

**CLOSED
CIVIL
CASE**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION**

Case No. 09-14118-CIV-GRAHAM/LYNCH

JUANA MACLEAN,

Plaintiff,

vs.

JANET NAPOLITANO, Secretary
Department of Homeland Security,
et al.,

Defendants,

ORDER

THIS CAUSE comes before the Court upon Defendants' Motion to Dismiss Petition for Lack of Jurisdiction [D.E. 6].

THE COURT has considered the Motion, the pertinent portions of the record and is otherwise fully advised in the premises.

BACKGROUND

Before this Court is an issue of law regarding Plaintiff Juana MacLean's residency status in the United States. Coined by Plaintiff as the "widow penalty," this issue arises when a United States citizen petitions the government to adjust the status of the alien spouse, but dies before the government actually adjudicates the request. The Government takes the position that a petition dies with the death of the petitioning United States citizen. The

surviving spouses claim the Government's position is contrary to the law. The Court agrees.

Facts

The facts in this matter are undisputed. Plaintiff was born in Spain and is a citizen of Belgium. Complaint, ¶4. On or about January 14, 2000, Plaintiff married Dr. Lloyd MacLean, a U.S. citizen. Complaint, ¶21. Shortly thereafter, on March 10, 2000, Dr. MacLean filed a Form I-130, Petition for Alien Relative (the "Petition") with the United States Custom and Immigration Service ("USCIS"). In filing the Petition, Dr. MacLean sought to establish that Plaintiff was his immediate relative for the purpose of obtaining an immigration visa. That same day, Plaintiff filed a Form I-485, Application to Register Permanent Residence or to Adjust Status ("Application"), seeking adjustment of her status to lawful permanent resident ("LPR"). Plaintiff relied on her husband's Petition attesting to her status as an immediate relative. Complaint ¶ 21.

On October 24, 2001, a few months before the MacLean's two year marriage anniversary, Dr. MacLean died. Complaint ¶ 22. On June 8, 2006, the USCIS informed Plaintiff that the Petition was "no longer valid due to the death of the petitioner." [D.E. 6, Exhibit 0].

Procedural Posture

On April 20, 2009, Plaintiff brought this action against Defendants Janet Napolitano, Secretary U.S. Department of Homeland

Security, Michael Aytes, Acting Deputy Direct, United States Citizenship and Immigration Services, Kathy Redmond, District Director, United States Citizenship and Immigration Services (collectively the "Defendants") asserting Defendants have violated her statutory rights under the Immigration and Nationality Act of 1952 ("INA"). In her Complaint, Plaintiff requests declaratory, injunctive and mandamus relief and asks the Court to a) find, as a matter of statutory interpretation, that Plaintiff remains an "immediate relative" under the INA; (b) order defendants to reopen and readjudicate the I-130 Petition; and (c) order Defendants to reopen and readjudicate the I-485 application.¹ The primary focus and theme of Plaintiff's Complaint is that Defendants wrongfully revoked her status as an immediate relative and wrongfully terminated the Petition as a direct result of Dr. MacLean's death.

On July 6, 2000, Defendants filed their Motion to Dismiss, asserting Plaintiff lacked standing to challenge the statutory and regulatory provisions relating to approved I-130 Petitions. In addition, Defendants argued that Plaintiff failed to state a claim regarding Dr. MacLean's unapproved and unadjudicated Petition

¹ Plaintiff also challenged Defendants' revocation of approved I-130 petitions and the Defendants' procedures relating to humanitarian reinstatement of such petitions. As Plaintiff's petition was never approved, only terminated prior to approval, the Court finds she lacks standing to challenge the Defendants procedures in this regard. See Miccosukee Tribe of Indians of Fla. v. Fla. St. Athletic Comm'n, 226 F.3d 1126, 1228 (11th Cir. 2000).

because the Petition was revoked, terminated or otherwise rendered null upon the death of the petitioner.

Defendants argue that the appropriate inquiry for the Court is not whether Plaintiff continued to be an "immediate relative" after Dr. MacLean's death, but rather, whether the Petition survived his death. The Court finds little distinction between Plaintiff's and Defendants' recitations of the legal issue. Whether called the "widow penalty" or Defendant's more sterile verbiage of "automatic revocation," the question is clear -- whether Dr. MacLean's death changed Plaintiff's status as an immediate relative and therefore terminated the petition prior to an adjudication on the merits.

The Court notes that this issue has caused a split among the circuits, with the First, Sixth and Ninth Circuits finding that the death of a citizen spouse does not terminate the petition, see Neang Chea Taing v. Napolitano, 567 F.3d 19 (1st Cir. 2009); Lockhart v. Napolitano, 573 F.3d 251 (6th Cir. 2009); Freeman v. Gonzalez, 444 F.3d 1031 (9th Cir. 2006), and the Third Circuit finding otherwise. See Robinson v. Napolitano, 554 F.3d 358 (3d Cir. 2009). The Eleventh Circuit has yet to address the issue.

DISCUSSION

I. Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1331 and Section 704 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704, to review the meaning of the term "immediate relative" as it appears in 8 U.S.C. § 1151(b)(2)(A)(i). Although the INA's jurisdictional

bar precludes judicial review of most discretionary immigration decisions, is not applicable here, where the Court must answer a purely legal question. Mejia Rodriguez v. U.S. Department of Homeland Security, 562 F.3d 1137, 1144-45 (11th Cir. 2009) ("non-discretionary, statutory eligibility decisions made by USCIS fall outside the limitations on judicial review in the INA."); Robinson, 554 F.3d at 360.

In addition, this Court has jurisdiction under 28 U.S.C. § 1361, which provides that "[t]he district courts shall have original jurisdiction over any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. This remedy is only available to Plaintiff "if she has exhausted all other avenues of relief and only if the defendant owes [her] a clear nondiscretionary duty." Heckler v. Ringer, 466 U.S. 602, 616, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984).

II. Standard of Review

The APA empowers courts to "hold lawful and set aside" not only agency actions and conclusions that are "arbitrary" or "capricious," but also agency actions and conclusions that are "otherwise not in accordance with law" or are "in excess of statutory jurisdiction, authority or limitations, or short of statutory right." 5. U.S.C. § 706(2)(A), (C). Under Chevron U.S.A., Inc. V. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S.Ct. 27778, 81 L.Ed.2d 694 (1984), agency actions based on

statutory interpretation are only entitled to deference if the statutory language is ambiguous. "The *Chevron* two-step ends when the meaning of a statute is found to be unambiguous. In that case, agency pronouncements thereon have no effect." Josendis v. Wall to Wall Residence Repairs, Inc., 606 F.Supp.2d 1376 (S.D. Fla. 2009).

III. Statutory and Regulatory Scheme

A. Process to Obtain Permanent Residency

The process for an alien to obtain LPR begins with an adjustment of the alien's status. Pursuant to INA § 245(a), the Attorney General may adjust the status of an alien if 1) the alien applies for an adjustment to their status - in the form of an I-485 Adjustment of Status Application; 2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and 3) an immigrant visa is immediately available to him at the time his application is filed. INA §245(a) (2006). The first hurdle is the immigrant visa.

One way to obtain an immigrant visa is for a United States citizen to file an I-130 Application and assert that the alien is his or her immediate relative under INA §201(b)(2)(A)(I). Aliens with immediate relative status are exempt from direct numerical limitations when acquiring LPR. See Taing v. Chertoff, 526 F.Supp.2d 177, 181-82 (D.Mass. 2007). If the USCIS approves the I-130 Petition and the alien's status, it then can approve the I-485 application. This approval, which is within the discretion of the

USCIS, results in the conferral of LPR status. Richards v. Napolitano, 2009 WL 1910961 at *4 (E.D.N.Y. 2009).

B. Interpretation of the Immediate Relative Statute

The INA, 8 U.S.C § 1151(b)(2)(A)(i), defines "immediate relatives" as follows:

Immediate relatives. --For purposes of this subsection, the term "immediate relatives" means the children, spouses, and parents of a citizen of the United States, except that, in the case of parent, such citizens shall be at least 21 years of age. 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 within 2 years after such date and only until the date the spouse remarries. . . .

8 U.S.C. §1151(b)(2)(A)(i). The controversy surrounding the so called "widow penalty" is centered on this definition. The question for this Court is whether the second sentence modifies the first sentence or whether the statute simply creates two tracks for an alien spouse to obtain immediate relative status.

The Court begins its analysis by examining the "language of the statute itself to determine if its meaning is plain. Plain meaning is examined by looking at the language and design of the statute as a whole.'" Lockhart, 573 F.3d at 255 (citations omitted). According to the plain language of the first sentence of §1151(b)(2)(A)(i), "spouses" are "immediate relatives." Id.

Within this first sentence, "[o]nly alien parents are subject to any limitation, with the grant of 'immediate relative' status being restricted to those whose citizen child is at least 21 years of age." Freeman, 444 F.3d at 1039. The Circuit Courts in Lockhart, Freeman and Taing all held that because "[t]here is no comparable qualifier to be a "spouse" -- that is, a requirement that the marriage must have existed for at least two years" -- we must assume that Congress intended no limitation on that term beyond the requirement that both parties are present for the marriage ceremony." Freeman, 444 F.3d at 1039 (quoting Keene Corp. V. United States, 508 U.S. 200, 208, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")).

As the Court finds the plain language of the first sentence clear, the question becomes whether the second sentence of the immediate relative provision modifies the first, "such that an alien widow or widower is no longer a "spouse" if she or he had not been married for two years at the time of the citizen-spouse's death." Robinson, 573 F.3d at 256.

Like the Courts in Freeman, Robinson, and Taing, this Court finds that the second sentence does not act to modify the first, but rather, "grants a separate right for an alien widow to self petition, within two years of the citizen spouse's death, by filing

a [F]orm 1-360 where the citizen spouse had not filed an immediate relative petition prior to his death." Freeman at 1039.

The Court's finding as to the plain language of the statute is bolstered by related statutory and regulatory provisions. For example, 8 U.S.C. § 1154(a)(1)(A)(i) provides that "[a]n alien spouse described in the second sentence of section 1151(b)(2)(A)(i) of this title also may file a petition with the Attorney General under this subparagraph for classification of the alien (and the alien's children) under such section." Both the First and Ninth Circuits found that "[t]he inclusion of the word 'also' in this subsection, as compared to the right given to living citizen spouses in § 1154(a)(1)(A)(i) (i.e., to file a petition on behalf of their alien spouse), further establishes that the right of self-petition is given to a select group of alien widows as an alternative to their citizen spouse's I-130 filing." Freeman, 444 F.3d at 1042 n.17. See also Tainq, 567 F.3d at 27.

In addition, pursuant to 8 U.S.C. § 1186 a (b) (1), if an alien spouse receives LPR status as an "immediate relative" before the second anniversary of her marriage, such status is on a conditional basis, and can be terminated if the qualifying marriage is found to be improper. If it is "determine[d], before the second anniversary of the alien's obtaining the status of lawful admission for permanent residence, that-the qualifying marriage . . . has been judicially annulled or terminated, *other than through the death of a spouse.*" *Id.* (Emphasis added). "[T]his language presents

'compelling evidence that Congress did not intend its provision for a widow's self-petition for adjustment of status to have the implicit collateral consequence of terminating a citizen spouse's already pending petition - particularly when the effect would be to foreclose a grieving widow from any adjustment at all 'through the death of [her] spouse.'" Taing, 567 F.3d at 27 (quoting Freeman, 444 F.3d at 1042).

Similarly, pursuant to 8 C.F.R. §§ 204.2(b)(1)(i)-(iv) an alien widow or widower may only self-petition for classification as an immediate relative if 1) "she had been married for at least two years to a United States citizen," 2) "the petition is filed within two years of the death of the citizen spouse," 3) "the alien petitioner and the citizen spouse were not legally separated at the time of the citizen's death," and 4) "the alien spouse has not remarried." As the Freeman, Lockhart and Taing Courts all found, "the more logical and statutorily substantiated interpretation of the second sentence is that it applies to those aliens whose citizen spouses did not initiate an adjustment of status proceeding before they died, granting such surviving spouses a beneficial right to file and "immediate relative" petition even without a living citizen spouse to vouch for the fact of the marriage." Lockhart, 573 F.3d at 257 (quoting Freeman, 444 F.3d at 1041).

As these related statutory and regulatory provisions demonstrate, the most logical interpretation of the immediate relative provision is that the second sentence does not modify the

first sentence. Accordingly, the Court finds that Congress plainly and unambiguously intended that the death of the citizen spouse before the two year anniversary of the marriage, does not terminate and I-130 Petition or change the alien's status as an immediate relative.

C. Defendants' Arguments

Defendants, likely in reaction to the First, Sixth and Ninth Circuits adoption of Plaintiff's position, attempt to recharacterize the issues in this case. Specifically, Defendants assert that the Government has a policy of terminating I-130 petitions upon the death of the citizen spouse that therefore Dr. MacLean's petition terminated on his death and that therefore, Plaintiff's status as an immediate relative is irrelevant. The Court finds Defendants arguments are without merit.

1. Revocation, Termination and Nullification of Petition

Defendants contend the only relevant inquiry for this Court is whether Dr. MacClean died prior to approval of the Petition. The Court finds the Defendants' argument misleading and without merit.

Under 8 U.S.C. § 1155:

The Secretary of Homeland Security may, at any time, for what [she] deems to be good and sufficient cause, *revoke the approval* of any petition *approved* by him under section 201. Such revocation shall be effective as of the date of approval of any such petition.

8 U.S.C. § 1155 (emphasis added). See also 8 C.F.R. § 205.1(a)(3)(C) (approval of a petition is revoked as of the date of the approval upon the death of the petitioner).

The Court finds these provisions inapplicable as they only apply to *approved* petitions. See Lockhart, 573 F.3d at 261; Taing, 567 F.3d at 29. Further, as both the Lockhart and Taing Courts found, Defendants' reading of the automatic revocation provision is contrary to Congress's intent in § 1151 (b) (2) (A) (i).

Where a regulation conflicts with congressional intent as expressed in a statutory scheme, courts must give effect to congressional intent . . . here, as expressed above in our discussion of Congress's intent behind § 1151 (b) (2) (A) (i), it is clear that Congress did not intend for [the citizen spouse's] death to cut off [Plaintiff's] eligibility for "immediate relative" status.

Taing, 567 F.3d at 29.

Although Defendants assert that this "rule" of revocation/termination/nullification has been in place since as early as 1938, they fail to establish that the government has actually applied the "rule" outside of the approved petition context. See Lockhart, 561 F.3d at 622 (noting that "[t]he Secretary provides no evidence establishing that the government has, since 1938, denied pending immediate relative petitions solely on the basis of the citizen spouse's death, nor . . . any historical analysis linking the 'immediate relative' provision to the automatic revocation of approved petitions.") Accordingly, the Court finds this argument unpersuasive.

2. Related Statutes/Exceptions to the "Rule"

Defendants also reference related status under which an alien may obtain permanent residence based on a relationship that has been dissolved by death. Specifically, Defendants cite the USA

Patriot Act, Pub. L. No. 107-56, §§ 421(a) & (b)(1)(B)(i) & 428 (b), 115 Stat. At 356-57 and the National Defense Authorization Act for Fiscal Year 2004 ("NDAA"), Publ L. No. 108-136, §1703(a)-(e), 117 Stat. 1392, 1693. The Court finds Defendants' reliance on these Acts misplaced as the referenced provisions pertain to the second sentence of §§ 1151 (b)(2)(A)(i), not the first sentence. As detailed above, the second sentence does not act to modify the first, and therefore has no bearing on this matter. See also Lockhart, 561 F.3d at 619; Taing, 567 F.3d at 29.

CONCLUSION

The Court finds that despite Dr. MacLean's death, the USCIS had no basis to revoke or terminate the petition prior to adjudicating it on the merits. Having properly interpreted the statutory provisions at issue in this matter, the Court need not go any further. Indeed, the USCIS is presumed to act in accordance with the court's interpretation. See F.C.C. v. Schreiber, 381 U.S. 279, 296, 85 S.Ct. 1459, 14 L.Ed.2d 383 (1965) ("The[re is a] presumption [that] administrative agencies . . . will act properly and according to law.")

Accordingly, it is

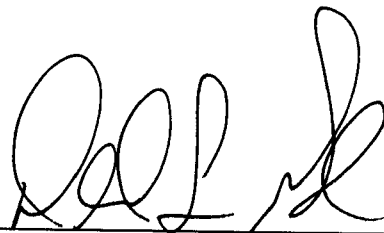
ORDERED AND ADJUDGED that Defendants' Motion to Dismiss Petition for Lack of Jurisdiction [D.E. 6] is **DENIED**. It is further

ORDERED AND ADJUDGED that Plaintiff's request for mandamus relief is granted. This cause is **REMANDED** to the U.S. Citizenship

and Immigration Service for further proceedings in accordance with this decision. It is further

ORDERED AND ADJUDGED this action shall be **CLOSED** for administrative purposes, and any pending motions are **DENIED** as moot. It is further

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of September, 2009.



DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Lynch
Counsel of Record