

LINDA NARANJO
Judge
(512) 854-4023

DIANA CAPUCHINO
Court Operations Officer
(512) 854-4023



419TH DISTRICT COURT

HEMAN SWEATT COURTHOUSE
P. O. BOX 1748
AUSTIN, TEXAS 78767
FAX: (512) 854-2224

JULIO DE LA LLATA
Staff Attorney
(512) 854-4029

ALICIA RACANELLI
Official Court Reporter
(512) 854-4028

BRITTANY HANNAH
Court Clerk
(512) 854-5844

April 9, 2009

Via Facsimile: (210) 224-5382

Mr. David G. Hinojosa
Mexican American Legal Defense and
Education Fund, Inc.
Attorney for Plaintiffs
110 Broadway, Ste. 300
San Antonio, Texas 78205

Via Facsimile: (512) 320-0667

Ms. Shelly Dahlberg
Assistant Attorney General
General Litigation Division
Attorney for Defendants
P. O. Box 12548, Capital Station
Austin, Texas 78711

Filed In The District Court
of Travis County, Texas
on 4/9/09
at 10:06 AM
by Amelia Rodriguez-Mendoza, Clerk

Re: Cause No. D-1-GN-09-000273 *Miguel Salazar et. al. v. Texas Dept. of Public Safety et al.*, in 345th
Judicial District, Travis County, Texas.

Dear Counsel:

What follows is the Court's ruling on Plaintiffs' Temporary Injunction hearing which was heard on March 25, 2009. After considering the pleadings, evidence, caselaw, and arguments of counsel, the Court grants the Temporary Injunction and sets out the issues and its ruling as follows:

This case is not about illegal immigrants obtaining driver licenses, it is about legal residents who have been denied or have been threatened a denial of a driver license.

Factual Dispute:

Miguel Salazar, Edgar Soria, Fransisco Avila Trejo, Jose Gomez, Eustolio Galvan and Green Meadows Landscaping Inc. (hereafter "Plaintiffs") bring this suit seeking declaratory and injunctive relief against the Texas Department of Public Safety, Stanley E. Clark, in his official capacity as Director of the Texas Department of Public Safety, the Public Safety Commission, and Allan B. Polunsky, in his official capacity as Chairman of the Public Safety Commission (hereafter collectively "DPS".)

In May 2008, DPS amended Rule 15.24 through notice and comment rulemaking. Rule 15.24 sets out what forms of identification DPS will accept in order for an applicant to prove their identity when applying for a driver license. Prior to the amendment of Rule 15.24, an unexpired visa was acceptable proof of identity. Rule 15.24 now requires that an unexpired visa be issued for a period of at least one (1) year and be valid for no less than six (6) months from the date the visa is presented to DPS in order to be acceptable proof of identity.

In October 2008, DPS promulgated Rule 15.171 also through notice and comment rulemaking. Rule 15.171 sets out eligibility requirements for the issuance of a driver license to non-citizens. In order to be eligible for a driver license, an applicant who is not a citizen or legal permanent resident of the United States must show that their lawful temporary admission to the United States does not expire within six (6) months.

Plaintiffs challenge the authority of DPS to amend and promulgate these rules as written and challenge the manner DPS has implemented the adopted rules. As to the immediate matter before the Court, Plaintiffs have asked the Court to temporarily enjoin DPS from enforcing these rules and DPS argues that the Court lacks jurisdiction to grant Plaintiffs' requested relief and that Plaintiffs lack standing.

Jurisdiction:

DPS asserts that Plaintiffs' suit for injunctive relief is barred by sovereign immunity. A suit brought "to control State actions or subject the State to liability is not maintainable without legislative consent or statutory authorization." Director of Dep't of Agric. & Env't v. Printing Indus. Ass'n of Tex., 600 S.W.2d 264, 265 (Tex. 1980). Plaintiffs' claim for injunctive relief would control State action. However, injunctive suits against state officials or a state agency who have acted outside the scope of their authority are maintainable "...if the pleadings, together with the relevant evidence, show the agency's activity is unlawful because it lacks statutory authorization." Tex. Workers' Comp. Comm'n v. Horton, 187 S.W.3d 282, 285 (Tex. App.—Beaumont 2006, no pet.); See Director of Dep't of Agric., 600 S.W.2d at 265. Therefore, if the Court finds that DPS acted outside of the scope of its statutory authority by amending Rule 15.24, by promulgating Rule 15.171, by changing the appearance of driver licenses given to non-citizens without going through the proper rule-making process, or by not allowing a United States Passport to serve as proof of citizenship, then immunity is not implicated.

Standing:

DPS also asserts that the Plaintiffs lack standing to bring their TEX. GOV'T CODE § 2001.038 (hereafter "APA 2001.038") claims. APA 2001.038 requires that a person allege and prove that a rule or its threatened application interferes with or threatens to interfere or impair a legal right or privilege.

For almost half a century Texas courts have determined that a person's driver license is a *privilege* subject to reasonable regulations by DPS. Grant v. State, 989 S.W.2d 428, 432 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Therefore, the only issue the Court needs to address is whether the rules implemented by DPS interfere with or threaten to interfere with or impair Plaintiffs' privilege to obtain a driver license.

First, Plaintiff Galvan is a legal permanent resident of the United States with a valid "green card." Plaintiff Galvan applied for and received a driver license. However, in applying Rule 25.171, DPS issued Plaintiff Galvan a driver license that differed in appearance from a standard

driver license in the following manner: his license had a vertical picture like one issued to an adult under the age of 21; it was marked with a heading reading "Temporary Visitor" (though he is a permanent resident); and his driver license stated that his lawful admittance to the United States expired one (1) year after the issuance of the driver license. DPS admitted that it erred and Plaintiff Galvan should have been issued a standard driver license. Clearly the application of Rule 25.171 interferes with Plaintiff Galvan's privilege by setting an earlier expiration date for his license than the six (6) year term set out by the Legislature and by altering the appearance of the driver license issued to him. TEX. TRANSP. CODE § 521.271. Therefore, the Court finds that Plaintiff Galvan has standing to bring his APA 2001.038 claims against DPS.

Second, Plaintiff Green Meadows Landscaping Inc. has, for the last ten (10) years, hired a majority of its workers through the Federal H2-B program. The H2-B program gives these workers a legal right to live and work in the United States temporarily, and prior to the promulgation, amendment and implementation of the new rules, they were able to obtain driver licenses without restrictions. Most of Plaintiff Green Meadows' workers have H2-B visas valid for ten (10) months or less due to the seasonal nature of their business. Plaintiff Green Meadows requires that at least one (1) person per work crew, the foreman, have a license to enable that person to drive the crew to different work sites. Plaintiff Green Meadows alleges it is harmed by DPS' promulgation, amendment and implementation of the new rules because many of Plaintiff Green Meadows' H2-B employees do not qualify for a driver license due to the fact that their visas are valid for less than one (1) year. Therefore, these employees cannot drive to and from work or to different work sites. The Court finds that Plaintiff Green Meadows' private rights to conduct business have been impaired, or threatened to be impaired, by DPS' amendment of Rule 15.24 and/or promulgation of Rule 15.171, and therefore, Plaintiff Green Meadows has standing to bring its APA 2001.038 claims.

Third, Plaintiffs Salazar, Soria and Trejo have H2-B visas valid for less than one (1) year. Plaintiff Salazar attempted to apply for a driver license and was denied due to DPS' application of Rule 15.24 and/or Rule 15.171 to him. Plaintiff Soria, a friend of Plaintiff Salazar, has not attempted to apply for a driver license due to the application of Rule 15.24 and/or Rule 15.171 to Plaintiff Salazar. Plaintiff Trejo has also not attempted to apply for a driver license due to the threatened application of Rule 15.24 and/or Rule 15.171 to him. The Administrative Procedure Act (hereafter "APA") recognizes that a rule does not actually have to be applied by an agency to an individual in order to have an effect on that individual; even the threatened application of a rule can confer standing on an individual to challenge it. TEX. GOV'T CODE § 2001.038. Word of mouth is a primary means by which information is learned and disseminated in immigrant communities due to shared cultural and linguistic identity. As evidenced by Plaintiffs Soria and Trejo, even the threatened application of Rules 15.24 and Rule 15.171 can have a chilling effect on legal residents applying for driver licenses. Plaintiffs Salazar, Soria and Trejo are eligible to receive a driver license under Chapter 521 of the TEX. TRANSP. CODE, and this privilege has been interfered with or threatened to be interfered with or impaired by the implementation of Rule 15.24 and/or Rule 15.171 by DPS. Therefore, Plaintiffs Salazar, Soria and Trejo have standing to bring their APA 2001.038 claims against DPS.

Last, Plaintiff Gomez, who has a valid employment authorization card and a class B Texas commercial driver license, attempted to apply for a Class A Texas commercial driver license and was denied due to the application of Rule 15.24 and/or Rule 15.171. Plaintiff Gomez is eligible to receive a driver license under Chapter 521 of the TEX. TRANSP. CODE, but this privilege has been interfered with by the implementation of Rule 15.24 and/or Rule 15.171 by DPS. Therefore, Plaintiff Gomez has standing to bring his APA 2001.038 claims against DPS.

Temporary Injunction:

In order to prevail on a temporary injunction, Plaintiffs must plead and prove three elements: (1) a cause of action against DPS; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002). Plaintiffs have plead a cause of action against DPS with their APA 2001.038 claims and request for permanent injunction.

The Court's primary focus will be on the second element, a probable right to the relief sought. State agencies possess only those powers granted to them by the Legislature. Texas Mun. Power Agency v. Pub. Util. Comm'n, 253 S.W.3d 184, 190 (Tex. 2007). An agency "may adopt only such rules as are authorized by and consistent with its statutory authority." Pruett v. Harris County Bail Bond Bd., 249 S.W.3d 447, 451 (Tex. 2008). Under the APA, a rule is a statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of a state agency. TEX. GOV'T CODE § 2001.003(6). However, an agency statement is not a rule if it only regards the internal management or organization of the agency. Id. Furthermore, a presumption favors adopting a rule of general applicability through formal rulemaking procedures. Rodriguez v. Serv. Lloyds Ins. Co., 997 S.W.2d 248, 255 (Tex. 1999).

The amended Rule 15.24 sets out what forms of identification DPS will accept in order for an applicant to prove their identity when applying for a driver license. Prior to the amendment of Rule 15.24, an unexpired visa was acceptable proof of identity. Rule 15.24 now requires that an unexpired visa be issued for a period of at least one (1) year, and have at least six (6) months left of validity when it is presented to DPS in order to be recognized as acceptable proof of identity. The Legislature gave DPS express and broad authority to verify a driver license applicant's full name and place and date of birth. TEX. TRANSP. CODE § 521.142(a). The Legislature also gave DPS express and broad authority to require any other information to determine an applicant's identity, competency, and eligibility. TEX. TRANSP. CODE § 521.142(e). The Court finds that the length of time a visa is valid for, or the amount of time left before a visa expires, has no correlation to the verification of an applicant's full name and place and date of birth or to an applicant's identity, competency or eligibility. Therefore, the Court finds that DPS acted outside the scope of its statutory authority when it amended Rule 15.24 and Plaintiffs have a probable right to relief on this issue.

The newly promulgated Rule 15.171 sets out eligibility requirements for the issuance of a driver license to non-citizens. In order to be eligible for a driver license, an applicant who is not a citizen or legal permanent resident of the United States must show their lawful temporary

admission to the United States does not expire within six months. Further, these driver licenses differ in appearance from standard driver licenses in that they show when an applicant's lawful admission period expires.

Finally, under this rule, DPS cancels these driver licenses if within forty five (45) days from the expiration of the status date on the license an applicant does not present valid documentation showing a status change or extension of the admissions period. The Legislature has explicitly set out when different categories of licenses expire and the only enumerated exception to the six (6) year term for a standard driver license is for drivers at least eighty five (85) years old. TEX. TRANSP. CODE § 521.271(a)(1); TEX. TRANSP. CODE § 521.2711. The Court finds that the cancellation of a driver license after a certain time period elapses is an expiration of the license, and the Legislature did not give DPS the authority to create exceptions to the six (6) year term except as enumerated by statute. The Legislature also explicitly set out who is ineligible to receive a driver license; lawfully admitted persons whose visas expire less than six (6) months from the date of the application are not a category of ineligible persons set out by the Legislature. TEX. TRANSP. CODE § 521.201. The Court finds that the Legislature did not give DPS the authority to create a new category of ineligible persons to receive a driver license. For the foregoing reasons, the Court finds that DPS acted outside the scope of its statutory authority when it enacted Rule 15.171 and Plaintiffs have a probable right to relief on this issue.

Prior to the enactment of Rule 15.171, licenses issued to non-citizens did not differ in appearance from licenses issued to citizens. After promulgating Rule 15.171, DPS issued an interoffice memo (hereafter "DPS Memo") instructing its agents on how to enforce and apply Rule 15.171. Pl. Ex. 12. Within the DPS Memo, DPS described how the new driver licenses would appear when they began to be issued. According to the DPS Memo, the new driver licenses would differ in appearance from a standard Texas driver license in the following manner: the driver license would be in a vertical card format regardless of the age of the applicant; the driver license would have the heading "Temporary Visitor" at the top of the license, and the driver license would have a statement near the photograph which would show the date of expiration of the applicant's legal admittance to the United States, if the applicant's legal admittance was for an indefinite amount of time, the "status date" would be for one (1) year. The vertical alignment of the license and statement of "Temporary Visitor" were not mentioned in the proposed rule. 33 TexReg 5270 - 5272 (2008). The APA's rulemaking procedures encourage open government by mandating that an agency give notice and invite public comment on changes to law and policy for the purpose of giving notice to the public of proposed new rules and policies and allowing the public to be heard on matters that affect them. Rodriguez, 997 S.W.2d at 255. A memo interpreting or implementing law or policy and changing a prior enforcement policy, issued to enforcement agents, can be a rule. See Texas Alcoholic Beverage Comm'n v. Amusement and Music Operators of Texas, Inc., 997 S.W.2d 651 (Tex. App.—Austin 1999, pet. dism'd w.o.j.). The Court finds that DPS acted outside the scope of its statutory authority by implementing these changes to the appearance of a driver license while failing to adopt the changes through proper notice and comment rulemaking under the APA and, therefore, Plaintiffs have a probable right to relief on this issue.

Letter to Counsel
 Cause No. D-1-GN-09-000273
 April 9, 2009
 Page 6

The third and final element Plaintiffs must show in order to be granted a temporary injunction is probable injury. Probable injury requires Plaintiffs to show that the harm complained of is imminent, the injury would be irreparable, and the applicant has no other adequate remedy. Harbor Perfusion, Inc. v. Floyd, 45 S.W.3d 713, 716 (Tex. App.—Corpus Christi 2001, no pet.).

The Court’s analysis of standing, *supra*, demonstrates that Plaintiffs have shown imminent harm by the adoption and implementation of Rule 15.24 and/or 15.171 and the resulting inability to drive.

An injury is irreparable if the injured party can not be adequately compensated in damages, or if the damages can not be measured by any certain pecuniary standard. Bunaru, 84 S.W.3d at 204. The Court finds that the harm to Plaintiffs cannot be adequately compensated in damages and the harm of being denied the privilege of having a driver license can not be measured by any certain pecuniary standard. Therefore, Plaintiffs have shown irreparable injury.

For a legal remedy to be adequate, it must give complete, final and equal relief. Henderson v. KRTS, Inc., 822 S.W.2d 769, 773 (Tex.App.—Houston [1st Dist.] 1992, no writ). There is no adequate remedy at law if damages can not be calculated. Tex. Indus. Gas v. Phoenix Metallurgical Corp., 828 S.W.2d 529, 533 (Tex. App. – Houston [1st Dist.] 1992, no writ). As stated *supra*, the Court finds that damages cannot be calculated, therefore, Plaintiffs have shown there is no adequate remedy at law available to them.

Therefore, the Court grants Plaintiffs’ requested injunctive relief and enjoins DPS from enforcing Rule 15.24 and Rule 15.171.

Finally, the Court will set a bond of five hundred (500) dollars payable by Plaintiffs to DPS.

Mr. Hinojosa, please prepare an Order and circulate it to Ms. Dahlberg with a mutually agreed upon date for a trial on the merits. If you have any questions regarding this matter, please contact my office at (512) 854-4029.

Yours very truly,



Judge Orinda L. Naranjo
 419th District Court, Travis County

OLN:jad
 xc: Ms. Amalia Rodriguez-Mendoza, District Clerk