

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DIANA GECAJ ENSTROM, and MARIA DEL)	FILED: MAY 27, 2009
CARMEN DIAZ-RUIZ,)	Case No. 09CV3185
)	JUDGE GUZMAN
Plaintiffs-petitioners,)	MAGISTRATE JUDGE COX
)	BR
vs.)	
)	
JANET NAPOLITANO, Secretary, U.S.)	
Department of Homeland Security; MICHAEL)	
AYTES, Acting Director, U.S. Citizenship and)	
Immigration Services,)	
)	
Defendants-respondents.)	

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

COME NOW Plaintiff-petitioners (plaintiffs) Diana Gecaj Engstrom and Maria del Carmen Diaz Ruiz, by and through their attorneys, and challenge defendants-respondents' (defendants) determinations that, as a matter of law, plaintiffs lost status as "immediate relative" spouses of United States citizens when their citizen spouses died while plaintiffs' immigration applications were filed and awaiting agency action. Plaintiffs respectfully petition this Court for injunctive, declaratory and mandamus relief to compel defendants and their subordinates to: (a) find that, as a matter of statutory interpretation, plaintiffs remain "immediate relatives" under

INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) due to marriage to their United States citizen husbands; (b) order defendants to reopen and readjudicate the immigrant petition (I-130 petition) that was filed on behalf of plaintiffs by the U.S. citizen spouse; and (c) order defendants to reopen and readjudicate the (i) adjustment of status applications (I-485 applications) that plaintiffs filed as immediate relative spouses of U.S. citizens. Plaintiffs allege as follows:

JURISDICTION

1. This action arises under the Immigration and Nationality Act of 1952 ("INA"), INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) and INA § 245, 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. Plaintiffs additionally seek 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 Janet Napolitano and Michael Aytes are officers of the United States acting in their official capacities, and the Department of Homeland Security ("DHS"), the United States Citizenship and Immigration Services ("USCIS") are agencies of the United States. Additionally, plaintiffs reside in this judicial district. A substantial part of the events giving rise to the claim occurred in this district, in that the Chicago Field Office of USCIS, an agency of DHS located at 101 West Congress Parkway, Chicago, Illinois is the local office that has withheld approval of plaintiff Engstrom's immigration petition and application for over five (5) years, and it is the local office that denied plaintiff Diaz-Ruiz' immigration petition and application following a motion to reopen. Defendants agreed in a previous class action lawsuit in a joint status report filed with the

U.S. District Court for the Central District of California (*Hootkins v. Napolitano*, 07-5696 CAS (C.D. Cal. 2009)) that transfer of plaintiffs claims would be appropriate to the Northern District of Illinois.

EXHAUSTION

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

4. There is no administrative appeal of the denial of an application for adjustment of status (Form I-485). 8 CFR § 245.2(a)(5)(ii).

5. There also is no administrative appeal of the I-130 immigrant petition in the case of a deceased petitioner, 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). Procedures for obtaining lawful permanent resident status through an adjustment of status (I-485) application require an approved I-130 immigrant petition.

6. While applicants may generally renew the adjustment of status application (Form I-485) in removal proceedings before EOIR, adjudication of this application requires an I-130 approval. Because the I-130 was denied and no administrative appeal of the I-130 exists, plaintiff has no administrative remedy. As such removal proceedings are not a mandatory exhaustion requirement and cannot be imposed on plaintiffs' APA action. See *Darby v. Cisneros*, 509 U.S. 137 (1993).

DEFENDANTS

7. 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.

8. Defendant-respondent Michael Aytes 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. Aytes is responsible for the overall administration of USCIS and the implementation of the immigration laws of the United States.

STATUTORY AND REGULATORY BACKGROUND

9. Plaintiffs seek lawful permanent resident status, and applied for such status. Plaintiffs challenge defendants' determinations that, as a matter of law, plaintiffs were stripped of the status as "immediate relative" spouses of United States citizens when their citizen spouses tragically died while plaintiffs' immigration applications were awaiting adjudication.

10. 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 INA § 204(a)(1)(A)(i), 8 U.S.C. § 1154(a)(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 INA § 201(b)(2)(A)(i), 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."

11. An alien spouse whose United States citizen spouse has not 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 INA § 204(a)(1)(A)(ii), 8 U.S.C. § 1154(a)(1)(A)(ii), which states, "An *alien spouse*

described in the *second sentence* of section 201(b)(2)(A)(i) [8 U.S.C. § 1151(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 INA § 201(b)(2)(A)(i), 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.”

12. Defendants have applied the incorrect immediate relative definition to plaintiffs’ petitions and applications. 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 INA § 201(b)(2)(A)(i), 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 INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i)).

13. The legal issues presented by this case have been the subject of extensive litigation throughout the United States in recent years. At present, four United States Courts of Appeals have issued rulings, the result of which is a circuit split in favor of the surviving spouses. The First, Third, and Ninth Circuits have issued *unanimous* rulings in the spouse’s favor. *See Taing v. Napolitano*, ---F.3d ---, 2009 U.S. App. LEXIS 10718 (1st Cir. May 20, 2009); *Lockhart v. Napolitano*, 561 F.3d 611 (6th Cir. Apr. 8, 2009); *Freeman v. Gonzales*, 444

F.3d 1031 (9th Cir. 2006). The Third Circuit issued a split decision in favor of the agency interpretation. *See Robinson v. Napolitano*, 554 F.3d 358 (3d 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 Seventh Circuit.

14. Through the application of the improper standard, defendants have compounded plaintiffs' grief. Defendants have stripped plaintiffs of immediate relative status, denied or withheld adjudication of the applications for adjustment of status, denied work and travel authorization, and placed plaintiffs at risk of removal from the United States. 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 ENGSTROM

15. Plaintiff Diana Gecaj Engstrom was born in Kosovo in 1980 and is a citizen of Kosovo, the former Yugoslavia.

16. Plaintiff Engstrom resides in Chicago, Illinois. Plaintiff Engstrom entered the United States lawfully in 2003, and was inspected and admitted.

17. On December 29, 2003, plaintiff Engstrom married Todd Engstrom, a United States citizen and United States Army Contractor responsible for training Iraqi security forces in Iraq.

The Petition and Application

18. On January 29, 2004, plaintiff Engstrom's U.S. citizen spouse filed with the

required fee a Form I-130, Petition for Alien Relative ("Petition") establishing his citizenship and that his spouse is an immediate relative, and executed an I-864 Affidavit of Support. On the same day, plaintiff Engstrom 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 Engstrom was assigned an Alien Number "A-Number", which is A099 103 420, and was issued a work permit.

19. On September 14, 2004, plaintiff's spouse Todd Engstrom was killed in Iraq when his convoy was hit by a rocket-propelled grenade.

The Denial

20. Defendants have withheld approval of the Petition and Application that were filed by the couple more than five (5) years ago, and plaintiff Engstrom has not been accorded adjustment of status to lawful permanent resident status.

Plaintiff DIAZ-RUIZ

21. Plaintiff Maria Del Carmen Diaz-Ruiz was born in Spain in 1973 and is a citizen of Spain.

22. Plaintiff Diaz-Ruiz lives in Glencoe, Illinois. Plaintiff Diaz-Ruiz entered the United States lawfully, having been inspected and admitted.

23. On June 29, 2004, plaintiff Diaz-Ruiz married Christopher Rodriguez, a United States citizen.

The Petition and Application

24. On December 30, 2004, plaintiff Diaz-Ruiz' U.S. citizen spouse filed with the required fee a Form I-130, Petition for Alien Relative ("Petition") establishing his citizenship and

that his spouse is an immediate relative, and executed an I-864 Affidavit of Support. On the same day, plaintiff Diaz-Ruiz 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 Diaz-Ruiz was assigned an Alien Number "A-Number", which is A099 235 659, and was issued a work permit.

25. On June 13, 2005, plaintiff's spouse Christopher Rodriguez died of congenital heart disease.

The Denial

26. On December 22, 2005, defendants denied the Petition and Application that were filed by the couple solely on the basis that plaintiff Diaz-Ruiz was no longer the spouse of a U.S. citizen. On May 18, 2006, plaintiff Diaz-Ruiz filed a motion to reopen which was denied in a written opinion October 25, 2006.

LAW OF THE CASE

27. Plaintiffs Engstrom and Diaz-Ruiz were plaintiffs in a class action lawsuit, *Hootkins v. Chertoff*, No. 07-5696 CAS (C.D. Cal., filed Aug. 30, 2007).

28. The Court in *Hootkins* limited the class to the Ninth Circuit, and in an Order dated April 28, 2009, declined to rule on plaintiffs claims, stating that "The Court is mindful of the importance of allowing the government to litigate legal issues before different courts throughout the country." *Hootkins, Id.*, Opinion, Dkt. #151, p. 18.

29. Following this ruling, plaintiffs and defendants on May 5, 2009 filed a joint stipulation in *Hootkins* for voluntary dismissal under Fed. R. Civ. P. 41(a)(1)(A)(ii) of plaintiffs Engstrom's and Diaz-Ruiz' claims without prejudice.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

30. Plaintiffs reallege and incorporate by reference paragraphs 1 through 29 above.

31. Plaintiffs are immediate relatives for purposes of INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) and are eligible for adjustment of status under INA § 245(a), 8 U.S.C. § 1255(a).

32. Plaintiffs were not stripped of the status of "immediate relative" spouses by the death of plaintiffs' spouses.

33. Plaintiffs remain eligible to receive adjustment of status as the "immediate relative" spouses of United States citizens.

34. Plaintiffs are admissible to the United States as lawful permanent residents.

35. An immigrant visa was immediately available to plaintiffs at the time plaintiffs' applications were filed, pursuant to INA § 245(a), 8 U.S.C. 1255(a).

36. Plaintiffs have suffered and will continue to suffer significant and irreparable harm because of defendants' policies, procedures, acts and failures to act as described herein.

37. Defendants violated plaintiffs' statutory right to apply for relief which Congress has provided under the INA, depriving plaintiffs 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).

38. Where defendants have been forced to halt the automatic termination practices, 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 INA § 213A(f)(5)(B), 8 U.S.C. § 1183a(f)(5)(B) as a qualifying substitute sponsor. See *Hootkins v. Napolitano*, 07-5696 CAS

(C.D. Cal. 2009) (holding automatic revocation regulations and substitute sponsor requirements as invalid as a matter of law).

39. The regulation found at 8 CFR § 205.1(a)(3)(C)(2) is invalid as a matter of law.

40. The substitute sponsor provisions of INA § 213A(f)(5)(B), 8 U.S.C. § 1183a(f)(5)(B) do not apply to plaintiffs whose U.S. citizen spouses executed an I-864 Affidavit of Support under INA § 213A(f)(5)(B), 8 U.S.C. § 1183a(f)(5)(B), thereby fulfilling the requirement of INA § 212(a)(4)(C)(ii), 8 U.S.C. § 1182(a)(4)(C)(ii) that the person petitioning for the alien's admission has executed an I-864 Affidavit of Support.

SECOND CAUSE OF ACTION

41. Plaintiffs reallege and incorporate by reference paragraphs 1 through 40 above.

42. Plaintiffs have suffered a "legal wrong" or have been "adversely affected or aggrieved" by agency action. 5 U.S.C. § 702. Plaintiffs are individuals aggrieved by agency action, for which there is no other adequate remedy in a court. 5 U.S.C. § 704.

43. Defendants have unlawfully and erroneously interpreted the definition of the term "immediate relative" in INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). Based on this erroneous interpretation, defendants have erroneously denied or unlawfully withheld adjudication of both the immediate relative petitions filed on plaintiffs' behalf and plaintiffs' adjustment of status in violation of Congressional intent. Plaintiffs are 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

44. Plaintiffs reallege and incorporate by reference paragraphs 1 through 43 above.

45. Defendants owe plaintiffs a clear and certain duty to adjudicate plaintiffs' applications on the basis that plaintiffs remain "immediate relative" spouses of United States citizens, and were not stripped of this status by the death of plaintiffs' spouses. See *Taing v. Napolitano*, 2009 U.S. App. LEXIS 10718 (1st Cir. May 20, 2009); *Lockhart v. Napolitano*, 561 F.3d 611 (6th Cir. Apr. 8, 2009); *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006). *But see Robinson v. Napolitano*, 554 F.3d 358 (3d Cir. 2009).

46. Defendants denied plaintiffs' applications solely on the basis that plaintiffs were stripped of the status of spouse, and not for discretionary reasons. Defendants have failed to perform their duties by determining that plaintiffs are no longer the "spouses" of U.S. citizens and therefore not entitled to adjustment of status, and by failing to exercise discretion.

47. Plaintiffs have no other adequate remedy.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Assume jurisdiction over this action;
2. Declare that plaintiffs filed the necessary petitions and applications for lawful permanent resident status, and were not stripped of the status of "spouse" of United States citizens upon the death of the citizen spouse;
3. Declare that plaintiffs are entitled to the process that flows from a properly filed petition and application, and must be considered spouses for purposes of the petitions and applications;
4. Declare that plaintiffs are immediate relatives under INA § 201(b)(2)(A)(i), 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-

I-130 petition unless plaintiffs 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 INA § 213A(f)(5)(B), 8 U.S.C. § 1183a(f)(5)(B) 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 plaintiffs whose citizen spouses executed a Form I-864 Affidavit of Support have satisfied the requirements of INA § 212(a)(4)(C)(ii), 8 U.S.C. § 1182(a)(4)(C)(ii) in that the person petitioning for the alien's admission has executed an I-864 Affidavit of Support, and that plaintiffs are not required to submit a Form I-864 from a qualifying substitute sponsor under INA § 213A(f)(5)(B), 8 U.S.C. § 1183a(f)(5)(B);
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 petitions and applications;
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 plaintiffs do 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 INA § 213A(f)(5)(B), 8 U.S.C. § 1183a(f)(5)(B) 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 applications on the ground that the applications were unlawfully denied on the basis of defendants' erroneous determination that plaintiffs' status as "immediate relative" spouses of United States citizens were stripped by the death of plaintiffs' spouses, (b) treat plaintiffs as "immediate relative" spouses and adjudicate the immigrant petitions ("petitions") filed on plaintiff's behalf accordingly, and (c) treat plaintiffs as "immediate relative" spouses and exercise discretion to adjudicate plaintiffs' adjustment of status applications ("applications");
13. Award plaintiffs 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 27th day of May, 2009.

By /s/Maria Baldini-Potermin
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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the United States of America that on May 27, 2009, true and correct copies of the plaintiffs' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR WRIT OF MANDAMUS, were sent via first class certified mail, return receipt requested, to the following:

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