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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PROYECTO SAN PABLO, et al.,
Plaintiff,
vs.
DEPARTMENT OF HOMELAND
SECURITY, et al.,
Defendant.

No. CV 89-456-TUC-RCC
AMENDED ORDER

Pending before the Court is Plaintiff's Motion to Compel (Docket No. 461). On February 26, 2007, a hearing on this motion was held before the Court. The motion was taken under advisement. The Court has considered all motions and responses in this matter. Based on the foregoing reasoning the Court will grant Plaintiffs Motion to Compel (Docket No. 461).

I. Introduction.

This class action lawsuit covers the following individuals who filed applications for legalization under the Immigration Reform and Control Act of 1986:

Individuals who (1) filed an application for legalization under section 245A during the application period that began on May 5, 1987, and ended on May 4, 1988; (2) filed the application with a legalization office or "qualified designated entity" (QDE) in the INS Northern or Western region of the country (that is, in Alaska, Arizona, California, Colorado, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington State, Wisconsin, or Wyoming); and (3) whose application for legalization was denied or whose temporary residence was terminated under section 245A(g)(2)(B) of the Act on the basis of an alleged deportation or exclusion after January 1, 1982.

Trial in this case was held in January 2001. On February 2, 2001, the Court entered a post-trial Order finding that the Immigration and Naturalization Service (INS) had violated

1 Due Process in the adjudication of legalization applications filed by the class members of this
2 lawsuit. On March 27, 2001, the Court issued a final Judgment and Order requiring the
3 Department of Homeland Security (DHS) and Citizenship and Immigration Services (CIS)
4 (the successor to INS) to reopen legalization applications filed by class members and (1)
5 accept waiver applications submitted by class members and adjudicate such waiver
6 applications in the same manner that waiver applications filed by other legalization applicants
7 were adjudicated; and (2) prior to making a decision on the reopened legalization application,
8 provide to legalization applicants complete copies of prior deportation files, including copies
9 of the tapes and/or transcripts of the prior deportation hearings held before the Immigration
10 Court, to enable them to bring a collateral challenge to the deportation order if appropriate.

11 On January 17, 2007, the Ninth Circuit Court of Appeals in *Rodolfo Pedroza-Padilla*
12 *v. Alberto R. Gonzales*, No. 03-74640, 2007 WL 295496 (C.A.9)(C.A.9, 2007) denied
13 petitioners motion for stay of removal. The issues in *Roldolfo Pedroza-Padilla* case are the
14 same as the issues in the instant case.

15 A legalization applicant must establish that he: (1) applied for legalization during a
16 twelve month period beginning May 5, 1987; (2) resided unlawfully in the United States
17 continuously since at least January 1, 1982; (3) has been physically present in the United
18 States continuously since November 6, 1986; and (4) is otherwise admissible as an
19 immigrant. *Pedroza-Padilla v. Alberto R. Gonzales*, No. 03-74640, 2007 WL 295496, *1
20 (C.A.9)(C.A.9, 2007); *See also Proyecto San Pablo v. INS*, 189 F.3d 1130, 1134 (9th Cir.
21 1999) (*citing* 8 U.S.C. §§ 1255a((a)(1)-(4)).

22 In *Pedroza-Padilla*, the Administrative Appeals Office ("AAO") denied his
23 application for waiver of inadmissibility on the ground that the waiver would serve no
24 purpose because petitioner was ineligible for legalization. *Pedroza-Padilla v. Alberto R.*
25 *Gonzales*, 2007 WL 295496 at 1. The AAO determined that even if petitioner received such
26 a waiver, he would continue to be ineligible for legalization because he had not resided
27 continuously in the United States since at least January 1, 1982. *Id.* The Ninth Circuit held
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1 that since petitioner could not prove continuous residence to qualify for legalization, the
2 Administrative Appeals Office ("AAO") did not abuse its discretion in its determination. *Id.*

3 The DHS and CIS considers it "futile" to accept waiver applications in this matter
4 because the class members are ineligible for legalization. The Court disagrees. Although
5 the class members at this stage are ineligible for legalization, that in and of itself does not
6 summarily close the door to the adjudication of their waiver applications. Justice requires
7 the DHS and CIS to adjudicate waiver applications according to the proper statutory standard
8 and in the same manner as those who are similarly situated. The class members deserve a
9 chance to challenge the deportation order pursuant to INA § 245A(f)(4). Without the
10 complete copies of their files, including copies of the tapes and/or transcripts of the
11 deportation hearings including the prior deportation file, class members cannot properly
12 argue their issue before the Ninth Circuit Court of Appeals.

13 Plaintiffs argue that the Court of Appeals should be able to review a record that is
14 complete and adequate for a final decision on the merits. This Court Agrees. Specifically,
15 class members and their counsel cannot challenge the validity of the prior deportation order
16 and establish that they left the United States under "voluntary departure" in lieu of
17 deportation. The Court does not find persuasive the Government's argument that the tapes
18 and/or transcripts cannot be located. The law required that these hearings be recorded. The
19 Government has submitted nothing to indicate that the hearings were not recorded. The
20 Plaintiffs have submitted exhibits that show on the same day a request was received, the
21 department sent out a letter that day indicating the files cannot be located. This fact gives
22 the Court serious pause as it pertains to the alleged effort that was expended to locate the
23 records. The Court finds it difficult to believe that the Government Defendants spent any
24 considerable amount of time in its attempt to locate the files, transcripts and/or tapes in these
25 matters.

26 In this case, all class members were denied legalization privileges because they were
27 deported on or after January 1, 1982, on the basis of Section 245A (g)(2)(B)(i) of the
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1 Immigration Reform And Control Act of 1986 ("IRCA"). Here, class members (1) were not
2 provided complete copies of prior deportation files, including copies of the tapes and/or
3 transcripts of the prior deportation hearings held before the Immigration Court and (2) class
4 member applications were not adjudicated in the same manner as those who were similarly
5 situated. The 9th Circuit decision in *Pedroza-Padilla*, did not disallow the adjudication of
6 application waivers, it was only instructive on why an immigrant would not qualify for
7 legalization.

8 The Court finds that DHS has failed to comply with the March 27, 2001, Judgment
9 and Order. In particular, (1) DHS has failed to adjudicate waiver applications in the manner
10 required by the March 27, 2001, Judgment and Order; and (2) DHS has failed to provide to
11 legalization applicants, prior to making a decision on their application, complete copies of
12 their prior deportation files, including copies of the tape and/or transcript of the prior
13 deportation proceedings, thus effectively preventing collateral challenges to the underlying
14 deportation order. As such, the Government Defendants are to comply with the original
15 March 27, 2001, Judgment and Order as discussed below. Accordingly,

16 **IT IS HEREBY ORDERED** that Defendants shall adhere to the following instructions for
17 this matter:

18 **I. Notice to Class Members**

19 DHS shall, within sixty (60) days of the date of this Order, provide Notice to all class
20 members who have filed motions to reopen pursuant to the March 27, 2001 Judgment and
21 Order. The Notice shall be mailed to the last known address, certified mail, return receipt
22 requested, with a copy to class counsel. In the event that service of the notice is not effected
23 as to any class member, DHS shall promptly notify class counsel of the name, A number,
24 date of birth, social security number, and last known address of the class member.

25 This Order and accompanying Notice to Class Members shall be posted on the USCIS
26 webpage with other legal matters, so that it is readily accessible to any interested person. It
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1 shall remain posted there until the final adjudication of a class member legalization
2 application, as required by this Order.

3 **II. Reopening of Legalization Applications**

4 Effective immediately, DHS shall, upon request of the applicant, reopen the
5 applicant's legalization application and treat such application as pending. The applicant shall
6 be entitled to the same benefits and protections to which other legalization applicant with
7 pending applications are entitled. In adjudicating the application, DHS must comply with
8 the procedures specified below, and no final decision can be issued unless such procedures
9 are followed.

10 **III. Adjudication of Waiver Applications**

11 Any class member who files an application for a waiver (Form I-690) is entitled to
12 adjudication on the merits in the same manner that waiver applications filed by other
13 legalization applicants are adjudicated. CIS does not comply with this order by denying the
14 waiver application on the grounds such as, e.g., "no purpose would be served" by approving
15 the waiver. In adjudicating waiver applications filed by class members, CIS must take into
16 account humanitarian purposes, assuring family unity, and the public interest, as required by
17 the statute. INA §245a(d)(2)(B)(i), 8 U.S.C. §1255a(d)(2)(B)(i). As this Court has
18 previously ordered, the waiver applications filed by class members must be adjudicated in
19 accordance with the standards established in Matter of P-, 19 I&N Dec. 823, 828 (Comm'r
20 1988) (waivers should be "granted liberally"), and Matter of N-, 19 I&N Dec. 760, 762
21 (Comm'r 1988) ("Congress intended the legalization program to be administered in a liberal
22 and generous fashion"). Defendants shall provide to counsel for plaintiffs a copy of all
23 denials of waiver applications filed by class members, at the same time as such denial is
24 issued to the class member.

25 **IV. Attorney's Fees and Costs**

26 This Court finds that plaintiffs' counsel are entitled to an award of attorneys fees and
27 costs pursuant to the Equal Access to Justice Act. Plaintiffs are the prevailing party and
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1 Defendants' position was not substantially justified. This Court's Judgment and Order
2 specifically directed that Defendants must provide a copy of the tape and/or transcript of the
3 prior deportation or exclusion hearing to class members prior to issuing a decision on the
4 legalization application to facilitate potential collateral challenges; and this Court specifically
5 directed that Defendants must adjudicate waiver applications filed by class members on the
6 same basis as that for other legalization applicants. This Court previously awarded EAJA
7 fees to class counsel at market rates for their work on his case, and the Court will again apply
8 the most recent relevant market rates for purposes of this award. Plaintiffs shall submit to
9 this Court within thirty days of the date of this Order their time and cost records and evidence
10 of the most recent market rates for determination of the amount of the award.

11 **FURTHER, IT IS HEREBY ORDERED** that Plaintiff's Motion to Compel (Docket No.
12 461) is **GRANTED**.

13 **FURTHER, IT IS ORDERED** that Defendants are to comply with the original order in this
14 matter as it pertains to the adjudication of the class members prior deportations files and
15 waiver applications.

16 **FURTHER, IT IS ORDERED** that Defendants are to accept waiver applications (Form I-
17 690) submitted by class members and adjudicate such waiver applications in the same
18 manner that waiver applications filed by other legalization applicants were adjudicated; and
19 (2) prior to making a decision on the reopened legalization application, provide to
20 legalization applicants complete copies of prior deportation files, including copies of the
21 tapes and/or transcripts of the prior deportation hearings held before the Immigration Court,
22 to enable them to bring a collateral challenge to the deportation order if appropriate.

23 **FURTHER, IT IS ORDERED** that in cases where the entire record cannot be located by the
24 Defendants, the following burden of proof will be applied for both the class members and
25 the Defendants:

26 A legalization applicant who may be denied on the basis of 8 U.S.C.
27 §1225a(g)(2)(B)(i), or because of a prior deportation or exclusion order, must
28 make a prima facie showing that the prior deportation or exclusion order was
not in compliance with the governing statute or regulations, or occurred in

1 violation of due process, or was otherwise unlawful or involved a gross
2 miscarriage of justice. If the applicant makes such a showing, then CIS has the
3 burden of coming forward with a copy of the tape and/or transcript of the prior
4 deportation or exclusion hearing, showing that the prior deportation or
5 exclusion did not violate the governing statute or regulations, due process, or
6 other provision of law, or was not a gross miscarriage of justice. If CIS
7 produces such evidence, then the applicant must show by a preponderance of
8 the evidence that the prior deportation or exclusion violated the governing
9 statute, regulations, due process, or was otherwise unlawful or a gross
10 miscarriage of justice. If CIS does not produce such evidence from the prior
11 deportation or exclusion file, then the prior deportation or exclusion cannot be
12 used as evidence to support a denial of legalization benefits.

13 **FURTHER, IT IS ORDERED** that upon the chance that Defendants are unable to locate
14 any portion of the class members complete file, they are to provide this Court with an
15 affidavit from the Head of the DHS and/or CIS that delineates what steps they took to find
16 the files and explain why the files were not located.

17 **FURTHER, IT IS ORDERED** that all other Motions in this matter are denied as moot.

18 **FURTHER, IT IS ORDERED** that because the administration portion of this matter was
19 completed after the March 2001 Judgment, the issue of employment authorizations for class
20 members is moot.

21 **FURTHER, IT IS ORDERED** that all other pending Motions are denied as MOOT.

22 DATED this 4th day of June, 2007.

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Raner C. Collins
United States District Judge