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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CATHOLIC SOCIAL SERVICES,
INC., - IMMIGRATION PROGRAM,
et al.,

NO. CIV.S-86-1343 LKK/JFM

Plaintiffs,

v.

O R D E R

JANET NAPOLITANO, SECRETARY
U.S. DEPARTMENT OF HOMELAND
SECURITY, et al.,

Defendants.

_____/

Pending before the court are the defendants' and plaintiffs' conflicting proposals concerning "abandonment" and "foreign filers." Two conflicting values are at stake. On the one hand, is the imperative of due process which strongly suggests that applicants not be deprived of the opportunity to apply for the benefits acquired in the settlement agreement in the instant case by virtue of the government's conduct, which the court previously determined was inconsistent with the decree. On the other hand, in the real world in which cases

1 must, at some point, end and allow the government and the people
2 to get on to other matters. The court must be frank, in some
3 ways there simply is no "right" answer. Nonetheless, some order
4 must be issued.

5 Accordingly, the court ORDERS that the government's
6 proposal, Dkt. No. 693, shall be adopted, save and except as
7 follows:

- 8 (1) Class members will have ninety (90) days from the date
9 notice is mailed of the amended notice of denial to
10 appeal to the AAO;
- 11 (2) The agency, where possible, shall refund the required
12 \$585.00 for unnecessary motions to reopen by virtue of
13 declared abandonment, or credit such fees towards the
14 fee for filing an administrative appeal at the class
15 members' option;
- 16 (3) Review of appeals shall be on the merits; and
- 17 (4) The CIS shall accept a filing fee as it existed in
18 2004-2005 (i.e. \$240.00).

19 IT IS SO ORDERED.

20 DATED: May 18, 2010.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

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14 IN THE UNITED STATES DISTRICT COURT
15 FOR THE EASTERN DISTRICT OF CALIFORNIA
16 WESTERN DIVISION

17	CATHOLIC SOCIAL SERVICES,)	Case No. Civ S 86-1343 LKK
18	(CENTRO DE GUADALUPE)	
19	IMMIGRATION CENTER), et al.,)	
20	Plaintiffs)	DEFENDANTS' REPORT
21)	TO THE COURT RE:
22)	ABANDONED APPLICATIONS
23	JANET NAPOLITANO, Secretary)	AND FOREIGN FILERS
24	of Department of Homeland)	
25	Security, et al.,)	DATE: N/A
26	Defendants)	
27	_____)	
28)	

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1 **A. INTRODUCTION**

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3 In the Order of December 14, 2009, the Court held that Defendants, United
4 States Citizenship and Immigration Services (“USCIS”), may not apply the
5 “abandonment” regulation, 8 C.F.R. § 103.2(b)(13), to applications filed under the
6 Settlement Agreement(s) in this and a related case. The Court also directed USCIS
7 to report to the Court its efforts to identify and reopen applications filed from abroad
8 and denied or rejected. USCIS reported to the Court on January 8, 2010, about its
9 efforts to identify foreign filers and to reopen their applications, or accept new
10 applications from overseas if the application was rejected. The parties subsequently
11 engaged in discussions to address Defendants’ plan to reopen and readjudicate all
12 abandoned applications, without applying 8 C.F.R. § 103.2(b)(13), and to reopen and
13 accept applications from overseas. Plaintiffs are unwilling to agree to Defendants’
14 proposed stipulation, and therefore this report to the Court is necessary. Defendants’
15 proposal to comply with the Court’s Order of December 14, 2009, is set out below.
16 Defendants’ understanding of Plaintiffs’ objections to the proposal are then set forth,
17 and discussed.

18
19 **B. DEFENDANTS’ PROPOSED STIPULATION IN**
20 **COMPLIANCE WITH THE COURT’S ORDER**

21
22 What follows is Defendants’ proposed stipulation of the steps to be taken to
23 comply with the Court’s Order of December 14, 2009.
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1 In order to fully comply with the Court's December 14, 2009 Order, USCIS
2 will reopen all applications filed under the settlement agreements and terminated or
3 denied as abandoned pursuant to 8 C.F.R. § 103.2(b)(13), and issue those applicants
4 new decisions advising of their right of appeal to the Administrative Appeals Office
5 ("AAO"). USCIS will also receive class membership worksheets and legalization
6 applications it rejected or denied because the applicant was not physically present in
7 the United States, adjudicate those worksheets and applications pursuant to the
8 settlements, and advise unsuccessful applicants of their rights of appeal to the special
9 masters or AAO, as appropriate. The following steps will be taken to comply with
10 the Court's Order.

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15 **I. Applications Terminated For Failure to Appear for**
16 **Fingerprints/Biometrics, A Scheduled Interview, or Failure to Respond to a Pre-**
17 **Interview Request for Evidence or Notice of Intent to Deny.**

18 A. These applicants will receive an Amended Notice of Decision, indicating
19 that USCIS records show that the legalization application was denied for
20 abandonment or lack of prosecution. The Amended Notice of Decision will inform
21 the applicant that because his or her original Notice of Decision did not explain his
22 or her appellate rights, he or she shall have 30 days from the date on the Amended
23 Notice to file an appeal with the AAO. A copy of Form I-694, *Notice of Appeal of*
24 *Decision Under Sections 245A or 210 of the Immigration and Nationality Act*, will
25 be enclosed with the Amended Notice of Decision. The AAO will not issue a
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1 decision on the appeal relying on 8 CFR 103.2(b)(13). All reasonable efforts will be
2 made to ensure that USCIS will identify these applicants within 180 days.
3

4 B. A copy of each notice sent pursuant to these procedures will be copied to
5 Plaintiffs' counsel. A copy of all notices returned as undeliverable will be provided
6 to Plaintiffs' counsel.
7

8 **II. Applications Terminated For Failure to Respond to a Post-Interview**
9 **Request for Evidence.**

10 A. Applications which were denied for abandonment or lack of prosecution
11 for failure to respond to a request for additional evidence or a Notice of Intent To
12 Deny after an interview, who were not advised of their right of appeal to the AAO,
13 will be afforded notice of their appeal rights and 30 days within which to file an
14 administrative appeal. All reasonable efforts will be made to ensure that USCIS will
15 identify these applicants within 180 days.
16

17 B. These applicants will receive an Amended Notice of Decision explaining
18 the reason for the denial of their application on the merits. A copy of Form I-694,
19 *Notice of Appeal of Decision Under Sections 245A or 210 of the Immigration and*
20 *Nationality Act*, will be enclosed with the Amended Notice of Decision. The AAO
21 will not issue a decision on the appeal relying on 8 CFR § 103.2(b)(13).
22
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24 C. A copy of each notice sent pursuant to these procedures will be copied to
25 Plaintiffs' counsel. A copy of all notices returned as undeliverable will be provided
26 to Plaintiffs' counsel upon receipt by USCIS. For all such returned notices, USCIS
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1 will also at the same time inform class counsel of the date of birth and SSN (if any)
2
3 for the applicant to enable class counsel to attempt to notify the applicant.

4 **III. Foreign Filers**

5 A. USCIS will follow the procedures spelled out in the declaration of Wade
6
7 Pryor dated January 8, 2010, as modified herein. As described in that Declaration,
8 there are two groups of foreign filers. One group filed their applications from abroad,
9 with foreign addresses. These applications were rejected by the Chicago Lock Box
10 and their applications and fees were returned. The second group had their applications
11 accepted, but USCIS later learned that they were outside the country, or had left the
12 United States after they applied. These applications were terminated. USCIS will
13
14 treat foreign filers differently, depending upon whether the agency has the application
15 and fee.
16

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18 B. Within 90 days of approval of these procedures, USCIS will provide class
19 counsel with a list of aliens in the "Rejected" and "Accepted" categories.

20 C. Within 90 days of approval of these procedures, USCIS will send persons
21 in the "Rejected" category a notice and invitation to re-submit a Form I-687
22 Application For Temporary Resident Status and Class Membership Worksheet, with
23 supporting documentation and fees (the applicant with the incomplete address and the
24 applicant who was also rejected for a birth date after January 1, 1982, will not receive
25 invitations). This notice will be mailed to the applicant's last known address as it
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1 appears in USCIS records. If the submission indicated an attorney or authorized
2 representative, a duplicate copy of the notice will also be sent to the attorney or
3 authorized representative. Each such applicant will be afforded six months from the
4 date his or her invitation was mailed to re-submit an application package to USCIS.
5 The postmark date on the application package will be used to determine whether the
6 submission is timely re-filed.
7
8

9 D. When the re-filed applications are receipted in, USCIS will proceed with
10 processing. If USCIS issues an adverse decision as to Class Membership for any of
11 the rejected applicants, the Notice of Decision will describe his or her Special Master
12 appeal rights and provide instructions for filing an appeal. Should USCIS issue an
13 adverse decision as to the Form I-687 in any of these cases, the Notice of Decision
14 will describe, and the applicant shall be afforded, the right to appeal to the AAO.
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17 E. Within one hundred and eighty days (180) days, USCIS will *sua sponte* and
18 without fee reopen and adjudicate the "Accepted" foreign filers applications. A Form
19 I-797 Reopening Notice will be sent to each of these applicants' last known address
20 as it appears in USCIS records. Should USCIS issue an adverse decision as to Class
21 Membership in any of these cases, the Notice of Decision will describe the
22 applicant's Special Master appeal rights and provide instructions for filing an appeal.
23 Should USCIS issue an adverse decision as to the Form I-687 in any of these cases,
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1 the Notice of Decision will describe, and the applicant afforded, the right to appeal
2 to the AAO.
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4 F. USCIS International Operations will coordinate biometrics and interviews
5 for foreign filers, if necessary. Applicants will be advised of standard procedures for
6 biometrics and interviews at consulates.
7

8 G. A copy of each notice sent pursuant to these procedures will be copied to
9 plaintiffs' counsel. A copy of all notices returned as undeliverable will be provided
10 to plaintiffs' counsel.
11

12 H. All adjudications will take place in accordance with the terms of the
13 settlement agreements, the regulations, and the Immigration and Nationality Act.
14

15 **IV General**

16 A. A copy of this stipulation shall be posted on USCIS's web site for a
17 period of nine months.
18

19 B. This stipulation is without prejudice to Plaintiffs' right to seek attorney's
20 fees and costs.
21

22 **C. PLAINTIFFS' OBJECTIONS TO THE PROPOSED** 23 **STIPULATION AND DEFENDANTS' RESPONSE**

24 Defendants do not presume to fully represent Plaintiffs' position on the
25 proposed stipulation. However, it appears that Plaintiffs have two primary objections
26 to Defendants' proposal. First, Plaintiffs argue that language must be included
27 directing how the AAO will decide the appeals of the legalization applications
28

1 originally denied under the abandonment regulation. Second, plaintiffs argue that
2 foreign filers who file new applications should not have to pay the current application
3 fee, despite the clear language of the Settlement Agreement which provides that all
4 applications must be accompanied by the current fee.
5

6
7 First, Plaintiffs propose language to direct the standard of adjudication to be
8 used by the AAO on the substantive legalization application, after the application is
9 reopened because the abandonment regulation was applied. The remedy for
10 Plaintiff's motion should be that Defendants may not apply the abandonment
11 regulation. Instead, Plaintiffs proposed that the stipulation contain the following
12 language: "The AAO shall exercise jurisdiction over appeals filed in conformance
13 with the Amended Notice of Decision and issue a decision determining the
14 applicant's substantive eligibility for legalization on the basis of the available
15 evidence." Defendants cannot agree to that language because it goes beyond the
16 motion arguing that the abandonment regulation should not be applied, adds new
17 terms, and assumes jurisdiction over every appeal before the appeal is even filed.
18 Also, it directs how the AAO will decide an applicant's substantive eligibility for
19 legalization, when that is not the subject of these lawsuits and is outside the Court's
20 jurisdiction.
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26 It is not proper to direct that every appeal to the AAO which was previously
27 denied as abandoned, will be properly within the jurisdiction of the AAO. The appeal
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1 could be untimely, or the appeal could be frivolous, and the AAO might dismiss the
2 appeal on that or some other basis. Defendants have previously shown the Court that
3 many applications are frivolous, and that some applicants seek review of a
4 deportation order or other irrelevant claim, or they present no evidence or any
5 argument. It is easy to recognize that the AAO might dismiss such an appeal without
6 addressing “the applicant’s substantive eligibility for legalization on the basis of the
7 available evidence,” to the satisfaction of Plaintiffs. Defendants do agree, and the
8 Stipulation provides, that the applications will be decided without reference to the
9 abandonment regulation, 8 C.F.R. § 103.2(b)(13). That is the regulation which was
10 addressed by the Court in the December 14, 2009 Order. There is no basis to assume
11 that every application denied as abandoned under that regulation will subsequently
12 present a claim within the jurisdiction of AAO, “but for” that regulation. Defendants
13 cannot stipulate in advance that every appeal will properly be within the AAO’s
14 jurisdiction.

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These lawsuits do not involve the applicants’ substantive eligibility for
legalization, and the Court has no jurisdiction to review whether an AAO decision
addresses the “the applicant’s substantive eligibility for legalization on the basis of
the available evidence.” See Reno v. CSS, 509 U.S. 43 (1993). The settlement
agreements provide an avenue for those persons who were “front-desked” in 1987 or
1988, to present a legalization application to the agency. After an applicant’s class

1 membership application is accepted, the Court does not have jurisdiction to review
2 whether the agency properly decides the applicant's "substantive eligibility for
3 legalization." Whether the agency properly decides the applicants' substantive
4 eligibility for legalization on the basis of the available evidence may only be reviewed
5 upon review of a subsequent order of removal. 8 U.S.C. § 1255a(f)(4)(A); Reno v.
6 CSS, 509 U.S. at 55 ("1255a(f)(4)(A) allows judicial review of an adjustment of
7 status only on appeal 'of an order of deportation.'"). The parties cannot stipulate to
8 create jurisdiction where none exists, and therefore we cannot stipulate how the AAO
9 will decide an applicant's substantive eligibility for legalization.
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13 Second, the Settlement Agreement(s) specifically provide, "The fee for filing
14 a Form I-687 shall be the fees applicable by regulation or Federal Register notice at
15 the time of filing the application(s)." Par. 5. That provision clearly contemplates
16 that the fees collected under the Settlement Agreement will be the current fee, and
17 mentions that filing fees may be changed "to reflect the current cost of adjudications."
18 Plaintiffs argue that the Form I-687 applications which were rejected from abroad
19 were rejected in 2004 and 2005, and therefore the agency must now accept the fee
20 applicable in those years. That is exactly the same position of the 1987 and 1988
21 applicants in 2003, when the settlements were entered. The settlement clearly
22 provides that the agency may collect the current fee, and it was clearly contemplated
23 and understood by the parties that the fees would change in the future. "Where 'the
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1 language [of a contract] is clear and unambiguous, the court will enforce the contract
2 as written and may not create ambiguity where none exists.” Order, at 9 (Dec. 14,
3 2009) (citation omitted). There is no ambiguity here. The Settlement Agreement
4 clearly provides that the applicant must pay the current fee with a Form I-687
5 application, it is not limited to the first I-687 the applicant files or when the
6 application is filed.^{1/}
7

8
9 Defendants have proposed to review approximately 65,000 applications to
10 determine whether the abandonment regulation was applied, and to reopen and
11 reconsider those applications where the regulation was applied. Defendants have also
12 proposed to reopen and readjudicate, or accept new applications, from all applicants
13 overseas. Defendants respectfully request that the Court approve this remedial plan.
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25 ¹ As a practical matter, USCIS is a fee-based organization that contracts with
26 non-federal entities, lockboxes, to accept petitions and applications. These federal
27 contracts provide for acceptance of current fees. USCIS does not control the
28 operations of the Chicago Lockbox where these applications will be filed. A
requirement to use old fees would hamper and substantially delay the filing process,
and many submissions may be rejected.

1 Dated: April 21, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this April 21, 2010, two copies of the foregoing document were served by U.S. Mail, addressed to:

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