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11 UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
13 WESTERN DIVISION

14 CAROLYN ROBB HOOTKINS, et. al.,) Case No. CV07-5696 CAS (MANx)
15)
16 Plaintiffs-petitioners,) Date: January 28, 2008
17) Time: 10:00 a.m.
18 vs.) Courtroom: 5
19) Honorable Christina A. Snyder
20 MICHAEL CHERTOFF, U.S. Department)
21 of Homeland Security, et. al.,) PLAINTIFFS' REPLY IN SUPPORT OF
22) CROSS MOTION FOR SUMMARY
23 Defendants-respondents.) JUDGMENT
24)
25) CLASS ACTION
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27)
28)

1 Defendants' Opposition to Plaintiffs' Cross Motion for Summary Judgment

2 (Def.'s Opp'n Pl. Cross Mot. S.J., or Def.'s Opp'n) requires only brief reply. Since the
3 lodging of plaintiff's Cross Motion for Summary Judgment, two more district courts have
4 followed the reasoning of *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) and
5 *Robinson v. Chertoff*, No. 06-5702 (SRC), 2007 WL 1412284 (D. N.J. May 14, 2007),
6 *appeal docketed*. See *Taing v. Chertoff*, - F. Supp. 2d -, 2007 WL 4348060 (D. Mass.
7 Dec. 12, 2007); and *Lockhart v. Chertoff*, No. 07-823 (KMO), 2008 WL 80225, slip op.
8 (N.D. Ohio Jan. 7, 2008), (*appended as* Attachment A to Def.'s Opp'n Pl. Cross Mot.
9 S.J.). The foregoing decisions are well-reasoned. In contrast, the two courts to have
10 adopted an opposite interpretation, *Turek v. DHS*, 450 F.Supp. 2d 736 (E.D. Mich. 2006),
11 and *Burger v. McElroy*, No. 97 CIV. 8775 (RPP), 1999 WL 203353 (S.D.N.Y. Apr. 12,
12 1999), did so on different facts with very little analysis (*Turek*), or improperly applied
13 *Chevron* deference (*Burger*). See *Lockhart v. Chertoff*, No. 07-823 (KMO), 2008 WL
14 80225, slip op. at *10 (N.D. Ohio Jan. 7, 2008). Plaintiffs' claims are well founded.
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21 Because those courts have not encountered the government's newly minted
22 Aytes Memorandum (Def.'s Mot. Dismiss, Exh. 1), however, this Court is in the unique
23 position to determine the lawfulness of defendants' eligibility-stripping affidavit of
24 support and humanitarian reinstatement constructs. While defendants did not defend the
25 "humanitarian reinstatement" pre-requisites to I-130 approval, an effort was made to
26 address the affidavit of support requirements. Specifically, defendants state that a new
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1 affidavit of support will be required for I-130 approval, “even if the deceased spouse filed
2 one.” (Def.’s Opp’n Cross Mot. S.J. 8, n. 5.) In support of this requirement, defendants
3 state that “Section 1182(a)(4)(C) of 8 U.S. Code *specifically requires a valid affidavit of*
4 *support* under section 1183a for all immediate relative and family preference cases...”
5 (Def.’s Opp’n. 8, n. 5) (emphasis supplied). Yet, 8 U.S.C. § 1182(a)(4)(C) does *not*
6 specifically require a valid affidavit of support. Instead, that section requires that “the
7 person petitioning for the alien’s admission (and any additional sponsor required under
8 section 213A(f) or any alternative sponsor permitted under paragraph (5)(B) of such
9 section) has *executed* an affidavit of support described in section 213A with respect to
10 such alien.” 8 U.S.C. § 1182(a)(4)(C)(ii) (emphasis supplied). *Execution* of an affidavit
11 by the petitioner is all that is required under the statute. The requirements, found at 8
12 U.S.C. § 1183a, defining the “enforceability” of executed affidavits of support serve
13 merely to instruct the form and process of the affidavit, and do not add additional
14 requirements for admission as a lawful permanent resident other than those found at
15 § 1182(a)(4). For example, a petitioning sponsor may execute an affidavit of support as
16 required under § 1182(a)(4), but during the pendency of the petition process the alien
17 may work the last of the required 40 qualifying quarters of coverage and therefore make
18 the affidavit of support unenforceable. See 8 U.S.C. § 1183a(a)(3)(A). The fact that the
19 duly executed affidavit of support becomes unenforceable does not make the alien
20 inadmissible under § 1182(a)(4), because the petitioner and alien spouse have done all
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1 that is required under the statute. Enforceability is not required for the sponsored
2 immigrant to be admissible - only *execution* of the affidavit by the petitioning sponsor.
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4 To maintain otherwise would lead to absurd results.

5 Further, even if enforceability were required at the time of admission,
6 defendants' argument that the affidavit of support executed by the petitioner cannot be
7 enforced following the death of the petitioner is not in accordance with the statute. The
8 regulation does, in fact, state that the sponsor's obligation ends when the sponsor dies.
9 8 C.F.R. § 213a.2(e)(2)(ii). Yet this "enforcement ends at death" requirement is not in
10 the statute, and runs contrary to the remedies provided for enforcement under 8 U.S.C.
11 § 1183a(c), which include remedies to enforce obligations against a person's estate. It is
12 true that "sponsor" is defined in the regulations as "an individual who is either required to
13 execute or has executed a Form I-864 under this part." 8 C.F.R. § 213a.1. There is no
14 disagreement that the spouses of plaintiffs executed a Form I-864. This is not the case of
15 a "juridical person" attempting to execute an affidavit of support, because plaintiffs'
16 spouses accomplished the execution of Form I-864 before notaries public, satisfying the
17 requirements of the statute. Nothing further is required of plaintiffs, and defendants'
18 position that the I-130 petition should turn on a substitute affidavit of support under an
19 unrelated provision is unfounded.
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26 It is well established law that the determination of admissibility is not within
27 the scope of visa petition procedure. *Matter of O*, 8 I&N Dec. 295 (BIA 1959) (available
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1 at <http://www.usdoj.gov/eoir/vll/intdec/vol08/Pg295.pdf>) (Attachment A). Despite this
2 basic tenet of immigration law, defendants seek to utilize grounds of inadmissibility in
3 violation of law to deny plaintiffs' visa petitions. In *Matter of O*, the Board of
4 Immigration Appeals reviewed the denial of an immigrant petition filed by a U.S. citizen
5 woman on behalf of her husband, a citizen of Italy. The Board noted that, "The parties
6 were married on September 25, 1929, at Fulton, New York. The petition is supported by
7 the birth certificate of the petitioner and by a marriage certificate. The beneficiary
8 appears, upon the basis of the documents submitted, *prima facie* eligible for a nonquota
9 status under section 101(a)(27)(A) of the Immigration and Nationality Act as the alien
10 husband of a citizen of the United States." *Id.* at 295. The immigration service had
11 denied the visa petition on the basis that the "beneficiary is ineligible to receive a visa
12 and is inadmissible to the United States..." *Id.* at 296. The Board disagreed with the visa
13 petition denial, and the court's analysis is so crucial to plaintiffs' claims that the analysis
14 is worth quoting in full,

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21 "the argument was also made that circuity of action should be avoided wherever
22 possible; that it would be anomalous to require approval of the visa petition when a
23 subsequent determination upon the alien's application for admission to the United
24 States will result in a finding of inadmissibility upon the grounds already set forth.

25 It is believed that the finding of inadmissibility as a basis upon which to deny
26 approval of a visa petition is not sanctioned under the procedure set forth in
27 granting visa petitions. The visa petition procedure for granting nonquota
28 immigrant status under section 101(a)(27)(A) or quota immigrant status under
sections 203(a)(2), 203(a)(3), or 203(a)(4) is set forth in section 205 of the
Immigration and Nationality Act [now INA 204]. Subsection (c) of section 205
[now INA 204(b)] provides that after an investigation of the facts in each case the

1 Attorney General shall, if he determines that the facts stated in the petition are true
2 and that the alien with respect to whom the petition is made is eligible for a
3 nonquota status or for preference quota immigrant status, shall approve the petition
4 and forward one copy thereof to the Department of State and the Secretary of State
shall then authorize the consular officer to grant the approved status.

5 It is obvious from a reading of section 205 that no provision is made therein for
6 determining admissibility under the immigration laws. The sole concern of this
7 procedure is eligibility for the status claimed. In relationship cases, the only
8 evidence submitted is documentary or in affidavit form. . . The fact that section 206
9 [now 205] grants the Attorney General authority to revoke approval of any petition
10 at any time for good and sufficient cause is not pertinent because the revocation of
an approved petition is not here involved, and we need not concern ourselves as to
the scope of good and sufficient cause.

11 The procedure set forth in section 205 [now 204] is generally a reenactment of the
12 provisions contained in the prior law as set forth in section 9 of the Immigration
13 Act of 1924. It has previously been held that neither section 9 of the Immigration
14 Act of 1924 nor regulations promulgated thereunder require a general inquiry into
15 an alien's admissibility under all the immigration laws; and that if there is no
16 challenge to the truthfulness of the claim of relationship or to the claim of
citizenship or permanent residence, there is no basis for denial (*Matter of O-*, 3
17 I&N Dec. 376). The visa petition procedure is concerned merely with the question
18 of status. It does not concern itself with substantive questions of inadmissibility
19 which may be explored by the consular officer before issuing the visa or by the
20 Service in connection with the inspection and exclusion procedure set forth in
sections 235 and 236. The Service position would deprive the consular officer of
21 the opportunity to determine whether a visa should be issued, and would also
22 circumvent the statutory hearing available to an applicant for admission into the
United States.”

23 *Matter of O*, 8 I&N Dec. 295, 296-97 (BIA 1959). Under the plain language of the
24 statute, and under established Board precedent, defendants may not condition approval of
25 an immigrant petition on admissibility considerations. To do so would deprive plaintiffs
26 of the opportunity to seek review of admissibility issues before the State Department, or
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1 if in the United States, renew a denied application for adjustment of status in removal
2 proceedings before an Immigration Judge. Such a deprivation would amount to denial of
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4 Due Process under the Fifth Amendment to the United States Constitution.

5 A reading of the statute which invalidates defendants' misuse of the
6 humanitarian reinstatement and affidavit of support requirements will avoid significant
7 due process concerns. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. &*
8 *Constr. Trades Council*, 485 U.S. 568, 575 (1988). Defendants may only review whether
9 the parties were married, and whether the alien remains a spouse for immediate relative
10 purposes. If the answer is yes, the petition *shall* be granted. 8 U.S.C. § 1154(b), INA
11 204(b). Plaintiffs do not ask this court to make that determination, but rather guide the
12 agency to the correct legal standard. Plaintiffs respectfully request that the Motion for
13 Summary Judgment be granted, and that defendants' motion to dismiss be denied.
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18 DATED this 16th day of January, 2008.

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1 PROOF OF SERVICE

2 I, the undersigned, say: my business address is 5285 SW Meadows Rd., Ste 175,
3 Lake Oswego, Oregon 97035. I am over the age of eighteen years and not a party to the
4 above-entitled action.

5 On January 16, 2008, true and correct copies of the plaintiffs': PLAINTIFFS'
6 REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICAITON, were served
7 pursuant to the district court's ECF system as to ECF filers on January 16, 2008, to the
8 following ECF filers:

9 Elizabeth Stevens
10 Office of Immigration Litigation
11 USDOJ Civil Division
12 P.O. Box 878
13 Ben Franklin Station
14 Washington, DC 20044

15 Sheri R. Glaser
16 Office of Immigration Litigation
17 USDOJ Civil Division
18 P.O. Box 878
19 Ben Franklin Station
20 Washington, DC 20044

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

23 EXECUTED on January 16, 2008, at Portland, Oregon.

24 S/ Brent W. Renison
25 Brent W. Renison, Declarant
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