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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CATHOLIC CHARITIES CYO (SAN FRANCISCO); ET AL.,

Plaintiffs,

-vs-

MICHAEL CHERTOFF, Secretary, U.S. Department of Homeland Security; ET AL.,

Defendants.

Case No. C 07-1307

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Hearing:
Hon. Phyllis J. Hamilton
Date: May 23, 2007
Time: 9 am

Plaintiffs' counsel, continued

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MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I INTRODUCTION

This is a class action seeking declaratory and injunctive relief compelling Defendants Michael Chertoff, Secretary of the U.S. Department of Homeland Security ("DHS") and the United States Citizenship and Immigration Services ("USCIS") to discharge their statutory duty to receive and adjudicate applications for lawful status from immigrant crime victims who assist law enforcement officials in the investigation or prosecution of criminal offenders. On October 28, 2000—over six years ago—the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, Div. A, 114 Stat. 1464 (2000), *codified at*, *inter alia*, 8 U.S.C. § 1101(a)(15)(U) ("Crime Victims Act" or "Act"), was signed into law. Among other things, the Crime Victims Act permits immigrants who are victims of serious crimes and who assist law enforcement to be granted "U" visas. After possessing U status for three years, such immigrants are eligible for lawful permanent resident status. Section 1101(a)(15)(U) reflects Congress's judgment that certain crime victims should be permitted to remain lawfully in the United States, both for humanitarian reasons and so that they may help bring dangerous, violent criminals to justice.

Despite having six years to do so, defendants have unlawfully failed to implement the U visa program. Defendants have failed to promulgate regulations, establish procedures, or publish application forms through which crime victims may apply for U visas. Defendants have set no filing fee, nor have they trained or assigned officers to adjudicate U visa applications. Nor have defendants referred immigrant crime victims for social services, as required by the 6-year old U visa law. When individuals who are *prima facie* eligible for U visas, including the named individual plaintiffs herein, request

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defendants to issue them U visas (or promulgate regulations and procedures permitting them to apply for such visas), defendants have refused. Consequently, immigrant crime victims have no way to apply for the immigration benefits Congress conferred on them some six years ago, and 10,000 U visas allocated annually by Congress have gone unused.

Plaintiffs and crime victims' advocates have repeatedly urged defendants to promulgate regulations and procedures implementing the U visa program and to issue U visas to eligible crime victims without further delay. Defendants have ignored these entreaties, and plaintiffs now seek judicial relief on behalf of themselves and those similarly situated requiring defendants to discharge their statutory duties and to restore plaintiffs and their class members to the position they would be in but for defendants' persistent non-feasance of their lawful obligations. Defendants' failure to implement the U visa statute not only unlawfully flaunts the will of Congress, it also discourages immigrant victims of crimes from reporting such crimes and cooperating with law enforcement, thus reducing the odds that perpetrators will be brought to justice.

II PROPOSED CLASS DEFINITION

Plaintiffs seek certification on behalf of themselves and all other persons similarly situated pursuant to Fed.R.Civ.Proc. Rule 23(a) and 23(b)(2). Plaintiffs propose this action be certified on behalf of the following class:

> All persons who are *prima facie* eligible for a U visa and who have applied for or would apply for issuance of a U visa but for defendants' failure to issue U visas or promulgate regulations implementing § 1512 of the Victims of Trafficking and Violence Protection Act of 2000.

The focus of the Court's inquiry into the propriety of class certification is whether there is a sufficient basis to support a "reasonable judgment" that the requirements of Rule 23 have been met. *Blackie v. Barrack*, 524 F.2d 891, 900-01 (9th Cir. 1975), *cert. denied*,

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429 U.S. 816 (1976). As proposed, the class definition meets all the requirements of Rule 23, Fed.R.Civ.Proc., and this action should accordingly be certified as a (b)(2) class action.

III THIS ACTION SATISFIES THE REQUIREMENTS OF RULE 23(a).

In order to be certified for class treatment, an action must first be shown to satisfy the four requirements of Rule 23(a) of the Federal Rules of Civil Procedure. The instant case meets these criteria.

A Numerosity and impracticality of joinder.

Rule 23(a)(1) requires that the class be "so numerous that joinder is impractical." Courts generally find the numerosity requirement of Rule 23(a)(1) satisfied when relatively few class members are involved. *See, e.g., Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982); *Carey v. Greyhound Bus Co.*, 500 F.2d 1372, 1381 (5th Cir. 1974) (number of class members assumed to be 28); *Arkansas Education Association v. Board of Education*, 446 F.2d 763, 765-66 (8th Cir. 1971) (class membership of 20 persons). *See generally* 3B MOORE'S FEDERAL PRACTICE ¶ 23.05 [1], at 23-154 to 23-155 (1978).

It is not necessary to determine the exact size of the class in order to satisfy Rule 23(a)(1), especially where it would be unreasonable to require the named plaintiffs to identify the names of all class members. *In re U.S. Financial Securities Litigation*, 69 F.R.D. 24, 34 (S.D.Cal. 1975); 7 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE: Civil § 1762. Rather, "the conduct complained of is the benchmark for determining whether a subdivision (b)(2) class exists, making it uniquely suited to civil rights actions in which the members of the class are often 'incapable of specific enumeration.'" *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972). "Where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied." *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 371 (C.D. Cal. 1982).

Over the past six years, Defendants have issued "deferred action" to over 8,000 thousand individuals based on their *prima facie* eligibility for U visas. Exhibit 1. There is

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no question that most of these individuals would have received actual U visas—and even become lawful permanent residents of the United States—but for Defendants' failure to implement the U visa statute. The numerosity requirement of Rule 23(a)(1) is plainly satisfied here.

B Common questions of law or fact.

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." The claims of the proposed class representatives and those of the proposed class members raise common questions of law and fact: *inter alia*, —

- whether Defendants may lawfully refuse to provide a path by which individuals who are *prima facie* eligible for U visas may receive the immigration benefit Congress has made available to them;
- whether Defendants' failure to implement the U visa statute is impairing the ability of law enforcement to bring criminals to justice;
- whether Defendants provide aliens who are eligible for U visas with referrals to nongovernmental organizations to advise the aliens regarding their options while in the United States and the resources available to them;
- whether Defendants may lawfully deny U visas to crime victims who cooperate with law enforcement agencies with a blanket policy and practice against issuing certifications of cooperation;
- whether Defendants must "re-capture" U visas available under prior years' quotas should the number of eligible U visa applicants who apply once Defendants begin issuing U visas exceed the quota for the year in which the U visa program actually begins; and
- whether Defendants may alter their policies and practices respecting the issuance of employment authorization to would-be U visa applicants without complying with the rulemaking requirements of the Administrative Procedure Act.

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These questions are common to the named plaintiffs and to the members of the proposed class because Defendants have acted and will continue to act on grounds generally applicable to both the named plaintiffs and proposed class members.

Even where there are individual variations in the facts or legal issues as they relate to a particular named plaintiff or proposed class member, the commonality requirement is satisfied so long as the class shares some common question of law or fact. *See, e.g., Eisen v. Carlisle and Jacqueline*, 391 F.2d 555, 562 (2nd Cir. 1968) (class certification granted notwithstanding "varying fact patterns underlying each individual ... transaction ..."); *Senter v. General Motors Corp*., 532 F.2d 511, 524 (6th Cir. 1976), *cert. denied*, 429 U.S. 870 (1976) (class certification granted in employment discrimination action brought on behalf of Black employees even though it was "manifest that every decision to hire, fire or discharge an employee may involve individual considerations"); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2nd Cir. 1968) (class certified in challenge to relocation practices of urban renewal project despite the different treatment suffered by each tenant during the relocation process); *Cullen v. New York State Civil Service Commission*, 435 F. Supp. 546, 559 (E.D.N.Y. 1977) (class certification granted in lawsuit challenging coercive practices in obtaining political contributions from public employees even though "fact questions specific to each instance of the alleged coercion will remain").

It is clear that the claims plaintiffs present here raise questions of law and fact common to all proposed class members sufficient to warrant class certification.

C Typicality of claims.

Rule 23(a)(3) requires that the claims of the named plaintiffs be "typical of the claims ... of the class." Meeting this requirement usually follows from the presence of common questions of law. Thus, courts have construed subdivisions (a)(2) and (a)(3) to be largely duplicative. *See* 3B MOORE'S FEDERAL PRACTICE ¶ 23.06-2, at 23-325. *See also*

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Orantes-Hernandez v. INS, *supra*, 541 F. Supp. at 371; *American Airlines, Inc. v. Transport Workers Union*, 44 F.R.D. 47, 48 (N.D. Okla. 1968) (holding (a)(3) met by representatives "sharing common with the class any claim or defense it has"); *Mersay v. First Republic Corp.*, 43 F.R.D. 465, 468-69 (S.D.N.Y. 1968) (allegation that defendants engage in scheme common to all members of class held to support finding that claims of representative party typical). As set forth above, common questions of law and fact abound in the case at bar.

Plaintiffs here have no interest in conflict with those of the proposed class. The named plaintiffs have identical legal theories and will seek the same injunctive and declaratory relief for themselves and for the class as a whole. Plaintiffs seek to vindicate the rights of unnamed class members, rights that are violated through the absence of uniform regulations, policies and practices. The typicality requirement of Rule 23(a)(3) is therefore satisfied.

D Adequacy of representation.

The final requirement for class certification, set out in Rule 23(a)(4), is that the named plaintiff "will fairly and adequately protect the interest of the class." The two principal elements of this requirement are (1) that the class representative's interests be co-extensive and not antagonistic to the class members' interests; and (2) that counsel for the named representatives be qualified. *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124-25 (5th Cir. 1969).

The interests of the class representative here are not antagonistic to those of the proposed class members. Their mutual goal is to secure a path by which they may obtain the immigration benefits Congress long ago said they should have..

Plaintiffs' lead counsel are employed by a non-profit organization specializing in federal litigation on behalf of immigrants and refugees. They have successfully litigated numerous class actions and individual cases in the federal courts involving the rights of

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immigrants. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982); *Ramon Sepulveda v. INS*, 863 F.2d 1458 (9th Cir. 1988); *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982); *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977);; *Immigrant Assistance Project v. INS*, 709 F. Supp. 998 (W.D.Wa. 1989); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982). Counsel will adequately represent both named and unnamed class members. The requirements of Rule 23(a)(4) are satisfied in this case.

IV THIS ACTION SATISFIES THE REQUIREMENTS OF RULE 23(b)(2).

In addition to satisfying the four requirements of Rule 23(a), a certifiable class action must meet one of the requirements of Rule 23(b). This action meets the requirements of Rule 23(b)(2): *i.e.*, "the party opposing the class has acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole ..."

Under subsection (b)(2) "the party opposing the class does not have to act directly against each member of the class. As long as his actions would affect all persons similarly situated, his acts apply generally to the whole class." 7A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 1775, at 19.

In this case the Defendants have refused to provide a path by which statutorily eligible individuals may apply for the immigration benefit Congress has made available to them. The class proposed in this case is a creation of Defendants' challenged policies and practices.

Courts have repeatedly certified classes comprising persons subjected to challenged regulations, practices or policies. *See, e.g., Catholic Social Services, Inc. v. Reno*, Civ. S-86-1343 LKK (E.D. Cal.); *Newman, et al., v. Immigration & Naturalization Service, et al.*, No. CV 87-4757-WDK (C.D. Cal.); *Immigrant Assistance Project v. INS*, Civil No. C-88-379R (W.D. Wa.); *National Center for Immigrants' Rights, Inc. v. INS*, Civ. No. 83-7927-KN (C.D. Cal.) (order issued July 9, 1985, certifying a nationwide class of all persons subjected to an

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INS regulation under challenge); *see generally Illinois Migrant Council v. Pilliod*, 540 F.2d 1062, 1072 (7th Cir. 1976), *modified*, 548 F.2d 715 (7th Cir. 1977). The requirements of subsection (b)(2) have accordingly been met.

/ / /

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V Conclusion

For the foregoing reasons, this action should be certified as a class action pursuant to Rule 23(a) and (b)(2), Fed.R.Civ.Proc.

Dated: April 18 2007.

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EXHIBIT 1

DECLARATION OF VERONICA BARBA

I, Veronica Barba, declare and say as follows:

1. I am employed by the Center for Human Rights and Constitutional Law located at 256 S. Occidental Blvd., Los Angeles, California, 90057.
2. On April 11, 2007 I contacted Sharon Rummery, the Regional Media Manager at the Northwest Region Public Affairs Office of the U.S. Citizenship and Immigration Services in San Francisco, California to request the number of U Visa applications which have been filed as well as those that have been granted deferred action.
3. During my April 11, 2007 conversation with Ms. Rummery, she stated that she would locate the information and send it to me via email.
4. On the afternoon of April 11, 2007 I received an email from Ms. Rummery containing the information attached on the following page.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 11th day of April, 2007, at Los Angeles, California.

Veronica Barba

EXHIBIT 1

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Here's something as of early October…. I don't know if it's what's desired, but it's available…

Fiscal Yr	DA requests @ start of FY	Requests for DA that led to assessment	Requests for DA that led to denial (refusal)	Requests for DA that were removed (terminated)	Requests for DA left pending at end of FY	
2000	--	--	--	--	--	
2001	--	--	--	--	--	
2002	--	--	--	--	--	
2003	--	--	--	--	**462**	
2004	**462**	**813**	**276**	**1**	**N/A**	
2005	**N/A**	**2267**	**507**	**7**	**574**	
2006	**574**	**4941**	**858**	**1**	**436**	

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EXHIBIT 1

/ / /

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PROOF OF SERVICE BY OVERNIGHT DELIVERY AND EMAIL

I declare and say as follows:

1. I am over the age of eighteen years and am not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 256 S. Occidental Blvd., Los Angeles, California, 90057, in said county and state.

2. On April 18, 2007, I caused to be served a true and correct copy of the attached MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CLASS CERTIFICATION on defendants by email addressed to Ila Casy Deiss ila.deiss@usdoj.gov, Tiffani Chiu tiffani.chiu@usdoj.gov Victor M. Lawrence victor.lawrence@usdoj.gov Jeffrey S. Robins jeffrey.robins@usdoj.gov and Federal Express overnight delivery, addressed to:

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Department of Justice
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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of March, 2007, at Los Angeles, California.

_____s/_____
Peter A. Schey

/ / /

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