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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)
17 Plaintiffs-petitioners,) Date: January 28, 2008
18) Time: 10:00 a.m.
19 vs.) Courtroom: 5
20) Honorable Christina A. Snyder
21 MICHAEL CHERTOFF, U.S. Department)
22 of Homeland Security, et. al.,) PLAINTIFFS' REPLY IN SUPPORT OF
23) MOTION FOR CLASS
24 Defendants-respondents.) CERTIFICATION
25)
26) CLASS ACTION
27)
28)

1 Defendants would have this Court deny class certification based on
2 insignificant variations on the common theme of plaintiffs' claims. Yet the timing of
3 death, adjudication, and status of adjudication are differences which do not affect the
4 critical decision for the Court to decide – that plaintiffs and class members qualify as
5 immediate relatives. Additionally, defendants continually point to the allegedly different
6 law in the Ninth Circuit, yet fail to acknowledge that the Immigration and Nationality Act
7 is a federal statute applicable equally to all corners of our nation. The interpretation of
8 the language of a federal statute is at issue here.

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12 At this stage, the Court need only make a “reasonable judgment” that Rule
13 23 requirements have been met. *Blackie v. Barrack*, 524 F.2d 891, 901 n. 17 (9th Cir.
14 1975) (holding that class certification can be granted if a court has sufficient material
15 before it to determine the nature of the allegations and to rule on compliance with Rule
16 23, and bases its ruling on that material). Plaintiffs have satisfied the four requirements
17 of numerosity¹, commonality, typicality, and adequacy, and have shown the action is
18 maintainable as a class action.

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22 **I. THE PROPOSED CLASS IS NARROWLY LIMITED TO IMMEDIATE**
23 **RELATIVES AND NOT OVERBROAD**

24 Limiting the proposed class to immediate relatives is appropriate because

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27 ¹ Defendants do not complain that plaintiffs lack numerosity. Further, undersigned
28 counsel is now aware of 123 class members nationwide. Class members have contacted
undersigned counsel with increasing frequency following media exposure of class
members' cases around the country.

1 immediate relatives are exempt from numerical limitation, and an immigrant visa is
2 immediately available to them. Therefore, the legal issues involving immediate relatives
3 are closely related. Additionally, the immediate relative definition is “straightforward
4 and succinct.” *Freeman v. Gonzales*, 444 F.3d 1031, 1039 (9th Cir. 2006). It includes
5 “the children, spouses and parents of a citizen of the United States, except that, in the
6 case of parents, such citizens shall be at least 21 years of age.” 8 USC 1151(b)(1)(A)(i).
7 It is true, as defendants point out, that plaintiffs’ proposed class could include individuals,
8 “such as an orphaned child whose United States citizen parents passed away, the mother
9 of a United States citizen son or daughter who passed away, or the father of a United
10 States citizen son or daughter who passed away.” (Def.’s Opp’n 5.) As the Court noted
11 in *Freeman*, “Only alien ‘parents’ are subject to any limitation, with the grant of
12 immediate relative status being restricted to those whose citizen child is at least 21 years
13 of age.” *Id.* at 1039. To the extent that an immediate relative meets the definition in the
14 statute, there is no reason advanced by defendants that explains why a child or parent
15 would be treated differently in the analysis of whether each remained an immediate
16 relative following the death of the petitioning relative.
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23 In so far as defendants argue that certain plaintiffs must have filed a motion
24 to reopen or wait for initiation of removal proceedings to exhaust administrative
25 remedies, therefore making them allegedly inappropriate as class representatives (Def.’s
26 Opp’n 6), issues of exhaustion have been adequately explained previously (Pl. Mot. S.J.
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1 22-32). Such exhaustion is not required, and would be futile.

2 **II. PLAINTIFFS SATISFY THE COMMONALITY REQUIREMENT**

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4 Plaintiffs meet the commonality requirement because there are shared legal
5 issues and a common core of salient facts. Under *Hanlon v. Chrysler Corp.*, 150 F.3d
6 1011, 1019 (9th Cir. 1998), either is sufficient. Contrary to defendants’ assertions, the
7 legal issues are not “disparate”, nor are the factual predicates “divergent.” (Def.’s Opp’n
8 9.)
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11 With regard to legal issues, defendants claim that “the law within the Ninth
12 Circuit creates different results than the law outside of the Ninth Circuit on the issue of
13 whether an individual proposed class member qualifies as an ‘immediate relative.’”
14 (Def.’s Opp’n 9-10.) Plaintiffs disagree. The Ninth Circuit in *Freeman* merely engaged
15 in judicial construction and application of a statute passed by Congress. The federal
16 statute is the same in the Ninth Circuit as it is outside the Circuit. Further, no other
17 Circuit Court has ruled on this issue.
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21 With regard to factual issues, defendants point to five examples of factual
22 differences: “whether the Plaintiff’s I-130 was denied because the spouse died before its
23 adjudication; whether the plaintiff’s I-130 was initially approved then revoked after the
24 spouse’s death; whether the plaintiff and spouse had been married for more than two
25 years; whether the plaintiff has a substitute for his or her former spouse who is willing
26 and able to submit a Form I-864; and whether the plaintiff can demonstrate that his or her
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1 marriage to the petitioner was legally valid.” (Def.’s Opp’n 10.) Whether the I-130 was
2 approved at the time of death or not, and whether it was revoked following the spouse’s
3 death does not change the analysis with regard to whether plaintiffs nevertheless remain
4 immediate relatives. Whether the plaintiffs were spouses for two years at the time of
5 death is irrelevant, because no plaintiffs or class members were spouses for two years at
6 the time of death. Whether a substitute sponsor is willing to file a Form I-864 is not
7 relevant to the definition of spouse, as outlined in previous briefing before this court. (Pl.
8 Mot. S.J. 26-28.) Finally, whether plaintiff can demonstrate that his or her marriage to
9 petitioner was legally valid is not before this Court, as the Court’s review is limited to
10 whether plaintiffs and class members qualify *as a matter of law* as immediate relatives.
11 While defendants seem to suggest that there may be other factual differences other than
12 those advanced (Def.’s Opp’n 10), plaintiffs are hard pressed to imagine what they might
13 be.
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19 Defendants’ examples fail to show “divergent factual predicates,” and
20 instead reinforce the common core of salient facts shared by plaintiffs and class members
21 alike – the filing by the U.S. citizen relative of a petition for immediate relative
22 classification, the death of the citizen spouse prior to adjudication and approval of lawful
23 permanent resident status, and the wrongful termination or non-adjudication of petitions
24 and applications for lawful permanent resident status.
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27 **III. PLAINTIFFS SATISFY THE TYPICALITY REQUIREMENT** 28

1 Plaintiffs can show that their claims are typical of the claims of the class.
2 Defendants' argument to the contrary primarily revolves around the Ninth
3 Circuit/Outside-the-Ninth Circuit argument again. As noted above, the federal statute is
4 applicable to all plaintiffs and class members, and the Ninth Circuit in *Freeman* merely
5 construed and applied the language of the statute. There is no claim that the statute is
6 worded differently for residents of different states.
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9 Defendants additionally seek to distinguish the cases where adjudication has
10 been withheld (Lockett, Engstrom), because "Lockett and Engstrom's petitions and
11 applications could be granted." (Def.'s Opp'n 13.) Lockett's case, however, must run
12 the gauntlet of unlawful requirements, including the filing of a humanitarian
13 reinstatement request and a substitute affidavit of support sponsor, before being
14 reviewed. Adjudication on Engstrom's case, on information and belief, is being held in
15 abeyance due to the introduction of private legislation by Senators Obama and Durbin,
16 which stays the agency's actions under Senate rules. Private legislation is rarely
17 successful. Additionally, it is clear that defendants will deny Mrs. Engstrom's petition
18 based on their stated position here and elsewhere, because she does not reside within the
19 jurisdiction of the Ninth Circuit.
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25 With regard to plaintiff De Mailly, defendants allege she is not an
26 appropriate class representative because she left the United States, following defendants'
27 own command that she leave, as expressed in her letter of denial. (Def.'s Opp'n 13.) It is
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1 precisely plaintiff De Mailly's case that underscores the importance of separating the
2 issue of immediate relative status from issues of admissibility unrelated to immediate
3 relative status. Indeed, if defendants are required to treat Mrs. De Mailly as a spouse for
4 immediate relative status, and her petition is approved, she may seek an immigrant visa
5 through the State Department, or seek entry to the United States for initiation of removal
6 proceedings, where she may challenge defendants' findings. The limited role of USCIS
7 is to determine whether the facts stated in the petition are true, and if so, USCIS shall
8 approve the petition. Due process considerations require the separation of the immediate
9 relative finding from other prerequisites to lawful permanent resident status.
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14 Defendants have recently moved to reopen plaintiff Heard's petition and
15 application. (Def.'s Opp'n 14.) If plaintiff Heard is approved for lawful permanent
16 resident status under another provision of the Immigration and Nationality Act or some
17 other Public Law, the approval will moot her individual case. It remains to be seen
18 whether defendants will approve her application. If her application is not approved, she
19 remains an effective representative for class members.
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22 Finally, defendants offer no support for the claim that an "individual whose
23 deceased child, deceased mother, or deceased father filed a Form I-130 on his or her
24 behalf" should be treated differently. (Def.'s Opp'n 14.)
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26 **IV. PLAINTIFFS SATISFY THE ADEQUACY REQUIREMENT**

27 Defendants complain that adequacy is not met because "the representative
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1 Plaintiffs have different interests than the interests of the proposed class members,
2 because of the diverse and disparate nature of the proposed class.” (Def.’s Opp’n 15-16.)
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4 As noted above, the proposed class is not diverse and disparate. The class is unified by a
5 common core of salient facts and shared legal issues - the filing by the U.S. citizen
6 relative of a petition for immediate relative classification, the death of the citizen spouse
7 prior to adjudication and approval of lawful permanent resident status, and the wrongful
8 termination or non-adjudication of petitions and applications for lawful permanent
9 resident status. The plaintiffs will fairly and adequately protect the interests of the class.
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11 No conflicts exist between plaintiffs and other class members.
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13 **V. PLAINTIFFS’ CLASS IS MAINTAINABLE UNDER 23(b)(3)**

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15 In arguing that plaintiffs’ class is not maintainable under 23(b)(3),
16 defendants use the same arguments advanced under commonality – namely the five so-
17 called “individual factual issues.” As plaintiffs outlined in the commonality section,
18 above, these variables do not affect each class members claims that the statute is being
19 wrongly interpreted.
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22 Defendants repeatedly torture the language of the statute, and in doing so
23 give the appearance that this issue and the factual predicates underlying plaintiffs’ claims
24 are so much more complicated than they are. It is to defendants’ benefit to muddy the
25 waters, and paint a picture of an unmanageable mess to defeat class certification. Yet the
26 interpretation of a few words in a statute is at issue here, nothing more sinister or
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1 complex. The class is manageable, and maintainable under 23(b)(3).
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4 DATED this 16th day of January, 2008.

5
6 By S/ Brent W. Renison

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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., Ste 175,
3 Lake Oswego, Oregon 97035. I am over the age of eighteen years and not a party to the
4 above-entitled action.

5 On January 16, 2008, true and correct copies of the plaintiffs': PLAINTIFFS'
6 REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION, were served
7 pursuant to the district court's ECF system as to ECF filers on January 16, 2008, to the
8 following ECF filers:

9 Elizabeth Stevens
10 Office of Immigration Litigation
11 USDOJ Civil Division
12 P.O. Box 878
13 Ben Franklin Station
14 Washington, DC 20044

15 Sheri R. Glaser
16 Office of Immigration Litigation
17 USDOJ Civil Division
18 P.O. Box 878
19 Ben Franklin Station
20 Washington, DC 20044

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

23 EXECUTED on January 16, 2008, at Portland, Oregon.

24 S/ Brent W. Renison
25 Brent W. Renison, Declarant
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