

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

FELICITAS CARREON-MOCTEZUMA,)	
OSWALDO BYIRINGIRO HAKORINAMA, and)	
ANGELICA ALEJANDRA ALAMILLO,)	
Individually on their own behalf, and)	
on behalf of all others similarly situated.)	CA B-07-145
v.)	
)	
T. DIANE CEJKA, DIRECTOR,)	
U.S.C.I.S., LEE'S SUMMIT, MISSOURI,)	
MICHAEL CHERTOFF, SECRETARY,)	
DEPARTMENT OF HOMELAND SECURITY, AND)	
THE UNITED STATES OF AMERICA.)	

**FIRST AMENDED
PETITION FOR WRIT OF HABEAS CORPUS AND CLASS ACTION COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF**

Felicitas Carreon-Moctezuma, Oswaldo Byiringiro Hakorinama, and Angelica Alejandra Alamillo, through the undersigned counsel, file the instant First Amended Petition for Writ of Habeas Corpus, (28 U.S.C. §2241) and Class Action Complaint for Declaratory and Injunctive relief, under 28 U.S.C. §1331 (federal question), together with 5 U.S.C. §702 et seq, (Administrative Procedure Act) ("APA"), and 28 U.S.C. §2201 (Declaratory Judgment Act).

Plaintiffs seek to force Defendants to process their I-765 applications for employment authorization, ("EADs"), (and those of the class they seek to represent), pursuant to 8 C.F.R. §274.13(d), and without regard to Requests For Evidence, ("RFEs"), issued in conjunction with applications other than the I-765 itself.

I. INTRODUCTION AND SUMMARY OF THE CASE

Under 8 C.F.R. §274.12(c)(9) and §274.13(a)(1), Plaintiffs, and the class they seek to represent, may file an I-765, application for an employment authorization document, in conjunction with a pending application for adjustment of status to that of a lawful permanent resident, ("Form I-485"). Under 8 C.F.R. §274a.12(c), such I-765s may be filed not only when the I-485 is pending before the District Director, but also during "any period when an administrative appeal or judicial review of [the I-485] is pending."

Further, 8 C.F.R. §274.13(d) mandates that the District Director "shall adjudicate" an I-765 within 90 days of receipt, and that failure to do so "will result" in the grant of an interim EAD.

Pursuant to 8 C.F.R. §103.2(b)(10)(i), an application or petition (of any type) may be held in suspension if it is "missing required evidence," or if an affected individual who requires fingerprints, or an interview, has requested re-scheduling. And under 8 C.F.R. §103.2(b)(10)(ii), "interim benefits" ... "will not be granted" based on an application held in suspension under §103.2(b)(10)(i).

Until recently, §103.2(b)(10)(ii) was interpreted in accordance with its plain language, as applying only to applications where RFEs had been issued. Recently, however, Defendants have reinterpreted it as also applying to applications where no RFE has been filed, but where there is an RFE in connection with a related application, such as an I-765 filed in conjunction with an I-485 (or an N-600, Application For a Certificate of Citizenship), for which an RFE was issued. Clearly, 8 C.F.R. §103.2(b)(10)(ii) would apply where, for example, a request for evidence, ("RFE"), was issued seeking proof that an I-765 applicant was eligible for an EAD, *i.e.*, proof that the related adjustment application or N-600 was still pending before the District Director, or undergoing administrative or judicial review. By its plain language, however, it has no bearing on I-765s where RFEs were issued for accompanying applications. Defendants' recently adopted construction applying it to I-765s where RFEs were issued with respect to *other* applications is inconsistent with the plain language of §103.2(b)(10)(ii), and effectively renders 8 C.F.R. §274.13(d) null and void.

Further, it appears that Defendants have started using RFEs as a ruse to avoid issuing EADs. At approximately the same time that they adopted this new interpretation, it also became common for them to request documents which had already been provided with the initial filing. They also issue very general demands, making it

almost impossible to determine what documents, if any, are actually being requested. This forces applicants to re-send large portions of the supporting documents, and usually delays issuance of the EAD beyond the date of the interview on the underlying application, rendering it of little, if any, value.

Consequently, Plaintiffs seek habeas relief, and, on their own behalf as well as on behalf of the class she seeks to represent, Petitioners request injunctive, and corresponding declaratory relief, limiting the application of 8 C.F.R. §103.2(b)(10)(ii) to the petition or application with respect to which Defendants have requested additional evidence.

II. JURISDICTION AND VENUE

1. Felicitas Carreon, ("Ms. Carreon"), is a native and citizen of Mexico, who resides in Brownsville, Texas. On July 30, 2007, she filed an application for adjustment of status, (I-485), in conjunction with a visa petition, (I-130), filed by her U.S. citizen daughter. Simultaneously, she filed an I-765 application for an Employment Authorization Document, ("EAD"). Petitioner's Exhibit A, incorporated herein by reference.

2. By "Request for Initial Evidence (I-485)" dated September 8, 2007, Defendants requested various forms of allegedly "initial" evidence. Said document also provided as follows, ¹ Plaintiffs' Exhibit B, herein incorporated by reference:

You are ineligible for interim employment authorization pursuant to Title 8, Code of Federal Regulations, Section 103.2(b)(10) until ninety days after the missing initial evidence is received.

3. Defendants' refusal to provide Ms. Carreon with an EAD until 90 days after they receive allegedly missing "initial documents" places significant restrictions on her liberty not shared by the

¹ Notably, the Form used for the RFE has a notation at the bottom, "NBC November 15, 2006 Revision 8," indicating that the form was revised less than a year ago.

populace at large, and constitutes "custody" within the meaning of *Jones v. Cunningham*, 371 U.S. 236, 240 (1963).

4. Similarly, Petitioners Hakorinama and Alamillo simultaneously filed applications for adjustment of status and EADs. Both received requests for evidence ("RFEs"), containing language similar to that quoted in Paragraph 2 above, and are therefor in "custody" as described in Paragraph 3 above.

II. THE PARTIES

5. Petitioner/Plaintiff Felicitas Carreon is a native and citizen of Mexico, who resides in Brownsville, Texas. Petitioner/Plaintiff Oswaldo Byiringiro Hakorinama is a native and citizen of the Democratic Republic of Congo, who resides in Tucson, Arizona. Petitioner/Plaintiff Angelica Alejandra Alamillo is a native and citizen of Mexico, who resides in Sebastian, Texas.

6. Respondent/Defendant T. Diane Cejka is the Director of the Lee's Summit Office of the U.S.C.I.S., which issued the RFE in question. (Exhibit B). Respondent/Defendant Michael Chertoff is the Secretary of the Department of Homeland Security. Both are sued in their official capacities only. The United States of America is also a Defendant herein.

III. THE FACTS

7. Petitioner Carreon a native and citizen of Mexico, who resides in Brownsville, Texas. On July 30, 2007, her U.S. citizen daughter filed a fee-paid I-130, in conjunction with which Petitioner Carreon filed applications for adjustment of status, (I-485), and for an Employment Authorization Document, ("EAD"). Exhibit A. Said applications contained all required "initial evidence," including a copy of the local crossing card with which she last entered the United States, and necessary financial documentation.

8. By "Request for Initial Evidence (I-485)" dated September 8, 2007, Defendants requested allegedly "initial" evidence. Said document used lengthy boilerplate language to request allegedly

missing financial documentation, without specifying what documents were lacking. It also provided as follows,² Exhibit B:

You are ineligible for interim employment authorization pursuant to Title 8, Code of Federal Regulations, Section 103.2(b)(10) until ninety days after the missing initial evidence is received.

9. Oswaldo Byiringiro Hakorinama is a native and citizen of the Democratic Republic of Congo. on or about January 31, 2003, he entered the United States from Canada, where he had been admitted as a refugee, with a B-1/B-2 visa issued on March 20, 2001. His application for asylum in the U.S. was denied, and he was placed in removal proceedings. On May 23, 2007, he filed applications for adjustment of status and an EAD, through his U.S. citizen wife.

10. By RFE dated June 11, 2007, Defendants requested, *inter alia*, that Mr. Hakorinama provide his birth certificate, a document which he has had difficulty obtaining, since he is from North Kivu, where war has broken out - again. His attorney provided other documents requested, but was unable to provide the birth certificate. The RFE stated that he was ineligible for an EAD until 90 days after the missing evidence had been received. A second RFE, with the same language, was issued September 13, 2007, again requesting the missing birth certificate. Mr. Hakorinama has just received, and will submit, an e-mailed copy of his birth certificate, but it is unknown whether this will satisfy Defendants, and if not, how long it will take to obtain an original.³

11. Angelica Alejandra Alamillo is a three-year-old native and citizen of Mexico, and adopted daughter of U.S. citizens, who filed

² Notably, the Form used for the RFE has a notation at the bottom, "NBC November 15, 2006 Revision 8," indicating that the form was revised less than a year ago.

³ This appears to be a "blind" application of the rules. One would think that if the State Department was sufficiently satisfied of his identity to issue a visa to Mr. Hakorinama, there is little need for an actual birth certificate.

applications for adjustment of status and an EAD ⁴ on her behalf on July 30, 2007. By RFE dated September 19, 2007, Defendants requested evidence of how Ms. Alamillo had entered the United States, (which evidence had already been provided), and a Form I-864W, a newly created form whose purpose is to state why Form I-864 is not required. Said RFE also contained the following language:

You are ineligible for interim employment authorization pursuant to Title 8, Code of Federal Regulations, Section 103.2(b)(10) until ninety days after the missing initial evidence is received.

IV. CLASS ALLEGATIONS

12. These are not isolated problems. Rather, they represent a nationwide policy recently adopted by Defendants, based on a reinterpretation of 8 C.F.R. §103.2(b)(10). The effect of this new policy is to deny Plaintiffs, the class they seek to represent, and N-600 applicants, whose ability to obtain EADs based on their pending applications derives from an Equal Protection violation vis-a-vis adjustment applicants, ⁵ of employment authorization well past the 90 deadline established by 8 C.F.R. §274.13(d).

13. Plaintiffs herein seek to represent a nation-wide class, consisting of all persons who are seeking the status of permanent residents, who have filed or will in the future file I-765s in conjunction with pending I-485s, and who have received or will receive RFEs, seeking evidence in support of their pending I-485s, with the following (or equivalent) language:

You are ineligible for interim employment authorization pursuant to Title 8, Code of Federal Regulations, Section 103.2(b)(10) until ninety days after the missing initial evidence is received.

14. On information and belief, Plaintiffs allege that the class as so defined numbers at least in the dozens, if not the hundreds, or

⁴ An Employment Authorization Documents is a prerequisite to obtaining a Social Security number, even for small children.

⁵ See, *Dominguez-Perez et al v. Ridge et al*, CA B-96-116 (S.D.Tx 2004).

thousands, not counting future members.

15. The class is so numerous that joinder of all members would be impracticable. Joinder is particularly impracticable since the class includes future members.

16. The claims of the Plaintiffs Carreon, Hakorinama, and Alamillo are typical of the claims of the class.

13. Plaintiffs Carreon, Hakorinama, and Alamillo, and their counsel, can and will fairly and adequately protect the interests of the class.

14. There are questions of law and fact which are common to the class and which predominate over any individual questions. Further, Defendants have acted, or refused to act, on grounds generally applicable to the class, making appropriate final injunctive and declaratory relief, with respect to the class as a whole.

V. THE CAUSES OF ACTION
A. HABEAS CORPUS

The deprivation of the liberty of Petitioners Carreon, Hakorinama, and Alamillo, as complained of herein violates the laws and Constitution of the United States, which claim is cognizable in habeas corpus under 28 U.S.C. §2241.

Under 8 C.F.R. §274.13(d), Defendants have a non-discretionary duty to adjudicate Petitioners' I-765s within 90 days of receipt, or issue an interim EAD. Their refusal to do so until 90 days after they provide additional evidence with respect to a legally and conceptually distinct application, (a pending I-485), places restrictions on their liberty not shared by the populace at large, within the meaning of *Jones v. Cunningham, supra*.

B. CLASS-WIDE RELIEF
INJUNCTIVE AND DECLARATORY RELIEF

Under 8 C.F.R. §274.13(d), Defendants have a non-discretionary duty to adjudicate the I-765s of members of the Plaintiff class within

90 days of receipt, or issue interim EADs. Their refusal to do so until 90 days after they provide allegedly missing "initial evidence" with respect to a legally and conceptually distinct application, to wit, a pending I-485, is a violation of Defendants' duties. As a result, Plaintiffs are entitled to injunctive, and corresponding declaratory relief.

VI. RELIEF REQUESTED

Wherefore, Petitioners Carreon, Hakorinama, and Alamillo seek Writs of Habeas Corpus, freeing them from the unlawful restraint on their liberty, by requiring that Defendants forthwith adjudicate their I-765s, or, alternatively, that they issue them interim EADs.

Plaintiffs Carreon, Hakorinama, and Alamillo, also request, on their own behalf and on behalf of the class they seek to represent, an injunction, enjoining and restraining Defendants from applying 8 C.F.R. §103.2(b)(10)(ii) to applications *other than* the specific application with respect to which an RFE has been issued, and corresponding declaratory relief.

Respectfully Submitted,

s/ Lisa S. Brodyaga
17891 Landrum Park Rd.
San Benito, TX 78586
(956) 421-3226

TX Bar No: 03052800
Federal ID: 1178

CERTIFICATE OF SERVICE

I, Lisa S. Brodyaga, certify that a copy of the foregoing was electronically served on Rene Benavides, AUSA, on October 21, 2007.

s/ Lisa S. Brodyaga