



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMMIGRATIONPORTAL.COM, et al.,

Plaintiffs,

v.

TOM RIDGE, SECRETARY, DEPARTMENT OF
HOMELAND SECURITY, et al.,

Defendants.

Civil Action: 03-2606
Judge James Robertson

**DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

INTRODUCTION

Defendants, through undersigned counsel, submit this supplemental memorandum in opposition to class certification pursuant to the Court's order of September 24, 2004.¹ On that date, the Court ordered, after a status conference, that the parties file supplemental briefs addressing whether there are questions of law or fact common to the class under Rules 23(a) and (b) (2) of the Federal Rules of Civil Procedure ("FRCP") as a result of the alleged delays by the United States Citizenship and

¹ Defendants hereby incorporate defendants' arguments against class certification as set forth in Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Class Certification filed on April 22, 2004.

Immigration Services ("CIS") in adjudicating plaintiffs' applications for employment based visa applications ("I-140") and adjustment of status applications ("I-485").

Despite the benefits of discovery, including deposing two senior CIS officials, plaintiffs have failed to establish a common question of law or fact as to the issue of delay in this case. Nor can they. As set forth below, and earlier in defendants' opposition to class certification, no common questions of law or fact exist as to the issue of delay because of the individualized, fact-specific nature of adjudicating each applicant's I-140 and I-485 applications, including the individualized security background checks for each applicant, and whether an applicant has filed completed applications and appeared for scheduled CIS-related appointments.

In addition, plaintiffs have failed to establish as required by Rule 23(b)(2) of FRCP that CIS has acted or refused to act in ways generally applicable to the entire class. Here, the alleged delays in adjudication of the individual applications are affected by the individual nature of each class member's application and, additionally, to varying degrees by staffing problems within CIS, lack of agency resources, competing agency responsibilities sometimes dictated by Congress or the Executive branch, increasing case loads, and national security issues. Together, these factors negate a finding of general applicability

to the issue of delay by CIS to the proposed class in this case.

Because the issue of whether defendants unreasonably delayed processing plaintiffs' employment-based visa and adjustment of status applications cannot be resolved without considering questions of law and fact peculiar to the individual I-140 and I-485 applications, and other outside factors, plaintiffs have failed to establish a common question of law or fact and, therefore, this Court should not certify a class in this case.

I. PLAINTIFFS HAVE FAILED TO ESTABLISH COMMON QUESTIONS OF LAW OR FACT FOR THE ALLEGED DELAYS IN ADJUDICATING THEIR EMPLOYMENT-BASED VISA AND ADJUSTMENT OF STATUS APPLICATIONS.

Plaintiffs in their motion for class certification, and during oral argument before this court, would have this court believe that adjudication of their employment-based visa applications, and corresponding adjustment applications, are based on "same issues of law." Status Conference, Sept. 20, 2004, Tr. 8, 23. According to plaintiffs, because the plaintiffs' applications are nearly identical as a matter of law, a common question of law and fact exists among the class members as to CIS's alleged delays in adjudicating their I-140 and I-485 applications. However, plaintiffs' allegations are incorrect as a matter of law, are unsupported by the facts in this case, and are directly contradicted by statements of high ranking CIS officials.

The present action challenges CIS's alleged delays in

adjudicating plaintiffs' employment-based visa and lawful permanent residence applications. As set forth in defendants' opposition to class certification, immigration based on employment is a multi-step process. Def. Mot. at 9-17. Generally speaking, there are five employment-based categories ("EB" 1-5), including 11 subcategories, for granting permanent residence to foreign nationals based on employment skills. Qualifying for one of the five EB categories requires satisfying several different statutory and regulatory requirements subject to review, in many cases, by several government agencies. Each of the employment categories and its subgroups requires different documentation and standards of proof that require individual determinations by CIS which, as set forth below, translates into differing processing times depending on the underlying application and the corresponding adjustment application.

If CIS approves an I-140, the approval authorizes the alien's classification as one who is eligible for the specific preference category. 8 U.S.C. § 1154(b). Approval of the visa petition does not confer on the alien any substantive immigration status. Rather, it merely makes the alien eligible to *apply* for permanent residence. 8 U.S.C. 1225(a)(3). If the alien is present in the United States, in a lawful nonimmigrant status, the alien is then eligible to apply for adjustment of status by

submitting a Form I-485. 8 U.S.C. § 1255(a).

Paul Pierre, the Branch Chief of Service Center Operations at CIS, during his recent deposition, discussed the complexity of the different employment visa applications and their corresponding adjustment applications, and how these differences affect CIS's processing times of the different applications. When asked during his deposition whether there were significant differences among the employment-based visa applications, Mr. Pierre, stated:

Absolutely. The differences is between the petitioner themselves. The I-140, of course, is a petition by -- generally by an employer here in the United States petitioning for a foreign worker. And that has really many subcategories within it. It could be an outstanding athlete, an outstanding performer. It could also mean that the person is a professional researcher in an intra company.

You have a corporation outside of the United States who is putting up a subsidiary here in the United States sending a manager abroad to assume -- to take over the managerial functions in the United States. It could be researchers with advanced degrees. It could be other employers with less degrees. It could be skilled workers with degrees, skilled workers with training and a degree and it could be unskilled workers as well. That's for the I-140's.

* * * * *

You also have the 526 where you have immigrant investors coming to the United States to establish employment.

Also, there are some special immigrants as well that do come to the United States. For example, people who work for the U.S. Government abroad sometimes do come in here. And for the 360's, usually those are petitions where -- it could be a religious worker. There are different provisions under the law that would allow folks to immigrate on an employment base especially immigrants to come here.

So, in that -- because each category that I just mentioned require different documentation and qualifications and -- even with the I-140 or the 360, there are some classes within those, and therefore, they would all be different. They use the same form, the basic three forms that you just mentioned, the 360, the 140 and the 526, but there could be -- there's quite a few differences.

Exhibit No. 1, Paul Pierre Deposition ("Pierre Dep.") at 152-155). Mr. Pierre went on to testify that the differences in the employment-based visa applications and their related adjustment applications affect the processing times of each of the different applications. Responding to the question of whether the differences in the various applications translated into differences in processing times, Mr. Pierre replied, "Yes. Because of the complexity of each of the cases . . . And because of that complexity, the requirements are different. That could translate into longer processing times." Ex. No. 1, Pierre Dep. at 154-55.

The individual nature of the adjudication of the I-140 and the I-485 applications is further highlighted by the fact that CIS must conduct multi-level security background checks on each application filed with a CIS Service Center. In fact, an applicant's application cannot be adjudicated by CIS until an applicant's background check has been completed. These mandated individual background checks further undercut plaintiffs' claim that there is a common question of law or fact as to the issue of delay in this case since no two applicants' individual background

checks will be the same. Mr. Pierre explained the security procedures that must be met before an I-140 and an I-485 can be adjudicated, stating:

However, they are certain checks that must be done before it can be assigned to an adjudicator. All applicants submitting forms I-485 who are between 14 years of age and 79 years of age must be fingerprinted. We must check to see if they have a criminal record because the finding of a criminal record could make the person inadmissible or removable.

So, while the file is waiting for assignment to an adjudicator, we schedule the applicant to be fingerprinted. Also, while the file is waiting, we also do additional checks against all databases. Mostly we check to see if there is an active lookout for that alien. We also do name checks for that alien against a number of databases, law enforcement agency databases. Once these checks are satisfied that they are okay, then we -- when the checks are done, then we schedule the person to come, we assign the file to an adjudicator for review and adjudication.

Ex. No. 1, Pierre Dep. at 12-13.

As described by Mr. Pierre, CIS must conduct at least three separate security checks on a particular application before it can approve that application. Specifically, CIS must run a name check on the International Border Inspection System ("IBIS") computer database which contains several "look-out lists" from several international, national state, regional, and local municipalities. Ex. No. 1, Pierre Dep. at 67-68. This check is done at the Service Center shortly after an application is filed and involves entering an applicant's name, aliases, date of birth, and country of origin into the IBIS database. Id. at 67. Assuming that there is not a "hit" in IBIS, this check is

completed within minutes. Ex. No. 1, Pierre Dep. at 68. Second, CIS does a name check of an applicant by running the name through an FBI names database. Ex. No. 1, Pierre Dep. at 69-70. On average it takes approximately forty-five days for the name check to be completed, but depending on the name it may take longer. Ex. No. 1, Pierre Dep. at 70. CIS is also required after an application is filed to do a finger print check by sending an electric copy of an applicant's finger prints to the FBI. Ex. No. 1, Pierre Dep. at 72. CIS, after an application is submitted to a Service Center, schedules an applicant for an appointment at a Application Support Center ("ASC") where a electronic version of an applicant's finger prints is made. Ex. No. 1, Pierre Dep. at 70-71. After taking an applicant's fingerprints, electronic versions of his prints are "bundled" with other applicants' fingerprints and are electronically sent to the FBI where they are compared against an FBI fingerprint database. Ex. No. 1, Pierre Dep. at 71-72. Assuming an applicant's finger prints are "cleared" by the FBI, within a few days the information is electronically returned to CIS by the FBI. Ex. No. 1, Pierre Dep. at 71-72. "Cleared" finger prints are considered valid for 15 months, at which point they expire, and an applicant must resubmit new fingerprints if their application has not been adjudicated by CIS. Id. at 71-72. After 15 months, CIS is required to obtain new fingerprints in order to assure an

applicant has not committed any crimes or other disqualifying acts while his application was pending before CIS. Ex. No. 1, Pierre Dep. at 52-54. Finally, CIS adjudicators are required to do a final name check on IBIS before granting a benefit if the last name check was conducted more the 90 days before.

Naturally, any problems that may arise at each step of these security background checks further delays adjudication of an applicant's application. Ex. No. 1, Pierre Dep. at 17-19. Mr. Pierre recently explained that

[i]f someone has a positive check or a potential hit for a criminal record, we have to satisfy that the person is truly admissible. And when you are talking about the life cycle of the 485, they are to include transfer to a district office for an interview, for a face to face interview as well.

Ex. No. 1, Pierre Dep. at 17-18. When there is a problem with an applicant's security background check, their name has to be manually check by the FBI, or the file has to be manually reviewed by an adjudicator or, alternatively, the applicant is required to attend a personal interview at a district office. Ex. No. 1, Pierre Dep. at 101, 103-104.

The importance of the security background check, and the effects they have on the processing of individual applications cannot be underestimated. Fugie Ohata, CIS Director of Service Centers Operations, clearly made this point in her recent deposition, stating

[t]he events of 9/11 required a whole new security

initiative. The tragic events of 9/11 made additional requirements to the USCIS And that required additional systems checks with relation to other federal law enforcement agencies and other agencies involved in the work that we do.

Exhibit No. 2, Fugie Ohata Deposition ("Ohata Dep.") at 8-9. Or, as Eduardo Aguirre, Director of CIS stated before Congress:

Although the security enhancements have meant longer processing times in some categories and a significant growth in the application backlog, USCIS has take the position that security absolutely will not be sacrificed in our search for increased efficiency.

See Immigration Provisions in the FY05 Budget: Hearing Before the Subcomm. on Immigration, Border Security and Claims of the House Comm. on the Judiciary, 108th Cong., 2nd Sess. at ___ (Prepared statement of USCIS Director Eduardo Aguirre, Jr. ("Aguirre Statement")), reprinted at 2004 WL 2011315.

In addition, an applicant's own failure to submit a complete application, or failure to appear for a CIS-related appointment, for example, significantly contributes to the delay of adjudicating that person's applications. Again, Mr. Pierre directly addressed the issue on how individual mistakes, or a failure to appear for a scheduled appointment delays the adjudication of an application because CIS must send out a Request for Further Evidence ("RFE"), or reschedule an applicant for another appointment. Mr. Pierre states,

There is a process called request for additional evidence that would impact the life cycle of the 485 and each case is unique.

It depends on, again, how well documented the petition or the application is. It depends how reliable the documentation is. Oftentimes adjudicators when they review the 485 have to request additional documentation, additional evidence, and that too could delay the final adjudication.

Ex. No. 1, Pierre Dep. at 16. If a request for further evidence is sent out, an applicant has 87 days to respond with further evidence. Ex. No. 1, Pierre Dep. at 65-66. Contrasting the difference of a well prepared application versus a deficient application, and the effects it has on adjudication of an application, Mr. Pierre stated,

If all these things were there, everything was perfect, then that application would sail through quicker than one where you would have to request additional documentation, the alien didn't present himself or herself for fingerprinting timely, for whatever reason, whether it's medical emergencies, I have to go on vacation, I have to reschedule the fingerprint application.

Ex. No. 1, Pierre Dep at p. 46.

In fact, this Court does not have to look beyond the named plaintiffs for examples of cases that were delayed because the applicant did not file a complete application, or failed to appear for a scheduled CIS-related appointment. For example, named plaintiff Rajah Kalipatnapu's sponsor IT People Corp. was required to respond to a Request for Evidence regarding Kalipatnapu's pending I-140 and I-485 applications. Exhibit No. 3. On December 13, 2003, the California Service Center sent IT People Corp. a request for further evidence, and IT People Corp. did not file its response until March 2, 2004, nearly three months after

receiving the request for further evidence. Clearly, IT People Corp.'s nearly three month delay in responding to the RFE significantly contributed to the delay in adjudicating Kalipatnapu's applications. Also, named plaintiff Samrayjia Komella was scheduled to have her fingerprints taken on September 22, 2004, at an Application Support Center. However, for whatever reasons, Ms. Komella failed to appear for her scheduled appointment, and had to be rescheduled for another appointment, thereby, further delaying adjudication of her pending applications. Exhibit No. 4.

These individual mistakes in filing an application, or failure to follow proper procedures, are individual factors that contribute to the delay of adjudicating individual applicants' applications.

Because there is not one specific legal standard or set of facts that applies to all the alleged class members' cases, plaintiffs cannot establish a "common question of law and fact" in connection with the alleged delay in adjudicating their applications. The necessity to conduct individual adjudications of potential class members' I-140 and I-485 applications, including comprehensive, individual background checks for each applicant, makes this case particularly unsuited for certification as a class action. The very nature of the individual adjudication process for the several types of different applications is such that it is impossible to say, in the abstract, which cases will be cleared

quickly and which will not. The time needed to complete one type of application over another cannot be fixed by any universal rule, but must necessarily depend on facts unique to each applicant. And because of these difference, CIS adjudicates applications in the order in which they are received, and according to the factors discussed above.

Despite the individual nature of each of the plaintiffs' applications, plaintiffs claim that the adjudication process for the employment-based visa application and the related adjustment of status application are practically the same. However, as seen above, this is just not correct. While plaintiffs may be correct when they assert that the general "procedures" used by CIS are the same for adjudicating an I-140 or an I-485, that is not the point. In fact, defendants would agree that the I-485 application is the same for all aliens in that it is the same form used for any alien who wants to adjust to a lawful permanent resident. However, this is where the similarities end. An application for adjustment of status is tied directly to the underlying visa petition. As set forth in section 8 U.S.C. § 1255(a), the Attorney General in his discretion may adjust the status of an alien to lawful permanent resident if (1) the alien makes an application for such adjustment (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time of his

application is filed. A simple review of the requirements set forth in 8 U.S.C. 1255(a) establishes that each applicant's application for adjustment of status is tied to his underlying eligibility for a visa and his admissibility to the United States. In addition to having an available visa in order to adjust to lawful permanent residence, each application must individually establish that he or she is admissible into the United State.² Again, these requirements demand individual determinations by CIS adjudicators based on the individual nature and merits of each application. As such, a plain reading of 8 U.S.C. 1255 refutes plaintiffs' claims that the adjudication of I-485 applications are all the same, and do not involve individual determinations based on specific factual issues and legal standards.

In fact, Mr. Pierre in his deposition directly refutes plaintiffs' claims that adjudication of an I-485 application is somehow not legally tied to the underlying visa application, or that the I-485 application is not decided on individual factors based on the underlying visa application. Mr. Pierre states that,

Each case belongs to an individual and the individual must qualify. In the case of a concurrently filed 485 and I-140,

²An alien, for example, may be inadmissible based on health grounds (having a mental disorder, a drug addiction, not being the proper vaccinations); having a criminal back ground (a crime involving moral turpitude, controlled substance violation, multiple criminal convictions, prostitution and commercial vice); trafficking in persons; and security and related grounds, including terrorist activities. See 8 U.S.C. 1255(a), (a)(2); 8 U.S.C. 1182(a).

you look at the bona fide of the petition and the 485 together because it's a concurrently filed petition.

Ex. No. 1, Pierre Dep. at 15-16. Nor does the fact that an I-140 and I-485 are filed separately with CIS somehow legally separate the two application from each other. See Ex. No. 1, Pierre Dep. at 43 ("As far as the qualifications of the alien to demonstrate that they do merit the benefits for the 485, the requirements are the same whether they are concurrently filed or not.") In addition, Mr. Pierre in his deposition cites to a company's ability to continue to pay wages to a visa applicant, and the applicant's individual criminal background as examples of how the adjudication of an I-485 may differ depending on the visa preference category on which the I-485 is based. See Ex. No. 1, Pierre Dep. at 156-157.

Because the issue of whether defendants have unreasonably delayed processing the plaintiffs' I-140 and I-485 applications cannot be resolved without considering questions of law and fact peculiar to the individual applications, this court should deny plaintiffs' motion for class certification.

II. PLAINTIFFS HAVE FAILED TO ESTABLISH THAT DEFENDANTS ACTED OR REFUSED TO ACT ON GROUNDS GENERALLY APPLICABLE TO THE CLASS AND, THEREBY, HAVE FAILED TO SATISFY THE REQUIREMENT OF FRCP 23(B) (2) .

Not only have plaintiffs failed to satisfy the commonality requirement of Rule 23(a) (2), they have not met the requirements of Rule 23(b) (2) of the FRCP. Rule 23(b) (2) provides an action is maintainable as a class action if the prerequisites of Rule 23(a)

are met, and:

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 as a whole;

Fed. R. Civ. P. 23(b) (2).

In this case, plaintiffs moved to certify a class of "[a]ll persons and their derivative beneficiary family members whose Employment-Based Adjustment of Status applications are pending before the various Service Centers and other offices of the USCIS." Def's. Class Mot. at 3. In order for plaintiffs to meet the requirements of Rule 23(b) (2), plaintiffs must establish that CIS has refused to act to decide employment-based adjustment applications on grounds generally applicable to the class as a whole. Here plaintiffs have made no such showing. The class sought to be certified is nationwide. Plaintiffs have not shown and cannot show that processing of plaintiffs' applications takes the same period of time throughout all CIS Service Centers, or that the processing time is the result of the same factors. For example, delays in processing a number of cases occur because an alien fails to submit a completed application, fails to appear for a fingerprint appointment, or because of the different burdens of proof among the different applications. Additionally, plaintiffs' applications are delayed to varying degrees by staffing problems within CIS, lack of agency resources, competing agency

responsibilities sometimes dictated by Congress or the Executive branch, increasing case loads, and national security issues. See Ex. No. 1, Pierre Dep. at 32-33; Exhibit No. 2, Ohata Dep. at 8-17.

This case is very similar to Garcia v. Veneman, -- F. Supp. -- , 2004 WL 2050120 (D.D.C. Sept. 10, 2004), where this court denied a motion for class certification by Hispanic farmers alleging that the United States Department of Agriculture ("USDA") discriminated against them in loan applications. The court in Veneman denied class certification in part because plaintiffs were unable under Rule 23(b)(2) to establish that the USDA "acted or refused to act on grounds generally applicable to the class" as a result of there being numerous individual factors that undercut a finding of "'one practice'" and "'single actor'" under discrimination law. Id. at p. 8. In fact, the court in Veneman rejected plaintiffs' claim of significant delay by USDA in adjudicating their loan applications, because "[h]ere again the individual stories of the named plaintiffs are anecdotes of bureaucracy, geographically dispersed, and quite different one from the other." Id. While defendants are not suggesting that plaintiffs' applications in this case are being adjudicated by unlawful, inconsistent standards, as was alleged in Veneman, this case is similar to Veneman in that CIS is faced with differing work loads in numerous Service Centers in which a variety of different types of applications with different burdens of proof are being adjudicated. In addition, while some of the factors set

forth immediately above (lack of agency resources, competing agency responsibilities, increasing case loads, and national security issues) go to the merits of the case of whether the CIS's alleged delays are "reasonable," this court "may 'probe behind the pleadings before coming to rest on the certification question'" General Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982) (internal citations omitted).

Plaintiffs also have failed to establish that certifying a class would result in "appropriate final injunctive relief with respect to the class as a whole." Rule 23(b)(2) FRCP. In this case, the only thing that CIS has not done is to act on plaintiffs' applications as quickly as they want. Plaintiffs do not dispute that their applications are in a queue of similar applications and that the queue is moving, albeit slower than they may like. They do not dispute that the nature of the movement flows from the manner in which the CIS allocates its limited resources. CIS will adjudicate plaintiffs applications - after the numerous other class members' applications in line ahead of them are adjudicated first.

Plaintiffs understandably want CIS to allocate its resources differently, as do a broad variety of other applicants and petitioners and their respective advocacy groups that have applications pending before USCIS. Plaintiffs, however, do not explain how CIS is to achieve the goal plaintiffs want. The only way to accomplish the result plaintiffs seek is for CIS to shift

its resources to move the adjustment application queue faster or to take some plaintiffs' applications ahead of the other applications who have been in line before them. Defendants understandably do not want the Court to tamper with its complex resource allocation policies, thereby according greater priority to plaintiffs and others who seek mandamus orders than to those who have waited in the queue longer or to others to whom Congress and/or USCIS have given greater priority.

Furthermore, the named plaintiffs make no allegation that their applications have been improperly placed in the queue, that their applications have been singled out for unfavorable treatment, or that the defendants are not adjudicating adjustment applications at the fastest rate practicable given their resources and the number of applications over which those resources must be stretched. Plaintiffs' request for mandamus and injunctive relief in this case therefore amounts to nothing more than a request to "reshuffle" the adjudications queue for pending I-140 and I-485 applications before the CIS, which if ordered by this Court, would merely place the interests of one class member before the interest of another with no benefit to the class as a whole. In re Barr Laboratories, 930 F.2d 72, 76 (D.C. Cir. 1991) (a judicial order putting plaintiff at the head of the queue simply moves all others back one step and produces no net result).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Class Certification, plaintiffs' motion for class certification should be denied.

Respectfully submitted,

KENNETH L. WAINSTEIN,
United States Attorney

PETER D. KEISLER
Assistant Attorney General
Civil Division

R. CRAIG LAWRENCE
Assistant United States
Attorney

MARK C. WALTERS
Assistant Director

Marianela Peralta
Assistant United States Attorney
Civil Division
555 4th Street, N.W.
Washington, D.C. 20530
(202) 514-7561

WILLIAM C. ERB, JR.
U.S. Department of Justice
Office of Immigration
Litigation
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044-0878
(202) 616-4869
ATTORNEYS FOR DEFENDANTS

Date: October 8, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2004, I caused the foregoing **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** to be served on plaintiffs' counsel by electronic mail with the United States District Court's Electronic Court Filing ("ECF") system.

WILLIAM C. ERB, JR.
Attorney
Office of Immigration Litigation
Civil Division
Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 616-4869

Dated: October 8, 2004

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TOM RIDGE, SECRETARY, DEPARTMENT OF
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Defendants.

Civil Action: 03-2606
Judge James Robertson

ORDER

UPON CONSIDERATION of Plaintiffs Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Certification of Class Action, and Supplemental Memorandum, and Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Class Certification, and Supplemental Memorandum, it is this _____ day of _____, 2004:

ORDERED that the Plaintiffs' Motion for Class Certification and is DENIED.

DATE

JUDGE JAMES ROBERTSON

