

1
2
3
4 **UNITED STATES DISTRICT COURT**
5 **FOR THE DISTRICT OF MARYLAND**
6 **BALTIMORE DIVISION**
7

8 FERNANDA VICTORIA MCKOY aka)
9 FERNANDA PULIDO SOTELO MCKOY,)
10 [REDACTED])
11 [REDACTED])

12 Plaintiff-petitioner,)

13 vs.)

14 MICHAEL CHERTOFF, Secretary, U.S.)
15 Department of Homeland Security; JONATHAN)
16 SCHARFEN, Acting Director, U.S. Citizenship)
17 and Immigration Services,)

18 Defendants-respondents.)
19)

Civil Case No.

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

20
21 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**
22 **AND PETITION FOR WRIT OF MANDAMUS**
23 **NATURE OF ACTION**

24 This is an action to compel the U.S. Department of Homeland Security (“DHS”)
25 and the U.S. Citizenship and Immigration Services (“USCIS”) to reopen and adjudicate
26 immigration petitions and applications that were filed by or on behalf of Plaintiff
27
28 Fernanda McKoy (“Plaintiff”) seeking adjustment of immigration status to permanent

1 resident. Plaintiff and her husband filed a petition and an application seeking permanent
2 resident status as an alien spouse – “immediate relative” of a United States Citizen.
3 Tragically, prior to agency action on the petition and application, Plaintiff’s citizen
4 spouse died. Immediately following the death of her spouse and as a result thereof,
5 USCIS determined that Plaintiff was not an “immediate relative” of a United States
6 citizen. USCIS summarily and improperly denied the alien spouse petition and
7 application, effectively treating the relationship as never having existed because of its
8 less than two-year duration. USCIS’s determination is based on an impermissible
9 interpretation of the Immigration and Nationality Act of 1952 ("INA") § 201(b)(2)(A)(i),
10 8 U.S.C. § 1151(b)(2)(A)(i)(2000), which governs such determinations. See *Freeman v.*
11 *Gonzales*, 444 F.3d 1031 (9th Cir. 2006); *Robinson v. Chertoff*, 2007 WL 1412284
12 (D.N.J. May 14, 2007) *appeal docketed*, No. 07-2977 (3d Cir. July 5, 2007); *Taing v.*
13 *Chertoff*, 2007 U.S. Dist. LEXIS 911411 (D. Mass 2007), *appeal docketed*, No. 08-1179
14 (1st Cir. Feb. 11, 2008); *Lockhart v. Chertoff*, 2008 U.S. Dist. LEXIS 889 (D. Ohio
15 2008), *appeal docketed*, No. 08-1179 (6th Cir. 2008); *But see Burger v. McElroy*, 97
16 Civ. 8775 (RPP), 1999 U.S. Dist. LEXIS 4854 (S.D.N.Y. Apr. 12, 1999); and *Turek v.*
17 *Dep’t of Homeland Security*, 450 F. Supp. 2d 736 (E.D. Mich. 2006). As a result,
18 Plaintiff is entitled to declaratory, injunctive, and mandamus relief.

19
20
21
22 Further, Plaintiff alleges for her Complaint and Petition as follows:

23 JURISDICTION

24
25 1. This action arises under the Immigration and Nationality Act of 1952
26 ("INA"), 8 U.S.C. § 1151(b)(2)(A)(i) and 8 U.S.C. § 1255 (2005; Supp. 2008). This
27 Court has jurisdiction over this action under 28 U.S.C. § 1331 (2000) (federal question),
28

1 the INA, the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, and the Mandamus
2 Act, 28 U.S.C. § 1361 (2000). Plaintiff additionally seeks relief pursuant to the
3 Declaratory Judgment Act, 28 U.S.C. § 2201 *et. seq.* (2000) (declaratory relief).
4

5 VENUE

6 2. Venue is proper in this Court under 28 U.S.C. § 1391(e) (2000) because
7 defendants Michael Chertoff and Jonathan Scharfen are officers of the United States
8 acting in their official capacities, and the Department of Homeland Security (“DHS”), the
9 United States Citizenship and Immigration Services (“USCIS”) are agencies of the
10 United States. Additionally, plaintiff resides in this judicial district. A substantial part of
11 the events giving rise to the claim occurred in this district, in that the Baltimore District
12 Office of USCIS, an agency of DHS located at George H. Fallon Federal Building, 31
13 Hopkins Plaza, Baltimore, Maryland 21201, was the local office that denied plaintiff’s
14 immigration petition and application.
15

16 EXHAUSTION

17 3. There are no administrative remedies available for plaintiff to exhaust.
18

19 4. There is no administrative appeal of the denial of an application for
20 adjustment of Status (I-485). 8 CFR § 245.2(a)(5)(ii) (2008).
21

22 5. There is no administrative appeal of the I-130 immigrant petition, even
23 before the Executive Office for Immigration Review (“EOIR”), because the Board of
24 Immigration Appeals (“BIA”) has held that the immigration courts (within EOIR) and the
25 BIA (administrative courts of limited and not general jurisdiction) lack jurisdiction under
26 the administrative regulations to review such a denial. See *Matter of Sano*, 19 I&N Dec.
27 299 (BIA 1985). There are two avenues for obtaining lawful permanent resident status,
28

1 the adjustment of status (I-485) and immigrant visa (DS-230) application. Both avenues
2 require an approved I-130 immigrant petition.

3 6. While plaintiff may renew the adjustment of status application (Form I-
4 485) in removal proceedings before EOIR, adjudication of this application requires an I-
5 130 approval. Also, initiation of removal proceedings is at the sole discretion of DHS.
6 One cannot apply for initiation of removal proceedings. In this case DHS has initiated
7 proceedings with a Notice to Appear scheduled for December 10, 2008. However,
8 adjudication of this application requires an I-130 approval. Immigration Judges lack
9 jurisdiction to approve or review an I-130. As such this is not a mandatory exhaustion
10 requirement and cannot be imposed on Plaintiffs's APA action. *See Darby v. Cisneros*,
11 509 U.S. 137 (1993).
12

13 **DEFENDANTS**

14 7. Defendant-respondent Michael Chertoff is sued in his official capacity as
15 Secretary of Department of Homeland Security ("DHS"). As Secretary of DHS, Mr.
16 Chertoff is responsible for the administration and enforcement of the immigration laws of
17 the United States.
18

19 8. Defendant-respondent Jonathan Scharfen is sued in his official capacity as
20 Acting Director of the United States Department of Homeland Security, United States
21 Citizenship and Immigration Services ("USCIS"). As Acting Director of USCIS, Mr.
22 Scharfen is responsible for the overall administration of USCIS and the implementation
23 of the immigration laws of the United States.
24

25 **STATUTORY AND REGULATORY BACKGROUND**

26 9. Under the INA, an alien who marries a United States citizen can apply to
27
28

1 the USCIS for adjustment of status. Plaintiff applied for such status.

2 10. Under the INA, a United States citizen who marries a non-citizen may
3 apply for his or her spouse to reside permanently in the United States. Pursuant to 8
4 U.S.C. § 1154(1)(A)(i), a United States citizen may file a petition (Form *I-130*) on behalf
5 of a spouse establishing the spouse is entitled to classification as an “immediate relative.”
6

7 11. The term “immediate relative”, as applicable to the United States citizen’s
8 petition, is set forth in the *first* sentence of 8 U.S.C. § 1151(b)(2)(A)(i) as the “children,
9 spouses, and parents of a citizen of the United States, except that, in the case of parents,
10 such citizens shall be at least 21 years of age.” *Id.* (emphasis added).
11

12 12. An alien spouse whose United States citizen *never filed* a petition on the
13 alien’s behalf, may also file a petition (Form *I-360* self-petition) on his or her own behalf,
14 pursuant to 8 U.S.C. § 1154(1)(A)(ii), which states, “An alien spouse described in the
15 *second sentence* of section 201(b)(2)(A)(i) *also* may file a petition...”. *Id.*, (emphasis
16 supplied). In such a case, the immediate relative definition set out in the *second* sentence
17 of 8 U.S.C. § 1151(b)(2)(A)(i) is applicable:
18

19 In the case of an alien who was the spouse of a citizen of the
20 United States for at least 2 years at the time of the citizen’s death
21 and was not legally separated from the citizen at the time of the
22 citizen’s death, the alien (and each child of the alien) shall be
23 considered, for purposes of this subsection, to remain an
24 immediate relative after the date of the citizen’s death but only if
the spouse files a petition under section 204(a)(1)(A)(ii) of this title
within 2 years after such date and only until the date the spouse
remarries.

25 13. Defendants have applied the incorrect immediate relative definition to
26 plaintiff’s petition and application. Specifically, defendants have taken the position that
27 if the citizen spouse dies before the second anniversary of the marriage, the alien spouse
28

1 is no longer considered a “spouse” entitled to immediate relative status. In doing so,
2 defendants have confused the immediate relative definition applicable to *I-130* petitions
3 filed by United States citizen spouses (the *first* sentence of 8 U.S.C. § 1151(b)(2)(A)(i))
4 with the immediate relative definition applicable to *I-360* self-petitions filed by alien
5 spouses (the *second* sentence of 8 U.S.C. § 1151(b)(2)(A)(i)).
6

7 14. Defendants have not only misconstrued the law, but have created a system
8 under which combination of spousal death and Defendant’s inability to quickly
9 adjudicate petitions severely penalizes grieving widows. It strips them of their status as
10 immediate relatives and results in the initiation of removal proceedings against them
11 despite the existence of a valid marriage at the time of death. This is colloquially known
12 as the “widow’s penalty.”
13

14 15. Through the unlawful application of the improper standard, defendants
15 have compounded plaintiff’s grief. Defendants have stripped plaintiff of immediate
16 relative status, denied the application for adjustment of status, and denied work
17 authorization. These actions have exacted grief, suffering, loss of work authorization,
18 separation of family members, and other injuries flowing from forced unlawful status
19 such as loss of entitlement to estate benefits, social security benefits, loss of driving
20 privileges due to state laws requiring proof of legal status, and loss of accrued lawful
21 residence time that is a prerequisite for eventual United States citizenship.
22
23

24 **PLAINTIFF**

25 16. Plaintiff Fernanda McKoy was born in Colombia in 1977.

26 17. Plaintiff-petitioner is a citizen of Colombia.

27 18. Plaintiff-petitioner entered the United States in nonimmigrant status, and
28

1 was inspected and admitted.

2 19. Plaintiff-petitioner has lived in Waldorf, Maryland since 2006. She lived
3 in Northern Virginia from 2001 to 2005 (Woodbridge 4/2001-10/2002; Dumfries
4 10/2002-11/2003; Woodbridge 11/2003-5/2005; Annandale 5/2005-10/2005; Springfield
5 10/2005 – 5/2006).

7 20. On February 9, 2007, plaintiff-petitioner married Felton Rudolph McKoy,
8 Sr., a United States citizen.

9
10 **The Petition and Application**

11 21. On July 1, 2007, plaintiff-petitioner's United States citizen spouse filed
12 with the required fee a Form I-130, Petition for Alien Relative ("Petition") establishing
13 his citizenship and that his spouse is an immediate relative, and executed an I-864
14 Affidavit of Support.

15 22. At the same time, plaintiff-petitioner filed with the required fee a Form I-
16 485, Application to Register Permanent Residence or to Adjust Status ("Application"),
17 seeking adjustment of status to lawful permanent resident, relying on the citizen spouse's
18 Petition attesting to the alien's status as spouse.

20 23. Plaintiff-petitioner was issued an Employment Authorization Document
21 and assigned an Alien Number, A086 909 814.

22 24. On November 23, 2007, plaintiff-petitioner's spouse McKoy died of a
23 heart attack.

25 **The Denial**

26 25. On September 20, 2008, defendants-respondents denied the Petition and
27 Application that were jointly filed by the couple solely on the basis that plaintiff-
28

1 pursuant to INA §245(a), 8 U.S.C. 1255(a).

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

5
6 35. Defendants violated plaintiff's statutory right to apply for relief which
7 Congress has provided under the INA, depriving plaintiff of the opportunity to adjust
8 status to lawful permanent resident and live lawfully in the United States under INA §
9 245, 8 U.S.C. 1255(a).

10
11 36. On November 8, 2007, defendants stated their position on the issue of
12 automatic termination in a Memorandum from Mike Aytes, Associate Director of
13 Domestic Operations, USCIS, which can be found at:

14 http://www.uscis.gov/files/pressrelease/1130AFMAD0804_11080

15 [7.pdf](#) Pursuant to that memo, defendants state that cases outside the Ninth Circuit will
16 continue to be automatically denied without appeal. In the Ninth Circuit, defendants also
17 improperly attempt to revoke the approval of an I-130 petition unless aliens similarly
18 situated to plaintiff present a request under 8 CFR § 205.1(a)(3)(C)(2) for humanitarian
19 reinstatement, supported by a Form I-864 executed by an individual who qualifies under
20 section 213A(f)(5)(B) of the INA as a qualifying sponsor. It is reasonably expected that
21 defendants will also improperly attempt to apply these unlawful requirements to plaintiff.
22

23
24 37. The regulation found at 8 CFR § 205.1(a)(3)(C)(2) is invalid as a matter of
25 law.

26 38. The substitute sponsor provision of section 213A(f)(5)(B) of the INA do
27 not apply to plaintiffs whose United States citizen spouse or parent executed an I-864
28

1 Affidavit of Support under section 213A(f)(1) of the INA, thereby fulfilling the
2 requirements of section 212(a)(4)(C)(ii) of the INA that the person petitioning for the
3 alien's admission has executed an I-864 Affidavit of Support.
4

5 **SECOND CAUSE OF ACTION – INJUNCTIVE RELIEF**

6 39. Plaintiff realleges and incorporates by reference paragraphs 1 through 38
7 above.

8 40. Plaintiff has suffered and will continue to suffer significant and irreparable
9 harm because of Defendant's policies, procedures, acts and failures to act as described
10 herein.

11 41. Plaintiff has suffered a "legal wrong" or has been "adversely affected or
12 aggrieved" by agency action. 5 U.S.C. § 702 (2000). Plaintiff is a person aggrieved by
13 agency action, for which there is no other adequate remedy in a court. 5 U.S.C. § 704
14 (2000).
15

16 42. Defendants have unlawfully and erroneously interpreted the definition of
17 the term "immediate relative" in INA § 201(a)(b)(2)(A)(i). Based on this erroneous
18 interpretation, defendants have erroneously denied both the immediate relative petition
19 filed on Plaintiff's behalf and Plaintiff's adjustment of status in violation of
20 Congressional intent.
21

22 43. Plaintiff is entitled to injunctive relief to "compel agency action
23 unlawfully withheld or unreasonably delayed" and to hold unlawful and set aside agency
24 action that, as here, is not in accordance with the law. 5 U.S.C. §§ 706(1) and (2) (2000).
25

26 44. Plaintiff is entitled to injunctive relief prohibiting Defendants from using
27 the death of the United States citizen spouse as a discretionary factor in the adjudication
28

1 of Plaintiff's Petition and Application.

2 **THIRD CAUSE OF ACTION-WRIT OF MANDAMUS**

3 45. Plaintiff realleges and incorporates by reference paragraphs 1 through 44
4 above.

5
6 46. Defendants owe Plaintiff a clear and certain duty to adjudicate Plaintiff's
7 applications on the basis that Plaintiff remains an "immediate relative" spouse of a United
8 States citizen, and was not stripped of this status by the death of Plaintiff's spouse. See
9 *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006).

10
11 47. Defendants denied approval of Plaintiff's applications solely on the basis
12 that Plaintiff's United States citizen spouse was deceased, and not for discretionary
13 reasons.

14 48. Defendants have failed to perform their duties by determining that
15 Plaintiff is no longer the "spouse" of a United States citizen and therefore not entitled to
16 adjustment of status and for issuance of an immigrant visa.

17
18 49. Plaintiff has no other adequate remedy.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiff respectfully requests that this Court:

- 21 1. Declare that Plaintiff filed the necessary Petition and Application for
22 lawful permanent resident status, and was not stripped of the status of
23 "spouse" of a United States citizen upon the death of the citizen spouse;
24
25 2. Declare that Plaintiff is entitled to the process that flows from a properly
26 filed Petition and Application, and must be considered a spouse for
27 purposes of the Petition and Application;
28

- 1 3. Declare that Plaintiff is an immediate relative under 8 USC §
2 1151(b)(2)(A)(i) and for the purposes of adjudicating an I-130 petition;
- 3 4. Declare that defendants also improperly attempt to revoke the approval of
4 the I-130 petition unless plaintiffs present a request under 8 CFR §
5 205.1(a)(3)(C)(2) for humanitarian reinstatement, supported by a Form I-
6 864 executed by an individual who qualifies under section 213A(f)(5)(B)
7 of the INA as a qualifying substitute sponsor;
- 8 5. Declare that 8 CFR § 205.1(a)(3)(C)(2) is invalid as a matter of law;
- 9 6. Declare that plaintiffs whose citizen spouse or parent executed a Form I-
10 864 Affidavit of Support have satisfied the requirements of
11 212(a)(4)(C)(ii) of the INA in that the person petitioning for the alien's
12 admission has executed an I-864 Affidavit of Support, and that plaintiff is
13 not required to submit a Form I-864 from a qualifying substitute sponsor
14 under section 213(A)(f)(5)(B) o the INA;
- 15 7. 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 8. Issue an injunction prohibiting Defendants from using the death of the
20 United States citizen spouse as a discretionary factor in the adjudication of
21 the Petition and Application.
- 22 9. Issue an injunction prohibiting Defendants from using factors flowing
23 from the unlawful denial of the Application to again deny the Petition and
24 the Petition and Application.
- 25 9. Issue an injunction prohibiting Defendants from using factors flowing
26 from the unlawful denial of the Application to again deny the Petition and
27 the Petition and Application.
- 28 9. Issue an injunction prohibiting Defendants from using factors flowing
 from the unlawful denial of the Application to again deny the Petition and
 the Petition and Application.

1 Application upon reopening, including but not limited to claims of
2 abandonment of the Application due to departure of the United States, and
3 bars to admissibility related to "unlawful presence" caused by the
4 wrongful denial;
5

- 6 10. Issue a writ of mandamus compelling defendants to
7 (a) reopen Plaintiff's adjustment of status Application on the ground that
8 the application was unlawfully denied on the basis of defendants'
9 erroneous determination that Plaintiff's status as an "immediate relative"
10 spouse of a United States citizen was stripped by the death of Plaintiff's
11 spouse, (b) treat Plaintiff as an "immediate relative" spouse and adjudicate
12 the immigrant petition ("petition") filed on Plaintiff's behalf accordingly,
13 and (c) treat Plaintiff as an "immediate relative" spouse and exercise
14 discretion to adjudicate Plaintiff's adjustment of status application
15 ("application");
16
17 11. Award Plaintiff reasonable costs and attorney's fees under the Equal
18 Access to Justice Act; and
19
20 12. Award such further relief as the Court deems just or appropriate.

21 DATED this ____ day of December, 2008.

22
23 By _____

24 Ivan Yacub
25 307 E. Annandale Rd., Ste. 201
26 Falls Church, VA 22042
27 Tel. 703 533 2347
28 Federal Bar No. 27628

Attorney for Plaintiff-petitioner