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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

El RESCATE LEGAL SERVICES, INC., et al., Plaintiffs, vs. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, et al., Defendants.	NO. CV 88-1201-KN PLAINTIFFS' APPLICATION FOR AN AWARD OF INTERIM ATTORNEYS' FEES AND COSTS; MEMORANDUM OF POINTS AND AUTHORITIES [EXHIBITS FILED UNDER SEPARATE COVER] Trial Date: Oct. 5, 1993

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APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS

TO DEFENDANTS AND THEIR COUNSEL OF RECORD:

Pursuant to the Joint Stipulation of the parties filed July 6, 1993, and at the direction of the Court, plaintiffs hereby submit their application for an order awarding interim attorneys' fees and costs in the total amount of $ 1,353,678.24 for the work of the various attorneys who have represented plaintiffs in this action through July 15, 1993.

This application is made on the ground that plaintiffs are entitled to an interim award of fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412, in that plaintiffs are the prevailing parties in the litigation, defendants' position was not substantially justified, and there are no special circumstances that would make an award of fees and costs unjust.

This application is based on the files and records of the court herein, the attached Memorandum of Points and Authorities, the Declarations and Exhibits filed herewith under separate cover, and any further evidence that may be presented.

DATED: August 2, 1993

Respectfully submitted,

IMMIGRANTS' RIGHTS OFFICE OF THE
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By: _____
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By this application, plaintiffs seek an award of interim attorneys' fees and costs in the amount of $ 1,353,678.24 for work performed to date[1] in this case which has completely altered the face of immigration court proceedings in the Los Angeles, San Diego and El Centro Immigration Courts. As set out below, the results of this lawsuit have been nothing less than astounding: not only has this action resulted in a policy of complete interpretation of immigration court proceedings in the three immigration courts covered by the litigation, but it has also been the catalyst for nationwide improvements in the quality of interpretation provided to non-English speaking alien respondents in immigration courts nationwide. Plaintiffs have furthered the public interest in safeguarding the fairness of immigration court proceedings for decades to come.

II. HISTORY OF THE LITIGATION

Because a breakdown of the different areas of work involved in this litigation will assist consideration of plaintiffs' fee request, plaintiffs will discuss these different areas in some detail.

A. Nature of the Litigation

This class action lawsuit was filed by five individuals who were subject to proceedings to expel them from the United States and two non-profit legal assistance organizations which represent

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[1] Plaintiffs seek recovery of $ 1,251,322.40 in attorneys' fees and $ 102,355.84 in reimbursable costs for all work performed in the case through July 15, 1993.

individuals before the immigration courts. It challenged the system for interpretation of exclusion, deportation and other immigration court proceedings initiated by the Immigration and Naturalization Service (INS) to enforce the provisions of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq.

There are two issues at the heart of this lawsuit. First, plaintiffs contend that the Executive Office for Immigration Review (EOIR)[2] engaged in a policy and practice of using uncertified, untrained and unqualified clerks to interpret immigration court proceedings when the person subject to the proceeding (hereinafter known as "respondent") cannot adequately understand English.[3] Second, plaintiffs contend that EOIR followed a policy and practice of not interpreting most portions of the immigration court hearing.[4] The complaint alleged three claims for relief: that defendants' policy and practice of employing inadequate interpreters and of failing to interpret many portions of the hearing (1) deprived plaintiffs of their statutory rights; (2) denied plaintiffs due process and equal protection, and (3) violated the Administrative Procedure Act.

B. Pre-Complaint Work

Plaintiffs' counsel spent many months prior to filing the complaint documenting interpretation problems in immigration

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[2] The Executive Office for Immigration Review (EOIR) is the federal agency responsible for supervising the Office of the Chief Immigration Judge and the Board of Immigration Appeals (BIA). 8 C.F.R. § 3.0.

[3] For convenience, hereinafter sometimes referred to as the "competency" issue.

[4] Hereinafter, the "completeness" issue.

court, identifying and consulting with experts regarding these problems, meeting with plaintiffs and drafting a complaint. On December 7, 1987, plaintiffs' counsel sent a letter to then-Chief Immigration Judge William Robie detailing both the competence and completeness problems, and advising EOIR that plaintiffs would bring suit unless the agency took measures to correct these problems. Decl. of Niels Frenzen, Exh. C. The only response to this letter was a brief letter from Judge Robie dated December 22, 1987, stating that "we are currently looking into the serious allegations which you have raised in your letter" and that EOIR would respond further "upon completion of our review." Exh. C and attachment. Plaintiffs waited a further two and a half months without receiving any further response, before filing their complaint on March 7, 1988. Exh. C.

C. Opposition to Motion to Dismiss

EOIR responded to the complaint with a motion to dismiss (filed May 10, 1988), arguing that the district court lacked jurisdiction over the plaintiffs' claims. The essence of their argument was that § 106(a) of the INA [8 U.S.C. § 1105(a)], granting exclusive jurisdiction to the courts of appeals to review "all determinations made during and incident to the administrative proceeding conducted by [the immigration judge]," deprives the district court of jurisdiction to consider even a class-wide procedural challenge such as this one. This argument had previously been rejected by courts both outside of and in this Circuit. Haitian Refugee Center v. Smith, 676 F.2d 1023, 1033 (5th Cir. Unit B 1982); Orantes-Hernandez v. Smith, 541 F.Supp. 351, 364 (C.D. 1982); Orantes-Hernandez v. Meese, 685

F.Supp. 1488, 1503 (C.D.Cal. 1988), aff'd. sub nom Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990). It was rejected in this case, at both the district court and appellate levels; and in fact it has been rejected by all courts that have considered it. See e.g., Montes v. Thornburgh, 919 F.2d 531 (9th Cir. 1990).

D. Discovery

Early in the litigation, plaintiffs served requests for production of documents and interrogatories, and when initial responses were inadequate, followed these with further requests for documents, interrogatories and requests for admissions. Although responses were made, Judge Gray characterized them as follows: "I don't remember having seen such uncooperative -- inappropriately uncooperative responses to discovery in a long while." (Transcript of Proceedings, 6/19/89 at 4:11-13, Exh. B herein).[5] Substantive responses were only provided after the Court ruled in favor of plaintiffs' motions to compel.

In part because defendants avoided making substantive responses concerning their policies and practices with respect to interpretation, plaintiffs were compelled to conduct some sixteen depositions of immigration court interpreters. These depositions developed substantial evidence of the interpreters' lack of education and training. See Decl. of Darline Alvarez, Exh. D.

Other discovery work included plaintiffs' responding to four sets of interrogatories and three sets of requests for documents,

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[5] See also, id. at 11:6-7: "The Court: Well, I have never seen such a lack of information on the part of the U.S. Attorney, Mr. Fan."

and conducting depositions of other EOIR officials including the Chief Immigration Judge and immigration court management officers. In addition, the defendants conducted exhaustive depositions of seven of plaintiffs' expert witnesses, as well as all of the individual named plaintiffs and attorneys from the two organizational plaintiffs. Frenzen Decl., Exh. C.

E. Motion for Class Certification

Plaintiffs moved for class certification on September 6, 1988. Defendants vigorously opposed class certification, submitting a 21-page brief with 443 pages of exhibits, and a supplement to that brief. The Court granted class certification on October 24, 1989. The class consists of tens of thousands of non- or limited-English-speaking persons who currently are, or in the future will be, subject to immigration court proceedings in the Los Angeles, San Diego and El Centro Immigration Courts.

F. Motion for Partial Summary Judgment

On August 22, 1989, plaintiffs moved for partial summary judgment regarding the completeness issue. The defendants vigorously opposed this motion. On November 9, 1989, the district court granted plaintiffs' motion for partial summary judgment regarding the "completeness" issue, finding that defendants' policy and practice of failing to require full interpretation of immigration court hearings violated plaintiffs' statutory rights to be present at their hearing, to counsel, to examine evidence and to confront and cross-examine witnesses. See El Rescate Legal Services v. Executive Office for Immigration Review (EOIR), 727 F.Supp. 557 (C.D.Cal. 1989), rev'd., 959 F.2d 742 (9th Cir. 1991). On January 4, 1990, the Court issued a

permanent injunction requiring defendants to interpret all portions of immigration court hearings.

G. Use of Experts to Assess Interpreter Competence

As part of their preparation for trial, plaintiffs sought defendants' agreement to administering a test to the immigration court interpreters in order to assess their competence. When defendants strenuously opposed this proposal, plaintiffs resorted to the alternative of engaging interpretation experts to evaluate the interpreters from the tape-recorded transcripts of immigration court proceedings. Decl. of Carlos Daniel Levy, Exh. E herein.

In order to conduct this evaluation, plaintiffs obtained through discovery copies of the tapes for hearings conducted during two randomly-selected weeks. Additional tapes had to be requested subsequently to complete the analyses. Two individual (as opposed to master) calendar hearings for each interpreter then had to be located on the tapes. This had to be done by experienced immigration attorneys, since legal assistants were unable to identify the individual calendar hearings from the tapes. The tapes of these hearings were then reviewed by federal court interpreters who evaluated the interpretation. Two overall interpretation experts then prepared a general report on the competence of the immigration court interpreters. The final report is eighty-six pages long and discusses separately the competence of forty-one individual interpreters. Exh. E.

H. First Round of Settlement Discussions

In March, 1990, defendants informed plaintiffs that they had a plan to develop a certification examination for immigration

court interpreters, and to implement interim measures to ensure better interpretation until the exam could be utilized. For the next several months the parties engaged in settlement discussions, assisted by U.S. District Judge A. Wallace Tashima as settlement judge. These settlement discussions ultimately broke down over the defendants' intention to "grandfather" the existing interpreting staff such that they would be exempt from the certification examination. See Frenzen Decl., Exh. C.

Ultimately, this issue was resolved, in that EOIR has now decided to require existing interpreters to meet new performance standards essentially equivalent to passage of the certification exam, and to remove from interpreting duties any existing interpreters who fail to meet these standards. See Joint Status Report, filed July 6, 1993, at 6; Frenzen Decl., Exh. C.

I. Monitoring and Motion to Compel Compliance

For many months during 1990, plaintiffs' counsel monitored the completeness of the interpretation being provided in the immigration courts covered by the permanent injunction. This monitoring identified a number of serious deficiencies in the completeness of the interpretation being provided. These deficiencies included failing to provide interpretation of "off-the-record" discussions and pre-hearing conferences, and failing to provide complete interpretation of bond proceedings.[6]

To redress these problems, plaintiffs filed a Motion to Compel Compliance and for Civil Contempt on November 5, 1990.

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[6] See Memorandum of Points and Authorities in Support of Plaintiffs' Motion for an Order to Compel Compliance and for Civil Contempt, filed 11/05/90.

A number of depositions were conducted concerning these issues, and a hearing was scheduled for February 26, 1991. At the hearing, Judge Gray urged the parties to reach agreement on a stipulation clarifying the application of the injunction to the problems raised by the plaintiffs. With the guidance of the Court, the parties negotiated a Memorandum of Understanding, which set out in greater detail the parameters of the permanent injunction. Thus, for example, the Memorandum of Understanding required interpretation of "off-the-record" discussions and pre-hearing conferences. See Memorandum of Understanding, filed June 28, 1991 concurrently with a stipulation dismissing the motion for civil contempt.

Plaintiffs' counsel expended a total of 963.75 hours in this phase of the litigation.

J. Monitoring and Contributing to Remedial Measures

On March 19, 1991, the district court, on its own motion, stayed all further proceedings to give defendants an opportunity to develop and implement various remedial measures they have undertaken, as a result of the lawsuit, to improve the quality of interpretation. The district court also directed defendants to share information regarding their remedial measures with plaintiffs to facilitate plaintiffs' monitoring of and input in the various projects undertaken by defendants. The Court also specifically noted that it had been necessary for plaintiffs to pursue the litigation and that attorneys' fees to plaintiffs would be indicated. March 19, 1991 Reporter's Transcript of Proceedings at 5, Exhibit A herein.

Since that time defendants have filed quarterly progress

reports to update the Court on their efforts, and sent monthly reports to plaintiffs. Plaintiffs have reviewed each step of the process with experts, and have provided input that has contributed to the development of the remedial measures. See Frenzen Decl., Exh. C.

K. Appeal

The defendants appealed the permanent injunction requiring complete interpretation. A three-judge panel of the Ninth Circuit issued an opinion on August 12, 1991, to which plaintiffs filed a timely petition for rehearing. On March 10, 1992, the panel granted rehearing, and issued an amended opinion overturning the district court. The court ruled in favor of plaintiffs on the challenges to jurisdiction asserted by the defendants. However, the court ruled that EOIR's policy requiring interpretation of questions to and anwswers from non-English-speaking respondents, and giving each immigration judge the discretion to determine what additional portions of the hearing need be interpreted was not facially invalid. The court remanded the case for the district court to determine whether that policy as applied by the immigration judges systematically violated respondents' rights to due process. El Rescate Legal Services v. Executive Office for Immigration Review (EOIR), 959 F.2d 742 (9th Cir. 1991)(as amended after rhrg. grntd.).

Had defendants reverted to the practices of incomplete interpretation utilized before the complaint was filed, plaintiffs would have proceeded to litigate and establish that those practices served to systematically violate respondents' due process rights. However, rather than returning to the old

practices, defendants developed a policy requiring complete interpretation. This policy is set forth in a May 1, 1992 memorandum from then-Chief Immigration Judge William Robie. See Robie Memorandum, Exh. F herein. This policy expressly is limited to the immigration courts that were covered by the injunction. In all important respects, the policy adopted the clarifications of the Memorandum of Understanding. See Robie Memorandum, Exh. F.

Plaintiffs' counsel expended a total of 620.15 hours on the appeal.

L. Second Round of Settlement Discussions

After the case was remanded to the district court, the parties again commenced settlement discussions. These discussions have lasted from approximately May, 1992 to the present, without reaching a complete agreement.

M. Meetings of Co-Counsel

Inevitably, in a complex class-action requiring the work of several co-counsel, meetings of co-counsel were necessary to ensure the coordination of the many necessary tasks. Plaintiffs have segregated all of the hours relating to meetings of co-counsel. To dispel any concern that the use of co-counsel may have led to duplicative expenditure of hours, plaintiffs have reduced the total number of hours for this category for which they seek compensation by one-third (33%), from 1,395.08 to 929.10. See Exh. X herein, "Calculation of Attorneys' Fees."

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III. THIS ACTION HAS BROUGHT ABOUT SIGNIFICANT PROCEDURAL AND SUBSTANTIVE CHANGES IN IMMIGRATION COURT

A. Challenged Prior Practices--Incomplete and Inaccurate Interpretation

Prior to the filing of this lawsuit, the only portions of a proceeding that EOIR generally required be interpreted for a non or limited-English-speaking respondent were the direct questions to the respondent and his or her responses. Matter of Exilus, 18 I&N Dec. 276 (BIA 1982). EOIR policy allowed each immigration judge the discretion to determine whether any other portions of the hearing need be interpreted. Id. EOIR did not require, and regularly failed to provide for, interpretation of all other portions of immigration court proceedings, including testimony of adverse and other English-speaking witnesses, all colloquies not specifically directed to the alien, arguments and objections of counsel, and the oral decision of the immigration judge. EOIR provided interpreters primarily for the benefit of the immigration judge and the creation of an English record, maintaining that it had no obligation to interpret the proceedings for the benefit of the respondent.[7]

In addition to incomplete interpretation, the quality of the

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[7] See El Rescate Legal Services v. Executive Office for Immigration Review (EOIR), 727 F.Supp. 557 (C.D.Cal. 1989), rev'd., 959 F.2d 742 (9th Cir. 1991). Although the court of appeals reversed the judgment of the district court, finding that the record lacked the factual determinations necessary to determine whether EOIR's interpretation policy violated the constitutional rights of respondents, the description of the policy set forth by the district court provides a useful summary of facts regarding the policy as applied.

interpretation that was provided was unsatisfactory at best. Discovery in this case revealed that since the creation of EOIR in 1983 until the lawsuit was filed, very little attention was given to the quality of interpretation in immigration court. No standardized written or oral examination was provided in either Spanish or English before an interpreter was hired. Review of an interpreter's interpreting abilities once he or she was hired consisted of informal evaluations from immigration judges and an occasional comment from an attorney practicing before the immigration court. Only after the complaint was filed did EOIR hire experts in the field of interpretation to evaluate the performance of interpreters in Southern California. Alvarez Decl., Exh. D at para. 3.

Prior to the filing of the lawsuit, interpreters were hired as language clerks, at the GS-4 level. Only a handful of the interpreters hired prior to the lawsuit had received more than a high school education. In addition to interpreting duties, they were responsible for maintaining court records, inputting computer information, and typing. Id. at paras. 6-8.

B. Results of the Action--Complete and Accurate Interpretation

As a result of this litigation, in Southern California immigration courts, virtually any discussion which takes place during the course of a hearing, whether it is on- or off-the-record, is interpreted for the benefit of the non-English-speaking respondent. This means that objections, opening and closing statements, testimony of English-speaking witnesses, the immigration judge's oral decision and colloquies between the immigration judge and counsel must now be interpreted. To ensure

that complete interpretation does not unduly prolong hearings, simultaneous interpretation is used for most of this interpretation. Robie Memorandum, Exh. F.

The other facet of this case involves the quality of interpretation provided. Plaintiffs alleged that EOIR provided untrained and uncertified interpreters who are not qualified to provide competent interpretation at immigration hearings. As a result of the litigation, defendants are developing and implementing remedial measures to improve the quality of interpretation. The most significant of these is the development of a certification exam which interpreters will be required to take and pass before being allowed to interpret in Spanish in immigration court proceedings. The exam is scheduled to be completed by September 1, 1994 and will be administered nationwide. Until the certification examination is administered, EOIR will use an Interim Hiring Test to screen applicants for interpreter positions. Joint Status Report, 7/6/1993, at 4-5.

EOIR has also conducted an assessment of the skills of each of the current interpreters, and prepared a specific training program for them. All EOIR interpreters have now attended training programs for periods ranging from several days to several weeks. Id. at 3. EOIR has upgraded the staff interpreter job classification and expanded the salary ladder. Id.

In addition, EOIR has added numerous quality control provisions to the present interpretation services contract, which expires October 1, 1995. Contract interpreters must pass an examination developed by the contractor which tests English and foreign language ability and the interpreter's knowledge of

immigration terms and phrases. Once the Spanish-English certification exam is complete, EOIR is committed to negotiating an agreement to require that contract Spanish interpreters take and pass the certification exam. Id. at 6-7.

Plaintiffs continue to monitor EOIR efforts to improve the quality of interpretation pursuant to the district court's directive that defendants share with plaintiffs information regarding the development of the certification exam and other remedial actions. See Frenzen Decl, Exh. C at para. 10.

In sum, not only are class members receiving complete interpretation of their immigration court proceedings, they also will benefit from the vast improvement in the quality of that interpretation. Moreover, the proposed certification examination to ensure the quality of interpretation will be implemented not only in Southern California for class members, but nationwide.

IV. PLAINTIFFS ARE ENTITLED TO ATTORNEYS' FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT

A. Interim Attorneys' Fees Are Recoverable Under The Act

The Equal Access to Justice Act (EAJA) provides for the award of attorneys' fees to prevailing parties in civil actions against the United States. It provides that,

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action brought by or against the United States in any court having jurisdiction of that action, unless the court finds