

**FREQUENTLY ASKED QUESTIONS (#1) 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 June 30, 2008, 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 (CIS). 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.

What is *Hootkins v. Chertoff*?

Hootkins v. Chertoff is a class action lawsuit against Department of Homeland Security and the CIS 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 CIS' interpretation of the law. First, it asks the court to order CIS 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 CIS 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 executed an affidavit of support (Form I-864), and whose spouse died before the couple's two-year wedding anniversary. The

class action requested approval of a nationwide class, but the court approved only those cases that were filed within the Ninth Circuit. 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 who did so in the Ninth Circuit, 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.

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), has been referred to the House Judiciary Committee for consideration. Advocacy is needed to support this bill. For more information on the legislation, please refer to the SSAD website (www.ssad.org).

The lawsuit does not include alien spouses whose citizen spouse filed for them *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.

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 is a bill in Congress that would allow an alien spouse to submit proof of the bona fide nature of the marriage, but requires advocacy to pass into law. See the SSAD website for information.

If a petition was filed on your behalf by your citizen spouse, but not in the Ninth Circuit, 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, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Puerto Rico, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

Special consideration may be warranted for those living within Circuits where the issue is currently on appeal. Three federal courts have already struck down CIS’ 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 later this year or early next 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, 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@entrylaw.com.

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 CIS 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.

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

Yes. Either CIS 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. CIS has not yet indicated whether it will appeal the decision.

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

The court should now 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 now request judgment in their favor, and request a judgment that includes class members' claims.

For further information, please visit the website:

<http://www.ssad.org>