UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Miriam VELASCO DE GOMEZ, et al. Plaintiffs, v. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, et al. Defendants.	Case No. 2:22-cv-368 **PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** Noting Date: May 6, 2022 ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiffs Miriam Velasco de Gomez, Elena Gonzalez Tavira, Carlos Gonzalez Martinez, Manuel Alvarez Garcia, and Aleciana Soares Costa and the class they seek to represent are all eligible to adjust their immigration status to lawful permanent residence under the Immigration and Nationality Act (INA). However, Defendants have unlawfully denied, or will deny, Plaintiffs' applications for lawful permanent residence based on an erroneous interpretation of the INA. Specifically, Defendant U.S. Citizenship and Immigration Services (USCIS) has taken the position that Plaintiffs are not admissible to the United States as required by 8 U.S.C. § 1255 because they remain subject to what are known as the three-year and ten-year "unlawful presence bars" to admissibility set forth in 8 U.S.C. § 1182(a)(9)(B)(i).

The unlawful presence bars are triggered when a noncitizen who has lived in the United States without authorization for at least 180 days departs the country. Thereafter, the noncitizen is temporarily "inadmissible" for either three years or ten years, depending on how long the individual was unlawfully present before their departure. Each Plaintiff in this case departed the United States after accruing sufficient unlawful presence to be subject to an unlawful presence bar. Each also returned to the United States and waited out at least part of the requisite period of inadmissibility in this country, applying for lawful permanent residence only *after* the applicable three or ten years had passed. As a result, Plaintiffs are no longer inadmissible under the plain language of § 1182(a)(9)(B)(i).

Nevertheless, Defendants denied or will deny their adjustment applications, insisting that because Plaintiffs either did not wait the entire three- or ten-year period outside the United States or continuously maintain lawful status within the United States during that time, they remain subject to § 1182(a)(9)(B)(i).

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The question presented in this case—whether USCIS's interpretation violates the INA and APA—can and should be resolved on a class-wide basis. The proposed class satisfies the requirements under Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. Plaintiffs thus request that the Court certify the following class and appoint them as class representatives:

> All individuals who (1) have submitted or will submit applications for adjustment of status, (2) have been found or will be found by the agency to be inadmissible pursuant to USCIS's policy and practice that requires the applicant to maintain lawful presence in the United States or remain outside the United States for the duration of the three- or ten-year unlawful presence bar periods at 8 U.S.C. § 1182(a)(9)(B)(i), even though the applicable period of three or ten years has passed since their last departure, and (3) were or will be otherwise eligible to adjust status.

On behalf of themselves and all proposed class members, Plaintiffs seek an order from this Court that (1) declares Defendants' restrictive interpretation of 8 U.S.C. § 1182(a)(9)(B)(i) unlawful and contrary to the INA, (2) declares that Plaintiffs are not inadmissible under § 1182(a)(9)(B)(i), (3) compels Defendants to rescind the adjustment of status denials already issued pursuant to their unlawful policy and practice and re-adjudicate those adjustment applications in accordance with law, (4) compels USCIS to refund the filing fee for any class member who was unlawfully instructed to file a waiver to overcome the grounds of inadmissibility at § 1182(a)(9)(B)(i), and (5) enjoins any future findings of inadmissibility or denials of adjustment of status applications solely on Defendant's policy and practice regarding the three- and ten-year unlawful presence bars at § 1182(a)(9)(B)(i).

II. BACKGROUND

A. Plaintiffs' Legal Claims

Adjudicating a motion for class certification does not call for "an in-depth examination of the underlying merits," but a court may nevertheless analyze the merits to the extent necessary to determine the propriety of class certification. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983

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n.8 (9th Cir. 2011); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351–52 (2011). Plaintiffs thus briefly summarize their claims below.

1. Adjustment of Status to Legal Permanent Residence

Noncitizens present in the United States may apply for lawful permanent resident (LPR) status based on certain family and employment-based categories. 8 U.S.C. §§ 1153, 1154, 1255. Adjustment of status allows applicants to apply to become LPRs while remaining in the United States, instead of requiring them to first return to their home countries and apply for immigrant visas from a U.S. embassy or consulate abroad.

Among other requirements, an applicant seeking to adjust status and become an LPR must generally be "admissible to the United States." 8 U.S.C. § 1255(a); *see also id.* § 1255(i)(2)(A). The INA lists the grounds of inadmissibility that might apply to an adjustment of status applicant at 8 U.S.C. § 1182. At issue in this case is the interpretation of § 1182(a)(9)(B)(i), which renders a noncitizen inadmissible based on (1) prior unlawful presence in the United States and (2) a prior departure or removal from the country.

Unlawful presence in the United States generally occurs in one of two ways. First, a noncitizen can enter and remain in the United States without permission. *Id.* § 1182(a)(9)(B)(ii). Second, a noncitizen can be inspected and admitted at the border, but then overstay their period of authorized stay. *Id.* As relevant here, under § 1182(a)(9)(B)(i), a noncitizen can be subject to what are known as the three-year and ten-year unlawful presence bars to admissibility. The three-year bar to admissibility is triggered when a noncitizen departs the United States after having been unlawfully present for "more than 180 days but less than 1 year." *Id.* § 1182(a)(9)(B)(i)(I). The ten-year bar to admissibility is triggered when a noncitizen departs the United States after having been unlawfully present "one year or more." *Id.* § 1182(a)(9)(B)(i)(II).

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A waiver of the three- or ten-year bars is available to some applicants who seek to apply for admission *prior to* the expiration of the three- or ten-year period. Specifically, 8 U.S.C. § 1182(a)(9)(B)(v) provides a waiver of inadmissibility if an applicant demonstrates that "refusal of admission to such immigrant [noncitizen] would result in extreme hardship to the citizen or lawfully resident spouse or parent of such [noncitizen]." However, the waiver is discretionary, and requires an additional $930 filing fee. USCIS, *Filing Fees*, I-601 Application for Waiver of Grounds of Inadmissibility (Mar. 23, 2022), https://www.uscis.gov/i-601. Moreover, many do not have a qualifying relative to apply for the waiver. Those who do not qualify for such a waiver are required to wait for the specified period to elapse before applying for admission as a lawful permanent resident.

The INA does not state a noncitizen must remain *outside* of the United States during the three- or ten-year time period before applying again for admission. Nor does it require a noncitizen to remain in lawful status for the three- or ten-year period of admissibility to run. Rather, the statute makes clear that the "the date of [the noncitizen's] departure or removal" from the United States commences the three- or ten-year period of inadmissibility. *Id.* § 1182(a)(9)(B)(i); *see also Matter of Rodarte-Roman*, 23 I. & N. Dec. 905, 909 (BIA 2006) (holding that that it is "evident that Congress made departure (rather than commencement of unlawful presence) the event that triggers inadmissibility or ineligibility for relief"). Consequently, § 1182(a)(9)(B)(i) contains no requirement that a noncitizen spend the specified period of inadmissibility outside the United States or maintain lawful status in the United States throughout the applicable period of inadmissibility.

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2. USCIS Policy and Practice Challenged by Plaintiffs

Notwithstanding the statute's plain language and published Board of Immigration Appeals (BIA) case law, USCIS has taken the position that Plaintiffs and proposed class members are inadmissible—and therefore ineligible to adjust status—because they did not complete the three- or ten-year period while they were outside the United States or in lawful status in the United States.

As demonstrated below, USCIS uniformly applies its extra-statutory policy to Plaintiffs and proposed class members—all of whom are adjustment of status applicants who were previously subject to the three- or ten-year unlawful presence bar, but who waited for the relevant period of inadmissibility to lapse before submitting their applications. Pursuant to its policy and practice, USCIS has denied, or will deny, Plaintiffs' and proposed class members' adjustment of status applications on the basis that the three- or ten-year period of inadmissibility only runs while the noncitizen remains outside of the United States, or, if the noncitizen reenters the United States, while they remain continuously in lawful status. This case is ideally suited for class certification, as it challenges the government's uniform policy and practice of denying all proposed class members' applications for adjustment of status pursuant to its unlawful interpretation of § 1182(a)(9)(B).

B. Named Plaintiffs' Factual Backgrounds

1. Plaintiff Miriam Velasco de Gomez

Plaintiff Miriam Velasco de Gomez (Ms. Velasco) is a noncitizen from Mexico. Velasco Decl. ¶ 2. She has lived in the United States for over twenty years and has two U.S. citizen children, along with two other children who are LPRs. *Id.* ¶¶ 2–3. She has one other child who is a citizen of Mexico. *Id.* ¶ 3.

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Ms. Velasco entered the United States in June 1996 on a B-2 visitor visa. *Id.* ¶ 4. After entering in 1996, she remained in the United States for almost four years, until departing in March of 2000. *Id.* As a result, she accrued more than one year of unlawful presence during this time and became subject to the ten-year unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B)(i)(II). Ms. Velasco then reentered the United States on April 8, 2000, again on a B-2 visa. *Id.* ¶ 6. She has remained in the United States since that date. *Id.* ¶¶ 2, 6.

On July 19, 2018, well over ten years since she last departed the United States, Ms. Velasco filed an application for adjustment of status on Form I-485, Application to Register Permanent Resident or Adjust Status. *Id.* ¶ 7. Her son Kevin Gomez, a U.S. citizen, concurrently filed Form I-130, Petition for Alien Relative. *Id.* That form listed Ms. Velasco as the beneficiary. *Id.* USCIS approved the I-130 petition on March 27, 2020. *Id.* ¶ 8. Because Ms. Velasco is an immediate relative of her son under the INA and because she was present pursuant to a lawful admission, she was eligible to adjust her status immediately under § 1255(a). *See* 8 U.S.C. § 1255(a); *id.* § 1151(b)(2)(A)(i) (defining "immediate relatives" and explaining that such individuals are not subject to visa limits).

Nevertheless, on March 27, 2020, USCIS issued a Request for Evidence (RFE), stating that Ms. Velasco was subject to the ten-year unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B)(i)(II). Maltese Decl. Ex. A; Velasco Decl. ¶ 9. Ms. Velasco timely responded to the RFE, explaining that she was no longer subject to the unlawful presence bar because ten years had elapsed since she became subject to it. Velasco Decl. ¶ 9.

On January 27, 2021, USCIS denied Ms. Velasco's application for adjustment of status. Maltese Decl. Ex. B; Velasco Decl. ¶ 10. The sole reason for USCIS's decision was that in the agency's view, Ms. Velasco remained inadmissible under 8 U.S.C. § 1182(a)(9)(B)(i)(II)

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because ten years did not elapse between her departure in 2000 and subsequent reentry. Maltese Decl. Ex. B. Following the denial, on February 25, 2021, Ms. Velasco submitted Form I-290B, Notice of Appeal or Motion, seeking a reopening or reconsideration of her adjustment application. Velasco Decl. ¶ 11. Ms. Velasco again argued that she was not subject to the unlawful presence bar under 8 U.S.C. § 1182(a)(9)(B)(i)(II) because more than two decades had passed since her last departure. *Id.* That motion remains pending.

Ms. Velasco faces significant harm because of USCIS's unlawful interpretation. The agency's policy prohibits her from adjusting status, depriving her of the benefits that accompany lawful permanent residence, including employment authorization. *Id.* ¶ 13. Notably, Ms. Velasco is not even eligible for a waiver of the unlawful presence bar under 8 U.S.C. § 1182(a)(9)(B)(v). *Id.* ¶ 12. In addition, without the security of LPR status, Ms. Velasco may face removal and separation from her family, including her U.S. citizen children. *Id.* ¶ 13.

2. Plaintiffs Elena Gonzalez Tavira and Carlos Gonzalez Martinez

Plaintiff Elena Gonzalez Tavira (Ms. Gonzalez) and Carlos Gonzalez Martinez (Mr. Gonzalez) are married noncitizens from Mexico. E. Gonzalez Decl. ¶ 2, C. Gonzalez Decl. ¶ 2; *see also* Dkt. 1 ¶ 45. They have lived in the United States for over twenty years and have four U.S. citizen children. E. Gonzalez Decl. ¶¶ 2–3; C. Gonzalez Decl. ¶¶ 2–3.

In addition to other prior entries and exits, Mr. and Ms. Gonzalez entered the United States without inspection in 1995 and remained in the United States until December 1997. E. Gonzalez Decl. ¶ 5, C. Gonzalez Decl. ¶ 5. The couple began to accrue unlawful presence on April 1, 1997, and accrued 8 months of unlawful presence prior to their departure.[1] E. Gonzalez

[1] As detailed in the complaint, Dkt. 1 ¶ 26, the unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B)(i) became law as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Under IIRIRA, the new unlawful presence bar provisions

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Decl. ¶ 5, C. Gonzalez Decl. ¶ 5. By accruing this unlawful presence, they became subject to the three-year unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B)(i)(I) when they departed the United States in December 1997.

The Gonzalezes entered without inspection when they returned to the United States in 1999, and have lived here since that time. E. Gonzalez Decl. ¶¶ 2, 6; C. Gonzalez Decl. ¶¶ 2, 6. On February 22, 2018, nearly twenty years later and far more than three years after their last departure, Mr. and Ms. Gonzalez submitted I-485 adjustment applications to USCIS. E. Gonzalez Decl. ¶ 7, C. Gonzalez Decl. ¶ 7. At the same time, their eldest son, Juan Carlos Gonzalez, submitted an I-130 to petition for each of them as his immediate relatives. E. Gonzalez Decl. ¶ 7, C. Gonzalez Decl. ¶ 7. Although Mr. and Ms. Gonzalez entered the United States without inspection in 1999, they are eligible for adjustment of status under 8 U.S.C. § 1255(i). Pursuant to that subsection, Congress permits noncitizens who entered without inspection to adjust status if (1) they are the beneficiary of an immigrant petition that was filed before April 30, 2001 (or if they filed an application for labor certification under 8 U.S.C. § 1182(a)(5)(A) before that date) and (2) they were present in the United States on December 21, 2000, so long as they pay an additional penalty fee of $1,000.00. 8 U.S.C. § 1255(i). The Gonzalezes satisfy these requirements. E. Gonzalez Decl. ¶ 7, C. Gonzalez Decl. ¶ 7.

On June 13, 2019, USCIS issued an RFE for both Mr. and Ms. Gonzalez's adjustment of status applications, stating that they were subject to the three-year unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B)(i)(I). E. Gonzalez Decl. ¶ 8, C. Gonzalez Decl. ¶ 8. The Gonzalezes responded that they were not inadmissible pursuant to that subsection because three years had

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became effective on April 1, 1997. *See* Pub. L. No. 104-208, Div. C § 301(b)(3), 1101 Stat. at 3009-1, 3009-578; *see also Matter of N-J-B-*, 22 I. & N. Dec. 1057, 1059 (A.G. 1999).

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elapsed since their last departure. E. Gonzalez Decl. ¶ 8, C. Gonzalez Decl. ¶ 8. USCIS subsequently denied Mr. and Ms. Gonzalez's applications for adjustment of status on January 13, 2021. Maltese Decl. Exs. C–D; E. Gonzalez Decl. ¶ 9, C. Gonzalez Decl. ¶ 9. The sole reason for USCIS's decision was that in the agency's view, Mr. and Ms. Gonzalez remained inadmissible under 8 U.S.C. § 1182(a)(9)(B)(i)(I) because three years did not elapse between their departure in 1997 and their return to the United States in 1999. Maltese Decl. Exs. C–D.

Following the denial, on March 12, 2021, the Gonzalezes submitted a motion to reopen or reconsider on Form I-290B, Notice of Appeal or Motion. *See* E. Gonzalez Decl. ¶ 10, C. Gonzalez Decl. ¶ 10. Mr. and Ms. Gonzalez again argued that they were not subject to the unlawful presence bar of 8 U.S.C. § 1182(a)(9)(B)(i)(I) because more than two decades had passed since their last departure. USCIS denied the motion. Maltese Decl. Exs. E–F; E. Gonzalez Decl. ¶ 11, C. Gonzalez Decl. ¶ 11. Like Ms. Velasco, the Gonzalezes are not eligible for a waiver of the unlawful presence bar under 8 U.S.C. § 1182(a)(9)(B)(v). E. Gonzalez Decl. ¶ 12, C. Gonzalez Decl. ¶ 12.

Mr. and Ms. Gonzalez face significant harm because of USCIS's unlawful interpretation. The agency's policy prohibits them from adjusting status, depriving them of the benefits that accompany lawful permanent residence, including employment authorization. E. Gonzalez Decl. ¶ 13, C. Gonzalez Decl. ¶ 13. In fact, USCIS's denial terminated the Gonzalezes' employment authorization, causing them to lose their jobs. E. Gonzalez Decl. ¶¶ 13–14, C. Gonzalez Decl. ¶ 13–14. In addition, without the security of LPR status, the Gonzalezes may face removal and separation from their family, including their U.S. citizen children. E. Gonzalez Decl. ¶ 13, C. Gonzalez Decl. ¶ 13.

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3. Plaintiff Manuel Alvarez Garcia

Plaintiff Manuel Alvarez Garcia is a noncitizen from Mexico. Alvarez Decl. ¶ 2. He has lived in the United States for nearly twenty years and has five children, three of whom are U.S. citizens and one of whom is an LPR. *Id.* ¶ 3. Mr. Garcia entered the United States in December 1998 on a B-2 visitor visa. *Id.* ¶ 4. He departed again a year later, in December 1999. *Id.* He reentered later that month, staying until sometime in 2000. *Id.* Mr. Garcia then reentered the United States later in 2000 and departed in 2003. *Id.* His last entry to the United States was in July 2003 pursuant to his B-2 visitor visa. *Id.* ¶ 6. He has lived in the United States since then. *Id.* ¶¶ 2, 7.

Because Mr. Garcia stayed in the United States past the periods of stay authorized by his visa, he accrued more than one year of unlawful presence. He therefore became subject to the ten-year unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B)(i)(II) when he departed the United States in 2003.

On October 11, 2019, long after the passage of ten years since his last departure, Mr. Garcia filed an application to adjust status under 8 U.S.C. § 1255(a). *Id.* ¶ 7. Along with the application, his U.S. citizen son and member of the U.S. Army, Manuel Eduardo Alvarez Villalpando (Mr. Alvarez), filed Form I-130. *Id.* That form listed Mr. Garcia as the beneficiary. *Id.*

USCIS approved the Form I-130 on March 31, 2021. *Id.* ¶ 8. Because Mr. Garcia is an immediate relative of his son under the INA and because he is present pursuant to a lawful admission, he is eligible to adjust his status immediately. *See* 8 U.S.C. §§ 1255(a), 1151(b)(2)(A)(i). Around the same time, on March 24, 2021, USCIS interviewed Mr. Garcia about his adjustment of status application. Alvarez Decl. ¶ 9.

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Months later, on July 9, 2021, USCIS issued Mr. Garcia an RFE, stating that Mr. Garcia appeared to be subject to the ten-year unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B)(i)(II). Maltese Decl. Ex. G; Alvarez Decl. ¶ 9. Mr. Garcia timely responded to the RFE, explaining that he was no longer subject to the unlawful presence bar because ten years had elapsed since he became subject to it. Alvarez Decl. ¶ 9. The RFE did not indicate any other grounds for possible denial or reasons for concern regarding Mr. Garcia's adjustment application. Maltese Decl. Ex. G. Mr. Garcia's application to adjust status now remains pending, Alvarez Decl. ¶ 10, and will be denied based on USCIS's erroneous legal interpretation of the unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B).

Just like the other Named Plaintiffs, Mr. Garcia faces significant harm because of USCIS's unlawful interpretation. He is not eligible for a waiver of the inadmissibility ground, *id.* ¶ 11, and the agency's policy therefore prohibits him from adjusting status, depriving him of the benefits that accompany lawful permanent resident status, including employment authorization. In addition, without the security of lawful permanent resident status, Mr. Garcia may face removal and separation from his family, including his U.S. citizen children. *Id.* ¶ 12.

4. Plaintiff Aleciana Costa Soares

Plaintiff Aleciana Costa Soares (Ms. Costa) is a noncitizen from Brazil. Costa Decl. ¶ 2. She has lived in the United States since 2018 and is married to her LPR husband. *Id.* ¶¶ 2, 14. She has four children, three of whom are U.S. citizens. *Id.* ¶ 3.

Ms. Costa entered the United States on a B-2 visitor visa on August 3, 2001. *Id.* ¶ 4. She departed the United States in December of 2003 and reentered the United States on a B-2 visitor visa in February of 2004. *Id.* In 2007, Ms. Costa's stepson filed an I-130 on her behalf. *Id.* ¶ 5. That I-130 was approved on June 4, 2007. *Id.* Ms. Costa also filed an application for adjustment

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of status and a waiver of inadmissibility, but those applications were denied. *Id.* She left the United States again in December of 2009. *Id.* ¶ 6. Because Ms. Costa stayed in the United States past the periods of stay authorized by her visa, she accrued more than one year of unlawful presence. She therefore became subject to the ten-year unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B)(i)(II) when she last departed the United States in 2009.

On September 8, 2010, while Ms. Costa was outside of the United States, she was ordered removed in absentia by an Immigration Judge (IJ). *See id.* ¶ 8. On April 30, 2018, Ms. Costa reentered the United States on B-2 visitor visa. *Id.* ¶ 9. Prior to reentering, she applied for and was granted consent to reapply for admission pursuant to 8 U.S.C. § 1182(a)(9)(A)(iii). *Id.* Ms. Costa has remained in the United States since her reentry in 2018.

Following her most recent entry in 2018, Ms. Costa again applied to adjust status. *Id.* ¶ 10. To do so, she first requested reopening of her removal proceedings. *Id.* The IJ reopened the proceedings, and on August 16, 2021, granted a motion to terminate the removal proceedings. *Id.* This allowed Ms. Costa to seek adjustment of status before USCIS. *Id.* Then, on September 10, 2021, Ms. Costa submitted her application to adjust status to USCIS. *Id.* ¶ 11. That application was based on the Form I-130 that had previously been approved in 2007. Because Ms. Costa is an immediate relative of her son under the INA and because she was present pursuant to a lawful admission, she was eligible to adjust her status immediately under § 1255(a). *See* 8 U.S.C. §§ 1255(a), 1151(b)(2)(A)(i).

On March 14, 2022, USCIS issued an RFE regarding Ms. Costa's application. Maltese Decl. Ex. H; Costa Decl. ¶ 12. In the RFE, the agency stated that she appears to be subject to the ten-year unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B)(i)(II) and is therefore inadmissible to the United States. Maltese Decl. Ex. H; Costa Decl. ¶ 12. The agency instructed Ms. Costa to file

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Form I-601, Application for Waiver of Grounds of Inadmissibility. Maltese Decl. Ex. H; Costa Decl. ¶ 13. The filing fee for Form I-601 is $930. Costa Decl. ¶ 13.

Ms. Costa faces significant harm because of USCIS's unlawful interpretation. Because of the agency's policy, she must file Form I-601 and pay an additional, $930 filing fee. *Id.* ¶ 13. In addition, the discretionary waiver is granted only if Ms. Costa is able to demonstrate that refusing her admission "would result in extreme hardship to [her] citizen or lawfully resident spouse or parent." 8 U.S.C. § 1182(a)(9)(B)(v). Alternatively, if Ms. Costa decided to assert her statutory rights and insist that no waiver is required, USCIS would deny her application and she would face potential removal proceedings and separation from her family. Costa Decl. ¶ 14. Moreover, without LPR status, Ms. Costa is unable to travel and see her father, who is aging and has experienced significant health issues in recent years. *Id.* Finally, obtaining LPR status would guarantee Ms. Costa work authorization, empowering her to better support her family's struggling financial situation. *Id.* ¶¶ 13–14.

III. ARGUMENT

Plaintiffs seek certification of the following class:

> All individuals who (1) have submitted or will submit applications for adjustment of status, (2) have been found or will be found by the agency to be inadmissible pursuant to USCIS's policy and practice that requires the applicant to maintain lawful presence in the United States or remain outside the United States for the duration of the three- or ten-year unlawful presence bar periods at 8 U.S.C. § 1182(a)(9)(B)(i), even though the applicable period of three or ten years has passed since their last departure, and (3) were or will be otherwise eligible to adjust status.

Under Federal Rule of Civil Procedure 23, Plaintiffs are entitled to class certification where two conditions are met: "The suit must satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b)." *Shady Grove Orthopedic Assocs., P.A.*

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v. Allstate Ins. Co., 559 U.S. 393, 398 (2010). Plaintiffs' proposed class satisfies Rule 23(a) and (b)(2).

Courts in the Ninth Circuit, including this Court, have routinely certified class actions challenging immigration policies and practices that have broad, categorical effect. *See, e.g.*, *Moreno Galvez v. Cuccinelli*, No. C19-0321RSL, 2019 WL 3219418, at *2 (W.D. Wash. Jul. 17, 2019) (certifying class of "[a]ll individuals who have been issued predicate Special Immigrant Juvenile Status ("SIJS") orders by Washington state courts after turning eighteen years old but prior to turning twenty-one years old and have submitted or will submit SIJS petitions to [USCIS] prior to turning twenty-one years old"); *J.L. v. Cissna*, No. 18-cv-04914-NC, 2019 WL 415579, at *12 (N.D. Cal. Feb. 1, 2019) (certifying class of "[c]hildren who have received or will receive guardianship orders pursuant to California Probate Code § 1510.1(a) and who have received or will receive denials of their SIJ status petitions on the grounds that the state court that issued the SIJ Findings lacked jurisdiction because the court did not have the authority to reunify the children with their parents"); *Rosario v. U.S. Citizenship and Immigr. Servs.*, No. C15-0813JLR, 2017 WL 3034447, at *12 (W.D. Wash. July 18, 2017) (granting nationwide certification to class of initial asylum applicants challenging the government's adjudication of employment authorization applications); *Wagafe v. Trump*, No. C17-0094-RAJ, 2017 WL 2671254, at *16 (W.D. Wash. June 21, 2017) (certifying two nationwide classes of immigrants challenging legality of a government program applied to certain immigration benefits applications); *Mendez Rojas v. Johnson*, No. C16-1024RSM, 2017 WL 1397749, at *7 (W.D. Wash. Jan. 10, 2017) (certifying two nationwide classes of asylum seekers challenging defective asylum application procedures); *Rivera v. Holder*, 307 F.R.D. 539, 551 (W.D. Wash. 2015) (certifying class of detained immigrants in the Western District of Washington challenging

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custody proceedings that categorically deny requests for conditional parole); *Khoury v. Asher*, 3 F. Supp. 3d 877, 890 (W.D. Wash. 2014) (certifying class of detained immigrants in the Western District of Washington challenging failure to provide custody hearings); *A.B.T. v. U.S. Citizenship and Immigr. Servs.*, No. C11-2108 RAJ, 2013 WL 5913323, at *2 (W.D. Wash. Nov. 4, 2013) (certifying nationwide class and approving a settlement amending government practices that precluded asylum applicants from receiving employment authorization); *Santillan v. Ashcroft*, No. C04-2686, 2004 WL 2297990, at *12 (N.D. Cal. Oct. 12, 2004) (certifying nationwide class of LPRs challenging delays in receiving documentation of their status).

These cases demonstrate the propriety of Rule 23(b)(2) certification in actions challenging immigration policies. Indeed, the rule was intended to "facilitate the bringing of class actions in the civil-rights area," particularly those seeking declaratory or injunctive relief. Charles Alan Wright & Arthur R. Miller, 7AA *Federal Practice and Procedure* § 1775 (3d ed. 2008). Claims brought under Rule 23(b)(2) often involve issues affecting noncitizens who would not have the ability to present their claims absent class treatment. Additionally, the core issues in these type of cases generally present pure questions of law, rather than disparate questions of fact, and thus are well suited for resolution on a class-wide basis.

A. The Proposed Class Meets All Requirements of Federal Rule of Civil Procedure 23(a).

1. <u>The proposed class members are so numerous that joinder is impracticable.</u>

Rule 23(a)(1) requires the class be "so numerous that joinder of all members is impracticable." "[I]mpracticability does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). "Numerousness—the presence of many class members—provides an obvious situation in which joinder may be impracticable, but it is not the only such

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situation . . . .” William B. Rubenstein, 1 *Newberg on Class Actions* § 3:11 (5th ed. 2018) (internal footnote omitted). “Thus, Rule 23(a)(1) is an impracticability of joinder rule, not a strict numerosity rule. It is based on considerations of due process, judicial economy, and the ability of claimants to institute suits.” *Id.* (internal footnote omitted). Determining numerosity therefore “requires examination of the specific facts of each case and imposes no absolute limitations.” *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980).

While “no fixed number of class members” is required, *Perez-Funez v. INS*, 611 F. Supp. 990, 995 (C.D. Cal. 1984), courts have generally found “the numerosity requirement satisfied when a class includes at least 40 members,” *Rannis v. Recchia*, 380 F. App’x 646, 651 (9th Cir. 2010); *see also Rivera*, 307 F.R.D. at 550 (certifying class where the “the Court [found] it highly plausible that more than 40 [noncitizens] will be detained on this basis over the next year, and that more than 40 [noncitizens] are being detained on this basis currently”); *Hum v. Dericks*, 162 F.R.D. 628, 634 (D. Haw. 1995) (“There is no magic number for determining when too many parties make joinder impracticable. Courts have certified classes with as few as thirteen members, and have denied certification of classes with over three hundred members.”). Courts have also found impracticability of joinder when even fewer class members are involved. *See, e.g.*, *McCluskey v. Trustees of Red Dot Corp. Emp. Stock Ownership Plan and Trust*, 268 F.R.D. 670, 674-76 (W.D. Wash. 2010) (certifying class with 27 known members); *Arkansas Educ. Ass’n v. Bd. of Educ.*, 446 F.2d 763, 765-66 (8th Cir. 1971) (finding 17 class members sufficient); *Villalpando v. Exel Direct Inc.*, 303 F.R.D. 588, 605-06 (N.D. Cal. 2014) (noting that courts routinely find numerosity “when the class comprises 40 or more members”).

Here, Plaintiffs estimate that there are likely hundreds of class members nationwide. Through declarations from nine private practitioners, Plaintiffs have identified at least forty-four

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other proposed class members, but believe these are but a portion of the total class, given the commonplace nature of Plaintiffs' factual claims. Anderson Decl. ¶¶ 3, 8; Heflin Decl. ¶¶ 3, 8–9; Hernandez Decl. ¶¶ 3–4; Jones Decl. ¶ 3; Klein Decl. ¶ 3; Nelson Decl. ¶ 3; Rich Decl. ¶ 3; Scheuerlein Decl. ¶ 3; Stratton Decl. ¶ 3. Consequently, Plaintiffs have identified a sufficient number of proposed class members to demonstrate the class is so numerous joinder is impracticable. Fed. R. Civ. P. 23(a)(1).

Joinder is also impracticable because of the existence of unnamed, unknown future class members who will be subjected to Defendants' extra-statutory eligibility requirement for adjustment of status applicants. *See Ali v. Ashcroft*, 213 F.R.D. 390, 408–09 (W.D. Wash. 2003) ("[W]here the class includes unnamed, unknown future members, joinder of such unknown individuals is impracticable and the numerosity requirement is therefore met, regardless of class size." (citations and internal quotation marks omitted)); *Rivera*, 307 F.R.D. at 550 (finding joinder impractical due, in part, to "the inclusion of future class members"); *Hawker v. Consovoy*, 198 F.R.D. 619, 625 (D.N.J. 2001) ("The joinder of potential future class members who share a common characteristic, but whose identity cannot be determined yet is considered impracticable."). Here, joinder is impracticable for the same reason, as the proposed class includes applicants who "have submitted *or will submit* applications for adjustment of status." *Supra* p. 13 (emphasis added).

In addition to class size and future class members, there are several other factors that demonstrate impracticability of joinder in the present case, such as judicial economy, geographic dispersion of class members, financial resources of class members, and the ability of class members to bring individual suits. *See* Rubenstein, *supra*, § 3:12; *see also, e.g.*, *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1327 (W.D. Wash. 2015) (finding joinder impracticable where

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proposed class members were, inter alia, "spread across the state" and "low-income Medicaid recipients"). Here, the proposed class members are dispersed nationwide, and as undocumented immigrants, many lack work authorization and thus, a stable source of income, rendering it difficult for them to afford the costs associated with litigation.

Finally, "[b]ecause plaintiffs seek injunctive and declaratory relief, the numerosity requirement is relaxed and plaintiffs may rely on [ ] reasonable inference[s] arising from plaintiffs' other evidence that the number of unknown and future members of [the] proposed subclass . . . is sufficient to make joinder impracticable." *Arnott v. U.S. Citizenship and Immigr. Servs.*, 290 F.R.D. 579, 586 (C.D. Cal. 2012) (second, third, fourth, and fifth alterations in original) (quoting *Sueoka v. United States*, 101 F. App'x 649, 653 (9th Cir. 2004)). As a result, even if numerosity were a close question here (which it is not), the court should certify the class. *Stewart v. Assocs. Consumer Discount Co.*, 183 F.R.D. 189, 194 (E.D. Pa. 1998) ("[W]here the numerosity question is a close one, the trial court should find that numerosity exists, since the court has the option to decertify the class later pursuant to Rule 23(c)(1).").

2. The class presents common questions of law and fact.

Rule 23(a)(2) requires that "there [be] questions of law or fact common to the class." One issue of law or fact common among class members, standing alone, is enough to satisfy this criterion. *See, e.g.*, *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 257 (C.D. Cal. 2008) ("Courts have found that a single common issue of law or fact is sufficient to satisfy the commonality requirement."); *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) ("[T]he commonality requirement asks us to look only for some shared legal issue or a common core of facts."). Commonality exists if class members' claims all "depend upon a common contention . . . of such a nature that it is capable of class-wide resolution—which means that determination of its truth

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or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. Therefore, the critical issue for class certification "is not the raising of common 'questions' . . . but, rather the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (citation omitted).

That putative class members may have different circumstances or other issues related to their individual adjustment applications does not defeat the commonality among them. Instead, Plaintiffs challenge a policy that applies equally to all class members, thus satisfying the commonality requirement, notwithstanding those differences. *See, e.g.*, *Moreno Galvez*, 2019 WL 3219418, at *2 (stating that class of immigrant youth satisfied commonality where the case presented questions of "[w]hether the [challenged] policy is in accordance with federal law" and "[w]hether the policy is arbitrary and capricious"); *J.L.*, 2019 WL 415579, at *9 (finding commonality where a "single common question—whether Defendants' new requirement is lawful—is 'central to the validity'" of class members' claims (citation omitted)); *Nw. Immigrant Rights Project v. U.S. Citizenship and Immigr. Servs.*, 325 F.R.D. 671, 693 (W.D. Wash. 2016) ("[A]ll questions of fact and law need not be common to satisfy the rule." (citation omitted)); *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012) ("Where the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." (citation omitted)); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D. Cal. 1982) (granting certification in challenge to common government practices in asylum cases, even though the outcome of individual asylum cases would depend on individual class members' varying entitlement to relief); *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (finding commonality based on plaintiffs' common challenge to INS procedures, and noting that "[d]ifferences among the class members with respect to the

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merits of their actual document fraud cases . . . are simply insufficient to defeat the propriety of class certification"). In sum, because Plaintiffs and proposed class members challenge USCIS's policy and practice, "[t]he fact that the adjudication of each individual [adjustment of status application] may require individualized factual and legal inquiries is simply irrelevant" to the issue of commonality. *J.L.*, 2019 WL 415579, at *9.

The commonality standard is even more liberal in a civil rights suit such as this one, which "challenges a system-wide practice or policy that affects all of the putative class members." *Gonzalez v. U.S. Immigr. & Customs Enf't*, 975 F.3d 788, 808 (9th Cir. 2020) (citation omitted). Moreover, "class suits for injunctive or declaratory relief" like this case, "by their very nature often present common questions satisfying Rule 23(a)(2)." Wright & Miller, *supra*, § 1763.

Here, Plaintiffs and proposed class members challenge a system-wide policy and practice. By definition, they have all applied or will apply for adjustment of status, and are otherwise eligible to adjust, but for Defendants' policy and practice. USCIS has denied, or will deny, class members' adjustment applications based on its policy and practice of imposing an extra-statutory requirement to § 1182(a)(9)(B), obligating Plaintiffs to wait outside the United States for the three- or ten-year period of inadmissibility, or otherwise be in lawful status within the country. Consequently, Plaintiffs and proposed class members all share the legal claim that this USCIS policy and practice violates the INA and APA.

Furthermore, Plaintiffs and proposed class members suffer the same injury. All have suffered or will continue to suffer from USCIS's denial or impending denial of their adjustment applications. Such injuries are capable of class-wide resolution through declaratory relief declaring Defendants' policy unlawful under the INA and APA, and injunctive relief enjoining

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Defendants from applying their erroneous interpretation of § 1182(a)(9)(B) in adjudicating adjustment applications. As the relief sought by Plaintiffs will resolve the litigation as to all class members "in one stroke," *Wal-Mart*, 564 U.S. at 350, the commonality requirement of Rule 23(a)(2) is satisfied.

3. Plaintiffs' claims are typical of the claims of the members of the proposed class.

Rule 23(a)(3) specifies that the claims of the representatives must be "typical of the claims . . . of the class." Meeting this requirement usually follows from the presence of common questions of law. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge."). To establish typicality, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* at 156 (citation and internal quotation marks omitted); *see also Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (finding typicality requirement met where class representatives "allege the same or similar injury as the rest of the putative class; they allege that this injury is a result of a course of conduct that is not unique to any of them; and they allege that the injury follows from the course of conduct at the center of the class claims" (internal quotation marks and alterations omitted)). As with commonality, factual differences among class members do not defeat typicality provided there are legal questions common to all class members. *LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) ("The minor differences in the manner in which the representative's Fourth Amendment rights were violated does not render their claims atypical of those of the class." (internal footnote omitted)).

In this case, the claims of the named Plaintiffs are typical of the claims of the proposed class. Plaintiffs suffer from the same injury in fact as proposed class members: the denials or impending denials of their adjustment applications based on the same, erroneous legal basis.

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Specifically, Plaintiffs, like proposed class members, have been denied or will be denied based on USCIS's policy imposing an extra-statutory requirement to § 1182(a)(9)(B)'s periods of inadmissibility. In sum, the harms suffered by Plaintiffs are typical of the harms suffered by the proposed class, and Plaintiffs' injuries and the injuries of proposed class members result from the identical course of conduct by Defendants. Plaintiffs therefore satisfy the typicality requirement.

4. Plaintiffs will adequately protect the interests of the proposed class, and counsel are qualified to litigate this action.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "Whether the class representatives satisfy the adequacy requirement depends on 'the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.'" *Walters*, 145 F.3d at 1046 (citations omitted).

a. Named Plaintiffs

Plaintiffs are motivated to pursue this action on behalf of others like them who, based on the government's unlawful policy, have been or will be wrongfully denied adjustment of status. The Plaintiffs are therefore potentially subject to forcible separation from their families, and homes. The denials or impending denials of their applications will also deprive them of employment authorization, which is critical to maintain a stable livelihood. Velasco Decl. ¶¶ 14–15; C. Gonzalez Decl. ¶¶ 13–14; E. Gonzalez ¶¶ 13–14; Alvarez Decl. ¶ 12; Costa Decl. ¶ 14–15. Other class members face the same potential harms. Plaintiffs will also fairly and adequately protect the interests of the proposed class because they share the same interests and seek the same justice for all putative class members: declaratory and injunctive relief that stops Defendants from unlawfully denying their adjustment of status applications based on USCIS's erroneous interpretation of § 1182(a)(9)(B)'s requirements. Finally, Plaintiffs do not seek money

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damages for themselves. As a result, there is no potential conflict between the interests of any of the Plaintiffs and members of the proposed class. Accordingly, Plaintiffs are adequate representatives of the proposed class.

b. Counsel

The adequacy of Plaintiffs' counsel is also satisfied here. Counsel are deemed qualified when they have experience in previous class actions and cases involving the same area of law. *See, e.g.*, *Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984); *Marcus v. Heckler*, 620 F. Supp. 1218, 1223–24 (N.D. Ill. 1985); Rubenstein, *supra*, § 3:72 ("The fact that proposed counsel has been found adequate in other class actions is persuasive evidence that the attorney will be adequate in the present action."). Plaintiffs are represented by attorneys from the Northwest Immigrant Rights Project, who have extensive experience in class action lawsuits and other complex federal court litigation involving immigration law, including challenges to USCIS policies in adjudicating immigration benefits. *See* Adams Decl. ¶¶ 3–4, 6–8. Counsel is able to demonstrate that they are counsel of record in numerous cases focusing on immigration law, in which they vigorously represented both the class representatives and absent class members in obtaining relief.

B. The Proposed Class Satisfies Federal Rule of Civil Procedure 23(b)(2).

In addition to satisfying the four requirements of Rule 23(a), Plaintiffs also must meet one of the requirements of Rule 23(b) for a class action to be certified. Here, Plaintiffs seek certification under Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Rule 23(b)(2) is "unquestionably satisfied when members of a putative class seek uniform injunctive or

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declaratory relief from policies or practices that are generally applicable to the class as a whole." *Parsons*, 754 F.3d at 688; *see also Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001) ("Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive."). "The rule does not require [the court] to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez*, 591 F.3d at 1125; *see also id.* at 1126 (certifying class of detained noncitizens under Rule 23(b)(2) because "all class members[] seek the exact same relief as a matter of statutory . . . right").

This action meets the requirements of Rule 23(b)(2). USCIS has subjected or will subject all class members to unlawful denials of their adjustment of status applications based on the same erroneous policy. Plaintiffs and proposed class members seek declaratory and injunctive relief enjoining USCIS from applying its unlawful policy and practice that requires Plaintiffs to have waited for the applicable period of inadmissibility to lapse while outside the United States or while in the United States in lawful status. Therefore, the declaratory and injunctive relief sought by Plaintiffs will apply to the proposed class as a whole.

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court certify the proposed class, appoint Plaintiffs as class representatives, and appoint the undersigned attorneys from the Northwest Immigrant Rights Project as class counsel.

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DATED this 14th day of April, 2022.

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s/ Leila Kang
Leila Kang, WSBA No. 48048

s/ Aaron Korthuis
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