CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

COURT GRANTS IMPORTANT INTERIM RELIEF TO RELIGIOUS WORKERS

Posted on September 16, 2008 by Cyrus Mehta

by Patricia S. Mann *

Ruiz-Diaz, et al. v. USA, et al., No. C07-1881 RSL (W.D. Wash.) is a national class action lawsuit, filed originally on November 27, 2007, with the District Court in Seattle, challenging Citizenship and Immigration Services' (CIS) refusal to allow religious workers to file a petition for an immigrant visa concurrently with an application for an adjustment of status. Because non-religious employment-based applicants, as well as family based applicants for permanent residence are allowed to file a petition for an immigrant visa and an application for adjustment of status (AOS) concurrently, CIS's policy, codified at 8 C.F.R. §245.2(a)(i)(B), denying this same right to religious workers appears straightforwardly arbitrary and unfair, and discriminatory.

This differential treatment is not merely a formal matter, insofar as there are important benefits to applicants, as well as their family members, to concurrent filing, and significant harms to religious workers and their families resulting from their inability to concurrently file for an immigrant visa and AOS. Once CIS accepts the application for AOS, the applicant and their family are allowed to remain in the United States and obtain work authorization pending the final adjudication of the petition for an immigrant visa and the AOS application. Because the adjudication of immigrant visa petitions can take many months and even years, many religious workers are forced to leave the U.S. and their religious positions here when their non-immigrant status has expired and their immigrant visas have not yet been approved.[1] Should they choose to remain in the U.S. out of status, working without employment authorization as they await approval of their I-360, they risk becoming statutorily ineligible to adjust status when their immigrant visas are finally approved.[2] This is obviously harmful for

not only the religious worker and their families, but the religious organizations they work for.

Ruiz-Diaz Plaintiffs sought a preliminary injunction requiring CIS to treat all religious workers with pending I-360 immigrant visas in the same manner as non-religious workers are treated. Plaintiffs requested to be allowed to file AOS applications while their I-360s are pending, enabling class members and their families to remain in the U.S. with the same benefits - remaining in status and remaining authorized to work - as are granted to non-religious workers who have been allowed to file concurrently. Plaintiffs charged that CIS acts unlawfully in refusing to accept concurrent AOS applications filed by religious workers when it accepts such applications from similarly situated employment-based and family-based applicants for permanent residence.

Standards for injunctive relief require a showing not only that the moving party will suffer irreparable injuries if the relief is not granted, but also that the moving party is likely to prevail on the merits. In this case, Plaintiffs charged that CIS's policy and practice violates the Immigration and Nationality Act (INA) §245(a)(2), 8 U.S.C. §1255(a)(2), which provides only that an application for adjustment of status may be filed if the applicant "is eligible to receive an immigrant visa." Moreover, because Plaintiffs are statutorily eligible under INA §245, 8 U.S.C. § 1255, to file applications for AOS, CIS's refusal to accept and adjudicate their applications while their I-360s are pending is a violation of the Due Process Clause of the U.S. Constitution. In addition, CIS's policy of refusing to accept concurrent filings by religious workers, while it accepts concurrently filed immigrant visas (I-140s) and AOS applications for non-religious workers, as well as concurrently filed family-based immigrant visas (I-130s) and AOS applications, violates the Equal Protection Guarantee of the U.S. Constitution. This disparate treatment of religious workers and non-religious workers also constitutes unlawful discrimination against religious workers and religious organizations, violating the Religious Freedom Restoration Act (RFRA) (42 U.S.C. § 2000bb-3(a) (1993) (restoring the compelling interest/least restrictive means test for infringing upon the exercise of religion)). CIS's refusal to grant employment authorization to Plaintiffs and their families while their immigrant visas are pending similarly violates the INA, the RFRA, as well as the First Amendment and the Equal Protection Guarantee, insofar as CIS does grant employment authorization to non-religious workers and their families while their immigrant visas are pending.

As an additional ground for believing that they would prevail on the merits in this case, Plaintiffs lawyers, Robert Pauw and Robert Gibbs could cite a decision by the same District Court in February 2007, *Hillcrest Baptist Church v. United States*, Case No. 06-1042Z (W.D. Wash.), in which Judge Thomas Zilly held:

> The Court declares that CIS's policy to accept concurrent filings of Form I-140s and Form I-485s, but not to accept concurrent filings of Form I-360s and Form I-485s... violates the Equal Protection Claus of the Fifth Amendment of the United States Constitution.

Hillcrest v. United States , Order dated February 23, 2007, p.16.

Nevertheless, this class action lawsuit had a rocky beginning, insofar as the Government quickly reacted to the initial complaint and motions for temporary restraining order and class certification by granting the I-360s of most of the named plaintiffs, thereby mooting out the class. But Plaintiffs attorneys, Robert Gibbs and Robert Pauw of the Seattle firm, Gibbs Houston Pauw, responded aggressively and effectively, amending their complaint, adding additional individual plaintiffs, but also adding several religious organizations that had already filed I-360s for several religious workers, but were also expecting to file I-360 petitions for additional workers.

Plaintiffs second motion to certify the class was granted by District Judge, Robert Lasnik, of Seattle, on June 30, 2008 (Doc.87), describing the class as follows:

> all individuals currently in the United States who are beneficiaries of a Petition for Special Immigrant (Religious Worker)(Form I-360) that has been filed or will be filed, and who were or would be eligible to file an Application for Adjustment of Status (Form I-485) but for CIS's policy codified at 8 C.F.R. § 245.2(a) (2)(i)(B) that the Form I-360 must be approved before the Form I-485 application can be filed.

Judge Lasnik found that the class satisfied the four requirements of F.R.C.P. 23(a): 1) Class members being so numerous that joinder is impractical; 2) Class members sharing commonality of questions of law and fact; 3) Class members having a typicality of claims, raising common questions of law; 4) Adequacy of representation; Attorneys Robert Gibbs and Robert Pauw have litigated numerous class action lawsuits involving immigration issues. Judge Lasnik also

concluded that F.R.C.P. 23(b) was satisfied insofar as each and every class member would benefit from injunctive or declaratory relief directed at the government's policy against concurrent filing. Contrary to Defendant's assertions, Judge Lasnik explained that the organizational plaintiffs were not members of the proposed class, and were "virtually irrelevant to the class certification analysis."

Perhaps most significantly, this definition of the class includes those who were eligible to file an application for adjustment of status, but are no longer eligible because (prior to any relief order of the court) they have exceeded the 180-day grace period following the expiration of their non-immigrant visas, making them ineligible for adjustment of status under INA §245(c) and (k).

> On August 21, 2008, Judge Robert Lasnik ordered:
>
> the accrual of unlawful presence/unauthorized employment time against the class members is hereby STAYED until this litigation is resolved or further order of the Court.[3]

Gabriel Ruiz-Diaz, et al. v. United States, et al., Order, p.4. Judge Lasnik explained that he recognized the "traumatic and irreparable harm" of forcing class members to depart from the United States before filing their adjustment of status applications due to delays in adjudicating their immigrant petitions. By halting the accrual of unlawful presence time and unlawful employment for all class members during the pendency of the litigation he sought to continue the *status quo antelitem,* preventing said irreparable harm to class members and their families, without causing defendants any undue hardship. *Ibid.*

However, Judge Lasnik was not willing to grant Plaintiff's request for an order that CIS must immediately begin accepting concurrently filed immigrant visas and adjustment applications. Although he acknowledged that Plaintiffs had raised "serious legal and/or factual questions regarding their statutory, RFRA, and Equal Protection claims," and based on the limited record available, he found "that plaintiffs have a fair chance of success on the merits of each of these claims" he could not conclude that mandatory injunctive relief was justified at this point.

Judge Lasnik distinguished between Ninth Circuit standards for granting a prohibitory injunction, as he was granting in ordering that there would be no

further accrual of unlawful presence/employment during the pendency of the litigation, and the higher standards for granting what he called a mandatory injunction, an order of affirmative conduct on the part of defendants, such as an order that the government must begin accepting adjustment applications from religious workers with pending I-360s. Judge Lasnik found that Plaintiffs had satisfied the standard for granting a prohibitive injunction, but that they had not shown that "the facts and law clearly favor the moving party," the Ninth Circuit standard for granting a mandatory injunction. *Ruiz-Diaz* Order, p.2, citing *Dahl v. HEM Pharms.Corp*., 7 F.3d 1399,1403(9th Cir. 1993).

Judge Lasnik has granted substantial relief for the thousands of class members who have a pending I-360 currently, or who will file an I-360 during the duration of this litigation. At a time when enforcement of immigration regulations is increasingly harsh and capricious, this ruling is a very welcome reminder of the continuing possibilities for achieving a more just and reasonable regulatory fabric through finely tuned litigation strategies.[4]

*** Patricia S. Mann is an Associate at Cyrus D. Mehta & Associates, PLLC where she works on immigration and nationality law matters. Before joining the firm, she successfully represented many clients in immigration court who had experienced persecution as a consequence of grass roots political activism in China. Pat received her J.D. in 2005 from New York University. Pat is admitted to practice in the Second Circuit, as well as the Eastern and Southern Districts. She is a member of the American Immigration Lawyers Association, as well as the National Immigration Project, and the City Bar Committee on Immigration and Nationality Law.**

[1] The authorized period of stay on a non-immigrant R visa is only for a maximum of five years, INA §101(a)(15)(R)(ii); 8 C.F.R. §214.2(r)(4) and (5), potentially extended for the amount of time spent outside the U.S. within the authorized five year period.

[2] If religious workers remain in the U.S. pending approval of their I-360s, even if their immigrant visa is finally approved, they will be ineligible to adjust if they remain in unlawful status or if they have worked without authorization for more than 180 days. See INA § 245(c)(2); INA §245(k). And if religious workers remain in the U.S. pending approval, and are finally unsuccessful and must

leave the U.S., they face being barred from entering the U.S. on any visa for three years or ten years, depending on whether their R visa expired more than 6 months or more than one year earlier. INA §212(a)(9)(B).

[3] It is not clear whether class members whose R status has already expired will be allowed to file for adjustment of status should the Plaintiffs prevail, or whether the three and ten year bars will apply to them should Plaintiffs lose, and they must leave the U.S. and consular process in order to return in any status. It is hoped that a further order or a final settlement agreement will make these class members eligible to adjust, or at least enable them to escape the three and ten year bars.

[4] However, see "Threats to the Future of Immigration Class Action," Jill E. Family, in Journal of Law & Policy, Vol. 27:71 (2008), a cautionary article on continuing efforts to limit the recourse of immigration lawyers to class action lawsuits such as *Ruiz-Diaz*.