UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DIANA GECAJ ENGSTROM, and, **MARIA DEL CARMEN DIAZ-RUIZ,** Plaintiffs, vs. **JANET NAPOLITANO**, *Secretary, U.S. Department of Homeland Security, et al.* Defendants.	)))))))))))))	Case No: 1:09-cv-03185 Honorable Ronald A. Guzman

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants' claim that the second sentence's inclusion of a surviving spouse coupled with the first sentence's exclusion of the term instructs that the first sentence was not intended to include surviving spouses. Def. Memo in Support of MSJ (Dkt. #15) at 8 (Def. Memo). Defendants' recourse to the canon of statutory construction, *inclusio unius est exclusion alterius*, is misplaced. The first sentence of 8 U.S.C. § 1151(b)(2)(A)(i) is governed by the petition procedure set out in 8 U.S.C. § 1154(a)(1)(A)(i) (first clause), and the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i) is governed by the self-petition procedure set out in 8 U.S.C. § 1154(a)(1)(A)(ii) (second clause). Thus, a first sentence spouse must be the beneficiary of a petition filed by his or her U.S. citizen spouse under the first clause of 8 U.S.C. § 1154(a)(1)(A),

while the second sentence spouse is provided a special self-petitioning ability for those who were spouses for at least two years at the time the U.S. citizen spouse died under the second clause of 8 U.S.C. § 1154(a)(1)(A). The second sentence spouse is also referred to as "the spouse" in the second sentence of § 1151(b)(2)(A)(i), and also referred to as an "alien spouse" in the second clause of 8 U.S.C. § 1154(a)(1)(A). Reference to a surviving spouse as an alien spouse shows inclusion of surviving spouse within the broader ambit of spouse. See *Taing v. Napolitano*, 567 F.3d 19, 26 (1st Cir. 2009) ("The fact that within the same subsection, Congress uses the word 'spouse' to refer to a living spouse and a surviving spouse lends support to the argument that it intended for 'spouse' to include surviving spouse."). Defendants point to the exclusion of the narrower term surviving spouse from the first sentence, but do not discuss the inclusion of the term spouse as describing a surviving spouse. Their position cannot be supported, and the canon of statutory construction relied on by Defendants supports Plaintiffs' reading of the statute, not Defendants'.

Defendants next argue that *Chevron* deference applies. Def. Memo at 12. Plaintiffs have described the weight of authority regarding this issue, finding the statute plain and unambiguous. Pl. Memo (Dkt. #12) at 7-10. *Chevron* does not apply. Defendants also argue that bills introduced in Congress demonstrate Defendants' position is legally sound. Def. Memo at 14-16. The Supreme Court has admonished that "[f]ailed legislative proposals are a particularly dangerous ground on which to rest a prior interpretation of a prior statute." Solid Waste Mgmt. Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 169-170 (2001). Reliance on any part of that draft legislation, including the committee report, would be improper.

Defendants further argue that other provisions of the INA, specifically the FY2004 National Defense Authorization Act (NDAA), Pub. L. No 108-136, § 1703, 117 Stat. 1392, 1693-96 (2003) and the USA PATRIOT Act, Pub. L. No. 107-56, §§ 421 and 423, 115 Stat. 272, 360-363, indicate that "when Congress wants to provide exceptions for widow(er)s to be eligible for immediate relative classification without any durational requirement for the marriage, it will do so expressly." Def. Memo. at 16. As the First Circuit stated, "The government's references to the Patriot Act and NDAA are inapposite because to the extent that they are relevant, the cited provisions pertain to the second sentence of § 1151(b)(2)(A)(i), not the first sentence." *Taing*, 567 F.3d at 30. Defendants also point to the present tense language of § 1154(b) as significant in reviewing the statute. Def. Memo. at 17 As the First Circuit in *Taing* explained, however, "the use of the present tense in § 1154(b) does not affect our analysis because Mrs. Taing still qualifies as 'an immediate relative' despite her husband's death." Id. at 28. Likewise, Plaintiffs still qualify as immediate relatives.

Further, Defendants claim that the use of the term "surviving spouse" in other provisions of the INA supports the conclusion that a surviving spouse is not a spouse. Def. Memo. at 17-18. As stated previously, reference to a surviving spouse as an alien spouse shows inclusion of surviving spouse within the broader ambit of spouse, and it is not necessary for the first sentence to be more specific, as it includes all spouses. Additionally, the term "surviving spouse" has been used as a more specific term within the INA to refer specifically *only* to surviving spouses, such that they may self-petition in their own right. The first sentence deals with spouses whose U.S. citizen spouses file a petition on their behalf, because they are not allowed to simply file their own self petition and immigrate apart from their citizen spouse's petition. Conversely, in the limited circumstance of someone who was the spouse of a citizen for at least two years, such

surviving spouses are allowed to self-petition. The narrower category of surviving spouse has been given self-petitioning privileges in certain instances, but all are spouses.

Defendants argue that 8 C.F.R. § 205.1 and 8 U.S.C. § 1155 provide support for automatic termination of a petition upon death of the petitioner. Def. Memo. at 18-20. In *Taing*, the court explained that § 205.1 is inapplicable to a pending petition and is *ultra vires* and contrary to congressional intent. Id. at 29. Plaintiffs also previously addressed this argument in their Memorandum in support of the Motion for Summary Judgment. Pl. Mot. at 21-22. With regard to Congressional intent, the Taing court noted, "[t]he result the government seeks would create an arbitrary, irrational and inequitable outcome in which approvable petitions will be treated differently depending solely upon when the government grants the approval." Id. at 30-31. Defendants' interpretation of the statute does not comport with common sense and instead creates arbitrary and "manifestly unjust results." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989).

Defendants claim that the five and three-quarter year delay in adjudicating Defendant Engstrom's application does not give rise to an APA or mandamus claim, because Defendants have "no clear, ministerial and non-discretionary duty to adjudicate immigration benefits within a prescribed period of time." Def. Mot. at 21-23. Defendants cannot escape the review provisions of the Administrative Procedures Act. Section 555(b) of the APA, 5 U.S.C. § 555(b), requires that "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." A number of courts of appeals have held that § 555(b) creates a non-discretionary duty to conclude agency matters. *See, e.g., Friends of the Bow v. Thompson,* 124F.3d 1210, 1220-21 (10th Cir. 1997); *Litton Microwave Cooking Prods. v. NLRB,* 949 F.2d

249, 253 (8th Cir. 1991); *Estate of French v. FERC*, 603 F.2d 1158 (5thCir. 1979); and *Silverman v. NLRB,* 543 F.2d 428, 430 (2d Cir. 1976). Moreover, § 555(b) requires that agency matters be resolved within a reasonable time. A violation of this duty is a sufficient basis for mandamus relief. *See, e.g., Sierra Club v. Thomas,* 828 F.2d 783, 797 (D.C. Cir. 1987). Courts have reached this same result in APA cases brought in the immigration context. *See, e.g., Villa v. United States Dep't of Homeland Sec.*, 607 F. Supp. 2d359, 366 (N.D.N.Y 2009); *Toor v. Still,* 2007 U.S. Dist. LEXIS 53173, *4-5 (N.D. Cal. July 10, 2007); *Yue Yu v. Brown,* 36 F. Supp. 2d 922, 928 (D.N.M. 1999); *Xu v. Chertoff,* 2007 U.S. Dist. LEXIS 50027, *7 (D.N.J. July 11, 2007); and *Haidari v. Frazier,* 2006 U.S. Dist. LEXIS 89177, *9-10 (D. Minn. 2006).

In *Ahmed v. DHS*, 328 F.3d 383 (7th Cir. 2003), the Court denied relief because there was no longer authority under the Fiscal Year limitations of the diversity visa lottery to grant relief, distinguishing that situation from one where the statute continues to provide the authority for relief. See *Razik v. Perryman*, No. 02-5189, 2003 U.S. Dist. LEXIS 13818, *6-7 (N.D. Ill. Aug. 6, 2003) (courts have consistently held that 8 U.S.C. § 1255 provides a right to have an application for an adjustment of status adjudicated); see also *Kashkool v. Chertoff*, 553 F. Supp. 2d 1131, 1147 (D. Ariz. 2008) (finding, after applying 5 U.S.C. § 555(b), that the nearly six-year delay in adjudicating Plaintiff's application was unreasonable); *Aslam v. Mukasey*, 531 F. Supp. 2d 736, 743 (E.D. Va. 2008) (finding a nearly three-year delay in the adjudication of an adjustment application unreasonable). As Judge Gettleman recently held, "[p]laintiffs have a right to have their applications adjudicated in a reasonable amount of time whether they seek relief through a writ of mandamus or under the APA." *Liu v. Chertoff*, No. 07-cv-00388, Dkt. #29, Memorandum Opinion and Order, p. 5 (N.D. Ill Oct. 5, 2007) (finding three-year delay unreasonable), citing *Iddir v. INS*, 301 F.3d 492, 500 (7th Cir. 2002); and *Agbemaple v. INS*,

1998 WL 292441, *2 (N.D. Ill. May 18, 1998). Seventh Circuit law and the decisions of this District Court support Plaintiff Engstrom's claim.

Under the circumstances of this case, it is unreasonable for the agency to take nearly six years to determine whether Mrs. Engstrom is an immediate relative. In fact, the agency has already decided that, as a general rule, petitions and applications in such cases as Mrs. Engstrom's are to be automatically denied. The blanket policy should be considered "denial" enough under these circumstances. Additionally, Defendants argue in the instant lawsuit that Mrs. Engstrom is not eligible as an immediate relative, which is tantamount to a denial. This is not the case of USCIS finger-pointing at FBI as the cause of delay. By arguing that "the pace at which USCIS processes applications and petitions is not susceptible to APA or mandamus jurisdiction because such processes are within the discretion of the Attorney General and are not subject to any specific time requirements," Def. Memo. at 22, Defendants invite the Court to render the APA and mandamus statutes ineffective, contrary to Congressional intent. Given the long delay to-date, the APA's requirement that a matter be concluded by the agency within a reasonable time, and the future delay that DHS Secretary Napolitano's deferred action announcement will cause over the next two years (at minimum), this Court has APA and mandamus jurisdiction.

Should the Court find in favor of Plaintiffs' claims to immediate relative status, it is clear from Defendants' 2007 policy directive that Defendants will impose additional unlawful requirements upon Plaintiffs as they have upon those surviving spouses who have prevailed in the Ninth Circuit. *See* Memorandum, Mike Aytes, Assoc. Dir. Domestic Operations, November 8, 2007 (hereinafter "Aytes Memorandum," available on the USCIS website at http://www.uscis.gov/files/pressrelease/I130AFMAD0804_110807.pdf); *see Hootkins v.*

Chertoff, No. 07-cv-5696 (C.D. Cal. 2009) (holding Aytes Memorandum requirements unlawful), appeal docketed, No. 09-56019 (9th Cir. June 30, 2009). Because the government's unlawful policy is clear, Plaintiffs state a claim for declaratory relief with respect to those unlawful requirements contained in the Aytes Memorandum.

The Aytes Memorandum makes it abundantly clear that a snare awaits Plaintiffs upon successful prosecution of their claims, just as occurred following the *Freeman* decision. That trap set by Defendants purports to require a "humanitarian reinstatement" request under 8 C.F.R. § 205.2(a)(3)(C)(2), and a substitute affidavit of support sponsor. Defendants claim that Plaintiffs are "unaffected by the practices they purport to challenge." Def. Mot. at 23-24. That claim is unfounded. Following the Ninth Circuit's decision in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) and the filing of the *Hootkins* class action lawsuit, Defendants erected additional barriers to approval by issuing the Aytes Memorandum two business days before the answer in *Hootkins* was due. Defendants policies as contained in the Aytes Memorandum have been found to be unlawful. *Hootkins v. Chertoff*, No. 07-cv-5696 (C.D. Cal. 2009). That ruling has been appealed to the Ninth Circuit by Defendants. Defendants will apply the unlawful Aytes Memorandum requirements to Plaintiffs' cases, and have not indicated otherwise.

The "humanitarian reinstatement" request requirement of the Aytes Memorandum is a violation of the statutory authority. See *Hootkins, supra*; See also *Pierno v. INS*, 397 F.2d 949 (2d Cir. 1968). Further, with respect the substitute affidavit of support, 8 U.S.C. § 1182(a)(4)(C) does *not* require a valid affidavit of support as Defendants claim in the Aytes Memorandum. Instead, that section requires that "the person petitioning for the alien's admission (and any additional sponsor required under section 213A(f) or any alternative sponsor permitted under paragraph (5)(B) of such section) has *executed* an affidavit of support described in section 213A

with respect to such alien." 8 U.S.C. § 1182(a)(4)(C)(ii) (emphasis supplied). *Execution* of an affidavit by the petitioner is all that is required under the statute. The requirements, found at 8 U.S.C. § 1183a, defining the "enforceability" of executed affidavits of support serve merely to instruct the form and process of the affidavit, and do not add additional requirements for admission as a lawful permanent resident other than those found at 8 U.S.C. § 1182(a)(4).

For example, a petitioning sponsor may execute an affidavit of support as required under § 1182(a)(4), but during the pendency of the petition process the alien may work the last of the required 40 qualifying quarters of coverage and therefore make the affidavit of support unenforceable. *See* 8 U.S.C. § 1183a(a)(3)(A). The fact that the duly executed affidavit of support becomes unenforceable does not make the alien inadmissible under 8 U.S.C. § 1182(a)(4), because the petitioner and alien spouse have done all that is required under the statute. Enforceability is not required for the sponsored immigrant to be admissible – only *execution* of the affidavit by the petitioning sponsor. To maintain otherwise would lead to absurd results.

Further, even if enforceability were required at the time of admission, Defendants' argument that the affidavit of support executed by the petitioner cannot be enforced following the death of the petitioner is not in accordance with the statute. The regulation does, in fact, state that the sponsor's obligation ends when the sponsor dies. 8 C.F.R. § 213a.2(e)(2)(ii). Yet this "enforcement ends at death" requirement is not in the statute, and runs contrary to the remedies provided for enforcement under 8 U.S.C. § 1183a(c), which include remedies to enforce obligations against a person's estate. It is true that "sponsor" is defined in the regulations as "an individual who is either required to execute or has executed a Form I-864 under this part." 8 C.F.R. § 213a.1. There is no disagreement that Plaintiffs' spouses executed a Form I-864. This is

not the case of a "juridical person" attempting to execute an affidavit of support, because Plaintiffs' U.S. citizen spouses accomplished the execution of Form I-864, satisfying the requirements of the statute. Nothing further is required of Plaintiffs, and Defendants' position that the I-130 petition should turn on a substitute affidavit of support under an unrelated provision is unfounded. *Hootkins, supra*.

It is well established law that the determination of admissibility is not within the scope of visa petition procedure. *Matter of O*, 8 I. &N. Dec. 295 (BIA 1959). Despite this basic tenet of immigration law, Defendants seek to utilize grounds of inadmissibility in violation of law to deny Plaintiffs' visa petitions. In *Matter of O*, the Board of Immigration Appeals reviewed the denial of an immigrant petition filed by a U.S. citizen woman on behalf of her husband, a citizen of Italy. The Board noted that, "The parties were married on September 25, 1929, at Fulton, New York. The petition is supported by the birth certificate of the petitioner and by a marriage certificate. The beneficiary appears, upon the basis of the documents submitted, *prima facie* eligible for a nonquota status under section 101(a)(27)(A) of the Immigration and Nationality Act as the alien husband of a citizen of the United States." *Id*. at 295. The immigration service had denied the visa petition on the basis that the "beneficiary is ineligible to receive a visa and is inadmissible to the United States …." *Id*. at 296. The Board disagreed with the visa petition denial, and the court admonished the Service for using admissibility criteria to deny eligibility.

Defendants have not stated that the Aytes Memorandum requirements will not be imposed upon Plaintiffs upon successful prosecution of their claims to wrongful denial, and in the absence of assurance that Defendants will not violate the law, Plaintiffs have a claim for declaratory relief with respect to these unlawful requirements as well. For the foregoing reasons,

Plaintiffs respectfully request that the Court deny Defendants' motion for summary judgment and grant summary judgment in favor of Plaintiffs.

DATED this 8th day of September, 2009.

By /s/Brent W. Renison

Brent W. Renison, OR964752
PARRILLI RENISON LLC
5285 SW Meadows Rd., Suite 175
Lake Oswego, Oregon 97035
(503) 597-7190
(503) 726-0730 (facsimile)
brent@entrylaw.com

Maria Baldini-Potermin, IL6257353
MARIA BALDINI-POTERMIN &
ASSOCIATES PC
1 N. LaSalle Street, Suite 3040
Chicago, IL 60602
(312) 368-8200
(312) 368-9400 (facsimile)
maria@baldini-potermin.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Patricia E. Bruckner
Office of Immigration Litigation
USDOJ Civil Division
P.O. Box 868
Ben Franklin Station
Washington, DC 20044
Email: Patricia.Bruckner@usdoj.gov

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED on the 8th day of September, 2009, at Lake Oswego, Oregon.

/s/ Brent W. Renison
Brent W. Renison