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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSE BAUTISTA-PEREZ, *et al.*,

Plaintiffs,

v.

ERIC H. HOLDER, Jr., Attorney  
General of the United States, and

JANET NAPOLITANO, Secretary  
of Homeland Security,

Defendants.

NO. C07-4192 TEH

ORDER RE HEARING ON  
MOTION TO DISMISS SECOND  
AMENDED COMPLAINT

13 This matter is scheduled for hearing on Monday, July 19, 2010, at 10:00am, on  
14 Defendants' motion to dismiss Plaintiffs' second amended complaint. The parties shall be  
15 prepared to address the following questions at the motion hearing:  
16

17 **For Defendants**

- 18 1. Although the final rule published in the Federal Register explains that the biometric  
19 fee "also covers costs associated with the use of the collected biometrics for FBI and  
20 other background checks," 72 Fed. Reg. 29851, 29857 (May 30, 2007), the language  
21 in the Code of Federal Regulations continues to provide that the fee "will be charged  
22 for any individual who is required to have biometric information *captured* in  
23 connection with an application or petition for certain immigration and naturalization  
24 benefits." 8 C.F.R. § 103.7(b)(1) (emphasis added). The definition of capture is, as  
25 Plaintiffs argue, "the act of recording in a permanent file," which would not  
26 encompass the act of re-accessing previously captured biometric data. How, then, can  
27 § 103.7(b)(1) be reconciled with the interpretation advanced by Defendants and in the  
28 final rule?

1 2. Even if Plaintiffs were to concede that background checks constitute a “necessary  
2 service” for which fees can be charged under section 549, Plaintiffs contend that they  
3 are charged for a service they do not receive: although the \$80 fee accounts for the  
4 cost of collecting biometrics *and* conducting background checks, only half of these  
5 services are performed for them. What is USCIS’s authority for charging the fee in  
6 this manner?  
7

8 **For Plaintiffs**

9 3. You argue that the “issues of whether these biometric services fees are necessary,  
10 correspond to actual biometric services, and are related to the TPS program are fact  
11 issues, subject to discovery.” Opp’n at 1. However, the parties appear to agree on the  
12 factual landscape: USCIS charges a \$80 biometric services fee to conduct background  
13 checks (or have the FBI conduct background checks) with previously collected  
14 biometric data. What fact issues will bear on the legality of this practice?  
15

16 4. Do you concede that it is necessary for USCIS to conduct criminal background checks  
17 on those applying and reapplying for TPS, in light of the criminal bars to obtaining the  
18 status that appear in the statute? If so, is the performance of background checks not a  
19 “necessary service” within the meaning of section 549?  
20

21 5. You argue that the reuse of previously collected biometric data to conduct background  
22 checks is unlawful because it is not a “biometric service.” Even if you are correct  
23 about the definition of “biometric service,” might the fee still be lawful because  
24 section 549 also authorizes a fee for “other necessary services”?  
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1 **For Both Parties**

2 6. Leave to amend is liberally granted upon dismissal of a complaint on a 12(b)(6)  
3 motion. If the second amended complaint is dismissed because the Court concludes  
4 that USCIS *can* charge the \$80 biometric services fee when previously collected  
5 biometric data is reused for background checks, what would Plaintiffs plead in a third  
6 amended complaint that would survive another motion to dismiss? Defendants, on  
7 what basis do you argue that leave to amend should be denied?  
8

9 7. If the Court concluded that the biometric services fee complies with section 549,  
10 would that determination also dispose of Plaintiffs' claim under the Administrative  
11 Procedure Act?  
12

13 **IT IS SO ORDERED.**

14  
15 Dated: 7/15/10



THELTON E. HENDERSON, JUDGE  
UNITED STATES DISTRICT COURT