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16 PHRA BUNPHITHAK JOMTHONG

17 UNITED STATES DISTRICT COURT  
18 CENTRAL DISTRICT OF CALIFORNIA

19 PHRA BUNPHITHAK JOMTHONG,	)	Case No.
20 Plaintiff/Petitioner,	)	Agency File No. A88-289-815
21 v.	)	<b>COMPLAINT FOR</b>
22 JANET NAPOLITANO, Secretary, U.S.	)	<b>DECLARATORY AND</b>
23 Department of Homeland Security, in her	)	<b>INJUNCTIVE RELIEF; and</b>
24 official capacity; and MICHAEL	)	<b>PETITION FOR REVIEW OF</b>
25 AYLES, acting Deputy Director, U.S.	)	<b>ADMINISTRATIVE AGENCY</b>
26 Citizenship and Immigration Services, in	)	<b>ACTIONS</b>
27 his official capacity,	)	
28 Defendants/Respondents.	)	

29 **I. Nature of the Case**

30 By and through his attorneys of record, Plaintiff/Petitioner, the Venerable  
31 PHRA BUNPHITHAK JOMTHONG, an ordained Buddhist monk, presents his  
32 Complaint and Petition for Review before this Court seeking declaratory judgment  
33 and injunctive relief with respect to immigration-related decisions of  
34 Defendants/Respondents (Case Number A8828915).

1 Plaintiff/Petitioner challenges wrongful denials by the Defendant, United  
2 States Citizenship and Immigrations Services Agency (“USCIS”), of his  
3 application for Adjustment of Status (“AOS”) which he filed seeking lawful  
4 permanent resident status in the United States. USCIS is a bureau within the  
5 Department of Homeland Security charged with the legal duty to adjudicate  
6 applications for immigration benefits, including AOS applications.

7 Although Plaintiff/Petitioner has fully complied with all required legal steps  
8 to be granted lawful permanent status, he has been forced to endure repeated acts  
9 of malfeasance on the part of Defendants/Respondents including decisions that are  
10 erroneous as a matter of law, not supported by evidence, lack the power to  
11 persuade, are contrary to statute, violate long-standing administrative agency  
12 policies, are arbitrary and capricious, constitute an abuse of discretion, are not in  
13 accordance with law, and contravene the legal rights of Plaintiff/Petitioner  
14 established by the First Amendment (Free Exercise of Religion Clause) and Fifth  
15 Amendment (Due Process Clause) under the United States Constitution.

16 Plaintiff/Petitioner also seeks judicial review, pursuant to the Administrative  
17 Procedures Act (“APA”) of the denial of his AOS application and the Defendants’  
18 contravention of his statutory rights under the Immigration and Nationality Act and  
19 the Religious Freedom Restoration Act.

## 20 **II. Jurisdiction**

21 1. This Court has subject matter jurisdiction over the present action pursuant to  
22 28 U.S.C. § 1331 (Federal Question jurisdiction) because Plaintiff/Petitioner’s  
23 claims arise under the federal laws of the United States, specifically the  
24 Immigration and Nationality Act (“INA”), 8 U.S.C. § 1255 *et seq.* (as amended),  
25 the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb *et seq.*, the  
26 First Amendment to the Constitution of the United States (the Free Exercise  
27 Clause), and the Fifth Amendment to the Constitution of the United States (the

1 Due Process Clause). This Court may grant relief in this action under the  
2 Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 and the Administrative  
3 Procedures Act, 5 U.S.C. § 701 *et seq.* (the “APA”).

4 2. Additionally, this Court has jurisdiction to review a denial of an AOS  
5 application, despite the jurisdiction-stripping provision of 8 U.S.C. §  
6 1252(a)(2)(B)(ii) [INA § 242(a)(2)(B)(ii)] based on the existence of numerous  
7 questions of law involving eligibility criteria for the grant of permanent residence  
8 rather than merely discretionary decisions of Defendants/Respondents. In addition,  
9 Defendants/Respondents are charged with the non-discretionary duty under the  
10 INA, the APA, and its own longstanding policies and practices to formally weigh  
11 the positive and any negative equities, articulate its weighing of the equities in its  
12 written decisions in an AOS application prior to adjudication, and to do so within a  
13 reasonable time, all of which Defendants/Respondents have failed to do. 5 U.S.C.  
14 § 555(b); *see Rashtabadi v. INS*, 23 F. 3d 1562, 1570 (9th Cir. 1994); *Ng v. INS*,  
15 804 F. 2d 534, 538 (9th Cir. 1986) (citing *Mattis v. INS*, 774 F. 2d 965, 968 (9th  
16 Cir. 1985)); *Salehpour v. INS*, 761 F. 2d 1442, 1447 (9th Cir. 1985)(holding that  
17 where the agency determines that the objective criteria of a regulation are clearly  
18 met, the agency may not interpret the regulation so as to add another requirement).

19 3. Further, Plaintiff/Petitioner maintains that the jurisdiction-stripping  
20 provision of 8 U.S.C. § 1252(a)(2)(B)(ii) [INA § 242(a)(2)(B)(ii)], by virtue of its  
21 placement in a statutory provision governing removal from the United States, only  
22 applies to denials of AOS applications which are made in conjunction with a final  
23 order of removal. *See Spencer Enter., Inc. v. U.S.*, 345 F. 3d 683, 692 n. 5 (9th  
24 Cir. 2003)(reserving judgment on whether 8 U.S.C. § 1252(a)(2)(B)(ii) [INA §  
25 242(a)(2)(B)(ii)] is only applicable in removal cases); *see also ANA Intl. Inc. v.*  
26 *Way*, 393 F. 3d 886, 891 (9th Cir. 2004); *Talwar v. INS*, 2001 U.S. Dist. LEXIS  
27 9248 at \*12 (S.D.N.Y. July 9, 2001); *Mart v. Beebe*, 94 F. Supp. 2d 1120, 1123-24

1 (D. Or. May 15, 2000); *Burger v. McElroy*, 1999 U.S. Dist. LEXIS 4854 at \*4  
2 (S.D.N.Y. Apr. 12, 1999); *Shanti v. Reno*, 36 F. Supp. 2d 1151, 1157-60 (D. Minn.  
3 1999).

4 4. This Court, rather than the Court of Appeals, has jurisdiction to  
5 review a denial of an AOS application. In holding that a district court “has  
6 jurisdiction to review a denial of status adjustment,” the U.S. Court of Appeals for  
7 the Ninth Circuit reasoned that although “[d]eterminations made during a  
8 deportation hearing, including final deportation orders, are reviewable exclusively  
9 by the Court of Appeals . . . [o]ther determinations, ancillary to an application for  
10 permanent residency, must be challenged first in district court.” *Jaa v. INS*, 779 F.  
11 2d 569, 571 (9th Cir. 1986). The Ninth Circuit has twice since held that a district  
12 court has jurisdiction to review a denial of an AOS application. *See Chan v. Reno*,  
13 113 F. 3d 1068, 1071 (9th Cir. 1997) (citing *Jaa* and *Tang*); *Tang v. Reno*, 77 F. 3d  
14 1194, 1196 (9th Cir. 1996) (citing 28 U.S.C. § 1331); *see also Hillcrest Baptist*  
15 *Church v. U.S.*, 2007 U.S. Dist. LEXIS 12782 at \*18-20 (W.D. Wash. Feb. 23,  
16 2007). Therefore, pursuant to the holdings in *Jaa*, *Chan*, and *Tang*, this Court has  
17 jurisdiction over the present action.

### 18 **III. Venue**

19 5. Pursuant to 28 U.S.C. § 1391(e), venue is proper in this Court because  
20 Defendants/Respondents are officers of the U.S. Government acting in their  
21 official capacities, with offices located within the Central District of California,  
22 and a substantial part of the events giving rise to this claim occurred within the  
23 jurisdiction of this Court.

### 24 **IV. Parties**

25 6. Plaintiff/Petitioner PHRA BUNPHITHAK JOMTHONG is an  
26 individual, who resides at and practices his faith within the Wat Buddhapanya  
27 Buddhist Temple (“the Temple”) in Pomona, California, and a native and citizen of

1 Thailand. Plaintiff/Petitioner is eligible for AOS under 8 U.S.C. § 1255 [INA §  
2 245] and 8 C.F.R. § 245.1 *et seq.*

3 7. Defendant/Respondent JANET NAPOLITANO, as Secretary of the  
4 U.S. Department of Homeland Security (“DHS”), is authorized under 8 U.S.C. §  
5 1103 *et seq.* to administer and enforce the immigration laws of the United States,  
6 possesses and exercises authority to establish regulations, issue instructions, review  
7 administrative determinations and delegate authority, including authority delegated  
8 to USCIS to adjudicate applications for such immigration benefits as AOS, among  
9 other duties, as necessary to carry out the immigration and nationality laws of the  
10 United States, and is sued in her official capacity.

11 8. Defendant/Respondent MICHAEL AYLES, as Acting Deputy  
12 Director of the United States Citizenship and Immigration Services Agency  
13 (“USCIS”), is charged under the Homeland Security Act of 2002, 6 U.S.C. § 101 *et*  
14 *seq.*, with, among other things, establishing national immigration benefits and  
15 service policies and priorities, and is sued in his official capacity.

16 **V. Statement of Facts**

17 Plaintiff Lawfully Enters the United States

18 9. Plaintiff/Petitioner, the Venerable Phra Bunphithak Jomthong (“Ven.  
19 Jomthong” or “Plaintiff/Petitioner”), entered the United States as a religious  
20 worker in valid R-1 nonimmigrant status on February 19, 2005.

21 10. Ven. Jomthong is a Buddhist “Bhikku” Monk of the Buddhapanya  
22 Society, and he volunteers his religious services in Pomona, California, at the  
23 Temple, a registered non-profit religious organization. The Temple contributes  
24 significantly to the Buddhist religious community in Southern California and  
25 elsewhere.



1 income. His basic living expenses are supported by members of the Temple  
2 community who make voluntary charitable donations, which satisfy the legal  
3 definition of gifts, of their own free will and volition to support the Temple and the  
4 monks who reside there.

5 16. All of Ven. Jomthong's religious services are offered free of charge,  
6 and there is no requirement or expectation of payment, or donation, and no  
7 solicitation of money. He does not engage in any solicitation of donations or any  
8 fundraising activities.

9 Ven. Jomthong Applies for Extension of his R-1 Status

10 17. The Temple timely petitioned USCIS to extend Ven. Jomthong's R-1  
11 status on May 23, 2006 prior to the expiration of his R-1 status.

12 18. On August 23, 2007, USCIS (California service center) approved the  
13 petition to extend R-1 nonimmigrant status and (unbeknownst to Ven. Jomthong  
14 and the Temple) granted R-1 status *retroactively* from July 13, 2006 to July 12,  
15 2007.

16 19. USCIS did not act on Ven. Jomthong's petition until August 23, 2007,  
17 even though the petition had been timely filed on May 23, 2006.

18 20. On May 31, 2006, the Temple also petitioned USCIS for Special  
19 Immigrant Status for Ven. Jomthong on Form I-360

20 21. USCIS approved the Temple's Special Immigrant Petition according  
21 Ven. Jomthong classification as a Special Immigrant on October 26, 2007.

22 22. Because the USCIS failed to act until August 23, 2007 to notify Ven.  
23 Jomthong that his R-1 lawful status had been approved (but only to a date that had  
24 already passed, i.e., until July 12, 2007), USCIS caused his lawful nonimmigrant  
25 status to lapse for 42 days, through no fault of his own.

26 23. The Temple did not fulfill its obligation to extend R-1 petition validity  
27 and R-1 status thereafter because the leader of the Temple, acting without benefit

1 of legal counsel, mistakenly assumed that the USCIS approval of the Temple's  
2 Special Immigrant visa petition was sufficient to accord Ven. Jomthong lawful  
3 immigration status.

4 Ven. Jomthong Applies for Adjustment of Status

5 24. Given that USCIS on October 26, 2007 had approved the Temple's  
6 petition for Special Immigrant classification for Ven. Jomthong, he applied to  
7 USCIS on January 31, 2008 for Adjustment of Status ("AOS") to Lawful  
8 Permanent Resident.

9 25. On August 28, 2008, USCIS (through its Nebraska Service Center  
10 ["NSC"]) denied Ven. Jomthong's application for AOS, stating that he was  
11 ineligible for status adjustment because he had failed to maintain lawful  
12 immigration status and/or engaged in unauthorized employment for a period of  
13 more than two years in violation of 8 U.S.C. § 1255(c) and (k) [INA § 245(c) and  
14 (k)].

15 26. On September 5, 2008, USCIS moved *sua sponte* to reopen the NSC's  
16 decision and returned Ven. Jomthong's application for AOS to a pending status.

17 27. On November 14, 2008, the Nebraska office again denied the  
18 application for AOS, finding once again that Ven. Jomthong had failed to maintain  
19 lawful status and/or engaged in unauthorized employment for a period of more  
20 than 180 days, the maximum permitted period of unauthorized status and  
21 employment under 8 U.S.C. § 1255(k) [INA § 245(k)].

22 Ven. Jomthong Moves to Reopen and Reconsider

23 His Application for AOS

24 28. On December 11, 2008, Ven. Jomthong moved to reopen and  
25 reconsider his application for AOS based upon the NSC's error in failing to  
26 consider that Ven. Jomthong's expiration of R-1 nonimmigrant status and  
27 corresponding loss of employment authorization was due to USCIS's failure to act

1 on the R-1 extension of status application until 42 days after Ven. Jomthong's R-1  
2 status lapsed.

3 29. The motion to re-open and reconsider also noted that USCIS's  
4 mathematical calculation of the number of days during which the agency alleged  
5 that Ven. Jomthong failed to maintain lawful status was in error and urged USCIS  
6 to apply the principle of equitable tolling to resolve any lapse in status.

7 30. Ven. Jomthong's 42-day lapse in status between July 12, 2007 and  
8 August 23, 2007 was through no fault of his own. USCIS did not extend his R-1  
9 status until August 23, 2007, even though the petition to extend R-1 status was  
10 timely filed in May 2006. When USCIS granted the petition on August 23, 2007,  
11 it retroactively granted him lawful status, but only through July 12, 2007.

12 Accordingly, when Ven. Jomthong received notice that his R-1 status had finally  
13 been approved and extended, his status had already lapsed by 42 days, through no  
14 fault of his own. Thus, under equitable tolling principles applied due to USCIS's  
15 failure to act, his true lapse in status began on August 23, 2007, that date when he  
16 received notice that his status expired on July 12, 2007, and not on July 12, 2007  
17 itself.

18 31. When Ven. Jomthong applied for AOS on January 31, 2008, that  
19 action "stopped the clock" on the accrual of unlawful nonimmigrant status. As  
20 such, the period of time during which he was arguably "out of status" ran from  
21 August 23, 2007 to January 31, 2008, a period of 162 days. Accordingly, 8 U.S.C.  
22 § 1255(k) [INA § 245(k)] applies and any lapse in nonimmigrant status is no legal  
23 basis for USCIS to deny his application for AOS.

24 USCIS Denies Ven. Jomthong's Motion to  
25 Reopen His Application for AOS

26 32. On January 26, 2009, USCIS reopened Ven. Jomthong's application  
27 for AOS, and denied it a third time.

