UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Venantius Nkafor Ngwanyia, et al.,

Plaintiffs,

v.

Civil No. 02-502 (RHK/AJB)
MEMORANDUM OPINION AND ORDER

John Ashcroft, Attorney General, et al.,

Defendants.

James K. Langdon II, Dorsey & Whitney, Minneapolis, Minnesota; Nadine Wettstein, J. Traci Hong, and Mary Kenney, American Immigration Law Foundation, Washington D.C.; and Iris Gomez, Massachusetts Law Reform Institute, Boston, Massachusetts, for Plaintiffs.

Thomas B. Heffelfinger, United States Attorney, and Fred Siekert, Assistant United States Attorney, Minneapolis, Minnesota; Robert D. McCallum, Jr., Assistant Attorney General, United States Department of Justice, Margaret J. Perry, Senior Litigation Counsel, United States Department of Justice, and Greg Mack, Trial Attorney, United States Department of Justice, Washington D.C., for Defendants.

Introduction

This matter comes before the Court on a motion for class certification. Forty-six asylees[1] (collectively, "Plaintiffs") with applications for lawful permanent resident status pending before the Immigration and Naturalization Service ("INS") have sued the INS, the Commissioner of the INS, and the United States Attorney General (collectively,

[1] "Asylees" refers to individuals granted asylum in the United States.

"Defendants"), alleging the Defendants have improperly administered the system by which asylees become lawful, permanent residents of the United States. Plaintiffs have moved under Federal Rule of Civil Procedure 23 for the Court to certify a class and several sub-classes consisting of all asylees who have applied for lawful permanent resident status and whose applications remain pending. (Compl. ¶ 277.) Defendants assert that class certification is inappropriate because of the individualized, fact-specific nature of Plaintiffs' claims. For the reasons set down below, the Court will grant Plaintiffs' motion.

Background

I. Statutory and Regulatory Framework

Under 8 U.S.C. § 1158(b), the INS may grant asylum to non-citizens in the United States who qualify as refugees and meet certain other requirements. After a year of physical presence in the United States, these asylees are permitted to apply for adjustment to lawful permanent resident status. 8 U.S.C. § 1559(b)(2). While asylee status does not expire at any particular time, 8 C.F.R. § 208.14(d), lawful permanent resident status confers advantages over asylee status. For instance, lawful permanent residents may apply for citizenship after five years, 8 U.S.C. § 1427(a), petition to immigrate close family members, id. §§ 1151, 1153, and travel abroad freely, id. § 1101(a)(13)(C). Because lawful permanent resident status is a prerequisite for naturalization, a delay in

adjusting to lawful permanent resident status also delays an asylee's opportunity to apply for citizenship. (Am. Compl. ¶ 17.)

Over the course of each fiscal year, the Attorney General may confer lawful permanent resident status on up to 10,000 asylees. 8 U.S.C. § 1159(b). If applications from asylees who wish to adjust their status exceed the number of permanent resident spots available, the INS establishes a waiting list based on the date the applicant files an application. 8 C.F.R. § 209.2(a) (2001). Plaintiffs assert that, despite a backlog of more than 96,000 asylees awaiting adjustment, Defendants have failed to adjust the status of approximately 21,281 asylees who "could have and should have been adjusted." (Am. Compl. ¶ 19.) Plaintiffs also assert that Defendants have administered the asylee waiting list in a manner that violates the INS's statutory and regulatory framework and the asylees' due process and equal protection rights. (Am. Compl. ¶¶ 329-46.)

II. Plaintiffs' Proposed Classes

Plaintiffs have moved the Court to certify a class consisting of all asylees in the United States who have applied for lawful permanent resident status and whose applications remain pending. They have also moved to certify the following subclasses:

Subclass I: All asylees who filed their adjustment of status applications with the INS on or before January 16, 1998;[2]

[2] January 16, 1998, was the last day asylees could apply for one of the 10,000 asylee adjustments available for fiscal year 2001.

Subclass II: All asylees who filed their adjustment of status applications after January 16, 1998, and on or before June 9, 1998;[3]

Subclass III: All asylees who filed their adjustment of status applications after June 9, 1998;[3]

Subclass IV: All asylees who applied for or applied to renew an Employment Authorization Document.[4]

(Pls.' Mem. Supp. Class Cert. at 3.) Plaintiffs assert that there are seventeen named plaintiffs in Subclass I, six named plaintiffs in Subclass II, eighteen named plaintiffs in Subclass III, and forty named plaintiffs in Subclass IV.

III. Plaintiffs' Complaint

Plaintiffs allege Defendants violated: (1) 8 U.S.C. § 1159(b) by violating Plaintiffs and class members' right to adjust their status and by delaying their adjustment pursuant to that statute; (2) 8 C.F.R. § 209(a)(1) by not maintaining a priority waiting list based on the date each plaintiff and class member's adjustment application was filed; (3) Pub. L. No. 105-277, Title I, § 128, Pub. L. No. 106-429, § 586, and Pub. L. No. 106-378 by failing to exempt qualifying Iraqi Kurds, Indo-Chinese parolees, and Syrian Jews from the 10,000 lawful permanent resident cap; (4) 8 U.S.C. § 1158(c)(1)(B) by requiring Plaintiffs and Class IV members to apply for and renew Employment Authorization

[3] June 9, 1998, was the last day asylees could apply for one of the 10,000 asylee adjustments available for fiscal year 2002.

[4] Asylees must apply for an Employment Authorization Document each year they wish to work in the United States until they become lawful permanent residents.

Documents in order to be employed when the right to employment is incident to their status as asylees; (5) the Administrative Procedures Act by unlawfully withholding or unreasonably delaying agency action under 5 U.S.C. § 706(1); and (6) the Due Process and Equal Protection Clauses of the Fifth Amendment to the United States Constitution. Plaintiffs seek injunctive relief requiring Defendants to comply with the statutory, regulatory, and constitutional requirements outlined above, as well as attorneys' fees under the Equal Access to Justice Act.

Analysis

I. Standard of Decision

The Court may certify a class action "only when it is satisfied after rigorous analysis that all of Rule 23's prerequisites are met." Lockwood Motors, Inc. v. General Motors Corp., 162 F.R.D. 569, 573 (D. Minn. 1995) (Kyle, J.). Rule 23(a) of the Federal Rules of Civil Procedure sets out four threshold prerequisites that must be satisfied before a party can obtain the certification of a class:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In addition to the prerequisites of Rule 23(a), the plaintiff must demonstrate that a class action can be maintained under one of the three categories described in Rule 23(b). Fed. R. Civ. P. 23(b).

The party seeking class certification bears the burden of showing that the requirements of the rule are satisfied and that the class should be certified. See General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982); Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994). Although a court should not decide the merits of a case at the class certification stage, see Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974), a motion for class certification "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) (citations and internal quotation marks omitted).

II. The Rule 23(a) Requirements

A. Numerosity

"In order to maintain a class action, Plaintiffs must show that the class of plaintiffs is so large that joinder of all members would be 'impracticable.'" In re Potash Antitrust Litig., 159 F.R.D. 682, 689 (Kyle, J.) (citing In re Federal Skywalk Cases, 680 F.2d 1175, 1178 (8th Cir. 1982)). Although the Plaintiffs need not show that joinder of all class members would be impossible, they must show that it would be difficult. See Lockwood Motors, 162 F.R.D. at 574 (citing Jenson v. Continental Fin. Corp., 404 F. Supp. 806, 809 (D. Minn. 1975) (Lord, J.)). Here, "the proposed class contains tens of thousands of asylees" (Pls.' Mem. Supp. Class Cert. at 8) and Defendants do not challenge it on numerosity grounds.

B. Commonality

The second provision of Rule 23(a) requires that the Plaintiffs show "that there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). While not every question of law and fact must be common to the entire class, the Plaintiffs must show that the course of action giving rise to their cause of action affects all putative class members, and that at least one of the elements of that cause of action is shared by all of the putative class members. See Lockwood Motors, 162 F.R.D. at 575 (citing Forbush v. J.C. Penney Co., Inc., 994 F.2d 1101, 1106 (5th Cir. 1993)). As a general rule, the commonality requirement imposes a very light burden on plaintiff seeking to certify a class and is easily satisfied. See Newberg on Class Actions, § 3.10 at 3-50 (collecting cases).

Plaintiffs argue that certification is appropriate because whether Defendants have properly administered the asylee adjustment process presents a common legal question. Moreover, Plaintiffs assert sub-classes I, II, and III are linked by the common issue of whether Defendants have failed to annually issue all 10,000 asylee adjustment numbers under 8 U.S.C. § 1158(b). Finally, Plaintiffs argue that sub-class IV is joined by the question of whether the requirement that asylees apply for an Employment Authorization Document and renew that document every year at the cost of $120 violates 8 U.S.C. § 1158(c)(1)(B).

Defendants respond that the individualized nature of Plaintiffs' claims precludes class certification. For each alleged incident of mismanagement of the asylee adjustment

process, Defendants assert, the Court will have to engage in a fact specific analysis into whether the applicant was actually eligible for lawful permanent resident status. In addition, Defendants assert that the focus of this litigation is not the policies emanating from INS headquarters in Washington D.C., but rather the implementation of those policies in local INS offices throughout the country.[5]

Plaintiffs' proposed class and sub-classes share common questions of fact and law. The issue of the alleged maladministration of the asylee adjustment process "pervades all the class members' claims." Paxton v. Union Nat. Bank, 688 F.2d 522, 561 (8th Cir. 1982). The class and sub-classes alike allege specific failures by Defendants to implement uniform asylum adjustment procedures in accord with constitutional and administrative norms. Indeed, "it would be 'a twisted result' to permit an administrative agency to avoid nationwide litigation that challenges the constitutionality of its general practices simply by pointing to minor variations in procedure among branch offices. . . ." Walters v. Reno, 145 F.3d 1032, 1046 (9th Cir. 1998). Although Defendants suggest that

[5] This appears to be part of Defendants' half-hearted attack on Plaintiffs' standing. As Defendants argue, "there are no claims involving adjustment applications submitted to each of the INS's District Offices. Put another way, Plaintiffs do not have standing to bring a nationwide class action where the Complaint is devoid of claims involving each INS District Office." (Defs.' Mem. Opposing Class Cert. at 14.) Of course, Plaintiffs have not *sued* "each INS District Office" and do not challenge their practices except as it provides evidence of Defendants' general maladministration of the asylee adjustment process. Each named plaintiff has alleged facts sufficient for the Court to conclude that "they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." Warth v. Seldin, 422 U.S. 490, 502 (1975). Plaintiffs therefore satisfy Article III's standing requirement.

the proposed class would include applicants who would ultimately be unable to qualify for permanent legal residency status, successful and unsuccessful applicants alike have the right to participate in a process that is legally and constitutionally sound. See, e.g., Regents of the University of California v. Bakke, 438 U.S. 265, 281 n.14 (1978). Accordingly, the Court finds that Plaintiffs have satisfied the commonality requirement.[6]

C. Typicality

The third requirement of Rule 23(a) calls for the party seeking certification to show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "Typicality is satisfied when the claims of the named plaintiffs emanate from the same event or are based on the same legal theory as the claims of the class members." Lockwood Motors, 162 F.R.D. at 575

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[6]While the Court finds common legal issues, it questions whether many of the statutory and regulatory provisions listed by Plaintiffs as "causes of action" are amenable to private enforcement, see Alexander v. Sandoval, 532 U.S. 275 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. . . . Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."); Massachusetts Mut. Life Ins. v. Russell, 473 U.S. 134, 145 n.13 (1985) (applying four-part test to determine whether private right of action is implicit in statute that does not expressly so provide), whether the INS's adherence to its own directives and those of Congress is justiciable, compare Truijillo-Hernandez v. Farrell, 503 F.2d 954, 955 (5th Cir. 1974), with Federation for American Immigration Reform, Inc. v. Reno, 897 F. Supp. 595, 601 (D.D.C. 1995), and the appropriate level of the Court's own review, see Fiallo v. Bell, 430 U.S. 787, 792 (1977) (noting that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens" and that judicial review should be "limited") (internal quotations omitted). Defendants, however, have not raised these issues and the Court does not consider them with regard to class certification.

(quotation and citations omitted). To satisfy the typicality requirement, a plaintiff must demonstrate that the claims are sufficiently similar that (1) the representative parties will adequately protect the interests of the class, and (2) there are no antagonistic interests between the representatives and the class. See In re Wirebound Boxes Antitrust Litig., 128 F.R.D. 268, 270 (D. Minn. 1989) (Murphy, J.). Commonality and typicality are closely related and a "finding of one generally compels a finding of the other." Select Comfort Corporation Securities Litigation, 202 F.R.D. 598, 602 (D. Minn. 2001) (Doty, J.) (citations omitted).

Plaintiffs assert that they have been "subjected to the same problems with the Defendants' administration of the asylee adjustment numbers . . . [and] assert the same legal claims and seek the same relief for themselves as they do for the proposed class." (Pls.' Mem. Supp. Class Cert. at 13.) Because Defendants do not challenge Plaintiffs' proposed class and sub-classes on typicality grounds, and because the Court concludes that the named plaintiffs have similar interests to those of the class and will adequately protect their interests, Plaintiffs meet the typicality requirement.

D. Adequacy of Representation

The fourth requirement of Rule 23(a) -- adequacy of representation -- is related to the typicality requirement. If the representative parties have interests or claims (or defenses to counterclaims) that are significantly different to that of the majority of class members, then neither typicality nor adequacy is present. See Potash, 159 F.R.D. at 692;

Wirebound Boxes, 128 F.R.D. at 270. To satisfy the adequacy requirement, the Plaintiffs must show "that (1) the representatives and their attorneys are able and willing to prosecute the action competently and vigorously and (2) each representative's interests are sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge." Potash, 159 F.R.D. at 692 (citing Wirebound Boxes, 128 F.R.D. at 270).

Here, Defendants have admitted that Plaintiffs' counsel are competent (see Answer ¶ 285) and do not argue that Plaintiffs' interests are antagonistic to those of the class. The Court therefore finds that Plaintiffs have satisfied the adequacy of representation requirement.

III. The Rule 23(b)(2) Requirement

In addition to the Rule 23(a) prerequisites, Plaintiffs must also demonstrate that a class action can be maintained under one of the three categories described in Rule 23(b). Fed. R. Civ. P. 23(b). Plaintiffs seek to proceed under Rule 23(b)(2).

The Court may certify a class under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Injunctive or declaratory relief is not "appropriate" when the "final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23(b)(2). "If the Rule 23(a) prerequisites have been met and

injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2)." DeBoer v. Mellon Mortg. Co., 64 F.3d 1171, 1175 (8th Cir. 1995) (quoting Charles A. Wright, et al., Federal Practice and Procedure § 1775, at 470 (1986).

In asserting that Plaintiffs' proposed class and sub-classes cannot be maintained under Rule 23(b)(2), Defendants generally rehash their commonality arguments. As discussed above, however, issues relating to Defendants' purported failure to properly administer the asylum adjustment program provide common questions of law and fact as well as a sufficient basis to maintain the suit as a class action under Rule 23(b)(2). The relief Plaintiffs seek is injunctive and on a class-wide basis. "Should plaintiffs' claims be found to have merit, class-wide injunctive relief would be appropriate." Jenson v. Eveleth Taconite Co., 139 F.R.D. 657, 666 (D. Minn. 1991). Because "[t]hese allegations fit squarely into the 23(b)(2) classification," the Court concludes that the class can be maintained under that Rule.[7] Id. Accordingly, class certification is appropriate.

Conclusion

[7] Under Rule 23(b)(2), notice to the class is not required and class members are not permitted to opt-out. See Sperry Rand Corp. v. Larson, 554 F.2d 868, 875 (8th Cir. 1977); Robinson v. Sears, Roebuck and Co., 111 F. Supp. 2d 1101 (E.D. Ark. 2000). The parties have not suggested and the Court does not conclude that notice to absent class members is warranted in this case.

Based on the foregoing, and all of the files, records and proceedings herein, **IT IS ORDERED** that Plaintiffs' Motion for Class Certification is **GRANTED.** The Court certifies the following class and sub-classes:

Class: All asylees in the United States who have applied for adjustment of status to lawful permanent residence and whose applications for adjustment remain pending;

Subclass I: All asylees who filed their adjustment of status applications with the INS on or before January 16, 1998;

Subclass II: All asylees who filed their adjustment of status applications after January 16, 1998, and on or before June 9, 1998;

Subclass III: All asylees who filed their adjustment of status applications after June 9, 1998;

Subclass IV: All asylees who applied for or applied to renew an Employment Authorization Document.

Dated: January 14, 2003

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RICHARD H. KYLE
United States District Judge