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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

MADHAVI R. CHINTAKUNTLA, AMJAD KHAN, RAJASEKHAR VONNA, SHASHAANKA AGRAWAL, SASIBHUSHNAN KUMAR YARLAGADDA, WANCHUN WANG Plaintiffs, v. UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE and DORIS MEISSNER, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, IN HER OFFICIAL CAPACITY, Defendants.	No. C 99-5211 MMC **~~[PROPOSED]~~ MEMORANDUM AND ORDER CERTIFYING CLASS AND GRANTING PERMANENT INJUNCTION** **May 4, 2000** **10:00 a.m.**

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[1]Mr. Surmaitis and Mr. Leiden appear *pro hac vice*.

I. INTRODUCTION:

The Plaintiffs seek class certification for their First Amended Complaint, which challenges decisions of the Defendant Immigration and Naturalization Service ("INS" or "Service") in adjudicating employment-based immigrant visa petitions (INS Forms I-140) that various employers have filed on behalf of the Plaintiffs and the proposed class members. The prospective employers, in filing the I-140 petitions, sought to have the prospective employees classified as preference immigrants as alien members of the professions with advanced degrees or the equivalent. This preference category is called the "EB-2 category," since it is the second of several employment-based immigrant visa categories. See, Immigration and Nationality Act ("INA") § 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Plaintiffs ask the Court to enter a permanent injunction compelling the INS to follow its own regulations and adjudicate the I-140 petitions of class members consistent with Congress' intent. After careful review of the pleadings filed by the parties in this case, and the argument of counsel, this Court finds that class certification should be granted in this case, and that permanent injunctive relief for those within the class is appropriate and necessary for the reasons discussed herein.[2]

II. JURISDICTION, VENUE, AND STANDING:

This controversy arises under the Immigration and Nationality Act, 8 U.S.C. § 1101, et seq., a United States statute. The Court, therefore, has jurisdiction over Plaintiffs' complaint. 28 U.S.C. § 1331. Since the Court has jurisdiction, the Court also has authority to declare the respective rights of the parties. 28 U.S.C. § 2201.

In addition, venue is proper in this Court because the named Plaintiffs live in the Northern District of California, and this action does not involve real property. 28 U.S.C. § 1391(e). It is also likely that many potential class members will live in the Northern District of

[2] The Government remains opposed to any injunction or class certification entered by the Court on the ground set forth in Defendants' Opposition to the Preliminary Injunction and Opposition to Class Certification filed February 24, 2000 as well as all supplemental briefing filed by Defendants on March 24, 2000.

1 California.

2 Under the Immigration and Nationality Act, only the prospective employer has standing
3 to file an EB-2 immigrant visa petition. INA § 204(a)(1)(D), 8 U.S.C. § 1154(a)(1)(D). Under
4 INS regulations, only the prospective employer has standing to appeal an adverse decision to the
5 AAO. 8 C.F.R. § 103.3(a)(1)(iii)(B). That is to say, the alien beneficiary has no standing in a
6 visa petition proceeding before the Service. The Ninth Circuit has held, however, that the alien
7 beneficiary does have standing to seek judicial review of a final administrative denial of a visa
8 petition. Abboud v. INS, 140 F.3d 843 (9th Cir. 1998). Accordingly, this Court also finds that
9 Plaintiffs have standing in the present action.

10

11 **III. CLASS CERTIFICATION**:

12 Plaintiffs and putative class members are all beneficiaries of employment based petitions
13 for permanent residency in the United States ("I-140's") whose Application for Alien
14 Employment Certification ("ETA 750") indicated that a Bachelor's degree (plus at least five years
15 experience) was required for the position. The denial of the I-140 petitions filed on behalf of
16 Plaintiffs and putative class members was on the basis that an advanced degree was not required
17 for the job positions identified on the attendant ETA-750 forms. See, e.g., Notices of Denial,
18 Plaintiffs' Exhibits C-2; E-3; F-3; G-2; H-2; M-2; M-4; N-2; N-4.

19 Thus, Plaintiffs have demonstrated that this case presents common questions of law and fact
20 and that claims of the named Plaintiffs are typical of the class as a whole. Walters v. Reno, 145
21 F.3d 1032, 1047 (9th Cir. 1998) ("[a]lthough common issues must predominate for class
22 certification under Rule 23(b)(3), no such requirement exists under 23(b)(2). It is sufficient if
23 class members complain of a pattern or practice that is generally applicable to the class as a
24 whole.") In addition, consistent with Fed. R. Civ. Proc. 23(b)(2) the Court finds that Plaintiffs
25 have established that the Defendants have acted on grounds generally applicable to the class, in
26 that, the present case involves Defendants' practice of denying I-140 petitions on the basis that an
27 advanced degree was not required for the job positions identified on the attendant ETA-750
28 forms. Plaintiffs have also demonstrated that the proposed class in this case is so numerous that

joinder would be impracticable, that the named Plaintiffs adequately represent the class, and that the interests of the class members will be adequately and fairly protected by Plaintiffs and their counsel.

This Court finds it appropriate in this case to set forth two sub-classes of affected individuals in light of the fact that class members will either have I-140 petitions currently pending adjudication, or will have had a final administrative determination -- thus calling for somewhat different remedial procedures for each sub-class.

The first sub-class will embrace those aliens whose visa petition cases were still pending before the Service on March 20, 2000 (whether before an INS Service Center or the INS' Administrative Appeals Office ("AAO")). For these aliens, adjudicating the question of the sufficiency of the ETA-750 will benefit the aliens, the visa petitioners, and the Service by clarifying the legal issue, thus helping to avoid needless litigation of individual cases.

The second sub-class will include those aliens whose visa petition cases are no longer pending before the Service, because the Service made an administratively final decision on or after July 1, 1997, and no administrative appeal was taken, or the petitioner appealed the denial and the AAO affirmed the Service Center's denial of the petition.

IV. STANDARD OF REVIEW:

Congress has entrusted to the Attorney General broad authority to administer the INA, including the specific authority to adjudicate EB-2 immigrant visa petitions. INA §§ 103(a) and 204(a)(1)(D), 8 U.S.C. §§ 1103(a) and 1154(a)(1)(D). The Attorney General, in turn, has delegated this authority to the Service. 8 C.F.R. §§ 2.1, 103.1(f)(3)(iii)(B) and 204.5(b).

While administrative agencies are often afforded deference by the courts in the interpretation of the laws they are entrusted with, this is not the case where the issue is one of "pure law" or where the agency's interpretation is contrary to Congressional intent. Cardoza-Fonseca v. INS,

480 U.S. 421, 447-48, 107 S.Ct. 1207, 1221 (1987) (The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent). Because the issue in the present case is one of statutory construction, and because the undisputed evidence in this case demonstrates that the INS' interpretation of the law with respect to the defined class has been inconsistent with the INS' own regulations, the INS' interpretation is not entitled to deference from this Court.

V. STANDARDS GOVERNING EB-2 "ADVANCED DEGREE" CASES:

The central issue in the present litigation is what language must be stated on an ETA-750, Part A, (Labor Certification) in order to demonstrate that an "advanced degree" or the equivalent is required for the position. This question would appear to be answered by INS' regulation which define an "advanced degree" as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of a baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of an advanced degree.

8 C.F.R. § 204.5(k)(2).

On March 20, 2000, after the filing of this lawsuit, the Acting INS Associate Commissioner for Programs and the Deputy Executive Associate Commissioner for Field Operations, issued a policy memorandum ("March 20, 2000, Memorandum") which provided some clarification of the requirements for demonstrating that an "advanced degree" or the equivalent is a job requirement that is directly relevant to the present case.

The March 20, 2000, Memorandum sets forth five basic principles regarding EB-2 I-140 adjudications. First, the March 20, 2000, Memorandum makes clear that it is the stated requirements of the job that the Service must consider in determining whether the job requires a professional with an advanced degree, or the equivalent. March 20, 2000, Memorandum at 2. Second, it establishes a definition of "progressive experience." Id. at 3. Third, it establishes that

the best way for the petitioner to meet its burden of proving that the job requires an advance degree professional is to make this requirement explicit on the ETA-750. Id. at 3-4. If a baccalaureate degree is acceptable, the ETA-750 should make it explicit that the person with a baccalaureate must also have five years' post-baccalaureate progressive experience. Id. Fourth, if the ETA-750 does not make this point explicitly, the Service officer should read the ETA-750 as a whole to determine whether it is reasonable to infer that the job would require someone with an advanced degree, or with a baccalaureate and five years' post-baccalaureate progressive experience. Id. at 4. Finally, if the ETA-750 is not clear, then before denying the petition, the Service officer "should request that the petitioner provide a supplemental statement clarifying whether the position requires five years of post-baccalaureate experience that is truly progressive in nature." Id. at 4.

The five basic principles contained in the March 20, 2000 Memorandum greatly advance the interests of the proposed class members and of the Service in the proper adjudication of EB-2 visa petitions. The March 20, 2000 Memorandum states that INS will not deny EB-2 I-140 petitions solely because a petitioner does not state the words "progressive," or "followed by." March 20, 2000 Memorandum at p. 3. Moreover, the memorandum states that:

> [t]he terms 'MA,' 'MS,' 'Master's Degree or Equivalent,' and 'Bachelor's degree with five years of progressive experience,' all equate to the educational requirements of a member of the professions holding an advance degree. The threshold for granting EB-2 classification will be satisfied when any of these terms appear in block 14 [of the ETA-750, Part A)...[though]. . .[i]t is also important to read the ETA-750 as a whole.. . .
> As long as the minimum requirement for the job offered is a master's degree or the Equivalent, the position should be found to require a member of the professions holding an advanced degree. This is true even if several variations of this requirement are stated.
>
> March 20, 2000 Memorandum at p. 4.

Thus, the March 20, 2000 Memorandum clarifies that INS adjudicators will examine the ETA-750 as a whole, and that variations in the educational requirement, including language which states that a Bachelor's degree plus (at least) five years of progressive experience, or similar language which indicates that a Master's degree or the equivalent is required, will be

acceptable.

The Court holds, however, that the issuance of the March 20, 2000, Memorandum does not render this case moot. First, the March 20, 2000, Memorandum is just that -- a policy memorandum. Since it has not been promulgated as a rule, it does not, strictly speaking, have the force of law. Nor has the Service, as yet, designated any precedent decisions incorporating the March 20, 2000, Memorandum. Thus, although it is a statement of policy, there is a question of whether it binds Service officers as a matter of law. Cf. 8 C.F.R. § 103.3(c). The Court does not mean to suggest that the Service did not, in good faith, intend Service officers to follow the March 20, 2000 Memorandum. The Court simply notes that the March 20, 2000 Memorandum, itself, does not adequately secure the rights of the proposed class members.

VI. PERMANENT INJUNCTION

Plaintiffs have raised the problem of class members whose periods of authorized non-immigrant stay may well expire before the Service can adjudicate their employers' visa petitions in light of the March 20, 2000, Memorandum. This problem was exacerbated by the regression, effective April 1, 2000, in the availability of immigrant visas in the second employment based preference visa category for persons born in India and the People's Republic of China ("Mainland China") and the possibility of further regression. In short, an alien who wishes to adjust status on the basis of an approved EB-2 visa petition cannot do so unless "an immigrant visa is immediately available" and the alien is otherwise eligible to file an adjustment application. INA § 245(a)(3), 8 U.S.C. § 1255(a)(3), INA § 245(c), 8 U.S.C. § 1255(c); 8 C.F.R. § 245.1(g)(1).

Thus, absent relief from this Court, many class members are in danger of imminent harm in that they would lose the ability to adjust their status to lawful permanent residents prior to

Defendants being able to correct the improper denials of their petitions in the normal course of the existing administrative process, due to an expiration of their non-immigrant status or the potential regression of immigrant visa priority dates. These factors additionally demonstrate that permanent injunctive relief is appropriate as there is a likelihood of substantial and immediate irreparable injury which the March 20, 2000 Memorandum may not sufficiently remedy (or moot), and there does not appear to be another adequate remedy at law. See, LaDuke v. Nelson, 762 F.2d 1318, 1330 (9th Cir. 1985), modified on other grounds, 796 F.2d 309 (9th Cir. 1986)(In order to obtain permanent injunctive relief Plaintiffs must demonstrate 'the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law.')(quoting O'Shea v. Littleton, 414 U.S. 488, 502, 94 S. Ct. 669 (1974)). To satisfy this standard, plaintiffs "must establish actual success on the merits, and that the balance of equities favors injunctive relief." Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 558 (9th Cir. 1990).

As outlined above, this Court cannot sustain INS' denials of class members' EB-2 I-140 petitions on the basis that the I-140 petitions filed on behalf of class members did not demonstrate that an "advanced degree," or the equivalent, was required for the job position.

In addition, the balance of equities tips in favor of the Plaintiffs. Without lawful immigration status, class-members and their families will be forced to leave the United States, as several have already been forced to do, leaving their jobs, their schools and communities. Although the imposition of certain special procedures for the re-adjudication of class-members' I-140 petitions will impose some burden on INS, viewing all of the factors of this case as a whole this Court finds that the equities tip in favor of the Plaintiffs and class-members. The Court finds that the INS bears the greatest responsibility for the improper denials of the I-140's in this case. Had the INS clearly, consistently and definitively ruled on whether "Bachelor's plus 5" satisfied the INS' regulations and the INA as to what constitutes

1 the "equivalent of an advanced degree", this lawsuit would not have been necessary.

2 The Court's concern for the potential for disruption for INS, as well as considerations of what would best meet the needs of class-members to make them, as near as possible, whole and to ensure that they do not suffer irreparable harm, is addressed through the narrowly tailored plan jointly submitted to the Court by the parties pursuant to the Court's April 4, 2000 order.

After careful review of the joint submission of the parties, the pleadings in this case, argument of counsel, and in consideration of the respective interests of the parties and class-members, the Court finds the joint submission to be consistent with the Court's equitable powers in granting appropriate and necessary relief, and finds that the terms of the Order fairly and adequately protect the interests of class-members and achieves a fair result.

VII. <u>ORDER</u>:

For the reasons set forth in this Memorandum, it is hereby ORDERED that:

1. This case is certified as a class action, in accordance with Rule 23 of the Rules of Civil Procedure.

2. The certified class is comprised of:

> any alien who is the beneficiary of an I-140 Employment Based Second Preference (EB-2) immigrant visa petition seeking to classify the alien beneficiary as a member of the professions holding an advanced degree, or the equivalent, whose ETA-750 indicated that a bachelor's degree (plus at least five years experience) was required for the position, whose I-140 petition was or may be denied by the Service on the basis that the position did not require an advanced degree, and who falls within one of the following 2 sub-classes:

A. The first sub-class includes any alien described in Part 2(i) above and:

> in whose case the I-140 petition was still pending before the Service on March 20, 2000, (whether before a Service Center or before the AAO); a case will be considered "pending" if an appeal has been filed or if the time for filing a notice of appeal had not expired as of March 20, 2000 and an appeal was timely filed.

B. The second sub-class includes any alien described in Part 2(i) above and:

1. in whose case the Service made an administratively final decision on or after July 1, 1997 denying the EB-2 visa petition (whether because the AAO affirmed the initial denial or because the petitioner did not appeal the initial denial to the AAO); and

2. in whose case there is not already pending a civil action seeking judicial review of the final Service decision in a different case.

3. No particular notice is needed for members of the first sub-class, since paragraph 6 of this Order specifically requires the Service to adjudicate visa petitions for those aliens in light of the March 20, 2000, Memorandum.

4. For members of the second sub-class, the Service will, within 60 days of the date of this order, publish in the Federal Register a notice concerning the opportunity under paragraph 7 of this Order for members of this sub-class to file untimely motions to reconsider. In addition, the notice will advise that, notwithstanding 8 C.F.R. § 245.1(g)(1), as stated in paragraph 8 herein, the Service will accept for filing any class member's application for adjustment of status even before the Service has approved the I-140, provided the class-member is otherwise eligible to apply for adjustment of status. In addition, the published notice will notify class members that November 1, 2000 will be the last date by which motions to reconsider pursuant to paragraph 7 of this Order, and applications for adjustment of status pursuant to paragraph 8 may be filed with the Service. As provided in 44 U.S.C. § 1507, publication of this notice in the Federal Register will be sufficient notice to members of the second sub-class. Prior to the publication of the notice and its effective date members of the second sub-class may file motions to reconsider as set forth in INS' regulations at 8 C.F.R.§ 103.5(a)(1)(i). The INS will reconsider the denied cases and re-adjudicate the I-140's pursuant to the March 20, 2000 memorandum.

5. Because the Service has a legitimate interest in the finality of its decisions and in the orderly judicial review of its decisions, this Court will not order relief for any alien in whose case the Service made an administratively final decision before July 1, 1997, without prejudice to the ability of the petitioner or beneficiary to seek judicial review of the final Service decision through

a separate civil action under 5 U.S.C. § 701, et seq.

6. For any alien in the first sub-class, the Service will adjudicate the employer's visa petition in light of the March 20, 2000, Service Memorandum, specifically including the provision for asking the petitioner to submit a supplemental statement to clarify any ambiguity in the ETA-750.

7. For any alien in the second sub-class, the Service will accept and adjudicate a motion to reconsider the Service decision in light of the March 20, 2000, Memorandum, even if the 30-day period specified under 8 C.F.R. § 103.5(a)(1)(i) for filing motions to reconsider has elapsed, provided that the petitioner files the motion to reconsider by November 1, 2000 along with the fee specified in 8 C.F.R. § 103.7(b). Under such circumstances, the Service will reconsider and re-adjudicate the previously denied I-140 petition in accordance with the March 20, 2000 Memorandum.

8. The Service will, notwithstanding 8 C.F.R. § 245.1(g)(1), accept for filing any class member's application for adjustment of status, even before the Service has approved the INS Form I-140 filed on the class member's behalf, as long as the class member is otherwise eligible to apply for adjustment of status, has a current priority date when he or she files the application, and the application is received by the Service on or before November 1, 2000. The class member, and any accompanying spouse or child, must file complete adjustment applications, including INS Form I-485, the filing and fingerprint fees, and all other documents and evidence required by the instructions on the Form I-485 and by 8 C.F.R. part 245. A final decision denying the Form I-140 will warrant denial of the adjustment application as well.

9. The Service will follow its standing policy to expedite adjudication of a class member's adjustment application, to the extent that the Service can feasibly do so, if the class member gives the Service 120 days written notice, accompanied by a birth certificate or other proof, of the date on which a child of the class member will become 21 years old. For class member

Dinesh Chandra, already brought to the attention of the Service prior to the entry of this Order, the requirement of 120 days written notice is waived and INS shall make its best efforts to expedite the adjudication of Mr. Chandra's adjustment application.

10. Any alien who is entitled to file an application for adjustment of status under paragraph 8 of this order may also file an application for employment authorization (INS Form I-765) and advance parole (INS Form I-131), with the appropriate fees. If the alien addresses the filing to the director of the appropriate Service office, clearly marks the envelope with the notation "**EB2 CLASS MEMBER, DO NOT OPEN IN MAIL ROOM. DELIVER IMMEDIATELY TO DIRECTOR'S OFFICE,**" identifies himself or herself as a member of the first or second sub-class in this case, and advises the Service of the date on which the alien's current employment authorization is scheduled to expire, the Service will adjudicate the INS Form I-765 by the day before the date on which the alien's current employment authorization is scheduled to expire. If the Service approves the applications for employment and travel authorization, the Service will issue the appropriate documents.

11. The Service shall treat what the Court has called the five basic principles regarding readjudication of EB-2 I-140 petitions, as outlined in the March 20, 2000, Memorandum as binding on the Service in its adjudication of advanced degree professional EB-2 visa petitions, until such time as the Service validly promulgates different rules in accordance with 5 U.S.C. § 553. Consistent with its March 20, 2000 memorandum, INS will not deny an EB2 I-140 petition solely because the petitioner stated on the ETA-750, Part A, that a Bachelor's degree plus at least five years of experience would be an acceptable equivalent requirement in lieu of a Master's degree, unless the INS specifically finds, on the basis of the record as a whole, including any supplementary statement filed under the March 20, 2000 Memorandum, the petitioner has failed to establish that "Bachelor's degree plus five years of experience" meant five years post-baccalaureate progressive experience in the speciality is the minimum acceptable qualification

1 for the position.

2 12. Defendants will re-adjudicate a maximum of 25 EB-2 I-140 petitions of class members
3 who are physically outside of the United States. Plaintiffs' counsel will make reasonable efforts
4 to identify to Defendants cases requiring re-adjudication under this paragraph. Defendants will
5 re-adjudicate the cases so identified by Plaintiffs' counsel in full accordance with the March 20,
6 2000 memorandum issued by the INS on the subject of "Education and Experience Requirements
7 for Employment-Based Second Preference (EB-2) Immigrants." For those cases that are
8 identified to Defendants on or before May 8, 2000, Defendants will re-adjudicate those cases, or
9 make requests of the petitioner for additional information, no later than June 8, 2000. If further
10 additional information is requested of the petitioner, Defendants will re-adjudicate the case
11 within thirty (30) days of INS' receipt of the requested information. As of the date of this Order,
12 Plaintiffs' counsel are aware of 13 individuals who meet the criteria described in this paragraph,
13 and names and INS file numbers of these individuals have been previously provided to
14 Defendants. As additional cases of class members meeting the criteria described in this paragraph
15 become known to Plaintiffs' counsel, they will furnish identifying information on those cases to
16 Defendants through counsel on or before August 8, 2000. For such additional cases that can be
17 identified to Defendants on or before August 8, 2000, Defendants will re-adjudicate those EB-2
18 I-140 petitions, or request additional information, within 30 days of identification to Defendants
19 of a case by Plaintiffs' counsel. If further additional information is requested of the petitioner,
20 Defendants will re-adjudicate the case within thirty (30) days of INS' receipt of the requested
21 information. The Service will designate a contact person(s) to receive information from
22 Plaintiffs' counsel under this paragraph, and to whom Plaintiffs' counsel may direct questions
23 regarding the status of petitions being re-adjudicated under this paragraph.

24 13. Due to the relief ordered as specified above, the Court denies the relief that Plaintiffs'
25 request with regard to enjoining Defendants from application of INA §§ 212(a)(9) and 245(c), 8
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U.S.C. §§ 1182(a)(9) and 1255(c), to any alien in the two sub-classes who remains in the United States after the period of the alien's authorized non-immigrant admission expires.

14. The Clerk shall enter judgment in accordance with this Memorandum and Order.

Dated: MAY X 4 2000

MAXINE M. CHESNEY

Maxine M. Chesney
United States District Judge