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SIFTON, J

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

GRACE CHADDERTON RICHARDS,

Plaintiff,

v.

JANET NAPOLITANO, Secretary, U.S.
Department of Homeland Security,
JOHN P. TORRES, Acting Assistant
Secretary, U.S. Immigration and Customs
Enforcement, and **MICHAEL AYLES**,
Acting Deputy Director, U.S. Citizenship
and Immigration Services,

Defendants.

Civil Action No.

Agency File No. A96 732 446

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF AND
PETITION FOR WRIT OF
MANDAMUS**

INTRODUCTION

Plaintiff Grace Chadderton Richards is the surviving spouse of a United States citizen. Defendants (collectively the “agency”) summarily, and unlawfully, denied the petition filed by Plaintiff’s husband prior to his death as well as Plaintiff’s corresponding application for adjustment of status to lawful permanent resident (commonly known as a “green card” application). Shortly thereafter, and as a direct result of Defendants’ unlawful construction of the Immigration and Nationality Act (“INA” or the “Act”), the agency initiated proceedings against Plaintiff to have her forcibly removed from the United States. Plaintiff now brings this action pursuant to relevant provisions of the INA and the Administrative Procedures Act (“APA”) for declaratory, injunctive and mandamus relief. She is challenging the agency’s determination that she is no longer a “spouse” and that her husband’s untimely death automatically disqualified her from classification as an “immediate relative” under the Act.

The legal issues presented by this case have been the subject of extensive litigation throughout the United States in recent years. At present, three United States Courts of Appeals have issued rulings, the result of which is a circuit split in favor of the surviving spouse(s), and a fourth, *Tiang v. Chertoff*, 526 F. Supp. 2d 177 (D. Mass. 2007) (ruling in favor of spouse), appeal docketed, No. 08-1179 (1st Cir. 2008), is poised to issue a ruling in the near future. Both the Ninth Circuit and the Sixth Circuit have issued *unanimous* rulings in the spouse’s favor. See *Lockhart v. Napolitano*, --- F.3d ---, 2009 WL 928504 (6th Cir. Apr. 8, 2009); *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006). The Third Circuit, which denied rehearing last month, issued a split decision in favor of the agency. See *Robinson v. Napolitano*, 554 F.3d 358 (3^d Cir. 2009). Squarely in the minority, the Third Circuit decision includes a powerful dissent and is being appealed to the United States Supreme Court. This is an issue of first impression in the Second Circuit.

As and for her Complaint, Plaintiff hereby alleges, by her attorneys, as follows:

JURISDICTION

1. This action arises under the INA, 8 U.S.C. § 1101, et seq. The Court has jurisdiction under 28 U.S.C. § 1331 as well as the Administrative Procedure Act, 5 U.S.C. § 701, et seq., and the Mandamus Act, 28 U.S.C. § 1361. Although not a jurisdictional statute, Plaintiff seeks additional relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, et seq. asdfas

VENUE

2. Venue in this district is proper under 28 U.S.C. § 1391(e) because Plaintiff resides in this district and no real property is involved in this action.

EXHAUSTION

3. There are no administrative remedies available for Plaintiff to exhaust.

4. There is no administrative appeal of the denial of the deceased spouse's Petition because the Board of Immigration Appeals has held that it lacks jurisdiction to review such a denial. *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985).

5. There is also no administrative appeal of the denial of the Plaintiff's Application. 8 CFR § 245.2(a)(5)(ii).

6. Although Plaintiff may renew the Application in removal proceedings before the Executive Office for Immigration Review ("EOIR"), a component of the Department of Justice, without an approved immigrant petition, the law precludes a grant of adjustment of status to Plaintiff. Accordingly, solely by virtue of the agency's unlawful summary denial of the Petition, the Immigration Judge presiding over such proceedings may not consider the Application and, as such, Plaintiff has no administrative remedy.

THE PARTIES

7. Plaintiff Grace Chadderton Richards is a 52-year-old national and citizen of Barbados. She resides at [REDACTED], Brooklyn, New York [REDACTED], and is the surviving spouse of Ricky Richards, a natural-born citizen of the United States.

8. Defendant Janet Napolitano is sued in her official capacity as Secretary of the Department of Homeland Security ("DHS"). As DHS Secretary, Ms. Napolitano bears ultimate responsibility for the lawful, just and proper administration of the nation's immigration laws.

9. Defendant John P. Torres is sued in his official capacity as Acting Assistant Secretary of DHS and titular head of Immigration and Customs Enforcement ("ICE"), the bureau within the agency responsible for enforcement of the nation's immigration laws, including the prosecution of non-citizens in removal proceedings.

10. Defendant Michael Aytes is sued in his official capacity as Acting Deputy Director of Citizenship and Immigration Services ("CIS"), the bureau within the agency responsible for implementing the nation's immigration laws and awarding benefits to deserving non-citizens.

STATEMENT OF FACTS

Background, Petition and Application

11. Plaintiff was born in Barbados [REDACTED]. She visited the United States numerous times under the terms of a multiple entry, non-immigrant visitor's visa that was issued in 1995. She routinely returned to Barbados at the conclusion of her authorized period of stay.

12. During a visit to the United States in or around 2000, Plaintiff was introduced to Mr. Ricky Richards, a natural-born citizen of the United States, by his cousin. They became friends and, over the course of time, began dating and fell in love. They maintained a long-distance relationship for several years.

13. On or about 31 July 2004, Plaintiff returned to the United States on holiday and was lawfully admitted under the terms of her visa. During this visit, just prior to when Plaintiff was scheduled to return home, Mr. Richards proposed marriage. Plaintiff accepted and moved-in with her fiancé and his mother in or around December 2004. The couple planned a wedding for the following year and they married on 28 July 2005 at a Church ceremony in Brooklyn, New York. Plaintiff continues to reside with her mother-in-law to this day.

14. Plaintiff and Mr. Richards cohabited together and lived as a bona fide married couple at all relevant times herein. Their marriage is thus valid under the INA.

15. Approximately six months after their marriage, on or about 25 January 2006, the couple filed an I-130 immigrant petition (the "Petition") along with an I-485 adjustment of status application (the "Application") with Defendants' duly authorized agents and paid all fees required by law. The Petition and Application were filed concurrently pursuant to agency regulation.

16. On or about 21 March 2006, the agency issued Plaintiff an Employment Authorization Document ("EAD"), which authorized her to work in the United States for a period of one year. The EAD reflected her lawful presence and right to remain in the United States as an applicant for permanent resident status.

17. The Social Security Administration issued Plaintiff a Social Security Number and corresponding ID card.

18. Plaintiff and her husband were directed to appear before the agency on 8 August 2006, in Garden City, New York, in connection with an interview on the Petition and Application. The couple appeared on the scheduled date, but no decision was made on their case. Unfortunately, they appeared without counsel and were subjected to rude and unprofessional treatment by the interviewing officer. For example, at the outset of the interview, upon inspection of the Plaintiff's documentation and before even beginning the questioning, the interviewing officer falsely accused Plaintiff of presenting a fake birth certificate because the certificate did not refer to the child by name. Plaintiff explained how that was customary in Barbados, a fact the interviewing officer could easily have verified through the Foreign Affairs Manual, among numerous other appropriate sources. The couple then proceeded to answer each of the questions posed in an honest and forthright manner. At the conclusion of the interview, the DHS officer marked the Plaintiff's passport "pending" and advised them that they would be notified of a decision by mail. As they were leaving the room, without prompting, the interviewing officer uttered, "I don't know why *you all* leave your good jobs and come over here."

19. Tragically, on 18 September 2006, Plaintiff's husband died. The Petition and Application remained pending before the agency. Mr. Richards was 49 years of age at the time of his death.

20. On or about 21 March 2007, the agency renewed Plaintiff's employment authorization for one year, once again reflecting her lawful status and physical presence in the United States. At some unknown point, DHS directed Plaintiff and her husband to appear for a second interview before the agency on 9 July 2007 (the interview notice does not reflect when it was issued).

21. Plaintiff retained counsel and appeared at the scheduled interview. Plaintiff presented her husband's death certificate to agency officials and tendered additional documentation establishing the bona fides of her marital relationship. She also arrived at the interview with two witnesses, including a family member of the deceased spouse, who were prepared to testify on her behalf regarding the validity of her marriage. Plaintiff also tendered a sworn Affidavit from the decedent's mother, with whom she continues to reside on [REDACTED] in Brooklyn.

22. During the "interview" on 9 July 2007, the adjudicating officer asked no questions of Plaintiff and refused to hear any witness testimony. He explained that it was the agency's policy to deny petitions where the citizen spouse had died prior to the two year anniversary of the marriage. Counsel presented case law holding that the agency's actions in this regard were unlawful and pleaded with the officer to: (A) approve the Petition *nunc pro tunc* to the date of the initial interview, when the Petition could, and should, have been adjudicated and approved; or, alternatively (B) hold the Petition and Application in abeyance pending supervisory review. The officer agreed to refrain from immediately denying the Petition and advised counsel that he would request agency counsel to review the matter. Counsel then requested to speak with a supervisory officer and was told to wait. The interviewing officer returned and advised that his supervisor was not "interested" in speaking with counsel and in fact had directed him to proceed with denying the Petition. The officer then advised counsel that Plaintiff would receive a denial notice in the mail.

23. For the next 19 months, the agency did not act on either the Petition or Application.

Denial of Petition and Institution of Removal Proceedings

24. By notice dated 4 February 2009, and decision dated 6 February 2009, DHS denied the Petition and Application. [See copy of decision annexed hereto Exhibit "A," hereinafter the "Decision".]

25. The Decision concluded that, “[s]ince the Plaintiff in this case is deceased, the intended beneficiary is no longer the spouse of a United States citizen. Since the beneficiary is no longer an ‘immediate relative’ as defined in the statute, the petition is hereby **DENIED**” (emphasis in original). The agency relied on *Matter of Varela*, 13 I & N Dec. 453 (BIA 1970), which the Board of Immigration Appeals itself discredited in *Matter of Sano*, 19 I & N Dec. 299, 301 (BIA 1985) (deeming *Varela* “extra-jurisdictional”), as binding precedent that “constrained” it to deny the Petition. The decision also noted that “[e]ven if there were no precedent Board decisions on this issue, the [Act] would require the Service to deny the Petition.”

26. Defendants do not, and cannot, dispute the fact that the agency routinely grants green cards to non-citizens married less than two years. Nor could Defendants dispute the fact that, if the agency had adjudicated the Petition before Mr. Richards’ death, it could have approved both the Petition and Application notwithstanding the duration of the marriage.

27. Defendants do not, and cannot, dispute the fact that, if Plaintiff and her husband had been married for at least two years at the time of his death, she would have been eligible for “immediate relative” classification and permanent resident status as a self-petitioning widow, even if Mr. Richards had never affirmatively filed a petition on her behalf seeking classification as an “immediate relative” spouse.

28. Compounding Plaintiff’s injuries and suffering, on or about 4 April 2009, in a ruthless, unnecessary and unwarranted act of administrative discretion, DHS issued and served a Notice to Appear (“NTA”) thereby placing Plaintiff under removal proceedings. A hearing in these proceedings has been scheduled for 9 July 2009. [See copy of NTA annexed hereto as Exhibit “B”.]

29. The NTA alleges, *inter alia*, that Plaintiff “remained in the United States beyond January 30, 2005, without authorization from the [agency],” and charges Plaintiff with being removable from the United States pursuant to section 237(a)(1)(B) of the Act, 8 U.S.C. 1227(a)(1)(b), “in that after admission ... [she] remained in the United States for a time longer than permitted, in violation of the Act.”

30. In the parlance of immigration law, and as the sole ground of removability, Plaintiff was charged as an “overstay.” Congress, however, expressly exempted immediate relatives of United States citizens from inadmissibility as overstays upon filing for adjustment of status to lawful permanent resident under section 245(a) of the Act. INA § 245(c)(2), 8 U.S.C. § 1255(c)(2).

31. Plaintiff thus had, and continues to have, a statutory right to seek adjustment of status.

32. But for the denial of the Petition and Application, the agency would not – and could not under its decades-old policy and/or the governing regulations – have commenced proceedings to remove Plaintiff from the United States.

33. But for the denial of the Petition and Application, the agency would not – and could not – have alleged that Plaintiff had remained in the United States longer than permitted and/or charged her with being removable as an overstay.

34. The Immigration Judge presiding over the upcoming hearing has authority to order that Plaintiff be removed from the United States forthwith. The Immigration Judge, however, has *no jurisdiction* over the Petition and *no authority* to compel DHS to reconsider its position regarding the Petition and Application. Furthermore, without an approved immigrant petition, the Immigration Judge *lacks authority* to consider the Application or grant Plaintiff adjustment of status.

35. Plaintiff does not qualify for any form of relief from removal. Therefore, unless the agency is enjoined from determining that Plaintiff is not a “spouse” under the INA and/or enjoined from alleging that she remained in the United States without authorization and/or enjoined from charging her as removable from the United States as an overstay, the Immigration Judge would be compelled to order her removal from the United States.

36. Although Plaintiff, if ordered removed, would have the right to appeal the order to the Board of Immigration Appeals, such appeal would be futile in light of Board precedent, which the agency is bound to follow.

37. The denial of the Petition – and the corresponding legal conclusions employed to deny the Application – are final, non-discretionary agency actions that are subject to judicial review.

CLAIMS FOR RELIEF

38. Plaintiff was, and remains, an “immediate relative” pursuant to INA § 1151(b)(2)(A)(i) by virtue of the valid and bona fide I-130 petition filed by her citizen spouse under INA § 204(a), 8 U.S.C. § 1154(a).

39. Plaintiff was, and remains, statutorily eligible for adjustment of status. Plaintiff is eligible to receive an immigrant visa, is admissible to the United States for permanent residence, and an immigrant visa was immediately available to Plaintiff at the time the Application was filed. *See* 8 U.S.C. 1255(a).

40. The agency “shall,” in accordance with regulation and routine agency practice, issue an employment authorization document (“EAD”) to non-citizens with pending applications for adjustment of status.

41. Plaintiff was not stripped of her status as an “immediate relative” spouse as a result of the untimely death of her husband. No provision of law exists providing for the automatic denial of an immediate relative petition upon the death of a petitioning spouse.

42. Defendants construction of 8 U.S.C. § 1151 is contrary to the express language of the statute. Its construction is also unreasonable and leads to arbitrary, capricious and absurd results.

43. Plaintiff has suffered, and will continue to suffer, significant harm as a result of Defendants’ policies, procedures, acts and failure to act as described herein.

44. Absent judicial intervention, Plaintiff will suffer irreparable injury, including but not limited to the loss of the right to seek permanent resident status and removal from the United States.

FIRST CAUSE OF ACTION – CLAIM UNDER INA

45. Plaintiff realleges and incorporates by reference paragraphs 1 through 44 herein.

46. Defendants have erroneously and unlawfully interpreted the definition of the terms “immediate relative” and “spouse” under the INA. Based on this erroneous and unlawful construction of the statute, Defendants denied the Petition and Application in violation of clear Congressional intent.

47. Defendants unlawfully deprived Plaintiff of immigration benefits to which she is entitled and violated her statutory rights under INA §§ 201, 204 and 245, 8 U.S.C. §§ 1151, 1154, 1255, including: (A) the right to be classified as an “immediate relative” under the Act; and (B) the corresponding right to a meaningful and lawful adjudication of her application for adjustment of status to lawful permanent resident.

SECOND CAUSE OF ACTION – CLAIM UNDER APA

48. Plaintiff realleges and incorporates by reference paragraphs 1 through 44 herein.

49. Plaintiff has suffered a “legal wrong” and/or has been “adversely affected or aggrieved” by agency action. 5 U.S.C. §§ 702, 704.

50. Plaintiff is entitled to judicial relief to “compel agency action unlawfully withheld or unreasonably delayed” and to “hold unlawful and set aside agency action that is not in accordance with law.” 5 U.S.C. §§ 706(1) and (2).

THIRD CAUSE OF ACTION – CLAIM UNDER MANDAMUS ACT

51. Plaintiff realleges and incorporates by reference paragraphs 1 through 44 herein.

52. Defendants denied the Petition and Application solely on the basis that Plaintiff was stripped of her status as “spouse,” and not for discretionary reasons.

53. In determining that Plaintiff was no longer the “spouse” of a U.S. citizen, Defendants failed to perform their congressionally mandated duties. Defendants also failed to perform their duties by determining, as a matter of law, that Plaintiff was not entitled to seek adjustment of status and by failing to exercise the discretion provided by Congress.

54. Defendants owe Plaintiff a clear and certain duty under the INA, as aforesaid. The Court thereby has authority under the Mandamus Act, 28 U.S.C. § 1361, to compel Defendants to adjudicate the Petition and Application on the basis that Plaintiff is the “immediate relative” spouse of a United States citizen and was not stripped of such status by her husband’s death.

55. Judicial intervention is required because Plaintiff has no other adequate remedy at law.

FOURTH CAUSE OF ACTION – CLAIM UNDER *DECLARATORY JUDGMENT ACT*

56. Plaintiff realleges and incorporates by reference paragraphs 1 through 44 herein.

57. Plaintiff is entitled to a declaration of her rights, which shall have the force and effect of a final judgment, in accordance with 28 U.S.C. § 2201(a).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for declaratory, injunctive and mandamus relief, and requests the Court to issue an Order:

- A. **Declaring**, as a matter of law and clear statutory interpretation, that:
- i. the INA contains no requirement that a non-citizen spouse be married two years in order to qualify as an “immediate relative” pursuant to 8 U.S.C. § 1151(b)(2)(A)(i);
 - ii. the duration of a non-citizen’s marriage is irrelevant under the INA where a citizen spouse has filed an I-130 petition on behalf of his/her non-citizen spouse;
 - iii. the INA contains no provision authorizing, or compelling, the agency to automatically or summarily deny a duly filed and pending petition solely on account of the death of the citizen spouse;
 - iv. the agency’s decisions denying the Petition and Application are not in accordance with law;
 - v. Plaintiff is eligible for classification as an “immediate relative” under the Act by virtue of her status as the surviving “spouse” of a United States citizen;
 - vi. Plaintiff is entitled to the process that flows from a properly filed Petition and Application and must be considered a “spouse” for purposes of adjudicating the Petition and Application;
 - vii. Plaintiff has the right to an adjudication on the merits of the Petition and Application in accordance with the declarations previously set forth herein; and
 - viii. Plaintiff has the right to an EAD upon submission of an application therefor;
- B. **Setting aside** as unlawful the agency’s decisions on the Petition and Application;
- C. **Enjoining** the agency from:
- i. determining that Plaintiff is no longer a “spouse” and that she is ineligible for immediate relative classification under the INA, and from denying the petition and Application on that basis;

ii. alleging that Plaintiff “remained in the United States beyond January 30, 2005, without authorization” from the agency;

iii. charging Plaintiff with being “subject to removal from the United States” pursuant to 8 U.S.C. § 1227(a)(1)(B) by virtue of her “remain[ing] in the United States for a time longer than permitted in violation of the Act or any other law of the United States”; and

iv. removing Plaintiff from the United States on the charge set forth in the NTA;

D. Compelling the agency to:

i. adjudicate the Petition and Application on the merits and in accordance with the declarations previously set forth herein; and

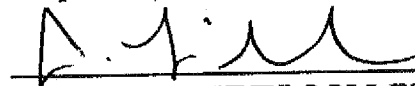
ii. issue Plaintiff an EAD within 30 days of receipt of an application therefor, and directing the agency to accept the Plaintiff’s renewal EAD application without fee;

E. Awarding Plaintiff costs and reasonable attorney’s fees pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412, et seq.; and

F. Granting such further relief as the Court deems just, proper and equitable.

DATED the 22nd day of April, 2009

Respectfully submitted,



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