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Class Members  
7

8 UNITED STATES DISTRICT COURT  
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
10 WESTERN DIVISION  
11

12 CAROLYN ROBB HOOTKINS, ANA ) CV NO.  
13 MARIA MONCAYO-GIGAX, (cont.), on )  
behalf of themselves and all others )  
14 similarly situated, ) PETITION FOR WRIT OF  
15 ) MANDAMUS AND COMPLAINT FOR  
16 Plaintiffs-petitioners, ) DECLARATORY AND INJUNCTIVE  
RELIEF  
17 vs. )  
18 ) CLASS ACTION  
MICHAEL CHERTOFF, Secretary, U.S. )  
19 Department of Homeland Security; )  
20 EMILIO GONZALEZ, Director, U.S. )  
Citizenship and Immigration Services; )  
21 CONDOLEEZZA RICE, Secretary of )  
22 State, U.S. Department of State; MAURA )  
HARTY, Assistant Secretary for Consular )  
23 Affairs, U.S. Department of State, )  
24 )  
25 Defendants-respondents. )

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(Plaintiffs-petitioners cont.) SUZANNE  
HENRIETTE DE MAILLY, SARA CRUZ  
VARGAS DE FISHER, RAYMOND  
LOCKETT, ELSA CECILIA  
BRENTESON, PAULINE MARIE  
GOBEIL, DAHIANNA HEARD, ROSE  
FREEDA FISHMAN-CORMAN, KHIN  
THIDAR WIN, DIANA GEJAC  
ENGSTROM, MARIA DEL CARMEN  
DIAZ-RUIZ, GLADYS WALSH, LI JU  
LU, YELENA ARIAS ANGULO, PURITA  
MANUEL POINTDEXTER, TRACY LEE  
RUDL, DIEU NGOC NGUYEN,  
AGNIESZKA BERNSTEIN, SARAH  
BAYOR, STELLA STANDIFER, AND  
FARAH BATOOL, on behalf of  
themselves and all others similarly situated,  
Plaintiffs-petitioners



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**VENUE**

2. Venue is proper in this Court under 28 U.S.C. § 1391(e) because defendants Michael Chertoff, Emilio Gonzalez, Condoleezza Rice and Maura Harty are officers of the United States acting in their official capacities, and the Department of Homeland Security (“DHS”), the United States Citizenship and Immigration Services (“USCIS”) and the United States Department of State (“State Department”) are agencies of the United States. Additionally, plaintiffs-petitioners Carolyn Robb Hootkins, Ana Maria Moncayo-Gigax, Susanne De Maily, Sara Cruz Vargas De Fisher, and many class members reside in this judicial district. Further, a substantial part of the events giving rise to the claim occurred in this district, in that the Los Angeles District Office of USCIS, an agency of DHS located at 300 Los Angeles Street, Los Angeles, California 90012, was the local office that denied many of plaintiffs-petitioners’ immigration petitions and applications, as well as petitions and applications filed by class members.

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**EXHAUSTION**

3. There are no administrative remedies available for plaintiffs-petitioners to exhaust.

4. There is no administrative appeal of the denial of an application for adjustment of Status (I-485). 8 CFR § 245.2(a)(5)(ii).

5. There is no administrative appeal of a denial of an immigrant visa application (DS-230) abroad. 22 C.F.R. § 42.81.

6. While plaintiffs-petitioners who filed to adjust status (I-485) may renew the adjustment of status application in removal proceedings before the Executive Office for Immigration Review (“EOIR”), initiation of removal proceedings is at the sole discretion of DHS, and DHS has not elected to initiate removal proceedings against most plaintiffs-petitioners

1 and class members. One cannot apply for initiation of removal proceedings.  
2 As such this is not a mandatory exhaustion requirement and cannot be  
3 imposed on Petitioner's APA action. *See Darby v. Cisneros*, 509 U.S. 137  
4 (1993).

5 7. There also is no administrative appeal of the I-130 immigrant  
6 petition, even before EOIR, because the Board of Immigration Appeals  
7 ("BIA") has held that the immigration courts (within EOIR) and the BIA  
8 (administrative courts of limited and not general jurisdiction) lack  
9 jurisdiction under the administrative regulations to review such a denial.  
10 See *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985). Both procedures for  
11 obtaining lawful permanent resident status, the adjustment of status (I-485)  
12 and immigrant visa (DS-230) applications, require an approved I-130  
13 immigrant petition.  
14

#### 15 DEFENDANTS

16 8. Defendant-respondent Michael Chertoff is sued in his official  
17 capacity as Secretary of Department of Homeland Security ("DHS"). As  
18 Secretary of DHS, Mr. Chertoff is responsible for the administration and  
19 enforcement of the immigration laws of the United States.

20 9. Defendant-respondent Emilio Gonzalez is sued in his official  
21 capacity as Director of the United States Department of Homeland Security,  
22 United States Citizenship and Immigration Services ("USCIS"). As Director  
23 of USCIS, Dr. Gonzalez is responsible for the overall administration of  
24 USCIS and the implementation of the immigration laws of the United States.

25 10. Defendant-respondent Condoleezza Rice is sued in her official  
26 capacity as Secretary of State of the United States Department of State. As  
27 Secretary of State, Dr. Rice is responsible for the overall administration the  
28 Department of State, including the Bureau of Consular Affairs which is

1 responsible for issuance of immigrant visas under the immigration laws of  
2 the United States.

3 11. Defendant-respondent Maura Harty is sued in her official  
4 capacity as Assistant Secretary for the Bureau of Consular Affairs within the  
5 United States Department of State. As Assistant Secretary, Ms. Harty is  
6 responsible for the overall administration of the immigrant visa issuance  
7 process under the immigration laws of the United States.

8 **STATUTORY AND REGULATORY BACKGROUND**

9 12. Plaintiffs-petitioners seek lawful permanent resident status, and  
10 applied for such status. Plaintiffs-petitioners challenge defendants-  
11 respondents' determinations that, as a matter of law, plaintiffs-petitioners  
12 lost status as "immediate relative" spouses of United States citizens when  
13 the citizen spouses of each tragically died while plaintiffs-petitioners'  
14 immigration applications were awaiting adjudication.

15 13. A United States citizen who marries a non-citizen may apply  
16 for his or her spouse to reside permanently in the United States with the  
17 citizen. Pursuant to 8 U.S.C. § 1154(1)(A)(i), a United States citizen may  
18 file a petition (Form *I-130*) on behalf of a spouse claiming the spouse is  
19 entitled to classification as an "immediate relative." The term "immediate  
20 relative", as applicable to the United States citizen's petition, is set forth in  
21 the *first* sentence of 8 U.S.C. § 1151(b)(2)(A)(i) as the "children, spouses,  
22 and parents of a citizen of the United States, except that, in the case of  
23 parents, such citizens shall be at least 21 years of age."

24 14. An alien spouse whose United States citizen *never filed* a  
25 petition on the alien's behalf, may also file a petition (Form *I-360* self-  
26 petition) on his or her own behalf, pursuant to 8 U.S.C. § 1154(1)(A)(ii),  
27 which states, "An alien spouse described in the *second sentence* of section  
28

1 201(b)(2)(A)(i) *also* may file a petition...”. Id., (emphasis supplied) In such  
2 a case, the immediate relative definition set out in the *second* sentence of 8  
3 U.S.C. § 1151(b)(2)(A)(i) is applicable: “In the case of an alien who was the  
4 spouse of a citizen of the United States for at least 2 years at the time of the  
5 citizen’s death and was not legally separated from the citizen at the time of  
6 the citizen’s death, the alien (and each child of the alien) shall be considered,  
7 for purposes of this subsection, to remain an immediate relative after the  
8 date of the citizen’s death but only if the spouse files a petition under section  
9 204(a)(1)(A)(ii) of this title within 2 years after such date and only until the  
10 date the spouse remarries.”

11 15. Defendants-respondents have uniformly applied the incorrect  
12 immediate relative definition to plaintiff-petitioners’ petitions and  
13 applications. Specifically, defendants-respondents have taken the position  
14 that if the citizen spouse dies before the second anniversary of the marriage,  
15 the alien spouse is no longer considered a “spouse” entitled to immediate  
16 relative status. In doing so, defendants-respondents have confused the  
17 immediate relative definition applicable to *I-130* petitions filed by United  
18 States citizen spouses (the *first* sentence of 8 U.S.C. § 1151(b)(2)(A)(i)) with  
19 the immediate relative definition applicable to *I-360* self-petitions filed by  
20 alien spouses (the *second* sentence of 8 U.S.C. § 1151(b)(2)(A)(i)). Courts  
21 have refused to follow the government’s position. See *Freeman v.*  
22 *Gonzales*, 444 F.3d 1031 (9th Cir. 2006); *Robinson v. Chertoff*, No.  
23 Civ.A.06-5702 (SRC), 2007 WL 1412284 (D.N.J. May 14, 2007)  
24 government notice of appeal filed July 2, 2007. But see *Burger v. McElroy*,  
25 97 Civ. 8775 (RPP), 1999 U.S. Dist. LEXIS 4854 (S.D.N.Y. Apr. 12, 1999);  
26 and *Turek v. Dep’t of Homeland Security*, 450 F. Supp. 2d 736 (E.D. Mich.  
27 2006).  
28





1 with legacy Immigration and Naturalization Service.

2 **The Petition and Application**

3 26. On April 29, 1999, plaintiff-petitioner's U.S. citizen spouse  
4 filed with the required fee a Form I-130, Petition for Alien Relative  
5 ("Petition") establishing his citizenship and that his spouse is an immediate  
6 relative. On the same day, plaintiff-petitioner filed with the required fee a  
7 Form I-485, Application to Register Permanent Residence or to Adjust  
8 Status ("Application"), seeking adjustment of status to lawful permanent  
9 resident, relying on the citizen spouse's Petition attesting to the alien's status  
10 as spouse. Plaintiff-petitioner was assigned an Alien Number "A-Number",  
11 which is A77 128 166.

12 27. On November 7, 1999, plaintiff-petitioner's spouse John  
13 Charles Gigax was killed in a car accident in Virginia while on duty with the  
14 United States Border Patrol, traveling in a U.S. government vehicle from a  
15 temporary assignment in Washington, D.C.

16 **The Denial**

17 28. On March 2, 2004, defendants-respondents denied the Petition  
18 and Application that were jointly filed by the couple solely on the basis that  
19 plaintiff-petitioner was no longer the spouse of a U.S. citizen. A motion to  
20 reopen was filed in November 2006, which was granted on February 10,  
21 2007. Although the motion to reopen has been granted, defendants-  
22 respondents have not approved plaintiff-petitioner's adjustment of status  
23 following the initial denial.

24 **Plaintiff-petitioner DE MAILLY**

25 29. Plaintiff-petitioner Suzanne Henriette De Mailly was born in  
26 the Belgian Congo in 1953. Plaintiff-petitioner is a citizen of Belgium.

27 30. Plaintiff-petitioner lived in Los Angeles, California until June  
28

1 2005 when she was forced by defendants-respondents to return to Belgium  
2 following the denial of her application and revocation of work authorization.  
3 Plaintiff-petitioner entered the United States as a visitor prior to her  
4 application, and was inspected and admitted.

5 31. On February 13, 2003, plaintiff-petitioner married Mark  
6 William Hubel, a United States citizen.

### 7 **The Petition and Application**

8 32. On February 21, 2003, plaintiff-petitioner's U.S. citizen spouse  
9 filed with the required fee a Form I-130, Petition for Alien Relative  
10 ("Petition") establishing his citizenship and that his spouse is an immediate  
11 relative. On the same day, plaintiff-petitioner filed with the required fee a  
12 Form I-485, Application to Register Permanent Residence or to Adjust  
13 Status ("Application"), seeking adjustment of status to lawful permanent  
14 resident, relying on the citizen spouse's Petition attesting to the alien's status  
15 as spouse. The petition and application were filed with the Los Angeles  
16 office of USCIS, and plaintiff-petitioner was assigned an Alien Number  
17 "A-Number", which is A95 623 420.  
18

19 33. Plaintiff-petitioner's spouse Mark William Hubel died on  
20 October 13, 2003.

### 21 **The Denial**

22 34. On July 1, 2004, defendants-respondents denied the Petition  
23 and Application that were jointly filed by the couple solely on the basis that  
24 plaintiff-petitioner was no longer the spouse of a U.S. citizen.

### 25 **Plaintiff-petitioner VARGAS DE FISHER**

26 35. Plaintiff-petitioner Sara Cruz Vargas de Fisher was born in  
27 Mexico in 1961. Plaintiff-petitioner is a citizen of Mexico.

28 36. Plaintiff-petitioner has lived in Riverside, California since

1 2001. Plaintiff-petitioner entered the United States on a nonimmigrant B-1  
2 visa in 2001, and was inspected and admitted.

3 37. On July 19, 2004, plaintiff-petitioner married Newton Edgar  
4 Fisher, a United States citizen.

5 38. Plaintiff-petitioner has two children from a previous marriage,  
6 Aldo David Angrade Vargas (born 1988) and Edson Daniel Andrade Vargas  
7 (born 1989).

### 8 **The Petition and Application**

9 39. On November 22, 2004, plaintiff-petitioner's U.S. citizen  
10 spouse filed with the required fee a Form I-130, Petition for Alien Relative  
11 ("Petition") establishing his citizenship and that his spouse is an immediate  
12 relative. On the same day, plaintiff-petitioner filed with the required fee a  
13 Form I-485, Application to Register Permanent Residence or to Adjust  
14 Status ("Application"), seeking adjustment of status to lawful permanent  
15 resident, relying on the citizen spouse's Petition attesting to the alien's status  
16 as spouse. Plaintiff-petitioner was assigned an Alien Number "A-Number",  
17 which is A95 692 884.

18 40. On June 27, 2005, plaintiff-petitioner's spouse Newton Edgar  
19 Fisher died of cancer.

### 20 **The Denial**

21 41. On May 13, 2005, defendants-respondents denied the Petition  
22 filed by the couple solely on the basis that plaintiff-petitioner was no longer  
23 the spouse of a U.S. citizen. No action has been taken on the Application for  
24 adjustment of status. By denying the Petition and withholding approval on  
25 the Application, defendants-respondents in effect denied the Petition and  
26 Application that were jointly filed by the couple solely on the basis that  
27 plaintiff-petitioner was no longer the spouse of a U.S. citizen.  
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1 **Plaintiff-petitioner BRENTESON**

2 48. Plaintiff-petitioner Elsa Cecilia Brenteson was born in Costa  
3 Rica in 1958. Plaintiff-petitioner is a citizen of Costa Rica.

4 49. Plaintiff-petitioner has lived in Phoenix, Arizona since 2006.  
5 Plaintiff-petitioner entered the United States on a nonimmigrant B-1/B-2  
6 visa in 1998, and was inspected and admitted.

7 50. On January 18, 2003, plaintiff-petitioner married Donald Irvin  
8 Brenteson, a United States citizen.

9 **The Petition and Application**

10 51. On May 14, 2003, plaintiff-petitioner's U.S. citizen spouse filed  
11 with the required fee a Form I-130, Petition for Alien Relative ("Petition")  
12 establishing his citizenship and that his spouse is an immediate relative. On  
13 the same day, plaintiff-petitioner filed with the required fee a Form I-485,  
14 Application to Register Permanent Residence or to Adjust Status  
15 ("Application"), seeking adjustment of status to lawful permanent resident,  
16 relying on the citizen spouse's Petition attesting to the alien's status as  
17 spouse. Plaintiff-petitioner was assigned an Alien Number "A-Number",  
18 which is A99 278 074.

19 52. On January 16, 2005, Plaintiff-petitioner's spouse Donald Irvin  
20 Brenteson died of cardiac arrest.

21 **The Denial**

22 53. On December 19, 2005, Defendants-respondents denied the  
23 Petition and Application that were jointly filed by the couple solely on the  
24 basis that plaintiff-petitioner was no longer the spouse of a U.S. citizen. On  
25 May 24, 2006, plaintiff-petitioner filed a motion to reopen which has not  
26 been acted upon.  
27

28 **Plaintiff-petitioner GOBEIL**



1 2007. Plaintiff-petitioner entered the United States on a nonimmigrant B-  
2 1/B-2 visa in 2001, and was inspected and admitted.

3 62. On July 9, 2004, plaintiff-petitioner married Jeffrey Loren  
4 Heard, a United States citizen and an Army veteran.

5 63. Plaintiff-petitioner and her husband have a son, Bryan Harley  
6 Heard, age one and one-half years old. Their son is a United States citizen.

### 7 **The Petition and Application**

8 64. On October 27, 2004, plaintiff-petitioner's U.S. citizen spouse  
9 filed with the required fee a Form I-130, Petition for Alien Relative  
10 ("Petition") establishing his citizenship and that his spouse is an immediate  
11 relative. On the same day, plaintiff-petitioner filed with the required fee a  
12 Form I-485, Application to Register Permanent Residence or to Adjust  
13 Status ("Application"), seeking adjustment of status to lawful permanent  
14 resident, relying on the citizen spouse's Petition attesting to the alien's status  
15 as spouse. Plaintiff-petitioner was assigned an Alien Number "A-Number",  
16 which is A99 204 406.

17 65. On March 20, 2006, plaintiff-petitioner's spouse Jeffrey Loren  
18 Heard was killed in an ambush outside Fallujah, Iraq, while working for a  
19 private security contractor in Iraq assisting United States military operations  
20 through the delivery of supplies to U.S. troops. Mr. Heard died of a gunshot  
21 wound to the head.  
22

### 23 **The Denial**

24 66. On September 27, 2006, Defendants-respondents denied the  
25 Petition and Application that were jointly filed by the couple solely on the  
26 basis that plaintiff-petitioner was no longer the spouse of a U.S. citizen.

### 27 **Plaintiff-petitioner FISHMAN-CORMAN**

28 67. Plaintiff-petitioner Rose Freeda Fishman-Corman was born in

1 Canada in 1930. Plaintiff-petitioner is a citizen of Canada.

2 68. Plaintiff-petitioner has lived in Clearwater, Florida since 2005.  
3 Plaintiff-petitioner entered the United States as a nonimmigrant visitor in  
4 2004, and was inspected and admitted.

5 69. On December 2, 2004, plaintiff-petitioner married Irving Jacob  
6 Corman, a United States citizen.

### 7 **The Petition and Application**

8 70. On April 14, 2005, plaintiff-petitioner's U.S. citizen spouse  
9 filed with the required fee a Form I-130, Petition for Alien Relative  
10 ("Petition") establishing his citizenship and that his spouse is an immediate  
11 relative. On the same day, plaintiff-petitioner filed with the required fee a  
12 Form I-485, Application to Register Permanent Residence or to Adjust  
13 Status ("Application"), seeking adjustment of status to lawful permanent  
14 resident, relying on the citizen spouse's Petition attesting to the alien's status  
15 as spouse. Plaintiff-petitioner was assigned an Alien Number "A-Number",  
16 which is A95 711 606.  
17

18 71. Plaintiff-petitioner's spouse Irving Jacob Corman died on  
19 September 1, 2005 in California.

### 20 **The Denial**

21 72. On May 19, 2006, defendants-respondents denied the Petition  
22 and Application that were jointly filed by the couple solely on the basis that  
23 plaintiff-petitioner was no longer the spouse of a U.S. citizen.

### 24 **Plaintiff WIN**

25 73. Plaintiff-petitioner Khin Thidar Win was born in Sri Lanka in  
26 1981. Plaintiff-petitioner is a citizen of Myanmar (Burma).

27 74. Plaintiff-petitioner has lived in Las Vegas, Nevada since 2002.  
28 Plaintiff-petitioner entered the United States on a nonimmigrant F-1 student

1 visa, and was inspected and admitted in 2002.

2 75. On March 5, 2005, plaintiff-petitioner married Donn Stephen  
3 Mauro, a United States citizen.

#### 4 **The Petition and Application**

5 76. On May 22, 2005, plaintiff-petitioner's U.S. citizen spouse filed  
6 with the required fee a Form I-130, Petition for Alien Relative ("Petition")  
7 establishing his citizenship and that his spouse is an immediate relative. On  
8 the same day, plaintiff-petitioner filed with the required fee a Form I-485,  
9 Application to Register Permanent Residence or to Adjust Status  
10 ("Application"), seeking adjustment of status to lawful permanent resident,  
11 relying on the citizen spouse's Petition attesting to the alien's status as  
12 spouse. Plaintiff-petitioner was assigned an Alien Number "A-Number",  
13 which is A96 533 069.

14 77. On February 6, 2006, plaintiff-petitioner's spouse Donn Stephen  
15 Mauro was killed by a drunk driver.

#### 16 **The Denial**

17 78. On March 2, 2006, defendants-respondents denied the Petition  
18 and Application that were jointly filed by the couple solely on the basis that  
19 plaintiff-petitioner was no longer the spouse of a U.S. citizen.

20 79. On September 26, 2006, plaintiff-petitioner filed a motion to  
21 reconsider the denial, which was granted on March 12, 2007 in an order  
22 which stated, "Upon review of the file, it has been determined that the  
23 applicant may be eligible for the benefit sought." No action has been taken  
24 on the Petition and Application, however, and plaintiff-petitioner has not  
25 been accorded adjustment of status to lawful permanent resident status.  
26

#### 27 **Plaintiff-petitioner ENGSTROM**

28 80. Plaintiff-petitioner Diana Gejac Engstrom was born in Kosovo

1 in 1980. Plaintiff-petitioner is a citizen of Kosovo, the former Yugoslavia.

2 81. Plaintiff-petitioner has lived in Bloomington, Illinois since  
3 May, 2005. Plaintiff-petitioner entered the United States on a nonimmigrant  
4 B-2 visa in 2003, and was inspected and admitted.

5 82. On December 29, 2003, plaintiff-petitioner married Todd  
6 Engstrom, a United States citizen and United States Army Contractor  
7 responsible for training Iraqi security forces in Iraq.

### 8 **The Petition and Application**

9 83. On January 29, 2004, plaintiff-petitioner's U.S. citizen spouse  
10 filed with the required fee a Form I-130, Petition for Alien Relative  
11 ("Petition") establishing his citizenship and that his spouse is an immediate  
12 relative. On the same day, plaintiff-petitioner filed with the required fee a  
13 Form I-485, Application to Register Permanent Residence or to Adjust  
14 Status ("Application"), seeking adjustment of status to lawful permanent  
15 resident, relying on the citizen spouse's Petition attesting to the alien's status  
16 as spouse. Plaintiff-petitioner was assigned an Alien Number "A-Number",  
17 which is A99 103 420.

18 84. On September 14, 2004, plaintiff-petitioner's Todd Engstrom  
19 was killed in Iraq when his convoy was hit by a rocket-propelled grenade.  
20

### 21 **The Denial**

22 85. Defendants-respondents have not denied the Petition and  
23 Application that were jointly filed by the couple. Based on defendants-  
24 respondents actions in other cases, plaintiff-petitioner fears that defendants-  
25 respondents may deny her application solely on the basis that plaintiff-  
26 petitioner was no longer the spouse of a U.S. citizen. In addition, no action  
27 has been taken on the Petition and Application, and plaintiff-petitioner has  
28 not been accorded adjustment of status to lawful permanent resident status.

1 **Plaintiff-petitioner DIAZ-RUIZ**

2 86. Plaintiff-petitioner Maria Del Carmen Diaz-Ruiz was born in  
3 Spain in 1973. Plaintiff-petitioner is a citizen of Spain.

4 87. Plaintiff-petitioner has lived in Glencoe, Illinois since July  
5 2005. Plaintiff-petitioner entered the United States on a nonimmigrant B-  
6 1/B-2 visa, and was inspected and admitted.

7 88. On June 29, 2004, plaintiff-petitioner married Christopher  
8 Rodriguez, a United States citizen.

9 **The Petition and Application**

10 89. On December 30, 2004, plaintiff-petitioner's U.S. citizen spouse  
11 filed with the required fee a Form I-130, Petition for Alien Relative  
12 ("Petition") establishing his citizenship and that his spouse is an immediate  
13 relative. On the same day, plaintiff-petitioner filed with the required fee a  
14 Form I-485, Application to Register Permanent Residence or to Adjust  
15 Status ("Application"), seeking adjustment of status to lawful permanent  
16 resident, relying on the citizen spouse's Petition attesting to the alien's status  
17 as spouse. Plaintiff-petitioner was assigned an Alien Number "A-Number",  
18 which is A99 235 659.

19 90. On June 13, 2005, plaintiff-petitioner's spouse Christopher  
20 Rodriguez died of congenital heart disease.

21 **The Denial**

22 91. On December 22, 2005, defendants-respondents denied the  
23 Petition and Application that were jointly filed by the couple solely on the  
24 basis that plaintiff-petitioner was no longer the spouse of a U.S. citizen. On  
25 May 18, 2006, plaintiff-petitioner filed a motion to reopen which was denied  
26 in a written opinion October 25, 2006.

27 **Plaintiff-petitioner WALSH**



1 **Plaintiff-petitioner LU**

2 99. Plaintiff-petitioner Li Ju LU was born in China in 1972.

3 Plaintiff-petitioner is a citizen of China.

4 100. Plaintiff-petitioner resides in Guangzhou, China.

5 101. On February 25, 2005, plaintiff-petitioner married Paul Michel  
6 Unger, a United States citizen.

7 **The Petition and Application**

8 102. On April 28, 2005, plaintiff-petitioner's U.S. citizen spouse  
9 filed with the required fee a Form I-130, Petition for Alien Relative  
10 ("Petition") with the California Service Center of USCIS, located in Laguna  
11 Niguel, California, establishing his citizenship and that his spouse is an  
12 immediate relative. The Petition was assigned a case number WAC-05-147-  
13 54736 and was approved. Because plaintiff-petitioner was physically in  
14 China, the approval was forwarded to the U.S. Department of State and the  
15 Consulate in Guangzhou, China began immigrant visa processing. Plaintiff-  
16 petitioner was assigned an immigrant visa case number GUZ20058221347.

17  
18 103. On February 3, 2006, plaintiff-petitioner's spouse died of a  
19 heart attack while in the United States.

20 **The Denial**

21 104. Following the death, defendants-respondents notified plaintiff-  
22 petitioner that her petition was automatically revoked solely on the basis that  
23 plaintiff-petitioner was no longer the spouse of a U.S. citizen. Plaintiff-  
24 petitioner was unable to receive a visa to attend her husband's funeral, and  
25 has not been allowed to visit her husband's grave site or visit the family of  
26 her husband.

27 **Plaintiff-petitioner ARIAS-ANGULO**

28 105. Plaintiff-petitioner Yelena Arias Angulo was born in Bolivia in

1 1970. Plaintiff-petitioner is a citizen of Bolivia.

2 106. Plaintiff-petitioner has lived in Falls Church, Virginia since  
3 December 2001. Plaintiff-petitioner entered the United States on a  
4 nonimmigrant B-1/B-2 visa in 2001, and was inspected and admitted.

5 107. On May 27, 2005, Plaintiff-petitioner married Donald Arias, a  
6 United States citizen.

7 **The Petition and Application**

8 108. On September 21, 2005, plaintiff-petitioner's U.S. citizen  
9 spouse filed with the required fee a Form I-130, Petition for Alien Relative  
10 ("Petition") establishing his citizenship and that his spouse is an immediate  
11 relative. On the same day, plaintiff-petitioner filed with the required fee a  
12 Form I-485, Application to Register Permanent Residence or to Adjust  
13 Status ("Application"), seeking adjustment of status to lawful permanent  
14 resident, relying on the citizen spouse's Petition attesting to the alien's status  
15 as spouse. Plaintiff-petitioner was assigned an Alien Number "A-Number",  
16 which is A96 628 021.

17  
18 109. On March 3, 2006, plaintiff-petitioner's spouse Donald Arias  
19 died.

20 **The Denial**

21 110. In June 2006, defendants-respondents interviewed plaintiff-  
22 petitioner and withheld approval, asking plaintiff-petitioner to instead file a  
23 widow self-petition (I-360) for which she is not eligible because she was not  
24 married two years at the time of her spouse's death. On August 2, 2007,  
25 defendants-respondents denied the Petition and Application that were jointly  
26 filed by the couple solely on the basis that plaintiff-petitioner was no longer  
27 the spouse of a U.S. citizen.

28 **Plaintiff-petitioner POINDEXTER**

1 111. Plaintiff-petitioner Purita Manuel Poindexter was born in the  
2 Philippines in 1954. Plaintiff-petitioner is a citizen of the Philippines.

3 112. Plaintiff-petitioner has lived in Hercules, California since April  
4 2007. Plaintiff-petitioner entered the United States on a nonimmigrant B-2  
5 visa in 2002, and was inspected and admitted.

6 113. On November 10, 2006, plaintiff-petitioner married Richard  
7 Daniel Poindexter, a United States citizen.

### 8 **The Petition and Application**

9 114. On December 3, 2006, plaintiff-petitioner's U.S. citizen spouse  
10 filed with the required fee a Form I-130, Petition for Alien Relative  
11 ("Petition") establishing his citizenship and that his spouse is an immediate  
12 relative. On the same day, plaintiff-petitioner filed with the required fee a  
13 Form I-485, Application to Register Permanent Residence or to Adjust  
14 Status ("Application"), seeking adjustment of status to lawful permanent  
15 resident, relying on the citizen spouse's Petition attesting to the alien's status  
16 as spouse. Plaintiff-petitioner was assigned an Alien Number "A-Number",  
17 which is A89 629 770.

18 115. Plaintiff-petitioner's spouse Richard Daniel Poindexter died on  
19 January 29, 2007.

### 20 **The Denial**

21 116. Plaintiff-petitioner was scheduled by defendants-respondents  
22 for an interview on February 15, 2007. Plaintiff-petitioner did not attend the  
23 interview because her husband had only recently passed away. On March 7,  
24 2007, defendants-respondents denied the Petition and Application that were  
25 jointly filed by the couple due to abandonment, but plaintiff-petitioner filed  
26 a motion to reopen with fee which is currently pending. Had plaintiff-  
27 petitioner appeared at the interview, defendants-respondents would have  
28

1 denied the Petition and Application solely on the basis that Petitioner was no  
2 longer the spouse of a U.S. citizen.

3 **Plaintiff-petitioner RUDL**

4 117. Plaintiff-petitioner Tracy Lee Rudl was born in Canada in 1972.  
5 Plaintiff-petitioner is a citizen of Canada.

6 118. Plaintiff-petitioner has lived in La Jolla, California since 2002.  
7 Plaintiff-petitioner entered the United States on a nonimmigrant H-1B work  
8 visa in 2002, and was inspected and admitted.

9 119. On July 24, 2004, plaintiff-petitioner married Corey Nicholas  
10 Rudl, a United States citizen and well-known internet marketing guru.

11 **The Petition and Application**

12 120. On March 30, 2005, plaintiff-petitioner's U.S. citizen spouse  
13 filed with the required fee a Form I-130, Petition for Alien Relative  
14 ("Petition") establishing his citizenship and that his spouse is an immediate  
15 relative. On the same day, plaintiff-petitioner filed with the required fee a  
16 Form I-485, Application to Register Permanent Residence or to Adjust  
17 Status ("Application"), seeking adjustment of status to lawful permanent  
18 resident, relying on the citizen spouse's Petition attesting to the alien's status  
19 as spouse. Plaintiff-petitioner was assigned an Alien Number "A-Number",  
20 which is A98 806 945.

21 121. On June 2, 2005, plaintiff-petitioner's spouse Corey Nicholas  
22 Rudl was killed while riding as a passenger in a car on a raceway.

23 **The Denial**

24 122. On November 14, 2005, defendants-respondents denied the  
25 Petition and Application that were jointly filed by the couple solely on the  
26 basis that plaintiff-petitioner was no longer the spouse of a U.S. citizen. On  
27 June 13, 2006, plaintiff-petitioner filed a motion to reopen which has not  
28

1 been acted upon.

2 **Plaintiff-petitioner NGUYEN**

3 123. Plaintiff-petitioner Dieu Ngoc Nguyen was born in Vietnam in  
4 1966. Plaintiff-petitioner is a citizen of Vietnam.

5 124. Plaintiff-petitioner has lived in Elk Grove, California since  
6 2004. Plaintiff-petitioner entered the United States on a K-1 visa as the  
7 fiancée of a United States citizen, and was inspected and admitted on March  
8 20, 2004.

9 125. On April 19, 2004, plaintiff-petitioner married Loc Van  
10 Nguyen, a naturalized United States citizen, within the 90 days from her  
11 entry as required by the K-1 visa.

12 **The Petition and Application**

13 126. Plaintiff-petitioner's spouse, pursuant to 8 C.F.R § 214.2(k)(1),  
14 previously filed a Form I-129F Petition for Alien Fiance(e) (Petition) which  
15 was approved, and plaintiff-petitioner was subjected to quasi-immigrant visa  
16 processing through defendants-respondents United States Department of  
17 State prior to receiving her K-1 visa. On May 4, 2004, following plaintiff-  
18 petitioner's lawful entry in K-1 status and marriage to her husband within  
19 the required 90 day period, and pursuant to 8 C.F.R § 214.2(k)(6)(ii),  
20 plaintiff-petitioner filed with the required fee a Form I-485, Application to  
21 Register Permanent Residence or to Adjust Status ("Application"), also  
22 within the 90 day period, seeking adjustment of status to lawful permanent  
23 resident. Pursuant to 8 C.F.R. § 245.1(c)(6)(i), plaintiff-petitioner is eligible  
24 for adjustment of status without the I-130 petition requirement, because  
25 plaintiff-petitioner's spouse filed the I-129F petition. Plaintiff-petitioner  
26 was assigned an Alien Number "A-Number", which is A96 350 330.  
27 Plaintiff-petitioner and her husband were interviewed by defendants-  
28

1 respondents on October 4, 2004, but no action was taken on the Application  
2 at that time due to backlogs in security checks.

3 127. Plaintiff-petitioner's spouse died on March 24, 2005 while  
4 security checks continued to be backlogged.

### 5 **The Denial**

6 128. On November 30, 2005, defendants-respondents denied the  
7 Petition and Application that were jointly filed by the couple solely on the  
8 basis that plaintiff-petitioner was no longer the spouse of a U.S. citizen.  
9 Plaintiff-petitioner filed a motion to reconsider which was denied on March  
10 3, 2006.

### 11 **Plaintiff-petitioner BERNSTEIN**

12 129. Plaintiff-petitioner Agnieszka Bernstein was born in Poland in  
13 1974. Plaintiff-petitioner is a citizen of Poland.

14 130. Plaintiff-petitioner has lived in Spring Valley, New York since  
15 April 2005. Plaintiff-petitioner entered the United States on a nonimmigrant  
16 J-1 visa, and was inspected and admitted September 14, 1998.

17 131. On April 17, 2005, plaintiff-petitioner married Bryan Bernstein,  
18 a United States citizen.

### 19 **The Petition and Application**

20 132. On July 25, 2005 plaintiff-petitioner's U.S. citizen spouse filed  
21 with the required fee a Form I-130, Petition for Alien Relative ("Petition")  
22 establishing his citizenship and that his spouse is an immediate relative. On  
23 the same day, plaintiff-petitioner filed with the required fee a Form I-485,  
24 Application to Register Permanent Residence or to Adjust Status  
25 ("Application"), seeking adjustment of status to lawful permanent resident,  
26 relying on the citizen spouse's Petition attesting to the alien's status as  
27 spouse. Plaintiff-petitioner was assigned an Alien Number "A-Number",  
28

1 which is A 96 588 669.

2 133. Plaintiff-petitioner's spouse Bryan Bernstein died on March 10,  
3 2006.

#### 4 **The Denial**

5 134. On March 29, 2006, defendants-respondents denied the Petition  
6 and Application that were jointly filed by the couple solely on the basis that  
7 plaintiff-petitioner was no longer the spouse of a U.S. citizen.

#### 8 **Plaintiff-petitioner BAYOR**

9 135. Plaintiff-petitioner Sarah Bayor was born in the Philippines in  
10 1966. Plaintiff-petitioner is a citizen of the Philippines

11 136. Plaintiff-petitioner has lived in Jamaica, New York since 2002.  
12 Plaintiff-petitioner entered the United States on a nonimmigrant C-1 visa,  
13 and was inspected and admitted.

14 137. On January 5, 2006 plaintiff-petitioner married Stephen R.  
15 Bayor, a United States citizen.

#### 16 **The Petition and Application**

17 138. On February 20, 2006, plaintiff-petitioner's U.S. citizen spouse  
18 filed with the required fee a Form I-130, Petition for Alien Relative  
19 ("Petition") establishing his citizenship and that his spouse is an immediate  
20 relative. On the same day, plaintiff-petitioner filed with the required fee a  
21 Form I-485, Application to Register Permanent Residence or to Adjust  
22 Status ("Application"), seeking adjustment of status to lawful permanent  
23 resident, relying on the citizen spouse's Petition attesting to the alien's status  
24 as spouse. Plaintiff-petitioner was assigned an Alien Number "A-Number",  
25 which is A99 806 135.

26 139. On May 5, 2007 plaintiff-petitioner's spouse Stephen R. Bayor  
27 died.  
28

1 **The Denial**

2 140. On August 9, 2007 defendants-respondents denied the Petition  
3 and Application that were jointly filed by the couple solely on the basis that  
4 plaintiff-petitioner was no longer the spouse of a U.S. citizen.

5 **Plaintiff-petitioner STANDIFER**

6 141. Plaintiff-petitioner Stella Standifer was born in Kenya in 1974.  
7 Plaintiff-petitioner is a citizen of Kenya.

8 142. Plaintiff-petitioner has lived in Philadelphia, Pennsylvania since  
9 2003. Plaintiff-petitioner entered the United States on a nonimmigrant F-1  
10 student visa in 1999, and was inspected and admitted. She is currently in H-  
11 1B nonimmigrant work status.

12 143. On October 11, 2003, plaintiff-petitioner married Glenn Collin  
13 Standifer, a United States citizen.

14 **The Petition and Application**

15 144. On March 31, 2004, plaintiff-petitioner's U.S. citizen spouse  
16 filed with the required fee a Form I-130, Petition for Alien Relative  
17 ("Petition") establishing his citizenship and that his spouse is an immediate  
18 relative. On the same day, plaintiff-petitioner filed with the required fee a  
19 Form I-485, Application to Register Permanent Residence or to Adjust  
20 Status ("Application"), seeking adjustment of status to lawful permanent  
21 resident, relying on the citizen spouse's Petition attesting to the alien's status  
22 as spouse. Plaintiff-petitioner was assigned an Alien Number "A-Number",  
23 which is A98 085 420.

24 145. On December 9, 2004, plaintiff-petitioner's spouse Glenn Collin  
25 Standifer suffered a sudden heart attack and died.

26 **The Denial**

27 146. On June 8, 2005, defendants-respondents denied the Petition  
28

1 and Application that were jointly filed by the couple solely on the basis that  
2 plaintiff-petitioner was no longer the spouse of a U.S. citizen. On July 5,  
3 2007, plaintiff-petitioner filed a motion to reopen which is currently  
4 pending.

### 5 **Plaintiff-petitioner BATOOL**

6 147. Plaintiff-petitioner Farah Batool was born in Pakistan in 1970.  
7 Plaintiff-petitioner is a citizen of Pakistan.

8 148. Plaintiff-petitioner has lived in Floral Park, New York since  
9 2006. Plaintiff-petitioner entered the United States on a nonimmigrant B-  
10 1/B-2 visa in 2003, and was inspected and admitted.

11 149. On July 14, 2003, plaintiff-petitioner married Dale Allen Davis,  
12 a United States citizen.

### 13 **The Petition and Application**

14 150. On February 23, 2004, plaintiff-petitioner's U.S. citizen spouse  
15 filed with the required fee a Form I-130, Petition for Alien Relative  
16 ("Petition") establishing his citizenship and that his spouse is an immediate  
17 relative. On the same day, plaintiff-petitioner filed with the required fee a  
18 Form I-485, Application to Register Permanent Residence or to Adjust  
19 Status ("Application"), seeking adjustment of status to lawful permanent  
20 resident, relying on the citizen spouse's Petition attesting to the alien's status  
21 as spouse. Plaintiff-petitioner was assigned an Alien Number "A-Number";  
22 which is A98 067 884.

23 151. On July 24, 2004, plaintiff-petitioner's spouse Dale Allen Davis  
24 died of cancer.

### 25 **The Denial**

26 152. Plaintiff-petitioner was scheduled by defendants-respondents  
27 for an interview on March 11, 2005. Plaintiff-petitioner did not attend the  
28

1 interview because her attorney at that time advised her on January 20, 2005  
2 in a letter that the application would be denied solely due to her husband's  
3 death. On May 17, 2005, defendants-respondents denied the Petition and  
4 Application that were jointly filed by the couple due to abandonment, but  
5 plaintiff-petitioner filed a motion to reopen with the required fee on August  
6 5, 2005 which is currently pending. Had plaintiff-petitioner appeared at the  
7 interview, defendants-respondents would have denied the Petition and  
8 Application solely on the basis that Petitioner was no longer the spouse of a  
9 U.S. citizen.

### 10 CLASS ACTION ALLEGATIONS

11 153. The named plaintiffs-petitioners bring this action pursuant to  
12 Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and  
13 all other persons similarly situated in the following classes. The named  
14 plaintiffs-petitioners seek to represent the following class and subclasses:  
15

16 Class: All beneficiaries of immediate relative petitions  
17 whose petitioning relatives died prior to  
18 beneficiaries' adjudication and approval of lawful  
19 permanent resident status.

20 Subclass I: All beneficiaries of immediate relative petitions  
21 who applied for adjustment of status in the United  
22 States, and whose petitioning relatives died prior to  
23 beneficiaries' adjudication and approval of lawful  
24 permanent resident status.

25 Subclass II: All beneficiaries of immediate relative petitions  
26 who applied for immigrant visas abroad, and  
27 whose petitioning relatives died prior to  
28 beneficiaries' adjudication and approval of lawful

1 permanent resident status.

2 154. Class members may belong to more than one class.

3 155. The members of the plaintiffs-petitioners classes warrant class  
4 action treatment because they fulfill the certifying requirements under Rule  
5 23(a) of the Federal Rules of Civil Procedure.

6 156. The proposed classes meet the commonality requirement of  
7 Fed. R. Civ. P. 23(a)(2) because there are questions of law and fact common  
8 to the class. Common questions of law include whether defendants-  
9 respondents improperly stripped plaintiffs-respondents of immediate relative  
10 status upon the death of their petitioning relative, and the proper definition  
11 of "spouse" for purposes of 8 U.S.C. § 1151(b)(2)(A)(i). Common questions  
12 of fact include whether plaintiffs-respondents met the essential prerequisites  
13 for immediate relative status including marriage to a United States citizen  
14 and the filing by the citizen of a petition.

15 157. The variances in the class members' and plaintiffs-petitioners  
16 marriage and are irrelevant to their complaints against defendants-  
17 respondents for immediate relative status.

18 158. The proposed classes meet the numerosity requirement of Fed.  
19 R. Civ. P. 23(a)(1) because the members of each of the two classes are so  
20 numerous that joinder of all members is impractical. Counsel for plaintiffs-  
21 petitioners are aware of 86 class members across the country. Because  
22 counsel learned of these cases through lawyer-to-lawyer referrals, it is  
23 believed that the numbers of class members across the country is  
24 substantially greater, by many times, than the number of identified class  
25 members. Counsel for plaintiffs-petitioners, for example, have not been able  
26 to locate any surviving spouses of Hurricane Katrina victims, although U.S.  
27 Representative F. James Sensenbrenner, Jr. (R-WI) introduced legislation in  
28

1 the 109<sup>th</sup> Congress (never voted upon) to assist such surviving spouses,  
2 leading counsel to believe such victims do, in fact, exist. It is believed that  
3 there are many hundreds, if not thousands, of surviving spouses throughout  
4 the country whose petitioning relatives died prior to beneficiaries'  
5 adjudication and approval of lawful permanent resident status.

6 159. The proposed classes meet the typicality requirement of Fed. R.  
7 Civ. P. 23(a)(3) because the claims of the named plaintiffs-petitioners are  
8 typical of the claims of each of the class members. The named plaintiffs-  
9 petitioners complain of the defendants-respondents misinterpretation of the  
10 term "spouse" for purposes of the immediate relative definition found at 8  
11 U.S.C. § 1151(b)(2)(A)(i), and of defendants-respondents illegal actions in  
12 denying or withholding lawful permanent resident status to plaintiffs-  
13 petitioners solely due to the death of their spouse. The claims of each class  
14 representative are typical of the claims of each member of that class.

15 160. The named plaintiffs-petitioners will fairly and adequately  
16 protect the interests of the classes as required by Fed. R. Civ. P. 23(a)(4)  
17 because their interests are identical to those of the other members of the  
18 classes. Plaintiffs-petitioners know of no conflicts between their interests  
19 and those of the class they seek to represent.

20 21 161. Fair and adequate protection of the interests of the classes will  
22 be further ensured because the named plaintiffs-petitioners are represented  
23 by competent legal counsel. Plaintiffs-petitioners' counsel are experienced  
24 in federal litigation, and with respect to the narrow issue raised in the instant  
25 action are among the most knowledgeable in the country. Plaintiffs-  
26 petitioners' counsel are undertaking representation on a pro bono basis, and  
27 have adequate resources and commitment to represent the class as a whole.

28 162. The instant action should be maintained as a class action under

1 Fed. R. Civ. P. 23(b)(2) because the defendants-respondents have acted on  
2 grounds generally applicable to each member of the classes by  
3 misinterpreting the term “spouse” for purposes of the immediate relative  
4 definition found at 8 U.S.C. 1151(b)(2)(A)(i), and of defendants-respondents  
5 illegal actions in denying lawful permanent resident status to plaintiffs-  
6 petitioners solely due to the death of their spouse.

7 163. Furthermore, as contemplated by Fed. R. Civ. P. 23(b)(1), if the  
8 individual members of the classes were to bring separate suits to address the  
9 defendants-respondents’ policies, practices and actions and inactions, the  
10 defendants-respondents may address the cases of the named plaintiffs-  
11 petitioners but ignore the applications and concerns of the remaining class  
12 members, thereby exacerbating the defendants-respondents violations of the  
13 law. Resolving this matter as a class action would also serve judicial  
14 economy since the courts would not be burdened with lawsuits by many  
15 individual adjustment of status and immigrant visa applicants. Such lawsuits  
16 are already beginning to emerge. *Robinson v. Chertoff*, No. Civ.A.06-5702  
17 (SRC), 2007 WL 1412284 (D.N.J. May 14, 2007) *government notice of*  
18 *appeal filed July 2, 2007*; *Taing v. Gonzales*, 07 Civ. 10499 (WGY)  
19 (E.D.Mass. filed March 14, 2007); *Lockhart v. Chertoff*, 07 Civ. 00823  
20 (KMO) (N.D. Ohio filed March 20, 2007).

21  
22 **CLAIMS FOR RELIEF**

23 **FIRST CAUSE OF ACTION**

24 164. Plaintiffs-petitioners reallege and incorporate by reference  
25 paragraphs 1 through 163 above.

26 165. Plaintiffs-petitioners are immediate relatives for purposes of  
27 INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) and are eligible for  
28 adjustment of status under INA § 245(a), 8 U.S.C. § 1255(a) (Subclass I)

1 and for issuance of an immigrant visa under INA § 204(b), 8 U.S.C. 1154(b)  
2 (Subclass II).

3 166. Plaintiffs-petitioners were not stripped of the status of an  
4 "immediate relative" spouse by the death of plaintiffs-petitioners' spouses.

5 167. Plaintiffs-petitioners remain eligible to receive adjustment of  
6 status or an immigrant visa as the "immediate relative" surviving spouse of a  
7 United States citizen.

8 168. Plaintiffs-petitioners are admissible to the United States as  
9 lawful permanent residents.

10 169. An immigrant visa was immediately available to plaintiffs-  
11 petitioners at the time plaintiffs-petitioners' applications were filed, pursuant  
12 to INA § 245(a), 8 U.S.C. 1255(a).

13 170. Plaintiffs-petitioners have suffered and will continue to suffer  
14 significant and irreparable harm because of defendants-respondents'  
15 policies, procedures, acts and failures to act as described herein.

16 171. Defendants-respondents violated plaintiffs-petitioners' statutory  
17 right to apply for relief which Congress has provided under the INA,  
18 depriving plaintiffs-petitioners of the opportunity to adjust status to lawful  
19 permanent resident and live lawfully in the United States under INA § 245, 8  
20 U.S.C. 1255(a), or to obtain an immigrant visa to enter as lawful permanent  
21 residents and live lawfully in the United States under INA § 204(b), 8 U.S.C.  
22 1154(b).

23  
24 **SECOND CAUSE OF ACTION**

25 172. Plaintiffs-petitioners reallege and incorporate by reference  
26 paragraphs 1 through 171 above.

27 173. Plaintiffs-petitioners have suffered a "legal wrong" or have  
28 been "adversely affected or aggrieved" by agency action. 5 U.S.C. § 702.

1 Plaintiffs-petitioners are each a person aggrieved by agency action, for  
2 which there is no other adequate remedy in a court. 5 U.S.C. § 704.

3 174. Defendants-respondents have unlawfully and erroneously  
4 interpreted the definition of the term "immediate relative" in INA §  
5 201(a)(b)(2)(A)(i). Based on this erroneous interpretation, defendants-  
6 respondents have erroneously denied both the immediate relative petitions  
7 filed on plaintiffs-petitioners' behalf and plaintiffs-petitioners' adjustment of  
8 status or immigrant visa applications in violation of Congressional intent.  
9 Plaintiffs-petitioners are entitled to injunctive relief to "compel agency  
10 action unlawfully withheld or unreasonably delayed" and to hold unlawful  
11 and set aside agency action that, as here, is not in accordance with the law.  
12 5 U.S.C. §§ 706(1) and (2).

### 13 **THIRD CAUSE OF ACTION**

14 175. Plaintiffs-petitioners reallege and incorporate by reference  
15 paragraphs 1 through 174 above.

16 176. Defendants-respondents owe plaintiffs-petitioners a clear and  
17 certain duty to adjudicate plaintiffs-petitioners' applications on the basis that  
18 each remains an "immediate relative" spouse of a United States citizen, and  
19 were not stripped of this status by the death of plaintiffs-petitioners' spouses.  
20 See *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006).

21 177. Defendants-respondents denied or withheld approval of  
22 plaintiffs-petitioners' applications solely on the basis that each was stripped  
23 of the status of spouse, and not for discretionary reasons. Defendants-  
24 respondents have failed to perform their duties by determining that  
25 plaintiffs-petitioners were no longer the "spouses" of U.S. citizens and  
26 therefore not entitled to adjustment of status and for issuance of an  
27 immigrant visa, and by failing to exercise discretion.  
28

1 178. Plaintiffs-petitioners have no other adequate remedy.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiffs-petitioners respectfully request that this

4 Court:

- 5 1. Assume jurisdiction over this action;
- 6 2. Declare that plaintiffs-petitioners filed the necessary petition  
7 and application for lawful permanent resident status, and were  
8 not stripped of the status of "spouse" of a United States citizen  
9 upon the death of the citizen spouse;
- 10 3. Declare that plaintiffs-petitioners are entitled to the process that  
11 flows from a properly filed application, and must be considered  
12 a spouse for purposes of the application;
- 13 4. Issue an injunction prohibiting defendants-respondents from  
14 using the death of the U.S. citizen spouse as a discretionary  
15 factor in the adjudication of the application;
- 16 5. Issue an injunction prohibiting defendants-respondents from  
17 using factors flowing from the unlawful denial of the  
18 application to again deny the application upon reopening,  
19 including but not limited to claims of abandonment of the  
20 application due to departure from the United States, and bars to  
21 admissibility related to "unlawful presence" caused by the  
22 wrongful denial;
- 23 6. Issue a writ of mandamus compelling defendants-respondents  
24 to (a) reopen plaintiffs-petitioners' adjustment of status and  
25 immigrant visa applications on the ground that the applications  
26 were unlawfully denied on the basis of defendants-respondents'  
27 erroneous determination that plaintiffs-petitioners' status as  
28

1 "immediate relative" spouses of United States citizens were  
2 stripped by the death of plaintiffs-petitioners' spouses, (b) treat  
3 plaintiffs-petitioners as "immediate relative" spouses and  
4 adjudicate the immigrant petitions ("petitions") filed on their  
5 behalf accordingly, and (c) treat plaintiffs-petitioners as  
6 "immediate relative" spouses and exercise discretion to  
7 adjudicate their adjustment of status and immigrant visa  
8 applications ("applications");

- 9
- 10 7. Award plaintiffs-petitioners reasonable costs and attorney's fees  
11 under the Equal Access to Justice Act; and  
12 8. Award such further relief as the Court deems just or  
13 appropriate.

14 DATED this 30th day of August, 2007.

15  
16 By 

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