

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

Gwendolyn Naag Hanford,)	
)	
Petitioner,)	
)	
v.)	CIVIL NO. SA-08-CA-0795-XR
)	
Michael Chertoff,)	
Secretary, U.S. Department of)	
Homeland Security,)	
<i>et al.,</i>)	
)	
Respondents.)	

RESPONDENTS’ REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

In her Response, Petitioner Gwendolyn Naag Hanford fails to establish that this court retains subject matter jurisdiction over her claims, and she argues that this Court should hear her claim based on policy arguments that are controverted by the plain language of the relevant statutory provisions. This court must dismiss this case for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Alternatively, the Court should dismiss the Complaint for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6).

A. Petitioner Was Not A Putative Class Member In *Hootkins v. Chertoff*; Therefore, Her Complaint Is Time Barred.

Mrs. Hanford alleges that the limitations period within which she could bring suit on the denial of her I-485 was tolled, because, under *Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983), the commencement of a class action suspends the applicable statute of limitations as to all asserted members. Mrs. Hanford alleges that she was a putative class member of the class action lawsuit filed in *Hootkins v. Chertoff*, CV07-05696 (CAS) (C.D. Cal. August 30, 2007). In fact,

Mrs. Hanford could not have been a putative class member, because the Complaints in *Hootkins* does not define a class that applies to her case, nor does it seek the relief she requests in her Complaint. The First Amended Complaint in *Hootkins*, which was filed March 20, 2008 and is attached hereto as Exhibit A, defines the class and subclasses that it seeks to represent as:

- Class: All beneficiaries of immediate relative petitions whose petitioning relatives died prior to beneficiaries' adjudication and approval of lawful permanent resident status.
- Subclass I: All beneficiaries of immediate relative petitions who applied for adjustment of status in the United States, and whose petitioning relatives died prior to beneficiaries' adjudication and approval of lawful permanent resident status.
- Subclass II: All beneficiaries of immediate relative petitions who applied for immigrant visas abroad, and whose petitioning relatives died prior to beneficiaries' adjudication and approval of lawful permanent resident status.

Exhibit A at ¶ 153. The named plaintiffs-petitioners in *Hootkins* seek to represent beneficiaries of immediate relative petitions, also known as an I-130 petitions, but Mrs. Hanford is not a beneficiary of such a petition. Further, Plaintiffs initial motion for class certification filed on November 28, 2007, makes no mention of I-129F beneficiaries. The first mention of a subclass for I-129F beneficiaries is in July of 2008, after Mrs. Hanford's claim expired. The First Amended Complaint alleges that one named plaintiff filed an I-129F and entered the United States on a K-1 visa, but in their claims for relief, the plaintiffs-petitioners seek a court order compelling respondents to readjudicate plaintiffs I-130 petitions and grant them "immediate relative" status. *Id.* at ¶¶ 126, 165-174. Mrs. Hanford's spouse did not file an I-130 petition on her behalf, and she is not seeking "immediate relative" status. *See* Complaint.

Because she does not fit the definition of the class or subclasses set out in the *Hootkins* Complaints, and is not eligible for the relief sought in the *Hootkins* Complaints, Mrs. Hanford cannot be a putative member of the class in *Hootkins*. Both parties agree that the *Hootkins* court ultimately defined the class as only containing members whose applications lie within the jurisdiction of the Ninth Circuit. The court did not enter an order certifying a class including recipients of K-1 visas, and limiting the class to members within the jurisdiction of the Ninth Circuit, until January 6, 2009, approximately eight months after the statute of limitations on Mrs. Hanford's claim had expired. The order certifying the class in *Hootkins* is attached to this reply as Exhibit B. Accordingly, Mrs. Hanford's attempts to circumvent the statute of limitations deadline that she missed are unfounded.

B. Because Petitioner Has Been Placed In Removal Proceedings, This Court Lacks Jurisdiction To Consider Her Claim.

Review of the denial of Mrs. Hanford's I-485 petition is properly renewed in the removal proceedings currently initiated against her. Accordingly, this Court lacks subject matter jurisdiction over Mrs. Hanford's claims. She is not entitled to judicial relief until the statutorily prescribed administrative remedies have been exhausted. *Myers v. Bethlehem Ship-Building Corp.*, 303 U.S. 41, 50-51 (1938). The requirement of exhaustion of administrative remedies may arise from explicit statutory language or from an implied scheme providing for relief from the agency. *See Coit Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561, 583-84 (1989); *Howell v. INS*, 72 F.3d 288, 291 (2d Cir. 1995). The doctrine of exhaustion of administrative remedies is especially prevalent in cases in which the relevant statute provides that the prescribed administrative procedures should be exclusive. *McKart v. United States*, 395 U.S. 185, 193 (1969).

If a party fails to exhaust administrative remedies, then subject matter jurisdiction does not exist. *Cardoso v. Reno*, 216 F.3d 512, 518 (5th Cir. 2000).¹

Mrs. Hanford argues that this Court may retain jurisdiction under *Darby v. Cisneros*, 509 U.S. 137 (1993), in which the Supreme Court held generally that when a party challenges a final agency decision under the APA, an appeal to “superior agency authority” is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review. *Id.* at 153. Where, as here, the Petitioner has already been placed in removal proceedings, the statutory scheme adopted by Congress for judicial review of denials of adjustment of status applications requires that questions of law be raised in the form of petitions for review of administratively final removal orders before the courts of appeal. *See* 8 U.S.C. §§ 1252(a)(2)(D), (a)(5), (b)(2), and (b)(9). Moreover, under 8 C.F.R. § 245.2(a)(5)(ii), “[n]o appeal lies from the denial of an application [for adjustment of status] by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 C.F.R. part 240 [Proceedings to Determine Removability of Aliens in the United States].” Plaintiff misrepresents the plain language of this regulation; the regulation read in conjunction with 8 U.S.C. §§ 1252(a)(2)(D), (a)(5), (b)(2), and (b)(9), creates a statutory scheme that requires a petitioner who

¹ Petitioner attempts to distinguish *Cardoso* from the instant case based on factual differences between the petitioners in *Cardoso* and the facts alleged by Mrs. Hanford in her Complaint. These factual differences, however, are inapposite, because Respondents rely on *Cardoso* for the well-established 5th Circuit precedent that the statutory and regulatory scheme regarding the non-appealability of denials of adjustment of status applications require that individuals exhaust administrative remedies before they may petition for review of a final order of removal. Petitioner then urges this court to not follow mandatory Fifth Circuit precedent and follow the Third Circuit’s holding in *Pinho* (explicitly distinguishes its holding from *Cardoso*). *Pinho v. Gonzles*, 432 F.3d 193, 202 (3d Cir. 2005).

seeks review of a denial of an I-485 application to renew her application in removal proceedings. *See Howell*, 72 F.3d at 293-94.

In *Howell*, the Second Circuit held that the U.S. District Court lacked jurisdiction to review the denial of Howell's application for adjustment of status (I-485) once deportation proceedings commenced, because Howell failed to exhaust her administrative remedies. The *Howell* court further held that *Darby* did not limit the requirement of exhaustion of administrative remedies in such a case, because the statutory scheme requires that petitioners renew their applications for adjustment of status through removal proceedings. *Id.* This court should follow the Second Circuit and hold that the limitations under *Darby* on the requirement that Mrs. Hanford exhaust all administrative remedies before seeking review of a denial in federal court do not apply in this case, because Section 1252, read in conjunction with 8 C.F.R. § 245.2(a)(5)(ii), mandates that a petitioner seek review of her application in removal proceedings.

Once Mrs. Hanford is placed in removal proceedings, the Immigration Judge retains exclusive jurisdiction over her application for adjustment of status. *See Cardoso*, 216 F.3d at 518; *Howell*, 72 F.3d at 293. Mrs. Hanford's discussion of discretionary decisions related to the "jurisdictional bars" described in 8 U.S.C. § 1252(a)(2)(B)² has no bearing on this case. If this Court exercises jurisdiction over this case, it will be concurrently ruling on the same legal questions as the Immigration Judge, a waste of judicial resources. Thus, the statutory scheme mandates that Mrs. Hanford challenge the denial of her application through the prescribed administrative remedies set out in § 1252(a)(2)(D).

² Mrs. Hanford cited to § 1251(a)(2)(B), but Respondents assume she intended to cite to § 1252(a)(2)(B), the provision on jurisdiction to review denials of discretionary relief.

Mrs. Hanford also discusses whether USCIS's decision to issue her a Notice to Appear is reviewable under 8 U.S.C. § 1252(g). Section 1252(g) is explicit that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings . . . or execute removal orders against any alien under this chapter." If this court exercises jurisdiction over Mrs. Hanford's claim, it will override the agency's decision to place Mrs. Hanford in removal proceedings. The statutory and regulatory scheme providing for the review of applications for adjustment of status exclusively in removal proceedings, and the lack of statutory support for judicial review of denials of adjustment of status applications, as well as the agency's decision to issue a Notice to Appear, should be read in concert to require administrative exhaustion through the re-application for adjustment of status before the immigration court in the removal proceedings. *See* 8 U.S.C. §§ 1252(b)(9), (d)(1), (g); 8 C.F.R. §§ 245.2(a)(1), (a)(5)(ii).

C. The Plain Language Of The Statute Does Not Provide For The Relief That Mrs. Hanford Seeks, And Accordingly, She Is Ineligible For Adjustment of Status.

Petitioner requests that this Court grant her relief to which she is not entitled under the plain language of the statute. She broadly interprets the Ninth Circuit's decision in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), to cover all fiancé petitions, which would lead to absurd results. Although Mrs. Hanford focuses on the meaning of the word "spouse," in 8 U.S.C. § 1151, the operative word in the *relevant* statutory provisions and regulations for adjustment of status for fiancé visa beneficiaries is "marriage." *See* 8 U.S.C. § 1255(d); 8 C.F.R. § 245.1(c)(6). In the United States, under the law of every state, marriage ends when one spouse dies. *See* 52 Am. Jr. 2d, Marriage § 8. Because Mrs. Hanford's husband passed away before the adjudication of her

application, she is no longer married to the United States citizen who filed the K-1 visa petition. Quite simply, her marriage terminated at the time of her former husband's death. She is therefore ineligible to adjust to legal permanent resident status under 8 U.S.C. § 1255(a).

Mrs. Hanford attempts to distinguish the Fourth Circuit's applicable holding in *Markovski v. Gonzales*, 486 F.3d 108 (4th Cir. 2007), from this case by pointing out the differences in the factual allegations in each case. However, the fact that Markovski's marriage ended in divorce and not death is not relevant under the language of § 1255. Also, Markovski's employer filed a petition to adjust status on his behalf, but it was based on his entry to the United States on a K-1 visa, because, as the Fourth Circuit found, § 1255(d) "prohibits an alien who arrived on the K-1 fiancé visa from adjusting his status on any basis whatever save for the *marriage* to the K-1 visa sponsor." *Id.* (Emphasis added).

CONCLUSION

For the foregoing reasons, Respondents respectfully requests that this Court dismiss Petitioner's Complaint for lack of subject matter jurisdiction. In the event this Court does exercise jurisdiction over this matter, Respondents request that this Court dismiss Petitioner's Complaint for failure to state a claim upon which relief can be granted for the reasons expounded above.

Respectfully submitted,

JOHNNY SUTTON
United States Attorney

GARY L. ANDERSON
Assistant United States Attorney
601 NW Loop 410, Suite 600
San Antonio, Texas. 78216
Texas State Bar No. 01219000
Tel. No. (210) 384-7365
Fax. No. (210) 384-7312

GREGORY G. KATSAS
Assistant Attorney General

ELIZABETH J. STEVENS
Assistant Director, District Court Section

/s/

JULIE S. SALTMAN
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868
Ben Franklin Station
Washington, DC 20044
Tel. (202) 532-4252
Fax: (202) 305-7000
Julie.Saltman@usdoj.gov

Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January, 2009, the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ _____
JULIE SALTMAN
Trial Attorney, Civil Division
U.S. Department of Justice