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U.S. DISTRICT COURT

2006 NOV 27 A 10: 54

Counsel for Petitioner

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

OSSERRITTA ROBINSON,

Civil No.

06-5702(SRC)

PETITIONER,

Agency Case No.: A96 428 797

v.

MICHAEL CHERTOFF, Secretary,
Department of Homeland Security; and
EMILIO GONZALEZ, Director, U.S.
Citizenship and Immigration Services,

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

RESPONDENTS.

**PETITION FOR WRIT OF MANDAMUS AND COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF ON BEHALF OF THE SURVIVING SPOUSE OF
A UNITED STATES CITIZEN**

Petitioner Osserritta Robinson challenges Respondents' determination that, as a matter of law, Petitioner lost her status as the "immediate relative" spouse of a United States citizen when her citizen spouse was tragically killed while Petitioner's immigration applications were pending. Petitioner respectfully petitions this Court for injunctive, declaratory and mandamus relief to compel Respondents and their subordinates to: (a) find that, as a matter of clear statutory interpretation, Petitioner remains an "immediate relative" under section 201(b)(2)(A)(i) of the Immigration and Nationality Act of 1952, as amended ("INA" or "the Act"), by virtue of her marriage to a United States citizen; (b) reopen and readjudicate the I-130 immigrant petition (the "Petition") that was filed on behalf of Petitioner by her U.S. citizen spouse; and (c) reopen and readjudicate the I-485 application for adjustment of status to lawful permanent resident (the "Application") that Petitioner filed as the immediate relative spouse of a U.S. citizen. Respondents' denial of the subject immigration applications was a final and non-discretionary agency action subject to judicial review. *See Pinho v. Gonzales*, 432 F.3d 193 (3d Cir. 2005). Petitioner hereby alleges as follows:

JURISDICTION

1. This action arises under the INA, 8 U.S.C. §§ 1151, 1255. The Court has jurisdiction under 28 U.S.C. § 1331, the Administrative Procedure Act, 5 U.S.C. § 701 et seq., the Mandamus Act, 28 U.S.C. § 1361, and the INA. Petitioner additionally seeks relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq.

VENUE

2. Venue in this district is proper under 28 U.S.C. § 1391(e) because Petitioner resides in this district and no real property is involved in the action. Additionally, a substantial part of the events giving rise to the claim occurred in this district in that the New Jersey District

Office of the United States Citizenship and Immigration Services, an agency of the United States Department of Homeland Security, was the office of Respondents that denied Petitioner's immigration applications.

EXHAUSTION

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

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

5. There is also no administrative appeal of the denial of the Petitioner's Application for adjustment of status. 8 CFR § 245.2(a)(5)(ii). Petitioner submitted a request for Respondents to reopen and/or reconsider the denial *sua sponte*, but Respondents ignored and/or failed to respond to such request.

6. While Petitioner may renew the Application in removal proceedings before the Executive Office for Immigration Review ("EOIR"), initiation of removal proceedings is at Respondent's discretion, and Respondent has not elected to initiate removal proceedings against Petitioner. As such, this is not a mandatory exhaustion requirement and it cannot be imposed on Petitioner's APA action. *See Darby v. Cisneros*, 509 U.S. 137 (1993). Furthermore, without an approved immigrant petition, the law precludes a grant of adjustment of status to Petitioner.

PARTIES

7. Petitioner Osserritta Robinson is a citizen and national of Jamaica. She arrived in the United States in January 2002 and thereafter fell in love with Mr. Louis Robinson, a citizen of the United States. The couple were married in February 2003 and, shortly thereafter, Mr. Robinson sponsored Petitioner for permanent resident status. While the Petitioner's residency application was pending, her husband was killed in a tragic accident. Respondents thereafter denied the application solely on the basis that, by virtue of the citizen spouse's untimely death,

Petitioner was stripped of her status as “spouse” and was thereby no longer entitled to “immediate relative” classification under U.S. immigration law.

8. Respondent Michael Chertoff is sued in his official capacity as Secretary of the Department of Homeland Security (“DHS”). As DHS Secretary, Mr. Chertoff is responsible for the administration and enforcement of the immigration laws of the United States.

9. Respondent Emilio Gonzalez is sued in his official capacity as Director of the United States Citizenship and Immigration Services (“USCIS”). As USCIS Director, Mr. Gonzalez is responsible for the overall administration of USCIS and implementation of the immigration laws of the United States.

STATEMENT OF FACTS

Background

10. Petitioner was born in Jamaica in 1977 and is a Jamaican citizen.

11. Petitioner arrived in New York on or about 14 January 2002 under the terms of a non-immigrant visitor’s visa. She was lawfully admitted to the United States as a B2 non-immigrant.

12. On 13 February 2003, Petitioner married Mr. Louis Robinson, a citizen of the United States, during a civil ceremony in Staten Island, New York.

The Petition and Application

13. The following month, on or about 14 March 2003, Mr. Robinson filed a Petition with USCIS establishing his citizenship and his spouse’s entitlement to immediate relative classification. Petitioner concurrently filed an Application seeking adjustment of status to lawful permanent resident, relying on the citizen spouse's Petition, as provided by law. Petitioner was assigned an alien registration number, or A# (A96 428 797), and Respondents began to process her application for permanent resident status.

14. Petitioner was thereafter granted employment authorization by USCIS and fingerprinted in accordance with law and processing of the Application.

15. On 15 October 2003, after having been married only eight months, Louis Robinson was tragically killed in the Staten Island Ferry accident, which made national headlines. At the time of the death of Petitioner's citizen spouse, the Petition and Application had been pending before USCIS for more than seven months.

The Denial

16. On 9 August 2005, Petitioner appeared before USCIS at the Newark, New Jersey District Office for an interview in connection with the Petition and Application.

17. Following the interview, by decision dated 15 October 2005, Respondents denied the jointly filed Petition and Application solely on the basis that Petitioner could no longer be considered the spouse of a U.S. citizen. The decision informed Petitioner that, "[u]pon the death of your husband . . . the [Petition] filed on your behalf is automatically terminated."

18. Respondents do not contend the fact that, had USCIS addressed the Petition before the citizen spouse's death, it could have approved the Petition and Application. Nor do Respondents contend the fact that, if Petitioner and her husband had been married for at least two years at the time of the citizen spouse's death -- whether the Petition remained adjudicated or had never been filed in the first instance -- Petitioner could have filed a separate petition for immigrant classification as a "widow," and that such petition could likewise have resulted in the conferral of permanent resident status.

19. There is no provision of law under the INA providing for the automatic termination of immediate relative or spousal status, or for the denial of a relative petition, upon the death of a petitioning spouse.

CLAIMS FOR RELIEF

20. Respondents construction of INA § 201(b)(2)(A)(i) is contrary to the express language of the statute, unreasonable, and leads to arbitrary and capricious results.

21. Petitioner was and remains an "immediate relative" for purposes of INA § 201(b)(2)(A)(i) and, as a matter of law, is eligible for adjustment of status under INA § 245(a),

8 U.S.C. § 1255(a).

22. Petitioner was inspected and lawfully admitted to the United States as a non-immigrant visitor.

23. Petitioner submitted and filed a completed application with USCIS under INA § 245(a), 8 U.S.C. § 1255(a). Together with the Application, Petitioner paid various filing fees required by law, which were duly collected by USCIS.

24. Petitioner's citizen spouse, Louis Robinson, submitted and filed a completed petition pursuant to INA § 204(a), 8 U.S.C. § 1154(a). Together with the Petition, Mr. Robinson paid the filing fee required by law, which was duly collected by USCIS.

25. An immigrant visa was immediately available to Petitioner at the time the Application was filed pursuant to INA § 245(a), 8 U.S.C. 1255(a).

26. Petitioner was not stripped of her status as an "immediate relative" spouse as a result of the untimely death of her husband.

27. Petitioner remains eligible to receive an immigrant visa as the immediate relative surviving spouse of a United States citizen pursuant to INA § 201(b)(2)(A)(I), 8 U.S.C. § 1151(b)(2)(A)(I).

28. Petitioner is admissible to the United States as a lawful permanent resident.

29. Petitioner has suffered, and will continue to suffer, significant and irreparable harm because of Respondents' policies, procedures, acts and failures to act as described herein.

FIRST CAUSE OF ACTION

30. Petitioner realleges and incorporates by reference paragraphs 1 through 29 herein.

31. Respondents violated Petitioner's statutory right to apply for relief which Congress has provided under the INA, thereby unlawfully depriving her of the opportunity to obtain adjustment of status to lawful permanent residence and live lawfully in the United States under INA § 245.

SECOND CAUSE OF ACTION

32. Petitioner realleges and incorporates by reference paragraphs 1 through 31 herein.

33. Petitioner has suffered a "legal wrong" or has been "adversely affected or aggrieved" by agency action. 5 U.S.C. § 702. Petitioner is a person aggrieved by agency action, for which there is no other adequate remedy at law. 5 U.S.C. § 704.

34. Respondents 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, Respondents have erroneously denied both the Petition and Application in violation of clear Congressional intent. Petitioner 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 law. 5 U.S.C. §§ 706(1) and (2). *See Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006).

THIRD CAUSE OF ACTION

35. Petitioner realleges and incorporates by reference paragraphs 1 through 34 herein.

36. USCIS denied the Petition and Application solely on the basis that she was stripped of the status of spouse, and not for discretionary reasons. Respondents have failed to perform their duties by determining that Petitioner was no longer the "spouse" of a U.S. citizen, and therefore not entitled to adjustment of status, and by failing to exercise discretion.

37. Respondents owe Petitioner a clear and certain duty under the INA, as aforesaid, and the Mandamus Act, 28 U.S.C. § 1361, to adjudicate the Petition and Application on the basis that Petitioner remains an "immediate relative" spouse of a United States citizen and was not stripped of such status by the untimely death of her husband. *See Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006).

38. Petitioner has no other adequate remedy at law.

PRAYER FOR RELIEF

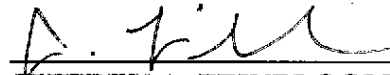
WHEREFORE, Petitioner respectfully requests that this Court:

- A. Assume jurisdiction over this action;
- B. Declare that Petitioner 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 her citizen husband;
- C. Declare that Petitioner is entitled to the process that flows from a properly filed Application, and must be considered a "spouse" for purposes of the Application;
- D. Issue an injunction prohibiting Respondents from using the death of the U.S. citizen spouse as a discretionary factor in adjudicating the Application;
- E. Issue an injunction prohibiting Respondents from using factors flowing from the unlawful denial of the Application to again deny the Application upon reopening, including but not limited to claims of abandonment of the Application;
- F. Issue a writ of mandamus compelling Respondents to (a) reopen the Application on the ground that it was improperly denied solely on the basis of USCIS' unlawful determination that Petitioner's status as an "immediate relative" spouse of a United States citizen was stripped by the untimely death of the citizen spouse, (b) treat Petitioner as an "immediate relative" spouse and adjudicate the Petition accordingly, and (c) treat Petitioner as an "immediate relative" spouse and exercise discretion to adjudicate the Application;
- G. Award Petitioner reasonable costs and attorney's fees; and
- H. Award such further relief as the Court deems just or appropriate.

DATED this 22nd day of November, 2006.

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