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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

NAGENDRA KUMAR NAKKA et al., Plaintiffs, v. U.S. CITIZENSHIP AND IMMIGRATION SERVICES et al., Defendants.	Case No. 3:19-cv-02099-YY RESPONSE TO DEFENDANTS' OBJECTIONS TO NOVEMBER 30, 2021 FINDINGS AND RECOMMENDATIONS

Plaintiffs, by and through Brent W. Renison, undersigned counsel, hereby respond to Defendants' objections (ECF No. 48) to portions of the November 30, 2021 Findings and Recommendations (ECF No. 45, hereafter F&R2).

I. Ripeness and Mootness.

Defendants have objected to the finding in F&R2 that Plaintiff Edwards' claim is ripe and not moot. (ECF No. 48, pp. 2-3). Regarding ripeness, Defendants claim that it is not inevitable that Defendants will rescind Edwards' grant of lawful permanent resident status (LPR status) because the decision to do so falls under prosecutorial discretion. The Court, however, found persuasive Plaintiffs argument that "[t]he government cannot be presumed to overlook their error forever, and one can easily predict that Defendants will pursue the rescission of Edwards' green card." F&R2, p. 13, quoting ECF No. 37, p. 2. On identical facts, Defendants recently denied

Plaintiff Peddada's green card application. The Court was correct in viewing Edwards' LPR grant as "clearly anomalous." F&R2 p. 13. Because Edwards and Peddada's cases are factually identical (Filed adjustment based on Dates for Filing showing immediately *available* visa number, CSPA adjusted age exceeded 21 by time of the Final Action Date chart indicated she could be *issued* a visa),[1] both claims are ripe. Indeed, under *Reno v. Catholic Social Services ("CSS"), Inc*. 509 U.S. 43, 57 N.18 (1993) and *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431 (9th Cir. 1996), an application need not necessarily even be filed for a case to be ripe if there is a firm prediction of the outcome based on clear application of the facts to the government's policy. The government has never, not once, argued that Edwards was actually eligible for LPR status under the challenged interpretations. Whether Edwards had filed and remained pending, filed and received denial, filed and received approval, or never filed at all, there is no dispute that Edwards facts support a denial under the challenged policy and just as she would not be required to even apply and wait to receive a denial to have her claim be ripe under *CSS* she is not required to wait to have her case rescinded. Being an LPR now, Edwards is now totally dependent on that LPR status for legal residence in the United States and work and travel authorization, and eligibility for naturalization.[2] Her LPR status can be rescinded at any moment, and considering Defendants' policy should be, as she proceeds through the next few years eschewing other potential (albeit largely inadequate) options she might have pursued to permanent resident status meanwhile being considered in violation of status where maintenance

[1] Visa availability is not the same as visa being "actually" issued for which the FAD finds its purpose, and Defendants' use of a chart representing visa *issuance* for statutory CSPA calculation which specifically requires only visa *availability* (not issuance) is not in accordance with law.

[2] Naturalization interviews include a review of whether the applicant was eligible for LPR status in the first place. See USCIS PM Volume 12, Part D. Ch. 2, A.1. "Lawful Admission for Permanent Residence." See also A.5. (U.S. Government Error) under Ch. 2, explaining that "An applicant is ineligible for naturalization under INA 318 [8 USC 1429] if his or her LPR status was obtained in error, even in the absence of fraud or willful misrepresentation."

of status is required to pursue such options in the first place.[3] Edwards has a justiciable controversy.[4]

Regarding mootness, Defendants have had an opportunity to address the mootness issue which was raised during oral argument by the Court. First, Defendants never argued Edwards' case was moot in the first place. Second, the government had ample briefing real estate in their Objections and chose to write a four page Objection brief without any substantive argument relating to mootness. If there was any argument to be made that Edwards' case was moot, the government had ample opportunity and space to address it. Third, Edwards' case is not moot because under the doctrine of voluntary cessation it is not absolutely clear that the agency will comply with the statute and not rescind her status. F&R2, p. 13, fn. 2. At this point in the litigation, more than two years in, with the number of briefs, oppositions, responses and replies, covering two motions to dismiss, Plaintiffs object to Defendants' request to have more time to brief this issue (they never even raised) as they have already had enough.

II. Plaintiffs state a claim against the Department of State based on the Foreign Affairs Manual

Defendants argue that no Plaintiff can "meaningfully allege" they would be affected by the interpretation in the FAM of the use of the Visa Bulletin for CSPA age calculation. Defendants fail to acknowledge, however, that on July 26, 2021 Defendant USCIS issued Plaintiff Peddada a denial letter which states in relevant part, "The evidence of record shows

[3] The USCIS Policy Manual specifies "[u]pon rescission, USCIS places the person into removal proceedings under INA 240 with a Notice to Appear, unless he or she is otherwise in a lawful status or in a period of stay authorized by the secretary." USCIS PM Vol. 7, Part Q, Ch. 5, D. Plaintiff Edwards' lawful H-4 status expired on her 21st birthday, and the result of rescission would be removal proceedings, adjustment of status bars of 245(c), as well as the unlawful presence bars of INA 212(a)(9)(B). Rescission would certainly lead not only to loss of LPR, but loss of eligibility for other immigration routes due to her reliance on the LPR status. She has, in essence, sailed on the ship USCIS allowed her to board and is at sea without another vessel in sight, living with the constant trepidation she may be tossed overboard.

[4] Even if the Court rules Edwards' claim is unripe, the controversy remains because there is no disagreement that Plaintiff Peddada's claim is ripe since she applied and received a denial.

that, when you filed your application, you were lawfully present in the United States. Your period of authorized stay has expired. You are not authorized to remain in the United States. If you fail to depart the United States within 33 days of the date of this letter USCIS may issue you a Notice to Appear and commence removal proceedings against you with the immigration court." See ECF No. 39, EXH A, Denial of Plaintiff Pavani Peddada's Adjustment of Status Application.

The beneficiary of an immigrant petition (as Plaintiff Peddada is, as derivative) is eligible to pursue LPR status through Adjustment of Status (AOS) *within* the United States or Consular Processing of an Immigrant Visa (IV) *outside* the United States. Both lead to LPR status. Defendants' denial of Peddada's AOS and command that she leave the country leaves her with but one route to pursue her claim, which is through the Department of State's Consular Processing option for an Immigrant Visa. Under the *CSS* and *Freedom to Travel* cases, supra, the Court can make a firm prediction that Plaintiff Peddada's IV application would *also* be rejected under the FAM guidance which mirrors the USCIS Policy manual in calculating CSPA age based on Final Action Dates (for issuance of visas) versus the Dates for Filing (reflecting visa availability, which CSPA uses), and her claims against DOS are also ripe. There is no need to await her forcible removal or "self-deportation" from the United States and application with DOS for an IV because it would inevitably lead to a denial on the same basis as that already determined by USCIS. The FAM and USCIS Policy Manual sections are identical in this regard, and denial remains as certain with DOS as it has come to be with USCIS.

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By /s/ Brent W. Renison

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2022, I electronically filed the foregoing RESPONSE TO DEFENDANTS' OBJECTIONS TO NOVEMBER 30, 2021 FINDINGS AND RECOMMENDATIONS with the Clerk of the Court for the District of Oregon by using the CM/ECF system, in accordance with Local Rule 5-1. Notice of this filing will be sent out to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

/s/ Brent W. Renison
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