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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CATHOLIC SOCIAL SERVICES,  
INC., - IMMIGRATION PROGRAM,  
et al.,

NO. CIV.S-86-1343 LKK/JFM

Plaintiffs,

v.

O R D E R

MICHAEL CHERTOFF, SECRETARY  
U.S. DEPARTMENT OF HOMELAND  
SECURITY, et al.,

Defendants.

\_\_\_\_\_ /

In January 2004, the court approved a class settlement in this case. The class action addressed regulations implementing the legalization program for undocumented immigrants under the Immigration Reform and Control Act, 8 U.S.C. 1255a. Plaintiffs move to enforce the class action settlement on the theory that defendants are engaging in a pattern and practice of refusing to implement the relief set forth in the settlement agreement.

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1 **I. BACKGROUND**

2 On November 12, 1986, plaintiffs filed a class action  
3 complaint challenging regulations promulgated by the Immigration  
4 and Nationalization Service (INS) to implement the 1986 amnesty  
5 program for undocumented immigrants. After protracted  
6 litigation, including numerous appeals to the Supreme Court and  
7 the Ninth Circuit, the parties reached a settlement and on  
8 December 1, 2003, they filed a joint motion to approve it. On  
9 January 23, 2004, this court issued an order approving the  
10 settlement.

11 The settlement defined the plaintiff class entitled to  
12 relief as:

13 A. All persons who were otherwise prima facie eligible  
14 for legalization under section 245A of the INA and who  
15 tendered completed applications for legalization under  
16 section 245A of the INA and fees to an INS officer or  
17 agent acting on behalf of the INS, including a QDE,  
18 during the period from May 5, 1987 to May 4, 1988, and  
19 whose applications were rejected for filing because an  
20 INS officer or QDE concluded that they had traveled  
21 outside the United States after November 6, 1986  
22 without advance parole.

19 B. All persons who filed for class membership under  
20 Catholic Social Services, Inc. v. Reno, CIV No. S-86-  
21 1343 LKK (E.D. Cal.), and who were otherwise prima  
22 facie eligible for legalization under Section 245A of  
23 the INA, who, because and INS officer or QDE concluded  
24 that they had traveled outside the United States after  
25 November 6, 1986 without advance parole were informed  
26 that they were ineligible for legalization, or were  
refused by the INS or its QDEs legalization forms, and  
for whom such information, or inability to obtain the  
required application forms, was a substantial cause of  
their failure to timely file or complete a written  
application.

26 Joint Motion to Approve Settlement of Class Action, Dec. 1,

1 2003, Ex. 1 ("Settlement Agreement") at ¶ 1. The settlement set  
2 forth a process for determination of whether an individual was a  
3 member of the plaintiff class. The individual is to submit an  
4 application for class membership and an application for status  
5 as a temporary resident, with supporting documentation, to the  
6 defendants. Id. at ¶ 4. The defendants are to grant class  
7 membership applications where "it appears more probable than not  
8 that the applicant meets the class definition." Id. at ¶ 6.  
9 Prior to denying an application, the defendants must forward to  
10 the applicant or his or her representative "a notice of intended  
11 denial explaining the perceived deficiency in" the application.  
12 Id. at ¶ 7. The applicant then has thirty days to submit  
13 additional evidence or otherwise remedy the deficiency. Id.

14 If, after this, the application is denied, the defendants  
15 must send a copy of the notice of denial to the applicant, his  
16 or her attorney, and class counsel. Id. at ¶ 8. Defendants must  
17 inform the applicant of his or her right to appeal the denial to  
18 a special master. Id. at ¶¶ 8-9. The applicant may also appeal  
19 the decision of the special master to this court. November 12,  
20 2008 Order, Doc. No. 667.

21 If, however, the application is granted, defendants must  
22 adjudicate the class member's application for temporary  
23 residence as if it were timely filed between May 5, 1987 and May  
24 4, 1988. Settlement Agreement at ¶ 11.

25 Plaintiffs raise two separate concerns with defendants'  
26 compliance with the settlement agreement. First, plaintiffs

1 contend that defendants are engaging in a pattern and practice  
2 of applying a regulation that was enacted in 1991 to class  
3 members' applications for temporary residence. Defendants do not  
4 contest that they are applying this regulation. Specifically,  
5 defendants have applied and continue to apply a so-called  
6 "abandonment" regulation where applicants fail to provide  
7 supplemental evidence after requested to do so by the  
8 government. After a class member's application is terminated  
9 under the abandonment regulation, her only option is to file a  
10 motion to reopen along with the required fee. Plaintiffs argue  
11 that defendants may not apply this regulation to class members'  
12 applications pursuant to the settlement agreement.

13 Second, plaintiffs argue that defendants have engaged in a  
14 pattern and practice of declining to consider applications for  
15 class membership by applicants residing abroad. Plaintiffs  
16 further contend that defendants have failed to notify these  
17 applicants of their right to appeal a decision denying their  
18 applications for class membership to a special master.

19 Plaintiffs seek both retrospective and prospective relief.  
20 In particular, they ask the court to order defendants to cease  
21 the behavior they allege violates the settlement agreement and  
22 to re-adjudicate the allegedly wrongfully decided claims and  
23 refund any allegedly wrongfully obtained fees.

24 **II. STANDARD OF REVIEW**

25 Federal courts may not enforce all settlements entered in  
26 cases before them. Rather, federal courts only have jurisdiction

1 where "the parties' obligation to comply with the terms of the  
2 settlement agreement had been made part of the order of  
3 dismissal - either by separate provision (such as a provision  
4 'retaining jurisdiction' over the settlement agreement) or by  
5 incorporating the terms of the settlement agreement in the  
6 order." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375,  
7 381 (1994). "[M]ere awareness and approval [by a federal judge]  
8 of the terms of a settlement agreement do not suffice to make  
9 them part of" the judge's order. Id. Instead, the dismissal must  
10 expressly reserve[] jurisdiction []or incorporate[] the terms of  
11 the settlement agreement." Hagestad v. Tragesser, 49 F.3d 1430,  
12 1433(9th Cir. 1995). If the terms of the settlement agreement  
13 are not made part of the order of dismissal, "enforcement of the  
14 settlement agreement is for state courts, unless there is some  
15 independent basis for federal jurisdiction." Kokkonen, 511 U.S.  
16 at 382.

17 Here, the settlement agreement specifically retained  
18 jurisdiction over two types of claims: (1) "claims by plaintiffs  
19 that the Defendants have engaged in a pattern and practice of  
20 refusing to implement any of the relief set forth in this  
21 Agreement;" and (2) "claims by plaintiffs that the Defendants  
22 have expressly repudiated this Agreement." Exhibit One to Joint  
23 Motion to Approve Settlement of Class Action ("Settlement  
24 Agreement"), Doc. No. 650, at ¶ 18. This express provision  
25 retaining jurisdiction satisfies Kokkonen, and the court  
26 therefore has jurisdiction over these two types of claims.

1 Courts view settlement agreements as "contract[s] and  
2 [their] enforceability is governed by familiar principles of  
3 contract law." Jeff D. v. Andrus, 899 F.2d 753, 759 (9th Cir.  
4 1990). When the United States is a party to a contract entered  
5 pursuant to federal law, "federal law controls the  
6 interpretation" of the contract. Kennewick Irrigation District  
7 v. United States, 880 F.2d 1018, 1032 (9th Cir. 1989). Courts  
8 often refer to general principles of contract interpretation  
9 when applying federal contract law. Id. Thus, when evaluating  
10 plaintiffs' motion, the court will interpret the settlement  
11 agreement according to general principles of contract  
12 interpretation.

### 13 III. ANALYSIS

#### 14 A. Whether USCIS May Apply the Abandonment Regulation to 15 Applications for Class Membership and Legalization

##### 16 i. Requirements of Settlement Agreement

17 In 1991, the Immigration and Nationalization Service  
18 ("INS"), the predecessor the U.S. Citizenship and Immigration  
19 Service ("USCIS"), among other agencies, implemented an  
20 "abandonment regulation," 8 C.F.R. § 103.2(b)(13)(i) (2009), for  
21 applications to change immigrant status. The relevant section of  
22 this regulation states that, "If the petitioner or applicant  
23 fails to respond to a request for evidence or to a notice of  
24 intent to deny by the required date, the application or petition  
25 may be summarily denied as abandoned, denied based on the  
26 record, or denied for both reasons." Id. "A denial due to

1 abandonment may not be appealed, but an applicant or petitioner  
2 may file a motion to reopen under § 103.5" Id. at §  
3 103.2(b)(15). Currently, USCIS charges a \$585.00 filing fee<sup>1</sup> to  
4 file such a motion. 8 C.F.R. § 103.7(b)(1).

5 Plaintiffs have presented evidence that USCIS has applied  
6 the abandonment regulation to the legalization applications of  
7 some class members. These class members are instructed by USCIS  
8 that they may reopen their applications by filing the § 103.5  
9 motion along with a filing fee. Defendants admit that, "In some  
10 instances USCIS applied the 1991 abandonment and reopening  
11 regulation[s to class member applications], which permits the  
12 agency to deny an application as abandoned, from which there is  
13 no administrative appeal, although there is the right to move to  
14 reopen to establish the application was not abandoned."

15 Opposition at 2. This admission along with plaintiffs' anecdotal  
16 evidence demonstrates that defendants have engaged in a pattern  
17 and practice of applying the abandonment and reopening  
18 regulations to the legalization applications of plaintiffs.

19 Plaintiffs contend that this practice constitutes a refusal  
20 to implement the relief set forth in the settlement agreement,  
21 thereby entitling the court to jurisdiction over the claim.  
22 Specifically, plaintiffs argue that application of a 1991  
23 regulation to class members' seeking legalization violates the  
24 express relief set forth in the settlement agreement.

25 \_\_\_\_\_  
26 <sup>1</sup> In their brief, plaintiffs indicate that the fee is \$385.00.  
Motion at 18. The current regulations list a fee of \$585.00.

1           The settlement agreement provides that, "The Defendants  
2 shall adjudicate each application for temporary residence filed  
3 on Form I-687 in accordance with the provisions of section 245A  
4 of the Immigration and Nationality Act, 8 U.S.C. § 1255a,  
5 regulations, and administrative and judicial precedents the INS  
6 followed in adjudicating I-687 applications timely filed during  
7 the [Immigration and Reform Act of 1986 ("IRCA")] application  
8 period." Settlement Agreement at ¶ 11. The IRCA application  
9 period began on May 5, 1987 and ended on May 4, 1988 ("1987-1988  
10 application period"). Reno v. Catholic Social Servs., 509 U.S.  
11 43, 46 (1993) (citing 8 U.S.C. § 1255a(a)(1)). Plaintiffs argue  
12 that application of the 1991 regulation violates the settlement  
13 agreement in that the agreement requires the defendants to  
14 adjudicate class member applications in accordance with  
15 regulations followed for applications filed during the 1987-1988  
16 application period. Because the 1991 regulation was not in  
17 effect during this period, plaintiffs argue, defendants cannot  
18 use the regulation in adjudicating class member applications.

19           Defendants argue that the settlement agreement is "silent  
20 as to how USCIS should treat an application for class membership  
21 or subsequent application for legalization when the application  
22 is abandoned by the applicant." Opposition at 2. Consequently,  
23 defendants argue, "It is not unreasonable for current USCIS  
24 officers to look to the current regulations when the Settlement  
25 Agreement is silent on how to adjudicate abandoned applications  
26 . . . ." Id. Defendants, however, are mistaken that the



1 settlement agreement is silent. The settlement agreement  
2 expressly requires that defendants may only use regulations in  
3 effect while applications filed during the 1987-1988 application  
4 period were adjudicated when adjudicating class member  
5 applications. Defendants do not address in any manner how  
6 utilization of the 1991 regulation complies with the  
7 requirements of paragraph 11 of the settlement agreement nor can  
8 the court envision any reasonable interpretation of paragraph 11  
9 that would allow defendants to apply a regulation not in effect  
10 during the 1987-1988 period.<sup>2</sup> Where "the language [of a  
11 contract] is clear and unambiguous, the court will enforce the  
12 contract as written and may not create ambiguity where none  
13 exists." Conrad v. Ace Property & Cas. Ins. Co., 532 F.3d 1000,  
14 1005 (9th Cir. 2008) (internal citation omitted). Thus,  
15 defendants have engaged in a practice of refusing to implement  
16 the relief set forth in the settlement agreement.<sup>3</sup>

17 What is the proper relief is apparent. Defendants must  
18 adjudicate class members' applications as if they applied during  
19 the 1987-1988 application period. The question of how these

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20  
21 <sup>2</sup> At oral argument, defendants contended that they do not know  
22 how abandoned applications were handled during the relevant period.  
23 Whatever else is true, such lack of information does not justify  
24 use of a prohibited regulation.

25 <sup>3</sup> Plaintiffs also raise additional arguments in support of its  
26 argument that the application of the abandonment regulation to  
class member's applications is wrongful. However, because the court  
finds the plain language of the settlement agreement dispositive,  
it does not address these arguments. Further, defendants raise  
numerous arguments that are not relevant to the interpretation of  
the terms of the settlement agreement. Similarly, the court does  
not address these arguments.

1 applicants are to be treated subsequent to abrogation of the  
2 abandonment regulation is not presently before the court.  
3 Plaintiff provides no information relative to practice in the  
4 relevant period, and defendants' showing is less than fully  
5 persuasive. If the parties are unable to resolve the issue,  
6 further litigation will be required.

7 **B. Whether USCIS Must Consider Applications of Class**  
8 **Members Living Abroad**

9 Plaintiffs have similarly presented anecdotal evidence that  
10 USCIS has declined to adjudicate applications for class  
11 membership from individuals who are living abroad. In essence,  
12 plaintiffs argue that because the settlement agreement does not  
13 distinguish between applicants currently living abroad and  
14 applicants currently living in the United States, to the extent  
15 that defendants decline to provide relief to applicants living  
16 abroad, they are engaging in a pattern and practice of violating  
17 the settlement agreement. Defendants oppose plaintiffs' claim  
18 because they contend this court's order approving the settlement  
19 precludes the claim.

20 Plaintiffs have only provided two examples of this alleged  
21 conduct. In the first, a foreign applicant, Mario de la Cruz,  
22 attempted to apply for class membership. USCIS rejected his  
23 application, and expressed that "[t]here is no appeal to this  
24 decision." Despite USCIS's statement, de la Cruz was able to  
25 appeal to the special master, who decided he was entitled to  
26 relief under the settlement agreement. Plaintiffs' Exhibit 25.

1 Plaintiffs' other example concerns an applicant, Stanley  
2 Samaratunga, who was abroad at the time USCIS sought to schedule  
3 his interview. USCIS administratively closed his claim.  
4 Plaintiffs' Exhibit 28. The notice contained the same language  
5 indicating that he could not appeal the decision. Plaintiffs  
6 make no indication as to whether this applicant was able to  
7 appeal the decision to the special master.

8 **i. Court Order Approving Settlement of Class Action**

9 In their opposition, defendants rely heavily upon this  
10 court's January 23, 2004 order approving the settlement.  
11 Defendants argue that "the Court has already held that  
12 Defendants' interpretation does not violate the Settlement  
13 Agreement." While the order does provide significant guidance  
14 for plaintiffs' current motion, it does not reach as far as  
15 defendants imply. Specifically, the order did not specify that  
16 Defendants are correct to decline adjudication of applications  
17 from individuals who are abroad. Rather, the court decided that  
18 it need not determine in approving the settlement whether  
19 individuals residing abroad may apply for class membership. In  
20 particular, the court found it "unnecessary to resolve this  
21 disagreement." January 23, 2004 Order at 3. The order further  
22 noted that, "The settlement itself anticipates such  
23 disagreements and establishes procedures for their resolution,"  
24 citing the sections of the settlement agreement addressing the  
25 appeal to the special master and the court's continuing  
26 jurisdiction. Id. at 4. Ultimately, this court concluded that

1 the claims of those who are residing abroad "will be fit for  
2 judicial resolution when and if defendants deny them the  
3 benefits of the settlement because they are outside the United  
4 States." Id. Thus, this court held not that the defendants could  
5 decline to adjudicate claims from individuals abroad, but rather  
6 that whether such claims must be adjudicated will be determined,  
7 if necessary, through the appellate procedure envisioned in the  
8 settlement.

9 **ii. Ripeness of Claims**

10 As described above, this court held that it would only  
11 resolve the ripe claims of applicants residing abroad.  
12 Furthermore, the court will only resolve these claims after they  
13 proceeded through special master review. Specifically, such  
14 review would be limited to situations where the special master  
15 decided in favor of the government.

16 Here, plaintiffs have not provided any evidence of ripe  
17 claims. Plaintiffs' first applicant, de la Cruz, was an  
18 individual whose application USCIS initially declined to  
19 adjudicate. However, he was nonetheless able to appeal the  
20 decision to the special master, where the special master  
21 resolved the appeal in his favor. Similarly, plaintiffs have not  
22 provided any information to support a claim that the second  
23 applicant plaintiffs identified, Samaratunga, does not have  
24 access to judicial review of his application.<sup>4</sup> As such, the

25 <sup>4</sup> It seems likely to the court that Samaratunga appealed the  
26 decision to a special master as the exhibits provided by plaintiffs  
indicate that he is represented by class counsel.

1 claim of the second applicant is also not ripe. Accordingly,  
2 plaintiffs have not identified any claims ripe for judicial  
3 review. As such, the court cannot decide at this time whether  
4 applications of individuals living abroad should be adjudicated  
5 by USCIS.

6 Nonetheless, plaintiffs have identified a pattern and  
7 practice of failure to comply with the terms of the settlement.  
8 Specifically, the settlement agreement states,

9 The Defendants shall send a written notice of the  
10 decision to deny an application for class membership  
11 to the applicant and his or her attorney of record,  
12 with a copy to Class Counsel. The notice shall explain  
13 the reason for denial of the application, and notify  
14 the applicant of his or her right to seek review of  
15 such denial by a Special Master . . . .

16 Settlement at ¶ 8. Plaintiffs have provided two notices of  
17 decision from USCIS declining to consider applications for class  
18 membership of individuals residing abroad. Plaintiffs' Exhibits  
19 26; 31. Neither notice notifies the applicant of his or her  
20 right to seek review of the denial by a special master. Id. As  
21 such, both notices violate the settlement agreement.

22 Defendants have recognized this failure to conform with the  
23 terms of the settlement agreement. Specifically, during oral  
24 argument, defendants' counsel informed the court that defendants  
25 have identified all individuals who applied for class membership  
26 from abroad. Counsel estimated the number of applicants to be  
56. Counsel further indicated that defendants are in the process  
of advising these applicants of their right to appeal to the  
special master. If defendants are taking such actions,

1 plaintiffs' claim for relief is moot. Accordingly, the court  
2 orders defendants to submit an affidavit and any other relevant  
3 evidence to the court concerning its actions (1) in identifying  
4 rejected applicants who were residing abroad and not informed of  
5 their right to special master review; and (2) in locating these  
6 applicants and informing them of their right to special master  
7 review within twenty eight (28) days of the issuance of this  
8 order. Plaintiffs may file objections, if any, within fourteen  
9 (14) days after service of defendants' affidavit.


10 **IV. CONCLUSION**

11 For the foregoing reasons, the court orders the following:

- 12 (1) Plaintiffs motion regarding application of the  
13 abandonment regulation is GRANTED.
- 14 (2) Defendants shall submit an affidavit and any other  
15 relevant evidence to the court concerning its actions  
16 (1) in identifying rejected applicants who were  
17 residing abroad and not informed of their right to  
18 special master review; and (2) in locating these  
19 applicants and informing them of their right to  
20 special master review within twenty eight (28) days  
21 of the issuance of this order.
- 22 (3) Plaintiffs may file objections, if any, within  
23 fourteen (14) days after service of defendants'  
24 affidavit.

25 IT IS SO ORDERED.

26 DATED: December 11, 2009.

  
LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT