UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMMIGRATIONPORTAL.COM, et al.,

Plaintiffs,

v.

TOM RIDGE, SECRETARY, DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

Civil Action: 03-2606
Judge James Robertson

DEFENDANTS' REPLY TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Defendants, through undersigned counsel, submit this reply to plaintiffs' supplemental memorandum in support of plaintiffs' motion for class certification.

1. Nearly 11 months after this action was filed, and six months after defendants filed their answer to the complaint, plaintiffs apparently are considering amending their complaint. However, this court should reject this "eleventh hour" attempt to save this alleged class action. Incredibly, plaintiffs seek to amend their complaint in their supplemental motion for class certification despite this Court's specific instructions that it only wanted the parties to address

whether there was a common question of law or fact regarding the alleged delay by CIS in adjudicating plaintiffs' I-140 and I-485 applications.

Under Fed. R. Civ. P. 15(a), a party may amend a complaint after an answer is filed, but only with leave of court. In deciding whether to grant leave, a court should take into account whether there has been bad faith, undue delay or prejudice to the defendant, and should reject a proposed amendment that would be futile. Foman v. Davis, 371 U.S. 178 (1962); Caribbean Broad. Sys., Ltd., v. Cable & Wireless PLC, 148 F.3d 1080, 1084(D.C. Cir. 1998). Plaintiffs have acted in bad faith and directly in contradiction to the court's order by seeking to amend their complaint at this stage of the litigation. Sensing that their complaint is deficient, particularly after a hearing before this Court in which the Court indicated it may deny class certification in this case, plaintiffs attempt to change course by adopting new legal strategies. By waiting until the eve of this Court's ruling on class certification, plaintiffs are acting in bad faith towards this Court and defendants, who have been proceeding under the original allegations in this case. Defendants have expended significant resources in defending against the original complaint, as has this Court in

overseeing this litigation, to only now have plaintiffs turn around and add new allegations requiring further use of defendants' and the Court's limited resources.

Allowing plaintiffs to amend their complaint after defendants have filed an answer, filed two oppositions to class certification, and responded to discovery requests, including providing two 30(b)(6) deponents and responding to a document discovery request, unfairly prejudices defendants. As set forth above, Plaintiffs could have amended their complaint much earlier, but instead, have decided to litigate this case through "ambush" by laying in wait to see defendants' defenses, and then seeking to change their complaint to their advantage once defendants have exposed the inherit faults of plaintiffs' complaint. However, this Court should not reward such desperate, "11th hour" tactics.

Finally, this Court should reject plaintiffs' attempts to amend their complaint since any further amendments would be futile. As already set forth in defendants' opposition to class certification and supplemental memorandum, certification of a class in this case is improper because: 1)there are no questions of law or fact common to the class as required by Rules 23(a)(2) and (3) because the allegations of delay are based on individualized, fact-specific factors including

satisfying different requirements for being granted an employment visa and lawful permanent residence, including a full security background investigation; and 2) the named class members do not fairly and adequately protect the interests of the class under Rule 23(a)(4) since they have conflicting, antagonistic interests, and they lack standing to litigate the claims of the class; and 3) Plaintiffs have failed to establish pursuant to Rule 23(b)(2) that defendants acted or refused to act on grounds generally applicable to the class. Finally, plaintiffs have moved to certify an extremely broad and vague class and subclasses, and these classes are disfavored. Permitting plaintiffs to amend their complaint would not correct these inherent deficiencies in plaintiffs' case, and allowing them to do so would only prolong this litigation needlessly.

2. Despite the expert testimony of two high ranking Citizenship and Immigration Services ("CIS") officials, and a plain reading of the law, plaintiffs continue to doggedly argue that adjudication of I-140 and I-485 applications by CIS "involve the same issues and are treated alike." Pls.' Supp. Mem. at 2. However, as set forth several times in our pleadings and during oral argument, plaintiffs are just plain wrong. Defs.' Supp. Mem. at 3-16; Defs' Opp. to Class Cert.

10-16, 20-23. Nor does quoting partial, incomplete statements from Paul Pierre's, of CIS, deposition change this fact. In fact, a review of plaintiffs' own supplemental motion acknowledges the individual nature of I-485 applications, including criminal background checks, the need to request further evidence, and the ability to pay wages for an underlying visa category. Pls.' Supp. Mem. at 3, 4-5. Of course, these examples do not include, as defendants set forth earlier in our own memoranda, the necessity to consider the individual grounds of admissibility, and the merits of an underlying visa petition of an I-485 application. Defs.' Supp. Motion at 15; Defs' Opp. to Class Cert. at 3-7.

3. Plaintiffs claim that it takes only minutes to adjudicate an I-485 application and the underlying visa application is incorrect. Pls.' Supp. Mem. at 7. To support their claim plaintiffs rely on a partial statement from Mr. Pierre's deposition. Id. Not surprisingly, plaintiffs mis-characterize Mr. Pierre's statement to support their claim. However, contrary to plaintiffs' assertion, Mr. Pierre in his deposition did not state that it takes "minutes" to adjudicate an I-485, but instead for statistical purposes, CIS measures the completion rate of I-485 applications by CIS adjudicators per hour. Therefore, for example, it can take an

adjudicator on average 45 minutes to adjudicate an I-485 or, for that matter, 135 minutes to adjudicate an I-485. Clearly, this is completely different from plaintiffs' assertion that it takes just a few "minutes" to adjudicate an I-485 application. The point is that Mr. Pierre in his deposition stated that CIS measures the completion rate of I-485 applications by CIS adjudicators per hour, not that it takes only a few minutes to adjudicate an I-485, as plaintiffs imply. Additionally, plaintiffs' claim is under cut by the fact Mr. Pierre pointed out in his deposition that the hourly completion rate he referred to "varies by [service] center, by month," and that his most recent estimate was not particularly indicative since "it was for a slice of a month" only. Paul Pierre Dep. at 61.

4. Plaintiffs also assert that defendants "possess sufficient resources to adjudicate applications in a timely manner," and that CIS has sufficient adjudicators to adjudicate its applications. Pls.' Supp. Mem. at 7. However, this claim is directly refuted by Mr. Pierre's deposition statement that CIS needs further resources to carry out its mission. Defs.' Supp. Mem., Exhibit No. 1, Paul Pierre's Dep. at 32. Again, plaintiffs rely on a partial statement by Mr. Pierre to support their claim. However, a review of Mr.

Pierre's complete statement establishes that while CIS has been authorized to hire several adjudicators to help address the current backlog of applications, the hiring process takes time, and that any new hires would have to go through several training steps before they could begin adjudicating I-485 applications. Paul Pierre Dep. at 92-93. For whatever reasons, plaintiffs did not include this section of Paul Pierre's statement. More importantly, the fact that CIS may be hiring more adjudicators does not alone establish that CIS has sufficient resources to carry out its mission.

5. Plaintiffs claim that security clearances can be completed in matter of days. Pls.' Supp. Mem. at 5-6. Again, this claim is not correct, and is directly refuted by Mr. Pierre's deposition testimony. Defs.' Supp. Motion at 7-11. In fact, plaintiffs themselves admit that FBI name clearance takes at least 45 days, and that the fingerprint checks can take days. Pls.' Supp. Mem. at 5-6.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in defendants' two earlier memoranda, plaintiffs' motion for class certification should be denied.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

Date: October 18, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this __ day of October 2004, I caused the foregoing **DEFENDANTS' REPLY TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** to be served on plaintiffs' counsel by electronic mail with the United States District Court's Electronic Court Filing ("ECF") system.

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