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3 UNITED STATES DISTRICT COURT
4 FOR THE DISTRICT OF COLORADO
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7 OLGA LEDEZMA,) Case No.
8)
9 Plaintiff-petitioner,)
10 vs.)
11)
12 JANET NAPOLITANO, Secretary, U.S.)
13 Department of Homeland Security;)
14 MICHAEL AYLES, Acting Director, U.S.)
15 Citizenship and Immigration Services,)
16 Defendants-respondents.)
17)

18 COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION
19 FOR WRIT OF MANDAMUS
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1 acting in their official capacities, and the Department of Homeland Security (“DHS”),
2 the United States Citizenship and Immigration Services (“USCIS”) are agencies of the
3 United States. Additionally, plaintiff resided in this judicial district prior to her
4 unlawful removal. A substantial part of the events giving rise to the claim occurred in
5 this judicial district, in that the Denver Field Office of USCIS, an agency of DHS
6 (previously located at 4730 Paris Street, Denver, Colorado, now relocated to 12484
7 East Weaver Place, Centennial, CO 80111), was the office that denied plaintiff’s
8 immigration petition and application.

9 EXHAUSTION

10 3. There are no administrative remedies available for plaintiff to exhaust.

11 4. There is no administrative appeal of the denial of an application for
12 adjustment of Status (I-485). 8 CFR § 245.2(a)(5)(ii).

13 5. There also is no administrative appeal of the revocation of an I-130
14 immigrant petition, where such revocation purportedly occurred as a “matter of law,”
15 even before the Executive Office for Immigration Review (“EOIR”). The Board of
16 Immigration Appeals (“BIA”) has held that both the immigration courts (within
17 EOIR) and the BIA (administrative courts of limited and not general jurisdiction) lack
18 jurisdiction under the administrative regulations to review such a denial. See *Matter*
19 *of Sano*, 19 I&N Dec. 299 (BIA 1985). Procedures for obtaining lawful permanent
20 resident status through an adjustment of status (I-485) application require an approved
21 I-130 immigrant petition.
22

23 6. While applicants may generally renew the adjustment of status
24 application (Form I-485) in removal proceedings before EOIR, adjudication of this
25 application requires an I-130 approval. Because the I-130 was denied and no
26 administrative appeal exists, plaintiff has no administrative remedy. As a result,
27 removal proceedings are not a mandatory exhaustion requirement and cannot be
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1 imposed on plaintiffs's APA action. *See Darby v. Cisneros*, 509 U.S. 137 (1993).

2 **DEFENDANTS**

3 7. Defendant-respondent Janet Napolitano is sued in her official capacity as
4 Secretary of Department of Homeland Security ("DHS"). As Secretary of DHS, Ms.
5 Napolitano is responsible for the administration and enforcement of the immigration
6 laws of the United States.

7 8. Defendant-respondent Michael Aytes is sued in his official capacity as
8 Acting Director of the United States Department of Homeland Security, United States
9 Citizenship and Immigration Services ("USCIS"). As Acting Director of USCIS, Mr.
10 Aytes is responsible for the overall administration of USCIS and the implementation
11 of the immigration laws of the United States.

12 **STATUTORY AND REGULATORY BACKGROUND**

13 9. Plaintiff seeks lawful permanent resident status, and applied for such
14 status. Plaintiff challenges defendants' determinations that, as a matter of law,
15 plaintiff was stripped of the status as an "immediate relative" spouse of a United
16 States citizen when the citizen spouse tragically died while plaintiff's immigration
17 applications were awaiting adjudication.

18 10. A United States citizen who marries a non-citizen may apply for his or
19 her spouse to reside permanently in the United States with the citizen. Pursuant to 8
20 U.S.C. § 1154(1)(A)(i), a United States citizen may file a petition (Form *I-130*) on
21 behalf of a spouse claiming the spouse is entitled to classification as an "immediate
22 relative." The term "immediate relative", as applicable to the United States citizen's
23 petition, is set forth in the *first* sentence of 8 U.S.C. § 1151(b)(2)(A)(i) as the
24 "children, spouses, and parents of a citizen of the United States, except that, in the
25 case of parents, such citizens shall be at least 21 years of age."

26 11. An alien spouse whose United States citizen *never filed* a petition on the
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1 alien’s behalf, may also file a petition (Form *I-360* self-petition) on his or her own
2 behalf, pursuant to 8 U.S.C. § 1154(1)(A)(ii), which states, “An alien spouse
3 described in the *second sentence* of section 201(b)(2)(A)(i) *also* may file a
4 petition...”. *Id.*, (emphasis supplied) In such a case, the immediate relative definition
5 set out in the *second* sentence of 8 U.S.C. § 1151(b)(2)(A)(i) is applicable: “In the
6 case of an alien who was the spouse of a citizen of the United States for at least 2
7 years at the time of the citizen’s death and was not legally separated from the citizen
8 at the time of the citizen’s death, the alien (and each child of the alien) shall be
9 considered, for purposes of this subsection, to remain an immediate relative after the
10 date of the citizen’s death but only if the spouse files a petition under section
11 204(a)(1)(A)(ii) of this title within 2 years after such date and only until the date the
12 spouse remarries.”

13
14 12. Defendants have applied the incorrect immediate relative definition to
15 plaintiff’s petition and application. Specifically, defendants have taken the position
16 that if the citizen spouse dies before the second anniversary of the marriage, the alien
17 spouse is no longer considered a “spouse” entitled to immediate relative status. In
18 doing so, defendants have confused the immediate relative definition applicable to *I-*
19 *130* petitions filed by United States citizen spouses (the *first* sentence of 8 U.S.C. §
20 1151(b)(2)(A)(i)) with the immediate relative definition applicable to *I-360* self-
21 petitions filed by alien spouses (the *second* sentence of 8 U.S.C. § 1151(b)(2)(A)(i)).

22 13. The legal issues presented by this case have been the subject of extensive
23 litigation throughout the United States in recent years. At present, three United States
24 Courts of Appeals have issued rulings, the result of which is a circuit split in favor of
25 the surviving spouse(s), and a fourth, *Tiang v. Chertoff*, 526 F. Supp. 2d 177 (D.
26 Mass. 2007) (ruling in favor of spouse), *appeal docketed*, No. 08-1179 (1st Cir. 2008),
27 is poised to issue a ruling in the near future. Both the Ninth Circuit and the Sixth
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1 Circuit have issued *unanimous* rulings in the spouse's favor. *See Lockhart v.*
2 *Napolitano*, --- F.3d ---, 2009 WL 928504 (6th Cir. Apr. 8, 2009); *Freeman v.*
3 *Gonzales*, 444 F.3d 1031 (9th Cir. 2006). The Third Circuit issued a split decision in
4 favor of the agency interpretation. *See Robinson v. Napolitano*, 554 F.3d 358 (3d Cir.
5 2009). Squarely in the minority, the Third Circuit decision includes a powerful
6 dissent and is being appealed to the United States Supreme Court. This is an issue of
7 first impression in the Tenth Circuit.

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9 14. Through the application of the improper standard, defendants have
10 compounded plaintiff's grief. Defendants have stripped plaintiff of immediate relative
11 status, denied the application for adjustment of status, denied work and travel
12 authorization, and effected her removal from the United States. These actions have
13 exacted grief, suffering, loss of work authorization, loss of travel authorization,
14 separation of family members, forced removal and other injuries flowing from forced
15 unlawful status such as loss of entitlement to estate benefits, social security benefits,
16 loss of driving privileges due to state laws requiring proof of legal status, and loss of
17 accrued lawful residence time that is a prerequisite for eventual United States
18 citizenship.

19 **PLAINTIFF**

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21 15. Plaintiff Olga Ledezma was born in Mexico in 1958. Plaintiff is a citizen
22 of the Mexico.

23 16. Plaintiff lived in Denver, Colorado from 2002 until she was forcibly
24 removed to Mexico in March 2009. Plaintiff entered the United States lawfully, after
25 being inspected and admitted, on April 3, 2002.

26 17. On April 26, 2002, plaintiff married Lucio Ledezma, a naturalized United
27 States citizen.

CLAIMS FOR RELIEF
FIRST CAUSE OF ACTION

21. Plaintiff realleges and incorporates by reference paragraphs 1 through 20 above.

22. Plaintiff is an immediate relative for purposes of INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) and is eligible for adjustment of status under INA § 245(a), 8 U.S.C. § 1255(a).

23. Plaintiff was not stripped of the status of an "immediate relative" spouse by the death of plaintiff's spouse.

24. Plaintiff remains eligible to receive adjustment of status as the "immediate relative" spouse of a United States citizen.

25. Plaintiff is admissible to the United States as a lawful permanent resident.

26. An immigrant visa was immediately available to plaintiff at the time plaintiff's applications were filed, pursuant to INA § 245(a), 8 U.S.C. 1255(a).

27. Plaintiff has suffered and will continue to suffer significant and irreparable harm because of defendants' policies, procedures, acts and failures to act as described herein.

28. Defendants violated plaintiff's statutory right to apply for relief which Congress has provided under the INA, depriving plaintiff of the opportunity to adjust status to lawful permanent resident and live lawfully in the United States under INA § 245, 8 U.S.C. 1255(a).

28. In other jurisdictions, where defendants have been forced to halt their unlawful automatic termination practices, defendants have also improperly attempted to revoke the approval of an I-130 petition unless plaintiff presents a request under 8 CFR § 205.1(a)(3)(C)(2) for humanitarian reinstatement, supported by a Form I-864 executed by an individual who qualifies under section 213A(f)(5)(B) of the

1 Immigration and Nationality Act as a qualifying substitute sponsor. See *Hootkins v.*
2 *Napolitano*, 07-5696 CAS (C.D. Cal. 2009) (holding automatic revocation regulations
3 and substitute sponsor requirements as invalid as a matter of law).

4 29. The regulation found at 8 CFR § 205.1(a)(3)(C)(2) is invalid as a matter
5 of law.

6 30. The substitute sponsor provisions of section 213A(f)(5)(B) of the
7 Immigration and Nationality Act (INA) do not apply to plaintiff whose U.S. citizen
8 spouse executed an I-864 Affidavit of Support under section 213A(f)(1) of the INA,
9 thereby fulfilling the requirement of section 212(a)(4)(C)(ii) of the INA that the
10 person petitioning for the alien’s admission has executed an I-864 Affidavit of
11 Support.

12 **SECOND CAUSE OF ACTION**

13 31. Plaintiff realleges and incorporates by reference paragraphs 1 through 30
14 above.

15 32. Plaintiff has suffered a “legal wrong” or has been “adversely affected or
16 aggrieved” by agency action. 5 U.S.C. § 702. Plaintiff is a person aggrieved by
17 agency action, for which there is no other adequate remedy in a court. 5 U.S.C. § 704.

18 33. Defendants have unlawfully and erroneously interpreted the definition of
19 the term “immediate relative” in INA § 201(a)(b)(2)(A)(i). Based on this erroneous
20 interpretation, defendants have erroneously denied both the immediate relative
21 petition filed on plaintiff’s behalf and plaintiff’s adjustment of status in violation of
22 Congressional intent. Plaintiff is entitled to injunctive relief to “compel agency action
23 unlawfully withheld or unreasonably delayed” and to hold unlawful and set aside
24 agency action that, as here, is not in accordance with the law. 5 U.S.C. §§ 706(1) and
25 (2).
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1 **THIRD CAUSE OF ACTION**

2 34. Plaintiff realleges and incorporates by reference paragraphs 1 through 33
3 above.

4 35. Defendants owe plaintiff a clear and certain duty to adjudicate plaintiff's
5 applications on the basis that plaintiff remains an "immediate relative" spouse of a
6 United States citizen, and was not stripped of this status by the death of plaintiff's
7 spouse. See *Lockhart v. Napolitano*, --- F.3d ---, 2009 WL 928504 (6th Cir. Apr. 8,
8 2009); and *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006). *But see Robinson v.*
9 *Napolitano*, 554 F.3d 358 (3d Cir. 2009).

10 36. Defendants denied plaintiff's applications solely on the basis that
11 plaintiff was stripped of the status of immediate relative as the spouse of a United
12 States citizen, and not for discretionary reasons. Defendants have failed to perform
13 their duties by determining that plaintiff is no longer the "spouse" of a U.S. citizen and
14 therefore not entitled to adjustment of status and for issuance of an immigrant visa,
15 and by failing to exercise discretion.

16 37. Plaintiff has no other adequate remedy.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiff respectfully requests that this Court:

- 19 20 21 22 23 24 25 26 27 28
1. Assume jurisdiction over this action;
 2. Declare that plaintiff 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 spouse;
 3. Declare that plaintiff is entitled to the process that flows from a properly filed petition and application, and must be considered a spouse for purposes of the petition and application;
 4. Declare that plaintiff is an immediate relative under 8 USC §

- 1 1151(b)(2)(A)(i) and for the purposes of adjudicating an I-130 petition;
- 2 5. Declare that defendants may not improperly attempt to revoke the
- 3 approval of an I-130 petition unless plaintiff presents a request under 8
- 4 CFR § 205.1(a)(3)(C)(2) for humanitarian reinstatement, supported by a
- 5 Form I-864 executed by an individual who qualifies under section
- 6 213A(f)(5)(B) of the Immigration and Nationality Act as a qualifying
- 7 substitute sponsor;
- 8 6. Declare that 8 CFR § 205.1(a)(3)(C)(2) is invalid as a matter of law;
- 9 7. Declare that plaintiff whose citizen spouse executed a Form I-864
- 10 Affidavit of Support has satisfied the requirements of 212(a)(4)(C)(ii) of
- 11 the INA in that the person petitioning for the alien's admission has
- 12 executed an I-864 Affidavit of Support, and that plaintiff is not required
- 13 to submit a Form I-864 from a qualifying substitute sponsor under
- 14 section 213A(f)(5)(B) of the INA;
- 15 8. Declare that I-130 petition procedure is not the forum for determining
- 16 substantive questions of admissibility under the immigration laws, and
- 17 when eligibility for immediate relative classification is established, the
- 18 petition shall be granted;
- 19 9. Issue an injunction prohibiting defendants from using the death of the
- 20 U.S. citizen spouse as a discretionary factor in the adjudication of the
- 21 petition and application;
- 22 10. Issue an injunction prohibiting defendants from using factors flowing
- 23 from the unlawful denial of the application to again deny the petition and
- 24 application upon reopening, including but not limited to claims of
- 25 abandonment of the application due to departure from the United States,
- 26 and bars to admissibility related to "unlawful presence" caused by the
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wrongful denial;

11. Vacate the removal order entered against plaintiff and enjoin the defendants from using factors flowing from the unlawful removal and related proceedings to deny the petition or application upon reopening, including but not limited to using the unlawful order or proceedings as a discretionary factor or as the basis of a finding of inadmissibility or determination of ineligibility for adjustment;
12. Order defendants to return the plaintiff to the United States, forthwith and free of restraint or other consequences of her unlawful removal, to pursue these remedies, including providing her with evidence of lawful admission, lawful status, and authorization to accept employment in the United States while these matters are pending before this court or the agency;
13. Issue an injunction prohibiting defendants from revoking approval of an I-130 petition where plaintiff does not present a request under 8 CFR § 205.1(a)(3)(C)(2) for humanitarian reinstatement, supported by a Form I-864 executed by an individual who qualifies under section 213A(f)(5)(B) of the Immigration and Nationality Act as a qualifying substitute sponsor, where plaintiff's citizen spouse previously executed a Form I-864.
14. Issue a writ of mandamus compelling defendants to (a) reopen plaintiff's adjustment of status application on the ground that the application was unlawfully denied on the basis of defendants' 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) treat plaintiff as an "immediate relative" spouse and adjudicate the immigrant petition ("petition") filed on plaintiff's behalf accordingly, and (c) treat

1 plaintiff as an "immediate relative" spouse and exercise discretion to
2 adjudicate plaintiff's adjustment of status application ("application");

3 15. Award plaintiff reasonable costs and attorney's fees under the Equal
4 Access to Justice Act; and

5 16. Award such further relief as the Court deems just or appropriate.
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7 DATED this 5th day of May, 2009.
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9
10 By /s/Laura L. Lichter
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12 LICHTER & ASSOCIATES, P.C.
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15 Phone: (303) 554-8400
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Attorney for Plaintiff-Petitioner

1 PROOF OF SERVICE

2 I, the undersigned, say: my business address is 1601 Vine Street, Denver,
3 Colorado 80206. I am over the age of eighteen years and not a party to the above-entitled
4 action.

5 On May 5, 2009, true and correct copies of the plaintiff's: COMPLAINT FOR
6 DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR WRIT OF
7 MANDAMUS, were sent via Certified Mail, Return Receipt Requested, to the following:

8 Office of Immigration Litigation
9 USDOJ Civil Division
10 P.O. Box 878
11 Ben Franklin Station
12 Washington, D.C. 20044

13 David M. Gaouette
14 United States Attorney
15 1225 Seventeenth Street, Suite 700
16 Denver, CO 80202

17 Janet Napolitano
18 Secretary, Department of Homeland Security
19 United States Department of Homeland Security
20 Washington, D.C. 20528

21 Michael Aytes
22 Acting Director, United States Citizenship and Immigration Services
23 United States Department of Homeland Security
24 425 I Street NW
25 Washington, D.C. 20536

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

28 EXECUTED on May 5, 2009, at Denver, Colorado.

/s/ Laura L. Lichter
Laura L. Lichter, Declarant