonpreference" category, is allocated only the residual visas not actually issued to the seven preference groups. We determined that applicants for preference visas and applicants for nonpreference [*3] visas had conflicting interests in the allocation of the recaptured visas. The separate counsel for these two groups and the government have submitted separate plans for the distribution of the 9,565 recaptured visas.

Because the preference system was not in full swing for most of fiscal 1977, a considerable time elapsed before the demand for preference category visas equalled the quantity available. Therefore, because the State Department allocates the quota uniformly from month to month, most of the recaptured visas would have gone to nonpreference applicants. The government and both subclasses have agreed that 8,496 visas should be issued to nonpreference subclass members in strict chronological order by priority date. The parties disagree, however, as to the proper distribution of the 1,069 remaining visas to the preference class.

The government argues that the full 1,069 visas should not be distributed. The State Department makes visa numbers available to consular offices in a monthly allocation. If the visa numbers allocated do not result in the actual issuance of visas and so remain unused in that month, they must be returned to the State Department for redistribution [*4] in later months. The numbers issued for a particular month often do not lead to an equal number of issuances, because some applicants on the waiting list either do not appear for their final interview or are found ineligible at the interview. If the numbers allocated during September, the last month of the fiscal year, are not used, they cannot be used in subsequent months. Thus the full 20,000 quota is not reached in many fiscal years. See Declaration of Franklin H. Baker. Because the only preference demand left unsatisfied in fiscal 1977 arose during September, defendants contend that many of the 1,069 numbers allocated to preference applicants during 1977 would have remained unissued.

The first of the preference categories with unsatisfied demand in fiscal 1977 were the second category, with 872 applicants on the waiting list, and the fourth category, with 225 applicants. Taking the rate of unused numbers from

September, 1977 through December, 1977, the government found a 55% rate for second preference and 49% for fourth preference. Therefore, the defendants contend that only 392 visas, or 45% of the second preference waiting list, should now be reissued to second preference [*5] applicants. As for the fourth preference applicants, defendants note that all of the fourth preference demand was satisfied in fiscal 1978. Therefore, no current fourth preference applicants are now suffering the ill effects of defendants' charging policy. Thus the 115 visas (51% of 225) that would have been issued in 1977 should be subject to the "fall down" effect of the preference system and be allocated to lower preference categories. Although the government believes that these 115 visas should go to fifth preference applicants, defendants assert that further study must precede a conclusion that fifth preference applicants are the current victims of the State Department's failure to issue the 115 visas to fourth preference applicants.

The nonpreference class proposes a different scheme. They contend that all 9,565 visas should be redistributed, regardless of the failure rate offered by the defendants. The nonpreference plaintiffs presume that the State Department would have overallocated visa numbers in order to approach the 20,000 quota. This overallocation would have been based on the failure rate or the unused number rate, which the nonpreference plaintiffs say should [*6] be derived only from the failure rate for September, 1977. The failure rate in September, 1977 was 39%. Thus to issue 1,069 visas with a 39% failure rate the State Department would have had to issue 1,752 visa numbers. Given the September 1977 preference demand, the 1,752 visa numbers would have been allocated as indicated in the first column of the following table, with the 61% success rate in the second column:

	Numbers Allocated	Visas Issued
First preference	0 (no demand)	0
Second preference	872 (total demand)	532
Third preference	0 (no demand)	0
Fourth preference	225 (total demand)	137
Fifth preference	209 (total demand)	127
Sixth preference	18 (total demand)	11
Seventh preference	0 (no demand)	0
Nonpreference group	428 (remainder of 1,752)	262

Then, the nonpreference plaintiffs look at fiscal 1978 processing. According to these plaintiffs, no demand for first, third, fourth, fifth, sixth, and seventh preference existed in October, 1978. Thus the nonpreference applicants claim that no applicants in any of these groups are now suffering injury as a result of the unlawful charging policy, and any visas that would have been [*7] unused by these groups in 1977 would have dropped down to the nonpreference category. Thus of the 1,069 visas, 532 would be allocated to second preference applicants and 567 would be issued to nonpreference applicants.

The preference plaintiffs also assert that all 1,069 visas should be issued. The preference class argues, however, that all of the 1,069 visas should be issued to preference applicants. These plaintiffs state that 872 visas, the extent of the second preference demand in September, 1977, should be issued to applicants from that category. The remaining 197 visas should be issued to fifth preference applicants, because the number of visas allocated to fourth preference applicants, the category for which demand existed in September, 1977, satisfied the demand for fourth preference visas in fiscal 1978.If, however, we choose to apply a
failure rate, the preference plaintiffs argue that we should apply a 20% failure rate rather than either the 39% rate proposed by nonpreference plaintiffs or the 55% and 49% rates proposed by the government.

Our goal in affording relief is to place the class members in the position they would be in absent the illegal charging policy. [*8] Silva v. Bell, 605 F.2d 978, 985 (7th Cir. 1979). Given the nature of the visa distribution process, however, we can only reach a rough approximation of this goal.The parties have reached their own approximation with respect to nonpreference visas, agreeing that 8,496 visas would have been originally issued to nonpreference applicants. But we have no practicable way of determining with certainty how the remaining 1,069 visas would have been distributed. Therefore we must make certain assumptions in order to approximate the distribution as it would have taken place.

One assumption we decline to accept, however, is the government's assertion that because of the percentage of

numbers which would have been issued but not used, not all 1,069 visas would have been actually issued. In Silva v. Bell, supra, the State Department was ordered to redistribute all Cuban visas, which had incorrectly been charged to the 120,000 Western Hemisphere quota. No reduction in recaptured visas was made simply because the 120,000 quota would not have been completely used in any of the years at issue. Moreover, the INS official responsible for allocating visa numbers during 1977 has stated that he [*9] designed his allocations to insure that Mexico reached or came close to its 20,000 annual visa limit, that he regularly overallocated numbers to Mexican posts because he was aware of the return rate, and that his practice of overallocating to Mexico carried over into September, 1977. Declaration of Franklin H. Baker, PP5, 7, 8. [1] We see no reason why we should not now frame relief for the injured class members so as to achieve the State Department's desired goal of using the full 20,000 quota. Inasmuch as we cannot be certain how close the defendants would have come to issuing 20,000 visas in fiscal 1977, we believe that our equitable powers enable us to favor the injured class by structuring relief so as to exhaust the full quota.

[*10] We do agree, however, with the nonpreference plaintiffs and the defendants that to distribute the visas as they would have been distributed during 1977, we must take into account the percentage of allocated visa numbers that would not have been used. This is not inconsistent with our holding that the distribution of recaptured visas should reach the full quota, because we can presume that the unused visa numbers would constitute the overallocation of numbers necessary to reach the quota. Neither the nonpreference plaintiffs' figure nor the defendants' figures are based on particularly reliable data, however. The percentage that would be relevant in determining the failure rate would be derived from the failure rate of those applicants who would have received final interviews in September, 1977 if the State Department had issued 1,069 additional visas.But these applicants did not receive interviews in September, 1977, so the nonpreference plaintiffs' figure based on actual September, 1977 issuances is not accurate. Moreover, some of the preference applicants who would have received interviews in September, 1977 did not have their interviews or receive visas until after January [*11] 1, 1978. Thus the government's percentage, based on the September, 1977 - December, 1977 figures, uses data from a month, September, when no visas or interviews were given to the relevant applicants, and does not use data from months, such as January, 1978, when some visas were issued to those applicants. [2]

The figures do, however, give us a general idea of what the failure rate would have been. They are more persuasive than the 20% figure urged by the preference plaintiffs. Their only support for this fugure seems to be that it will benefit them more than the other proposed figures. Because we have no more reliable figures than those proposed by the nonpreference plaintiffs and the government, we will take those figures into account and adopt the figure of 40% as our rough approximation of what the unused number rate would have been.

Because we have assumed for the purposes of shaping relief that the State Department would have allocated [*12] enough visas to compensate for the failure rate, we must make our calculations assuming a 40% rate. Making this assumption, the State Department would have issued 1,781 visa numbers for September, 1977 as follows:

	Number
First preference	0 (no demand) [3]
Second preference	872 (total demand) [4]
Third preference	0 (no demand) [5]
Fourth preference	225 (total demand) [6]

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[1] Although Mr. Baker states that he overallocated the visas so as to reach the 20,000 quota, he states that he would have allocated only 1,100 visas to preference applicants in September, 1977. This allocation would certainly not be enough to result in the issuance of 1,069 visas. It is possible that the 1,100 visa numbers, when combined with the numbers necessary to result in the issuance of 8,500 nonpreference visas, would constitute a significant overallocation. Even if this is the case, Mr. Baker's attempt to overallocate to reach the quota would have fallen short of the mark. As we will demonstrate infra, ours will not.

[2] Moreover, the government figures measure only second and fourth preference visa issuances. But, assuming an overallocation, some of the visas issued during September, 1977 would have been issued to other preference categories.

[3] See Baker Declaration.

[4] Id. P9.

[5] Id. P10.

[6] Id. P11. Although Mr. Baker indicates that this 225 figure includes an overallocation, there would be no point in allocating visas to a preference category beyond the current demand for that category. Thus we will assume that the demand for the fourth

	Number
Fifth preference	209 (total demand) [7]
Sixth preference	18 (total demand) [8]
Seventh preference	0 (no demand) [9]
Nonpreference group	452 (remainder)

Assuming a 60% [*13] success rate, this allocation would have resulted in the following issuance of visas:

	Number
Second preference	524
Fourth preference	135
Fifth preference	126
Sixth preference	12
Nonpreference group	272

We must then examine the visa allocation in fiscal 1978. If the processing of a particular preference group became current during 1978, so that no members remained on the waiting list, then any applicant who was later placed on the waiting list would not have his application delayed by the unlawful charging policy, and thus no members now currently on the preference waiting list for that category would be suffering injury. The only preference category that was not current by October, 1978 was the second preference category. See U.S. Department of State Visa Bulletin for October, 1978, Nonpreference Plaintiffs' Exhibit D to Reply Memorandum. Thus 524 visas should now be redistributed to second preference applicants. The remaining 273 visas that would have gone to preference applicants in September, 1977 should fall down to the nonpreference category, in addition to the 272 visas that would have gone to the nonpreference category as a result of the failure [*14] rate in September, 1977.

Therefore, the State Department should distribute 524 visas to second preference applicants and 9,041 visas to nonpreference applicants in accordance with the Final Judgment Order entered herein.

INJUNCTIVE RELIEF

On December 21, 1979 we entered a temporary restraining order, which we modified on January 18, 1980. The temporary restraining order enjoins the INS from deporting any Mexican immigrant who has a second preference priority date earlier than April 1, 1978 or a nonpreference priority date earlier than July 1, 1976. The plaintiffs have moved for a permanent injunction to this effect which would protect the immigrants for the duration of the distribution process. The government urges us not to award any permanent injunctive relief, and if we do, defendants have several criticisms of the plaintiffs' proposed injunction.

The government contends that the proposed injunction is improper because it would benefit more immigrants than would stand to gain from the distribution of the recaptured visas. Defendants note that there are presently over 130,000 nonpreference applicants on the waiting list. Defendants also argue that the injunction would [*15] conflict with a similar injunction entered in the Silva case. Finally, the government contends that the immigrants to be protected by the injunction, who are in the country illegally, have unclean hands and so are not entitled to relief.

None of these criticisms are persuasive. First, the injunction would not be overbroad, because the 130,000 waiting list is made up of aliens who are still in Mexico, as well as those who are in the United States. Moreover, more than the first ten to twenty thousand members of the waiting list must be protected, because many of the nonpreference applicants on the waiting list are entitled to relief under the Silva case. Second, because the injunction here is similar to the one entered in Silva, and because the cut-off date for priority dates of nonpreference applicants is later in plaintiffs' proposed injunction than the date the Silva court used, we cannot see how the proposed injunction conflicts

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preference category was 225 in September, 1977.Because of the "fall down" effect discussed infra, this assumption will not have any effect on the actual distribution of visas.

[7] See forms FS-469, Visa Number Demand, Exhibit C to Nonpreference Plaintiffs' Reply Memorandum.

[8] Id.

[9] Id.

with the Silva injunction. Finally, defendants' unclean hands argument is inapposite given the INS policy of extending relief from deportation to those who are close to receiving a visa. See 8 C.F.R. § 242.5. Absent the defendants' unlawful charging [*16] policy, many of the immigrants protected by the injunction would now have visas. Therefore, we conclude that the plaintiffs are entitled to a permanent injunction.

We have entered, with modifications, the injunction the plaintiffs seek. We add only a few comments here with respect to the criticisms defendants have made. The government, in a supplemental memorandum, has proposed as a cut-off for priority dates July 1, 1973 rather than the July 1, 1976 date for nonpreference applicants now in effect in the temporary restraining order. As plaintiffs note, however, protecting only the 19,000 immigrants with pre-July 1, 1973 dates is clearly insufficient, because many of these 19,000 are entitled to, and will receive, visas as part of the Silva distribution. Therefore, the July 1, 1976 date will stand.

We have incorporated the defendants' suggestion that only immigrants entering the country prior to December 14, 1979 are protected.

The government also challenges the work authorization paragraph in plaintiffs' proposed injunction. This provision is identical to the provision contained in the Silva injunction. Although liability was not at issue in Silva, and although the [*17] Court of Appeals may ultimately determine that the class protected by the injunction is not entitled to relief, we believe that work authorization is necessary to prevent further injury to immigrants who have been injured by what we have held to be an unlawful charging policy. [10] The authorization will date back to the last date the immigrant entered the country.

The government has also criticized other provisions of the proposed injunction which are identical to provisions in the Silva injunction. See Proposed Permanent Injunction, PP3, 4, 7; Defendants' Memorandum in Response, 18-22. The government has not submitted anything which persuasively or conclusively indicates that these provisions, as used in Silva, have posed difficulties in administration or implementation. Therefore, we see no reason why these provisions should not be part of the injunction in the instant case.

Finally, we agree with the government that with respect to the second preference immigrants, once the INS has identified by name the likely beneficiaries [*18] of the distribution process, the injunction should protect only those named applicants. In identifying the second preference applicants likely to obtain relief, the INS should make substantial allowance for the probability that many of the numbers issued to applicants on the waiting list will not actually result in the issuance of visas. The INS in making this allowance should use at least a 40% rate, the failure rate we used here.

Final judgment and a permanent injunction will enter.

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[10] For the same reasons that the injunctive relief as a whole is not overbroad, this provision regarding employment authorization is not overbroad.