

MARIA DEL CARMEN RENDON
QUIJADA,

Petitioner/Appellant,

JULIAN JAVIER PIMIENTA
DOMINGUEZ,

Respondent/Appellee.

Arizona Supreme Court

No. CV-23-0160-PR

Court of Appeals

Division Two

No. 2 CA-CV 2022-0174-FC

Pima County Superior Court

Case No. D 2022-1319

PETITIONER/APPELLANT'S SUPPLEMENTAL BRIEF

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STATEMENT OF FACTS

Appellant (“wife”) respectfully incorporates by reference the statement of facts contained in the Petition for Review. See Pet. For Rev. at 5-7.

STATEMENT OF ISSUES

Wife respectfully incorporates the statement of the issues contained in the Petition for Review. See Pet. Rev. at 4.

ARGUMENT

Through the INA, Congress has declared which aliens may seek to establish domicile in the United States. Under these sections, specific classes of "nonimmigrants" are generally precluded. See *Toll v. Moreno*, 458 U.S. 1, 13 (1982), 17; *Elkins v. Moreno*, 435 647, 665 (1978). See generally 8 U.S.C. 1153 (categories of aliens eligible for "immigrant" visas); 8 U.S.C. 1101(a)(15) (distinguishing "immigrant" from "nonimmigrant" visas and listing categories of nonimmigrant visas).

In *Elkins v Moreno*, The United States Supreme Court held that nonimmigrant visa holders must satisfy the conditions of their visa both at entry and during their presence in the United States. 435 U.S. 647, 666-67 (1978) ("Of course, should a G-4 alien terminate his employment with an international treaty organization, both he and his family would those their G-4 status"). Multiple

federal appellate courts have reached the same conclusion. See e.g. *Khano v. INS*, 999 F.2d 1203, 1207 & n.2 (7th Cir. 1993) (stating the immigration authorities may deport "those nonimmigrants who fail to maintain the conditions attached to their nonimmigrant status while in the United States"); *Graham v. INS*, 998 F.2d 194, 196 (3d Cir. 1993) (holding that if an alien on a temporary worker visa planned "to make the United States his domicile, then he violated the conditions of his visa and his intent was not lawful"); *Castillo-Felix v. INS*, 601 F.2d 459, 464 (9th Cir. 1979) (holding that aliens who "are here for a temporary purpose" yet intend to remain in the country "violate the terms of their admission and are no longer here lawfully").

Under the conditions of her visa, Appellant ("wife") was precluded from establishing residency in the United States. However, at the time these proceedings began, Wife had already violated the conditions of her visa, as it had not been renewed and had expired in March of 2020. Therefore, just as the Visa was no longer effectual, neither were its conditions.

- I. **The Appellee's focus on the restrictions related to TD visa holders does not take into account that the TD visa is expired due to the actions of the Appellee and the 'unclean hands' doctrine should apply.**

It is uncontested by both parties to this litigation that the appellee and husband in this matter willfully refused to renew the TD visa status for his wife and offspring. It is uncontested that appellee basically abandoned the family and then tried to get divorced in the Republic of Mexico. The supplemental brief filed on behalf of appellee fails to mention where, in fact, domicile would exist for appellant. It is inconceivable that the mere invocation of the doctrine of “consequentialism” would render a woman living in Arizona without any legal resource. This reasoning would allow her husband to leave the family, not renew a visa willfully (then claim that as grounds to deny domicile in Arizona), not assist the family in any meaningful sense and appropriate all community assets to his own use.

II. Appellee argues federal preemption on immigration matters but then asks the Court to rule on a novel issue based almost solely on federal immigration case law and statutes.

The old saying that one cannot “have your cake and eat it too” comes to mind. Almost every statute and case cited by appellee is grounded in federal immigration law. The present matter is not before an immigration court. Appellee is asking this Court to rule that a litigant, present in Arizona for years, who was found to be admissible by the federal government and is seeking legal residency through a US citizen sibling cannot get a divorce in Arizona. This in

spite of living in Arizona for years and certainly residing in Arizona physically longer than the requisite ninety (90) days, to be able to request a divorce in this State. Appellant cannot get spousal maintenance, cannot request child support (presumably even for US citizen / Arizona resident children), cannot get access to any portion of the income generated by her husband, cannot get access to any of the community property or retirement account funds.

III. Appellee's argument, if successful, would place appellee in a position of being above the law and place appellant and similarly situated TN visa holders or previous TN visa holders without any remedy in disputed matrimonial matters and unable to seek any other form of immigration relief in Arizona.

The best argument against the position taken by appellee is the uncontested fact that the federal government, The United States Citizenship and Immigration Service (USCIS) *is in fact processing the application for residency filed by a sibling on behalf of appellant.* If it were improper, illegal, or legally impossible for a former TN visa holder to request legal residency, no better authority would exist to say that than the USCIS. Yet, that has not happened, and that federal agency is processing the application. It has not been rejected. It has not been denied. Immigration and Customs Enforcement agents have not sent a letter to

appellant asking her to visit their office or gone to her home to arrest her. No better proof can exist to reject the argument that has been presented by appellee than the ongoing existence and processing of the application for alien relative that no one argues was improperly filed or requested.

IV. **Similar case law in other states favors upholding the decision of the appellate court.**

In *In Re Marriage of Gunderson*, two Canadian citizens sought a divorce following a breakdown in their marriage.¹²³ Wash. App. 1035 (2004). Lorraine Gunderson was physically present in Washington state on A TN visa. There the court found that immigration status was not dispositive of domiciliary intent, and that domicile only had two aspects, physical presence, and the intent to reside. *Id.* The court also found that by obtaining a H-1B visa before the decree was finalized, Lorraine had cured any defect in her intent to remain in Washington indefinitely. *Id.*

Just as the court in *Gunderson* found that Lorraine was domiciled in Washington, so should this court find that Wife is domiciled in Arizona. In *Gunderson*, the procurement of a more permanent visa was found to be sufficient evidence of intent to reside. In the present case, Wife is awaiting the adjudication of a I-130 petition filed on her behalf by her sister. This petition has the potential

to allow the Wife to adjust her status to that of Legal Permanent Resident, thereby showing an intent to remain in the U.S. indefinitely. Further, Lorraine was no longer bound by the conditions of the TN visa as the time the decree was finalized having procured her H-1B visa, here too, Wife is no longer bound by the conditions of her TN visa and has not been since it expired in March of 2020. Wife, in the present case, is physically present in Arizona and is seeking permanent status with the intent to remain indefinitely. Therefore, regardless of her present immigration status, wife has met her burden to establish domicile and should be considered domiciled in Arizona, as “it is not necessary for the courts of [the state] to carry out immigration policy by denying nonimmigrant aliens a judicial forum when they otherwise meet domiciliary requirements.” Id.

CONCLUSION

For the foregoing reasons, the Court should uphold the decision of the Court of Appeals and find that the Appellant “Wife” is domiciled in the State of Arizona.

Respectfully submitted,

/s/Peter E. Herberg 11/28/2023
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