

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

Laura Nancy CASTRO,)	
Yuliana Trinidad CASTRO,)	
In her own name, and on behalf of her)	
Infant daughter, "C.A.G.",)	
Trinidad Muraira de CASTRO,)	
Rodrigo SAMPAYO,)	
Jessica GARCIA,)	
Ana ALANIS,)	Civil Action No. B-09-208
Alicia RUIZ,)	
Maria REYES,)	Honorable Hilda G. Tagle
Jenifer Itzel GONZALEZ,)	
)	
PETITIONERS/PLAINTIFFS, In Their Own)	
Name and On Behalf of All Others Similarly Situated,)	
)	
v.)	
)	
Michael T. FREEMAN, Port Director,)	
U.S. Customs and Border Protection,)	
Eliseo CABRERA,)	
Hillary CLINTON, U.S. Secretary of State,)	
Janet NAPOLITANO, Secretary, Department of)	
Homeland Security,)	
Eric HOLDER, Jr., United States Attorney General,)	
and the UNITED STATES OF AMERICA,)	
)	
RESPONDENTS/DEFENDANTS.)	
_____)	

PLAINTIFFS' (OPPOSED) FIRST MOTION FOR CLASS CERTIFICATION

Plaintiffs, Laura Nancy Castro ("Laura"), Yuliana Trinidad Castro ("Yuliana"), in her own name and on behalf of her infant daughter, C.A.G. ("C.A.G."), Trinidad Muraira de Castro ("Trinidad"), Rodrigo Sampayo ("Sampayo"), Jessica Garcia, ("Garcia"), her mother, Ana Alanis ("Alanis), Alicia Ruiz ("Ruiz"), Maria Reyes ("Reyes"), and Jenifer Itzel Gonzalez, ("Gonzalez"), through counsel, hereby move this Court pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure for an order that this action may be maintained as a class action, and in support, state as follows:

1. On September 13, 2010, Plaintiffs filed and served a Third Amended Petition for Writ of Habeas Corpus, Federal Tort Claims (“F.T.C.A.”) and *Bivens* Action for Damages and Class Action Complaint for Declaratory and Injunctive Relief.
2. Plaintiffs Laura Castro, Yuliana Castro, Sampayo, Ruiz, Reyes and Gonzales challenge the procedures employed by the Departments of Homeland Security and State in the revocation of U.S. passports and the adjudication of U.S. passport applications.¹
3. Specifically, Plaintiffs challenge as inappropriate the standards employed, the failure to provide a prompt, due process hearing, and inadequate training, with respect to the revocation of passports and denial of passport applications.
4. On behalf of themselves and all persons similarly situated, Plaintiffs move this Court for an order certifying nationwide classes of persons defined as follows:

First Proposed Class: *Passports Revoked Based on Allegations Related to Non-Nationality*¹

¹ Plaintiffs contend that 8 C.F.R. §51.62(b), authorizing the Department of State to revoke a passport for non-nationality, without a Due Process hearing, is *ultra vires*. Other than for convicted sex tourists (22 U.S.C. §212a(b)(1)(B)), the only statutory authority for revocation limits the grounds for such action, and mandates a prompt post-revocation hearing. *See*, 8 U.S.C. §1504(a):

The Secretary of State is authorized to cancel any United States passport or Consular Report of Birth, or certified copy thereof, if it appears that such document was illegally, fraudulently, or erroneously obtained from, or was created through illegality or fraud practiced upon, the Secretary. The person for or to whom such document has been issued or made shall be given, at such person's last known address, written notice of the cancellation of such document, together with the procedures for seeking a prompt post-cancellation hearing. The cancellation under this section of any document purporting to show the citizenship status of the person to whom it was issued shall affect only the document and not the citizenship status of the person in whose name the document was issued.

These grounds are mirrored in 22 C.F.R. §51.62(a)(2). There is no corresponding statutory authority for §51.62(b) (revocation where DOS determines that the bearer is not a U.S. national).

Individuals who:

- (a) have received or will receive U.S. passports;
- (b) whose passports, on or after September 7, 2003, have been or will be revoked by Defendants, based, in whole or in part, on 22 C.F.R. § 51.62(b) (non-nationality) or 22 C.F.R. § 51.62(a)(2) (obtained illegally, or by fraud or error), where the underlying assertion is that the bearer claims to have been, but was not, born in the United States; and
- (c) whose claims of U.S. citizenship have not been finally adjudicated by a federal court.

Second Proposed Class: *Passport Applications Denied Based on Failure to Prove U.S. Nationality*

Individuals who:

- (a) on or after September 7, 2003, applied for, or who will in the future apply for, a United States passport;
- (b) whose passport applications have been or will be denied, based in whole or in part on the applicants' alleged failure to prove their claims of birth in the United States, (including, but not limited to, allegations of fraud relating to their place of birth, such as that an applicant was fraudulently registered as born in Texas), and
- (c) whose claims of U.S. citizenship have not been finally adjudicated by a federal court.

As used in these class definitions, September 7, 2003, represents six years prior to the date of the initial filing of the instant action (September 7, 2009), as contemplated by the applicable statute of limitations, 28 U.S.C. § 2401.

5. From its inception, Plaintiffs filed this suit as a class action, and now seek certification of two of the putative classes, Classes D and E of their Third Amended Petition and Complaint, [102:26]. They seek class certification pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2), on behalf of all persons who have had or will have their U.S. passports revoked or who have had their passport applications denied, based on Defendants' determination that the evidence presented -- including, *inter alia*, facially valid Texas birth certificates -- is insufficient to entitle them to the constitutional rights which attend U.S. citizenship.

6. This matter satisfies the four requirements for class certification under Fed. R. Civ. P. 23(a). First, the classes are so numerous that joinder of all members would be impracticable. The number

of class members is not known with precision, but it can reasonably be inferred that: the proposed class of persons with Passports Revoked numbers well over 20 (if not 200) persons; and the proposed class of persons with Passport Applications Denied numbers well over 50 (if not 5,000) persons. Moreover, the numbers will steadily increase as Defendants revoke additional passports and deny additional passport applications in the future. Class members may presently live in Texas any state of the United States, or abroad. The difficulties in contacting and communicating with the members of a national class, and the inclusion of future members, make joinder of all class members impracticable, if not impossible. Finally, all class members seek the same relief. The proposed class of persons whose passports were revoked asks the Court to order Defendants to provide a prompt administrative hearing with full due process protections that will afford them a meaningful opportunity to challenge the basis for the revocation. The proposed class of persons whose passport applications were denied similarly seek prompt administrative hearings with full due process protections that will afford them a meaningful opportunity to challenge the basis for the denial of their passport applications. In addition, Plaintiffs ask the Court to order Defendants to work with Plaintiffs to develop guidelines governing the burden of proof and evidentiary standards for passport revocations and adjudication of passport applications involving claims of birth in the United States, and, following development of such guidelines, Plaintiffs ask the Court to approve them. Finally, Plaintiffs ask the Court to order Defendants to provide training to Department of State adjudicatory personnel, and U.S. Customs and Border Patrol officers, based on the court-approved guidelines.

7. Second, there are significant questions of law common to the Plaintiffs and class members. For the proposed class of persons whose passports have been or will be revoked, such questions include:

(1a) Whether Defendants may lawfully revoke a passport pursuant to 22 C.F.R. § 51.62(b)

(non-nationality), where the statute, 8 U.S.C. §1504, does not authorize such action;

(1b) Alternatively, whether by revoking a passport because DOS has “determined” that the bearer is not a U.S. citizen, without a prompt Due Process hearing, whether such action is based on 22 C.F.R. §51.62(b) with §51.70(b)(1), or any other law, policy, regulation, or simple institutional neglect, Defendants violate the Citizenship Clause of the Fourteenth Amendment and the Fifth Amendment’s Due Process Clause, the right to equal protection of law under the Fifth Amendment, and/or the liberty interest in the right to international travel,² the Sixth Amendment’s right to counsel and/or the Thirteenth Amendment’s prohibition against involuntary servitude, and

(2) Whether such hearings as are provided, *e.g.*, in cases where revocation is based on 22 C.F.R. §51.62(a)(2) with §51.70(a), are sufficient to protect the constitutional rights of the passport holder, where such hearings are conducted only in Washington, D.C., (unless the person is outside of the United States), at the expense of the passport holder, are officiated only by a Department of State employee, (rather than an administrative law judge), are not governed by written procedures, where pre-hearing procedures are not conducted on the record, there is no body of decisional law and no procedure for resolving questions of law, no guarantee that one’s witnesses will be allowed to attend in person, and no clarity as to the evidentiary standards or burden of proof.³

² See, *Regan v. Wald*, 468 U.S. 222,240-42 (1984) (right to international travel is liberty right protected by the Fifth Amendemnt); *Atem v. Ashcroft*, 312 F.Supp.2d 792 (E.D.Va. 2004) (finding due process applicable since cancellation of passport implicates a specific liberty interest, to wit, the right to international travel)

³ See, (sealed) Exh. AA, emails regarding the revocation hearing for Laura Castro [151].

With respect to the proposed class of persons whose passport applications have been or will be denied, such questions include:

(1) Whether denial of a passport application for failure to establish U.S. citizenship, pursuant to 22 C.F.R. §51.23(a) and/or §51.40, without a prompt hearing or other procedure affording due process protections, violates the Citizenship Clause of the Fourteenth Amendment, the Fifth Amendment's Due Process Clause, and/or liberty interest in the right to international travel, the Sixth Amendment's right to counsel and the Thirteenth Amendment's prohibition against involuntary servitude.

(2) Whether 22 C.F.R. §51.70(b)(1) violates the rights of putative class members to equal protection of law under the Fifth Amendment, where passport applicants whose applications are denied for alleged failure to establish U.S. nationality are not entitled to any hearing at all, but those whose applications are denied for reasons encompassed by 22 C.F.R. §51.70(a) are afforded to a hearing to "review the basis for the denial."

8. Third, the claims of the Plaintiffs are typical of the claims of the proposed classes. The Plaintiffs' legal claims -- that Defendants' actions in revoking passports and denying passport applications based on allegations related to non-citizenship, without providing any opportunity to challenge the allegations -- are typical of the legal claims of the class. In addition, the declaratory and injunctive relief Plaintiffs seek is identical to the equitable relief that would be sought by the proposed class members were they to bring suit individually. *See* para. 6, *above*.

9. Fourth, Plaintiffs and their counsel will fairly and adequately represent and protect the interests of the proposed classes. Plaintiffs are not subject to any unique defenses that may be asserted against them individually and that might render them atypical of the other class members.

Nor are Plaintiffs aware of any existing conflict between their own interests and the interests of the proposed classes they seek to represent. Additionally, Plaintiffs' counsel, Lisa Brodyaga, Jaime Diez, Javier Maldonado, and Trina Realmuto, are experienced in class action suits and in civil rights cases and are competent to represent the class and to prosecute this litigation.

10. Class certification also is appropriate under Fed. R. Civ. P. 23(b)(2) because the Defendants have acted or will act on grounds generally applicable to the class, *i.e.*, they revoke passports based on allegations related to lack of U.S. citizenship (based on 22 C.F.R. § 51.70(b)(1)), and they deny passport applications for failure to prove U.S. citizenship, without providing any opportunity to contest the revocations or denials, thereby making appropriate final injunctive relief and/or corresponding declaratory relief with respect to the class as a whole.

11. In support of this motion, the Petitioners submit the accompanying Brief in Support of Plaintiffs' First Motion for Class Certification.

12. Pursuant to Local Rule 7.1(D), Plaintiffs' counsel has conferred with Julie Saltman, counsel for Defendants, regarding the filing of this motion and understand that the Defendants oppose class certification in this matter.

WHEREFORE, Plaintiffs' respectfully request that they be certified as representatives of the two classes defined herein, and that this action proceed as a class action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2).

Respectfully Submitted,

s/ Lisa S. Brodyaga

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CERTIFICATE OF SERVICE

I certify that the above was electronically served on all counsel of record on April 18, 2011.

S/
Lisa Brodyaga, Attorney for Plaintiffs