UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Miriam VELASCO DE GOMEZ, Elena GONZALEZ TAVIRA, Carlos GONZALEZ MARTINEZ, Aleciana COSTA SOARES, Manuel ALVAREZ GARCIA, on behalf of themselves as individuals and on behalf of others similarly situated,

Plaintiffs,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, Ur JADDOU, Director, U.S. Citizenship and Immigration Services, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Alejandro MAYORKAS, Secretary, U.S. Department of Homeland Security,

Defendants.

Case No. 2:22-cv-368

CLASS ACTION COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

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INTRODUCTION

1. This lawsuit challenges the United States Citizenship and Immigration Services' (USCIS) nationwide policy of denying applications for adjustment of status based on an erroneous interpretation of the "unlawful presence bar" at 8 U.S.C. § 1182(a)(9)(B)(i). Plaintiffs Miriam Velasco de Gomez, Elena Gonzalez Tavira, Carlos Gonzalez Martinez, Aleciana Costa Soares, and Manuel Alvarez Garcia are noncitizens who, like hundreds of other noncitizens, are eligible to adjust their status and become lawful permanent residents of the United States, but for USCIS's unlawful interpretation.

2. Under the Immigration and Nationality Act (INA), a noncitizen who departs or is removed from the United States following a certain period of unlawful presence is rendered inadmissible for three or ten years—and therefore cannot apply to adjust status absent a waiver. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(I), (II). Plaintiffs are individuals who were subject to this unlawful presence bar but who have since waited the three or ten years required to no longer be inadmissible.

3. However, Defendants assert that a noncitizen will only satisfy the three- or ten-year period of inadmissibility if that noncitizen either waits the entire period outside the United States or the noncitizen continuously maintains a lawful status in the United States during the relevant period.

4. USCIS's restrictive interpretation of the INA defies the statute's plain language. Nowhere does the statute require that a noncitizen must wait three or ten years outside of the country, or else continuously maintain lawful status while inside the United States for that period of time. While other, related inadmissibility provisions *do* require that an individual wait outside the United States or else maintain continuous lawful status, the statutory provision at issue in this

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case pointedly does *not* do so.

5. Indeed, USCIS has previously interpreted the statute to recognize that the passage of time alone, whether inside or outside the United States, satisfies the inadmissibility period. Nonetheless, USCIS now asserts that any time an individual subject to the unlawful presence bar spends inside the United States and after their lawful status has expired will not count toward the three- or ten-year bar.

6. There is no statutory language supporting USCIS's restrictive interpretation that time ceases to count toward the period of inadmissibility if the person is in the United States without lawful status. Notably, the Board of Immigration Appeals (BIA) recognizes this fact and has correctly concluded that a noncitizen may reside in the United States while waiting out the penalty imposed by the three- and ten-year bars. The BIA has reached this conclusion even for individuals who have spent their time waiting for the unlawful presence bar to expire while unlawfully present in the United States.

7. Despite the absence of statutory language requiring that Plaintiffs wait outside the United States or maintain continuous lawful status to satisfy the three or ten-year period, USCIS has determined that Plaintiffs are inadmissible and has either (1) denied or will deny Plaintiffs' applications, or (2) required waivers to the ground of inadmissibility. Those determinations violate the plain language of the INA, are not in accordance with law, and are arbitrary and capricious.

8. Accordingly, Plaintiffs, on behalf of themselves and the class that they seek to represent, ask that the Court exercise its jurisdiction, declare USCIS's policy unlawful, enjoin the agency from applying its policy prospectively, and order the agency to reopen and re-adjudicate the class members' applications that have been denied on this basis.

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JURISDICTION AND VENUE

9. This case arises under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, the regulations implementing the INA, and the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq*.

10. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, as a civil action arising under the laws of the United States. The Court may grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202 and 5 U.S.C. § 702.

11. Venue is proper in the Western District of Washington pursuant to 28 U.S.C. § 1391(e) (general venue) because this is a civil action in which Defendant is an agency of the United States, at least one of the named Plaintiffs reside in the judicial district, and there is no real property involved in this action. In addition, some of the administrative decisions denying Plaintiffs' applications for adjustment of status were issued by the Seattle Office of USCIS, which is located within this district.

PARTIES

12. Plaintiff Miriam Velasco de Gomez is an applicant for lawful permanent residence based on an approved Form I-130 immigrant petition filed by her U.S. citizen son. She is a citizen of Mexico and resides in Mountlake Terrace, Washington. USCIS has denied her application for adjustment of status based solely on the agency's erroneous unlawful presence bar policy.

13. Plaintiff Elena Gonzalez Tavira is an applicant for lawful permanent residence based on an approved Form I-130 immigrant petition filed by her U.S. citizen son. She is a citizen of Mexico and she is married to Plaintiff Carlos Gonzalez Martinez. She resides in Lynden, Washington. USCIS has denied her application for adjustment of status based solely on

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the agency's erroneous unlawful presence bar policy.

14. Plaintiff Carlos Gonzalez Martinez is an applicant for lawful permanent residence based on an approved Form I-130 immigrant petition filed by his U.S. citizen son. He is a citizen of Mexico and is married to Plaintiff Elena Gonzalez Tavira. He resides in Lynden, Washington. USCIS has denied his application for adjustment of status based solely on the agency's erroneous unlawful presence bar policy.

15. Plaintiff Aleciana Costa Soares is an applicant for lawful permanent resident residence based on an approved Form I-130 immigrant petition filed by her U.S. citizen son. She is a citizen of Brazil and resides in Round Rock, Texas. She was issued a notice advising that her that she is inadmissible based on the agency's erroneous unlawful presence bar policy, and that she must file a waiver on Form I-601, with the corresponding $930 filing fee, to determine whether the agency will grant a discretionary waiver.

16. Plaintiff Manuel Alvarez Garcia is an applicant for lawful permanent resident status based on an approved Form I-130 immigrant petition filed by his U.S. citizen son. He is a citizen of Mexico and resides in Moses Lake, Washington. His application for adjustment of status remains pending and will be denied based solely on the agency's erroneous unlawful presence bar policy.

17. Defendant U.S. Citizenship and Immigration Services (USCIS) is a component of the U.S. Department of Homeland Security, 6 U.S.C. § 271(a)(1), and an "agency" within the meaning of the APA, 5 U.S.C. § 551(1). USCIS is the agency responsible for implementing many provisions of the INA, and in particular, 8 U.S.C. § 1255, the provisions under which noncitizens present in the United States may adjust to lawful permanent resident status.

18. Defendant Ur Jaddou is the Director of USCIS. Ms. Jaddou is responsible for

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processing and determining applications for adjustment of status in accordance with the laws and lawfully promulgated regulations of the United States. She is sued in her official capacity.

19. Defendant Alejandro Mayorkas is the Secretary of the U.S. Department of Homeland Security. He is ultimately responsible for administering U.S. immigration and naturalization laws and regulations, including the laws and regulations governing the adjustment of status process. He is sued in his official capacity.

20. Defendant U.S. Department of Homeland Security (DHS) is an executive agency of the United States and an "agency" within the meaning of the APA. 5 U.S.C. § 551(1). DHS is the federal parent agency of USCIS and the agency that is ultimately responsible for the administration and enforcement of the country's immigration laws.

LEGAL BACKGROUND

21. This case concerns Plaintiffs' applications for adjustment of status to become lawful permanent residents (LPR). As detailed below, Defendants erroneously claim that Plaintiffs are inadmissible based on prior unlawful presence in the United States, and thus either do not qualify for adjustment of status or must apply for a waiver of the ground of inadmissibility.

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

23. Among other requirements, an applicant for adjustment of status must be admissible to the United States. *See* 8 U.S.C. § 1255(a), (i).

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24. The INA lists the applicable grounds of inadmissibility at 8 U.S.C. § 1182. Relevant here are the unlawful presence bars under § 1182(a)(9)(B)(i), which render a noncitizen temporarily inadmissible based on (1) prior unlawful presence in the United States and (2) a subsequent departure or removal from the country.

25. Unlawful presence in the United States generally occurs in one of two ways. First, a noncitizen can enter the United States without permission and remain in the country without lawful status. 8 U.S.C. § 1182(a)(9)(B)(ii). Second, a noncitizen can be inspected and admitted at the border, but then overstay a period of authorized stay. *Id.*

26. 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 is triggered when a noncitizen has been unlawfully present in the United States "more than 180 days but less than 1 year" and subsequently departs the United States. *Id.* § 1182(a)(9)(B)(i)(I). By contrast, the ten-year bar applies when a noncitizen has been unlawfully present "one year or more" and subsequently departs the United States. *Id.* § 1182(a)(9)(B)(i)(II). Congress created the three- and ten-year bars as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Pub. L. No. 104-208, Div. C § 301(b), 1101 Stat. 3009-1, 3009-575–78. This new unlawful presence bar was prospective in application and became effective on April 1, 1997. *See id*. Div. C § 301(b)(3), 1101 Stat. at 3009-578; *see also Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 597 (9th Cir. 2002).

27. The unlawful presence bars at 8 U.S.C. § 1182(a)(9)(B)(i) also contain a limited waiver. However, that waiver is available only if the noncitizen can demonstrate that denial of the waiver would result in "extreme hardship to the citizen or lawfully resident spouse or parent of such [noncitizen]." *Id.* § 1182(a)(9)(B)(v). Because the waiver is limited to citizen or LPR

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spouses or parents of the applicants, many individuals subject to the bars at § 1182(a)(9)(B)(i) will not be eligible for a waiver, even if they could show "extreme hardship."

28. The INA does not require a noncitizen to remain outside of the United States during the three- or ten-year time period before applying again for admission after the three- or ten-year period has elapsed.

29. Just as significant, the INA does not require a noncitizen to remain in lawful status in order for the three- or ten-year period of inadmissibility to run. Rather, the statute's text demonstrates that the prior departure alone commences the three- or ten-year period of inadmissibility. *See Matter of Rodarte-Roman,* 23 I. & N. Dec. 905, 909 (BIA 2006) (holding that it is "evident that Congress made departure (rather than commencement of unlawful presence) the event that triggers inadmissibility or ineligibility for relief").

30. In contrast to the three- and ten-year bars at 8 U.S.C. § 1182(a)(9)(B)(i), similar bars to adjustment of status explicitly require that a person serving their inadmissibility period in the United States maintain lawful status. For example, under 8 U.S.C. § 1255(c)(2), an applicant who is not an immediate relative or special immigrant must "maintain continuously a lawful status since entry into the United States" to be eligible for adjustment of status.

31. That statutory restriction—and its absence from § 1182(a)(9)(B)—demonstrate that the three- and ten-year bars contain no requirement that a person inside the United States be in lawful status to satisfy their three- or ten-year period of inadmissibility. As the Supreme Court has explained, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken v. Holder,* 556 U.S. 418, 430 (2009) (alteration and citation omitted).

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32. Notably, the BIA has also agreed that 8 U.S.C. § 1182(a)(9)(B) does not require a noncitizen subject to it to remain outside the United States until the inadmissibility bar expires *or* that they remain in the United States with lawful status during the applicable period. Concluding otherwise would "transform the ground[s] of inadmissibility at section 212(a)(9)(B)[] into [] permanent ground[s] of inadmissibility," since someone unlawfully present in the United States before the expiration of the bar could never again become admissible. *Matter of Armando Cruz*, at 2 (BIA Apr. 9, 2014) (Ex. A). The BIA has reached the same conclusion in cases where the noncitizen remained in the United States unlawfully. *See id*. at 1 (noting that after the departure triggering the inadmissibility bar, the noncitizen "returned to the United States illegally . . . and never departed"); *see also Matter of Tapia Cervantes* (BIA Dec. 21, 2018) (Ex. B) (similar). Such a permanent bar would defy Congress's intent, as § 1182(a)(9)(B) provides only for "the temporary inadmissibility of [noncitizens] who have been unlawfully present in the United States for certain continuous periods." *Matter of Rodarte-Roman*, 23 I. & N. Dec. at 909.

INDIVIDUAL PLAINTIFFS' ALLEGATIONS

Miriam Velasco de Gomez

33. Plaintiff Miriam Velasco de Gomez (Ms. Velasco) is a noncitizen from Mexico. 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 lawful permanent residents of the United States. She has one other child who is a citizen of Mexico and is not an LPR.

34. Ms. Velasco entered the United States in June 1996 on a B-2 visitor visa. She remained in the United States for over three years and departed around March of 2000. As a result, she accrued more than one year of unlawful presence and became subject to the ten-year unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B)(i)(II).

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35. Ms. Velasco reentered the United States on April 8, 2000, again on a B-2 visa. She has remained in the United States since that date.

36. On July 19, 2018, Ms. Velasco filed an application for adjustment of status on Form I-485, Application to Register Permanent Residence or Adjust Status. Her son Kevin Gomez Velasco, a U.S. citizen, concurrently filed Form I-130, Petition for [Noncitizen] Relative. That form listed Ms. Velasco as the beneficiary.

37. USCIS approved the I-130 petition on March 27, 2020. 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), 1151(b)(2)(A)(i) (defining "immediate relative" and explaining that such individuals are not subject to visa limits).

38. 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). 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.

39. On January 27, 2021, USCIS denied Ms. Velasco's application for adjustment of status. 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) because ten years did not elapse between her departure in 2000 and her subsequent reentry.

40. 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. Ms. Velasco again argued that she was not subject to the unlawful presence bar

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under 8 U.S.C. § 1182(a)(9)(B)(i)(II) because more than two decades had passed since her last departure. That motion remains pending but will be dismissed under USCIS's erroneous unlawful presence policy.

41. Ms. Velasco is not eligible for a waiver of the unlawful presence bar under 8 U.S.C. § 1182(a)(9)(B)(v) as she does not have a qualifying relative for the waiver.

42. Ms. Velasco faces significant harm because of USCIS's unlawful interpretation. Because of the agency's policy, she cannot adjust status and is thus deprived of the benefits that accompany lawful permanent residence, including employment authorization. In addition, without the security of lawful permanent resident status, Ms. Velasco may face removal and separation from her family, including her U.S. citizen children.

Elena Gonzalez Tavira

43. Plaintiff Elena Gonzalez Tavira (Ms. Gonzalez) is a noncitizen from Mexico. She has lived in the United States for over twenty years and has four U.S. citizen children.

44. In addition to other entries and exits, Ms. Gonzalez entered the United States without inspection in 1995 and remained in the United States until December 1997. As noted above, IIRIRA became effective on April 1, 1997, and as a result, Ms. Gonzalez accrued 8 months of unlawful presence prior to her departure. By accruing this unlawful presence, she became subject to the three-year unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B)(i)(I) when she departed the United States in December 1997.

45. After departing the United States in 1997, Ms. Gonzalez married Plaintiff Carlos Gonzalez Martinez (Mr. Gonzalez) in Mexico in 1998. Mr. and Ms. Gonzalez returned to the United States and entered without inspection in 1999. They have lived in the United States since then.

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46. Mr. and Ms. Gonzalez are eligible for adjustment of status under 8 U.S.C. § 1255(i). Pursuant to that subsection, certain noncitizens who are unlawfully present in the United States and who entered without inspection may 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. Under 8 U.S.C. § 1255(i), the applicant must also pay a $1,000 penalty fee.

47. Mr. and Ms. Gonzalez satisfy these requirements. Mr. Gonzalez is the primary beneficiary of an immigrant petition under 8 U.S.C. § 1153(a)(4) as the sibling of a U.S. citizen, and Ms. Gonzalez is a derivative beneficiary of that petition. The visa petition was filed on April 19, 2001, prior to the deadline of April 30 of that year. Even more than twenty years later, USCIS is not yet accepting immigrant petitions under § 1153(a)(4) on behalf of Mexican noncitizens because they are subject to a country cap that significantly limits the availability of visas from Mexico. *See* 8 U.S.C. § 1151(a)(1), (c); *see also* U.S. Dep't of State, Visa Bulletin Vol. X, No. 63 (Mar. 2022).

48. On February 22, 2018, Ms. Gonzalez submitted an I-485 to USCIS. She paid the additional $1,000 penalty fee as required under 8 U.S.C. § 1255(i), because she had entered the country without inspection. At the same time, her eldest son, Carlos, submitted an I-130 to petition for Ms. Gonzalez as his immediate relative.

49. On June 13, 2019, USCIS issued an RFE, stating that Ms. Gonzalez was subject to the three-year unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B)(i)(I). Ms. Gonzalez responded that she was not inadmissible pursuant to that subsection because three years had elapsed since her last departure. USCIS subsequently issued a Notice of Intent to Deny (NOID)

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Ms. Gonzalez's adjustment application for the same reason. In response, Ms. Gonzalez again asserted she was not subject to the three-year unlawful presence bar.

50. USCIS denied Ms. Gonzalez's application for adjustment of status on January 13, 2021. The sole reason for USCIS's decision was that in the agency's view, Ms. Gonzalez remained inadmissible under 8 U.S.C. § 1182(a)(9)(B)(i)(I) because three years did not elapse between her departure in 1997 and her return to the United States in 1999.

51. Following the denial, Ms. Gonzalez submitted a motion to reopen or reconsider on Form I-290B, which USCIS received on March 12, 2021. Ms. Gonzalez again argued that she was 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 her last departure from the United States. USCIS denied the motion on August 10, 2021, reiterating its prior determination that Ms. Gonzalez remained in admissible under § 1182(a)(9)(B)(i)(I).

52. Ms. Gonzalez is not eligible for a waiver of the unlawful presence bar under 8 U.S.C. § 1182(a)(9)(B)(v), as she does not have a qualifying relative.

53. Ms. Gonzalez faces significant harm because of USCIS's unlawful interpretation. Because of the agency's policy, she cannot adjust status and is thus deprived of the benefits that accompany lawful permanent residence, including employment authorization. In addition, without the security of lawful permanent resident status, Ms. Gonzalez may face removal and separation from her family, including her U.S. citizen children.

Carlos Gonzalez Martinez

54. Plaintiff Carlos Gonzalez Martinez is a noncitizen from Mexico. He has lived in the United States for over twenty years and has four U.S. citizen children.

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55. In addition to other entries and exits, Mr. Gonzalez entered the United States without inspection in 1995 and remained in the United States until December 1997. Mr. Gonzalez accrued 8 months of unlawful presence prior to his departure during that time. By accruing this unlawful presence, he became subject to the three-year unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B)(i)(I) when he departed the United States in December 1997.

56. After departing the United States in 1997, Mr. Gonzalez married Plaintiff Elena Gonzalez Tavira in Mexico in 1998. Mr. and Ms. Gonzalez returned to the United States and entered without inspection in 1999.

57. As detailed above, Mr. Gonzalez is eligible for adjustment of status under 8 U.S.C. § 1255(i) as the beneficiary of an immigrant visa petition filed before April 30, 2001, and as someone who was present in the United States as of December 2000.

58. On February 22, 2018, Mr. Gonzalez submitted an I-485 to USCIS. He paid the additional $1,000 penalty fee as required under 8 U.S.C. § 1255(i), because he had entered the country without inspection. At the same time, his eldest son, Carlos, submitted the I-130 to petition for a visa for him as an immediate relative.

59. On June 13, 2019, USCIS issued an RFE, stating that Mr. Gonzalez was subject to the three-year unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B)(i)(I). Mr. Gonzalez responded that he was not inadmissible pursuant to that subsection because three years had elapsed since his last departure. USCIS subsequently issued a NOID, stating the agency intended to deny Mr. Gonzalez's adjustment application for the same reason. Mr. Gonzalez again asserted he was not subject to three-year unlawful presence bar.

60. USCIS denied Mr. Gonzalez's application for adjustment of status on January 13, 2021. The sole reason for USCIS's decision was that in the agency's view, Mr. Gonzalez

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remained inadmissible under 8 U.S.C. § 1182(a)(9)(B)(i)(I) because three years did not elapse between his departure in 1997 and his return to the United States in 1999.

61. Following the denial, Mr. Gonzalez submitted a motion to reopen or reconsider on Form I-290B, which USCIS received on March 12, 2021. Mr. Gonzalez again argued that he was 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 his last departure from the United States. USCIS denied the motion on August 10, 2021, reiterating its prior determination that Ms. Gonzalez remained in admissible under § 1182(a)(9)(B)(i)(I).

62. Mr. Gonzalez is not eligible for a waiver of the unlawful presence bar under 8 U.S.C. § 1182(a)(9)(B)(v), as he does not have a qualifying relative.

63. Mr. Gonzalez faces significant harm because of USCIS's unlawful interpretation. Because of the agency's policy, he cannot adjust status and is thus deprived of the benefits that accompany lawful permanent residence, including employment authorization. In addition, without the security of lawful permanent resident status, Mr. Gonzalez may face removal and separation from his family, including his U.S. citizen children.

Aleciana Costa Soares

64. Plaintiff Aleciana Costa Soares (Ms. Costa) is a noncitizen from Brazil. She has lived in the United States since 2018 and is married to her LPR husband. She has at least two U.S. citizen children and two other children.

65. Ms. Costa entered the United States on a B-2 visitor visa on August 3, 2001. She departed the United States in December of 2003 and reentered the United States on a B-2 visitor visa in February of 2004.

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66. In 2007, Ms. Costa's stepson filed an I-130 on her behalf. That I-130 was approved on June 4, 2007. Ms. Costa also filed an application for adjustment of status and a waiver of inadmissibility, but those applications were denied. She left the United States again in December of 2009.

67. 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.

68. On September 8, 2010, while Ms. Costa was outside of the United States, she was ordered removed in absentia by an Immigration Judge (IJ).

69. On April 30, 2018, Ms. Costa reentered the United States on B-2 visitor visa. 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). Ms. Costa has remained in the United States since her reentry in 2018.

70. Following her most recent entry in 2018, Ms. Costa again applied to adjust status. To do so, she first requested reopening of her removal proceedings. The IJ reopened the proceedings, and on August 16, 2021, granted a motion to terminate the removal proceedings. This allowed Ms. Costa to seek adjustment of status before USCIS.

71. On September 10, 2021, Ms. Costa submitted her application to adjust status to USCIS. 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).

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72. On March 14, 2022, USCIS issued an RFE regarding Ms. Costa's application. In the RFE, the agency stated 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.

73. The agency instructed Ms. Costa to file Form I-601, Application for Waiver of Grounds of Inadmissibility. The filing fee for Form I-601 is $930.

74. 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.

75. 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). The statute also specifies that "[n]o court shall have jurisdiction to review a decision or action by the Attorney General regarding" the discretionary waiver. *Id.* As a result, Ms. Costa suffers significant emotional stress because she does not know if she would even be granted a waiver.

76. 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.

Manuel Alvarez Garcia

77. Plaintiff Manuel Alvarez Garcia (Mr. Alvarez) is a noncitizen from Mexico. He has lived in the United States for nearly twenty years and has three U.S. citizen children. His other two children are citizens of Mexico. One of those children is also a lawful permanent resident of the United States.

78. Mr. Alvarez entered the United States in December 1998 on a B-2 visitor visa. He departed again a year later, in December 1999, and reentered later that month on the same visa.

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He then departed the United States sometime in 2000, reentered the same year, and stayed until the spring of 2003. He last entered the United States on a B-2 visitor visa in July 2003 and has lived in the United States since then.

79. Because Mr. Alvarez 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 last departed the United States in 2003.

80. On October 11, 2019, Mr. Alvarez filed an application to adjust status under 8 U.S.C. § 1255(a). Along with the application, his U.S. citizen son, Manuel Eduardo Alvarez Villalpando (Mr. Alvarez Villalpando), filed Form I-130. That form listed Mr. Alvarez as the beneficiary. Mr. Alvarez Villalpando has served as a member of the U.S. Army since 2017.

81. USCIS approved the Form I-130 on March 31, 2021. Because Mr. Alvarez 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).

82. USCIS interviewed Mr. Alvarez about his adjustment of status application on March 24, 2021. During that interview, the USCIS officer asked Mr. Alvarez a series of questions about his prior entries and exits to the United States.

83. On July 9, 2021, USCIS issued Mr. Alvarez an RFE, stating that Mr. Alvarez appeared to be subject to the ten-year unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B)(i)(II). Mr. Alvarez 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. The RFE did

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not indicate any other grounds for possible denial or reasons for concern regarding Mr. Alvarez's adjustment application.

84. Mr. Alvarez's application to adjust status remains pending. Upon information and belief, USCIS will deny his application based on its erroneous legal interpretation of the unlawful presence bar at 8 U.S.C. § 1182(a)(9)(B).

85. Mr. Alvarez is not eligible for a waiver of the unlawful presence bar under 8 U.S.C. § 1182(a)(9)(B)(v), as he does not have a qualifying relative.

86. Mr. Alvarez faces significant harm because of USCIS's unlawful interpretation. Because of the agency's policy, he cannot adjust status and is thus deprived of the benefits that accompany lawful permanent residence, including employment authorization. In addition, without the security of lawful permanent resident status, Mr. Alvarez may face removal and separation from his family, including his U.S. citizen children.

CLASS ACTION ALLEGATIONS

87. Plaintiffs bring this action on behalf of themselves and all others who are similarly situated pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(2). A class action is proper because this action involves questions of law and fact common to the classes, the class is so numerous that joinder of all members is impractical, Plaintiffs' claims are typical of the claims of the class, and Plaintiffs will fairly and adequately protect the interests of the class. Defendants have acted on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole.

88. Plaintiffs seek to represent the following class: "All individuals who (1) have submitted or will submit applications for adjustment of status to USCIS, (2) have been found or will be found by the agency to be inadmissible pursuant to USCIS's policy that requires the

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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) are otherwise eligible to adjust status."

89. The proposed class meets the numerosity requirements of Federal Rule of Civil Procedure 23(a)(1). The class is so numerous that joinder of all members is impracticable. Plaintiffs are not aware of the precise number of potential class members. Plaintiffs estimate there are hundreds of class members and that there will be many more future class members.

90. The proposed class meets the commonality requirements of Federal Rule of Civil Procedure 23(a)(2). The members of the class are all subject to the denial of their applications for adjustment of status based on USCIS's erroneous unlawful presence bar policy. The lawsuit raises questions of law common to members of the proposed class, including whether the agency's policy violates the INA and is arbitrary and capricious.

91. The proposed class meets the typicality requirements of Federal Rule of Civil Procedure 23(a)(3) because the claims of the representative Plaintiffs are typical of the class. Each of the class members has been denied or will be denied adjustment of status despite having met all the eligibility requirements. Plaintiffs and the proposed class share the same legal claims, which assert the same substantive and procedural rights under the INA and APA.

92. The proposed class meets the adequacy requirements of Federal Rule of Civil Procedure 23(a)(4). The representative Plaintiffs seek the same relief as the other members of the class—namely, an order declaring Defendants' policy unlawful, enjoining USCIS from applying the policy prospectively, and re-adjudication of their applications pursuant to a lawful interpretation of the INA. Plaintiffs will fairly and adequately protect the interests of the

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proposed class members because they seek relief on behalf of the class as a whole and have no interest antagonistic to other class members.

93. Plaintiffs are also represented by competent counsel with extensive experience in complex class actions and immigration law.

94. The proposed class also satisfies Federal Rule of Civil Procedure 23(b)(2). Defendants have acted on grounds generally applicable to the proposed class, thereby making appropriate final declaratory and injunctive relief.

CAUSE OF ACTION

Violation of the Administrative Procedure Act 5 U.S.C. § 706(2)(A) (Arbitrary and Capricious Agency Action and Agency Action Not in Accordance with Law)

95. All the foregoing allegations are repeated and realleged as though fully set forth herein.

96. USCIS's application of the unlawful presence bars at 8 U.S.C. § 1182(a)(9)(B)(i) violates the INA and lacks any lawful basis. By determining that Plaintiffs are inadmissible based on its erroneous interpretation of 8 U.S.C. § 1182(a)(9)(B)(i), USCIS has unlawfully denied or will deny Plaintiffs' applications for adjustment of status, or has unlawfully required or will require Plaintiffs to submit an additional application for a discretionary waiver of the grounds of inadmissibility.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

a. Assume jurisdiction over this matter;

b. Certify the case as a class action as proposed herein;

c. Appoint Plaintiffs as representatives of the class;

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d. Declare that Defendants' interpretation of 8 U.S.C. § 1182(a)(9)(B)(i) is unlawful and contrary to the Immigration and Nationality Act;

e. Declare that Plaintiffs are not inadmissible under 8 U.S.C. § 1182(a)(9)(B)(i);

f. Remand Plaintiffs' applications for adjustment of status to USCIS to re-adjudicate in accordance with the law;

g. Enjoin Defendants, their subordinates, agents, employees, and all others acting in concert with them from applying USCIS's unlawful interpretation of 8 U.S.C. § 1182(a)(9)(B)(i) to the processing and adjudication of Class Members' adjustment of status applications;

h. Order Defendants to reopen and re-adjudicate any Class Member's application in which the erroneous unlawful presence bar policy was the sole basis for denial;

i. Order Defendants to refund the filing fee for any class member who was unlawfully instructed to file a waiver of the grounds of inadmissibility;

j. Award Plaintiffs' counsel reasonable attorneys' fees under the Equal Access to Justice Act, and any other applicable statute or regulation; and

k. Grant such further relief as the Court deems just, equitable, and appropriate.

DATED this 25th day of March, 2022.

s/ Matt Adams
Matt Adams, WSBA No. 28287

s/ Aaron Korthuis
Aaron Korthuis, WSBA No. 53974

s/ Leila Kang
Leila Kang, WSBA No. 48048

s/ Margot Adams
Margot Adams, WSBA No. 56573

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