

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

J. Jesus CAMACHO-MONTERO,)	Case No. 1:09-CV-0695
)	
Plaintiff-petitioner,)	
)	COMPLAINT FOR DECLARATORY
vs.)	AND INJUNCTIVE RELIEF AND
)	PETITION FOR WRIT OF
ERIC HOLDER, JR., Attorney General)	MANDAMUS
of the United States;)	
JANET NAPOLITANO, Secretary, U.S.)	
Department of Homeland Security;)	
JONATHAN SCHARFEN, Acting)	
Director, U.S. Citizenship and Immigration)	
Services,)	
)	
Defendants-respondents.)	

AMENDED PETITION FOR WRIT OF MANDAMUS AND

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff-petitioner (Plaintiff) filed a Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief with the Federal District Court for the Northern District of Georgia on March 13, 2009. Plaintiff-petitioner hereby amends the Complaint to reflect a change in one of the named Defendants, namely, the U.S. Attorney General of the United States. Plaintiff's Counsel inadvertently named Michael Mukasey, rather than the newly appointed Attorney General of the United States, Eric Holder, Jr., as the first named Defendant.

Plaintiff challenges Defendants-respondents' (Defendants) determination that, as a matter of law, Plaintiff lost status as an "immediate relative" spouse of a

United States citizen when his citizen spouse died while Plaintiff's immigration applications were filed and awaiting agency action. Plaintiff respectfully petitions this Court for injunctive, declaratory and mandamus relief to compel Defendants and their subordinates to: (a) find that, as a matter of statutory interpretation, Plaintiff remains an "immediate relative" under INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), due to marriage to a United States citizen; (b) order Defendants to reopen and re-adjudicate the immigrant petition (I-130 petition) that was filed on behalf of Plaintiff by his U.S. citizen spouse; and (c) order Defendants to reopen and re-adjudicate the (i) adjustment of status application (I-485 application) that Plaintiff filed as an immediate relative spouse of a U.S. citizen. See Exhibit A, Copy of I-130 Receipt Notice, See Exhibit B, Copy of I-485 Receipt Notice, See Exhibit C, Copy of I-485 Denial. Plaintiff alleges as follows:

JURISDICTION

1. This action arises under the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1151(b)(2)(A)(i) and 8 U.S.C. § 1255. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question), the INA, the Administrative Procedure Act, 5 U.S.C. § 701 et seq., and the Mandamus Act, 28 U.S.C. § 1361. Plaintiff additionally seeks relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 et. seq. (declaratory relief).

VENUE

2. Venue is proper in this Court under 28 U.S.C. § 1391(e) because Defendants Eric Holder, Jr., Janet Napolitano, and Jonathan Scharfen are Officers of the United States acting in their official capacities, and the U.S. Attorney

General's Office, the Department of Homeland Security ("DHS"), and the United States Citizenship and Immigration Services ("USCIS") are agencies of the United States. Additionally, Plaintiff resides in this judicial district. A substantial part of the events giving rise to the claim occurred in this district, in that the Atlanta District Office of USCIS, an agency of DHS located at 2150 Parklake Drive, Atlanta, GA 30345, was the local office that denied Plaintiff's Immediate Relative Petition and Adjustment of Status Application.

EXHAUSTION

3. There are no administrative remedies available for Plaintiff to exhaust.
4. There is no administrative appeal of the denial of an application for adjustment of Status (I-485). 8 CFR § 245.2(a)(5)(ii).
5. There also is no administrative appeal of the I-130 immigrant petition, even before the Executive Office for Immigration Review ("EOIR"), because the Board of Immigration Appeals ("BIA") has held that the immigration courts (within EOIR) and the BIA (administrative courts of limited and not general jurisdiction) lack jurisdiction under the administrative regulations to review such a denial. See *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985). The procedure for obtaining lawful permanent resident status, the adjustment of status (I-485) application, requires an approved I-130 immigrant petition as a condition for approval.
6. While Plaintiff may renew the adjustment of status application (Form I-485) in removal proceedings before EOIR, adjudication of this application requires an I-130 approval. Also, initiation of removal proceedings is at the

sole discretion of DHS, and DHS has not elected to initiate removal proceedings against Plaintiff. One cannot apply for initiation of removal proceedings. As such this is not a mandatory exhaustion requirement and cannot be imposed on Plaintiff's APA action. *See Darby v. Cisneros*, 509 U.S. 137 (1993).

DEFENDANTS

7. Defendant-respondent, Eric Holder, Jr., is sued in his official capacity as the United States Attorney General. As Attorney General, Mr. Mukasey is responsible for the administration and enforcement of the immigration laws of the United States.
8. Defendant-respondent, Janet Napolitano, is sued in her official capacity as Secretary of Department of Homeland Security ("DHS"). As Secretary of DHS, Ms. Napolitano is responsible for the administration and enforcement of the immigration laws of the United States.
9. Defendant-respondent, Jonathan Scharfen, is sued in his official capacity as Acting Director of the United States Department of Homeland Security, United States Citizenship and Immigration Services ("USCIS"). As Acting Director of USCIS, Mr. Scharfen is responsible for the overall administration of USCIS and the implementation of the immigration laws of the United States.

STATUTORY AND REGULATORY BACKGROUND

10. Plaintiff seeks lawful permanent resident status, and applied for such status.

Plaintiff challenges Defendants' determinations that, as a matter of law, Plaintiff was stripped of the status as an "immediate relative" spouse of a United States citizen when the citizen spouse tragically died while Plaintiff's immigration applications were awaiting adjudication.

11. A United States citizen who marries a non-citizen may apply for his or her spouse to reside permanently in the United States with the citizen. Pursuant to 8 U.S.C. § 1154(1)(A)(i), a United States citizen may file a petition (Form *I-130*) on behalf of a spouse claiming the spouse is entitled to classification as an "immediate relative." The term "immediate relative", as applicable to the United States citizen's petition, is set forth in the *first* sentence of 8 U.S.C. § 1151(b)(2)(A)(i) as the "children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age."
12. An alien spouse whose United States citizen *never filed* a petition on the alien's behalf, may also file a petition (Form *I-360* self-petition) on his or her own behalf, pursuant to 8 U.S.C. § 1154(1)(A)(ii), which states, "An alien spouse described in the *second sentence* of section 201(b)(2)(A)(i) *also* may file a petition...". *Id.*, (emphasis supplied) In such a case, the immediate relative definition set out in the *second* sentence of 8 U.S.C. § 1151(b)(2)(A)(i) is applicable: "In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section

204(a)(1)(A)(ii) of this title within 2 years after such date and only until the date the spouse remarries.”

13. Defendants have applied the incorrect immediate relative definition to Plaintiff’s Petition and Application. Specifically, Defendants have taken the position that if the citizen spouse dies before the second anniversary of the marriage, the alien spouse is no longer considered a “spouse” entitled to immediate relative status. In doing so, Defendants have confused the immediate relative definition applicable to *I-130* petitions filed by United States citizen spouses (the *first* sentence of 8 U.S.C. § 1151(b)(2)(A)(i)) with the immediate relative definition applicable to *I-360* self-petitions filed by alien spouses (the *second* sentence of 8 U.S.C. § 1151(b)(2)(A)(i)).
14. Courts have refused to follow the Defendant’s position. See *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006); *Robinson v. Chertoff*, 2007 WL 1412284 (D.N.J. May 14, 2007) *appeal docketed*, No. 07-2977 (3d Cir. July 5, 2007); *Taing v. Chertoff*, 2007 U.S. Dist. LEXIS 911411 (D. Mass 2007), *appeal docketed*, No. 08-1179 (1st Cir. Feb. 11, 2008); *Lockhart v. Chertoff*, 2008 U.S. Dist. LEXIS 889 (D. Ohio 2008), *appeal docketed*, No. 08-1179 (6th Cir. 2008); *But see Burger v. McElroy*, 97 Civ. 8775 (RPP), 1999 U.S. Dist. LEXIS 4854 (S.D.N.Y. Apr. 12, 1999); and *Turek v. Dep’t of Homeland Security*, 450 F. Supp. 2d 736 (E.D. Mich. 2006).
15. Through the application of the improper standard, Defendants have compounded Plaintiff’s grief. Defendants have stripped Plaintiff of immediate relative status, denied the Application for Adjustment of Status, and denied work and travel authorization. These actions have exacted grief,

suffering, loss of work authorization, loss of travel authorization, separation of family members, and other injuries flowing from forced unlawful status such as loss of entitlement to estate benefits, social security benefits, loss of driving privileges due to state laws requiring proof of legal status, and loss of accrued lawful residence time that is a prerequisite for eventual United States citizenship.

PLAINTIFF

16. Plaintiff, J. Jesus Camacho Montero, was born on March 26, 1969, in Mexico. Plaintiff-petitioner is a citizen of Mexico.
17. Plaintiff has lived in Atlanta, Georgia since March 9, 2000. Plaintiff entered the United States lawfully, and was inspected and admitted. See Exhibit D, Copy of I-94 Card.
18. On January 26, 2004, Plaintiff married Stacy Elizabeth Nichols (a.k.a., Stacy Elizabeth Camacho), a United States citizen. See Exhibit E, Copy of Marriage Certificate.

The Petition and Application

19. On April 22, 2004, Plaintiff's U.S. citizen spouse filed with the required fee a Form I-130, Petition for Alien Relative ("Petition") establishing her citizenship and that her spouse is an immediate relative, and executed an I-864 Affidavit of Support. On the same day, Plaintiff filed with the required fee a Form I-485, Application to Register Permanent Residence or to Adjust Status ("Application"), seeking adjustment of status to lawful permanent resident, relying on the citizen spouse's Petition attesting to the alien's status

as spouse. Plaintiff was assigned an Alien Number "A-Number", which is A099-110-592.

20. On July 5, 2005, Plaintiff's spouse, Stacy Elizabeth Camacho, was killed in a motor vehicle collision. See Exhibit F, Copy of Death Certificate.

The Denial

21. Defendants issued a Notice denying the Adjustment Application on the sole basis that the Immediate Relative Petition was administratively closed because the Plaintiff was no longer an immediate relative.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

22. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 21 above.

23. Plaintiff is an immediate relative for purposes of INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) and is eligible for adjustment of status under INA § 245(a), 8 U.S.C. § 1255(a).

24. Plaintiff was not stripped of the status of an "immediate relative" spouse by the death of Plaintiff's spouse.

25. Plaintiff remains eligible to receive adjustment of status as the "immediate relative" surviving spouse of a United States citizen.

26. Plaintiff is admissible to the United States as a lawful permanent resident.
27. An immigrant visa was immediately available to Plaintiff at the time Plaintiff's Applications were filed, pursuant to INA § 245(a), 8 U.S.C. 1255(a).
28. Plaintiff has suffered and will continue to suffer significant and irreparable harm because of Defendants' policies, procedures, acts and failures to act as described herein.
29. Defendants violated Plaintiff's statutory right to apply for relief which Congress has provided under the INA, depriving Plaintiff of the opportunity to adjust status to lawful permanent resident and live lawfully in the United States under INA § 245, 8 U.S.C. 1255(a).
30. Defendants also improperly attempt to revoke the approval of an I-130 petition unless plaintiff presents a request under 8 CFR § 205.1(a)(3)(C)(2) for humanitarian reinstatement, supported by a Form I-864 executed by an individual who qualifies under section 213A(f)(5)(B) of the Immigration and Nationality Act as a qualifying substitute sponsor.
31. The regulation found at 8 CFR § 205.1(a)(3)(C)(2) is invalid as a matter of law.
32. The substitute sponsor provisions of section 213A(f)(5)(B) of the Immigration and Nationality Act (INA) do not apply to plaintiff whose U.S. citizen spouse executed an I-864 Affidavit of Support under section 213A(f)(1) of the INA, thereby fulfilling the requirement of section 212(a)(4)(C)(ii) of the INA that the person petitioning for the alien's admission has executed an I-864 Affidavit of Support.

SECOND CAUSE OF ACTION

33. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 32 above.
34. Plaintiff has suffered a “legal wrong” or has been “adversely affected or aggrieved” by agency action. 5 U.S.C. § 702. Plaintiff is a person aggrieved by agency action, for which there is no other adequate remedy in a court. 5 U.S.C. § 704.
35. Defendants have unlawfully and erroneously interpreted the definition of the term “immediate relative” in INA § 201(a)(b)(2)(A)(i). Based on this erroneous interpretation, Defendants have erroneously denied both the immediate relative petition filed on Plaintiff’s behalf and Plaintiff’s Adjustment of Status in violation of Congressional intent. Plaintiff is entitled to injunctive relief to “compel agency action unlawfully withheld or unreasonably delayed” and to hold unlawful and set aside agency action that, as here, is not in accordance with the law. 5 U.S.C. §§ 706(1) and (2).

THIRD CAUSE OF ACTION

36. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 35 above.
37. Defendants owe Plaintiff a clear and certain duty to adjudicate Plaintiff’s Petition and Application on the basis that Plaintiff remains an “immediate relative” spouse of a United States citizen, and was not stripped of this status by the death of Plaintiff’s spouse. See *Freeman v. Gonzales*, 444 F.3d 1031

(9th Cir. 2006).

38. Defendants denied Plaintiff's Petition and Application solely on the basis that Plaintiff was stripped of the status of spouse, and not for discretionary reasons. Defendants have failed to perform their duties by determining that Plaintiff is no longer the "spouse" of a U.S. citizen and therefore not entitled to adjustment of status and for issuance of an immigrant visa, and by failing to exercise discretion.
39. Plaintiff has no other adequate remedy.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Assume jurisdiction over this action;
2. Declare that Plaintiff filed the necessary Petition and Application for lawful permanent resident status, and was not stripped of the status of "spouse" of a United States citizen upon the death of the citizen spouse;
3. Declare that Plaintiff is entitled to the process that flows from a properly filed petition and application, and must be considered a spouse for purposes of the Petition and Application;
4. Declare that Plaintiff is an immediate relative under 8 USC § 1151(b)(2)(A)(i) and for the purposes of adjudicating an I-130 petition;
5. Declare that Defendants also improperly attempt to revoke the approval of an I-130 petition unless Plaintiff presents a request under

- 8 CFR § 205.1(a)(3)(C)(2) for humanitarian reinstatement, supported by a Form I-864 executed by an individual who qualifies under section 213A(f)(5)(B) of the Immigration and Nationality Act as a qualifying substitute sponsor;
6. Declare that 8 CFR § 205.1(a)(3)(C)(2) is invalid as a matter of law;
 7. Declare that Plaintiff whose citizen spouse executed a Form I-864 Affidavit of Support has satisfied the requirements of 212(a)(4)(C)(ii) of the INA in that the person petitioning for the alien's admission has executed an I-864 Affidavit of Support, and that Plaintiff is not required to submit a Form I-864 from a qualifying substitute sponsor under section 213A(f)(5)(B) of the INA;
 8. Declare that I-130 petition procedure is not the forum for determining substantive questions of admissibility under the immigration laws, and when eligibility for immediate relative classification is established, the petition shall be granted;
 9. Issue an injunction prohibiting Defendants from using the death of the U.S. citizen spouse as a discretionary factor in the adjudication of the petition and application;
 10. Issue an injunction prohibiting Defendants from using factors flowing from the unlawful denial of the Application to again deny the Petition and application upon reopening, including but not limited to claims of abandonment of the application due to departure from the United States, and bars to admissibility related to "unlawful presence" caused by the wrongful denial;
 11. Issue an injunction prohibiting Defendants from revoking approval of

an I-130 petition where plaintiff does not present a request under 8 CFR § 205.1(a)(3)(C)(2) for humanitarian reinstatement, supported by a Form I-864 executed by an individual who qualifies under section 213A(f)(5)(B) of the Immigration and Nationality Act as a qualifying substitute sponsor, where Plaintiff's citizen spouse previously executed a Form I-864.

12. Issue a writ of mandamus compelling Defendants to (a) reopen plaintiff's adjustment of status application on the ground that the application was unlawfully denied on the basis of Defendants' erroneous determination that Plaintiff's status as an "immediate relative" spouse of a United States citizen was stripped by the death of Plaintiff's spouse, (b) treat Plaintiff as an "immediate relative" spouse and adjudicate the immigrant petition filed on Plaintiff's behalf accordingly, and (c) treat Plaintiff as an "immediate relative" spouse and exercise discretion to adjudicate Plaintiff's Adjustment of Status Application;
13. Award Plaintiff reasonable costs and attorney's fees under the Equal Access to Justice Act; and
14. Award such further relief as the Court deems just or appropriate.

DATED this 18th day of March, 2009.

Kuck Casablanca LLC,



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CERTIFICATE OF SERVICE

This is to certify that this 18th day of March, 2009, the foregoing **COMPLAINT** and its accompanying Exhibits were served by First Class Certified Mail, postage pre-paid, on:

Office of Immigration Litigation
USDOJ Civil Division
P.O. Box 868
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A handwritten signature in cursive script, appearing to read "Charles H. Kuck", is written over a horizontal line.

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