

JUDGE PRESKA

08 CV 10094

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IRINA GOROVETS,

DOC #           

Plaintiff/Petitioner,

08 Civ. \_\_\_\_\_  
(ECF CASE)

-against-

COMPLAINT/PETITION

MICHAEL CHERTOFF, in his official capacity as  
Secretary of the Department of Homeland Security;  
JONATHAN SCHARFEN, in his official capacity as  
Acting Director of the United States Citizenship and  
Immigration Services; and ANDREA  
QUARANTILLO, in her official capacity as District  
Director of the New York City District of the United  
States Citizenship and Immigration Services,

Defendants/Respondents.  
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PRELIMINARY STATEMENT

1. Plaintiff-Petitioner, Irina Gorovets ("Plaintiff"), challenges Defendants  
Respondents' ("Defendants") determination that, as a matter of law, she lost her status as a  
spouse and "immediate relative" of her United States citizen husband because her husband died  
while their immigration petitions were awaiting agency action, in violation of the Immigration  
and Nationality Act ("INA") and Administrative Procedure Act. As a result of this  
determination, Defendants unlawfully refused to grant Plaintiff an immediate relative visa,  
denied her application to become a lawful permanent resident, and subsequently placed her in  
removal proceedings.

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DISTRICT CLERK

## JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 701 *et seq.* (Administrative Procedure Act), 28 U.S.C. § 1361 (Mandamus Act), and 28 U.S.C. § 2201 *et seq.* (Declaratory Judgment Act).

3. Venue properly lies in the Southern District of New York under 28 U.S.C. § 1391(e) because Plaintiff resides in this judicial district and no real property is involved in the action. In addition, a substantial part of the events giving rise to the claims occurred within this judicial district, as the New York City District Office of the U.S. Citizenship and Immigration Services (“USCIS”), an agency of the U.S. Department of Homeland Security, was the local office that denied Plaintiff’s immigration petitions.

## PARTIES

### Plaintiff

4. Plaintiff, Irina Zayko Gorovets, is a citizen and national of Russia and the surviving spouse of Mr. Emil Gorovets, a United States citizen. Plaintiff resides at 40 Waterside Plaza, New York, New York.

5. In June 2005, USCIS denied the I-485 Adjustment of Status Application and I-130 Immediate Relative Petition filed by Plaintiff and her husband, solely on the ground that because Mr. Gorovets had died before USCIS completed adjudication of the Application and Petition, Plaintiff was stripped of her status of spouse and could no longer be classified as an “immediate relative” under the Immigration and Nationality Act.

## **Defendants**

6. Defendant Michael Chertoff is the Secretary of the United States Department of Homeland Security ("DHS"). As such, he is responsible for, *inter alia*, administering USCIS and ensuring the implementation and enforcement of the Immigration and Nationality Act.

7. Defendant Jonathan Scharfen is the Acting Director of United States Citizen and Immigration Services. As such, he is responsible for, *inter alia*, the administration of immigration benefits and services in the United States.

8. Defendant Andrea Quarantillo is the District Director of the New York City District Office of USCIS. As such, she is responsible for, *inter alia*, administering the immigration laws in the following counties in New York State: Bronx, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Sullivan, Ulster, and Westchester.

## **STATUTORY AND REGULATORY BACKGROUND**

### **Adjustment of Status and Immediate Relative Classification**

9. Under the INA, an alien who marries a U.S. citizen can apply to USCIS for an adjustment of his or her immigration status to lawful permanent resident. INA § 245(a), 8 U.S.C. § 1255(a).

10. To apply for lawful permanent residency, the alien must file an Adjustment of Status Application (the "I-485"). INA § 245(a), 8 U.S.C. § 1255(a), 8 C.F.R. § 245.2.

11. USCIS may adjust the alien's status to lawful permanent resident only if the alien is eligible to receive an immigrant visa and an immigrant visa is available to him or her at the time the I-485 application is filed. Thus, an immigrant visa is needed before USCIS can

approve an adjustment of status application. INA § 245(a), 8 U.S.C. § 1255(a), 8 C.F.R. § 245.2.

12. Immigrant visas are available, without numerical limitation, to "immediate relatives" of U.S. citizens. The definition of immediate relatives is set forth in the *first* sentence of 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." INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

13. A U.S. citizen may file a Petition for Alien Relative (the "I-130") on behalf of his or her alien spouse, requesting that the spouse be classified as an immediate relative under the INA. 8 C.F.R. § 204.1.

14. Classification as an immediate relative of a U.S. citizen entitles an alien to an immigrant visa. INA § 204(a)(1)(A)(i), 8 U.S.C. § 1154(a)(1)(A)(i).

15. Thus, the I-485 adjustment of status application filed by the alien spouse is contingent upon approval of the I-130 immediate relative petition filed by the citizen spouse. As a result, the INA specifies that citizen-alien married couples may concurrently file an I-485 and I-130. 8 C.F.R. § 245.2.

16. In the event, however, that the U.S. citizen spouse dies before filing an I-130 petition on behalf of the alien-spouse, the *second* sentence of 8 U.S.C. § 1151(b)(2)(A)(i) establishes that the widowed alien spouse may self-petition for reclassification as an immediate relative if the alien spouse has been married to the citizen for at least two years prior to his or her death:

**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 1154(a)(1)(A)(ii) of this title [an I-360 form] within 2 years after such date and only until the date the spouse remarries.

INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

17. This provision, separate and distinct from the first sentence's definition of immediate relative, creates a right for certain surviving spouses to self-petition for classification as an immediate relative. Specifically, 8 U.S.C. § 1154(a)(1)(A)(ii) states that in addition to aliens entitled to immediate relative status, under § 1151(b)(2)(A)(i), "[a]n alien spouse described in the *second sentence* of section 1151(b)(2)(A)(i) of this title *also* may file a petition [for classification as an immediate relative]." INA § 204(a)(1)(A)(ii), 8 U.S.C. § 1154(a)(1)(A)(ii) (emphasis added).

18. There is no statutory provision within the INA or its amendments that provides for the termination of immediate relative or spousal status upon the death of the U.S. citizen spouse, or for the denial of an I-130 relative petition upon the citizen spouse's death.

#### **USCIS POLICY AND PRACTICE**

19. If the citizen spouse files an I-130 on behalf of the alien-spouse, but subsequently dies before USCIS has adjudicated the petition and before the couple's two-year wedding anniversary (as has happened in the instant case), USCIS treats the death of the citizen spouse as immediately stripping the widowed alien spouse of immediate relative status, and automatically denies the I-130 Petition.

20. Because the I-485 adjustment of status application filed by the alien spouse of a citizen cannot be processed without an approved I-130 (and classification of the spouse as an immediate relative), the denial of the I-130 has the automatic effect of preventing the alien spouse from adjusting his or her status to a lawful permanent resident. As a result, unless there

is another basis for continued residency, the alien spouse will be placed into removal proceedings.

21. In contrast, if a citizen-alien married couple files an I-130 petition and I-485 application and USCIS adjudicates and approves them while the citizen spouse is still alive, the alien spouse's adjustment of status application will not be voided by the citizen spouse's subsequent death, regardless of whether it occurs before the couple has been married for two years. INA § 216, 8 U.S.C. § 1186a.

### **EXHAUSTION OF REMEDIES**

22. There is no administrative appeal from the denial of an I-485 Application to Adjust Status (I-485). 8 C.F.R. § 245.2(a)(5)(ii).

23. There is no administrative appeal available to a surviving spouse from the denial of his or her deceased U.S. citizen spouse's Petition for an Immigrant Relative (I-130) because the Board of Immigration Appeals has held that it lacks jurisdiction to review the denial of an I-130 petition when the appeal is brought by a beneficiary (the spouse seeking adjustment of status) rather than a petitioner (the U.S. citizen spouse). Matter of Sano, 19 I & N Dec. 299 (BIA 1985).

24. There is no administrative appeal from the denial of a Petition for an Immigrant Relative (I-130) or an Application to Adjust Status (I-485) before the Executive Office of Immigration Review ("EOIR"). While an alien may renew his or her I-485 adjustment of status application in removal proceedings before the EOIR, adjudication of an I-485 application is dependent upon an approved I-130 petition. Since Immigration Judges lack jurisdiction to approve or review the denial of an I-130 petition, there is no meaningful opportunity for a surviving spouse to renew the I-485 application in his or her removal proceedings.

25. Thus, once USCIS has denied the I-130 and the I-485 of a surviving spouse of a U.S. citizen on the basis that the death of the citizen spouse stripped the alien spouse of immediate relative status, there are no administrative avenues by which to seek relief.

### **STATEMENT OF FACTS ABOUT PLAINTIFF**

#### **Background**

26. Plaintiff Irina Gorovets is a citizen and national of Russia.

27. Plaintiff entered and was lawfully admitted to the United States on August 27, 1998, under the terms of a B1 nonimmigrant visa.

28. Plaintiff has lived in New York City since August 1998.

29. In September 1998, Plaintiff began a relationship with Mr. Emil Gorovets, a world-renowned singer and composer known by many as the "Russian Frank Sinatra." The couple fell deeply in love and began building a life together.

30. In February 1999, Plaintiff began living with Mr. Gorovets. She also became actively involved in his music career, serving as a co-producer on projects and assisting him with preparations for radio shows and concert tours.

31. The Gorovetses planned to marry in the spring of 1999, but they postponed their wedding due to a series of unfortunate events, including several surgeries needed by Mr. Gorovets and the unexpected death of Mr. Gorovets's son in May 1999.

32. On March 2, 2000, Plaintiff married Mr. Gorovets, a citizen of the United States, in New York, New York, thereby entering into a valid marriage to a U.S. citizen.

#### **The Petition and the Application**

33. On or about May 2000, Mr. Gorovets filed an I-130 Petition for Alien Relative along with the appropriate filing fee on behalf of Plaintiff, his wife. He also executed an I-864

affidavit of support. Simultaneously, Plaintiff filed her I-485 Application to Register Permanent Residence or Adjust Status. Accompanying her application, Plaintiff submitted the appropriate filing and fingerprint fees. Plaintiff was assigned an Alien Number (A# 78-419-014) and was granted employment authorization by USCIS.

34. On or about August 11, 2000, the Gorovetses received a letter from the Immigration and Naturalization Service ("INS," now USCIS) requesting that they appear on October 16, 2001, for an interview in connection with Ms. Gorovets's I-485 application.

35. In May 2001, Mr. Gorovets became seriously ill with diabetes and kidney disease. He subsequently suffered kidney failure and died on August 17, 2001.

36. Mr. Gorovets's death occurred approximately one year and three months after the Gorovetses filed their forms I-130 and I-485, and less than two months before Ms. Gorovets's I-485 interview.

37. At the time of Mr. Gorovets's death, he and Plaintiff had been married for approximately one year and six months.

38. On October 16, 2001 Plaintiff appeared before an INS immigration officer in New York, New York for an interview in connection with the Gorovetses' petition and application. At this interview, Plaintiff informed INS of Mr. Gorovets's death.

#### **The Denials and Subsequent Removal Proceedings**

39. On June 16, 2005, USCIS denied the I-130 petition filed by Mr. Gorovets and the I-485 application filed by Plaintiff.

40. USCIS denied the I-130 petition solely on the basis of its determination that Plaintiff was no longer the spouse of a U.S. citizen since her husband was deceased.

41. USCIS denied the I-485 application solely on the basis that, because the I-130 petition filed by Mr. Gorovets had been denied due to his death, Plaintiff was ineligible to receive an immediate relative visa and was thus not entitled to an adjustment of status to lawful permanent resident.

42. At no time did USCIS dispute the legitimacy of the Gorovetses' marriage.

43. USCIS's delay in adjudicating the petitions resulted in a failure to evaluate the I-130 petition and I-485 application while Mr. Gorovets was alive. Had USCIS adjudicated the petition and application in a timely manner, and adjudicated them before Mr. Gorovets's death, it would have granted Plaintiff's classification as an immediate relative and adjustment of status application, even though the couple had been married for less than two years.

44. Had Plaintiff and her husband been married for two years at the time of Mr. Gorovets's death, even if Mr. Gorovets had never filed an I-130, Plaintiff could have filed a separate I-360 petition for immigrant classification as a "widow" and the petition would have resulted in the conferral of lawful permanent resident status.

45. On July 15, 2005, Plaintiff filed a Motion to Reopen the denial of the I-130 petition. The motion was denied.

46. On May 15, 2007, USCIS notified Plaintiff that removal proceedings had been initiated against her and scheduled a removal hearing for June 20, 2007.

47. Plaintiff is currently in removal proceedings before U.S. Immigration Court. On March 5, 2008, Plaintiff requested a continuance to allow her to file a federal action challenging USCIS's refusal to classify her as an immediate relative of her deceased citizen spouse. This request was denied.

48. On June 4, 2008, Plaintiff requested a continuance based on a pending motion for certification of a nationwide class of surviving spouses of U.S. citizens in an action filed in the U.S. District Court for the Central District of California. This request was denied.

49. On June 30, 2008, the Central District of California certified a class that was limited to individuals residing within the states within the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit. This class does not include Plaintiff.

50. On July 2, 2008, Plaintiff appealed the Immigration Judge's denial of the continuance to the BIA. The BIA denied her appeal.

51. Plaintiff is an immediate relative of a U.S. citizen, her husband Emil Gorovets, and remains eligible to receive an immediate relative immigrant visa as his surviving spouse.

52. Plaintiff is admissible to the United States as a lawful permanent resident because an immigrant visa was immediately available to Plaintiff at the time she filed her I-485 application to adjust status.

53. Defendants have not set forth any reason for denying the Gorovetses' petitions other than their assertion that upon Mr. Gorovets's death Plaintiff ceased to be a spouse of a U.S. citizen entitled to immediate relative status.

54. Plaintiff is currently in removal proceedings, at risk of deportation from the United States, where she has lawfully resided for more than ten years, made her home, and built relationships with friends and family. Plaintiff is a sixty-five year old woman with physical disabilities including chronic hypertension, chronic obstructive pulmonary disease, osteoarthritis, and lasting injuries from an automobile accident including head trauma and severe back problems. Her age and physical condition compound the hardship Plaintiff would face if she is forced to relocate to Russia.

## **STATEMENT OF CLAIMS**

### **FIRST CAUSE OF ACTION**

55. Defendants' refusal to grant the Gorovetses' I-130 petition and I-485 application solely because of an interpretation of the term "immediate relative," INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), that is contrary to the plain meaning of the statute and Congressional intent, violates INA § 245, 8 U.S.C. § 1255.

### **SECOND CAUSE OF ACTION**

56. Defendants' refusal to grant the Gorovetses' I-130 petition and I-485 application solely because of an interpretation of the term "immediate relative," INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), that is contrary to the plain meaning of the statute and Congressional intent, constitutes an agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in violation of 5 U.S.C. § 706(2)(A).

### **THIRD CAUSE OF ACTION**

57. Defendants' refusal to grant the Gorovetses' I-130 petition and I-485 application, solely because of an interpretation of the term "immediate relative," INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), that is contrary to the plain meaning of the statute and Congressional intent, gives rise to a claim for relief pursuant to the Mandamus Act, 28 U.S.C. § 1361.

## **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Assume jurisdiction over the matter;
2. Issue a declaratory judgment declaring that:
  - (a) the definition of "immediate relative" as set forth in the first sentence of 8 U.S.C. § 1151(b)(2)(A)(i), includes surviving spouses of U.S.

citizens, where the citizen spouse submits an I-130 immediate relative petition on behalf of the alien spouse before the citizen spouse's death;

(b) Defendants' refusal to grant the Gorovetses' I-130 petition and I-485 application, solely because of an interpretation of the term "immediate relative," INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), that is contrary to the plain meaning of the statute and Congressional intent, violates the INA § 245, 8 U.S.C. § 1255; and

(c) Defendants' refusal to grant the Gorovetses' I-130 petition and I-485 application, solely because of an interpretation of the term "immediate relative," INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), that is contrary to the plain meaning of the statute and Congressional intent, constitutes an agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in violation of 5 U.S.C. § 706(2)(A);

3. Issue a permanent injunction ordering Defendants to include within the definition of "immediate relative," as that term is used in the first sentence of INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), a surviving spouse of a U.S. citizen, where the citizen spouse submits an I-130 immediate relative petition on behalf of the alien spouse before the citizen spouse's death;

4. Remand the Gorovetses' I-130 petition and I-485 application for reopening and adjudication and directing Defendants to adjudicate the petition and application based on the lawful interpretation of the term "immediate relative," INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), set forth in paragraph 2(a) above;

5. Issue a writ of mandamus, compelling Defendants to:

(a) reopen Plaintiff's I-485 adjustment of status application on the grounds that the application was denied solely because of an erroneous determination that Plaintiff's status as an "immediate relative" spouse of a United States Citizen was stripped by the death of Plaintiff's spouse;

(b) classify Plaintiff as an "immediate relative" spouse of a U.S. citizen and adjudicate the I-130 Immigrant Petition filed on Plaintiff's behalf accordingly; and

(c) classify Plaintiff as an "immediate relative" spouse of a U.S. citizen and adjudicate Plaintiff's I-485 Adjustment of Status Application accordingly;

6. Award Plaintiff reasonable costs and attorney's fees pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, and 28 U.S.C. § 2412(d), *et seq.*; and

7. Grant any and all further relief this Court deems just and proper.

Dated: New York, New York  
November 20, 2008

Respectfully submitted,



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