

The Honorable Richard A. Jones
United States District Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

B.H., M.A., A.S.D., M.F., H.L., L.M.M.M., B.M.,
G.K., L.K.G., and D.W.,
Individually and on Behalf of All Others
Similarly Situated,

Plaintiffs,

v.

U.S. CITIZENSHIP AND IMMIGRATION
SERVICES; EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW; Janet
NAPOLITANO, Secretary, Department of
Homeland Security; Alejandro MAYORKAS,
Director, U.S. Citizenship and Immigration
Services; Eric H. HOLDER, Jr., Attorney General
of the United States; Juan OSUNA, Director,
Executive Office for Immigration Review,

Defendants.

Case No. 2:11-cv-02108 R.A.J.

[PROPOSED] ORDER APPROVING
CLASS ACTION SETTLEMENT

This matter comes before the Court on the parties' request for final approval of the settlement of this class action and payment of attorneys' fees and costs. Dkt. Nos. 60, 69. For the reasons discussed in detail below, the Court GRANTS final approval of the Settlement Agreement.

Brief Procedural History

1
2 On May 8, 2013, the Court granted preliminary approval of the parties' settlement agreement
3 that would resolve this class action in its entirety, and it approved the notice to the class. Dkt. No.
4 61. On September 20, 2013, the Court held a fairness hearing on the proposed settlement agreement.
5 Dkt. No. 67. No formal objection to the settlement was received; however, the Court received a
6 letter raising concerns regarding a single issue. In response to this letter of concern, and for
7 purposes of clarifying the agreement, the parties proposed to revise the agreement slightly. Dkt. No.
8 68. The Court tentatively approved the revised settlement agreement, pending a revised notice to the
9 class. Dkt. No. 70. The Court then directed counsel for the parties to issue a revised notice to the
10 class which would include a description of the revised settlement agreement, including a link to a
11 red-lined version of the revised settlement agreement, and the parties' stipulated motion for
12 attorneys' fees. Counsel complied with the Court's directive, filing the required documents on
13 September 26, 2013. Dkt. Nos. 68 & 69. The Court approved the parties' notice on attorneys' fees
14 and modification of settlement agreement, as well as the revised class notice, on September 27,
15 2013. Dkt. No. 70. Finally, the Court directed counsel to file a joint proposed final order certifying
16 the settlement class and approving class action settlement, which the parties did on October 30,
17 2013.

18 The Court granted counsel 30 days to allow class members to respond to the revised class
19 notice, which directed that "objections to the above revisions of the proposed settlement agreement
20 or to the proposed payment of Attorney's Fees and Costs should be submitted to the Court within
21 thirty (30) days of the date of this notice." The Court scheduled a hearing for final approval of the
22 settlement in this case on November 4, 2013.

1 A single objection was received on October 24, 2013, and reviewed by this Court. Dkt. No.
2 71.

3 **Objection to the Settlement Agreement**

4 On October 24, 2013, this Court docketed an objection from Attorney Smaragda (Esmeralda)
5 Karakoudas. Dkt. No. 71. This objection relates to “the clause on page 12, ii, II, which has to do
6 with expedited hearings.” This section excludes from challenge through the class review process
7 challenges to “whether the immigration judge offered a non-detained individual ABT claimant an
8 expedited hearing date that was a minimum of forty-five (45) days from the last master calendar
9 hearing.”¹

10 The objection describes a situation in which an individual might not get a work permit in a
11 timely fashion due to an EOIR clerk incorrectly listing the alien’s hearing as “expedited,” rather than
12 “nonexpedited.” According to the objection, “[a]ny errors made with respect to whether a case is
13 expedited or nonexpedited should fall within the purview of the settlement agreement.”

14 The parties submit that no modification to the Settlement Agreement is necessary to address
15 this objection. First, the objection addresses an issue which was not raised in the complaint or
16 amended complaint. The parties’ position is that the proposed settlement agreement, by necessity,
17 can only resolve claims contained in the complaint itself. There is no claim, and, by extension, no

18 ¹ In its entirety, this section reads as follows:

19 ii. The following non-exhaustive list of claims cannot be challenged through the Individual ABT Claim
20 Review process; however, this Agreement shall not affect or in any way limit the ability of parties,
21 individuals, groups, or classes to challenge or obtain review of claims not resolved by this Agreement
through any existing right or authority under law, regulations, or applicable procedures

22 (II) A challenge to whether the immigration judge offered a non-detained individual ABT
23 claimant an expedited hearing date that was a minimum of forty-five (45) days from the last master
calendar hearing.

1 class, for individuals whose hearings the immigration courts improperly deem to be expedited. The
2 objection points to a provision that affords class members a greater amount of time between his or
3 her last master calendar and individual hearing dates; *i.e.*, fourteen versus forty-five days, as a means
4 to increase the time that the class member will have to prepare for the individual hearing and thus
5 avoid further delay that would stop the applicant from accruing time towards employment
6 authorization eligibility. It does not pertain to whether an individual is accurately placed on the
7 expedited or non-expedited immigration court calendars. Accordingly, the agreement does not
8 resolve such claims.

9 For this reason, the agreement does not foreclose such asylum applicants from seeking
10 redress through existing procedures. In fact, the agreement expressly proffers that applicants whose
11 claims fall outside the scope of this action may challenge those claims “through any existing right or
12 authority under law, regulations, or applicable procedures.” Accordingly, the redress for a person in
13 the situation raised in the objection might be to send an administrative complaint to the Court
14 Administrator under current EOIR procedures (*See* Operating Policies and Procedures Memorandum
15 11-02) and/or file a complaint in Federal District Court challenging any final agency decision on the
16 issue. Therefore, while the Settlement Agreement does not address the issue raised by the objection,
17 it also does not preclude such a person from obtaining redress through other means.

18 Second, the parties contend that the provisions of the Settlement Agreement relating to
19 Notice may nonetheless assist asylum seekers and attorneys in immediately addressing any
20 misclassification of hearings, as discussed in the objection. Pursuant to the Settlement Agreement,
21 Part III.A.1, asylum seekers and their attorneys will receive greater notice as to the reasons for case
22 adjournment and the impact of adjournment codes on eligibility for employment authorization:
23

1 Defendant EOIR will amend the November 15, 2011, Operating Policies and Procedures
2 Memorandum 11-02: The Asylum Clock from Chief Immigration Judge Brian O'Leary, to
3 state that an immigration judge must make the reason(s) for the case adjournment clear on
4 the record. Furthermore, Defendants will provide general information, jointly produced by
5 Defendants EOIR and USCIS, who shall work in good faith with Plaintiffs' counsel,
6 regarding employment authorization for individuals with pending asylum applications,
7 including where to obtain case-specific information, the impact of hearing adjournment codes
8 on EAD eligibility, and where to direct inquiries relating to requests to correct hearing
9 adjournment codes and inquiries relating to EAD eligibility. Defendant EOIR will provide
10 the notice to an asylum applicant when an asylum application is lodged or filed with an
11 immigration court. In addition, EOIR will make a copy of the notice available at each
12 hearing. USCIS will make the information publicly available, including providing the notice
13 to an asylum applicant upon referral.

14 Accordingly, the parties contend that attorneys and asylum seekers will be in a better to position to
15 immediately address in Immigration Court whether a case is adjourned to the next hearing as an
16 expedited or non-expedited case, as well as the impact of such an adjournment on eligibility for
17 work authorization.²

18 **Extension of Certain Deadlines Due to the Government Shutdown**

19 At the end of the day on September 30, 2013, the appropriations act funding for the
20 Department of Justice and much of the Department of Homeland Security expired and
21 appropriations lapsed. The Government did not resume normal activities until October 17, 2013.
22 During that period, many Government operations were shut down and many federal employees were
23 barred from working. Even those employees who were permitted to work were limited in their

24 ² The parties further contend that this objection was filed beyond the 30-day deadline to object to
anything other than the revisions the Court noted at the September 20, 2013 fairness hearing. The
original notice that the Court approved in May 2013 – relating to the original proposed settlement
agreement – instructed individuals to file their objections within 30 days. That 30-day period expired
prior to the fairness hearing the Court held on September 20, 2013, and this objection had not been
filed by that time. The second notice, which the Court approved in September 2013, sought
objections only to the revised portions of the proposed agreement. The objection, submitted in
October 2013, does not relate to the revised provisions.

1 abilities to accomplish their tasks due to the massive reduction of the federal workforce.³ As a
2 result, the Defendants in this case were hampered in their ability to implement the provisions of the
3 Agreement due to be rolled out six (6) months from the Effective Date of the Agreement, or not later
4 than November 8, 2013.⁴

5 Accordingly, Defendants propose, and Plaintiffs do not oppose, to extend those deadlines
6 affected by the Government shutdown until Tuesday, December 3, 2013. This brief extension
7 corresponds to the length of the Government shutdown, plus a few additional days to accommodate
8 the fact that the Thanksgiving Holiday falls during this period.⁵ Specifically, the parties seek to
9 extend deadlines associated with the following:

- 10 • Defendants will implement the interim procedures to afford relief to the affected
11 “Hearing Claim” subclass members (relating to the “lodge not filed” relief)
- 12 • Defendants will implement the interim procedures to afford relief to the affected
13 “Notice and Review Claim” class members (relating to amending the November 15,
14 2011, Operating Policies and Procedures Memorandum (OPPM) 11-02: The Asylum
15 Clock from Chief Immigration Judge Brian O’Leary, and the creation of interim
16 notices, including the USCIS and EOIR Joint Notice, regarding employment
17 authorization for individuals with pending applications)

17 ³ The the Office of Immigration Litigation and EOIR, both components of the Department of Justice,
18 were significantly affected by the shutdown, with the majority of their employees being furloughed.
19 In addition, while most USCIS employees continued to work during shutdown, Department of
20 Homeland Security headquarters personnel were affected, including leadership and supervisory
employees necessary for review and clearance of documents and other matters at various stages of
preparation, and otherwise necessary to the timely implementation of the Agreement.

21 ⁴ The Government Defendants have calculated and announced this deadline as November 7 in some
of their publications, while the Plaintiffs have reported it as November 8.

22 ⁵ The parties submit that no additional notice of these changes is required, because the only purpose
23 of such a notice would be to allow individuals to object to the delay, which would, by necessity,
create *more* delay.

- 1 • Defendants will implement the interim procedures to afford relief to the affected
2 “Prolonged Tolling” subclass members (including further amendments to OPPM 11-
3 02)
- 4 • Defendants will implement the procedures to afford relief to the affected “Missed
5 Asylum Interview Claim” subclass members
- 6 • Defendants will implement the procedures to afford relief to the affected “Remand”
7 subclass members (relating to the inclusion of time after remand of an asylum claim
8 into the calculation for eligibility for employment authorization).

9 **Findings and Approval of Class Certification**

10 Having considered the parties’ submissions and the objection filed, the Court finds as follows:

- 11 1. Except as specifically noted below, the Court, for the purposes of this Order adopts the
12 definitions set forth in the Settlement agreement.
- 13 2. The Court on April 17, 2013, certified the following class and subclasses:

14 Notice and Review Class: All noncitizens in the United States who meet all of the following
15 criteria: (1) have filed or will file or lodge with Defendants a complete asylum application;
16 (2) whose asylum applications have neither been approved nor subjected to a denial for
17 which no rights of review or appeal remain; (3) whose applications for employment
18 authorization have been or will be denied; (4) whose eligibility for employment authorization
19 based on a pending asylum application will be determined in a manner that is alleged to
20 provide insufficient notice and/or opportunity for review; and (5) who fall in one or more of
21 the following Subclasses:

22 Hearing Subclass: Individuals who meet all of the following criteria: (1) who have been
23 or will be issued a Form I-862, *Notice to Appear* in removal proceedings, or Form I-863,
24 *Notice of Referral* to an immigration judge; (2) who have filed or lodged, or sought to
lodge, or who will lodge or seek to lodge a complete defensive asylum application with
the immigration court prior to a hearing before an immigration judge; and (3) whose
eligibility for employment authorization has been or will be calculated from the date the
asylum application was or will be filed at a hearing before an immigration judge.

Prolonged Tolling Subclass: Asylum applicants who meet all of the following criteria: (1)
non-detained asylum applicants whose time creditable toward employment authorization
is or will be stopped due to delay attributed to them by Defendants; (2) who have
allegedly resolved the issue causing the delay or will allegedly resolve the issue causing
the delay prior to the next scheduled hearing before an immigration judge; (3) but whose

1 time creditable toward employment authorization remains or will remain stopped until
2 the next hearing date.

3 Missed Asylum Interview Subclass: Asylum applicants who meet both of the following
4 criteria: (1) who have failed or will fail to appear for an asylum interview with USCIS;
5 and (2) who have not or will not accrue time creditable toward eligibility for employment
6 authorization following the date of the missed asylum interview on account of missing
7 that asylum interview.

8 Remand Subclass: Asylum applicants who meet both of the following criteria: (1) whose
9 asylum applications were or will be denied by the immigration court before they have
10 been pending at least 180 days exclusive of applicant caused delays; and (2) who
11 subsequent to an appeal in which either the Board of Immigration Appeals (BIA) or a
12 federal court of appeals remands their case for further adjudication of their asylum claim
13 by an immigration judge, have not or will not accrue additional time creditable toward
14 eligibility for employment authorization.

15 3. This Court has jurisdiction over the subject matter of the litigation and over all parties
16 to the Settlement Agreement, including all members of the Settlement Class.

17 4. The Notice to the Class given pursuant to the Court's Preliminary Approval Order,
18 Dkt. No. 61, and Order Approving Notice on Attorneys' Fees and Modification of the Settlement
19 Agreement, Dkt. No. 70, constituted the best notice practicable under the circumstances to all
20 potential members of the Class, and fully complied with Fed. R. Civ. P. 23(e)(1). The Court finds
21 that such notice was reasonable, that it constitutes adequate and sufficient notice to all persons
22 entitled to receive notice, and that it meets the requirements of Due Process. Class members were
23 given a full and fair opportunity to address the merits of class counsel's representation and the
24 adequacy of the terms of the Settlement Agreement.

5. The Court has reviewed the request for clarification and the objection to the
Settlement Agreement submitted to the Court. The Court agrees that the revision to the Settlement
Agreement addresses the request for clarification. The Court has heard, considered, and overruled
the objection that has been voiced to the Settlement Agreement, for the reasons recited above.

1 6. The settlement set forth in the Settlement Agreement, which is incorporated herein by
2 reference, is now hereby approved as fair, reasonable, and adequate to all parties and Class
3 members, pursuant to Fed. R. Civ. P. 23(e).

4 7. In reaching its conclusion that the Settlement Agreement is fair, reasonable, and
5 adequate, the Court has considered, among other things, the following factors: (a) the strength of the
6 Plaintiffs' case; (b) the risk, expense, and complexity and likely duration of further litigation; (c) the
7 risk of maintaining class action status throughout the trial; (d) the policy changes implemented as
8 part of the settlement agreement and amount offered in settlement; (e) the extent of discovery
9 completed and the stage of the proceedings; (f) the experience and views of counsel; (g) the presence
10 of government participants; and (h) the reaction of Class members to the proposed settlement.

11 8. The Court reiterates its prior finding, Dkt. No. 54, that the Settlement Class satisfies
12 all requirements of Fed. R. Civ. P. 23(a) and 23(b)(2).

13 9. The Court reaffirms its appointment of class counsel, Dkt. No. 54: Matt Adams and
14 Christopher Strawn, Northwest Immigrant Rights Project (NWIRP); Melissa Crow, Mary Kenney,
15 and Emily Creighton, American Immigration Council (AIC); Robert H. Gibbs and Robert Pauw,
16 Gibbs Houston Pauw; and Iris Gomez, Massachusetts Law Reform Institute (MLRI). The Court
17 reiterates its finding that, as required by Fed. R. Civ. P. 23(g), class counsel has fairly, adequately,
18 and competently represented the interests of the Class. The Court hereby grants the parties' request
19 that Defendants pay class counsel attorneys' fees and costs in the amount of \$425,000, to be
20 distributed in accordance with the Settlement Agreement.

21 10. Because the lapse in appropriations and the resulting Government shutdown has
22 caused Defendants to require additional time to complete the necessary tasks to implement various
23 provisions of the proposed settlement agreement, and because the parties have agreed that a brief

1 extension neither frustrates the purpose of the agreement, nor is unfair to Class members, the Court
2 will extend all deadlines which otherwise would have occurred on November 8, 2013 (*i.e.*, six (6)
3 months after the date the Court granted preliminary approval), until December 3, 2013.

4 11. A separate Judgment is separately and concurrently entered on Form AO 450. The
5 Court shall retain jurisdiction over this matter for purposes of supervising the implementation,
6 enforcement, construction, and interpretation of the Settlement Agreement, and specifically as
7 provided in Part II.11 in the Settlement Agreement (Dispute Resolution Mechanism).

8 Dated this ___ day of (Insert Month), 2013.

9
10 _____
The Honorable Richard A. Jones
UNITED STATES DISTRICT JUDGE

11
12 Presented this 29th day of October, 2013, by:

13 For the Plaintiffs:

14 /s/ Christopher Strawn
15 Christopher Strawn
Northwest Immigrant Rights Project
16 615 Second Ave., Suite 400
Seattle, WA 98104

For the Defendants:

14 /s/ J. Max Weintraub
15 J. Max Weintraub
Senior Litigation Counsel
16 United States Department of Justice
Civil Division
17 Office of Immigration Litigation
District Court Section
18 P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044

1 DATED: October 30, 2013

Respectfully submitted,

2 /s/ Christopher Strawn
3 Matt Adams #28287
4 Christopher Strawn #32243
5 NORTHWEST IMMIGRANT
6 RIGHTS PROJECT
7 615 2nd Avenue, Suite 400
8 Seattle, WA 98104
9 (206) 587-4009 ext. 111
10 (206) 587-4025 (Fax)
11 matt@nwirp.org
12 chris@nwirp.org

13 Melissa Crow
14 Mary Kenney
15 Emily Creighton
16 AMERICAN IMMIGRATION COUNCIL
17 1331 G Street NW, Suite 200
18 Washington, DC 20005
19 (202) 507-7512
20 (202) 742-5619 (Fax)
21 mcrow@immcouncil.org
22 mkenney@immcouncil.org
23 ecreighton@immcouncil.org

24 B.H. v. USCIS, Case No. 2:11-cv-02108RAJ
[PROPOSED] Order Approving Class Settlement

U.S. DEPARTMENT OF JUSTICE
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
202-305-7551

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Robert H. Gibbs
Robert Pauw
GIBBS HOUSTON PAUW
1000 Second Avenue, Suite 1600
Seattle, WA 98104
(206) 224-8790
(206) 689-2270 (Fax)
rgibbs@ghp-law.net
rpauw@ghp-law.net

Iris Gomez
MASSACHUSETTS LAW REFORM
INSTITUTE
99 Chauncy Street, Suite 500
Boston, MA 02111
(617) 357-0700 x. 331
(617) 357-0777 (Fax)
igomez@mlri.org

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

STUART F. DELERY
Assistant Attorney General
Civil Division

DAVID J. KLINE
Director

COLIN A. KISOR
Deputy Director

/s/ J. Max Weintraub
J. MAX WEINTRAUB
Senior Litigation Counsel
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Phone: (202) 305-7551
Fax: (202) 305-7000
Email: jacob.weintraub@usdoj.gov

JENNY A. DURKAN
United States Attorney
/s/ Priscilla T. Chan
PRISCILLA T. CHAN, WSBA# 28533
Assistant United States Attorney
Western District of Washington
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Phone: 206-553-7970
Fax: 206-553-4073
Email: priscilla.chan@usdoj.gov

Attorneys for Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2013, I electronically filed the foregoing proposed order with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered parties and their counsel.

/s/ J. Max Weintraub
J. MAX WEINTRAUB
Senior Litigation Counsel
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Phone: (202) 305-7551
Fax: (202) 305-7000
Email: jacob.weintraub@usdoj.gov