

**FREQUENTLY ASKED QUESTIONS (#2) ON THE  
HOOTKINS V. CHERTOFF CLASS ACTION LAWSUIT  
(SURVIVING SPOUSE LAWSUIT)**

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**FEDERAL COURT APPROVES NINTH CIRCUIT CLASS OF SURVIVING SPOUSES**

On January 6, 2009, the U.S. District Court for the Central District of California provisionally certified (approved) a class action lawsuit against the United States Citizenship and Immigration Services (USCIS). The case, *Hootkins v. Chertoff*, CV 07-5696 CAS (C.D. Cal. August 30, 2007), challenges the agency's practice of automatically denying spousal status to spouses of U.S. citizens when the citizen spouse dies during bureaucratic processing of the green card application. Previously, on June 30, 2008, the Court held a hearing on the class and issued a tentative order limiting the class to the Ninth Circuit and ordering the parties to file proposed class definitions in light of the tentative ruling. Plaintiffs filed their proposed class definition on July 2, 2008, and Defendants filed their proposed definition on July 3, 2008. The action was stayed at the request of both parties prior to the issuance of a final order on class certification due to settlement negotiations and to await Congressional action. At the request of Plaintiffs, the Court lifted the stay on January 6, 2009 and issued a final ruling on class certification based on the briefs submitted by the parties prior to the issuance of the stay.

**What is *Hootkins v. Chertoff*?**

*Hootkins v. Chertoff* is a class action lawsuit against Department of Homeland Security and the USCIS to challenge the "widow penalty." It was filed by surviving spouses of U.S. citizens whose citizen spouses had filed an immigrant petition and an affidavit of support on their behalf, and who received automatic termination of their Lawful Permanent Resident (LPR, or green card) status upon the death of their citizen spouse during bureaucratic processing. The case asks the court to correct two problems created by USCIS' interpretation of the law. First, it asks the court to order USCIS to treat surviving spouses as "immediate relative" spouses, in accordance with the Ninth Circuit Court Case, *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), without requiring the spouse show identical facts to *Freeman* (including that a Form I-485 Adjustment of Status Application be filed prior to the death), in cases where an I-130 or I-129F petition was filed by the U.S. citizen spouse. Second, it asks the court to order USCIS to determine the petition for immediate relative spouse status without imposing additional illegal requirements by forcing the surviving spouse to first submit a substitute affidavit of support from a close relative and prove extreme hardship with a humanitarian reinstatement request.

### **Who is included in the lawsuit?**

According to the court's ruling, the class action will include all alien spouses whose U.S. citizen spouses filed an immigrant petition (Form I-130 or I-129F) and filed an affidavit of support (Form I-864 or I-864EZ), and whose spouse died before the couple's two-year wedding anniversary. Additionally, the class action requested approval of a nationwide class, but the court approved only those cases in which the I-130 or I-129F petition were adjudicated by or are now pending at a USCIS office located within the Ninth Circuit, or where the citizen spouse or alien spouse resided within the Ninth Circuit at the time of the citizen spouse's death. The Ninth Circuit includes the following states and territories: *Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Marianas Islands, Oregon, and Washington*. Therefore, those alien spouses whose citizen spouses filed the required forms, and whose petitions were adjudicated by a USCIS office located in the Ninth Circuit, or who were residing in the Ninth Circuit at the time of death, are included. These alien spouses are called "class members" and can have their rights determined by the court even though their names are not on the lawsuit as plaintiffs. To determine where the I-130 or I-129F was adjudicated, or where it is pending now, you may review the receipt notice or notice of denial for the location of the USCIS office.

### **Who is not included in the lawsuit?**

The lawsuit does not include alien spouses whose U.S. citizen spouses did not file an immigrant petition (I-130 or I-129F) on their behalf. In such "non-petitioning" cases, a change in the law is needed, and a bill has been introduced in Congress to allow for a case-by-case adjudication of these marriages. H.R. 6034, introduced by James McGovern (D-MA) and Mark Udall (D-CO) in 2008, was reported out of the House Judiciary Committee but failed to be voted upon before Congress adjourned for the 110th Congress. Advocacy is needed to press for the re-introduction of this bill in the House and Senate. For more information on the legislation, please refer to the SSAD website ([www.ssad.org](http://www.ssad.org)).

The lawsuit does not include alien spouses whose citizen spouse filed for them and where the petition (I-130 or I-129F) was adjudicated outside the Ninth Circuit - *Alabama, American Samoa, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Virgin Islands, West Virginia, Wisconsin, and Wyoming* – unless the citizen spouse or the alien spouse resided in the Ninth Circuit at the time of the citizen's death.

### **What can I do if I am not covered by the class action?**

If a petition *was not* filed on your behalf, you must advocate for a change in the law. H.R. 6034 was a bill introduced in 2008 in the 110th Congress that would have allowed an alien spouse to submit proof of the bona fide nature of the marriage, but requires advocacy to be reintroduced in the 111th Congress and then passed into law. See the SSAD website for information.

If a petition *was* filed on your behalf by your citizen spouse, but was not adjudicated in the Ninth Circuit or pending there, and neither you nor your citizen spouse were residing in the Ninth Circuit at the time of your citizen spouse's death, then you should discuss your options with competent immigration counsel. Depending on your circumstances, you may wish to file your own lawsuit in your individual capacity in federal court in the state where you live. In states where no current litigation is pending on this issue, it may be time to consider filing a lawsuit. Those states are *Alabama, American Samoa, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, Puerto Rico, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming*. There is now pending litigation in *Maryland, Missouri, New York, and Texas*. Note that there is a six-year statute of limitations on federal claims that may apply, which may mean that you must file a lawsuit within six years of your denial. That time period may be "tolled" during the time that the class action was pending and not yet decided, but you should consult with competent immigration counsel to determine whether you face a statute of limitations issue.

You should also contact the incoming Obama-Biden Administration and ask them to direct USCIS to simply follow the *Freeman* decision outside the Ninth Circuit. The Bush Administration decided to reject the *Freeman* decision, but we have yet to hear from the incoming administration. SSAD Pro Bono Counsel Brent Renison submitted a letter to the Obama Transition Team on December 8, 2008, which can be viewed at the following website: <http://www.ssad.org/obamabiden.html>

Special consideration may be warranted for those living within Circuits where the issue is currently on appeal. Three federal courts have already struck down USCIS' automatic stripping rules outside the Ninth Circuit. *Robinson v. Chertoff*, 2007 U.S. Dist. LEXIS 34956 (D. N.J. 2007), appeal docketed, No. 07-2977 (3d Cir. July 5, 2007); *Taing v. Chertoff*, 2007 U.S. Dist. LEXIS 91411 (D. Mass. 2007), appeal docketed, No. 08-1179 (1st Cir. Feb. 11, 2008); *Lockhart v. Chertoff*, 2008 U.S. Dist. LEXIS 889 (D. Ohio 2008), appeal docketed, No. 08-3321 (6th Cir. 2008). When the Courts of Appeal rule on those cases (expected early this year), the decisions will affect surviving spouses residing in those states. The *Robinson* case is in the Third Circuit, which includes *Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands*. The *Taing* case is in the First Circuit, which includes *Maine, New Hampshire, Massachusetts, and Rhode Island*. The *Lockhart* case is in the Sixth Circuit, which includes *Michigan, Ohio, Kentucky and Tennessee*. If your case arises in one of those states, you may wish to await the Circuit Court rulings.

### **If I am covered by the class action, what should I do?**

If you believe that the facts of your case make you a member of the class that was just approved, please complete the Class Action Questionnaire available on the SSAD website. The court has not yet established a process for registering for the class, or whether there will be any such process, but it will be helpful to have your information on file ahead of time. If you have questions about the class or your ability to participate in the class after reading this FAQ, please contact class counsel Brent Renison at (503) 597-7190 or [brent@ssad.org](mailto:brent@ssad.org).

### **Did the court order CIS to approve cases in the Ninth Circuit?**

No. The court ordered that the plaintiffs named in the lawsuit be able to represent anyone who has a similar case in the Ninth Circuit, but has not yet ruled on the legality of the USCIS procedures. Class certification means that the plaintiffs can request a determination from the court on behalf of everyone who has a case similar to theirs, as determined by the court. This saves time, energy, and resources of the court, the parties, and the class members, because one decision by the court will affect all the cases in the Ninth Circuit. Even if the Court rules that the challenged USCIS procedures violate the law, each case will still be adjudicated on its own merits by USCIS.

Please note that if you are in the Ninth Circuit and have a qualifying substitute affidavit of support sponsor who is willing to submit an affidavit of support on your behalf, and further believe that you are able to meet the strict requirements of the humanitarian reinstatement criteria outlined in the “Education” section of the [www.ssad.org](http://www.ssad.org) website, you may request that your case be reviewed and approved despite the class action lawsuit. A number of surviving spouses have obtained green card approval by filing a motion to reopen under the “Aytes Memo” even under this very difficult set of standards.

### **Can the Class Certification Order be appealed to a higher court?**

Yes. Either USCIS or the surviving spouses can appeal the decision to grant the class in the Ninth Circuit and deny the class outside the Ninth Circuit. This decision must be made within 10 days of the order, and the appeal must be filed with the Ninth Circuit Court of Appeals. Class counsel have not yet determined if an appeal will be filed. USCIS has not yet indicated whether it will appeal the decision.

### **Now that the class has been certified, what happens next?**

The Court should soon be able to hear a renewed motion for summary judgment. In cases where the parties do not disagree about the facts, but only disagree as to the proper law, a case can be decided without trial. Because this case involves undisputed facts, the Court can rule on the plaintiffs and class members’ claims. Plaintiffs will soon request judgment in their favor, and request a judgment that includes class members’ claims.

With regard to those Plaintiffs who are no longer class representatives because their cases do not meet the class definition (those outside the Ninth Circuit), the Court may entertain a separate motion for summary judgment to resolve those claims separately. More information will be available to those Plaintiffs soon.

It is indescribably difficult to cope with the death of a spouse and at the same time face the cruel and unjust punishment that the “widow penalty” inflicts. Our hearts go out to you as you struggle to overcome these hurdles.

For further information and for future updates, please visit the website: <http://www.ssad.org>