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8 UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION
11

12 CAROLYN ROBB HOOTKINS, et. al.,) Case No. CV07-5696 CAS (MANx)
13)
14 Plaintiffs-petitioners,) Date: January 28, 2008
15) Time: 10:00 a.m.
16 vs.) Courtroom: 5
17) Honorable Christina A. Snyder
18 MICHAEL CHERTOFF, U.S. Department)
19 of Homeland Security, et. al.,) PLAINTIFFS' REPLY IN SUPPORT OF
20) MOTION FOR PRELIMINARY
21) INJUNCTION
22)
23) CLASS ACTION
24)
25)
26)
27)
28)

1 The status quo will be maintained by ordering defendants to renew work and
2 travel authorization that was previously granted, and to allow plaintiffs to remain free
3 from removal while pursuing their challenge to defendants' actions. Plaintiffs in
4 Subgroup I executed and filed, with fee, all the necessary applications for adjustment to
5 lawful permanent resident status. Each applied for and received an Employment
6 Authorization Document (EAD) authorizing work¹ and an Advance Parole (AP)
7 document authorizing travel. Such documents are routinely approved following the
8 proper filing of an application. In fact, these documents are so routine, that as of July 30,
9 2007, defendant USCIS collects a unified fee of \$930 for Form I-485, which includes the
10 EAD and AP application fees. There is no longer even an option to just pay the I-485
11 adjustment of status application fee, a policy that reflects that the EAD and AP
12 applications are an integral part of the adjustment process.

13 Defendants claim that this Court has no jurisdiction to order defendants to
14 grant EADs and APs to plaintiffs because the adjudication of these applications is
15 committed to agency discretion. (Def.'s Opp'n Mot. P.I. 11) While not explicit,
16 defendants' claims appear to be directed at the language found in 8 USC § 1252(a)(2)(B),
17 which states in relevant part,

18 [N]o court shall have jurisdiction to review - ... (ii) any other decision or action of
19 the Attorney General or the Secretary of Homeland Security the authority for
20 which is *specified under this title to be in the discretion* of the Attorney General or
21 the Secretary of Homeland Security, other than the granting of relief under section
22 1158(a).

23 8 USC § 1252(a)(2)(B)(ii) (emphasis supplied). Plaintiffs admit that the issuance of AP
24 documents is specified under "this title" (Title II) at INA 212 (d)(5) (8 USC §

25 _____
26 ¹ Defendants claim that Plaintiff Rose Freeda Fishman-Corman never applied for an
27 EAD. That is incorrect. Plaintiffs submit with this Reply a copy of Mrs. Fishman-
28 Corman's I-765 Application for Employment Authorization (EAD) that she submitted at
the time she applied for adjustment of status, and copy of the EAD issued to her by
USCIS in San Diego, California. (Attachment A)

1 1182(d)(5)) to be discretionary, but plaintiffs counter that the issuance of EAD
2 documents is *not* “specified under this title” to be in the discretion of defendants. Rather,
3 the supposed “discretionary” nature of EAD issuance is found in 8 CFR § 274a.13(a)(1).
4 (Def.’s Opp’n Mot. P.I. 11) Because the alleged discretionary nature of EAD issuance is
5 not specified under Title II, but rather in a regulation, EAD issuance is amenable to
6 judicial review. Further, several additional sources indicate EAD issuance is not
7 discretionary. First, the language of 8 CFR § 274a.12(c)(9) states,

8 (c) *Aliens who must apply for employment authorization.* An alien within a class
9 of aliens described in this section must apply for work authorization. If authorized,
10 such an alien may accept employment subject to any restrictions stated in the
11 regulations or cited on the employment authorization document. BCIS [now
12 USCIS], *in its discretion, may establish a specific validity period for an*
13 *employment authorization document, which may include any period when an*
14 *administrative appeal or judicial review of an application or petition is pending...*
15 (9) An alien who has filed an application for adjustment of status to lawful
16 permanent resident pursuant to part 245 of this chapter. For purposes of section
17 245(c)(8) of the Act, an alien will not be deemed to be an “unauthorized alien” as
18 defined in section 274A(h)(3) of the Act while his or her properly filed Form I-485
19 application is pending final adjudication, if the alien has otherwise obtained
20 permission from the Service pursuant to 8 CFR 274a.12 to engage in employment,
21 or if the alien had been granted employment authorization prior to the filing of the
22 adjustment application and such authorization does not expire during the pendency
23 of the adjustment application. *Upon meeting these conditions, the adjustment*
24 *applicant need not file an application for employment authorization to continue*
25 *employment during the period described in the preceding sentence;”* *Id.* (emphasis
26 supplied)

27 The regulations specific to pending adjustment applicants make clear that any discretion
28 exercised only relates to the period of validity, and not whether to grant the EAD. Also,
the regulation provides for an EAD during “an administrative appeal or judicial review of
an application or petition.” *Id.* Moreover, an application for EAD, once granted, is not
required to be renewed. Plaintiffs were each granted an EAD because they met the

1 conditions of EAD issuance, and plaintiffs are not required to file an application for an
2 EAD to continue employment authorization. The Court may order defendants to vacate
3 the automatic termination of work authorization and renew plaintiffs' and class members'
4 EADs without the latter making application for an EAD. Finally, with respect to EAD
5 issuance, plaintiffs submit a copy of a Memorandum, dated May 12, 2003, from William
6 R. Yates, then Acting Associate Director for Operations of the newly formed Bureau of
7 Citizenship and Immigration Services, updating the Adjudicator's Field Manual on EAD
8 issuance. (Attachment B). On page 4-5 of the Memorandum, it is noted that,
9
10

11
12 “Administration Discretion. In a very limited number of categories (two), the
13 Service has the discretionary authority to deny employment authorization even if
14 the alien passes the other three tests. Administrative discretion is a factor of the
15 case of: An alien who has been released under an order of supervision. Such
16 discretion is specified in 8 CFR § 274a.12(c)(18); and An alien who has been
17 paroled into the U.S. under section 212(d)(5) of the Act, depending on the
18 conditions imposed by the Attorney General. (In other words, one of these
19 conditions may be that the alien not work in the U.S. Such condition need not be
20 specified at the time of the parole, and might not even be taken into consideration
21 until the alien files the Form I-765.)”

22 Attachment B, *Id.* p. 4-5. It is clear from the Memorandum that discretion only applies to
23 EAD applications filed under 8 CFR § 274a.12(c)(18) (order of supervision) and 8 CFR §
24 274a.12(c)(11) (humanitarian parole), and not to EAD applications filed under 8 CFR §
25 274a.12(c)(9), the section under which plaintiffs and class members filed EAD
26 applications.

27 Moreover, plaintiffs note that the issuance of EAD and AP documents to
28 adjustment of status applicants is in practice routine and not discretionary. Indeed, every
plaintiff was routinely issued an EAD and AP following application, prior to the death of
their spouses, and prior to the unlawful denial by defendants of their applications for

1 adjustment of status. Additionally, plaintiffs are not challenging any discretionary action
2 to deny EAD and AP documents, but rather the *automatic* denial of these documents, not
3 based on any discretionary criteria, due to the unlawful denial of plaintiffs' applications
4 for adjustment of status. Defendants' invocation of 8 USC § 1252, if anything, is
5 premature. The Ninth Circuit has held that "determinations that require application of
6 law to factual determinations are non-discretionary." *Hernandez v. Ashcroft*, 345 F.3d
7 824, 833-34 (9th Cir. 2003). Because defendants *automatically* denied plaintiffs EAD
8 and AP documents without legal authority, such determination is not protected from
9 judicial review. *Id.* at 847. The Court continues to have jurisdiction over such claims.

10
11 With respect to AP issuance, defendants' claim that AP issuance has a
12 statutory and regulatory discretionary component has some merit. Yet plaintiffs claim
13 that termination of their AP documents have not been based on discretionary criteria.
14 Plaintiffs submit a copy of a Memorandum, dated June 23, 2003, from William R. Yates,
15 then Acting Associate Director for Operations of the newly formed Bureau of Citizenship
16 and Immigration Services, updating the Adjudicator's Field Manual on Advance Parole.
17 (Attachment C). In the Memorandum, it is stated that,

18 "(g) Judicial Review. As noted, whether to grant advance parole is a matter
19 entrusted to DHS discretion. Under section 242(a)(2)(B)(ii) of the Act, no court
20 has jurisdiction to review a decision that is entrusted to DHS discretion. It is
21 likely, however, that many courts will read section 242(a)(2)(B)(ii) of the Act
22 narrowly, and hold that they still have jurisdiction to ensure that DHS actually did
23 exercise discretion in denying advance parole. See, e.g., *Montero-Martinez v.*
24 *Ashcroft*, 277 F.3d 1137 (9th Cir. 2002) (restriction on review of discretionary
25 decisions limited only to the actual exercise of discretion, and not to the issue of
26 the alien's eligibility for the benefit). An alien may still be able to challenge a
27 denial of advance parole, therefore, on the ground that DHS did not consider the
28 actual facts of the alien's individual case, and exercise discretion on the basis of
those facts. See *Jean v. Nelson*, 472 U.S. 846, 857 (1985)."

Attachment C, *Id.*, p. 14. Plaintiffs allege that defendants did not actually exercise
discretion in denying advance parole. The AP documents were terminated following the

1 unlawful denial of plaintiffs' applications. Plaintiffs also question the authority for
2 defendants to even require an AP document as a prerequisite to avoiding an automatic
3 finding of abandonment of the adjustment of status application upon departure from the
4 United States. (Pl. Mot. P.I. 3, fn. 1) Indeed, plaintiff De Mailly departed the United
5 States following the denial of her application for adjustment of status without advance
6 parole, and it is clear that defendants view her application as abandoned. Nevertheless,
7 plaintiff De Mailly maintains her claim that her application was wrongfully denied, and
8 that the lack of an advance parole document should not operate to deprive her of her
9 claim to lawful permanent resident status. Lastly, the automatic and unlawful denial of
10 interim EAD and AP documents is not a decision or action authorized under any statute,
11 and therefore not within the ambit of 8 USC § 1252.

12 Further, 8 USC § 1252(g) is no help to defendants because perfunctory
13 issuance of an interim EAD is not a "decision or action by the Attorney General to
14 commence proceedings, adjudicate cases, or execute removal orders against any alien
15 under this Act." *Id.* The issuance of an EAD during the pendency of adjustment of status
16 processing is not the "decision or action" to adjudicate a case, but rather the issuance of
17 an incidental interim benefit. The Supreme Court has held that the language of 8 USC §
18 1252 should be interpreted narrowly. *Reno v. American-Arab Anti-Discrimination*
19 *Committee*, 525 U.S. 484 (1999); see also *Barahona-Gomez v. Reno*, 236 F.3d 1115 (9th
20 Cir. 2001).

21 Defendants further complain that no evidence was submitted that plaintiffs
22 were working or had a need for travel. (Def.'s Opp'n Mot. P.I. 2, 5.) This argument
23 ignores the fact that the status quo was that plaintiffs were authorized to work, authorized
24 to seek employment, and authorized to travel without having their applications deemed
25 automatically abandoned. Whether plaintiffs were able to secure work, or had an
26 unexpected event requiring travel is not relevant. Indeed the status quo, as described by
27 defendants is "the last uncontested status which preceded the parties' controversy."
28

1 *Dep't of Parks and Recreation for State of Calif. V. Bazaar Del Mundo Inc.*, 448 F.3d
2 1118, 1124 (9th Cir. 2006). (Def.'s Opp'n Mot. P.I. 5.) The controversy at issue is the
3 denial of plaintiffs' properly filed I-130 and I-485 applications, and it is undisputed that
4 prior to the denial of those applications plaintiffs enjoyed EAD and AP documents.
5 Therefore, the last "uncontested status" of plaintiffs was the status of a pending
6 adjustment of status applicant with the right to work and travel pursuant to EAD and AP
7 documents. Defendants distorted the status quo by terminating plaintiffs' applications,
8 and by automatically terminating interim EAD and AP documents. In order for the status
9 quo to be preserved, defendants must be instructed to renew plaintiffs' and class
10 members' work and travel documents.

11
12 With regard to the request to enjoin defendants from removing plaintiffs
13 from the United States before their claims of unlawful denial have been heard,
14 defendants' arguments against an injunction miss the mark. Defendants urge the Court to
15 find that 8 USC § 1252(g) and 8 USC § 1252(f) insulate defendants' actions from judicial
16 review. Yet § 1252(g) must be narrowly read, as it is an exceedingly specific limitation
17 on the Court's power to review discretionary action. *Barahona-Gomez v. Reno*, 236 F.3d
18 1115 (9th Cir. 2001). While it is true that the discretionary decision to commence
19 proceedings is not reviewable under § 1252(g), the Court can nevertheless review due
20 process challenges and challenges to regulations. *Catholic Social Services, Inc. v. INS*,
21 232 F.3d 1139, 1150 (9th Cir. 2000). Plaintiffs here challenge the denial of immigrant
22 petitions in violation of the Due Process Clause of the Fifth Amendment to the United
23 States Constitution. Defendants do not have the discretion to violate the Constitution.
24 Further, plaintiffs challenge the authority of the regulations, an entirely non-discretionary
25 dispute. Finally, 8 USC § 1252(f) only limits lower federal courts' jurisdiction over
26 orders to enjoin operation of part IV of the subchapter, which includes 8 USC §§ 1221-
27 1231. Because plaintiffs claims arise from the defendants' erroneous and
28 unconstitutional interpretation of 8 USC §§ 1151, 1154 and 1255, injunctive relief would

1 be appropriate if issued under part I (Selection System, 8 USC §§ 1151-1160) and part V
2 (Adjustment and Change of Status, 8 USC §§ 1255-1260) of the subchapter. See
3 *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (finding that 8
4 USC § 1252(f) does not apply to a preliminary injunction issued under 8 USC § 1255a,
5 located in part V). This Court may therefore issue injunctive relief to restrain removal of
6 plaintiffs and class members who are threatened by defendants' misinterpretation of the
7 law, so that they are able to meaningfully pursue their claims.

8 Public policy is not served by forcing plaintiffs and class members into the
9 shadows, compelling them to rely on friends and relatives for support, tempting them to
10 work illegally, and failing to provide them with important identification and status
11 documents so necessary to our orderly system. This Court has authority to enjoin
12 defendants from distorting the status quo, and in so doing order defendants to issue
13 renewed EADs to plaintiffs and class members, to order defendants to properly exercise
14 discretion in an individualized fashion to renew or deny renewal of AP documents, and to
15 order defendants to refrain from removing plaintiffs and class members from the United
16 States before their claims of unlawful denial have been heard. Plaintiffs respectfully
17 request such an order.
18

19 DATED this 18th day of January, 2008.

20
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1 PROOF OF SERVICE

2 I, the undersigned, say: my business address is 5285 SW Meadows Rd., Ste 175,
3 Lake Oswego, Oregon 97035. I am over the age of eighteen years and not a party to the
4 above-entitled action.

5 On January 18, 2008, true and correct copies of the plaintiffs': PLAINTIFFS'
6 REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION, were served
7 pursuant to the district court's ECF system as to ECF filers, to the following ECF filers:

8 Elizabeth Stevens
9 Office of Immigration Litigation
10 USDOJ Civil Division
11 P.O. Box 878
12 Ben Franklin Station
13 Washington, DC 20044

14 Sheri R. Glaser
15 Office of Immigration Litigation
16 USDOJ Civil Division
17 P.O. Box 878
18 Ben Franklin Station
19 Washington, DC 20044

20 I declare under penalty of perjury under the laws of the United States of America
21 that the foregoing is true and correct.

22 EXECUTED on January 18, 2008, at Portland, Oregon.

23 S/ Brent W. Renison
24 Brent W. Renison, Declarant