UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SANG GEUN AN, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

No. C03-3184P

ORDER DENYING DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR JUDGMENT ON THE PLEADINGS AND

This matter comes before the Court on the government's Motion to Dismiss, or, in the Alternative for Judgment on the Pleadings, (Dkt. No. 20), and Plaintiffs' Motion for Partial Summary Judgment, (Dkt. No. 16). Having reviewed the pleadings and supporting materials, the Court rules as follows. The Court DENIES the government's Motion to Dismiss. The government seeks dismissal on the grounds that either the law of the case doctrine or res judicata bars Plaintiffs' claims based on Golden Rainbow Freedom Fund v. Ashcroft, No. CV-99-755C (W.D. Wash. September 18, 2000), *aff'd* 24 Fed. Appx. 698 (9th Cir. Nov. 26, 2001). However, the law of the case doctrine does not apply because this is not the same case as Golden Rainbow. Likewise, res judicata does not bar

Plaintiffs' claims because the government has failed to provide sufficient evidence that Plaintiffs are in privity with the Golden Rainbow limited partnership. The Court GRANTS Plaintiffs' Motion for Partial Summary Judgment. The Ninth Circuit's recent decision in Chang v. United States, 327 F.3d 911 (9th Cir. 2003), prohibits retroactive application of certain precedent decisions (discussed below) as a basis upon which to deny I-829 petitions when the immigrant investors' I-526 petitions were approved before the precedent decisions were issued. Plaintiffs here are similarly situated as the plaintiffs in Chang, and therefore, the same result is warranted. Consequently, Plaintiffs' remaining claims (which are not the subject of this motion) are moot and final judgment in favor of Plaintiffs will be entered. As a result of this ruling, the Court STRIKES the government's Alternative Motion for Judgment on the Pleadings based on Rule 12(c). The government's motion is moot because it was aimed at all of Plaintiffs' claims except the impermissible retroactive application claim.

As a separate matter, the Court finds that an order granting Plaintiffs' Motion for Partial Summary Judgment is appropriate notwithstanding the government's failure to file a substantive brief in opposition. In its one-page response to Plaintiffs' motion, the government argued that a response would be premature given the government's motion to dismiss, but that if its motion were denied, it requests 10 days to respond to Plaintiffs' motion. However, the dispositive motions deadline was June 14. More importantly, the government did not move for an extension or continuance of the summary judgment motion. Rather, the government presumed, without leave of this Court, that it could file its response later. A party may not unilaterally change deadlines established by the Court and the Local Rules for the Western District of Washington. Because the government chose not to move for a continuance of the summary judgment motion, the Court will rule on the Motion for Partial Summary Judgment based on the pleadings filed to date.

BACKGROUND

The 19 individual Plaintiffs ("Investor-Plaintiffs") in this case are citizens of different Asian countries who have been participating in the Immigrant Investment Program to obtain lawful

permanent resident status. 8 U.S.C. § 1153(b)(5). Together with their respective dependents, there are a total of 62 Plaintiffs in this case.

Through the Immigrant Investment Program, immigrant investors may become lawful permanent residents by investing $1 million dollars in a U.S. commercial enterprise that creates at least 10 full-time jobs for U.S. citizens or lawful aliens. Alternatively, they may invest $500,000 in a "targeted employment area." This is the fifth preference in an employment-based visa preference category, and for this reason, the program is known as the EB-5 program.

To participate in the EB-5 program, an immigrant investor first files an "I-526" petition with the Immigration and Naturalization Service ("INS")[1] seeking approval of the immigrant investor's investment and business plan. Once the petition is approved, the immigrant investor and his or her dependants may enter the country as conditional lawful permanent residents. 8 U.S.C. § 1186b. After two years in the country, the immigrant investor must file within 90 days an "I-829" petition for unconditional permanent resident status. The INS is required to make a determination on the I-829 petition within 90 days of it being filed. Regulations indicate that the INS is to approve the I-829 petition if the immigrant investor made no material misrepresentations in the I-526 petition and has complied with the EB-5 requirements. 8 C.F.R. § 216.6

In this case, the INS approved all of the Investor-Plaintiffs' I-526 petitions between 1996 and early 1998. (Plfs' Mot. for Partial Summ. J., Exs. A-S (hereinafter, all exhibits cited are those attached to Plaintiffs' motion unless otherwise noted). As a result, they were granted conditional permanent residency. They invested in the Golden Rainbow Freedom Fund ("Golden Rainbow"), which was a limited partnership created to provide a means for immigrant investors to invest their money under the EB-5 program. The Golden Rainbow qualified for the $500,000 investment

[1] Because the relevant events in this case occurred prior to the federal government reorganization, the Court refers to the INS rather then the newly-created Citizenship and Immigration Service.

requirement. A few of the Investor-Plaintiffs invested the required $500,000 in one initial payment. Most, however, invested either $200,000 and $300,000 initially and later paid the remaining amount due, or in some instances, indicated that they would pay the remaining amount due at a later specified date. (Id.).

In mid-1998, the INS established new rules for the EB-5 program through a set of "precedent decisions" in which the INS rejected the same type of investment arrangement that these Investor-Plaintiffs participated in with the Golden Rainbow Freedom Fund. See In re Soffici, 22 I&N Dec. 158 (1998); In re Izumii, 22 I&N Dec. 169 (1998); In re Hsuing, 22 I&N Dec. 201 (1998); In re Ho, 22 I&N Dec. 206 (1998). Pursuant to 8 C.F.R. § 103.3(c), these decisions were binding for the subsequent administration of the EB-5 program. In these precedent decisions, the INS concluded that these types of investment arrangements did not comply with the intent of the EB-5 program. As such, the INS excluded them from satisfying the EB-5 requirements.

Importantly, in this case, all of the I-526 petitions were granted before mid-1998, when the precedent decisions were issued. (Exs. A-S). In all but one case, the Investor-Plaintiffs filled out and signed I-829 petitions; mostly between December, 1998 and August, 1999, with one apparently as late as January, 2000. (Exs. B-M, O-S).[2] Only one of the I-829 petitions was filled out and signed before the precedent decisions were issued. (Ex. K (filed January, 1998)). The Investor-Plaintiffs present evidence of only one petition having been denied. (Ex. R).[3] While nothing in the record indicates the

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[2] The petition in Exhibit A is unsigned and undated. Exhibit N does not contain any evidence of a petition. Additionally, except for four of the petitions (exhibits D, P, Q, and R), there is no evidence that these petitions were actually filed and received by the INS. Exhibits D, P, and Q contain notices from the INS that the petitions were pending. Exhibit R contains a May, 2002 letter from the INS denying the petition. Nonetheless, the government does not dispute that all the Investor-Plaintiffs and their dependents filed I-829 petitions.

[3] Plaintiffs assert in their motion that three petitions have been denied. However, the exhibits for the other two Investor-Plaintiffs whose petitions they claim have been denied do not include any evidence of this. (See Exs. A and I).

status of the remaining petitions, Plaintiffs assert that they are still pending. (Plfs' Mot. at 12). The government does not contest this allegation.

In their complaint, Plaintiffs allege 1) improper retroactive application of the new rules, 2) estoppel preventing the government from denying Plaintiffs' I-829 petitions, 3) violation of the Administrative Procedures Act ("APA") for failing to issue the new rules through notice and comment rulemaking procedures, 4) abuse of discretion in retroactively applying the new rules, 5) action exceeding statutory authority, and 6) violation of due process and equal protection.

PROCEDURAL BACKGROUND

In May, 1999, the Golden Rainbow limited partnership filed suit against the United States, challenging the implementation of the EB-5 program. The case was filed in this district. Judge Coughenour granted summary judgment in favor of the government and denied it for the plaintiff. No. CV-99-755C (W.D. Wash. September 18, 2000). He ruled that the precedent decisions were not subject to the rulemaking notice and comment procedural requirements of the APA because the decisions were merely interpretive. At the end of the order, he also concluded without analysis that "the retroactive application of the [precedent] decisions, as applied to plaintiff, will not be disturbed." Id. at 4.

Plaintiff Golden Rainbow appealed. The Ninth Circuit affirmed in a short unpublished decision. Golden Rainbow Freedom Fund v. Ashcroft, 24 Fed. Appx. 698 (9th Cir. Nov. 26, 2001). In addition to affirming the basis of Judge Coughenour's ruling, the court went on to discuss whether the precedent decisions could be applied retroactively. The court concluded that they could. Id. at 700.

A year and a half later, in an unrelated case, the Ninth Circuit reached the opposite conclusion, holding that the precedent decisions could not be applied retroactively. Chang v. United States, 327 F.3d 911 (9th Cir. 2003). This decision was published.

The government now moves to dismiss on the grounds that all of Plaintiffs' claims are barred by either the law of the case doctrine or res judicata, or in the alternative, for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Plaintiffs move for partial summary judgment on their impermissible retroactive application claim.

ANALYSIS

I. The Government's Motion to Dismiss

The government argues that Plaintiffs' claims are barred under either the doctrines of law of the case or res judicata based on the Golden Rainbow district court and Ninth Circuit decisions.

A. Law of the Case Doctrine

The law of the case doctrine provides that "the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." Chevron, Inc. v. Bronster, 363 F.3d 846, 849 (9th Cir. 2004) (quoting Bernhardt v. Los Angeles County, 339 F.3d 920, 924 (9th Cir. 2003)). The doctrine applies to explicit decisions as well as those issues decided by necessary implication. Id. Nonetheless, a court has discretion to depart from the doctrine if: 1) the decision is clearly erroneous and its enforcement would work a manifest injustice, 2) intervening controlling authority makes reconsideration appropriate, or 3) substantially different evidence was adduced at trial. Id.

The doctrine is not applicable in this instance because this case is not the same case as Golden Rainbow and the parties are not the same. The district court's final judgment was affirmed and the case is now closed. Moreover, in Golden Rainbow, the plaintiff was the Golden Rainbow limited partnership. Here, the plaintiffs are the Investor-Plaintiffs and their dependents. This was made clear by the Ninth Circuit's opinion in Golden Rainbow. The court began by analyzing whether the Golden Rainbow limited partnership had standing to assert its own claim for harm. 24 Fed. Appx. at 699. As part of this analysis, the court noted that "[a]t argument, Golden Rainbow made it clear that it does

not purport to represent those parties [the immigrant investors] themselves on appeal." Id. at 699 n.1. The court concluded that the Golden Rainbow limited partnership had standing.

None of the cases cited by the government apply the law of the case doctrine to two different cases where one of the parties is different from a party in the previous case. Likewise, the Court's research revealed no such cases. In all of the cases where the doctrine has been applied, it is applied at a later stage in the litigation in the same case. This is highlighted by Second Circuit's description of the difference between the law of the case doctrine and res judicata:

> The doctrine of law of the case is similar to the issue preclusion prong of res judicata in that it limits relitigation of an issue once it has been decided. However, law of the case is concerned with the extent to which law applied in a decision at one stage of litigation becomes the governing principle in later stages of the same litigation. Res judicata does not speak to direct attacks in the same case, but rather has application in subsequent actions.

Rezzonico v. H & R Block, Inc., 182 F.3d 144, 148 (2d Cir. 1999).

Nonetheless, the government argues that the law of the case doctrine applies because the Ninth Circuit in Golden Rainbow recognized that the alleged harm impacted the immigrant investors as well as the Golden Rainbow limited partnership. In its retroactivity analysis, the court noted that even if Golden Rainbow and the immigrant investors relied on the INS's position before the precedential decisions and may have suffered as a result of those decisions, they "had to know that any initial approval was conditional." Id. at 700. Consequently, applying the precedent decisions retroactively was proper. Id. However, any comment on the impact to the immigrant investors is dicta, not the holding of the case. This comment alone does not change the fact that the immigrant investors were not parties to the Golden Rainbow case. Therefore, the law of the case doctrine does not apply to the instant case.

B. Res Judicata

The government argues that all of Plaintiffs' claims are barred by res judicata because the claims were rejected by the district court and Ninth Circuit in Golden Rainbow. The res judicata

doctrine provides that "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003). To establish a res judicata defense, the moving party must show that there is "(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." Id.

Taking the third prong first, "[e]ven when the parties are not identical, privity may exist if there is substantial identity between parties, that is, a sufficient commonality of interest." Id. at 1081. Privity exits when the interests of the non-party were adequately represented in the prior suit or when the interests of the non-party and the party in the previous case are so closely aligned that the party is a "virtually representative" of the non-party. Id. at 1082. In a recent Ninth Circuit case, the court found that there was privity between the parties because their interests were identical, the relief they sought was identical, and neither party sought "any interest peculiar to themselves but rather a vindication of the public right." Headwaters Inc. v. U.S. Forest Serv., 382 F.3d 1025, 1031 (9th Cir. 2004).

The government argues that there is privity here because Plaintiffs acknowledge that they are investors in the Golden Rainbow limited partnership and, according to the government, "they are really the same parties," even if they have different names. (Def's Mot. at 7). This argument is not persuasive. Merely asserting that they are "really the same parties" and that their interests are identical is not sufficient. While some of the relief that Plaintiffs seek overlaps with the relief Golden Rainbow sought, unlike Headwaters, the relief sought is not identical. Likewise, neither party here is seeking to vindicate public rights. Further, it is entirely possible that the limited partnership and the limited partners could have divergent interests. Because the government is asserting res judicata as a defense, the government bears the burden of proving the existence of privity between the Plaintiffs and Golden Rainbow limited partnership. Because the government has failed to do so, this prong has not been satisfied. Consequently, res judicata does not bar Plaintiffs' claims.

II. Plaintiffs' Motion for Partial Summary Judgment

Summary judgment is not warranted if a material issue of fact exists for trial. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996). The underlying facts are viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "Summary judgment will not lie if . . . the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970). However, once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). To discharge this burden, the nonmoving party cannot rely on its pleadings, but instead must have evidence showing that there is a genuine issue for trial. Id. at 324.

Plaintiffs argue that Chang v. United States, 327 F.3d 911 (9th Cir. 2003), compels summary judgment on their improper retroactive application claim. In Chang, the Ninth Circuit held that the government could not retroactively apply the precedent decisions to evaluate and deny I-829 petitions when the immigrant investors had their I-526 petitions approved before the precedent decisions and had made significant commitments in reliance on the reasonable expectation that their I-829 applications would be approved so long as they did not make any material misrepresentations in their I-526 petitions. Plaintiffs contend that they are in same position as the plaintiffs in Chang, and therefore Chang's reasoning and holding apply to their case.

In Chang, the immigrant investors had filed I-526 petitions and the INS had approved them well before mid-1998, when the precedent decisions were issued. They all filed their I-829 petitions before mid-1998. They all invested in the type of investment arrangement that the INS later rejected

in the mid-1998 precedent decisions. As a result, the INS denied some of the plaintiffs' I-829 petitions on the grounds that they had not complied with EB-5 requirements. The INS put the other petitions on administrative hold. Among other things, the Ninth Circuit held that the claims of the immigrant investors whose petitions had not yet been denied were nonetheless ripe because denial was certain; there was no need to await what was inevitable. Id. at 922.

The court also held that the INS could not apply the precedent decisions retroactively to immigrant investors who had filed their I-526 petitions before the precedent decisions were issued in mid-1998. Id. at 928-29. First, the court concluded that the new rules were "an abrupt departure" from a "well established practice" of approving I-829 petitions without respect to the type of investment arrangements that it rejected in the precedent decisions. Second, the court concluded that the balance of the burdens weighed significantly on the immigrant investors who had sold their homes and businesses in their native countries, moved with their dependents to this country and lived here for at least two years, and invested a significant amount of money in the investment arrangement at issue. The court rejected the argument that the immigrant investors could ask for their money back from the limited partnerships in which they had invested. The court noted that the immigrant investors' reliance was not just the money invested, but also included the time and expense put into obtaining legal permanent residence status, as well as the other facts just outlined. Id. In sum, the court held that the immigrant investors had relied on the previous practice of approving I-829 petitions based on such investment arrangements and that "[t]he INS may not apply the rules established in the 1998 precedent decisions in reviewing the I-829 petitions of those whose I-526 petitions had been approved before those new rules were promulgated." Id. at 930.

Chang distinguished R.L. Investment Limited Partners v. INS, 273 F.3d 874 (9th Cir. 2001) ("RLILP"), a previous Ninth Circuit case that reached a contrary conclusion regarding retroactivity. Chang, 327 F.3d at 926. In RLILP, the plaintiffs had filed but the INS had not approved their I-526 petitions. Therefore, they did not have a similar reliance interest as the plaintiffs in Chang had.

As discussed above, the Ninth Circuit addressed this issue in the earlier unpublished decision in Golden Rainbow Freedom Fund v. Ashcroft, 24 Fed. Appx. 698 (9th Cir. Nov. 26, 2001). In an extremely brief opinion, the Ninth Circuit held that it was not impermissible to apply the new rules retroactively because the INS had not established a precedential position prior to the mid-1998 cases. Id. at 700. However, Golden Rainbow is an unpublished decision. Because Chang is a published decisions, it is the binding precedent that this Court must follow.

Here, all but one of the Investor-Plaintiffs are similarly situated as the plaintiffs in Chang. Like the plaintiffs there, the Investor-Plaintiffs filed and the INS approved their I-526 petitions before the precedent decisions. They left their home countries, moved with their families to the United States, and invested significant amounts of money in the Golden Rainbow limited partnership, all before the precedent decisions were issued. (See Ex. A-B, E-L, O, and R-S). However, it appears that one of the Investor-Plaintiffs, Yueh-Tsun Chuang, made his initial investment in November, 1998, which was after the precedent decisions were issued. (Ex. C). The government might argue that his and his family's reliance is perhaps not as justified, and therefore retroactive application of the precedent decisions to his petition is not necessarily improper. However, Chang made clear that reliance is not based on the money invested alone, but includes the time invested in participating in the EB-5 program, as well as the fact that they uprooted their homes and families, selling businesses and homes in their home countries and moving to the United States. Because these factors apply to Yueh-Tsun Chuang's case, Chang's holding applies to his petition as well. Additionally, there is no evidence in the record regarding when five of the Investor-Plaintiffs[4] invested in the Golden Rainbow limited partnership. (Exs. D, M, N, P, and Q respectively). However, there is evidence that their I-526 petitions were approved and, for some of them, that they filed I-829 petitions before the precedent

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[4] Shih P. Huang, Akemi Tonoike, Pei-Chen Tsai, Hsiao-Yun Wang (Liu), and Tsui-Mei Weng (Lin).

decisions were issued. Based on the same reasoning as above, it appears that these same factors apply to these five Investor-Plaintiffs as well.

In short, this Court reaches the same result that the court in Chang reached. Namely, that "[t]he INS may not apply the rules established in the 1998 precedent decisions in reviewing the I-829 petitions of those whose I-526 petitions had been approved before those new rules were promulgated." Id. at 930.

Because Chang applies to all of the Plaintiffs, their remaining claims are moot. In Chang, the plaintiffs had also brought estoppel and APA claims. The Ninth Circuit stated that it need not reach those claims in light of its holding prohibiting retroactive application of the precedent decisions. Id. at 929. Even though Plaintiffs' motion is one for partial summary judgment, granting their motion disposes of the entire case and final judgment will be entered.

III. The Government's Motion for Judgment on the Pleadings Under Rule 12(c)

Under Fed. R. Civ. P. 12(c), a party may move for judgment on the pleadings "after the pleadings are closed, but within such time as not to delay the trial." A Rule 12(c) motion is similar to a Rule 12(b)(6) motion except for the timing; the Rule 12(c) motion is brought after the pleadings are closed. Here, the dispositive motions deadline was June 14, which is the same day that the government filed this motion. Therefore, the timing is proper. The standard applied on a Rule 12(c) motion is essentially the same as that applied on a Rule 12(b)(6) motion. Even if all material facts alleged by the non-moving party are true, "[j]udgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990).

The government contends that judgment on the pleadings is appropriate for all but one of Plaintiffs' claims, namely the estoppel, APA, abuse of discretion, exceeding statutory authority, and due process claims. The government did not argue that judgment on the pleadings is warranted for

Plaintiffs' improper retroactive application claim. Because the Court concludes that summary judgment in favor of Plaintiffs is warranted on their improper retroactive application claim, the Court need not reach the government's argument regarding these other claims because they are moot.

CONCLUSION

The Court DENIES the government's Motion to Dismiss. The law of the case doctrine does not apply because this is not the same case as Golden Rainbow. Likewise, res judicata does not bar Plaintiffs' claims because the government has failed to provide sufficient evidence that Plaintiffs are in privity with the Golden Rainbow limited partnership. The Court GRANTS Plaintiffs' Motion for Partial Summary Judgment. The Ninth Circuit's recent decision in Chang prohibits retroactive application of the precedent decisions as a basis upon which to deny I-829 petitions when the immigrant investors' I-526 petitions were approved before the precedent decisions were issued. Plaintiffs here are similarly situated as the plaintiffs in Chang, and therefore, the same result is warranted. As a result of this ruling, the Court STRIKES the government's Alternative Motion for Judgment on the Pleadings based on Rule 12(c) as moot.

The clerk is directed to provide copies of this order to all counsel of record.

Dated: November 1, 2004

/s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge

United States District Court

WESTERN DISTRICT OF WASHINGTON

SANG GEUN AN, et al.,

Plaintiffs

v.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT IN A CIVIL CASE

CASE NO. C03-3184P

___ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Pursuant to Rule 56, summary judgment is granted on Plaintiffs' claim for improper retroactive application of In re Izumii, 22 I&N Dec. 169 (1998) and related precedent decisions. Defendant may not retroactively apply these precedent decisions as a basis upon which to deny Plaintiffs' I-829 petitions when their I-526 petitions were approved before the precedent decisions were issued. Plaintiffs' remaining claims are rendered moot by the Court's order. Therefore, entry of final judgment is appropriate.

Dated: November 1, 2004

BRUCE RIFKIN, Clerk of Court

/s/ Mary Duett

By, Deputy Clerk