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15 UNITED STATES DISTRICT COURT FOR THE
16 CENTRAL DISTRICT OF CALIFORNIA
17

18 Hugo Benjamin OSORIO,

19 Plaintiff,
20 v.

21 UNITED STATES CUSTOMS AND BORDER
22 PROTECTION,
23 Defendant.
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Case No. _____

**Complaint for
Declaratory and
Injunctive Relief Under
the Freedom of
Information Act**

1 **INTRODUCTION**

2 1. Plaintiff Hugo Benjamin OSORIO hereby files this action under
3 the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive
4 and other appropriate relief seeking the disclosure and release of agency
5 records improperly withheld by Defendant UNITED STATES CUSTOMS
6 AND BORDER PROTECTION.

7
8 **JURISDICTION AND VENUE**

9 2. This Court has jurisdiction under the FOIA pursuant to 5 U.S.C. §
10 552(a)(4)(B), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201-2
11 (authority to issue declaratory judgment when jurisdiction already exists).

12 3. Venue is properly with this Court pursuant to 28 U.S.C. § 1391(e)
13 (general venue) because this is a civil action in which Defendant is the
14 United States of America; because Plaintiff resides in this judicial district;
15 and there is no real property involved in this action.

16 **PARTIES**

17 4. Plaintiff Hugo BENJAMIN OSORIO is a native and citizen of
18 Mexico, who has been married to his United States Citizen wife since 2009.
19 Plaintiff resides with his wife and his stepdaughter, age 10, in Tustin,
20 California.

21 5. Defendant, UNITED STATES CUSTOMS AND BORDER
22 PROTECTION (CBP) is an agency of Department of Homeland Security,
23 within the Executive Branch of the government of the United States. CBP is
24 an agency within the meaning of 5 U.S.C. § 552(f)(1). CBP has in its
25 possession, custody, and control of records to which Plaintiff seeks access.
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FACTUAL ALLEGATIONS

6. Plaintiff Hugo BENJAMIN OSORIO is a native and citizen of Mexico, who has been married to his United States Citizen wife since 2009.

7. Plaintiff intends to file for residency based on his marriage to his United States citizen wife, and the hardship that she faces if he is not permitted to remain in the United States. See 8 U.S.C. § 1182(a)(9)(B)(v). Petitioner's wife is a cancer survivor and continues to be subject to a host of medical issues. In addition her ten year old United States citizen daughter, Petitioner's stepdaughter, suffers from epilepsy and requires constant monitoring and treatment.

8. Petitioner originally entered the United States in 1992. In approximately 1996, he was arrested by criminal authorities and was transferred to the Immigration and Naturalization Service.¹ Upon information and belief, no criminal charges were brought against him.

9. Petitioner recalls that he was given "voluntary departure" by the Immigration and Naturalization Service and was physically removed from the United States. Approximately three days later, he attempted to return to the United States and was detained and fingerprinted by officials at the border. He was returned to Mexico but was not provided with any paperwork from immigration officials. Approximately three days later, he returned to the United States and has not departed since that time.

10. Petitioner has resided continuously in the United States for at least 17 years.

11. Based on his 2009 marriage to his United States citizen wife,

¹ The Immigration and Naturalization Service ceased to exist on March 1, 2003 and its functions were transferred to the Department of Homeland Security. See Homeland Security Act of 2002, Pub.L. No. 107-296, 116 Stat 2135 (Nov. 25, 2002).

1 Petitioner is eligible to apply for lawful permanent residence. 8 U.S.C. §
2 1151(b)(2)(A)(i). Because he entered the United States without
3 authorization, he must depart the United States and obtain the visa through
4 “consular processing” with the United States Department of State.
5 However, once he departs the United States for the consular processing
6 appointment, he will trigger a ten year “unlawful presence” bar because he
7 has been unlawfully present in the United States for more than one year. See
8 8 U.S.C. §1182(a)(9)(B)(i)(II).

9 12.A waiver of that ten year unlawful presence bar is available if
10 Petitioner can demonstrate that the denial of admission would cause
11 “extreme hardship” to a United States or lawful permanent resident parent,
12 spouse, or child, including a step-child. 8 U.S.C. §1182(a)(9)(B)(v).
13 Petitioner’s United States citizen spouse is a survivor of stomach and colon
14 cancer, and still suffers from significant medical issues. His ten year old
15 U.S. Citizen stepdaughter suffers from epilepsy, and must undergo treatment
16 and constant monitoring. Under legal precedent defining “extreme
17 hardship,” he has an outstanding claim to the waiver of the ten year
18 “unlawful presence” bar. See Matter of Cervantes, 22 I&N Dec. 560, 565-
19 66 (BIA 1999).

20 13.A new administrative policy allows individuals who are married to
21 United States citizens to file the “extreme hardship” unlawful presence
22 waiver in the United States, so that they do not have to depart to their
23 country of origin for the consular processing appointment until the waiver
24 has been adjudicated. See “Provisional Unlawful Presence Waivers of
25 Inadmissibility for Certain Immediate Relatives,” 78 Fed. Reg. 536-01 (Jan.
26 3. 2013). However, that special waiver, called the “Provisional Unlawful
27 Presence Waiver,” is not available if the noncitizen is inadmissible under
28

1 any other ground, beyond the unlawful presence ground at INA §
2 212(a)(9)(B)(i)(II). 78 Fed. Reg. 536-01.

3 14. On June 6, 2014, Plaintiff filed a request with Defendant CBP
4 electronically, requesting “any and all records” under his name. Defendant
5 CBP issued a confirmation receipt electronically, assigning the receipt
6 number CBP- 2014-030366.

7 15. Petitioner filed this request in order to obtain any records from the
8 incident at the border when he attempted to return to the United States in
9 approximately 1996. He requires this information in order to determine if he
10 is eligible for the Provisional Unlawful Presence Waiver, since that waiver is
11 not available if Petitioner is inadmissible on any other ground beyond
12 unlawful presence, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

13 16. Five months have elapsed since Plaintiff’s FOIA request to
14 Defendant CBP.

15 17. Plaintiff has not received any response from Defendant CBP
16 beyond the initial receipt acknowledging his request.

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18 **CAUSES OF ACTION**

19 **COUNT ONE**

20 **(Violation of FOIA, 5 U.S.C. § 552)**

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22 18. Plaintiff incorporates the allegations in the paragraphs above as though
23 fully set forth here.

24 19. Defendant has unlawfully withheld records requested by Plaintiff
25 pursuant to 5 U.S.C. § 552.

26 20. The FOIA statute requires that a response to a request be issued within 20
27 days, excepting Saturdays, Sundays, and legal public holidays. 5 U.S.C. §
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1 552(a)(6)(A)(i). Plaintiff's request to Defendant CBP has been pending for five
2 months without a response.

3 21. Defendant has violated FOIA by failing to produce any and all non-
4 exempt records responsive to Plaintiffs' FOIA request within the twenty (20) day
5 time period set forth in 5 U.S.C. §552(a)(6)(A)(i).

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7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiffs pray that this Court grant the following relief:
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- 10 (1) Order Defendant to conduct a search of any and all responsive
11 records to Plaintiff's FOIA request and demonstrate that it
12 employed search methods reasonably likely to lead to the
13 discovery of records responsive to Plaintiff's FOIA request;
14 (2) Order Defendant to produce, by a date certain, any and all non-
15 exempt records responsive to Plaintiff's FOIA request and a
16 *Vaughn* index of any responsive records withheld under claim
17 of exemption;
18 (3) Enjoin Defendant from continuing to withhold any and all non-
19 exempt records responsive to Plaintiff's FOIA request;
20 (4) Award costs and reasonable attorney fees and costs incurred
21 under this action under 5 U.S.C. § 552(a)(4)(E); and
22 (5) Grant such further relief as the Court deems just and
23 proper.

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1 Dated: November 4, 2014

Respectfully submitted,

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18 Counsel for Plaintiff

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