IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION

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AT GREENBELT
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DISTRICT OF MARYLAND
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MARIA PAULA ROBLEDO and MATEO PINZON, & ZAINAB HASSAN-NORRIS,

Robledo/Pinzon:

Montgomery County

Norris:

Montgomery County

Plaintiffs-petitioners,

vs.

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

Defendants-respondents.

Civil Case No. AW 08 CV 2581

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

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

NATURE OF ACTION

This is an action to compel the U.S. Department of Homeland Security ("DHS")

and the U.S. Citizenship and Immigration Services ("USCIS") to reopen and readjudicate immigration petitions and applications that were filed by or on behalf of Plaintiff Maria Paula Robledo, Plaintiff Mateo Pinzon, and Plaintiff Zainab M. Hassan-Norris ("Plaintiffs") seeking adjustment of immigration status to permanent resident. Plaintiffs and their husbands (and in the case of Plaintiff Pinzon, his step-father) filed petitions and applications seeking permanent resident status as alien spouses - "immediate relatives" - of U.S. citizens. Tragically, prior to agency action on the petitions and applications, each Plaintiff's citizen spouse or parent died. Immediately following the death of each spouse or parent and as a result thereof, USCIS determined that Plaintiffs were not "immediate relatives" of U.S. citizens. USCIS summarily and improperly revoked the alien spouse or child's immigration petition and application, effectively treating each relationship as never having existed because of its less than two-year duration. USCIS's determination is based on an impermissible interpretation of the Immigration and Nationality Act of 1952 ("INA") § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2000), which governs such determinations. *See Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006); *Robinson v. Chertoff*, No. 06-5702 (SRC), 2007 WL 1412284 (D.N.J. May 14, 2007), *appeal docketed*, No. 07-2977 (3d Cir. July 5, 2007); *Taing v. Chertoff*, 526 F. Supp. 2d 177 (D. Mass. 2007), *appeal docketed*, No. 08-1179 (1st Cir. Feb. 11, 2008); *Lockhart v. Chertoff*, No. 2008 U.S. Dist. LEXIS 889 (N.D. Ohio Jan. 7, 2008), *appeal docketed*, No.

08-1179 (6th Cir. 2008); *but see Burger v. McElroy*, No. 97 Civ. 8775 (RPP), 1999 U.S. Dist. LEXIS 4854 (S.D.N.Y. Apr. 12, 1999); and *Turek v. Dep't of Homeland SEC*, 450 F. Supp. 2d 736 (E.D. Mich. 2006). As a result, Plaintiffs are entitled to declaratory, injunctive, and mandamus relief.

Further, Plaintiffs allege for their Complaint and Petition as follows:

JURISDICTION

1. This action arises under the INA, 8 U.S.C. § 1151(b)(2)(A)(i) and 8 U.S.C. § 1255 (2005; Supp. 2008). This Court has jurisdiction over this action under 28 U.S.C. § 1331 (2000) (federal question), the INA, the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (2000), and the Mandamus Act, 28 U.S.C. § 1361 (2000). Plaintiffs additionally seek relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.* (2000) (declaratory relief).

VENUE

2. Venue is proper in this Court under 28 U.S.C. § 1391(e) (2000) because Defendants Michael Chertoff and Jonathan Scharfen are officers of the United States acting in their official capacities, and the Department of Homeland Security ("DHS"), the U.S. Citizenship and Immigration Services ("USCIS") are agencies of the United States. Additionally, Plaintiffs reside in this judicial district. A substantial part of the events giving rise to the claim occurred in this district, in that the Baltimore District Office of

USCIS, an agency of DHS located at 31 Hopkins Plaza, Baltimore, MD 21201, was the local office that denied Plaintiffs' respective immigration petitions and applications.

EXHAUSTION

3. There are no administrative remedies available for Plaintiffs to exhaust.

4. There is no administrative appeal of the denial of an application for adjustment of Status (I-485). 8 C.F.R. § 245.2(a)(5)(ii) (2008).

5. There is no administrative appeal of the I-130 immigrant petition, even before the Executive Office for Immigration Review ("EOIR"), because the Board of Immigration Appeals ("BIA") has held that the immigration courts (within EOIR) and the BIA (administrative courts of limited and not general jurisdiction) lack jurisdiction under the administrative regulations to review such a denial. *See In Re Matter of Sano*, 19 I&N Dec. 299 (BIA 1985). There are two avenues for obtaining lawful permanent resident status, the adjustment of status (I-485) application and the immigrant visa (DS-230) application. Both avenues require an approved I-130 immigrant petition.

6. While each of the Plaintiffs may renew the adjustment of status application (Form I-485) in removal proceedings before EOIR, adjudication of this application requires an I-130 approval. Immigration Judges lack jurisdiction to approve or review an I-130. Also, initiation of removal proceedings is at the sole discretion of DHS, and DHS has not elected to initiate removal proceedings against all of the plaintiffs. One cannot

apply for initiation of removal proceedings. As such this is not a mandatory exhaustion requirement and cannot be imposed on Plaintiffs' APA action. *See Darby v. Cisneros*, 509 U.S. 137 (1993).

DEFENDANTS

7. Defendant-respondent Michael Chertoff is sued in his official capacity as Secretary of DHS. As Secretary of DHS, Mr. Chertoff is responsible for the administration and enforcement of the immigration laws of the United States.

8. Defendant-respondent Jonathan Scharfen is sued in his official capacity as Acting Director of USCIS. As Acting Director of USCIS, Mr. Scharfen is responsible for the overall administration of USCIS and the implementation of the immigration laws of the United States.

STATUTORY AND REGULATORY BACKGROUND

9. Under the INA, an alien who marries a U.S. citizen can apply to the USCIS for adjustment of status to permanent resident.

10. In order to seek adjustment of status, the citizen spouse must file with USCIS a petition (Form I-130, Petition for Alien Relative) on behalf of his or her spouse establishing that the spouse is entitled to classification as an "immediate relative."

11. The term "immediate relative," which is applicable to the U.S. citizen's

Form I-130 petition, is defined in the *first* sentence of 8 U.S.C. § 1151(b)(2)(A)(i) as the "children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age." *Id.* (emphasis added).

12. Along with the filing of the Form I-130, the non-citizen spouse must file an application (Form I-485, Application to Register Permanent Residence or Adjust Status) for adjustment of his/her immigration status to permanent resident.

13. In the tragic event that the U.S. citizen spouse dies without having filed a Form I-130 petition on behalf of his or her alien spouse, Congress has provided that the widowed alien spouse may self-petition for reclassification as an "immediate relative" by filing a Form I-360 (Petition for Amerasian, Widow(er), or Special Immigrant) provided that the widowed alien spouse satisfies certain eligibility criteria; namely, that he or she was married to the U.S. citizen spouse for at least two years prior to the citizen spouse's death and the couple was not legally separated at the time of death.

14. Specifically, 8 U.S.C.A. § 1154(a)(1)(A)(ii), states that "[a]n alien spouse described in the *second sentence* of section 201(b)(2)(A)(i) . . . *also* may file a petition . . .." *Id.* (emphasis supplied). The *second* sentence of 8 U.S.C. § 1151(b)(2)(A)(i) provides:

> 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.

15. Where, as happened here, the citizen spouse files a *Form I-130* on behalf of his alien spouse, but subsequently dies before the couple's second wedding anniversary, USCIS treats the death of the citizen spouse as immediately stripping the widowed alien spouse of "immediate relative" status and automatically revokes the *Form I-130.*

16. This agency action is based on the erroneous application of the *Form I-360* two year marriage eligibility requirement in the definition of "immediate relative" that is set forth in the *second sentence* of 8 U.S.C. § 1151(b)(2)(A)(i) to the *Form I-130* Petition. Put another way, Defendants have confused the definition of "immediate relative" that is applicable to *I-130* petitions filed by U.S. citizen spouses (the *first* sentence of 8 U.S.C. § 1151(b)(2)(A)(i)) with the definition of "immediate relative" that is applicable to *I-360* self-petitions filed by alien spouses (the *second* sentence of 8 U.S.C. § 1151(b)(2)(A)(i)).

17. Defendants have not only misconstrued the law, but have created a system under which combination of spousal death and Defendants' inability to quickly adjudicate petitions severely penalizes grieving widows. It strips them of their status as immediate relatives and results in the initiation of removal proceedings against them and their non-citizen children despite the existence of a valid marriage at the time of death.

This is colloquially known as the "widow's penalty."

18. Through the unlawful application of the improper standard, Defendants have compounded Plaintiffs' grief at a time in which they are most vulnerable. Defendants have stripped Plaintiffs of immediate relative status, denied the application for adjustment of status, and denied work and travel authorization. These actions have exacted grief, suffering, loss of work authorization, loss of travel authorization, separation of family members, and other injuries flowing from forced unlawful status such as loss of entitlement to estate benefits, social security benefits, loss of driving privileges due to state laws requiring proof of legal status, and loss of accrued lawful residence time that is a prerequisite for eventual U.S. citizenship.

PLAINTIFF MARIA PAULA ROBLEDO

19. Plaintiff Maria Paula Robledo (Plaintiff Robledo) was born in Colombia in 1973.

20. Plaintiff Robledo is a citizen of Colombia.

21. Plaintiff Robledo and her son, Mateo Pinzon, entered the United States in nonimmigrant status, and were inspected and admitted.

22. Plaintiff Robledo has lived in Germantown, Maryland since 2004.

23. On July 11, 2006, Plaintiff Robledo married Duglio Renato Ricci, a naturalized U.S. citizen.

The Petition and Application

24. In September 2006, Plaintiff Robledo's U.S. citizen spouse filed with the required fee a Form I-130, Petition for Alien Relative ("Petition") establishing his citizenship and that his spouse is an "immediate relative," and executed an I-864 Affidavit of Support.

25. At the same time, Plaintiff Robledo filed with the required fee a Form I-485, Application to Register Permanent Residence or to Adjust Status ("Application"), seeking adjustment of status to lawful permanent resident, relying on her citizen spouse's Petition attesting to her status as spouse.

26. Plaintiff Robledo was issued an Employment Authorization Document and assigned an Alien number, A89 630 300.

27. On May 30, 2007, Plaintiff Robledo's spouse died.

The Denial

28. Fifteen days after the death of Plaintiff Robledo's spouse, on June 15, 2007, Defendants denied the Petition and Application that were jointly filed by the couple solely on the basis that Plaintiff Robledo was no longer the spouse of a U.S. citizen.

29. On October 9, 2007, Plaintiff Robledo was placed in removal proceedings before the Executive Office for Immigration Review, Immigration Court, Room 440, Fallon Federal Building, 31 Hopkins Plaza, Baltimore, Maryland 21201. Her next

scheduled hearing is December 9, 2008 before an immigration judge.

30. The Immigration Judge has no jurisdiction to review an I-130 petition.

PLAINTIFF MATEO PINZON

31. Plaintiff Mateo Pinzon (Plaintiff Pinzon) was born in Colombia in 2001.

32. Plaintiff Pinzon is a citizen of Colombia.

33. Plaintiff Pinzon and his mother, Plaintiff Maria Robledo, entered the United States in nonimmigrant status, and were inspected and admitted.

34. Plaintiff Pinzon has lived in Germantown, Maryland with his mother since 2004.

35. On July 11, 2006, Plaintiff Pinzon's mother, Plaintiff Robledo married Duglio Renato Ricci, a naturalized U.S. citizen.

36. Upon the marriage of Plaintiff Pinzon's mother to Mr. Ricci, Plaintiff Pinzon became a "child" under the Immigration and Naturalization Act, INA § 101(b)(1)(B), 8 U.S.C. § 1101(b)(1)(B), because he was under 18 at the time.

The Petition and Application

37. In September 2006, Plaintiff Robledo's U.S. citizen parent filed with the required fee a Form I-130, Petition for Alien Relative ("Petition") establishing his citizenship and that his child is an "immediate relative," and executed an I-864 Affidavit of Support.

38. At the same time, Plaintiff Pinzon filed with the required fee a Form I-485, Application to Register Permanent Residence or to Adjust Status ("Application"), seeking adjustment of status to lawful permanent resident, relying on his citizen parent's Petition attesting to his status as "child."

39. On May 30, 2007, Plaintiff Pinzon's step-father died.

The Denial

40. Fifteen days after the death of Plaintiff Pinzon's parent, on June 15, 2007, Defendants denied the Petition and Application that were jointly filed by the father and son solely on the basis that Plaintiff Pinzon was no longer the "child" of a U.S. citizen.

PLAINTIFF ZAINAB M. HASSAN-NORRIS

41. Plaintiff Zainab M. Hassan-Norris (Plaintiff Hassan-Norris) was born in Sierra Leone in 1967.

42. Plaintiff Hassan-Norris is a citizen of Sierra Leone.

43. Plaintiff Hassan-Norris entered the United States in nonimmigrant status in 1994, and was inspected and admitted.

44. Plaintiff Hassan-Norris has lived in Silver Spring, MD since 1994.

45. On September 23, 2002 Plaintiff Hassan-Norris married Larry Vincent Norris, a U.S. citizen.

The Petition and Application

46. On November 12, 2002, Plaintiff Hassan-Norris's U.S. citizen spouse filed with the required fee a Form I-130, Petition for Alien Relative ("Petition") establishing his citizenship and that his spouse is an immediate relative, and executed an I-864 Affidavit of Support.

47. At the same time, Plaintiff Hassan-Norris filed with the required fee a Form I-485, Application to Register Permanent Residence or to Adjust Status ("Application"), seeking adjustment of her status to lawful permanent resident, relying on her citizen spouse's Petition attesting to her status as spouse.

48. Plaintiff Hassan-Norris was issued an Employment Authorization Document and assigned an Alien number, A72 350 295.

49. On October 2, 2003, Plaintiff Hassan-Norris gave birth to the couple's son, Luther Andrew Norris.

50. On January 9th 2004, Plaintiff Hassan-Norris's spouse died.

The Denial

51. Within one month following the death of Plaintiff Hassan-Norris's spouse, on February 2, 2004, Defendants denied the Petition and Application that were jointly filed by the couple solely on the basis that Plaintiff Hassan-Norris was no longer the spouse of a U.S. citizen.

52. On April 14, 2004, Plaintiff Hassan-Norris filed a Motion to Reopen and Reconsider the Denial. On May 19, 2006, Plaintiff Hassan-Norris received a letter from the Baltimore, Maryland USCIS stating, "Records fail to reflect you are eligible to adjust to permanent status pursuant to Sec. 245 of the Act -- ORDERED – It is ordered that any prior decision in which the application for Adjustment of Status was denied be Upheld."

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION – DECLARATORY RELIEF

53. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 52 above.

54. Notwithstanding USCIS determinations, each 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).

55. Notwithstanding Defendants' actions, the death of Plaintiff's U.S. citizen spouse (or in the case of Plaintiff Pinzon, father) prior to the couple's second wedding anniversary did not strip Plaintiff of her status as an "immediate relative" spouse (or child).

56. Notwithstanding Defendants' actions, each Plaintiff remains eligible to receive adjustment of status.

57. Notwithstanding Defendants' actions, each Plaintiff is admissible to the

United States as a lawful permanent resident.

58. Notwithstanding Defendants' actions, an immigrant visa was immediately available to each Plaintiff at the time Plaintiff's I-130 petition and I-485 application were filed, pursuant to INA § 245(a), 8 U.S.C. § 1255(a).

59. Defendants violated each Plaintiff's statutory right to apply for relief which Congress has provided under the INA, depriving each 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.A. § 1255(a).

SECOND CAUSE OF ACTION – INJUNCTIVE RELIEF

60. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 59 above.

61. Plaintiffs have suffered and will continue to suffer significant and irreparable harm because of Defendants' policies, procedures, acts and failures to act as described herein.

62. Plaintiffs have suffered a "legal wrong" or have been "adversely affected or aggrieved" by agency action. 5 U.S.C. § 702 (2000). Plaintiffs are persons aggrieved by agency action, for which there is no other adequate remedy in a court. 5 U.S.C. § 704 (2000).

63. Defendants 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, Defendants have erroneously denied both the "immediate relative" petitions filed by Plaintiffs' citizen spouses' (or father's) behalf and Plaintiffs' application for adjustment of status in violation of Congressional intent.

64. Plaintiffs are entitled to an injunction compelling "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) & (2) (2000).

65. Plaintiffs are entitled to injunctive relief prohibiting Defendants from using the death of the U.S. citizen spouse (or parent) as a discretionary factor in the adjudication of Plaintiffs' Petitions and Applications.

THIRD CAUSE OF ACTION – WRIT OF MANDAMUS

66. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 65 above.

67. Defendants owe Plaintiffs a clear and certain duty to adjudicate Plaintiffs' applications on the basis that each Plaintiff remains an "immediate relative" spouse (or "child") of a U.S. citizen, and was not stripped of this status by the death of Plaintiffs' respective spouse (or parent). *See Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006).

68. Defendants withheld approval of Plaintiffs' respective Petitions and Applications solely on the basis that Plaintiffs' respective U.S. citizen spouses (or parent)

were deceased, and not for discretionary reasons.

69. Defendants have failed to perform their duties by determining that Plaintiffs are no longer the "spouse" (or "child") of a U.S. citizen and therefore not entitled to adjustment of status and for issuance of an immigrant visa.

70. Plaintiffs have no other adequate remedy.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that each Plaintiff filed the necessary Petition and Application for lawful permanent resident status, and was not stripped of the status of "spouse" or "child" of a U.S. citizen upon the death of the citizen spouse or parent;
2. Declare that each Plaintiff is entitled to the process that flows from a properly filed Petition and Application, and each must be considered a spouse or child for purposes of the Petition and Application;
3. Declare that each Plaintiff is an "immediate relative" under 8 U.S.C. § 1151(b)(2)(A)(i) and for the purposes of adjudicating an I-130 petition;
4. Declare that I-130 petition procedure is not the forum for determining substantive questions of admissibility under the immigration laws, and when eligibility for "immediate relative" classification is established, the Petition

shall be granted;

5. Issue an injunction prohibiting Defendants from using the death of the U.S. citizen spouse or parent as a discretionary factor in the adjudication of the Petition and Application;

6. Issue an injunction prohibiting Defendants from using factors flowing from the unlawful denial of the Application to again deny the Petition and 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;

7. Issue a writ of mandamus compelling Defendants to

   a. reopen Plaintiffs' adjustment of status Applications on the ground that the Applications were unlawfully denied on the basis of Defendants' erroneous determination that each Plaintiff's status as an "immediate relative" spouse or child of a U.S. citizen was stripped by the death of each Plaintiff's citizen spouse or parent;

   b. treat each Plaintiff as an "immediate relative" spouse or child and adjudicate the immigrant Petition filed on each Plaintiff's behalf accordingly, and

c. treat each Plaintiff as an "immediate relative" spouse or child and exercise discretion to adjudicate each Plaintiff's adjustment of status Application.

8. Award Plaintiffs reasonable costs and attorney's fees under the Equal Access to Justice Act; and

9. Award such further relief as the Court deems just or appropriate.

DATED this day of October, 2008.

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