

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DIANA GECAJ ENGSTROM, and,)
MARIA DEL CARMEN DIAZ-RUIZ,)

Plaintiffs,)

vs.)

Case No: 1:09-cv-03185
Honorable Ronald A. Guzman

JANET NAPOLITANO, Secretary,)
U.S. Department of Homeland Security, et al.)

Defendants.)

**PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Defendants begin their arguments relating to the term spouse by mis-quoting Black's law dictionary. Specifically, Defendants state,

At the time of the enactment of the second sentence of Section 1151(b)(2)(A)(i), the dictionary definition of "spouse" was "[o]ne's husband or wife." See Black's Law Dictionary 1402 (6th ed. 1990).

Def. Opp. p. 4. The 1990 edition of Black's, however, contains exactly the following definition of spouse:

Spouse. One's husband or wife, and "surviving spouse" is one of a married pair who outlive the other.

Black's Law Dictionary 1402 (6th ed. 1990). Plaintiffs have outlived their spouses, but spouses they remain. The term spouse includes surviving spouse.

Defendants also argue that “Defendants’ interpretation of Section 1151(b)(2)(A)(i) is based on legitimate policy objectives and does not produce arbitrary results.” Def. Opp. at 13-14. Arbitrary results are precisely what flow from Defendants interpretation.

The statutes providing for Conditional Permanent Resident (CPR) status highlight the absurdity of Defendants interpretation. In 1986, Congress enacted the Immigration Marriage Fraud Amendments (“IMFA”). See Pub. L. No. 99-639, which added 8 U.S.C. § 1186a to the Immigration and Nationality Act. The purpose of IMFA was “to deter immigration related marriage fraud and other immigration fraud.” See *Choin v. Mukasey*, 537 F.3d 1116 (9th Cir. 2008). The automatic denial scheme advanced by Defendants does nothing to deter immigration fraud, unjustly punishes those caught in immigration service bureaucratic backlogs, and cannot have been intended by Congress. Defendants’ interpretation is not a permissible construction of the statute.

Defendants admit that even under its own misguided construction of the statute, had the agency acted on Plaintiffs’ applications for adjustment of status one day before their husbands died or anytime before, Defendants could have approved Plaintiffs for Conditional Permanent Resident (“CPR”) status and could not thereafter have terminated that status when their spouses died. That is because 8 U.S.C. § 1186a insulates an alien spouse who obtains the LPR or CPR status based on a marriage which was entered into less than 24 months before the date of approval from termination of status “through the death of a spouse.” This anomalous result was first recognized by the Court in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) which noted that, “[t]he government also tells us that, had DHS addressed the Freemans’ application before Mr. Freeman died, the adjustment of status could have been granted even though they had not been married for

two years.” *Id.* at 1040.

Under Defendants’ logic, the agency could also approve “Alien Spouse A” (for example) in as little as four (4) months after the marriage, and if her spouse should pass away five (5) months after the marriage was entered into, she would be completely insulated from termination of her status under § 1186a. At Defendants’ agency just down the road, however, “Alien Spouse B” whose spouse also passes away five (5) months after the marriage was entered into would be automatically denied because the agency took six (6) months to process. The death of Alien Spouse A’s husband occurred at the same time as Alien Spouse B’s husband, yet A is saved and B is damned. This example is not purely hypothetical. According to the USCIS processing times published on August 13, 2009 for I-485 applications, as of June 30, 2009 the Chicago office was working on those applications filed January 18, 2009 (5 ½ months), while Indianapolis was working on those filed March 2, 2009 (4 months). See Exhibit 1 (Chicago Processing Times); Exhibit 2 (Indianapolis Processing Times). Thus, Alien Spouse B is hurt by Chicago’s processing delays, while Alien Spouse B is helped by Indianapolis’ relative speed. If Congress had intended such dire consequences to follow from the vagaries of processing times which vary from office to office and year to year, Congress would have clearly provided for such result. Yet Congress did not provide that bureaucratic delays, as opposed to the conscious decision to enter into marriage and follow the established rules, should determine the outcome. As the Sixth Circuit stated,

This is exactly the type of absurdity to be avoided in the construction of statutes. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (“[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”). We cannot ignore the plain meaning of the statute which results in a consistent and rational statutory scheme in favor of a reading that is arbitrary and unjust.”

Lockhart v. Napolitano, 561 F.3d 611, 621 (6th Cir. 2009).

Laws are established so that society may have order. An orderly society is not made of arbitrary laws that turn upon the unforeseeable and the uncontrollable. Congress, recognizing that death of a spouse and administrative processing times are fortuitous and beyond the control of the applicant, established an orderly statutory scheme. The agency may terminate CPR status that is granted to an alien spouse defined in 8 U.S.C. § 1186a(g)(1)(B) whose marriage was entered into less than 24 months if the qualifying marriage “has been judicially annulled or terminated, *other than through the death of a spouse*”. 8 U.S.C. § 1186a(b)(1)(A)(ii) (emphasis supplied). This section gives the agency the power to terminate status for a divorce situation, unless the alien spouse qualifies for a hardship waiver separately under 8 U.S.C. § 1186a(c)(4). Neither of those sections, however, gives the agency *any* right to terminate status for death of a spouse, since those sections specify that death of a spouse is not a basis for termination. Further, 8 U.S.C. § 1186a(c)(1)(A) requires a petition to remove the condition by the “alien spouse and the petitioning spouse (if not deceased)”, and 8 U.S.C. § 1186a(c)(1)(B) requires a personal interview by “the alien spouse and the petitioning spouse (if not deceased)”. In setting out the details of the petition, 8 U.S.C. § 1186a(d) provides again for evidence that the qualifying marriage “has not been judicially annulled or terminated, other than through the death of a spouse”. The entire statutory scheme contemplates an alien spouse who obtains permanent resident status “by virtue of a marriage which was entered into less than 24 months before the date the alien obtains such status”, shall not have CPR status terminated based on death of a spouse. 8 U.S.C. § 1186a(g)(1)(B)

Defendants argue that 8 U.S.C. § 1186a would only have application had Plaintiff's spouse been alive by the time USCIS adjudicated her application. Def. Opp. at 13. The Conditional Permanent Resident statute, 8 U.S.C. § 1186a, is a part of the statutory scheme governing the provision of permanent resident status to spouses of U.S. citizens. To ignore the statute, as the Defendants seem to suggest the Court should do, would be to fail to consider the statutory scheme as a whole. Defendants invite the Court to "ignore the plain meaning of the statute which results in a consistent and rational statutory scheme in favor of a reading that is arbitrary and unjust." *Lockhart, Id.* at 621. Established canons of statutory construction require that the statute be considered as a part of the whole, including the provisions of § 1186a, in favor of a consistent and rational statutory scheme.

Plaintiff seeks not automatic approval, but rather an order setting aside Defendants' automatic denial policies. Under the statutory scheme discussed above, Defendants have several mechanisms to deny an application on the merits should a factual basis for such denial exist. The first of those mechanisms is the requirement that a marriage must not be a fraud or a sham. The Board of Immigration Appeals long ago established that a fraudulent or sham marriage is one that was not valid at inception, and that such a marriage cannot form the basis of an immigration benefit. *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980) (holding that applicant who had separated after marriage should have the opportunity to show the intent at the time the marriage was entered into, and should be allowed to submit any evidence available in support of the petition). Under this rule, Defendants may deny an application because it was based on a fraud or sham marriage at inception. All evidence may be considered, including documentation of

a shared life together, and including indicia of a bona fide marriage.

The fact that an interview may not be possible due to the untimely passing of the citizen petitioner is not a proper basis for automatic denial. In fact, in the 2008 fiscal year the U.S. admitted 45,519 spouses of U.S. citizens as LPRs and 28,713 spouses of U.S. citizens as CPRs as “new arrivals”, meaning that the U.S. citizen petitioner was *never interviewed*. See 2008 Yearbook of Immigration Statistics, Table 7, Exhibit 3. Because USCIS has granted LPR or CPR status to 74,232 spouses of U.S. citizens in the past year without interviewing the U.S. citizen illustrates several points. First, an interview is not required to make a determination about the marriage. Indeed, no interview of petitioners is required under the regulations governing the filing of petitions by U.S. citizens, and the regulation governing adjustment of status merely requires the “applicant for adjustment of status” (here, Plaintiffs) to be interviewed. 8 C.F.R § 245.6. Even then, this interview can be waived. 8 C.F.R § 245.6. Second, other documentary evidence is sufficient to establish the bona fides of the marriage, despite the lack of an interview of the U.S. citizen. In a given case, USCIS may review affidavits, interview witnesses, review documentary evidence of shared financial resources, and make a judgment about the evidence before the agency. Moreover, the interview may already have taken place, and that has not stopped Defendants from invoking the automatic termination policy. Those were the facts in the case of Nelly Lockhart. See *Lockhart, supra* at 613 (Mrs. Lockhart and her husband *were interviewed* April 2005, and her husband died December 21, 2005 before action was taken by USCIS). The Defendants’ reliance on the “opportunity to interview the couple on the *bona fides* of the marriage” (Def. Resp. at 15) is misplaced. Defendants have means at their disposal to determine the

bona fides of the marriage where the spouse is deceased, just as they routinely make such determinations without interviewing the tens of thousands of American citizen spouse petitioners each year.

The second mechanism that Defendants may utilize to deny an application on the merits lies in the Secretary's discretionary power. Adjustment of status applicants may be adjusted only if the Secretary, in her discretion, deems adjustment appropriate. 8 U.S.C. § 1255(a). A decision to deny adjustment of status in discretion (as opposed to as a matter of law) is not subject to judicial review. 8 U.S.C. § 1252(a)(2)(B). The Secretary's discretionary power to deny an adjustment of status is all powerful. Armed with these two mechanisms, one based on the facts of the marriage and the other based purely on discretion, Defendants are well equipped to maintain important safeguards to the integrity of the system of granting immigration benefits. Defendants' automatic termination policy is at odds with Congress' intent that cases be judged on the individual merits. If Congress had intended Defendants to wield the life shattering tools of summary denial regardless of the underlying facts and in blind defiance of the arbitrary consequences, Congress would have explicitly stated so. Congress did not.

Defendants further claim that they are entitled to judgment as a matter of law with respect to the validity of 8 C.F.R. 205.1(a)(3)(C)(2) and to the claims surrounding a substitute affidavit of support sponsor under 8 U.S.C. 1183a(f)(5)(B). Def. Opp. at 14-15. Plaintiffs previously outlined these claims. Pl. Resp. (Dkt. #18) at 6-9. Following Plaintiffs' filing of that Response, a new policy document was disseminated by Defendants. A Memorandum authored by Donald Neufeld, Acting Associate Director, Office of Domestic Operations, dated September 4, 2009, establishes Defendants' intent to impose the unlawful substitute affidavit of support requirements on surviving spouses in the First, Sixth and Ninth Circuits, which are covered by the *Taing*,

Lockhart and *Freeman* holdings. See Exhibit 4. Plaintiffs may obtain declaratory judgments pursuant to 28 U.S.C. § 2201 regarding these unlawful requirements. Plaintiffs respectfully ask the court to declare 8 C.F.R. 205.1(a)(3)(C)(2) *ultra vires* and “[d]eclare 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).”
Complaint, p. 12.

For the foregoing reasons, Plaintiffs respectfully request that summary judgment in Plaintiffs’ favor be granted on all claims.

DATED this 14th day of September, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th 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:

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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 14th day of September, 2009, at Lake Oswego, Oregon.

/s/ Brent W. Renison
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