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10 Class Members

11  
12 UNITED STATES DISTRICT COURT  
13 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
14 WESTERN DIVISION

15 CAROLYN ROBB HOOTKINS, et. al., ) Case No. CV07-5696 CAS (MANx)

16 Plaintiffs-petitioners, )

17 vs. )

18 MICHAEL CHERTOFF, U.S. Department )  
19 of Homeland Security, et. al., )

20 Defendants-respondents. )

21 Date: January 28, 2008

22 Time: 10:00 a.m.

23 Courtroom: 5

24 Honorable Christina A. Snyder

25 MEMORANDUM IN SUPPORT OF

26 MOTION FOR PRELIMINARY

27 INJUNCTION

28 CLASS ACTION

1 **I. FACTS**

2 Plaintiffs-petitioners and class members who filed adjustment  
3 of status (Subclass I) applied for and received Employment Authorization  
4 Documents (EADs) and Advance Parole Travel Documents (APs). Because  
5 Lawful Permanent Resident (LPR) status carries with it work and travel  
6 authorization, the EAD and AP documents are intended to allow work and  
7 travel during the pendency of the application process. In cases where  
8 plaintiffs-petitioners' adjustment of status applications have been denied, the  
9 EAD and AP documents have also been denied, with the exception of some  
10 plaintiffs-petitioners in the jurisdiction of the Ninth Circuit. Some class  
11 members have been placed in removal proceedings.

12 Plaintiffs-petitioners and class members have an urgent and  
13 ongoing need to work. The denial of work authorization has threatened their  
14 ability to provide for themselves and their families, and denied them crucial  
15 career advancement opportunities. Plaintiffs-petitioners and class members  
16 also have a critical need to be able to travel on short notice, as relatives  
17 abroad may need their presence, whether the event be a marriage or birth, or  
18 the death of a relative. Plaintiffs-petitioners also have a compelling need to  
19 be free from the threat of deportation, so that they can pursue their  
20 adjustment of status applications.

21 **II. LEGAL STANDARD FOR INJUNCTIVE RELIEF**

22 To obtain preliminary injunctive relief in the Ninth Circuit, the movant must  
23 show: (1) a strong likelihood of success on the merits; (2) the possibility of irreparable  
24 injury to the movant if the preliminary relief is not granted; (3) a balance of hardships  
25 favoring the movant; and (4) advancement of the public interest. *Johnson v. Cal. State*  
26  
27  
28

1 *Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995); *Rohman v. City of Portland*, 909  
2 F. Supp. 767, 771 (D. Or. 1995).

3  
4 Alternatively stated, a court may issue a preliminary injunction if the movant  
5 demonstrates *either* a combination of probable success on the merits and the possibility  
6 of irreparable injury *or* that serious questions are raised and the balance of hardships tips  
7 sharply in the movant's favor. *Johnson*, 72 F.3d at 1430; *Rohman*, 909 F. Supp. at 771.

8 These formulations are points on a sliding scale in which the required degree  
9 of irreparable harm increases as the probability of success decreases. *Rohman*, 909  
10 F. Supp. at 771 (citing *United States v. Odessa Union Warehouse Co-Op*, 833 F.2d 172,  
11 174 (9th Cir. 1987)). The Court of Appeals for the Ninth Circuit has said that this really  
12 describes one test: a continuum in which the required showing of harm varies inversely  
13 with the required showing of meritoriousness. *See id.* (citing *San Diego Comm. v.*  
14 *Governing Bd.*, 790 F.2d 1471, 1473 n.3 (9th Cir. 1986)).

15  
16 **III. PETITIONERS ARE ENTITLED TO A PRELIMINARY**  
17 **INJUNCTION THAT COMPELS RESPONDENTS AND THEIR**  
18 **SUBORDINATES TO PRESERVE THE STATUS QUO.**

19 A. Plaintiffs-petitioners Have a Strong Likelihood of Success on the Merits.

20 Plaintiffs-petitioners and class members who applied for adjustment of status  
21 (Subclass I) are eligible to apply for an Employment Authorization Document ("EAD")  
22 and an Advance Parole Travel Document ("AP") because of the pending application for  
23 adjustment of status to lawful permanent resident. *See* 8 C.F.R. § 274a.12(c)(9) and §  
24 245.2(a)(4)(ii)(B) (2007)<sup>1</sup>. Defendants-respondents have issued EAD and AP documents  
25 to Plaintiffs-petitioners. Defendants-respondents decision not to renew Plaintiffs-

26  
27 <sup>1</sup> The Advance Parole regulation, which deems the departure of the applicant for  
28 adjustment of status an automatic abandonment of the application, may be *ultra vires*.  
Nevertheless, plaintiffs-petitioners are seeking to comply with the requirement.

1 petitioners EAD and AP documents is capricious. Indeed, Defendants-respondents  
2 decision to deny EAD and AP documents raises constitutional due process concerns. As  
3 the court in *Diaz v. I.N.S.* stated, "[C]onstitutional standards are implicated. Once a  
4 regulation permitting the grant of employment authorization to political asylum  
5 applicants is promulgated and the alien actually receives authorization to work, the right  
6 may not be revoked arbitrarily or unreasonably." 648 F. Supp 638, 656 n.36 (E.D. Cal.  
7 1986) (citing *Goldberg v. Kelly*, 397 U.S. 254, 261–62 (1970)). It was both arbitrary and  
8 unreasonable for defendants-respondents, after issuing EAD and AP documents, to refuse  
9 renewal of plaintiffs-petitioners EAD and AP documents. *See* Administrative Procedure  
10 Act, 5 U.S.C. § 706 (2000). Plaintiffs-petitioners must also be free from the threat of  
11 deportation in order to pursue their applications for adjustment of status to lawful  
12 permanent resident.

13  
14 Plaintiffs-petitioners have a strong likelihood of success on their claim for  
15 relief in the mandamus petition. *See Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir.  
16 2006); *Robinson v. Chertoff*, No. Civ.A.06-5702 (SRC), 2007 WL 1412284 (D.N.J. May  
17 14, 2007) *government notice of appeal filed July 2, 2007*. *But see Burger v. McElroy*, 97  
18 Civ. 8775 (RPP), 1999 U.S. Dist. LEXIS 4854 (S.D.N.Y. Apr. 12, 1999); and *Turek v.*  
19 *Dep't of Homeland Security*, 450 F. Supp. 2d 736 (E.D. Mich. 2006).

20  
21 B. Plaintiffs-petitioners Will Suffer Substantial and Irreparable Harm Absent a  
22 Preliminary Injunction.

23 The hardships facing plaintiffs-petitioners if the preliminary injunction does  
24 not issue could scarcely be more acute. Plaintiffs-petitioners will be ineligible for work  
25 and will lose the ability to support themselves and their family. With no income to pay  
26 financial obligations such as mortgage, rent, or car payments, plaintiffs-petitioners could  
27 also lose their homes, cars, and personal effects. Plaintiffs-petitioners will lose valuable  
28

1 opportunities for career advancement, and without productive activities on which to focus  
2 following the deaths of their spouses, may fall into a state of depression or worse.

3 Plaintiffs-petitioners only other alternatives are to work in violation of the law, an  
4 alternative that goes against public policy and the defendants-respondents own stated  
5 objectives in halting unlawful employment. Additionally, working in violation of the law  
6 could potentially subject plaintiffs-petitioners' employers to criminal sanction. Finally,  
7 for those plaintiffs-petitioners facing removal proceedings, the threat or actual  
8 implementation of deportation is the ultimate harm, causing distress and separation from  
9 family members, counsel, and loss of ability to adjust status to lawful permanent resident.  
10

11 In similar circumstances, the U.S. District Court for the Northern District of  
12 California held that it was "beyond question" that denial of employment authorization  
13 threatened substantial and irreparable injury. *Grijalva v. Ilchert*, 815 F. Supp. 328,  
14 332 (N.D. Cal. 1993). In *Grijalva*, an asylum applicant applied for work authorization  
15 while her asylum application was pending. *Id.* at 329. USCIS rejected her employment  
16 authorization application, so she filed suit to obtain a temporary restraining order  
17 compelling USCIS to grant her employment authorization. *Id.* That court's analysis is  
18 worth quoting in full:

19  
20 Plaintiff has also established a threat of irreparable injury. An  
21 unreasonable denial of Plaintiff's work authorization, which  
22 would prevent Plaintiff from working to support herself  
23 pending resolution of her claim for asylum, would cause  
24 Plaintiff substantial and potentially irreparable harm. In order  
25 to support herself without a work permit, Plaintiff may feel  
26 compelled to engage in unauthorized employment while her  
27 application for asylum is pending. Not only is an alien who  
28 engages in unauthorized employment deportable, 8 U.S.C.  
§ 1251(a)(9), but an employer who hires an alien without  
employment authorization may be subject to criminal sanctions.  
8 U.S.C. § 1324(a). Consequently, an alien who is wrongfully  
denied employment authorization is compelled to rely on

1 friends and relatives for support, to work illegally and risk  
2 deportation or adverse action on his asylum application, or,  
3 ultimately, to abandon his application for asylum. [*Ramos v.*  
4 *Thornburgh*, 732 F. Supp. 696, 699 (E.D. Tex. 1989)]. Thus, the  
5 threat of substantial and irreparable injury from improper denial  
6 of employment authorization is beyond question. *See* [*Nat'l*  
7 *Ctr. for Immigrants' Rights, Inc. v. I.N.S.*, 743 F.2d 1365, 1369  
8 (9th Cir. 1982)].

9 *Id.* at 331–32; *see also Ramos*, 732 F. Supp. at 699 (same holding); *Nat'l Ctr. for*  
10 *Immigrants' Rights*, 743 F.2d at 1369 (same holding).

11 C. The Balance of Hardships Strongly Favors Plaintiffs-Petitioners.

12 In stark contrast, there is absolutely no plausible interest that defendants-  
13 respondents can claim in preventing plaintiffs-petitioners from working or traveling, or  
14 for proceeding to deport them. Defendants-respondents granted work and travel  
15 authorization in the past to plaintiffs-petitioners, and allowed them leave to remain in the  
16 United States lawfully while their applications remained pending. This is not a case  
17 implicating security concerns, where the issue is whether defendants-respondents should  
18 be permitted to detain someone. Rather, the sole issue is whether the defendants-  
19 respondents should be permitted to force plaintiffs-petitioners to stay at home and not  
20 work to support themselves and their families, or to remain at home, unable to travel to  
21 see the birth or marriage of a relative, or console relatives and pay respects to loved ones  
22 who pass away, or to force them out of the country. After the grant of EAD and AP  
23 documents, there can be no governmental interest in keeping plaintiffs-petitioners from  
24 working and traveling now, absent a change in circumstances. *See, e.g., Diaz*, 648  
25 F. Supp at 647–48 (minimal hardship to INS in being compelled to issue EADs to asylum  
26 applicants). Following the grant of a leave to remain in the United States, there is no  
27 governmental interest in proceeding with deportation until plaintiffs-petitioners claims to  
28 immediate relative status can be determined through the judicial process.

1           D.    The Public Interest Favors Petitioner.

2           The public has no interest in compelling someone to stay at home rather than  
3 work to support his or her family or travel for legitimate purposes. Plaintiffs-petitioners  
4 respectfully request the Court to invoke its power to restrain defendants-respondents from  
5 distorting the status quo, and direct defendants-respondents to suspend removal  
6 proceedings and renew plaintiffs-petitioners EAD and AP documents, and those of class  
7 members when certified.  
8

9           **IV. SECURITY**

10           Fed. R. Civ. P. 65(c) states that no restraining order or preliminary  
11 injunction shall issue except upon the giving of security in an amount the court deems  
12 proper for the payment of such costs and damages as may be incurred by any party found  
13 to have been wrongfully enjoined or restrained. Defendants-respondents in this case will  
14 incur no costs or damages if they are compelled to renew plaintiffs-petitioners' EAD and  
15 AP documents. In fact, the filing fees associated with such documents are adequate to  
16 cover any costs or damages that may be incurred. Petitioner requests that the Court use  
17 its discretion to require only the filing fees as security.  
18

19           **V. CONCLUSION**

20           The balance of the hardships favors strongly favors plaintiffs-petitioners,  
21 and a keen public interest lies in preserving the status quo and allowing plaintiffs-  
22 petitioners to continue work and travel authorization while this controversy is being  
23 litigated. Because plaintiffs-petitioners are likely to succeed on the merits of their claims,  
24 and because they face substantial and irreparable harm if defendants-respondents are not  
25 compelled to suspend removal proceedings and renew their EAD and AP documents,  
26  
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1 plaintiffs-petitioners respectfully request this Court to grant the motion for a preliminary  
2 injunction.  
3

4 By \_\_\_\_\_  
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Attorneys for Plaintiffs-petitioners

1 PROOF OF SERVICE

2 I, the undersigned, say: my business address is 5285 SW Meadows Rd., Suite 175,  
3 Lake Oswego, OR 97035. I am over the age of eighteen years and not a party to the  
4 above-entitled action.

5 On November 26, 2007, I served the within document(s) described as:  
6 MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION,  
7 on the interested party(ies) in this action as follows:

8 I inserted a true and correct copy of the document(s) in a sealed envelope and  
9 caused each such envelope, with first-class postage thereon fully prepaid, to be deposited  
10 in a recognized place of deposit of the United States Mail for collection and mailing to  
11 the office/residence of the addressee(s) on the date shown below following ordinary  
12 business practices, addressed as follows:

13 Elizabeth Stevens  
14 Office of Immigration Litigation  
15 USDOJ Civil Division  
16 P.O. Box 878  
17 Ben Franklin Station  
18 Washington, DC 20044

19 Leon W. Weidman, Chief  
20 United States Attorney's Office  
21 Room 7516, Federal Building  
22 300 N. Los Angeles Street  
23 Los Angeles, CA 90012

24 Alberto Gonzales  
25 United States Attorney General  
26 United States Department of Justice  
27 950 Pennsylvania Avenue, NW  
28 Washington, D.C. 20530-0001

Michael Chertoff  
Secretary, Department of Homeland Security  
United States Department of Homeland Security  
Washington, D.C. 20528

1  
2 Emilio Gonzalez  
3 Director, United States Citizenship and Immigration Services  
4 United States Department of Homeland Security  
5 425 I Street NW  
6 Washington, D.C. 20536

7 Condoleezza Rice  
8 Secretary of State  
9 United States Department of State  
10 Attn: Christopher Riche, Exec. Dir. Legal Advisor  
11 Rm. 5519  
12 2201 C Street NW  
13 Washington, D.C. 20520

14 Maura Harty  
15 Assistant Secretary for Consular Affairs  
16 United States Department of State  
17 Attn: Christopher Riche, Exec. Dir. Legal Advisor  
18 Rm. 5519  
19 2201 C Street NW  
20 Washington, D.C. 20520

21  
22 I declare under penalty of perjury under the laws of the United States of America  
23 that the foregoing is true and correct.

24 EXECUTED on November 23, 2007, at Lake Oswego, Oregon.

25  
26  
27  
28  

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Brent W. Renison, Declarant