

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

Laura Nancy CASTRO,)	
Yuliana Trinidad CASTRO,)	
Jessica GARCIA,)	
Luis MONTEMAYOR,)	Civil Action No. B-09-208
Ana Luisa GUERRERO,)	
Alicia RUIZ,)	
Maria REYES,)	Honorable Hilda G. Tagle
)	
PLAINTIFFS, In Their Own)	
Names and On Behalf of All Others Similarly Situated,)	
)	
v.)	
)	
Michael T. FREEMAN, Port Director,)	
U.S. Customs and Border Protection, and)	
John KERRY, U.S. Secretary of State,¹)	
Janet NAPOLITANO, Secretary, Department of)	
Homeland Security,)	
)	
DEFENDANTS.)	

PLAINTIFFS’ OPPOSED THIRD MOTION FOR CLASS CERTIFICATION

Plaintiffs, through undersigned 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:

1. On December 7, 2012, the Court granted in part and denied in part Defendants’ motion to dismiss the First Cause of Action and its motion to dismiss the Seventh Cause of Action, [221]. The Court found Plaintiffs’ First Cause of Action moot as to plaintiffs who had received

¹ Pursuant to Federal Rule of Civil Procedure 25(d), Secretary of State John Kerry is automatically substituted for his predecessor, Hillary Clinton.

passports following the earlier denial of their passport applications, [221, 13-16]. The Court further ordered Plaintiffs to file a motion for class certification by March 7, 2013, and noted that the Court would employ the relation-back doctrine, [221: 40 n.7]. Following a stipulation by the parties, the Court extended the motion deadline to March 15, 2013, [226].

2. Plaintiffs challenge the State Department's application of the preponderance of the evidence standard in revoking U.S. passports based, in whole or in part, under 22 C.F.R. § 51.62(a)(2) (fraud) and (b) (non-nationality). Specifically, Plaintiffs contend that the State Department is misapplying the preponderance of evidence standard by: (1) erroneously shifting the burden of proving loss of nationality from the party alleging the loss (usually a government entity) to the U.S. passport holder; and (2) unilaterally manipulating the burden of proof by, *inter alia*, failing to consider all the evidence, including evidence the passport holder might submit and by denying U.S. passport holders notice and an opportunity to respond before revocation.

3. On behalf of themselves and all persons similarly situated, Plaintiffs move this Court for an order certifying two nationwide classes of persons defined as follows:

First Proposed Class

Passports Revoked Based on Allegations Based on Non-Nationality
(Represented by Plaintiffs Luis Montemayor and Ana Luisa Guerrero)

Individuals who:

- have received or will receive U.S. passports based on birth in the United States, a U.S. territory or outlying possession;
- whose passports, on or after September 7, 2003, have been or will be revoked by the Department of State based, in whole or in part, on 22 C.F.R. § 51.62(b) (non-national), where the underlying assertion is that the bearer is not a national of the United States;
- DOS has revoked, or will revoke, the passport based solely on evidence provided by the party seeking revocation or gathered by the Department of State; and
- whose claims of U.S. citizenship have not been finally adjudicated by a federal court.

Second Proposed Class

Passports Revoked Based on Allegations Based on Fraud Related to Non-Nationality (Represented by Plaintiff Laura Nancy Castro)

Individuals who:

- have received or will receive U.S. passports based on birth in the United States, a U.S. territory or outlying possession;
- whose passports, on or after September 7, 2003, have been or will be revoked by the Department of State based, in whole or in part, on 22 C.F.R. § 51.62(a)(2) (obtained illegally, or obtained by fraud or error), where the underlying assertion is that the bearer is not a national of the United States;
- DOS has revoked, or will revoke, the passport based solely on evidence provided by the party seeking revocation or gathered by the Department of State; and
- 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 before 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.

4. This matter satisfies the four requirements for class certification under Fed. R. Civ. P. 23(a). First, the inclusion of future members, and dispersion of innumerable proposed class members in various states and countries renders joinder impracticable. FED. R. CIV. P. 23(a)(1). Plaintiffs have identified approximately 151 potential class members throughout the United States in the first proposed class and are requesting further discovery to identify the number of potential class members in the second proposed class. Second, the relevant causes of action are limited to facts and pure issues of law that are common to the proposed classes. FED. R. CIV. P. 23(a)(2). That is, DOS issued passports to all Plaintiffs and class members based on birth within the United States and later revoked their passports based on some new evidence suggesting birth elsewhere. And, the legal issues include whether DOS erroneously shifts the burden of proof to either itself or the U.S. passport holder and whether DOS unilaterally manipulates the burden and standard of

proof by making it entirely one-sided. Third, the claims asserted and the relief sought by the Plaintiffs are the same, and thus typical, of the claims and relief sought on behalf of the proposed classes. FED. R. CIV. P. 23(a)(3). Plaintiffs and proposed class members are all proceeding under the same legal theory -- that the State Department's revocation of their passports violates the Fifth and Fourteenth Amendments -- and all seek the same injunctive relief. Fourth, the named Plaintiffs and their counsel will adequately represent the interests of the proposed classes. FED. R. CIV. P. 23(a)(4). The State Department revoked the passports of the Plaintiffs raising these claims, and undersigned counsel have significant litigation expertise.

5. This matter also satisfies the requirements for class certification under FED. R. CIV. P. 23(b)(2). Plaintiffs seek only injunctive and declaratory relief, and Defendants have acted on grounds applicable to the class. Specifically, Plaintiffs seek declaratory and injunctive relief to prevent the State Department from misapplying the burden of proof and unilaterally manipulating the evidentiary standard in the future and to redress past, erroneously-issued revocations.

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

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

WHEREFORE, pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2), Plaintiffs respectfully request that the Court certify the two classes defined herein, and that this action proceed as a class action.

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Respectfully Submitted,

s/ Javier Maldonado

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CERTIFICATE OF SERVICE

I, Javier Maldonado, hereby certify that copies of the foregoing were served electronically on all counsel of record on March 15, 2013.

/s/ Javier N. Maldonado

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