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9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

11 CAROLYN ROBB HOOTKINS, et al. ) Case No. CV07-05696 (CAS)  
12 Plaintiffs, )  
13 ) Date: January 28, 2008  
14 v. ) Time: 10:00 a.m.  
15 MICHAEL CHERTOFF, Secretary, U.S. ) Courtroom: 5  
Department of Homeland Security, ) Honorable Christina A. Snyder  
16 et al. )  
17 Defendants. )  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendants Michael Chertoff, Emilio Gonzalez, Condoleeza Rice, and  
3 Maura Harty (collectively "Defendants"), by and through the  
4 undersigned counsel, respectfully move this Court for an Order  
5 denying Plaintiffs' Motion for Class Certification, because the  
6 Plaintiff's proposed class fails to meet the requirements of Fed.  
7 R. Civ. P. 23.

8 **INTRODUCTION**

9 Plaintiffs are individuals who seek lawful permanent resident  
10 status through their prior status as legally married spouses of  
11 United States citizens. Petition for Writ of Mandamus and  
12 Complaint for Declaratory and Injunctive Relief ("Complaint"),  
13 page 1.

14 In the instant action, Plaintiffs seek to certify a class  
15 defined as "all beneficiaries of immediate relative petitions  
16 whose petitioning relatives died prior to beneficiaries'  
17 adjudication and approval of lawful permanent resident status."  
18 Complaint at ¶ 153. Plaintiffs also seek to certify two  
19 subclasses: (1) subclass I: "[a]ll beneficiaries of immediate  
20 relative petitions who applied for adjustment of status in the  
21 United States, and whose petitioning relatives died prior to  
22 beneficiaries' adjudication and approval of lawful permanent  
23 resident status;" and (2) subclass II: "[a]ll beneficiaries of  
24 immediate relative petitions who applied for immigrant visas  
25 abroad, and whose petitioning relatives died prior to  
26 beneficiaries' adjudication and approval of lawful permanent  
27 resident status." *Id.*

1 **STATEMENT OF FACTS**

2 The Legal Authority Within The Ninth Circuit Versus The  
3 Legal Authority Outside The Ninth Circuit

4 In the Ninth Circuit, the *Freeman v. Gonzales*, 444 F.3d 1031  
5 (9th Cir. 2006) decision is precedent. The *Freeman* Court  
6 concluded that the death of the United States citizen spouse did  
7 not necessarily strip the alien spouse of his or her immediate  
8 relative status. *Id.* at 1040-43. According to the Court, once  
9 the citizen spouse has filed the Form I-130 and the alien spouse  
10 has filed the related adjustment of status application (Form I-  
11 485), "immediate relative" status vests with the alien spouse, and  
12 the death of the United States citizen spouse does not strip the  
13 alien of "immediate relative" status. *Id.* at 1042-43. In the  
14 Ninth Circuit, therefore, an alien may immigrate as the spouse of  
15 a citizen, despite the fact that he or she is not, legally,  
16 married to a citizen.

17 The law outside of the Ninth Circuit stands in stark contrast.  
18 The United States Citizenship and Immigration Services' ("USCIS")  
19 guidance on the application of the *Freeman* decision outside the  
20 Ninth Circuit states that USCIS adjudicators will continue to  
21 follow *Matter of Sano*, 19 I. & N. Dec. 299 (BIA 1985) and *Matter of*  
22 *Varela*, 13 I. & N. Dec. 453 (BIA 1970). See Effect of Form I-130  
23 Petitioner's Death on Authority to Approve the Form I-130,  
24 attached as Exhibit 1 at 3. These two cases have the same result:  
25 the Board affirmed the INS decisions that denied the respective  
26 Forms I-130 based on the petitioner's death.<sup>1</sup>

27  
28 <sup>1</sup> The sole difference between these two decisions were the reasons that the Board gave for the respective denials. In *Matter*

1 This USCIS guidance continues and further clarifies the law  
2 that applies within the Ninth Circuit under *Freeman*. The guidance  
3 states that for cases arising in the Ninth Circuit, USCIS  
4 adjudicators may, under *Freeman*, approve a Form I-130 after the  
5 petitioner has died, if the case involves the same essential  
6 facts, including the fact that alien filed the adjustment  
7 application before the petitioner died, and if the alien proves  
8 that the now-terminated marriage was legally valid, and that the  
9 spouses did not marry to confer an immigration benefit on the  
10 alien. Ex. 1 at 6-7. If the Form I-130 is approved, USCIS will  
11 not deem the approval automatically revoked on the petitioner's  
12 death under 8 C.F.R. § 205.1(a)(3)(i)(C), if there is a person who  
13 is willing and able to file an affidavit of support (USCIS Form I-  
14 864) on the alien's behalf, in place of the Form I-864 that the  
15 citizen spouse would have been required to submit. Ex. 1 at 7.

#### 16 ARGUMENT

#### 17 I. THE PROPOSED CLASS IS OVERLY BROAD AND AMORPHOUS.

18 The Supreme Court has said:

19 "[N]ationwide class actions may have a detrimental effect by  
20 foreclosing adjudication by a number of different courts and  
21 judges, and of increasing, in certain cases, the pressures on  
22 this Court's docket. It often will be preferable to allow  
several courts to pass on a given class claim in order to gain  
the benefit of adjudication by different courts in different  
factual contexts."

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of *Varela*, the Board decided the case on the merits and assumed it  
26 had jurisdiction. The Board held that the visa petitioner's death  
27 required denial of the Form I-130 because the beneficiary was no  
28 longer a spouse of the citizen. 13 I. & N. Dec. at 454. In *Matter*  
of *Sano*, the Board decided that the beneficiary's lack of standing  
would have been the more proper basis for the decision in *Varela*,  
but the Board did not question its conclusion in *Varela* that a  
person is no longer a "spouse" after his or her spouse has died. 19  
I. & N. Dec. at 300-01.

1 *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S. Ct. 2545, 2258, 61  
2 L. Ed. 2d 176 (1979). Plaintiffs' proposed class falls within the  
3 ambit of cases where class certification would improperly  
4 interfere with the litigation of similar issues in other judicial  
5 districts.

6 Plaintiffs are essentially trying to form a nationwide class  
7 based on the decision in the *Freeman* case, which is only  
8 applicable law within the Ninth Circuit. Plaintiffs state that  
9 out of 106 identified class members, sixty-four do not reside  
10 within the jurisdiction of the Ninth Circuit. Plaintiffs' Motion  
11 for Class Certification ("Pl. Motion") at 8-9.<sup>2</sup> That is  
12 approximately sixty percent of the proposed class members. It is  
13 a fundamental notion that United States District Courts "are bound  
14 only by the law of their own circuit . . . [and] are not to resolve  
15 splits between circuits." *Hasbrouck v. Texaco, Inc.*, 663 F.2d  
16 930, 933 (9th Cir. 1981) (citation omitted). Thus, since the law  
17 that applies within the jurisdiction of the Ninth Circuit creates  
18 different results than the law that applies outside the  
19 jurisdiction of the Ninth Circuit, this Court should deny class  
20 certification and allow courts outside the Ninth Circuit to  
21 adjudicate the Plaintiffs' individual claims; and create their own  
22 precedent.

23 It is absolutely necessary that for a class to be certified,  
24 the moving party must show that a class exists, and the class

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26 <sup>2</sup> Plaintiffs state that "[o]ut of 106 identified class  
27 members, 25 are in California (23.6%), and a total of 42 are in the  
28 jurisdiction of the Ninth Circuit (39.6)." Pl. Motion at 8.  
Assuming that statement is true, that means the remaining 62  
identified class members (60%) are outside the jurisdiction of the  
Ninth Circuit.

1 definition must be susceptible to a precise definition. *O'Connor*  
2 *v. Boeing North Am., Inc.*, 184 F.R.D. 311. 319 (C.D. Cal. 1998)  
3 ("A class definition should be 'precise, objective, and presently  
4 ascertainable"). In the instant case, the class definition is not  
5 precise for several reasons.

6 Plaintiffs' proposed class is overly broad, because it could  
7 sweep in individuals who had an immediate relative, other than a  
8 deceased spouse, file a Form I-130 on his or her behalf. The case  
9 centers around Plaintiffs' erroneous argument that even though the  
10 prior spouse of each named Plaintiff passed away, each named  
11 Plaintiff remains an "immediate relative" under 8 U.S.C. §  
12 1151(b)(2)(A)(1) for the purpose of adjustment of status.  
13 Plaintiffs argue that the question of law in this case is "whether  
14 defendants-respondents may strip plaintiffs-petitioners of the  
15 status of spouse." See Pl. Motion at 4-7.

16 Plaintiffs' proposed class goes well beyond just spouses.  
17 Plaintiffs seek to certify a class that would include any  
18 immediate relative. Therefore, this definition could be construed  
19 as including individuals, such as an orphaned child whose United  
20 States citizen parents passed away, the mother of a United States  
21 citizen son or daughter who passed away, or the father of a United  
22 States citizen son or daughter who passed away. These latter  
23 situations do not fall under the legal question of "whether  
24 defendants-respondents may strip plaintiffs-petitioners of the  
25 status of spouse." *Id.*

26 Moreover, Plaintiffs proposed class is overbroad, because  
27 Plaintiffs De Mailly, Vargas De Fisher, Gobeil, Fishman-Corman,  
28 Walsh, Lu, Arias-Angulo, Bernstein, and Bayor never filed a motion

1 to reopen or a motion for reconsideration after their adjustment  
2 of status applications were denied. See Complaint at ¶¶ 34, 41,  
3 59, 72, 98, 110, 134, 140. These Plaintiffs' applications for  
4 adjustment of status have been denied for anywhere from  
5 approximately five months to over five years.<sup>3</sup> Plaintiffs cannot  
6 bring a District Court action when their application for  
7 adjustment of status has been denied for such long periods of  
8 time; and they never took further action. These Plaintiffs can  
9 seek to appeal their denial in removal proceedings. See 8 C.F.R.  
10 § 245.2(a)(5)(ii) (2006).<sup>4</sup>

11 In addition, Plaintiffs' proposed class is overly broad,  
12 because Plaintiff De Mailly was self-removed; thus she cannot  
13 reopen her case, which is part of the relief Plaintiffs request.<sup>5</sup>  
14 See Complaint at ¶30; 8 C.F.R. § 1003.23(1).<sup>6</sup>

15 Also, Plaintiff Lu's petition was initially approved; thus she  
16 had remedies available to her under the regulations, but she never

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17 <sup>3</sup> Out of these ten Plaintiffs, the most recent denial was  
18 Plaintiff Baylor's application for adjustment of status, which was  
19 denied on August 9, 2007. See Complaint at ¶ 140. The oldest  
20 denial was Plaintiff Walsh's application for adjustment of status,  
21 which was denied on September 16, 2002. See Complaint at ¶ 98.

22 <sup>4</sup> 8 C.F.R. § 245.2(a)(5)(ii) reads in pertinent part:

23 . . . No appeal lies from the denial of an application by the  
24 director, but the applicant, if not an arriving alien, retains  
25 the right to renew his or her application in proceedings under  
26 [8 C.F.R. § 240].

27 <sup>5</sup> Plaintiffs request that this Court "reopen and readjudicate  
28 [their] immigrant petitions" and "reopen and readjudicate [their]  
adjustment of status applications. See Complaint at 1.

29 <sup>6</sup> 8 C.F.R. § 1003.23(1) reads in relevant part: "[a] motion to  
reopen or to reconsider shall not be made by or on behalf of a  
person who is the subject of removal, deportation, or exclusion  
proceedings subsequent to his or her departure from the United  
States."

1 sought those remedies. See 8 C.F.R. § 205.1(a)(3)(C)(2), as  
2 amended, 71 Fed. Reg. 35742, 35749 (June 21, 2000).<sup>7</sup> Furthermore,  
3 she resides in China and Defendants are aware of no evidence that  
4 she has ever resided in the United States or even been to the  
5 United States. See Complaint at ¶¶ 99-104.

6 Furthermore, Plaintiffs' proposed class is overbroad, because  
7 Plaintiffs Lockett and Engstrom's applications for adjustment of  
8 status are pending. See Complaint at ¶¶ 47,<sup>8</sup> 85.<sup>9</sup> In addition,  
9 Plaintiff Heard's Form I-130 petition was reopened on USCIS  
10 motion. See Reopening of Visa Petition Proceeding And Request for  
11 Evidence, attached as Exhibit 1 at 23-24. USCIS has given her  
12 sixty days to submit evidence that the petitioner of her Form I-  
13 130 died under combat conditions while he was employed by a  
14 private contractor supporting the U.S. armed forces in Iraq; and  
15 that petitioner served honorably on active duty in the U.S. armed  
16 forces prior to the civilian employment. See *Id.* at 2-4. If  
17 Plaintiff Heard submits the requested evidence, then her Form I-  
18 130 will be converted to, and adjudicated as, a widow's Form I-  
19 360. *Id.* Thus, this Court cannot yet "reopen and readjudicate

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21  
22 <sup>7</sup> 8 C.F.R. § 205.1(a)(3)(C)(2), as amended, 71 Fed. Reg. at  
23 35,749 provides that USCIS may reinstate approval of a Form I-130 if  
24 some qualified person is willing and able to submit a Form I-864,  
25 affidavit of support, as a substitute for petitioner.

26 <sup>8</sup> Plaintiffs make an unsupported allegation that Lockett's  
27 petition and application were denied, because Defendants withheld  
28 his approval at his interview and indicated that guidance from  
headquarters was needed. See Complaint at ¶ 47.

<sup>9</sup> Plaintiffs merely state that Engstrom fears that her  
application and petition may be denied, but state that "no action  
has been taken on her Petition and Application." See Complaint at  
¶ 85.

1 [their] immigrant petitions" and "reopen and readjudicate [their]  
2 adjustment of status applications. Complaint at 1.

3 As such, this Court should limit the proposed class to not  
4 include Plaintiffs Lu and De Mailly, any individuals whose  
5 applications are pending, or any individuals whose motions to  
6 reopen or motions for reconsideration have been granted.

7 **II. THE CLASS PROPOSED BY PLAINTIFFS FAILS TO SATISFY THE**  
8 **REQUIREMENTS FOR CERTIFICATION OF A CLASS.**

9 **A. Standard of Review**

10 To obtain class certification under Rule 23 of the Federal  
11 Rules of Civil Procedure ("Fed. R. Civ. P."), the party seeking  
12 certification must satisfy all of the four factors in Rule 23(a),  
13 namely:

14 (1) the class is so numerous that joinder of all members is  
15 impracticable ["numerosity"], (2) there are questions of law  
16 or fact common to the class ["commonality"], (3) the claims or  
17 defenses of the representative parties are typical of claims  
or defenses of the class ["typicality"], and (4) the  
representative parties will fairly and adequately protect the  
interests of the class ["adequacy of representation"].

18 Fed. R. Civ. P. 23(a). In addition to these requirements, a court  
19 must find that the class satisfies at least one requirement of  
20 Fed. R. Civ. P. 23(b). *Armstrong v. Davis*, 275 F.3d 849, 868 (9th  
21 Cir. 2001); *Berry v. Baca*, 226 F.R.D. 398, 401-02 (C.D. Cal.  
22 2005).

23 The party seeking class certification bears the burden of  
24 proof on all factors. *Zinser v. Accufix Research Inst., Inc.*, 253  
25 F.3d 1180, 1186 (9th Cir. 2001). Indeed, the failure to meet "any  
26 one of Rule 23's requirements destroys the alleged class action."  
27 *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 673 (9th  
28 Cir. 1975). In addition, the district court must conduct a

1 rigorous analysis to determine that the requirements of Rule 23  
2 have been met. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161, 102 S.  
3 Ct. 2364, 2372, 72 L. Ed. 2d 740 (1982). If a court is not fully  
4 satisfied, the class should not be certified. *Id.* Accordingly,  
5 this Court should deny class certification, because Plaintiffs'  
6 proposed class fails to meet all the requirements of Rule 23 of  
7 the Fed. R. Civ. P. governing class actions.

8 **B. The Proposed Class Fails To Satisfy "Commonality."**

9 Plaintiffs fail to demonstrate that "there are questions of  
10 law or fact common to the class." Fed. R. Civ. P. 23(a)(2).  
11 Otherwise referred to as commonality, this requirement is  
12 construed permissively by the courts, such that it may be shown by  
13 a simply demonstration of "the existence of shared legal issues  
14 with divergent factual predicates" or "a common core of salient  
15 facts coupled with disparate legal remedies within the class."  
16 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).  
17 Plaintiffs fail to meet the commonality requirement since the  
18 proposed class would include both "disparate legal issues" and  
19 "divergent factual predicates."

20 1. *The Proposed Class Presents "Disparate Legal*  
21 *Issues."*

22 Plaintiffs state that they are asking the Court to decide  
23 "whether class members qualify as a matter of law as immediate  
24 relatives." Pl. Motion at 4. Plaintiffs are requesting a class  
25 that would include members that reside both in the jurisdiction of  
26 the Ninth Circuit and outside the jurisdiction of the Ninth  
27 Circuit. This is of extreme importance, since the law within the  
28 Ninth Circuit creates different results than the law outside of

1 the Ninth Circuit on the issue of whether an individual proposed  
2 class member qualifies as an "immediate relative." See *supra* at  
3 2-3.

4 Therefore, each proposed class member presents a distinct  
5 legal question depending on the residence of the individual, which  
6 is inappropriate for a class action. See *Falcon*, 457 U.S. at 155  
7 (holding that the "class action device" is "'particularly  
8 appropriate' when the 'issues involved are common to the class as  
9 a whole' and when they 'turn on questions of law applicable in the  
10 same manner to each member of the class.'" (quoting *Califano*, 442  
11 U.S. at 701) (emphasis added).

12 2. *The Proposed Class Presents "Divergent Factual*  
13 *Predicates."*

14 In addition, this Court should deny class certification,  
15 because there are factual differences that surround the named  
16 Plaintiffs and putative class members that affect whether the  
17 individual qualifies as an immediate relative by virtue of their  
18 prior status as legally married spouses of United States citizens.  
19 For example, factual differences include, but are not limited to  
20 whether the Plaintiff's I-130 was denied because the spouse died  
21 before its adjudication; whether the plaintiff's I-130 was  
22 initially approved then revoked after the spouse's death; whether  
23 the plaintiff and spouse had been married for more than two years;  
24 whether the plaintiff has a substitute for his or her former  
25 spouse who is willing and able to submit a Form I-864; and whether  
26 the plaintiff can demonstrate that his or her marriage to the  
27 petitioner was legally valid.

28

1           Therefore, Plaintiffs' proposed class lacks commonality, and  
2 this Court should deny class certification.

3  
4  
5           **C.    The Proposed Class Fails To Satisfy Rule 23(a)(3)'s**  
6           **Typicality Requirement.**

7           Plaintiffs have likewise failed to demonstrate that "the  
8 claims or defenses of the representative parties are typical of  
9 the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3).  
10 "The test of typicality refers to the nature of the claim or  
11 defense of the class representative, and not to the specific facts  
12 from which it arose or the relief sought." *Jones v. Shalala*, 64  
13 F.3d 510, 514 (9th Cir. 1995). See also *General Telephone Co. Of*  
14 *Southwest v. Falcon*, 457 U.S. 147, 156, 102 S. Ct. 2364, 2370, 72  
15 L. Ed. 2d 740 (1982) ("We have repeatedly held that a class  
16 representative must be part of the class and possess the same  
17 interest and suffer the same injury as the class member.")  
18 (internal quotation omitted); *Sullivan v. Chase Inv. Services of*  
19 *Boston, Inc.*, 79 F.R.D. 246, 257 (N.D.Ca. 1978) ("[I]f it is  
20 predictable that a major focus of the litigation will be on an  
21 arguable defense unique to the named plaintiff[s] or a small  
22 subclass, then the named plaintiff is not a proper class  
23 representative . . . [and if] factual variations reveal that  
24 different class members have different interests that will affect  
25 an effective presentation of their claims, then issues are raised  
26 on typicality). The typicality requirement of Rule 23(a)(3) is  
27 more rigorous than the commonality requirement of Rule 23(a)(2).  
28 *Hanlon*, 150 F.3d at 1019.

1 Plaintiffs simply argue that typicality is met because the  
2 named Plaintiffs "complain of the defendants-respondents  
3 misinterpretation of the term 'spouse' for purposes of the  
4 immediate relative definitions found at 8 U.S.C. §  
5 1151(b)(2)(A)(), and of defendants-respondents illegal action in  
6 denying or withholding lawful permanent resident status to  
7 plaintiffs-petitioners solely due to the death of their spouse."  
8 Pl. Motion at 5.

9 The typicality requirement is not met in this case for several  
10 reasons. First, Plaintiffs fail to demonstrate how the  
11 representative Plaintiffs have the same claims or defenses as  
12 members of the proposed class. As described above, the law within  
13 the jurisdiction of the Ninth Circuit creates different results  
14 than the law outside of the jurisdiction of the Ninth Circuit. See  
15 *supra* at 2-3. As such, the named Plaintiffs who reside within the  
16 Ninth Circuit have different claims or defenses and are thus not  
17 proper class representatives for proposed members who reside  
18 outside the Ninth Circuit; and vice versa. See *Sullivan*, 79  
19 F.R.D. at 257. On top of that, Plaintiffs fail to show which  
20 named Plaintiff(s) represent which members of the proposed class of  
21 persons with the same claims or defenses.

22 In addition, it is arguable that a large focus of this  
23 litigation will be on the law within the Ninth Circuit as a  
24 defense; and this law fails to apply to the representative  
25 Plaintiffs and proposed class members who reside outside the Ninth  
26 Circuit. Typicality is destroyed when named Plaintiffs' claims  
27 are subject to particular defenses. See *Gartin v. S & M NuTec*  
28 *LLC*, 245 F.R.D. 429, 435 (C.D. Cal. 2007) (citing *Hanon v.*

1 *Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation  
2 omitted) (holding that “. . . Plaintiff's claim is not typical  
3 because her claims are so unique and subject to particular  
4 defenses that litigation of the action is likely to be overwhelmed  
5 by addressing her individual claims”).

6 Moreover, the varied factual circumstances of the named  
7 plaintiffs and proposed class members will hinder an effective  
8 presentation of their claims and reveal that named Plaintiffs have  
9 different interests. *Sullivan*, 79 F.R.D. at 257. “Where the  
10 substantive claims depend on individual permutations . . . the  
11 claims of the named plaintiffs who have the same general complaint  
12 against the defendant as the class are not typical.” *Gartin*, 245  
13 F.R.D. at 434 (citation omitted). Each individual's claim in this  
14 case is extremely dependent on their personal factual  
15 distinctions. *See supra* at 10.

16 In addition, according to Plaintiffs' proposed class, named  
17 Plaintiffs whose petitions and applications have not yet been  
18 adjudicated will represent class members whose petitions and  
19 applications have already been denied. Plaintiff Lockett and  
20 Engstrom's petitions and applications are pending; thus they are  
21 not effective representatives for a class member whose application  
22 was denied, because Lockett and Engstrom's petitions and  
23 applications could be granted. *See Complaint* at ¶¶ 47, 85.

24 Moreover, according to Plaintiffs' proposed class, Plaintiff  
25 De Mailly was self-removed. *Complaint* at ¶¶ 30, 100. She is not  
26 an effective representative for class members, because she cannot  
27 reopen her case. *See supra* at 6.

28

1 Also, Plaintiff Heard's Form I-130 was reopened on USCIS  
2 motion; thus she is not an effective representative for class  
3 members because of her unique situation. See Exh. 1 at 23-24;  
4 *supra* at 7.

5 Furthermore, according to Plaintiffs' proposed class, named  
6 Plaintiffs whose deceased child, deceased mother, or deceased  
7 father filed a Form I-130 on his or her behalf will be represented  
8 by named Plaintiffs whose deceased spouse filed a Form I-130 on  
9 his or her behalf. An individual whose deceased child, deceased  
10 mother, or deceased father filed their I-130 does not have a  
11 factual situation that is in any way related to the question of  
12 whether each named Plaintiff remains an "immediate relative" under  
13 8 U.S.C. § 1151(b)(2)(A)(1) for the purpose of adjustment of  
14 status by virtue of their prior status as legally married spouses  
15 of United States citizens. Thus, the claims or defenses of the  
16 named Plaintiffs in this case are not typical of the claims or  
17 defenses of an individual whose deceased child, deceased mother,  
18 or deceased father filed a Form I-130 on his or her behalf.

19 Therefore, this Court should deny class certification because  
20 Plaintiffs' proposed class fails to meet the typicality  
21 requirement.

22 **D. The Proposed Class Fails To Satisfy Rule 23(a)(4)'s**  
23 **Adequacy of Representation Requirement.**

24 Additionally, Plaintiffs cannot demonstrate that they are  
25 adequate representatives of the class they purport to represent.  
26 See Fed. R. Civ. P. 23(a)(4). A showing of adequate  
27 representation requires named plaintiffs in a putative class  
28 action to demonstrate that their claims and the class claims are

1 so interrelated that the interests of the class members will be  
2 fairly and adequately protected in their absence. *Falcon*, 457  
3 U.S. at 158 n.13. "This factor requires: (1) that the proposed  
4 representative Plaintiffs do not have conflicts of interest with  
5 the proposed class, and (2) that Plaintiffs are represented by  
6 qualified and competent counsel." *Dukes v. Wal-Mart, Inc.*, 474  
7 F.3d 1214, 1233 (9th Cir. 2007). "Representation will most likely  
8 be adequate where the representative's interests are comparable to  
9 those of the absent class members, similar to the typicality  
10 inquiry of Rule 23(a)(3)." *Gartin*, 245 F.R.D. at 434 (citation  
11 omitted).

12 As applied to the instant case, however, Plaintiffs have, once  
13 again, failed to demonstrate how adjudication of the claims of any  
14 of the named Plaintiffs will fairly and adequately protect the  
15 interest of the proposed class. See Fed. R. Civ. P. 23(a)(4).  
16 Instead, Plaintiffs merely offer a perfunctory statement that this  
17 requirement is met: "Plaintiffs-petitioners know of no conflicts  
18 between their interests and those of the class they seek to  
19 represent." Pl. Motion at 6.

20 Despite this assertion, the representative Plaintiffs have  
21 different interests than the interests of the proposed class  
22 members, because of the diverse and disparate nature of the  
23 proposed class. In light of that, the Named Plaintiffs cannot  
24 adequately represent the numerous class members whose cases  
25 present diverse factual scenarios that are relevant to their  
26 individual recovery. See *Gartin*, 245 F.R.D. at 434 (discussing  
27 how courts have denied class certification if a named plaintiff  
28 has a unique fact pattern, because the named plaintiff is "ill-

1 suited to represent absent class members" and thus cannot  
2 demonstrate adequacy of representation).

3 **E. The Proposed Class Is Not Maintainable Under 23(b)(3).**

4 Finally, despite the claims outlined in the Complaint,  
5 Plaintiffs have failed to demonstrate that the proposed class is  
6 maintainable under one of the subsections of Fed. R. Civ. P.  
7 23(b). Plaintiffs erroneously argue that the proposed class is  
8 maintainable under Fed. R. Civ. P. 23(b)(3).

9 To demonstrate that a class action is maintainable under Fed.  
10 R. Civ. P. 23(b)(3), plaintiffs must show that "common questions  
11 of law and fact predominate over individual issues" and that "a  
12 class action is the superior method of resolving the claims."  
13 *Zinser*, 253 F.3d at 1188. Courts have named these two  
14 requirements "predominance" and "superiority."

15 1. *Plaintiffs Fail To Demonstrate That The Proposed*  
16 *Class Meets The Requirements of Predominance.*

17 "Implicit in the satisfaction of the predominance test is the  
18 notion that the "adjudication of common issues will help achieve  
19 judicial economy." *Id.* at 1189 (citation omitted). Plaintiffs  
20 erroneously argue that "[t]he question of law - whether  
21 defendants-respondents may strip plaintiffs-petitioners of the  
22 status of spouse - predominates over other questions only  
23 affecting individual members."

24 That is incorrect, because in order to answer that question,  
25 there are several sub-questions that need to be examined; and the  
26 answers are unique to each member.

27 First, the factual situations of the named plaintiffs are so  
28 diverse. "If the main issues in a case require the separate

1 adjudication of each class member's individual claim or defense, a  
2 Rule 23(b)(3) action would be inappropriate." *Zinser*, 253 F.3d at  
3 1189. The Court will have to look into individual factual issues,  
4 which include but not limited to whether the Plaintiff's I-130 was  
5 denied because the spouse died before its adjudication; whether  
6 the plaintiff's I-130 was initially approved then revoked after  
7 the spouse's death; whether the plaintiff and former spouse had  
8 been married for more than two years; whether the plaintiff has a  
9 substitute for his or her former spouse who is willing and able to  
10 submit a Form I-864; and whether the plaintiff can demonstrate  
11 that his or her marriage to the petitioner was legally valid.

12 In addition, the case law that applies within the Ninth  
13 Circuit creates dramatically different results than the case law  
14 that applies outside the Ninth Circuit. See *supra* at 2-3. These  
15 variances in Circuit law further destroys any alleged efficiency  
16 that would result from forming a class action in this case.

17 "[P]roliferation of disparate factual and legal issues is  
18 compounded exponentially' when law of multiple jurisdictions  
19 apply." *Zinser*, 253 F.3d at 1190 (citation omitted).

20 Therefore, adjudicating this case as a class action will fail  
21 to attain judicial economy, because this case is better suited to  
22 individual adjudications. As such, this Court should deny class  
23 certification.

24 2. *Plaintiffs Fail To Demonstrate That The Proposed*  
25 *Class Meets The Requirements of Superiority.*

26 To determine "superiority," Courts must look to the four  
27 factors in Rule 23(b)(3). These four factors are: (1) the  
28 "interest of members of the class in individually controlling the

1 prosecution or defense of separate actions;" (2) "the extent and  
2 nature of any litigation concerning the controversy already  
3 commenced by or against members of the class;" (3) "the  
4 desirability or undesirability of concentrating the litigation of  
5 the claims in the particular forum;" and (4) "the difficulties  
6 likely to be encountered in the management of a class action."

7       Each individual class member has an interest in controlling  
8 his or her defense. There are factual disparities that affect  
9 each individual's adjudication; and each class member has an  
10 interest in ensuring the Court's decision is based on his or her  
11 individual factual situation. In addition, since this case  
12 requires the application of different legal standards to different  
13 Plaintiffs' claims, depending on where they reside, each Plaintiff  
14 has an interest in ensuring the correct legal standard is applied  
15 to his or her individual claim. Plaintiffs argue that "multiple  
16 lawsuits will lead to conflicting decisions and decidedly non-  
17 uniform results." Pl. Motion at 7. As argued above, it is not the  
18 job of a District Court to resolve splits between the circuits.  
19 *See supra* at 4.

20       In regards to the second requirement of superiority,  
21 Plaintiffs cite four cases that have been filed following the  
22 *Freeman* decision that involve the "surviving spouse" issue; and  
23 make a perfunctory statement that "[t]he extent of the litigation  
24 is relevant to the Court's findings with respect to class  
25 certification, pursuant to Fed. R. Civ. P. 23(b)(3)(B)." Pl.  
26 Motion at 7-8. Since counsel for Plaintiffs indicate that they  
27 know of 106 class members across the country, the filing of these  
28 four cases supports the idea that individual adjudications may be

1 adequate to satisfy class members' claims. Pl. Motion at 8. See  
2 *Zinser*, 253 F.3d at 1191 (holding that because nine lawsuits were  
3 pending where thousands of patients were implanted with pacemakers  
4 with ENCOR lead, "individual litigation may be sufficient to  
5 satisfy potential claims".)<sup>10</sup>

6 In addition, Plaintiffs erroneously argue that there is a  
7 large desirability to concentrate the litigation of claims in the  
8 Central District of California. In support of their argument,  
9 Plaintiffs make blanket statements, but cite no case law that  
10 supports their statements. For example, Plaintiffs claim that  
11 "because defendants-respondents have just issued a Memorandum . .  
12 . purporting to implement specific rules with respect to surviving  
13 spouse cases *within the Ninth Circuit*, it is appropriate for the  
14 Court to review the application of these special rules with  
15 respect to the statute in question." Pl. Motion at 9. This  
16 argument leaves out one essential point: many of the class members  
17 do not reside within the jurisdiction of the Ninth Circuit; and a  
18 different legal standard applies to the class members who reside  
19 outside of the Ninth Circuit. Thus, Plaintiffs subsequent  
20 statement that "[t]he determination as to whether defendants-  
21 respondents' Memorandum comports with the statute can more easily  
22 be made in this forum than anywhere else" is untrue. Again, as  
23 argued above, it is not the job of a District Court to resolve a  
24 Circuit split. See *supra* at 4. Plaintiffs erroneously argue

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25  
26 <sup>10</sup> Plaintiffs make the argument it is desirable to concentrate  
27 the litigation of the class members' claims, because there is no  
28 process for appointment of counsel in immigration cases. Pl. Motion  
at 8. Plaintiffs offer no legal citation to support the notion that  
a class action is desired, because it provides a means to grant  
legal resources to class members.

1 that the management of the class will be an easy task. Pl. Motion  
2 at 9. Plaintiffs make a mechanical statement that "the litigation  
3 will likely be focused on the interpretation of a federal statute,  
4 and not to intensive fact-based inquiry, due to the Court's review  
5 of questions of law." *Id.* As argued throughout this opposition,  
6 this litigation will focus on the unique factual situation of each  
7 class member, what legal standard applies to each class member  
8 depending on whether the class member resides within the Ninth  
9 Circuit or not, and what result the legal standard and the factual  
10 situation creates for each class member. Those are very  
11 individual questions that are better suited to individual  
12 adjudications. Thus, the management of the class will not be as  
13 simple a task, as Plaintiffs suggest.

14 **CONCLUSION**

15 For all of the foregoing reasons, Defendants respectfully  
16 submit that the Court should deny Plaintiffs' motion for class  
17 certification.

18 Respectfully Submitted,

19  
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28 Dated: 7 January 2008

1  
2 **CERTIFICATE OF SERVICE**

3 Case No. C-07-5696-CAS

4 I hereby certify that on this 7th day of January 2008,  
5 true and correct copies of the Defendants' **OPPOSITION TO**  
6 **PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** were served pursuant  
7 to the district court's ECF system as to ECF filers on January  
8 7, 2008, to the following ECF filers:

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