

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

FELICITAS CARREON-MOCTEZUMA,)
OSWALDO BYIRINGIRO HAKORINAMA, and)
ANGELICA ALEJANDRA ALAMILLO,)

Plaintiffs,)

v.)

Civil Case No. 07-145

T. DIANE CEJKA, Director, U.S. Citizen)
and Immigration Service, Lee’s Summit Office)
MICHAEL CHERTOFF, Secretary for the)
Department of Homeland Security, and)
THE UNITED STATES OF AMERICA,)

Defendants.)

DEFENDANTS’ MOTION TO DISMISS

Defendants, through undersigned counsel, hereby move to dismiss Plaintiffs’
complaint as moot.

I. BACKGROUND

A. Procedural Background

The Secretary of Homeland Security (“DHS”) is charged with the administration
and enforcement of laws relating to the immigration and naturalization of aliens,
including establishing regulations providing the form of bonds, reports and such, and
performing other acts as necessary for carrying out his statutorily prescribed authority.

8 U.S.C. § 1193(a). Specifically, the United States Citizenship and Immigration Services (“USCIS”), housed within DHS, has been charged with adjudicating I-485, Applications to Adjust Status, and I-765, Applications For Employment Authorization. 8 C.F.R. § 245; 8 C.F.R. § 274a.12.

Pursuant to 8 C.F.R. § 274a.12(c), certain classes of aliens, who are temporarily within the United States, must file an Application For Employment Authorization (“I-765”) in order to receive an Employment Authorization Document (“EAD”). This class of aliens includes any alien who has filed a I-485, Application to Adjust Status (I-485”). See C.F.R. § 274a.12(c)(9). USCIS is provided with the discretionary authority to adjudicate I-765, and – if granted – to place any restrictions upon them. 8 C.F.R. § 274a.12(c).

Plaintiffs argue that they are entitled to judicial relief because USCIS has improperly withheld adjudication of their I-765's based solely on deficiencies in their concurrently filed I-485's. See First Amended Complaint at 6. They ask the Court to compel USCIS to immediately adjudicate their I-765 applications or, in the alternative, to issue interim Employment Authorization Documents (“EAD’s”). See First Amended Complaint at 8. However, since filing their first amended complaint, Plaintiffs have complied with the Requests for Initial Evidence and have become recipients of EAD’s. See attached declaration of Terri Robinson. The Court should therefore dismiss this case as moot.

B. Factual Background

Plaintiff Felicitas Carreon-Moctezuma (“Carreon”) filed an I-485 on July 30, 2007. See Petitioner’s Exhibit A. Carreon filed a concurrent I-765 on that date. Id. Carreon’s I-485, however, lacked required initial evidence that would allow USCIS to adjudicate her applications. As a result, USCIS mailed two letters to Carreon dated September 8, 2007, requesting that she provide required initial documentation in order for her application to be processed and adjudicated. Id. The first Request for Initial Evidence informed Carreon of her failure to submit documentation showing that a member of her household’s income was lawfully obtained. Id. The second Request for Initial Evidence informed Carreon of her failure to provide “evidence of [her] current nonimmigrant status or the nonimmigrant status under which [she] last entered the United States” or if she last entered without inspection “evidence of [her] eligibility for adjustment of status.” Id. As a result of her failure to submit these required documents, the Request for Initial Evidence stated that she would be ineligible to receive interim employment authorization pursuant to 8 C.F.R. § 103.2(b)(10)(ii) until the documentation was received. Id.

On November 26, 2007, USCIS received Carreon’s response to the Request for Initial Evidence. See attached declaration of Terri Robinson. As Carreon’s application was no longer lacking the required initial evidence, her I-765 was adjudicated and an EAD was issued on that same date. Id.

Petitioner Oswaldo Byiringiro Hakorinama (“Hakorinama”) filed an I-485 along

with a I-765 with USCIS on May 23, 2007. See Petitioner's Amended Complaint at 5, ¶ 9. Hakorinama's I-485, however, failed to include a birth certificate, as is required for USCIS to adjudicate I-485's. On June 11, 2007, USCIS sent Hakorinama a Request for Initial Evidence informing him of his failure to submit the birth certificate. See Petitioner's Exhibit G. The Request for Initial Evidence further provided that should Hakorinama be unable to provide his birth certificate, as required by 8 C.F.R.

§ 103.2(b)(2)(ii), he must provide the following documents:

‘an original written statement on government letterhead establishing this (the non-existence of a birth certificate) from the relevant government or other authority. The statement must indicate the reason the record does not exist, and indicate whether similar records for the time and place are available.’ If your birth certificate is not available, please submit acceptable secondary evidence including but not limited to church, or school records listing your parents' names and your date of birth, hospital records of your birth, etc. Id.

As a result of his failure to properly submit required initial evidence with his I-485, Hakorinama was ineligible to receive any interim benefits, including employment authorization. Id.; see also § 103.2(b)(10)(ii).

On September 4, 2007, Hakorinama responded to the Request for Initial Evidence. See Petitioner's Exhibit G. Rather than providing the birth certificate or secondary documents, as requested by USCIS in the Request for Initial Evidence, Hakorinama provided an affidavit and other unrequested documents. Id. On September 17, 2007, USCIS mailed a second Request for Initial Evidence to Hakorinama, again seeking his birth certificate. Id.

On October 29, 2007, USCIS received Hakorinama's response to the second Request for Initial Evidence. See attached declaration of Terri Robinson. As Hakorinama complied with the Request for Initial Evidence, his I-765 was adjudicated. Id. On November 26, 2007, Hakorinama became the recipient of an EAD pending the adjudication of his I-485.

Petitioner Angelica Alejandra Alamillo ("Alamillo") filed a I-485 along with a I-765 with USCIS on July 30, 2007. See First Amended Complaint at 5-6, ¶ 11. On September 19, 2007, USCIS mailed two Requests for Initial Evidence to Alamillo based on her failure to provide required documents with her I-485, Application to Adjust Status. See Petitioner's Exhibit F. The first Request for Initial Evidence required Alamillo to submit a I-864, Affidavit of Support from her joint sponsor. Id. The Second Request for Initial Evidence required that Alamillo submit either evidence of her nonimmigrant status or evidence of her eligibility to adjust status under section 245 of the Immigration and Nationality Act ("INA") (e.g. a beneficiary of a immigrant visa petition). Id. The Request for Initial Evidence also stated that based on her failure to provide the required documents she is "ineligible for interim employment authorization benefits . . . until ninety (90) days after the missing initial evidence is received." Id.

On October 30, 2007, USCIS received Alamillo's response to the Request for Initial Evidence. See attached declaration of Terri Robinson. As her applications were no longer missing required documents, USCIS was able to adjudicate her I-765. Id. On

November 2, 2007, USCIS granted Alamillo's application and issued an EAD. Id.

II. ARGUMENT

A. Standard of Review

Fed. R. Civ. P., Rule 12(b)(1) permits dismissal of an action when the court lacks subject matter jurisdiction. A motion under 12(b)(1) may be decided on any of three basis: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; and (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. Barrera-Montenegro v. United States, 74 F.3d 657, 659 (5th Cir. 1996); Fleischer v. U.S. Dept. of Veterans Affairs, 955 F. Supp. 731, 733-34 (S.D. Tex. 1997). A Rule 12(b)(1) motion should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of a claim that would entitle her or him to relief. Home Builders Ass'n of Mississippi, Inc. v. City of Madison, Miss., 143 F.3d 1006, 1009 (5th Cir. 1998); Benton v. United States, 960 F.2d 19, 20 (5th Cir. 1992). A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory authority or constitutional power to adjudicate it. Home Builders Ass'n of Mississippi, 143 F.3d at 1009.

B. Pursuant to Fed. R. Civ. 12(b)(1), the Court Must Dismiss this Action For Mootness

Article III of the Constitution limits the jurisdiction of federal courts to the consideration of "Cases" or "Controversies." Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 101 (1998); Sierra Club v. Peterson, 185 F.3d 349, 360 (5th Cir. 1999). The

“case or controversy” constraint, in turn, limits federal courts to cases that present a “justiciable controversy,” and no such “controversy is presented . . . when the question sought to be adjudicated has been mooted by subsequent developments.” Flast v. Cohen, 392 U.S. 83, 95 (1968).

A case is moot when the litigants are no longer threatened with an actual injury traceable to the defendants that could be redressed by a favorable judicial decision. Lewis v. Continental Bank, 494 U.S. 472, 477 (1990). A federal court may only decide “real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” Id.

Justiciability is an ongoing requirement, for the “requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” Arizonians for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997) (citation and internal quotation marks omitted). While a lawsuit may have been considered alive at the inception of the suit, “[t]he parties must continue to have a ‘personal stake in the outcome’ of the lawsuit.” Lewis, 494 U.S. at 478 (citing Los Angeles v. Lyons, 461 U.S. 95, 101 (1990)). Here, Plaintiffs’ claims were based on the fact that USCIS had withheld adjudication of their I-765’s due to the issuance of Requests for Evidence on their I-765’s that were filed in conjunction; the relief they sought was for USCIS to adjudicate those applications or, in the alternative, to issue interim EAD’s. See

First Amended Complaint at 8. The fact that USCIS granted all three Plaintiffs' EAD's (see attached declaration of Terri Robinson) has preempted their claims, and the relief they seek would consequently have no practical impact. Accordingly, because the Plaintiffs no longer have a legally cognizable interest in the relief they seek, their claims must be dismissed as moot.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiffs' claims for want of subject matter jurisdiction and for failure to state a claim.

Dated: December 10, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2007, a true and correct copy of the Motion to Dismiss was been forwarded to Plaintiffs' counsel of record, Lisa Brodyaga by e-mail or Certified Mail Return Receipt Requested at 17891 Landrum Park Road, San Benito, Texas 78586.

/s/ Rene Carlo Benavides
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