Exhibit B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. EDCV 10-894-VAP(DTBx) Date: September 28, 2011

Title: TAREK HAMDI-*v*- UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICE, et al.

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PRESENT: HONORABLE VIRGINIA A. PHILLIPS, U.S. DISTRICT JUDGE

Marva Dillard	Phyllis Preston
Courtroom Deputy	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None	None

PROCEEDINGS: MINUTE ORDER (1) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO REVIEW THE JULY 18, 2011 DISCOVERY ORDER OF U.S. MAGISTRATE JUDGE AND (2) GRANTING DEFENDANTS' MOTION TO REVIEW THE JULY 27, 2011 DISCOVERY ORDER OF U.S. MAGISTRATE JUDGE **[Doc. Nos. 56 & 62]**

I. BACKGROUND

Defendants' Motion to Review the July 18, 2011 Discovery Order of U.S. Magistrate Judge, filed July 29, 2011 (Doc. No. 56) ("Mot. 1"), and Defendants' Motion to Review the July 27, 2011 Discovery Order of U.S. Magistrate Judge, filed August 8, 2011 (Doc. No. 62) ("Mot. 2), came regularly before the Court for hearing on September 12, 2011. Plaintiff filed opposition to the motions on August 8, 2011

(Doc. No. 64) and August 22, 2011 (Doc. No. 70), respectively ("Opp'n 1" and "Opp'n 2"), and Defendants filed replies to each opposition ("Reply 1" and "Reply 2") on August 15, 2011 (Doc. No. 67) and August 27, 2011 (Doc. No 71), respectively. After hearing the arguments advanced by the parties at the hearing on the motions, as well as reviewing and considering all papers submitted, including the documents as to which privileges were claimed and that Defendants submitted for in camera review, the Court rules as follows.

II. STANDARD OF REVIEW

A party objecting to a magistrate judge's ruling on a pretrial motion may, within ten days of entry of the order, file a motion seeking review by the assigned district judge, designating the specific portions of the ruling objected to and stating the grounds for the objection. A party objecting to a magistrate judge's order must show it to be "clearly erroneous or contrary to law." 28 U.S.C. § 636 (b)(1)(A); Fed. R. Civ. P. 72(a). A reviewing district judge will hold a magistrate judge's findings of fact "clearly erroneous" only if the district judge has "a definite and firm conviction that a mistake has been committed" by the magistrate judge. Concrete Pipe & Prods v. Constr. Laborers Pension Trust, 508 U.S. 602, 623 (1993); see, e.g., Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965, 971 (C.D. Cal. 2010) (Morrow, J.). In contrast to the deferential standard of review applied under the "clearly erroneous" standard, a district judge conducts a de novo review of the magistrate judge's conclusions of law to determine whether they are "contrary to law." Crispin, 717 F. Supp. 2d at 971.

III. MOTION FOR REVIEW OF JULY 18, 2011 DISCOVERY ORDER

Defendants object to, and seek review of, the ruling compelling them to produce all documents withheld on the basis of a claimed deliberative process or law enforcement privilege. (Mot. 1 at 1.) They contend the ruling is contrary to law because it finds the deliberative process privilege applies only to "high level policy questions," but in so holding relies merely on nonbinding precedent, whereas more recent, binding, precedent holds the privilege applies to individual agency decisions such as the one at issue in this case. (Id.)

Plaintiff responds that Defendants have failed to invoke the deliberative privilege properly, and that in any case, the privilege does not apply to

material that is not "deliberative," i.e., final agency opinions or policies. (Opp'n 1 at 7.)

Defendants also attack the July 18 ruling disallowing Defendants' claim of the law enforcement privilege, arguing the ruling is clearly erroneous because the balance tips in Defendants' favor when Plaintiff's need for the withheld documents is weighed against Defendants' public interest in nondisclosure. Plaintiff responds that Defendants did not properly invoke this privilege, and that the privilege does not apply to the documents withheld.

A. The Deliberative Process Privilege

1. Defendants properly invoked this privilege

Plaintiff's first contention fails. He asserts that Defendants have not invoked the deliberative process privilege properly because they failed to demonstrate the claim of privilege was lodged "by the head of the department which has control over the matter, after actual personal consideration by that officer," (Opp'n 1 at 7, quoting United States v. Reynolds, 345 U.S. 1, 7-8 (1953)). Reynolds was a Federal Tort Claims Act action brought by three widows of servicemen killed in the crash of a military aircraft on a highly secret mission. The privilege referred to in the passage quoted by Plaintiff was not the deliberative process privilege at issue here. It was "the privilege which protects military and state secrets." Id. Accordingly, Reynolds does not stand for the principle, as Plaintiff argues, that Defendants must demonstrate the head of USCIS personally had to invoke the deliberative process privilege and was required to inspect personally the documents at issue. Curiously, however, the court in United States v. Rozet, 183 F.R.D. 662, 665 (N.D. Cal. 1998) also cited by Plaintiff, relied on Reynolds in holding the deliberative process privilege could only be invoked properly by an agency head.

In any event, Defendants did invoke the privilege properly by providing the executed declarations of both Jane Arellano, USCIS Los Angeles District Director, and Lauren Kielsmeier, USCIS Acting Deputy Director, affirming Ms. Kielsmeier's authority to assert the privilege.

2. The withheld documents were covered by the deliberative process privilege

A document cannot qualify for protection under the deliberative process privilege unless it is both predicisional and deliberative. Lahr v. National Transp. Safety Bd., 569 F.3d 964, 981 (9th Cir. 2009) (citation omitted). In other words, it must be created before the agency reaches its policy or decision, and "prepared in order to assist an agency decisionmaker in arriving at his [or her] decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Id. at 979-80; citation omitted.

According to Defendants, USCIS generated each of the documents as to which it is claiming the privilege in order to assist the agency in (1) "evaluating whether Plaintiff met the naturalization eligibility requirements and (2) providing advice to assist in a final naturalization decision." (Mot. 1 at 6.) If so, the documents are both "predecisional" -- created before the agency reached its decision on Plaintiff's naturalization application – and "deliberative" – created for the purpose of assisting the USCIS decisionmakers in making the naturalization decision. The Court has reviewed the documents as to which the privilege is claimed and finds they are predecisional, i.e., they were prepared before the decision to deny Plaintiff's application for naturalization.

Next, of course, the Court considers whether the documents also are deliberative. In other words, the Court must decide if the July 18 Order's finding that documents consisting of "application of established policies on plaintiff's specific naturalization application" are not privileged was "contrary to established law."

Defendants rely, inter alia, on the U.S. Supreme Court's decision in Department of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001), where the Court held the deliberative process privilege covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and public policies are formulated." Id. They argue the Supreme Court does not distinguish between the decision-making process for broad policy formulation indulged in by legislative bodies, and that

engaged in for narrower, individual decisions made by agencies, such as the one challenged here.

The Ninth Circuit has gone further, holding the deliberative process privilege applies indeed to agency decisions as well as to development of agency policies, in keeping with the purpose of the privilege, i.e., protecting the "consultative functions of government." Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d. 1114, 1117 (9th Cir. 1988) (citation omitted). Accordingly, the defense argues, relying on these as well as other Ninth Circuit authorities, the documents at issue here come within the scope of the deliberative process privilege.

Plaintiff asserts that each of the cases Defendants cite does indeed deal with "the disclosure of documents pertaining to significant, important or high level decisions or policy." (Opp'n 1 at 7.) Moreover, according to Plaintiff, even if the July 18 Order erroneously concluded that the privilege only covered "high level policy decisions," the Magistrate Judge reviewed the withheld documents and concluded they were not protected by the deliberative process privilege as they pertained "to the application of established policies on plaintiff's specific naturalization application." (Opp'n 1 at 6, quoting July 18 Order at 7.)

In support of his contention that such documents are exempt, Plaintiff cites, inter alia, Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 867 (D.C. Cir. 1980). (Opp'n 1 at 7-8.) There, the appellate court explained that a court undertaking such a determination should:

> ask [it]sel[f] whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency; . . . whether the document is recommendatory in nature or is a draft of what will become a final document, and whether the document is deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another. Finally, even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public. Id. (quotation and citation omitted).

After reviewing the sparse body of law on the deliberative process privilege, the Coastal States Court noted it had consistently refused claims of privilege when agencies apply "orders and interpretations" to cases before them. Id.

The Coastal States decision, a 1980 case, is out-of-circuit authority and therefore only persuasive rather than binding, authority. Furthermore, more recent authority from the District of Columbia Circuit supports Defendants' position that the documents here are protected by the deliberative process privilege.

For example, the District of Columbia Circuit in Hinckley v. United States, 140 F.3d 277 (D.C. Cir. 1998), upheld the district court's decision, finding privileged a hospital review board's internal deliberations regarding the conditional release of an inmate housed there after acquittal on the grounds of criminal insanity. Holding that the deliberative process privilege protected the deliberations of the review board "as it evaluated the evidence before it in order to come to a decision about Hinckley's conditional release," the court explained "[c]ommunications are 'deliberative' if they are 'part of the agency give-and-take by which a decision itself is made." Id. at 284. Here, as in Hinckley, the documents over which privilege is asserted concern the deliberations of the agency as it arrived at its challenged decision. And again, just as in Hinckley, Plaintiff here claims that the documents nevertheless are not deliberative because the agency's "decision about whether to grant [the relief sought] . . . allegedly constituted nothing more than 'the routine application of already-formulated [agency] policy.'"

The Circuit Court rejected this argument in Hinckley. It explicitly held "the deliberative process privilege [may apply] to protect materials that concern individualized decisionmaking, rather than the development of generally applicable policy." Id., citing Mapother v. Department of Justice, 3 F.3d 1533 (D.C. Cir. 1993). In Mapother, the appellate court considered whether the deliberative privilege covered, inter alia, the Waldheim Report, a document describing the activities during World War II of Kurt Waldheim, former Secretary-General of the United Nations and former President of Austria. Noting that the Report did not consist of or develop new policies regarding exclusion of war criminals, the court nevertheless held portions of the Report privileged, including the factual material culled from historical archives. Id. at 1538.

In sum, the authority Plaintiff relies upon as support for his position that the documents here are not privileged under the deliberative process protection is not only contrary to the more recent authority from the Ninth Circuit, it is also called into question by recent cases within its own circuit. In light of the ample and well-founded authority finding privileged documents reflecting an agency's decision-making process on an individual application, such as the Plaintiff's naturalization application before the defendant agency here, the Court finds the July 18 Order on this point was contrary to law.

Hence, Defendants may withhold the privileged documents unless Plaintiff can demonstrate the balance tips in Plaintiff's favor when weighing Plaintiff's need for the withheld documents against Defendants' interest in nondisclosure.

3. The balancing test favors protection of the privileged documents

Defendants argue Plaintiff cannot show his need for the withheld documents overrides Defendants' interest in nondisclosure under the four factors set forth in F.T.C. v. Warner Communications, Inc., 742 F.2d 1156, 1161 (9th Cir. 1984), i.e., "1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." (Citations omitted.)

The first factor strongly favors the defense. As discussed more fully in Section IV, below, in this action the Court conducts a de novo review of Plaintiff's eligibility for naturalization. Hence, the evidence sought by Plaintiff would have little if any relevance here. The second factor similarly tips in favor of Defendants, who have produced Plaintiff's A-file, the documents upon which they rely to argue naturalization should be denied, and the witnesses who interviewed Plaintiff during the administrative proceedings. The government plays a significant role in this litigation, of course; the USCIS and the individual defendants are all federal entities or officials, so the third factor favors Plaintiff. The fourth factor, which the Ninth Circuit has held the most significant, National Wildlife Fed'n, 861 F.2d at 117, strongly favors Defendants here. Disclosure of the USCIS's decision-making process would impede open and candid communication within the agency.

Accordingly, the Court finds the balancing test tips strongly in favor of the Defendants' interest in nondisclosure of the privileged documents.

B. The Law Enforcement Privilege

Defendants also withheld certain documents on the basis of the law enforcement privilege, and argue the July 18 Order is contrary to law "in its finding that 'plaintiff's interest in exploring the basis for the denial of his naturalization application outweighs defendants' assertion of the enforcement privilege.'" (Mot. 1 at 14, quoting July 18 Order.)

Defendants' argument reduces down to the following: to succeed in this action, Plaintiff will have to demonstrate to the Court on a de novo review of USCIS's decision that he is eligible for naturalization. The withheld documents are of no relevance to assist Plaintiff in meeting this burden because Defendant do not (and of course cannot) rely on them to counter Plaintiff's evidence at trial. (Opp'n at 18-19.)

As Plaintiff correctly points out, however, Defendants cannot avail themselves of the law enforcement privilege because they did not properly invoke it. Defendants did not, as they were required to do, submit a declaration or affidavit from the appropriate head of the department, stating, inter alia, with specificity the rationale of the claimed privilege." (June 22, 2011 Order at 12; Doc. No. 40.) The Magistrate Judge found Defendants had failed to comply with that requirement because District Director Arellano's declaration consisted only of a "general claim of harm" which was "insufficient to overcome the burden placed on the party resisting disclosure." Id. at 12-13. In particular, the Magistrate Judge noted, "Defendants fail to describe in particularity how disclosure would 'impair' law enforcement investigations or how much harm would be done by making such disclosures in this particular case." Id. at 13.

Defendants have failed to demonstrate that the Magistrate Judge's ruling on this point is either clearly erroneous or contrary to law. Hence, they are not entitled to review of the July 18 Order insofar as it relates to the documents which Defendants have withheld on the basis of the law enforcement privilege.

IV. MOTION FOR REVIEW OF JULY 27, 2011 DISCOVERY ORDER

Defendants seek review of the Magistrate Judge's order compelling them to produce to Plaintiff documents that address or relate to defendants' interpretation of the terms association(s), membership(s), and affiliation(s)], as well as permitting Plaintiff "to seek testimony regarding [the policies, procedures, practices, and training that address or relate to defendants' interpretation of the terms association(s), membership(s), and affiliation(s)] at the depositions of the Rule 30(b)(6) representative and Irene Martin." (s)]

Defendants argue that the documents and deposition testimony sought by Plaintiff are irrelevant and not likely to lead to the discovery of admissible evidence in this case. (Mot. 2 at 4.) Defendants are correct.

Plaintiff seeks relief in this action under 8 U.S.C. § 1421(c), i.e., naturalization by the District Court:

> A person whose application for naturalization under this subchapter is denied, after a hearing before an immigration officer under section 1447(a) of this Title, may seek review of such denial before the United States district court for the district in which such person resides in accordance with chapter 7 of Title 5. Such review shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application.

As the district court's review of the naturalization application is made de novo, its role is to decide, after receiving evidence and hearing testimony, whether an applicant meets the statutory requirements. These include: (1) a five year period of permanent legal residence in the U.S. immediately preceding the application; (2) continual residence within the U.S. from the date of application; and (3) "good moral character," attachment to "the principles of the Constitution of the United States," and being "well disposed to the good order and happiness of the United States." 8 U.S.C. § 1427(a).

Hence, at trial (or perhaps dispositive motion) in this proceeding, Plaintiff bears the burden of proving he satisfies each of these eligibility criteria. Both sides appear

to agree only the third requirement, i.e., "good moral character," is in question here. Defendants claim they have produced in discovery everything Plaintiff sought bearing on the eligibility requirements, including Plaintiff's alien file, as well as hundreds of pages of other non-privileged documents, and have submitted for deposition four witnesses (three USCIS agents and one FBI agent), as well as deposed Plaintiff, his wife and two character witnesses. (Mot. 2 at 7-8.)

Plaintiff argues in opposition to the Motion that Defendants' rules and procedures for processing naturalization applications "may not be statutorily or constitutionally permissible," because they "appear to require consideration of criteria not relevant to determining a person's statutory eligibility to naturalize and that permit law enforcement agencies to dictate whether USCIS should grant or deny the benefit for reasons unrelated to [the applicant's] eligibility to naturalize." (Opp'n 2 at 3.) Neither the process nor the outcome of the USCIS hearing or appeal is at issue in this action, however. and hence the agency's "policies, procedures, practices and training" relating to the terms identified in Plaintiff's discovery are not discoverable.

Plaintiff also contends the discovery allowed under the July 27 Order is relevant to his claims "that Defendants violated the Fifth Amendment, the APA and INA." (Opp'n 2 at 9.) This argument lacks merit as well; the petition in this case is one solely for relief under 8 U.S.C. § 1421(c), naturalization by the District Court, although it contains references to the Court's jurisdiction under the Declaratory Judgment Act and the APA. (Petition at 1.)

Hence, the Court grants Defendants' Motion as to the July 27, 2011 Order. The Court notes, however, that in their Reply, Defendants represent they "have produced all relevant non-privileged documents they possess, including all evidence Defendants are currently aware of that they might use in defending this case." (Reply 2 at 1-2.) Neither side will be permitted at trial to introduce or otherwise rely on evidence it has not previously disclosed in discovery, particularly any evidence as to which it has claimed the shield of privilege, unless such evidence can be identified properly as rebuttal evidence, a very narrow category indeed.

IT IS SO ORDERED.