UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

ARACELY ZAMORA-GARCIA, *et al*,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. M-05-331
	§	
MARC MOORE, *et al*,	§	
	§	
Defendant.	§	

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS'/PETITIONERS' MOTION TO CERTIFY FEDERAL CLASSES

I. Introduction

Now before the Court is Plaintiffs'/Petitioners' Motion for Class Certification. (Doc. 112). Plaintiffs/Petitioners seek to certify three classes with claims against Bonding Defendants[1] ("Surety Bond Classes") and four classes with claims against Federal Defendants/Respondents[2] ("Federal Classes"). *Id.*[3] The Court will consider the certification of Plaintiffs'/Petitioners' Federal Classes herein.

Plaintiffs'/Petitioners' Sixth Amended Petition for Writ of Habeas Corpus and Class Action Complaint for Injunctive and Declaratory Relief asserts claims against Federal Respondents in connection with said Respondents' refusal to grant Orders of Supervision ("OOS") to certain individuals, as well as due process and equal protection claims against Federal Defendants

[1] Bonding Defendants include Fairmont Specialty Insurance Company (f/k/a Ranger Insurance Company); Stonington Insurance Company (f/k/a Nobel Insurance Company); and Michael W. Padilla, in his capacity as Independent Administrator with Will Annexed of the Estate of Don Vannerson, d/b/a Aaron Federal Bonding Agency. (Doc. 114 at ¶¶ 16-18).

[2] Federal Defendants include Marc Moore, District Director for Interior Enforcement, Department of Homeland Security; and Alberto Gonzales, U.S. Attorney General, The United States of America. (Doc. 114 at ¶¶ 13-15). Federal Defendants/Respondents are sued in their official capacity. *Id.*

[3] Where addressing the habeas claims before it, the Court will refer to Petitioners and Federal Respondents. Where addressing the non-habeas claims before it, the Court will refer to Plaintiffs and Federal Defendants.

arising out of said Defendants' alleged mishandling of immigration cash bonds. (Doc. 114). Plaintiffs/Petitioners seek class-wide relief with respect to these claims and propose to certify the following classes pursuant to Federal Rule of Civil Procedure 23: (1) Supervision Class; (2) Obligor Cash Bond Class; (3) Immigrant Cash Bond Class A; and (4) Immigrant Cash Bond Class B. (Doc. 112).

II. Analysis

A. Class Certification Standard of Review

To certify a class action under Federal Rule of Civil Procedure 23, Plaintiffs/Petitioners must fulfill the four requirements set forth in Rule 23(a) and at least one of the three requirements enumerated in Rule 23(b). *E.g.*, *Vizena v. Union Pac. R.R. Co.*, 360 F.3d 496, 502 (5th Cir. 2004)(per curiam). Plaintiffs/Petitioners bear the burden of establishing that all of the applicable Rule 23 requirements have been satisfied. *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 601 (5th Cir. 2006); *Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005).

1. FED. R. CIV. P. 23(a)

a. Numerosity

Pursuant to Rule 23(a), Plaintiffs/Petitioners must first show that "the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). "Impracticable" need not mean "impossible," but rather that it is "extremely difficult or inconvenient" to join all members of the class. WRIGHT, CHARLES ALAN & MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE § 1762 (2006). By itself, the mere allegation that a class is too numerous to make joinder practicable is insufficient to satisfy the "numerosity" prong. *Pederson v. La. State Univ.*, 213 F.3d 858, 868 (5th Cir. 2000). Rather, "'a plaintiff must ordinarily demonstrate some evidence or reasonable estimate of

the number of purported class members.'" *Id.* (quoting *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981)). The Fifth Circuit has also noted that, when conducting a numerosity analysis, the district court must not focus on sheer numbers alone but also on whether joinder of all members is practicable in view of all other relevant factors. *Id.* at 868 n.11. "Practicability of joinder depends on size of the class, ease of identifying its members and determining their addresses, facility of making service on them if joined and their geographic dispersion." *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980). The Fifth Circuit has indicated that a district court may draw reasonable inferences regarding these factors notwithstanding the lack of any direct evidence. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624-25 (5th Cir. 1999). The inclusion of future members in the class definition is also a factor to consider in determining if joinder is impracticable; in fact, that the class includes unknown, unnamed future members weighs in favor of certification. *Pederson*, 213 F.3d at 868 n.11.

b. Commonality

Second, Plaintiffs/Petitioners must show that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). The test for "commonality" is not a demanding one, as it requires the presence of only one common question of law or fact whose resolution will affect all or a significant number of the putative class members. *James v. City of Dallas*, 254 F.3d 551, 570 (5th Cir. 2001); *see also Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986)(threshold of commonality "is not high"). That some of the putative class members may have claims that require some individualized analysis is not fatal to commonality. *James*, 254 F.3d at 570; *see also Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993)(necessity for even somewhat complex calculations of individual awards does not defeat commonality requirement).

c. Typicality

Third, Plaintiffs/Petitioners must show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). The "typicality" inquiry "'focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent.'" *James*, 254 F.3d at 571 (quoting *Mullen*, 186 F.3d at 625). Like commonality, the test for typicality is not demanding, as it does not require a complete identity of claims. *Id.* "'Rather, the critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality.'" *Id.* (quoting 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.24[4] (3d ed. 2000)).

d. Adequacy

Fourth, Plaintiffs/Petitioners must demonstrate that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). In considering the "adequacy" requirement, the Court should evaluate whether the class representatives have a sufficient stake in the outcome of the litigation and whether they have interests antagonistic to the unnamed class members. *See Jenkins*, 782 F.2d at 472. In addition, the Court should inquire into the zeal and competence of counsel for the class representatives as well as the class representatives' willingness and ability to take an active role in the litigation and to protect the interests of the absent class members. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001). Generally, class representatives should "possess a sufficient level of knowledge and understanding to be capable of 'controlling' or 'prosecuting' the litigation." *Id.* at 482-83. They need to know more than that they were "'involved in a bad business deal'"; however, they

"need not be legal scholars and are entitled to rely on counsel...." *Id.* at 483 (quoting *Kelley v. Mid-America Racing Stables, Inc.*, 139 F.R.D. 405, 410 (W.D.Okla. 1990)). Differences between the class representatives and other class members do not defeat the adequacy requirement so long as those differences do not "'create conflicts between the named plaintiffs' interests and the class members' interests.'" *James*, 254 F.3d at 571 (quoting *Mullen*, 186 F.3d at 625-26).

2. FED. R. CIV. P. 23(b)(2)

Of the three requirements enumerated in Federal Rule of Civil Procedure 23(b), Plaintiffs/Petitioners purport to satisfy the second–that is, they claim that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class a whole." FED. R. CIV. P. 23(b)(2).

A Rule 23(b)(2) class is characterized by harm of a "group nature" and relief of a "broad character," such that "the (b)(2) class is, by its very nature,...a homogenous and cohesive group with few conflicting interests among its members." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998). The Fifth Circuit has further noted that "[a]ctions for class-wide injunctive or declaratory relief are intended for (b)(2) certification precisely because they involve group remedies." *Id.* at 414. Generally, no notice is required and no absolute right of opt-out exists for a class certified pursuant to Rule 23(b)(2). FED. R. CIV. P. 23(c)(2)(A)("For any class certified under Rule 23(b)(1) or (2), the court *may* direct appropriate notice to the class")(emphasis added); *Ayers v. Thompson*, 358 F.3d 356, 375-76 (5th Cir. 2004); *Bollin v. Sears, Roebuck & Co.*, 231 F.3d 970, 975 n.22 (5th Cir. 2000)("The uniformity of the injury across the class is what renders the notice and opt-out provisions...unnecessary" in Rule 23(b)(2)

class actions).

B. Supervision Class

Petitioners Aracely Zamora-Garcia, Manuel Sandoval-Herrera, Petra Carranza de Salinas, Maria Francisca Arce Cedeno, Norma Pena de Herrera, Isidro Herrera, and Luis Alvarado-Narvaez seek to represent the "Supervision Class," described as follows:

> [Those] persons who are or will be under removal proceedings, who are not physically detained by [Federal Respondents], and who have been or will be under a final order of deportation, exclusion, or removal, which has not been or will not be executed for three months or more after its issuance, notwithstanding that there was no judicially ordered stay of deportation, exclusion or removal during that three month period, and to whom the Federal Respondents have not issued Orders of Supervision, or have subsequently revoked or refused to renew previously issued Orders of Supervision.

(Doc. 112).

Petitioners request an injunction on their own behalf and on behalf of the class they seek to represent requiring that, upon request of the class member, and in the absence of individual factors which would warrant the refusal to do so, Federal Respondents place said class members under Orders of Supervision ("OOS"). (Doc. 114 at ¶ 136).

1. Overview of Petitioners' OOS Claims

In the predecessor action to the present suit, this Court found that it had jurisdiction over Petitioners' habeas challenge to Federal Respondents' refusal to issue OOS. *Zamora-Garcia v. Trominski*, Southern District of Texas, McAllen Division, Case No. M-02-144 (Docs. 61, 124). Furthermore, the Court granted the habeas relief requested in Plaintiffs'/Petitioners' Second Amended Petition for Writ of Habeas Corpus and Class Action Complaint for Damages, Injunctive, Declaratory, and Other Relief, wherein Petitioners Miriam Garrido, Eugenio Reyna-Montoya, Cesar Lucio, Apolinar Torres-Espino, and Praxedis Rodriguez-Castro sought to be

placed under OOS. *Zamora-Garcia v. Trominski* (Doc. 36 at ¶¶ 58, 68-70; Doc. 124).[4]

Petitioners were all citizens of Mexico who were under administratively final orders of removal and had actions pending in federal court challenging said orders. *Zamora-Garcia v. Trominski* (Doc. 36 at ¶ 6). As individuals under administratively final removal orders, Petitioners were subject to removal during a 90-day "removal period." *See* 8 U.S.C. § 1231(a)(1). Petitioners had not pursued judicial stays of removal; therefore, their removal periods began on the date each Petitioner's order of removal became administratively final. *Id.*; 8 C.F.R. § 241.4(g). Petitioners argued that because Federal Respondents had not removed Petitioners within their 90-day removal periods, Federal Respondents were statutorily *required* to provide Petitioners with OOS while they remained in the United States to pursue their pending federal court actions. *Zamora-Garcia v. Trominski* (Docs. 118, 124).

In its order, the Court noted that 8 U.S.C. § 1231(a)(3) provides that "if the alien *does not leave or is not removed* within the removal period, the alien, pending removal, *shall* be subject to supervision under regulations prescribed by the Attorney General." *Zamora-Garcia v. Trominski* (Doc. 124)(quoting 8 U.S.C. § 1231(a)(3)(emphasis added)). The Court further noted that it was "reasonably clear" that the "terms of supervision" in paragraph (3) are "orders of supervision" as described in 8 C.F.R. § 241.5. *Zamora-Garcia v. Trominski* (Doc. 124)(citing 8 C.F.R. § 241.5.; 8 U.S.C. §§ 1231(a)(3), (a)(6)). The Court dismissed Federal Respondents' argument that the statutory mandate to provide OOS applies only to aliens detained during the removal period and then released, instead finding that the statute clearly provides that a non-detained alien who does not leave within the 90-day removal period *shall* be granted an OOS. *Zamora-Garcia v. Trominski* (Docs. 117, 124). In addition, the Court rejected Federal Respondents' position that the 90-day removal period is renewed where an alien challenges his or her administratively final

[4] These individuals are no longer Plaintiffs/Petitioners in the present action. (Doc. 114).

removal order in federal court. *Zamora-Garcia v. Trominski* (Docs. 117, 124). The Court recognized that 8 U.S.C. § 1231(a)(1)(C) states, in relevant part, that "[t]he removal period *shall* be extended beyond a period of 90 days...if the alien...conspires or acts to prevent the alien's removal subject to an order of removal." *Zamora-Garcia v. Trominski* (Doc. 124 (quoting 8 U.S.C. § 1231(a)(1)(C)(emphasis added)). If, as Federal Respondents argued, challenging a final order of removal in federal court is conspiring or acting to prevent removal, such act would extend the 90-day removal period and remove the alien from the group of individuals for whom OOS are mandated–that is, non-detained aliens under administratively final orders of removal whose removal periods have expired. *Zamora-Garcia v. Trominski* (Doc. 124). The Court analyzed existing case law and concluded that the filing of a habeas petition by an alien under an administratively final order of removal is a permissible means of seeking judicial review of questions of law and thus cannot be characterized as conspiring or acting to prevent removal under § 1231(a)(2)(C). *Id.* Therefore, each Petitioner's removal period had expired and, under § 1231(a)(3), each Petitioner was required to be provided an OOS by Federal Respondents. *Id.*

Subsequent to the issuance of the Court's January 4, 2005 order granting the individual OOS Petitioners' habeas relief, Federal Respondents issued an "Interoffice Memorandum" clarifying its OOS policy. (Docs. 55, 112). The Memorandum, dated February 27, 2006, advises that except for those aliens who were under OOS because their home countries would not accept them as deportees (a group not represented by either the previous or current Petitioners), the OOS and employment authorization documents of all aliens under OOS would be cancelled or revoked and such aliens would be required to file applications for administrative stays of removal with Federal Respondents. *Id.* By letter dated April 21, 2006, counsel for Petitioners requested that those aliens who had been allowed to remain in the United States for more than the 90-day

removal period, and who *thereafter* obtained stays of removal, be issued OOS or, if they already had such orders, be allowed to keep them. (Doc. 59, 112). Federal Respondents denied counsel's request in a letter dated April 24, 2006, informing counsel that only those aliens named in this Court's January 4, 2005 order would remain under OOS. (Docs. 64, 112). The letter further informed counsel that Federal Respondents would no longer abide by the informal agreement allowing individuals with pending federal court actions to remain in the United States. *Id.* According to the letter, these aliens are now required to obtain either an administrative stay of removal or a judicial stay issued by a federal court. (Doc. 64). Federal Respondents' letter further indicated that the requirement to issue OOS upon the expiration of the 90-day removal period applied only to aliens detained and then released, and that aliens with cases pending in federal court were "blocking" their removal, thereby preventing them from obtaining OOS. *Id.* In other words, with respect to aliens other than the individual Petitioners whose habeas relief was granted by this Court, Federal Respondents continue to challenge the Court's interpretation of the applicable statute and regulations.

In light of these developments, Petitioners now seek to represent within the proposed Supervision Class two groups of individuals affected by Federal Respondents' current OOS policy: (1) those immigrants who are or will be under final orders of removal and who challenged or will challenge their removal orders in federal court, and whom Federal Respondents did not or will not remove during the 90-day removal period, notwithstanding that the immigrants did not obtain a judicial stay of removal during that period, or otherwise obstruct removal (represented by Petitioners Zamora-Garcia, Sandoval-Herrera, Carranza de Salinas, and Alvarado-Narvaez); and (2) those immigrants who are or will be under final orders of removal and whom, for humanitarian reasons, Federal Respondents did not or will not remove during the

90-day removal period, notwithstanding that the immigrants did not obtain a judicial stay of removal during that period, or otherwise obstruct removal (represented by Petitioners Arce Cedeno, Pena de Herrera, and Herrera). (Doc. 112).

In its prior order, the Court noted that to determine whether class certification is appropriate "when the underlying claim is without merit is to promote inefficiency for its own sake." *Zamora-Garcia v. Trominski* (Doc. 124)(quoting *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984)). Although the Court previously analyzed Petitioners' OOS claims and ordered that the individual Petitioners be granted OOS, at the time the Court had only to consider whether OOS are mandated for those individuals who had *not* pursued judicial stays of removal, and therefore their 90-day removal periods had expired. *Zamora-Garcia v. Trominski* (Doc. 124). The Court recognizes that 8 U.S.C. § 1231 provides, in relevant part, that the 90-day removal period begins on the *latest* of the following:

> (i) The date the order of removal becomes administratively final.
> (ii) If the removal order is judicially reviewed *and* if a court orders a stay of the removal of the alien, the date of the court's final order....

8 U.S.C. § 1231(a)(1)(B)(emphasis added).[5]

Here, Petitioners have provided the Court with evidence that Petitioners Sandoval-Herrera, Lucio, and Alvarado-Narvaez have obtained judicial stays of removal with the Fifth Circuit. (Docs. 55, 90). In addition, Petitioners' live habeas petition and class action complaint alleges that Petitioner Carranza de Salinas has a pending case before the Fifth Circuit, although the Court cannot determine whether a judicial or administrative stay of removal has been issued in her

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[5] *See also* 8 C.F.R. § 241.4(g)(1)(i):

> (i) The removal period for an alien subject to a final order of removal shall begin on the latest of the following dates:
> (A) The date the order becomes administratively final;
> (B) If the removal order is subject to judicial review (including review by habeas corpus and if the court has ordered a stay of the alien's removal, the date on which, consistent with the court's order, the removal order can be executed and the alien removed.

case. (Doc. 114 at ¶¶ 80). Furthermore, Petitioners' live petition and complaint indicates that Petitioner Zamora-Garcia is currently pursuing "judicial remedies" and that her application for an administrative stay of removal has never been adjudicated, although it was filed in 2002. (Doc. 114 at ¶¶ 89). With respect to those Petitioners who have been allowed to remain in the United States for humanitarian reasons, Petitioners allege that they have either been granted administrative stays of removal (Petitioner Arce Cedeno) or have filed applications for administrative stays of removal (Petitioners Pena de Herrera and Herrera). (Doc. 55; Doc. 114 at ¶¶ 93, 96-97).

Petitioners apparently take the position that because Federal Respondents have not removed any of the above-named Petitioners within 90 days of the date of their administratively final order of removal, Petitioners are entitled to OOS. Petitioners have therefore defined their Supervision Class accordingly. However, the Court cannot ignore that several Petitioners are pursuing judicial review of their administratively final orders of removal *and* have obtained, or will obtain, judicial stays of removal. In such case, it appears that the 90-day removal period begins when the reviewing court issues its final order, not when the order of removal becomes administratively final. *See* 8 U.S.C. § 1231(a)(1)(B); 8 C.F.R. § 241.4(g)(1)(i). Therefore, it appears that the first group of Petitioners within the Supervision Class–that is, those who are seeking judicial review of their administratively final removal orders and have obtained, or will obtain, judicial stays of removal–have not yet remained in the United States beyond their 90-day removal periods and are not yet entitled to OOS under 8 U.S.C. § 1231(a)(3). However, as the second group of Petitioners within the Supervision Class have remained in the United States for humanitarian reasons and have not obtained stays of removal from a court, these Petitioners' 90-day removal periods have expired and, pursuant to the Court's prior analysis, they are entitled to

OOS.[6] Therefore, the Court will herein determine whether their claims are appropriate for class certification.

Before doing so, however, the Court must address Federal Respondents' argument that the certification of a class is generally inappropriate in habeas proceedings. (Doc. 123). According to Federal Respondents, the writ of habeas corpus historically has been used to afford relief to an individual then in custody, not to classes of individuals who may be in custody in the future. *Id.* Petitioners point out that although they styled their OOS claims only as habeas claims in the predecessor action, they now bring such claims both in habeas and pursuant to 28 U.S.C. §§ 1331 (federal question) and 1346(a)(2)(action against an agency and/or officers of the United States). (Doc. 129 (citing Doc. 114 at ¶ 31)). The Court also notes that at least two courts have found appropriate the certification of a class of habeas petitioners challenging the government's immigration procedures, and still more have approved of habeas class actions outside the immigration context. *See Ali v. Ashcroft* , 346 F.3d 873 (9th Cir. 2003), *overruled on other grounds*, 421 F.3d 795 (9th Cir. 2005)(approving of nationwide class of habeas petitioners challenging alleged violations of 8 U.S.C. § 1231); *Kazarov v. Achim* , 2003 WL 22956006 (N.D.Ill. Dec. 12, 2003)(certifying class under Rule 23(b)(2) of habeas petitioners challenging government's immigration detention procedures); *U.S. ex. rel. Sero v. Preiser* , 506 F.2d 1115, 1126-27 (2d Cir. 1974)(certification of habeas class of state prisoners avoided "[t]he considerable expenditure of judicial time and energy in hearing and deciding numerous individual petitions presenting the identical issue"); *Williams v. Richardson* , 481 F.2d 358, 361 (8th Cir. 1973)(finding that habeas class action "may very well represent the most appropriate manner of litigating the general claims" of inmates challenging conditions of confinement); *Mead v. Parker* ,

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[6] That these Petitioners are now required to apply for administrative stays of removal with Federal Respondents does not affect the statutory requirement that they be provided with OOS upon the expiration of the 90-day removal period.

464 F.2d 1108, 1112-13 (9th Cir. 1972)(although habeas relates to "the individual petitioner and to his unique problem[,]...there can be cases...where the relief sought can be of immediate benefit to a large and amorphous group. In such cases, it has been held that a class action may be appropriate."). As such, the Court rejects Federal Respondents' argument.

2. FED. R. CIV. P. 23(a)

a. Numerosity

With respect to the second group of Petitioners within the Supervision Class–that is, those individuals who have been allowed to remain in the United States for humanitarian reasons, Petitioners advance that there are "a significant number" of these Petitioners. (Doc. 129). Petitioners have provided evidence that Petitioners Pena de Herrera and Herrera were previously granted OOS for humanitarian reasons, which OOS were cancelled pursuant to the policy outlined in Federal Respondents' February 27, 2006 Interoffice Memorandum. (Doc. 55). More specifically, the evidence supports Petitioners' allegation that Mr. and Mrs. Herrera have been allowed to remain in the United States to care for their 12-year-old U.S. citizen daughter who suffers from beta thalassemia major, a serious blood disease which requires frequent red blood cell transfusions. (Doc. 55; Doc. 114 at ¶ 94). Petitioners' live petition and complaint also alleges that Petitioner Arce Cedeno was issued an OOS for humanitarian reasons in 1997, which OOS was cancelled pursuant to Federal Respondents' current policy. (Doc. 114 at ¶ 93). According to the petition and complaint, Ms. Arce Cedeno has been allowed to remain in the United States to care for her 11-year-old U.S. citizen son who suffers from a life-threatening blood disorder, propionic acidemia. (Doc. 114 at ¶ 92).

Although Petitioners identify only three individuals who fit within the class of persons allowed to remain in the United States for humanitarian reasons, and who are in need of OOS,

the Court recognizes that Petitioners seek declaratory and injunctive relief on behalf of all those individuals who may warrant OOS on such basis in the future. Clearly, the joinder of all of these individuals would be impracticable at this time. As such, the Court finds that the class is sufficiently numerous.

b. Commonality

As indicated in the Court's discussion of Petitioners' OOS claims, a question of law common to the class Petitioners seek to represent is clearly present. Specifically, the legal issue presented by this class is whether a non-detained alien under an administratively final order of removal who has been allowed, for humanitarian reasons, to remain in the United States more than 90 days after the issuance of the order, is entitled to receive an OOS. The resolution of this issue will affect Petitioners and all of the class members they seek to represent; as such, the test for commonality is satisfied.

c. Typicality

That the claims of the named class representatives are typical of the claims of the proposed class is also evident. As noted *supra*, Petitioners Arce Cedeno, Pena de Herrera, and Herrera have all been allowed to remain in the United States for humanitarian reasons. They currently do not have OOS despite the fact that their 90-day removal periods have expired and argue that Federal Respondents are required to provide them with OOS pursuant to the applicable statute and regulations. Petitioners' claims clearly have the same essential characteristics of those of the putative class; therefore, Petitioners have demonstrated the requisite typicality.

d. Adequacy

Finally, the named Petitioners have shown that they are adequate representatives of the putative class. Petitioners Arce Cedeno, Pena de Herrera, and Herrera all have a sufficient stake

and a shared interest in the outcome of the litigation, as their ability to receive OOS hinges upon such outcome. In addition, Mr. and Mrs. Herrera have submitted sworn declarations indicating that they understand their responsibilities as class representatives and have met with counsel "many times" to discuss the present case. (Doc. 112, Exs. CC 37, CC 37A, CC 38, CC 38A). The Court is also satisfied that counsel for Petitioners is sufficiently zealous and competent to prosecute the claims of the class. (Doc. 93, Ex. CC 19). As such, Petitioners have satisfied all of the requirements of Rule 23(a).

3. FED. R. CIV. P. 23(b)(2)

As indicated in the Court's prior discussion of Petitioners' OOS claims, it is evident that Federal Respondents have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. In the predecessor action, the Court concluded that 8 U.S.C. § 1231(a)(3) *requires* that an alien who has not been removed by the expiration of the 90-day removal period be granted an OOS.[7] Accordingly, the Court granted the individual Petitioners' requested relief by ordering that they be provided with OOS. Although Federal Respondents complied with the Court's order with respect to the individual Petitioners, the evidence submitted to the Court indicates that Federal Respondents continue to challenge the Court's interpretation of the applicable statute and regulations and refuse to grant OOS to similarly situated persons. Therefore, Petitioners now request an injunction on their own behalf and on behalf of the class they seek to represent requiring that Federal Respondents place said class members under OOS. Given Federal Respondents' refusal to act on grounds generally applicable to the class and Petitioners' request that the Court grant class-wide injunctive relief directly addressing such

[7] The Court recognizes, as do Petitioners, that OOS are statutorily mandated only in the absence of any actions by the alien to obstruct removal. *See* 8 U.S.C. § 1231(a)(1)(C).

refusal to act, the class is appropriate for certification under Rule 23(b)(2).

For the foregoing reasons, the Court **DENIES** Petitioners' request to certify the first group of Petitioners within the Supervision Class and **GRANTS** Petitioners' motion to certify the second group of Petitioners within the Supervision Class.

C. Obligor Cash Bond Class, Immigrant Cash Bond Class A, and Immigrant Cash Bond Class B ("Cash Bond Classes")

As noted *supra*, Plaintiffs also seek to represent three classes of individuals challenging Federal Defendants' handling of cash bonds. First, Plaintiff Adrianna Echavarria seeks to represent the "Obligor Cash Bond Class," defined as follows:

> (a) all Obligors who posted an immigration Cash Bond,
> (b) which bond was breached on or after July 28, 1998, following a demand made on the Obligor which was returned undelivered to the Federal Defendants, and
> (c) where the Immigrant appeared at all hearings and other required appearances of which s/he received appropriate notice, and
> (d) where the Federal Defendants did not make additional efforts to provide actual notice of the demand to the Obligors, as would be required by *Jones v. Flowers* , 126 S.Ct. 1708 (2006).

(Doc. 112).

Mrs. Echavarria, individually and on behalf of the class she seeks to represent, seeks injunctive and declaratory relief requiring Federal Defendants to reinstate the breached bonds posted by the members of the class (if proceedings are ongoing) or reinstate and cancel the breached bonds (if proceedings have been completed). (Doc. 112; Doc. 114 at ¶ 142).

Second, Plaintiff Jorge Echavarria seeks to represent the "Immigrant Cash Bond Class A," defined as follows:

> (a) all Immigrants released on a Cash Bond,
> (b) which bond was breached on or after July 28, 1998, following a demand made on the Obligor which was returned undelivered to the Federal Defendants, and
> (c) where the Immigrant appeared at all hearings and other required appearances of which s/he received appropriate notice, and
> (d) where the Federal Defendants did not make additional efforts to provide actual notice

> of the demand to the Obligors, as would be required by *Jones v. Flowers* , 126 S.Ct. 1708 (2006).

(Doc. 112).

Mr. Echavarria, individually and on behalf of the class he seeks to represent, seeks injunctive and declaratory relief requiring Federal Defendants to reinstate the breached bonds (if proceedings are ongoing) or reinstate and cancel the breached bonds (if proceedings have been completed). (Doc. 112; Doc. 114 at ¶ 143).

Finally, Plaintiff Juan Larin-Ulloa seeks to represent the "Immigrant Cash Bond Class B," defined as "All Immigrants released on a Cash Bond that is still outstanding, and all Immigrants who will, in the future, be released on cash bonds." (Doc. 112). Mr. Larin-Ulloa, on his own behalf and on behalf of the class, seeks injunctive and declaratory relief requiring that Federal Defendants make efforts to provide notice of a demand on a bond consistent with *Jones v. Flowers* , *supra* . (Doc. 112; Doc. 114 at ¶ 144).

1. Overview of Claims of Cash Bond Classes

The parties do not dispute that an immigrant in removal proceedings who is detained by the Department of Homeland Security ("DHS") may bond out from detention by obtaining a cash bond posted with DHS by an obligor for the benefit of the immigrant. (Doc. 114 at ¶ 34). Federal Defendants notify the bonded immigrant of any DHS demand, or call-in, on the bond by sending notice to the obligor at the address provided to Federal Defendants by the obligor when posting the bond. (Doc. 114 at ¶¶ 42, 49).[8] [9] Plaintiffs' live complaint alleges that where notice of a demand on a cash bond sent to an obligor is returned undelivered, Federal Defendants make no additional attempt to send notice to the obligor and immediately breach the bond. (Doc. 114

[8] Although Plaintiffs concede that Federal Defendants most frequently issue a demand on a bond for the purpose of executing an administratively final order of removal, Plaintiffs allege that Federal Defendants have the right to issue a call-in on a bond for any reason. (Doc. 114 at ¶ 49).

[9] Plaintiffs allege that the cash bond documents do not advise the obligor to submit a change of address. (Doc. 114 at ¶ 42).

at ¶¶ 42-43). According to Plaintiffs, Federal Defendants do so even where they have knowledge that the obligor is residing at a different address. *Id.* Consequently, the amount of the bond is forfeited to Federal Defendants and the immigrant's liberty and immigration rights are endangered. (Doc. 114 at ¶¶ 35, 43-44). Plaintiffs claim that Federal Defendants' breach of the cash bond under these circumstances deprives the obligor and bonded immigrant of due process. (Doc. 114 at ¶ 138).[10] Plaintiffs further claim that pursuant to the Supreme Court's recent decision in *Jones v. Flowers* , 126 S.Ct.1708 (2006), Federal Defendants are required to make additional, reasonable efforts to provide notice of a demand on a cash bond to the obligor after the bond has been returned to Federal Defendants undelivered, but where the bonded immigrant has appeared at every hearing or other required appearance of which he or she has received notice. (Doc. 112; Doc. 114 at ¶ 141).

2. FED. R. CIV. P. 23(a)

a. Numerosity

In support of their contention that the proposed classes are sufficiently numerous, Plaintiffs point to excerpts from the bond logs of Federal Defendants' San Antonio, Texas office between January 1, 2003 and June 30, 2003. (Doc. 112); *Zamora-Garcia v. Trominski* (Doc. 66). Plaintiffs claim that the logs reveal that during this period around 30 cash bonds were posted per month in the San Antonio district. *Id.* In addition, Plaintiffs claim that the cash bond logs for the Port Isabel Service Processing Center ("PISPC") show even higher numbers, with approximately 680 cash bonds posted during the same six month period. (Doc. 129); *Zamora-Garcia v.*

[10] Plaintiffs also allege that with respect to surety bonds, which are posted with DHS by a surety, who has contracted with an indemnitor, for the benefit of the immigrant, Federal Defendants treat the surety more favorably than the cash bond obligor, in violation of due process and equal protection. (Doc. 114 at ¶¶ 60, 139). However, Plaintiffs' class-wide obligor and immigrant cash bond claims against Federal Defendants appear to hinge on due process rather than equal protection. (Doc. 112). At this time, the Court will assume that Plaintiffs do not seek class-wide relief with respect to any claim against Federal Defendants grounded in equal protection.

Trominski (Doc. 66). According to Plaintiffs, the logs also show that "many, if not more, bonds were breached as were posted, indicating that a very high number of cash bonds were breached during that period." (Doc. 112); *Zamora-Garcia v. Trominski* (Doc. 66).

Plaintiffs also cite to the deposition of DHS supervisory detention and deportation officer Glenn Stewart ("Stewart"), in which Stewart attested that Federal Defendants send a notice of a demand on a cash bond to the obligor's address listed in the bond contract. (Doc. 112); *Zamora-Garcia v. Trominski* (Doc. 69 at p. 44). Stewart further stated that "[i]f [the demand notice is] returned undeliverable and the post office said it's undeliverable, then we'll declare that bond breached" and "[w]e don't go any further trying to track this person down." *Zamora-Garcia v. Trominski* (Doc. 69 at pp. 44-45). Stewart indicated that Federal Defendants consult no other documents in the bonded immigrant's "A file" to determine the obligor's correct address. (Doc. 66 at pp. 44-45). Plaintiffs claim that in addition to satisfying Rule 23(b)(2), as discussed *infra*, the information provided in Stewart's deposition "makes [it] highly likely that there is a significant percentage of breaches of cash bonds, regardless of the good faith or intent of the obligor and bonded immigrant." (Doc. 112).

Federal Defendants contest numerosity on the sole basis that Plaintiffs have identified only one class representative for each of the three Cash Bond Classes. (Doc. 123). Federal Defendants' argument is hardly persuasive, given the evidence of numerosity submitted by Plaintiffs as well as the fact that the Immigrant Cash Bond Class B includes future members, the latter of which cannot be identified at this time. In light of the evidence submitted to the Court and the inclusion of future members in the Immigrant Cash Bond Class B, the Court finds that the classes are sufficiently numerous so as to render joinder impracticable.

b. Commonality

In essence, the question of law presented by each of the Cash Bond Classes is whether Federal Defendants' failure to take additional, reasonable measures to notify an obligor of a demand on a cash bond where the notice is returned undelivered, and where the bonded immigrant has appeared at all hearings and other required appearances of which he or she received appropriate notice, is violative of the constitutional guarantee of due process. The representatives of the Obligor Cash Bond Class and the Immigrant Cash Bond Class A both seek injunctive and declaratory relief requiring the reinstatement or reinstatement and cancellation of bonds already breached as a result of Federal Defendants' failure to provide additional notice. In addition, the representative of Immigrant Cash Bond Class B seeks injunctive and declaratory relief requiring Federal Defendants to provide additional, reasonable notice to obligors of demands on cash bonds in the future.

Although Federal Defendants advance no specific argument as to why Plaintiffs have failed to meet the test for commonality, an issue was raised at a hearing before the Court on November 17, 2006 that bears upon the commonality analysis. (Doc. 123). Specifically, the question arose as to whether the proposed classes are too broad, in that they encompass not only situations where the obligor has moved, but where the address to which the demand notice is sent is correct and the obligor purposefully fails to claim it. In such case, the classes as defined would potentially encompass persons with differing degrees of "fault," and thus present differing questions of law or fact.

Plaintiffs point to *Jones v. Flowers* , *supra*, in support of their argument that the Cash Bond Classes are not overly broad so as to endanger commonality. (Doc. 29). In that case, the Commissioner of State Lands of the State of Arkansas attempted to notify the petitioner of a tax

sale on his property by sending two letters by certified mail to the property's address. *Jones*, 126 S.Ct. at 1712-13. Both letters were returned "unclaimed." *Id.* The State eventually sold the property and the petitioner thereafter filed suit, claiming that the Commissioner's failure to provide notice of the tax sale had resulted in the taking of the petitioner's property without due process. *Id.* at 1713. The Supreme Court recognized that although "[d]ue process does not require that a property owner receive actual notice before the government may take his property," "due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 1713-14 (citing *Dusenbery v. United States*, 534 U.S. 161, 170 (2002); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). In addition, "'when notice is a person's due...[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.'" *Id.* at 1715 (quoting *Mullane*, 339 U.S. at 315).

In addressing the question of "whether due process entails further responsibility when the government becomes aware prior to the taking [of property] that its attempt at notice has failed," the Supreme Court reasoned that it did not believe that "a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed." *Id.* at 1714, 1716. In other words, "[n]o one 'desirous of actually informing' the owners would simply shrug his shoulders...and say 'I tried.'" *Id.* at 1716. As such, the Court held that the State should have taken additional reasonable steps to notify the petitioner of the tax sale, if practicable to do so. *Id.* at 1718.[11] That the letters may have been returned unclaimed because the petitioner "was not home when the postman called and did not retrieve the letter[s] at the post office" did not affect such holding.

[11] The Court concluded that additional reasonable steps were available to the State. *Id.* at 1718-21.

See id. at 1718.

Here, Plaintiffs have stated a due process claim cognizable under *Jones*.[12] More specifically, Plaintiffs claim that Federal Defendants figuratively "shrug their shoulders" when notice of a demand on a cash bond mailed to an obligor's address listed in the bond contract is returned, and that Federal Defendants' failure to take additional, reasonable steps to notify the obligor of the bond demand, thus leading to the breach of the bond and the deprivation of the obligor's property interest and the bonded immigrant's liberty interest, violates due process. In *Jones*, the possible reasons why the letters sent to the petitioner were returned "unclaimed" did not affect the Court's determination that the State had failed to comply with due process. Similarly, this Court finds that the specific reasons why Federal Defendants' demand notices are returned do not bear upon the question of law common to the proposed class–that is, whether Federal Defendants must take additional, reasonable steps to notify the obligor of a demand on a cash bond when that notice is returned. As such, the Court finds that Plaintiffs have satisfied the commonality requirement.

c. Typicality

Plaintiffs submit that the claims of Plaintiffs Adrianna Echavarria, Jorge Echavarria, and Juan Larin-Ulloa are typical of those of the classes they seek to represent. (Doc. 112). Specifically, Plaintiffs allege that Plaintiff Adrianna Echavarria paid a cash bond in order to secure the release of her husband, Plaintiff Jorge Echavarria, during his removal proceedings.

[12] In a previous order in the present case, the Court found that the obligor Plaintiffs have stated a due process claim for which relief can be granted under *Jones*. (Doc. 100). The Court recognizes that the due process claim of these Plaintiffs concerns the deprivation of a property interest–that is, the forfeiture of the bond amount, whereas the bonded immigrant Plaintiffs' due process claim concerns the deprivation of a liberty interest, in that the breach of a cash bond may result in the bonded immigrant's return to the custody from which he or she was bonded. *See Zamora-Garcia v. Trominski* (Doc. 135). In a previous order issued in the predecessor action, the Court found that the bonded immigrant's liberty interest is not implicated by Federal Defendants' failure to send notice of a demand on a cash bond directly to the bonded immigrant, as notice to the obligor is all that is constitutionally required. *Id.* However, the Court did not hold that the bonded immigrant Plaintiffs may not assert a due process claim with regard to the lack of reasonable notice to the obligor.

(Doc. 114 at ¶ 90). According to Plaintiffs, Mr. Echavarria never failed to appear at an Immigration Court setting, was represented by counsel at all relevant times, and was granted relief from deportation on June 10, 2003. (Doc. 112; Doc. 114 at ¶ 90). However, Federal Defendants allegedly breached the bond of Mr. Echavarria after a demand notice sent to Mrs. Echavarria at an address where she had resided in 1993 was returned undelivered. (Doc. 112; Doc. 114 at ¶¶ 90-91). Plaintiffs claim that neither Mr. or Mrs. Echavarria ever received notice, in person or through counsel, of any demand on the bond. (Doc. 114 at ¶ 90). Plaintiffs also allege, upon information and belief, that Federal Defendants knew that Mrs. Echavarria and her husband were no longer at the 1993 address and had information regarding how to contact Mrs. Echavarria. (Doc. 114 at ¶ 91).

With regard to Plaintiff Larin-Ulloa, Plaintiffs allege that an obligor posted a cash bond on his behalf on September 1, 2006. (Doc. 114 at ¶ 104). Plaintiffs claim that Mr. Larin-Ulloa is currently released from the custody of Federal Defendants pursuant to that cash bond and that he has appeared at every appearance requested by Federal Defendants as he continues to contest his removal through legal channels. *Id.*

Federal Defendants offer no specific argument as to why these three Plaintiffs' claims are atypical of the classes they seeks to represent. (Doc. 123). As discussed *supra*, the question of law presented by the classes is whether Federal Defendants' failure to take additional, reasonable measures to notify an obligor of a demand on a cash bond where the notice is returned undelivered, and where the bonded immigrant has appeared at all hearings and other required appearances of which he or she received appropriate notice, violates due process. Here, Federal Defendants apparently made no further efforts to notify Mrs. Echavarria, the obligor, of the demand on the cash bond of Mr. Echavarria, the bonded immigrant, when the demand notice was

returned undelivered, despite having information regarding how to contact Mrs. Echavarria, and despite the fact that Mr. Echavarria had appeared at all required court settings. Clearly, Mr. and Mrs. Echavarria's claims are typical of the Obligor Cash Bond Class and the Immigrant Cash Bond Class A.

In addition, Plaintiffs have provided sufficient argument and evidence to suggest that should Federal Defendants send notice of a demand on the bond of Mr. Larin-Ulloa to the address of the obligor listed in the bond contract, Mr. Larin-Ulloa's obligor is in danger of failing to receive such notice, thus resulting in the breach of Mr. Larin-Ulloa's bond and the potential deprivation of his liberty. As he seeks to represent all individuals in danger of these very consequences, Mr. Larin-Ulloa's claims are typical of the Immigrant Cash Bond Class B.

d. Adequacy

Finally, Plaintiffs claim that Mr. and Mrs. Echavarria and Mr. Larin-Ulloa are adequate representatives of the proposed class. (Doc. 112). According to Plaintiffs, the Echavarrias "have both a long history with class counsel and a stake in the outcome of the case." *Id.* In addition, Plaintiffs submit that class counsel has the experience and resources necessary to prosecute the claims of the class. *Id.* Federal Defendants offer no specific argument as to why these individuals are inadequate class representatives. (Doc. 123).

The Court agrees with Plaintiffs that Mr. and Mrs. Echavarria have a sufficient stake and interest in the outcome of the litigation, as the reinstatement and cancellation of the bond Mrs. Echavarria posted on Mr. Echavarria's behalf is dependent upon such outcome. In addition, Mr. Larin-Ulloa's ability to remain free on bond as he challenges his removal order may depend upon the outcome of the present litigation. Moreover, neither the Echavarrias nor Mr. Larin-Ulloa appear to have interests antagonistic to those of the classes they seek to represent. Finally, as

noted *supra*, the Court is satisfied that counsel for Petitioners is sufficiently zealous and competent to prosecute the claims of the class. (Doc. 93, Ex. CC 19). As such, the Cash Bond Classes satisfy all the requirements of Rule 23(a).

3. FED. R. CIV. P. 23(b)(2)

Plaintiffs submit that the Cash Bond Classes are appropriate for certification under Rule 23(b)(2), in that Federal Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final equitable relief. (Doc. 112). Without more, Federal Defendants assert that Plaintiffs fail to meet their burden to make a demonstration of at least one of the factors under Rule 23(b). (Doc. 123). However, Plaintiffs allege, and the record provides some evidence, that Federal Defendants do not attempt to provide additional notice of a call on a cash bond to the obligor after the notice is returned undelivered. According to Plaintiffs, Federal Defendants' inaction occurs even where the bonded immigrant has appeared at all required hearings and other appearances of which he or she has received notice, and even where Federal Defendants possess additional information regarding how to contact the obligor. Clearly, at issue with respect to the Cash Bond Classes are Federal Defendants' actions, or failure to act, on grounds generally applicable to cash bond obligors such as Mrs. Echavarria and bonded immigrants such as Mr. Echavarria and Mr. Larin-Ulloa. As such, the Cash Bond Classes are appropriate for certification under Rule 23(b)(2).

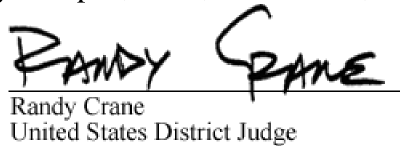
For the foregoing reasons, the Court **GRANTS** Plaintiffs' motion to certify the Obligor Cash Bond Class, Immigrant Cash Bond Class A, and Immigrant Cash Bond Class B.

III. Conclusion

For the reasons described above, the Court hereby **ORDERS** that Plaintiffs'/Petitioners' Motion for Class Certification is **GRANTED** in part and **DENIED** in part. (Doc. 112). More

specifically, the Court hereby **DENIES** Petitioners' request to certify the first group of Petitioners within the Supervision Class and **GRANTS** Petitioners' motion to certify the second group of Petitioners within the Supervision Class. In addition, the Court **GRANTS** Plaintiffs' motion to certify the Obligor Cash Bond Class, Immigrant Cash Bond Class A, and Immigrant Cash Bond Class B.

SO ORDERED this 25th day of April, 2007, at McAllen, Texas.



Randy Crane
United States District Judge