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Attorneys for Plaintiffs
(Plaintiffs' attorneys continued on page two)

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

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on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

DEPARTMENT OF HOMELAND SECURITY; Michael CHERTOFF, Secretary of DHS; Emilio T. GONZALEZ, Director of U.S. Citizenship and IMMIGRATION SERVICES DEPARTMENT OF STATE; Condoleezza RICE, Secretary of State

Defendants.

No.:

COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MANDAMUS RELIEF

CLASS ACTION

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Attorneys for Plaintiffs (Continued from Page 1)

I. INTRODUCTION

1. Named plaintiffs and class members (hereafter plaintiffs) bring this action on behalf of themselves and all others similarly situated. Each of the plaintiffs qualifies for and seeks an immigrant visa, that is, lawful permanent residence (an employment-based "green card,") to work for an American company and to remain here permanently and lawfully.

2. Plaintiffs and their employers have been stymied by the defendants' unlawful actions and decisions as detailed in this complaint. The government officials in charge of allocating and issuing immigrant visa numbers and complying with long-established regulations and policies, opened a door to allow plaintiffs to take the last step toward permanent residence. Plaintiffs and their employers scrambled, at enormous expense, to take advantage of the long-awaited opportunity. Suddenly, and flouting their own regulations and long-followed policies, the officials slammed the door shut.

3. Only if the immigrant visa allocation process complies with its governing law and operates in predictable and transparent ways can the intended customers know what to expect and conform their conduct accordingly. In a properly-functioning system, the government plans and implements an orderly and responsive process.

4. What defendants did in June and July 2007, as plaintiffs describe herein, was the antithesis of an orderly, predictable, and responsive process. Defendants deliberately violated their

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governing law, and without notice, abrogated procedures and practices they have followed for decades. As a result, thousands of qualified applicants, who had expended enormous resources to submit timely applications in June and July, were left confused, disappointed, and without a foreseeable remedy.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); the Due Process Clause of the United States Constitution; 28 U.S.C. § 1361 (Mandamus Act); and 28 U.S.C. § 1651 (All Writs Act). The U.S. government has waived its sovereign immunity over the claims raised here pursuant to 5 U.S.C. § 702. The plaintiffs bring their claims pursuant to 8 U.S.C. §§ 1101 et seq. (Immigration and Nationality Act (INA)); 5 U.S.C. §§ 701 et seq. (Administrative Procedure Act (APA)); and 28 U.S.C. §§ 2201-02 (Declaratory Judgment Act).

6. There are no administrative remedies available to plaintiffs to redress the grievances described herein. This action challenges the defendants' procedural policies, practices, and interpretations of law. This action does not challenge a final removal order or a discretionary decision involving the grant or denial of an application for adjustment of status. Therefore, the jurisdiction provisions of 8 U.S.C. § 1252 are not applicable.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because defendants are officers or employees of U.S. agencies acting in their official capacities; numerous plaintiffs reside in this district; because a substantial part of the events or omissions giving rise to the claim occurred in this jurisdiction; and because no real property is involved in this action.

II. PARTIES

The Defendants

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8. Defendant Department of Homeland Security (DHS) is an executive agency of the United States. Since March 1, 2003, DHS has been the agency primarily responsible for implementing the INA. Within DHS, the United States Citizenship and Immigration Services (USCIS) is responsible for adjudicating applications for adjustment of status to lawful permanent residence.

9. Defendant Michael Chertoff is the Secretary of DHS and as such is charged with the responsibility for the administration and enforcement of the INA. He is sued in his official capacity.

10. Defendant Emilio T. Gonzalez is the Director of USCIS and as such is charged with the responsibility for the administration of adjustment of status. He is sued in his official capacity.

11. Defendant Department of State (DOS) is an executive agency of the United States with responsibility for oversight, management and distribution of immigrant visas under the INA.

12. Defendant Condoleezza Rice is the Secretary of DOS and as such is charged with responsibility for the administration of immigrant visas. She is sued in her official capacity.

The Plaintiffs

13. Each of the following plaintiffs submitted, or was eligible to submit, an application for adjustment of status to the USCIS for receipt in June or July 2007, or both. Under the respective Visa Bulletins, each of the plaintiffs was eligible to apply for adjustment of status.

14. The plaintiffs have suffered a variety of harms as a result of the defendants' actions. The principal harm was not being able to apply for adjustment of status. Corollary harms plaintiffs suffered include all or some of the following: Plaintiffs' spouses and sometimes the plaintiffs themselves are unable to obtain employment authorization, resulting in a significant financial impact on their families. Plaintiffs cannot change employers or positions, and cannot work part time for another employer. Plaintiffs also are not eligible for an advance parole document, which is an

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immigration document that would enable them to travel internationally. Plaintiffs will be subject to dramatically higher filing fees, under the scheduled USCIS fee increase that is effective July 30, 2007.

15. Plaintiffs scheduled, underwent, and paid for the required medical exams, the results of which might expire by the next time plaintiffs are again eligible to submit their adjustment applications. Plaintiffs may have to pay extra attorneys' fees to refresh and resubmit their adjustment applications. Plaintiffs took time, in some cases days, away from work and family to have the medical exams, retrieve the results, track down necessary documents, and assemble their adjustment application packages.

16. Plaintiffs changed international travel plans at the last minute to be physically present in the country at the time of filing. Plaintiffs experienced extreme stress during the application process, only to be told their applications would be rejected.

Plaintiffs who submitted adjustment applications in July 2007

17. Plaintiff xxxxxxxxxxx is a resident of the State of Washington. She was born in Japan, and is currently employed as a registered nurse. She submitted her application under the EB-3 immigrant category.

18. Plaintiff xxxxxxxxxx is a resident of the State of Washington. He was born in Canada, and is currently employed as a pharmacist in Oregon. He submitted his application under the EB-3 immigrant category. Mr. xxxxxx lives with his wife and two children who submitted their adjustment applications derivative to his.

19. Plaintiff xxxxxxx is a resident of the State of Washington. He was born in Canada, and is currently employed as a pharmacist. He submitted his application under the EB-3 immigrant

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category. Mr. xxxx's wife submitted her application derivative to his. They have a US citizen daughter and a US citizen son.

20. Plaintiff xxxxxxxxxx is a resident of the State of Washington. He was born in Korea, and is currently employed as a geotechnical engineer. He submitted his application under the EB-2 immigrant category. Mr. xxx's wife submitted her application derivative to his. They have a US citizen daughter and a US citizen son.

21. Plaintiff xxxxxxxxx is a resident of the State of Washington. She was born in India, and is currently employed as an engineer. She submitted her application under the EB-2 immigrant category. Ms. xxxxxxxxxx husband and daughter submitted their adjustment applications derivative to hers.

22. Plaintiff xxxxxxx is a resident of Florida. She was born in Canada, and is currently employed as a nursing home administrator. She submitted her application under the EB-3 immigrant category.

23. Plaintiff xxxxxxxxx is a resident of Mississippi. He was born in India, and is currently employed as a physician. He submitted his application under the EB-2 immigrant category.

24. Plaintiff xxxxxxx is a resident of Texas. He was born in India, and is currently employed as a project lead working in computer science. He submitted his application under the EB-2 immigrant category. Mr. xxxxxx is married, and his wife submitted her application derivative to his.

25. Plaintiff xxxxxxx is a resident of South Carolina. She was born in Canada, and is currently employed as an administrative services manager. She submitted her application under the

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EB-3 immigrant category. Ms. xxxxx lives with her husband who submitted his application derivative to hers.

26. Plaintiff xxxxxxx is a resident of Texas. He was born in India, and is currently employed as a security administrator. He submitted his application under the EB-2 immigrant category.

27. Plaintiff xxxxxx is a resident of New York. He was born in Panama, and is currently employed as a project manager. He submitted his application under the EB-3 immigrant category.

28. Plaintiff xxxxx is a resident of California. She was born in China, and is currently employed as a market research manager. She submitted her application under the EB-2 immigrant category. Ms. xxxx lives with her husband who submitted his adjustment applications derivative to hers. They have a 2-year old US citizen son.

29. Plaintiff xxxxx is a resident of California. She was born in France, and is currently employed as a scientific illustrator. She submitted her application under the EB-3 immigrant category.

30. Plaintiff xxxxxx is a resident of Indiana. He was born in Venezuela, and is currently employed as an executive chef. He submitted his application under the EB-3 immigrant category.

31. Plaintiff xxxxx is a resident of Florida. He was born in India, and is currently employed as a physician. He submitted his application under the EB-2 immigrant category. Mr. xxxxx wife and two sons submitted their adjustment applications derivative to his. Mr. xxxx 19 year old son is in danger of aging out.

32. Plaintiff xxxxx is a resident of Florida. She was born in Israel, and is currently employed as a teacher. She submitted her application under the EB-3 immigrant category. She has a U.S. citizen son.

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33. Plaintiff xxxxx is a resident of New York. He was born in China, and is currently employed as a researcher. He submitted his application under the EB-2 immigrant category. He lives with his wife, who submitted her application derivative to his.

34. Plaintiff xxxxxx is a resident of California. He was born in India, and is currently employed as a software engineer. He submitted his application under the EB-3 immigrant category. His wife and two children submitted their adjustment applications derivative to his.

35. Plaintiff xxxxx is a resident of New Jersey. She was born in China, and is currently employed as a real estate investment analyst. She submitted her application under the EB-3 immigrant category. Her husband submitted his adjustment application derivative to hers.

36. Plaintiff xxxx is a resident of Kansas. He was born in Albania, and is currently employed as a director of field services. He submitted his application under the EB-3 immigrant category.

37. Plaintiff xxxxx is a resident of Florida. He was born in India, and is currently employed as a senior software development engineer. He submitted his application under the EB-2 immigrant category. He lives with his wife and two children, one of whom is a US citizen. His wife and his eldest child submitted their adjustment applications derivative to his.

38. Plaintiff xxxx is a resident of Maryland. He was born in China, and is currently employed as an architectural drafter. He submitted his application under the EB-3 immigrant category.

39. Plaintiff xxxxxxxxxxx is a resident of Texas. He was born in India, and is currently employed as a network engineer. He submitted his application under the EB-2 immigrant category. He lives with his wife and two sons who submitted their adjustment application derivative to his.

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40. Plaintiff xxxxxx is a resident of Michigan. He was born in China, and is currently employed as an engineer. He submitted his application under the EB-2 immigrant category. He lives with his wife and daughter who submitted their application derivative to his. His daughter will age out unless his adjustment application is accepted. X. Plaintiff xxxxxxxx is a resident of New Hampshire. He was born in India, and is currently employed as a data warehouse developer. He submitted his application under the EB-3 immigrant category. His wife submitted her adjustment application derivative to his, and they have a US citizen daughter.

41. Plaintiff xxxx is a resident of New York. He was born in China, and is currently employed as an attorney. He submitted his application under the EB-2 immigrant category. He lives with his wife who submitted her application derivative to his.

42. Plaintiff xxxxxxx is a resident of California. He was born in Canada, and is currently employed as a power operations analyst. He submitted his application under the EB-3 immigrant category.

43. Plaintiff xxxxx is a resident of the state of Missouri. He was born in England and currently is employed as a director of sales. He submitted his application under the EB-3 category.

44. Mr. xxx's priority date was current in June 2007, and he submitted an adjustment of status application. However, USCIS may have been confused about his priority date or for some other reason, USCIS rejected his application. Mr. xxxx received the return package on June 21. Because he expected that his priority date would be current again in July, Mr. xxx attempted to resubmit the application for delivery on July 2.

Plaintiffs who submitted adjustment applications in June 2007

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45. Plaintiff xxxxx is a resident of California. He was born in Peru, and is currently employed as a bookkeeper. He submitted his application under the EB-3- "Other Worker" immigrant category.

46. Plaintiff xxxxx is a resident of Texas. He was born in Mexico, and is currently employed as a cook. He submitted his application under the EB-3 – "Other Worker" immigrant category. He has eight children, one of whom submitted his adjustment application derivative to his. His son is in danger of aging out.

Plaintiff who would have filed adjustment applications in July 2007

"but for" the defendants' actions

47. Plaintiff xxxx is a resident of Utah. He was born in Poland, and is a scientist by trade as well as the owner of a small business in which he currently cannot work. He would have submitted his application under the EB-2/NIW immigrant category. Mr. xxxxx wife would have submitted her application derivative to his, and they have a US citizen daughter. Mr. xxxx may lose significant funds from two federal research grants he has pending. He submitted the proposals to the National Institute of Health, for $1.5 million and $100,000, under the assumption that he would have a pending adjustment of status application in July.

III. LEGAL BACKGROUND

48. An immigrant visa is alternatively known as lawful permanent residence, or a "green card." People in the United States in some other status, for example, a non-immigrant employment status such as H-1B, can "adjust" their status to permanent residence if there is a visa number available for them. This case concerns the system of allocating employment-based immigrant visas and the process for applying for adjustment of status. Applications for adjustment of status are filed on an Immigration Form I-485, and so are often called I-485 applications.

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49. Under the INA, a limited number of immigrant visas are available to all classes of prospective immigrants. Specifically, the INA authorizes the issuance of a maximum of 140,000 employment-based immigrant visas each fiscal year. 8 U.S.C. § 1151(d)(1)(A).

50. These visas are to be distributed annually according to certain statutory formulas among the following five employment-based preference categories: First preference: priority employees including immigrants with extraordinary ability, outstanding professors and researchers, and certain multinational executives and managers; Second preference: immigrants who are members of the professions holding advanced degrees or immigrants of exceptional ability; Third preference: skilled workers, professionals and "Other Workers" (also known as "essential workers"); Fourth preference: certain special immigrants; and Fifth preference: "employment creation" immigrants (also known as "investor visas"). 8 U.S.C. § 1153(b).

51. For foreign employees already in the U.S. (including all plaintiffs), there are several steps to gaining an employment-based immigrant visa. For many employment-based preference categories, the foreign employee's employer first must apply for and obtain a "labor certification" from the Department of Labor. In all categories, either the foreign employee or the employer must file an immigrant visa petition with USCIS. The final step for many is for the foreign employee to file an application for adjustment of status with USCIS. The adjustment of status application and the visa petition may be filed concurrently when a visa is immediately available. 8 C.F.R. § 245.2(a)(2)(i)(C).

52. Upon the filing of either the labor certification application (in cases where this is required) or the immigrant visa petition, the foreign employee's case is assigned a "priority date." Because demand for visas often exceeds availability, waiting lists have been established. The priority date secures the foreign employee's place on the waiting list.

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53. At the final step, to be eligible to adjust status to lawful permanent residency, a foreign employee must: 1) apply for adjustment of status; 2) be eligible to receive an immigrant visa and be admissible to the U.S. for permanent residence; and 3) have an immigrant visa immediately available to him at the time the application is filed. 8 U.S.C. § 1255(a).

54. Upon applying for adjustment of status, a foreign employee becomes eligible for work authorization and permission to travel abroad. 8 C.F.R. § 274a.12(c)(9); 8 U.S.C. § 1182(d)(5)(A). The adjustment of status application also protects against the accrual of unlawful presence for the period that it is pending. 8 U.S.C. 1182(a)(9)(B). The filing of an adjustment of status application within a certain time frame is also necessary for minor children of foreign employees who seek to remain eligible for adjustment without "aging out" pursuant to the Child Status Protection Act. 8 U.S.C. § 1153(h)(1). Finally, if an adjustment application is filed and has not been adjudicated for more than 180 days, the foreign employee also is eligible to make certain job changes. 8 U.S.C. § 1154(j).

55. DOS is responsible for issuing visas and monitoring the numbers of visas issued under the statutory formulas. 8 U.S.C. § 1153(g).

56. DOS publishes a Visa Bulletin monthly. The Visa Bulletin announces visa availability in each preference category effective in the following month. The Visa Bulletin informs the public whether visas are available without limit in a particular category, whether they are unavailable, or whether they are available only for foreign employees with a priority date before a certain date (known as the "cut-off" date). On information and belief, DOS never has issued more than one Visa Bulletin during the same month in which the Bulletin is in effect.

57. An immigrant visa must be "immediately available" for a foreign employee to apply for adjustment of status. 8 C.F.R. § 245.2(a)(2)(i)(A). USCIS defines a visa as available for

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"accepting and processing" the adjustment of status application if the Visa Bulletin states that the preference category is current or if the foreign employee's priority date is earlier than the date shown in the Visa Bulletin. 8 C.F.R. § 245.1(g)(1).

58. An employment-based immigrant visa is not issued at the time a foreign employee applies for adjustment of status and, accordingly, a visa number cannot be counted as having been "used" at that point in time. Rather, the immigrant visa shall be counted as "used," and the visa numbers reduced accordingly, only after USCIS approves the adjustment of status application. 8 U.S.C. § 1255(b). Consequently, the number of adjustment applications accepted by USCIS pursuant to a current Visa Bulletin never has corresponded precisely with the number of available visas, since a visa is not issued at the time of application.

59. Adjustment of status applications frequently remain pending for months, and often years, and thus there is a significant lag time between filing of the application and final approval.

60. Immediately prior to approval of an adjustment application, a USCIS officer must request that a visa number be allocated by DOS. 8 C.F.R. § 245.2(a)(5)(ii). Such request is not to be made until after the applicant has been interviewed and found to be eligible for adjustment of status. Where no interview is required, the applicant still must have been found to be eligible for adjustment of status before a number can be ordered.

FACTUAL BACKGROUND

61. On May 11, 2007, DOS published the Visa Bulletin for June 2007 (hereafter "June Visa Bulletin"), summarizing visa availability for the entire month of June. (Attachment 1). Relevant here, the June Visa Bulletin announced that the third employment preference category of "Other Workers" was current for those with a priority date of October 1, 2001, or earlier. The June

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Visa Bulletin also stated that the "Other Worker" category would "become 'Unavailable' beginning in July and would remain so for the remainder of FY-2007."

62. Relying on the June Visa Bulletin, plaintiffs who had priority dates earlier than the dates published in the June Visa Bulletin, including those in the "Other Worker" category who had priority dates earlier than October 1, 2001, properly delivered adjustment of status applications to USCIS for filing throughout the month of June.

63. On information and belief, on or before June 6, 2007, DOS informed USCIS that, effective June 6, 2007, immigrant visas were no longer available for the "Other Worker" category, as all numbers for FY-2007 already had been made available.

64. Sometimes, visa numbers that were available at the beginning of the month become unavailable at some point during the month. This event is commonly referred to as retrogression. By mid-month, DOS predicts whether there will be retrogression (or advancement) in particular categories and responds by issuing a revised Visa Bulletin for the following month.

65. On information and belief, DOS has sent notices similar to the June 6, 2007 notice to USCIS many times in the past. On none of the past occasions has DOS issued a new visa bulletin during the month in which the Visa Bulletin applies. Nor has USCIS discontinued acceptance of new applications for adjustment of status during that month, except for applications under the "diversity visa lottery" and its predecessors. The "diversity visa lottery" is legally and logically distinguishable from employment-based visa categories in ways not relevant to this action.

66. For example, an August 30, 1991 cable from the Immigration and Naturalization Service (USCIS's predecessor agency), IMMACT 90 Wire #69, file CO 204.8P (Attachment 2) said, in pertinent part:

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> 1) The Department of State (DOS) has advised INS that as of August 2, 1991, all third preference visa numbers for fiscal year 1991 have been allocated. Furthermore, DOS will not be issuing a visa bulletin for the month of September, 1991…
>
> This creates a problem for field offices which (under [then] 8 C.F.R. 245.(f)(1)) must continue to accept concurrent filings of I-140s and I-485s if the alien's priority date is before the date reflected on the August bulletin. In response to an INS inquiry, DOS has advised that *they could not issue an amended August visa bulletin* reflecting the unavailability of third preference numbers. Accordingly INS *has no alternative but to continue to accept such concurrent filings.* (emphasis added).

67. Further, the June 2006 Visa Bulletin (Attachment 3) issued in May 2006, said, in pertinent part:

> E. THE EMPLOYMENT THIRD PREFERENCE "OTHER WORKER" CATEGORY BECOMES "UNAVAILABLE" FOR JUNE.
>
> Continued heavy demand for numbers (particularly for adjustment of status cases at USIS offices) will result in the 5,000 annual numerical limit being reached during the month of May. Therefore, it has been necessary to make the Employment Third preference "Other Worker" category "unavailable" for June, and it will remain so for the remainder of the fiscal year.

68. As documented by its August 30, 1991 wire, USCIS has long followed a policy and practice of accepting and holding in abeyance non-lottery adjustment of status applications, even though the visa numbers have retrogressed. In fact, USCIS is mandated by regulation to follow this

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pratice. 8 C.F.R. § 245.1(g)(1). USCIS issues important interim benefits to these applicants and resumes processing their applications once a visa number becomes current again.

69. On information and belief, USCIS responded to the DOS June 6, 2007 information with a decision to reject and return all "Other Worker" adjustment applications delivered for filing in June, notwithstanding that the June Visa Bulletin stated that this category was still available for applicants who met the listed priority date. On information and belief, USCIS also erroneously rejected employment-based adjustment applications from people in categories other than "Other Workers," notwithstanding that these applications were current under the June Visa Bulletin.

70. On or about June 20, 2007, the American Immigration Lawyers Association (AILA) sent an email and attached letter to USCIS officials, challenging the rejection of these applications and asking that USCIS immediately cease this practice. (Attachment 4). Among other things, AILA pointed out that this change in USCIS policy violated 8 C.F.R. § 245.1(g)(1) and that "the lack of public notice of the change in policy has significant negative implications on public confidence in the transparency of USCIS policies and procedures." The letter also pointed out that the INS revised 8 C.F.R. Part 245 twice, once in 1994, and again in 2002. Both times, the agency chose to leave 8 C.F.R. § 245.1(g)(1) intact.

71. Further, AILA's letter pointed to the USCIS Adjudicators Field Manual, AFM 20.1 Note, which reiterates that USCIS applies the Visa Bulletin "in effect for the calendar month in which the I-485 is filed, regardless of the printing and issuance of the following month's Visa Bulletin." Lastly, the AILA letter cited two USCIS publicly-issued memoranda, from February 14, 2003 and December 19, 2004, confirming the agency's long-standing practice.

72. In response to this AILA letter, USCIS informed AILA that it would continue to reject "Other Worker" adjustment applications filed in June.

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73. Plaintiffs who delivered adjustment applications to USCIS based upon the June Visa Bulletin have had or will have their adjustment applications rejected and returned by USCIS on the ground that no visas for this category are available, even though their priority dates are earlier than the dates listed for their category in the June Visa Bulletins.

74. On June 12, 2007, DOS issued the Visa Bulletin for July 2007 (hereafter "July Visa Bulletin"), summarizing visa availability for the entire month of July. (Attachment 5). Relevant here, the July Visa Bulletin announced that *all* employment-based preference categories were "Current" except for the "Other Worker" category which was "Unavailable." The July Visa Bulletin explained that a listing of "Current" meant that visa "numbers are available for all qualified applicants."

75. The "Current" status of all employment-based categories except for "Other Worker" category was extremely significant to plaintiffs. It meant that as of July 2, 2007 (the first business day in July), they were eligible to proceed to the final step, filing their adjustment of status applications.

76. Plaintiffs' long waits, and the significance of the July Visa Bulletin, can be understood by reviewing the following excerpt of the Visa Bulletins. This chart includes one category, Employment-Based Third Preference (EB-3), for March through July 2007. The chart illustrates that the priority dates did not move at all between March and May, 2007, except for a one-year change in the "All others" category. For China and India the dates remained on August 1, 2002 until June, when they changed to June 1, 2003. Suddenly in July, the categories that had been June 2005 and June 2003 were suddenly "current," meaning that anyone who had an application pending since 2003 and was otherwise eligible could apply for adjustment.

	All Others	China	India

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	Not Listed		
March, EB-3	August 1, 2002	August 1, 2002	May 8, 2001
April, EB-3	August 1, 2002	August 1, 2002	May 8, 2001
May, EB-3	August 1, 2003	August 1, 2002	May 8, 2001
June, EB-3	June 1, 2005	June 1, 2003	June 1, 2003
July, EB-3	Current	Current	Current

77. On information and belief, the DOS issued the July 2007 Visa Bulletin listing all Employment-Based categories except "Other Workers" as "Current" in order to ensure that USIS used all available visa numbers for Fiscal Year 2007, which ends September 2007. In prior years, DOS allocated visa numbers but USCIS did not use them, and because of internal operations of the visa allocation system not relevant here, many thousands of valuable visa numbers were lost.

78. The July Visa Bulletin also advised that, while all employment preference categories except "Other Workers" "have been made current for July," readers should be "alert to the possibility that not all Employment preferences will remain Current for the remainder of the fiscal year. Should the rate of demand for numbers be very heavy in the coming months, it could become necessary to retrogress some cut-off dates for September …. Severe cut-off date retrogressions are likely to occur early in FY-2008."

79. Immediately after the DOS issued the July Visa Bulletin, plaintiffs began preparing adjustment of status applications for filing in July. In those cases in which no visa petition had yet been filed by the employer, the employers of these plaintiffs also immediately began preparing

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immigrant visa petitions on Form "I-140" for filing in July, concurrently with the adjustment applications in accordance with 8 C.F.R. § 245.2(a)(2)(i)(C).

80. Plaintiffs and their employers took extraordinary and costly steps to assemble the necessary information and supporting documents in order to file these applications. They spent thousands of dollars and enormous amounts of time, changed travel plans, and cancelled trips abroad in reliance on the publicly issued July 2007 Visa Bulletin.

81. Following publication of the July 2007 Visa Bulletin and without any notice or warning to the public, USCIS undertook an unprecedented effort to begin processing tens of thousands of pending adjustment applications. On information and belief, USCIS intended to order as many of the remaining FY-2007 employment-based immigrant visa numbers as possible from DOS before July 2, 2007.

82. USCIS ordered staff at its local offices and service centers to work overtime throughout the weekend of June 30-July 1. Upon information and belief, as many as 25,000 adjustment applications purportedly were adjudicated in the 48 hours before July 2, 2007.

83. In total, almost 60,000 visa numbers were ordered by USCIS between publication of the July Visa Bulletin on June 12 and July 2, 2007. In comparison, only 66,425 USCIS requests for visas were made during the first eight months of FY-2007.

84. Upon information and belief, USCIS employees ordered thousands – possibly as many as tens of thousands – of visa numbers for adjustment of status applications that were not yet ready for a final adjudication. In these cases, the USCIS employee had not yet determined that the adjustment applicant was eligible for adjustment, and one or more steps remained before such a determination could be made. In some cases, the agency interview of the adjustment applicant had not yet occurred or the evaluation of eligibility had not yet been made. In all such cases, because

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certain adjudicatory steps remained unfinished, it was impossible for the USCIS employee to know in advance that the adjustment application would actually be approved and that the visa number thus would be used.

85. On information and belief, USCIS strongly and repeatedly pressured DOS to reissue the July Visa Bulletin so that USCIS could reject all employment-based adjustment applications starting July 2, on the basis that the Visa Bulletin said the priority dates were not current.

86. On July 2, 2007, DOS published on its website an "Update on July Visa Availability" (hereafter "July Update"). (Attachment 6). The July Update stated that the "sudden backlog reduction efforts" by USCIS had resulted in the use of almost 60,000 employment-based visa numbers. As a result of USCIS's "unexpected" action, DOS said, USCIS offices had been notified of the following: "Effective Monday July 2, 2007 there will be no further authorizations in response to requests for Employment-based preference cases. All numbers available to these categories under the FY-2007 annual numerical limitation have been made available."

87. Within an hour or two after the DOS issued its July Update, USCIS issued a notice announcing that, beginning that day, July 2, 2007, USCIS "is rejecting applications to adjust status (Form I-485) filed by aliens whose priority dates are not current under the revised July Visa Bulletin." (Attachment 7).

88. On or around July 6, 2007, DOS issued a statement, labeled "Visa Bulletin," (Attachment 8), which said, in full:

The Visa Bulletin for July 2007, posted on June 12, must be read in conjunction with the Update of July Visa Availability, posted on July 2. The Update of July Visa Availability, posted on July 2, must be read in conjunction with the Visa Bulletin for July 2007, which was posted on June 12."

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89. In reliance on the July 2007 Visa Bulletin posted on June 12, 2007, plaintiffs in employment preference categories other than the "Other Worker" category properly delivered adjustment of status applications to USCIS for filing on July 2 and have continued to do so during the month of July.

90. All plaintiffs who have delivered or will deliver adjustment applications to USCIS in July 2007 for employment-based preference categories other than "Other Worker" have had or (unless this court intercedes) will have their adjustment applications rejected and returned by USCIS pursuant to its July 2, 2007 announcement.

91. Many other plaintiffs were preparing to and fully intended to apply for adjustment of status during July 2007 in reliance on the July Visa Bulletin. These plaintiffs have since determined that the filing of such applications would be futile since USCIS has made clear that it will reject and return all such applications. These plaintiffs were eligible to file for adjustment of status under the July Visa Bulletin and would have done so but for the announcement by USCIS that all such applications would be rejected outright because no visa numbers are available.

92. On information and belief, USCIS began to return unused visa numbers to DOS as early as July 5, 2007. On information and belief, a significant number of visa numbers already have been or will be returned to DOS from those ordered by USCIS during the period June 2007 through July 2, 2007. On information and belief, many other cases for which USCIS ordered visa numbers remain unadjudicated, and will remain unadjudicated for the foreseeable future.

93. All plaintiffs have been irreparably harmed by defendants' actions. Among the harms suffered by plaintiffs is the loss of interim immigration benefits that come with an application for adjustment of status, including interim employment authorization, the ability to obtain permission to travel abroad, eligibility to change jobs after a prescribed time period, protection against the accrual

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of unlawful presence, and protection for minors against "aging out" under the Child Status Protection Act.

IV. CLASS ALLEGATIONS

94. Plaintiffs bring this action on behalf of themselves and all others similarly situated, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b). The three classes that named plaintiffs seek to represent are the following:

A. "June priority date" category. Foreign nationals who:

Have priority dates earlier than the date shown in the June 2007 Visa Bulletin for their employment-based category; and

Submitted an adjustment of status application for receipt by USCIS in June; and

Either received a rejection notice and/or had their application returned as rejected because there were no visa numbers available; or

Have not received a receipt notice, cancelled check, or notice of approval of the adjustment application.

B. All employment-based categories except "Other Workers;" Individuals who submitted applications to USCIS. Foreign nationals who:

Submitted or will submit adjustment of status applications in any employment-based category other than "Other Worker" for receipt by USCIS in July 2007; and

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Either received a rejection notice and/or had their application returned as rejected because there were no visa numbers available; or

Have not received a receipt notice, cancelled check, or notice of approval of the adjustment application.

C. All July employment based categories except "Other Workers;" individuals who would have submitted applications "but for" defendants' actions. Foreign nationals who:

Were eligible to apply for adjustment of status under the July Visa Bulletin in an employment-based category; and

Would have submitted adjustment of status applications for receipt by USCIS in July 2007, but for the actions of USCIS and DOS complained of in this suit.

95. The requirements of Federal Rules of Civil Procedure 23(a) and 23(b) are met. The proposed classes are so numerous that joinder of all members is impracticable. The precise number of potential class members in each class is not currently identifiable by plaintiffs. However, on information and belief, many thousands of foreign employees meet the description of each class. For example, on information and belief, more than 8,800 people submitted an application via Federal Express alone to Defendants' Nebraska Service Center for delivery on July 2 alone (Class B).

96. The questions of law and fact at issue are common to the proposed classes, including whether defendants acted without authority and whether their actions violated the INA, the APA, the Due Process Clause and/or agency regulations. The claims of the named plaintiffs are typical of the claims of the proposed classes.

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97. The named plaintiffs will fairly and adequately protect the interests of the proposed classes because they seek relief on behalf of the classes as a whole and have no interest antagonistic to other members of the classes.

98. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications. Questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

99. The named plaintiffs are represented by competent counsel with extensive experience in immigration law and federal court litigation, including class actions. Plaintiffs' counsel are representing the plaintiffs pro bono, and are willing and able to protect the interests of the classes.

100. Finally, defendants have acted on grounds generally applicable to the classes, thereby making appropriate final declaratory and injunctive relief with respect to the classes as a whole.

V. CAUSES OF ACTION

Count One

Rejection of adjustment applications with priority dates current in June 2007; Violation of 8 C.F.R. § 245.1(g)(1) (June class)

101. All preceding paragraphs are incorporated herein. The USCIS regulation at 8 C.F.R. § 245.1(g)(1) compels USCIS to accept and process adjustment applications provided the applicant's priority date is current, that is, earlier than the date indicated on that month's Visa Bulletin issued by DOS.

102. Plaintiffs applied for adjustment of status with USCIS in June 2007 based on approved employment-based visa petitions with priority dates current in June. For example, the

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"Other Worker" plaintiffs have priority dates before October 1, 2001. The then-current June Visa Bulletin issued by DOS indicated visa availability in the "Other Workers" preference category for applicants with a priority date earlier than October 1, 2001. USCIS has violated or will violate 8 C.F.R. § 245.1(g)(1) when it rejected and returned or when it will reject and return these adjustment of status applications.

Count Two

Rejection of adjustment applications with priority dates current in June 2007; Violation of the Administrative Procedure Act (June class)

103. All preceding paragraphs are incorporated herein.

104. In order to reject adjustment applications from employment-based applicants whose priority dates were current in June 2007 (Class A), USCIS established an unlawful and secret special procedure for rejecting these adjustment applications to the detriment of the members of the Class. Arguendo, if USCIS's actions constituted a new "policy," that "policy" has a "legislative" impact on plaintiffs and is a substantive policy of general applicability. That "policy" was instituted in June 2007 without complying with the APA's rule-making procedures, including notice and comment via the Federal Register.

105. The APA requires that notice of proposed "legislative" rules be published in the Federal Register and that the agency provide notice to and an opportunity for comment by interested persons. Defendant USCIS's decision to reject and return adjustment applications for the members of Class A without first publishing a proposed regulation, and without providing notice and an opportunity to comment, violated 5 U.S.C. § 553 and is unlawful and unenforceable as a result.

106. The APA also requires that substantive rules of general applicability and statements of general policy be published in the Federal Register. Defendant USCIS's decision to reject and

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return adjustment applications from the members of Class A without first publishing this policy in the Federal Register alternatively violated 5 U.S.C. § 552 and is unlawful and unenforceable as a result. Plaintiffs did not have actual and timely notice of defendant USCIS's decision of the "policy" to reject and return adjustment of status applications of Class A in June 2007.

Count Three

Unlawful ordering of visa numbers;

Violation of 8 U.S.C. § 1255(b); 8 C.F.R. § 245.2(a)(5)(ii) (July classes)

107. All preceding paragraphs are incorporated herein.

108. Defendant USCIS's actions in ordering immigrant visa numbers from DOS in June and early July 2007 for adjustment cases that were not yet completed and in which the applicant had not yet been determined to be eligible violated 8 U.S.C. § 1255(b), 8 C.F.R. § 245.2(a)(5)(ii) and the agency's own policy and practice manual.

Count Four

Rejection of July adjustment applications when visa numbers were available; Violation of 8 U.S.C. §§ 1255(a) and (b) (July classes)

109. All preceding paragraphs are incorporated herein.

110. All immigrant visa numbers that were unlawfully ordered by USCIS in advance of final completion of an adjustment application remained "available" pursuant to 8 U.S.C. §§ 1255(a) and (b). Defendant DOS's July Update to the Visa Bulletin erroneously announced that no visa numbers remained available in any employment-based preference category as a direct result of USCIS's unlawful action in ordering advance visas. Defendant DOS violated 8 U.S.C. § 1255(b) in

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counting visas as issued for adjustment applications that were not actually approved.

111. Defendant USCIS has violated or will violate 8 U.S.C. § 1255(a) by rejecting and returning adjustment of status applications that have been or will be delivered to it in July 2007 by plaintiffs who fell within employment-based preference categories other than the "Other Worker" category, because immigrant visa numbers are available.

112. Defendant USCIS has violated 8 U.S.C. § 1255(a) by publicly announcing on July 2, 2007 that it would reject and return all adjustment of status applications filed by foreign employees in employment-based preference categories filed in July 2007. This announced policy has directly harmed plaintiffs who were eligible to file an adjustment of status application in July 2007 and would have done so "but for" defendants' actions.

Count Five

Withdrawal of July visa availability and rejection of July adjustment applications; Violation of the APA (July classes)

113. All preceding paragraphs are incorporated herein.

114. Arguendo, and to the extent that defendants applied new rules and policies as expressed in the purported update to the July Visa Bulletin and the USCIS's memorandum of July 2, 2007 that are binding on plaintiffs; that affect plaintiffs' rights and obligations; that add to the legal landscape by creating new rights or duties; that have widespread application; and/or that are inconsistent with prior rules, policies, practices or interpretations, these new rules and policies are "legislative" under the APA.

115. The APA requires that any "legislative" rule be published in the Federal Register and that the agency provide notice to and an opportunity for comment by interested persons. Defendants' actions violate and are unlawful under 5 U.S.C. § 553.

Count Six

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Withdrawal of July visa availability and rejection of July adjustment applications; Improper retroactive application of new practices (July classes)

116. All preceding paragraphs are incorporated herein.

117. Defendants have applied retroactively new rules, policies and/or practices as expressed in the purported update to the July Visa Bulletin and the USCIS's memorandum of July 2, 2007.

118. The defendants' retroactive application of these new rules, policies and/or practices, even if regarded as interpretative, may not be applied retroactively to plaintiffs' detriment.

119. The retroactive application irreparably harms and impermissibly burdens plaintiffs because they have detrimentally relied on the defendants' former criteria, *i.e.* the July Visa Bulletin issued on June 12, 2007, to ascertain when they would be eligible to file their adjustment applications. Indeed, plaintiffs and their employers rushed to obtain the necessary supporting documentation and undertook extraordinary and costly steps to assemble the required information to file adjustment applications with USCIS by the end of July 2007, the time frame provided by the July Visa Bulletin. DOS's abrupt withdrawal of immigrant visa availability and USCIS's consequent failure to accept adjustment applications rendered it impossible for plaintiffs to decipher how to apply for and/or actually apply for a statutorily provided benefit of adjustment of status. Plaintiffs who nevertheless applied for adjustment of status expect their applications to be rejected pursuant to the USCIS' July 2, 2007 Update on Employment-Based Adjustment of Status Processing (posted to USCIS' website on July 2, 2007).

120. The new rules, policies and/or practices, even if regarded as interpretations, represent an abrupt departure from well established policy and practice.

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121. Plaintiffs relied on the former rules, policies, and practices of the defendants with respect to use of the Visa Bulletin to determine eligibility to apply for adjustment of status. Indeed, many plaintiffs and proposed class members relied specifically on the representations made in the June and July 2007 Visa Bulletin regarding immigrant visa availability.

122. The retroactive application of the new rules, policies, and/or practices, even if regarded as interpretations, places extreme burdens on plaintiffs as all would have been entitled to apply for adjustment of status before July 31, 2007, and thus, also would have been entitled to interim benefits (i.e. advance parole and employment authorization) but for defendants' refusal to accept their applications for processing.

123. The statutory interest in applying these new rules, policies, and/or practices to plaintiffs' adjustment applications does not outweigh plaintiffs' reliance on defendants' previous rules, policies, and practices and, in particular, the July Visa Bulletin.

124. As a result of the retroactive application of the defendants' new rules, policies and/or practices, even if characterized as interpretations, plaintiffs now suffer extreme burden and have been and will continue to be irreparably injured to their detriment.

Count Seven

Withdrawal of July visa availability and rejection of July adjustment applications; Abuse of discretion and Violation of Due Process (July classes)

125. All preceding paragraphs are incorporated herein.

126. DOS's abrupt withdrawal of immigrant visa availability and USCIS's consequent failure to accept adjustment of status applications in July 2007 is arbitrary, capricious, and an abuse of discretion under 5 U.S.C. § 706 and violates the Due Process Clause of the U.S. Constitution.

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127. DOS's abrupt and radical abrogation of its own prior publicly announced and published rules, requirements, and standards with respect to Visa Bulletins such that prospective adjustment applicants have adequate notice to prepare their applications for filing or stop preparing them is likewise arbitrary, capricious, and an abuse of discretion under 5 U.S.C. § 706 and violates due process.

128. USCIS's decision to abruptly and radically depart from its own prior publicly announced and published rules, requirements, and standards to accept adjustment applications notwithstanding the lack of availability of immigrant visa numbers is likewise arbitrary, capricious, and an abuse of discretion under 5 U.S.C. § 706(2)(A) and violates due process.

129. Plaintiffs reasonably relied on the opportunity to submit their adjustment of status applications on or before July 31, 2007 as set forth in the July Visa Bulletin.

130. Plaintiffs have been and will continue to be irreparably harmed by USCIS's refusal to accept their adjustment applications.

VII. RELIEF REQUESTED

Wherefore, plaintiffs respectfully ask that the Court:

a) Permit this case to proceed as a class action and certify the classes as and when requested by plaintiffs;

b) Declare that defendants' acts and omissions complained of herein violate the INA, defendants' regulations, the Administrative Procedures Act, and the Due Process Clause of the Fifth Amendment, and constitute illegal retroactive application of a new practice.

c) Preliminarily and permanently enjoin defendants as and when requested by plaintiffs;

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d) Order defendants to establish an appropriate application and re-submission period for plaintiffs to submit or re-submit their adjustment applications;

e) Order defendants to issue timely and adequate public notice of the application and re-submission period;

e) Accept all properly-filed adjustment of status applications from plaintiffs and issue interim benefits;

f) Award the plaintiffs their attorneys' fees and costs under the Equal Access to Justice Act, and;

g) Grant such other relief as the Court deems just, equitable and proper.

Respectfully submitted this 17th day of July 2007.

NORTHWEST IMMIGRANT RIGHTS PROJECT
AMERICAN IMMIGRATION LAW FOUNDATION
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