

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**NELLY SUPANGAN LOCKHART** )  
145 Chestnut Lane, Building G, Apt. 204 )  
Richmond Hts., OH 44143 )

Petitioner, )

v. )

**MICHAEL CHERTOFF**, Secretary, )  
Department of Homeland Security )  
**EMILIO T. GONZALEZ**, Director, U.S. )  
Citizenship and Immigration Services )  
**MARK B. HANSEN**, District Director, )  
U.S. Citizenship and Immigration Services )

Respondents. )

Civil Action No.: \_\_\_\_\_

Agency Number: A 98-089-150

JUDGE:

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

**PETITION FOR WRIT OF MANDAMUS AND  
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF  
ON BEHALF OF A SURVIVING SPOUSE OF A U.S. CITIZEN**

Petitioner Nelly Lockhart 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 died 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 INA § 201(b)(2)(A)(i) due to her marriage to a United States citizen; (b) reopen and re-adjudicate the Immigrant Petition (Form I-130 petition) that was filed on behalf of Petitioner by her U.S. citizen husband; and (c) reopen and re-adjudicate the Adjustment of Status application (Form I-485 application) that Petitioner filed as an immediate relative spouse of a U.S. citizen. Petitioner alleges as follows:

### **JURISDICTION**

1. This action arises under the Immigration and Nationality Act of 1952 (hereinafter “INA”), 8 U.S.C. §1255 and §1151. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1331 (federal question jurisdiction), the Administrative Procedure Act, 5 U.S.C. 701, et seq., the Mandamus Act, 28 U.S.C. §1361 and the INA. Petitioner seeks relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §2201, et seq.
2. Jurisdiction over this petition for Mandamus is also conferred by 5 U.S.C. §704 and §706(1) (Administrative Procedures Act); and 8 U.S.C. § 1255 (adjustment of status of nonimmigrant to permanent residence).
3. Costs and attorney fees will be sought pursuant to the Equal Access to Justice Act, 5 USC §504, and 28 USC §2412(d), *et. seq.*

## VENUE

4. Venue is proper in this District under 28 U.S.C. § 1391(e) as Petitioner resides in this district no real property is involved in this action. In addition, a substantial part of the events giving rise to the claim occurred in this district in that the Cleveland, Ohio District Office (now called Field Office) of the U.S. Citizenship and Immigration Services, an agency of the U.S. Department of Homeland Security, was the office of Respondents that denied Petitioner's immigration applications.

## EXHAUSTION OF ADMINISTRATIVE REMEDIES

5. There are no administrative remedies available for Petitioner to exhaust.
6. There is no administrative appeal of the denial of an application for adjustment of status. 8 CFR §245.2(a)(5)(ii).
7. While Petitioner may renew the Application in removal proceedings before the Executive Office for Immigration Review ("EOIR"), initiation of removal proceedings against Petitioner, is not a mandatory exhaustion requirement. As such this is not a mandatory exhaustion requirement. *See Darby v. Cisneros*, 509 U.S. §137 (1993). Due to the denial of Petitioner's applications she is currently in removal proceedings.
8. There also is no administrative appeal of the I-130 Immigrant 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 Sana*, 19 I&N Dec. 299 (BIA 1985). Petitioner submitted a request for Respondents to Reopen and/or Reconsider the denial *sua sponte*, but Respondents denied such request.

## **PARTIES**

9. Petitioner Nelly Lockhart (*née* Nelly Supangan Ando) is a citizen and national of the Philippines. Nelly Lockhart was lawfully admitted to the U.S. on December 15, 2003 as a B-1. On January 20, 2004 Petitioner married Gerald Lockhart, a United States citizen. On or about February 1, 2004, Gerald Lockhart filed an I-130 petition on behalf of his wife Nelly Lockhart with the Cleveland, Ohio, USCIS district office. Simultaneously, Nelly Lockhart filed her I-485 Application to Register Permanent Residence or to Adjust Status, seeking adjustment of status to lawful permanent residence, relying on the citizen spouse's Petition attesting to the alien's status as spouse. On or about May 2005 Petitioner and her U.S. citizen husband appeared for an interview at the Cleveland, Ohio USCIS office regarding the pending I-130 petition and I-485 application. Both gave testimony regarding the validity of their marriage. Following the interview date no decision was issued. While both applications remained filed, heard but unadjudicated, the citizen spouse died. USCIS denied both applications solely on the basis that Petitioner was stripped of her status of spouse, and no longer entitled to "immediate relative" classification under U.S. immigration law.
10. Respondent Michael Chertoff is sued in his official capacity as the Secretary of the Department of Homeland Security ("DHS"). In that capacity, he has responsibility for the administration and enforcement of the immigration laws pursuant to 8 U.S.C. §1103(a).

11. Respondent Emilio T. Gonzalez is sued in his official capacity as the Director of United States Citizenship and Immigration Services (“USCIS”), an agency within the U.S. Department of Homeland Security. As the Director of the USCIS, Mr. Gonzalez is responsible for the overall administration of USCIS and implementation of the immigration laws of the United States.

12. Respondent Mark B. Hansen is sued in his official capacity as the District Director of the USCIS Office in Cleveland, Ohio. As the District Director of the Cleveland USCIS Office Mr. Hansen is responsible for the overall administration of the Cleveland USCIS and has jurisdiction over the applications at issue in the instant case.

## **STATEMENT OF FACTS**

### **Background**

13. Petitioner Nelly Lockhart is a citizen of the Philippines.

14. Petitioner Nelly Lockhart was lawfully admitted to the U.S. on December 15, 2003. Petitioner has lived in the Cleveland, Ohio area since December 2003.

15. On January 20, 2004 Petitioner and Gerald Lockhart, a citizen of the United States, were married in Cleveland, Ohio.

### **The Petition and Application**

16. On or about February 1, 2004 Gerald Lockhart filed an I-130 Petition for Alien Relative on behalf of his wife Nelly with the Cleveland USCIS office. Simultaneously,

Nelly Lockhart filed her I-485 Application to Register Permanent Residence or Adjust Status. Petitioner was assigned an Alien Number “A-Number”, which is A 98-089-150.

17. On June 24, 2004 a son, named Justin Carlyle Lockhart, was born to Petitioner and her U.S. citizen spouse.

18. On April 6, 2005 the Respondent USCIS issued a request for additional evidence to Petition. Petitioner sent the Respondent the additional evidence that same month.

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

20. On or about May 2005, an interview was held at the Cleveland USCIS office relative to the I-130 Petition and I-485 Application. Gerald Lockhart and his wife Nelly Lockhart attended this interview *pro se*. Both gave testimony at this interview as to the validity of their marriage. The Respondent did not issue a decision regarding the pending applications until October 2006, which was 17 months after the interview and two years and 8 months after the initial filing of the applications.

21. On December 21, 2005, seven months after the I-30/I-485 interview, Mr. Lockhart died suddenly and tragically from a heart attack.

22. At the time of Mr. Lockhart’s death, he and Petitioner had been married for 1 year and 11 months. They had one child Justin.

### **The Denial**

23. On October 26, 2006 (over 2 years and 9 months after filing the I-130/I-485) and 1 year and 3 months after their interview, the Respondent USCIS denied the I-130 petition and I-485 application that were jointly file by Petitioner and her U.S. citizen husband solely on the basis that Petitioner was no longer the spouse of a U.S. citizen

since her husband had died. Had the USCIS addressed the petition and application before the death, the petition and application could have been granted even though the couple had been married for less than two years.

24. On November 20, 2006 Petitioner and her counsel filed a request for a Service Motion to Reopen and Reconsider the Denial of the I-130 petition. On or about December 4, 2006, the USCIS issued a cursory denial of the request for a Service Motion to Reopen and Reconsider without presenting any law or reason for the denial.

25. Petitioner is currently in removal proceedings before the Cleveland, Ohio Immigration Court. A Master Calendar hearing is scheduled for April 5, 2007.

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

27. Petitioner was inspected and admitted to the United States as an B-1 nonimmigrant.

28. Petitioner submitted a Form I-485, Application to Register Permanent Residence or Adjust Status, to the USCIS. With the application, Petitioner submitted the appropriate USCIS filing and fingerprint fees.

29. Petitioner's U.S. citizen spouse, Gerald Lockhart, filed a Petition for Alien Relative (Form I-130) pursuant to INA §204(a), 8 U.S.C. §1154(a). With the Petition was submitted the appropriate USCIS filing fee.

30. Petitioner was not stripped of the status of an "immediate relative" spouse by the death of Petitioner's spouse.

31. Petitioner remains eligible to receive an immigrant visa as the "immediate relative" surviving spouse of a United States citizen.

32. Petitioner is admissible to the United States as a lawful permanent resident.
33. An immigrant visa was immediately available to Petitioner at the time her I-485 application was filed, pursuant to INA §245(a), 8 U.S.C. §1255 (a).
34. 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.

## **CLAIMS FOR RELIEF**

### **FIRST CAUSE OF ACTION**

35. Petitioner realleges and incorporates by reference paragraphs 1-34 of the above.
36. Respondents violated Petitioner's statutory right to apply for relief which Congress has provided under the INA, depriving Petitioner of the opportunity to obtain adjustment of status to lawful permanent resident and live lawfully in the United States under INA §245.

### **SECOND CAUSE OF ACTION**

37. Petitioner realleges and incorporates by reference paragraphs 1-36 above.
38. 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 in a court. 5 U.S.C. §704.
39. 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 immediate relative petition filed on Petitioner's behalf and Petitioner's adjustment of status application in violation

of clear Congressional intent. Petition 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 the law. 5 U.S.C. §§706(1) and (2).

### **THIRD CAUSE OF ACTION**

40. Petitioner realleges and incorporates by reference paragraphs 1 through 39 above.

41. Respondents owe Petitioner a clear and certain duty to adjudicate Petitioner’s Application on the basis that she remains an “immediate relative” spouse of a United States citizen, and was not stripped of this status by the death of Petitioner’s spouse. See *Freeman v. Gonzales*, 444 F. 3d 1031 (9<sup>th</sup> Cir. 2006).

42. USCIS denied Petitioner’s Application/Petition 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, or approval of the I-130 Petition, and by failing to exercise discretion.

43. Petition has no other adequate remedy.

### **FOURTH CAUSE OF ACTION**

44. Petitioner realleges and incorporates by reference paragraphs 1 through 43 above.

45. The USCIS decision denying the I-130 Petition and I-485 Application were issued on October 26, 2006, which was one year and five months AFTER the USCIS interview held on or about May 2005.

46. The USCIS unreasonably delayed adjudication of the I-130 Petition and I-485 Application causing irreparable harm to Petitioner as her spouse died on December 21, 2005, seven months after the USCIS interview date.

47. Petition has a clear right to have her application adjudicated in a timely manner. The adjudication of an I-130 Petition and I-485 application is a ministerial, non-discretionary task that Defendants must perform within a reasonable period of time. 5 U.S.C. §555(b). Not issuing a decision immediately following an interview, when all requested documents have been submitted and all security and police checks have been completed, is not reasonable time. This delay by Respondents was detrimental to Petitioner as her husband then died.

### **PRAYER FOR RELIEF**

WHEREFORE, Petitioner prays that the Court:

- (1) Assume jurisdiction of this action;
- (2) Declare that Petitioner's spouse filed the necessary I-130 Petition and Petitioner filed the I-485 Application for lawful permanent resident status, and was not stripped of the status of "spouse" of a United States citizen upon the death of the citizen spouse;
- (3) Declare that Petitioner is entitled to the process that flows from a properly filed Application and Petition, and must be considered a spouse for purposes of the Application and Petition;
- (4) Issue an injunction an injunction prohibiting Respondents from using the death of the U.S. citizen spouse as a discretionary factor in the adjudication of the Application;
- (5) Issue and injunction prohibiting Respondents from using factors flowing from the unlawful denial of the Application and Petition to again deny the Application upon reopening, including but not limited to claims of abandonment

of the Application due to departure from the United States, and bars to admissibility related to “unlawful presence” caused by the wrongful denial;

(6) Issue a writ of mandamus compelling Respondents to (a) reopen Petitioner’s adjustment of status application on the ground that the application was improperly denied solely on the basis of Respondent’s unlawful determination that Petitioner’s status as an “immediate relative” spouse of a United States citizen was stripped by the death of Petitioner’s spouse, (b) treat Petitioner as an “immediate relative” spouse and adjudicate the I-30 Immigrant Petition (“Petition”) filed on Petitioner’s behalf accordingly, and (c) treat Petitioner as an “immediate relative” spouse and exercise discretion to adjudicate Petitioner’s Adjust of Status Application (“Application”);

(7) Award Petitioner reasonable costs and attorney’s fees; and

(8) Award such further relief as the Court deems just or appropriate.

Respectfully submitted,

s/Barbara A. Firstenberg, Esq.  
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