

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

JOSE JESUS RODRIGUEZ-PADILLA,)
GUADALUPE GONZALEZ-MORA, and)
REYNALDO OZUNA-VILLAREAL,)
Individually on their own behalf, and)
on behalf of all others similarly situated.)

v.)

DORA J. SANCHEZ, FIELD OFFICER IN CHARGE,)
U.S.C.I.S., HARLINGEN, TEXAS,)
MICHAEL CHERTOFF, SECRETARY,)
DEPARTMENT OF HOMELAND SECURITY, AND)
THE UNITED STATES OF AMERICA.)

CA M-07-204

SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS,
AND WRIT OF MANDAMUS, AND CLASS ACTION COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Jose Jesus Rodriguez-Padilla, Guadalupe Gonzalez-Mora, and Reynaldo Ozuna-Villareal, through counsel, and pursuant to Rule 15(a), Fed. Rules. Civ. Proc., file the instant Second Amended Petition for Writ of Habeas Corpus, (28 U.S.C. §2241); and for Writ of Mandamus, (28 U.S.C. §1361), and class action Complaint for declaratory and injunctive relief, under 28 U.S.C. §§1331 (federal question), and 1346(a)(2) (actions against Officers of the United States), together with 28 U.S.C. §2201 (Declaratory Judgment Act).

I. INTRODUCTION AND SUMMARY OF THE CASE

Under 8 U.S.C. §1304(d), Respondents have a non-discretionary duty to provide all lawful permanent residents, ("LPRs"), with "a certificate of alien registration or an alien registration receipt card in such form and manner and at such time as shall be prescribed under regulations issued by the Attorney General." See, 8 C.F.R. §264.1 (permitting I-94s as evidence of LPR status for those who "have not been registered previously," ¹ those allowed to depart without institution of deportation proceedings, and those

¹ Ironically, Defendants have all but discontinued the use of I-94s for newly-minted LPRs, because they can process and issue the I-551 within a period of ten days to two weeks from the approval of an I-485 application for LPR status.

placed under deportation proceedings), ² and 8 C.F.R. §299.1 (showing the I-551 as the Prescribed Form for a Permanent Resident Card); ³ *Loa-Herrera v. Trominski*, 231 F.3d 984,988,n.8 (5th Cir. 2000), quoting *Etuk v. Slattery*, 936 F.2d 1433, 1444 (2nd Cir. 1991) ("The INA mandates that the Attorney General provide LPRs who register with proof of their legal status"). Neither regulation authorizes I-94s as evidence of LPR status while Defendants conduct "security checks" in connection with the filing of an I-90.

Initially, green cards were issued without expiration dates. However, a number of years ago, the process was changed. The oldest cards were invalidated, and new cards were issued only for ten year periods, after which LPR must renew them by filing a Form I-90. Lost and mutilated cards are also replaced by filing I-90s. See, 8 C.F.R. §264.5. Said regulation sets forth the process of obtaining replacement cards, and requires that the applicant provide "the prior Permanent Resident Card or other evidence of permanent residence or commuter status," §264.5(e)(1)(ii) (emphasis added). It also mandates that the applicant be fingerprinted on Form FD-258, 8 C.F.R. §264.5(e)(3).

Recently, Defendants have converted the process by which new I-551 cards are issued into an enforcement procedure, and delay the issuance of such cards, and, in some cases, even the provision of temporary proof of LPR status, as a means of coercing compliance with requirements beyond those contemplated, or authorized, by law. Further, instead of simple fingerprint cards, applicants must now submit to a full bio-metric data collection, ⁴ and most recently, they may be asked to provide extensive documentation, *in addition*

² The regulation has not yet been updated to include removal proceedings, although I-94s are used in that connection as well.

³ Historically, such alien registration cards for LPRs have been called "green cards." At present, such cards are issued on Form I-551, and both terms will be used herein.

⁴ Because it is reasonable, Plaintiffs are not challenging the introduction of this new technology.

to their expiring I-551s or other proof of LPR status. For example, the preprinted notice of biometrics appointments now generally used states as follows, [43:2] (emphasis in original):

3. DISPOSITION OF ARREST(S). Applicants **must** bring certified or original evidence of disposition of any arrest/charge in or outside the U.S. Unless it is alcohol or drug related, you do not need to submit documentation for traffic incidents that do not involve an arrest if the only penalty was a fine of less than \$500 and/or points on your driver's license. Failure to provide this information may result in your application being delayed or denied.

On January 31, 2005, Defendants adopted two new versions of the biometrics appointment notice. One with the above language, [43:2], and one without, [45:4]. The one without this language was used for biometrics appointments in I-90 cases at least as of August, 2005, [45:4],⁵ but on information and belief, Plaintiffs allege that Defendants no longer use it in I-90 cases, if at all.

The centers where biometrics are taken have the equipment to place strips on the back of I-551s, extending their validity. Although Defendants frequently extend expiring or expired I-551s when the biometrics are taken, they do not always do so.⁶ Most members of the putative class are unaware that this possibility exists, and do not affirmatively request extensions if Defendants fail to grant

⁵ Such language is appropriate in connection with other types of applications, where the existence of a criminal record is relevant to eligibility for the benefit sought, e.g., applicants for asylum, or for adjustment of status, where the applicant is not already an LPR, and is seeking to become one. It is not appropriate where eligibility simply depends on whether the applicant continues to be an LPR. It is doubtless for this reason that two versions of the form were simultaneously promulgated, and the one without the offending language was, at least for a while, used in connection with I-90 applications.

⁶ Plaintiffs have thus far been unable to discern any pattern in the grant or failure to grant such extensions, and consider that it is probably arbitrary, and left to the discretion of the officials on duty at the time.

them on their own initiative. An I-90 applicant could request an I-94 as temporary proof of LPR status ⁷ at a District Office, but said offices lack the equipment to put strips on the back of I-551 cards, extending their validity, and, as held in *Loa-Herrera, supra*, I-94s are an inadequate substitute for an I-551.

Further, when the biometric checks reveal a "hit," (*i.e.*, that an I-90 applicant has had some involvement with the criminal justice system), Defendants delay the issuance of the I-551 while they conduct "security checks." This often causes the issuance of the I-551 to be delayed beyond the validity of any "stip" placed on the back of an expired or expiring I-551, and sometimes results in delays that can only be called ridiculous. ⁸

Plaintiffs assert that in I-90 cases, the use of the biometrics appointment form demanding documents relating to criminal records, and the attendant threat to *delay or deny* issuance of a new I-551, are improper. They also assert that failing to put the strip, extending the validity of an I-551, on *all* expired or expiring I-551s when the applicant appears for his/her biometrics appointment, and delaying issuance of a new I-551 while they conduct "security checks," are inconsistent with Defendants' statutory obligation to provide Plaintiffs with appropriate evidence of their LPR status. Plaintiffs also urge that to require personal interviews of I-90 applicants for reasons other than to determine actual eligibility for a new I-551 is inappropriate. *See*, 8 C.F.R. §264.5(e)(3)(ii).

⁷ Under 8 U.S.C. §1304(d), the certificate of alien registration or alien registration card "shall be issued ... in such form and manner and at such time as shall be prescribed under regulations issued by the Attorney General." The only form listed by the regulations as proof of LPR status is the I-551. *See*, 8 C.F.R. §299.1. And, as found in *Loa-Herrera, supra* at 986-87, LPRs who are given I-94s in lieu of I-551s face "a greater degree of harassment by the INS and diminished employment opportunities."

⁸ Plaintiff Ozuna, for example, filed an I-90 in 2001, and has yet to receive his I-551, due to alleged delays in completing the "security checks," notwithstanding repeated prodding.

Consequently, Plaintiffs seek declaratory, and corresponding injunctive relief, limiting the demands which Defendants may make on an LPR who has filed an I-90 to those which are consistent with both 8 C.F.R. §264.5 and the underlying statutory provisions, including 8 U.S.C. §§1304(d) and 1229a(c)(3). Plaintiffs also seek declaratory, and corresponding injunctive relief, requiring that, when an I-90 applicant with an expiring and expired I-551 appears for his/her biometrics appointment, Defendants place a strip on the reverse of the I-551, extending its validity for the period of time it is anticipated that it will take to adjudicate the I-90, and that when an I-90 applicant seeking to replace a lost or destroyed I-551 appears for his/her biometrics appointment, Defendants provide an I-94, temporary proof of LPR status, valid for an equivalent period. Finally, Plaintiffs seek declaratory, and corresponding injunctive relief, prohibiting Defendants from delaying issuance of a new I-551 for reasons other than to ascertain eligibility for a new card, such as while they attempt to pressure an I-90 applicant into providing records involving alleged criminal activity, or while they conduct "security checks."

I. JURISDICTION AND VENUE

1. Jose Jesus Rodriguez-Padilla, ("Mr. Rodriguez"), is a 39-year-old native and citizen of Mexico, who has resided in the United States as a lawful permanent resident since 1981. In July of 2005, Mr. Rodriguez filed an I-90, seeking to renew an expired I-551. To date, he has not received his new I-551, the lack of which places significant restrictions on his liberty not shared by the populace at large, and constitutes "custody" for habeas purposes.

2. Guadalupe Gonzalez-Mora, ("Mr. Gonzalez"), is a native and citizen of Mexico, who has been a lawful permanent resident since 1990, and a lawful temporary resident since 1988. He currently resides in Palmview, Texas. On September 21, 2007, Mr. Gonzalez filed an I-90 to renew his expired I-551. He received a biometrics

appointment for December 5, 2007. It instructed as follows:

3. **DISPOSITION OF ARREST(S)** . Applicants **must** bring certified or original evidence of disposition of any arrest/charge in or outside the U.S.. Unless it is alcohol or drug related, you do not need to submit documentation for traffic incidents that do not involve an arrest if the only penalty was fine of less than \$500 and/or points on your driver's license. Failure to provide this information may result in your application being delayed or denied.

Plaintiffs' Exhibit N, [Document 43]. Mr. Gonzalez attended his biometrics appointment, in McAllen, Texas, but no strip was placed on his I-551, extending its validity I-551, the lack of which places significant restrictions on his liberty not shared by the populace at large, and constitutes "custody" for habeas purposes.

3. Reynaldo Ozuna-Villareal, ("Mr. Ozuna"), is a native and citizen of Mexico, who resides in Rio Grande City, Texas. Mr. Ozuna filed a fee-paid application to replace his expired I-551 on August 7, 2001. Said application has never been adjudicated, allegedly because Defendants have not completed their "security checks." Despite countless trips to the office of Defendant Sanchez, he has received only an I-94, temporary evidence of LPR status, which has been repeatedly extended. Exhibit Q, [Doc. 49].

II. THE PARTIES

4. Jose Jesus Rodriguez-Padilla, Guadalupe Gonzalez-Mora, and Reynaldo Ozuna-Villareal are all natives and citizens of Mexico, and lawful permanent residents of the United States. Petitioner Rodriguez resides in Rockford, Illinois, Petitioner Gonzalez, in Palmview, Texas, and Petitioner Ozuna, in Rio Grande City, Texas.

5. Respondent/Defendant Dora J. Sanchez is the Field Officer In Charge the Harlingen Office of the U.S.C.I.S. Respondent/Defendant Michael Chertoff is the Secretary of the Department of Homeland Security. Both are sued in their official capacities only. The United States of America is also a Defendant herein.

III. THE FACTS
A. GENERAL ALLEGATIONS

6. Depending on where the application is processed, it generally takes Defendants from about six to eighteen months to process I-90 applications for replacements of expired or expiring I-551s. See, Exh. "P" [Doc. 48]. Defendants therefore customarily provide I-90 applicants with temporary proof of LPR status. This usually occurs when the applicant appears for his/her biometrics appointment, at which time a strip is placed on the back of the old I-551, extending its validity for a period of about six months.

7. If a new I-551 has not been issued before the expiration of the extended I-551, there is often no procedure by which an I-90 applicant can request another strip on his/her I-551, further extending the validity thereof. Nor are there generally available procedures by which I-90 applicants who did not receive such a strip at the biometrics appointment can thereafter request one. The best that can be obtained in such cases is usually an I-94, temporary proof of LPR status.

B. PETITIONER JOSE JESUS RODRIGUEZ-PADILLA

8. Jose Jesus Rodriguez-Padilla is a 39-year-old native and citizen of Mexico. In 1981, Mr. Rodriguez adjusted his status to lawful permanent resident. Mr. Rodriguez has had several arrests and one conviction, (in 1995), in Cook County, IL, between 1992 and 2004. He also has at least one arrest/conviction in California.

9. In July of 2005, Mr. Rodriguez filed a I-90 to renew his expired I-551. He attended his biometrics appointment in September, 2005. In October, 2005, he received a Request For Evidence for dispositions of all arrests from 1987 to the present. Said Request stated that the documents were required to "complete the processing" of his I-90 application. In October 2005, Mr. Rodriguez sent a copy of his Chicago arrest history. Defendants subsequently gave him a temporary stamp on his I-551 extending it to March 2006. Mr. Rodriguez does not recall when or if he received another RFE

but he did request his arrest history from California in July 2006.

10. Mr. Rodriguez received another RFE dated December 3, 2007, demanding sworn statements, his arrest history, and certified court dispositions for each and every arrest. The notice allowed him 30 days to respond, and warned that no extensions would be granted. The notice also stated as follows:

If the evidence submitted does not establish that your case was approvable at the time it was filed, it can be denied.

If you do not respond to this request within the time allowed, your case will be considered abandoned and denied due to lack of prosecution. Evidence received in this office after the due date may not be considered.

Through counsel, Mr. Rodriguez declined to provide any further documentation. To date, his counsel has not received a response, or his new I-551. Plaintiffs' Exhibit O, (Document 45).

C. PETITIONER GUADALUPE GONZALEZ-MORA

11. Guadalupe Gonzalez-Mora is a native and citizen of Mexico. He has been a lawful permanent resident of the United States since 1990, and a lawful temporary resident since 1988. He currently resides in Palmview, Texas. In 1994, Mr. Gonzalez was given probation for the offense of simple possession of marijuana. An Order to Show Cause was issued, but was never filed with the EOIR.

12. On September 21, 2007, Mr. Gonzalez filed an I-90 to renew his expired I-551. And on November 27, 2007, he affirmatively filed an I-191 with Respondent Sanchez, seeking 212(c) relief, pursuant to 8 C.F.R. §212.3(a)(1). He received a biometrics appointment on his I-90 for December 5, 2007. It instructed as follows:

3. **DISPOSITION OF ARREST(S)**. Applicants **must** bring certified or original evidence of disposition of any arrest/charge in or outside the U.S.. Unless it is alcohol or drug related, you do not need to submit documentation for traffic incidents that do not involve an arrest if the only penalty was fine of less than \$500 and/or points on your driver's license. Failure to provide this information may result in your application

being delayed or denied.

Plaintiffs' Exhibit N, [Document 43].

13. Mr. Gonzalez attended the biometrics appointment. He took a copy of the I-191 and supporting documents, including a copy of his conviction record, and proof of payment of the pertinent fine, but did not take "certified or original" copies thereof. No strip extending the validity of his I-551 was placed thereon when he attended his biometrics appointment. As of filing the instant action, he has neither received an appointment on his I-191, nor any further communication regarding his I-90.

D. PETITIONER REYNALDO OZUNA-VILLAREAL

14. Reynaldo Ozuna has been a lawful permanent resident since December 1, 1990, and was a lawful temporary resident since about 1987. In 1996, Mr. Ozuna pled guilty to a marijuana offense. On August 7, 2001, when returning from a temporary visit abroad, Mr. Ozuna was stopped, because his I-551 had expired, and because the computer showed his marijuana conviction. He filed an I-90, and surrendered his I-551 in exchange for an I-94, with multiple notations. But removal proceedings were never initiated. Instead, on February 10, 2002, Mr. Ozuna affirmatively applied for §212(c) relief, which application was granted on November 12, 2003, by then Interim District Director Alfonso De Leon.

15. Since then, Mr. Ozuna has made numerous trips to Mexico, using his I-94, and has often experienced delays on his return. Allegedly because the "background checks" have not been completed, his I-90 has never been adjudicated, and he has never received his I-551, despite repeated inquiries.

IV. CLASS ALLEGATIONS

16. The above are not isolated problems. Rather, they are the result of nationwide practices recently adopted by Defendants.

17. Plaintiffs herein seek to represent a national class,

consisting of all persons who have been or will be afforded the status of permanent residents, who have filed or will in the future file I-90 applications to renew or replace their I-551s, and who have or will have complied with the requirements of 8 C.F.R. §264.5, and in whose cases: 1) at the time the applicant appeared for his/her biometrics appointment, Defendants did not or will not extend their I-551s, (or, for those applicants seeking to replace a lost or destroyed I-551, did not or will not issue an I-94, temporary proof of LPR status), valid for a period of time roughly equivalent to the published processing time for I-90s in the district wherein their applications were filed, or 2) Defendants have not adjudicated or will not adjudicate the I-90 in accordance with their published processing schedules.

18. On information and belief, Plaintiffs allege that the class as so defined numbers at least in the dozens, if not the hundreds, not counting future members.

19. The class is so numerous that joinder of all members would be impracticable. Joinder is particularly impracticable since the class includes future members.

20. The claims of the representative parties are typical of the claims of the class.

21. The representative parties, and their counsel, can and will fairly and adequately protect the interest of the class.

22. There are questions of law and fact that are common to the class which predominate over any individual questions. Further, Defendants have acted, or refused to act, on grounds generally applicable to the class, making appropriate final injunctive and declaratory relief, with respect to the class as a whole.

V. THE CAUSES OF ACTION
A. HABEAS CORPUS

The deprivation of the liberty of Petitioners as complained of

herein violates the laws and Constitution of the United States, which claims are cognizable in habeas corpus under 28 U.S.C. §2241.

Under 8 U.S.C. §1304(d), Respondents have a non-discretionary duty to provide Petitioners with "a certificate of alien registration or an alien registration receipt card in such form and manner and at such time as shall be prescribed under regulations issued by the Attorney General." See, 8 C.F.R. §264.1 ("Prescribed Registration Forms") and 8 C.F.R. §299.1 (showing I-551 as the "Prescribed Form" for a "Permanent Resident Card"); *Loa-Herrera v. Trominski*, 231 F.3d 984,988,n.8 (5th Cir. 2000), quoting *Etuk v. Slattery*, 936 F.2d 1433,1444 (2nd Cir. 1991) ("The INA mandates that the Attorney General provide LPRs who register with proof of their legal status.") Respondents' failure to provide Petitioners with such documents violates the laws and Constitution of the United States.

B. MANDAMUS - FAILURE TO ISSUE ALIEN REGISTRATION RECEIPT

Under 8 U.S.C. §1304(d), Respondents have a duty to provide Plaintiffs with proof of their LPR status. The named Plaintiffs have all completed the requirements of 8 C.F.R. §264.5. Defendants have no lawful authority to delay the issuance of documentation evidencing their LPR status, as specified by 8 C.F.R. §264.1 and §299.1, while they conduct "security checks," or for any other reason unrelated to whether the applicant continues to be a lawful permanent resident. The duty to issue an I-551 after an LPR has filed an I-90, and complied with the requirements of 8 C.F.R. §264.5, is a purely ministerial one, and is subject to enforcement by Writ of Mandamus.

**C. CLASS-WIDE RELIEF
INJUNCTIVE AND DECLARATORY RELIEF**

Under 8 U.S.C. §1304(d), Defendants have a duty to provide Plaintiffs, and the class they seek to represent, with alien registration receipt cards in the prescribed form, to wit, other than in limited instances not relevant herein, an I-551. Defendants have no lawful authority to demand that I-90 applicants

provide documents or submit to a personal interview relating to anything other than their continued LPR status, or to delay the issuance of I-551s while they conduct "security checks," or for any other reason unrelated to whether the I-90 applicant is eligible for a new I-551, *i.e.*, whether s/he continues to be a lawful permanent resident. The failure to timely issue such cards violates Defendants' statutory duties. As a result, Plaintiffs are entitled to injunctive, and corresponding declaratory relief.

VI. RELIEF REQUESTED

Wherefore, Petitioners seek a Writ of Habeas Corpus, freeing them from the unlawful restraint on their liberty.

The named Plaintiffs also seek a Writ of Mandamus, mandating that Defendants provide them forthwith with appropriate evidence of their status as lawful permanent residents, to wit, their I-551s;

The named Plaintiffs also request class certification, and on their own behalf and on behalf of the class they seek to represent, an injunction, enjoining and restraining Defendants: 1) from using the version of the 2005 revision of the biometrics appointment notice requiring documents relating to criminal activity, rather than the one without such language, in connection with I-90 applications; 2) from not placing a strip on expired or expiring I-551 of I-90 applicants appearing for their biometric appointments, extending the validity thereof for the time necessary to process the I-90, as set forth in their published processing schedules,⁹ and 3) from making demands on Plaintiffs for documents or person interviews, or delaying the issuance of their I-551s, for any reason unrelated to their eligibility for such cards, to wit, whether they continue to be lawful permanent residents. Plaintiffs also seek corresponding declaratory relief, and such other and further relief as the Court

⁹ Hopefully, this would also motivate Defendants to bring the time for processing I-90s in California, (currently about 18 months), into line with the rest of the country, (about 6 months).

may find to be just and appropriate.

Respectfully Submitted,

s/ Lisa S. Brodyaga
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CERTIFICATE OF SERVICE

I certify that copies of the foregoing was served electronically on Rene Benavides, AUSA, and Arthur Rizer, Attorney, OIL, on January 21, 2008.

s/ Lisa S. Brodyaga