

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

<b>J. JESUS CAMACHO-MONTERO,</b>	:	
	:	
<b>Plaintiff,</b>	:	
	:	
<b>vs.</b>	:	<b>CIVIL ACTION NO.</b>
	:	<b>1:09-cv-0695-BBM</b>
<b>ERIC HOLDER, Attorney General,</b>	:	
<b>Department of Justice;</b>	:	
<b>JANET NAPOLITANO, Secretary,</b>	:	
<b>Department of Homeland</b>	:	
<b>Security; MICHAEL AYLES,<sup>1</sup></b>	:	
<b>Acting Deputy Director, U.S.</b>	:	
<b>Citizenship and Immigration</b>	:	
<b>Services,</b>	:	
<b>Defendants.</b>		

**DEFENDANTS’ MOTION TO DISMISS AND BRIEF IN SUPPORT**

COME NOW Defendants, by and through the United States Attorney for the Northern District of Georgia, and pursuant to Fed. R. Civ. P. 12(b)(6), the Defendants move this Court to dismiss Plaintiff, J. Jesus Camacho-Montero’s Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief (Complaint) for failure

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<sup>1</sup> Pursuant to Fed. R. Civ. P. 25(d), Michael Ayles, the interim successor to former Director Jonathan Scharfen, who was named as a defendant in this action in his official capacity, is automatically substituted as the proper party defendant in this action.

to state a claim, and in support, show as follows:

**I. FACTUAL AND PROCEDURAL HISTORY**

Plaintiff seeks to have this Court issue a declaration and grant injunctive relief regarding the denial of the Petition for Alien Relative (Form I-130 or I-130 petition) filed on his behalf and his Application to Register Permanent Residence or Adjust Status (Form I-485 or I-485 application). For the reasons set forth infra, this Court should dismiss the Complaint because Plaintiff no longer qualifies as an immediate relative and therefore has failed to state a claim.

Plaintiff is a native and citizen of Mexico. See Complaint ¶ 16. Plaintiff entered the United States in B-2 nonimmigrant visitor status. Id. ¶ 17. On January 26, 2004, Plaintiff married a United States citizen named Stacy Elizabeth Nichols (Nichols). Id. ¶ 18. On April 22, 2004, Nichols filed an I-130 petition on behalf of Plaintiff seeking to classify him as the “spouse” of a United States citizen under 8 U.S.C. § 1151(b). See id. ¶ 19. On the same day, Plaintiff filed an I-485 application seeking to adjust status to that of lawful permanent resident, including an Affidavit of Support (Form I-864) executed by Nichols. Id. Unfortunately, on July 5, 2005, Nichols died. Id. at ¶ 20. United States Citizenship and Immigration Services (USCIS) administratively closed the I-130 due to the fact that Plaintiff was no longer the spouse of a United States

citizen following the death of petitioner Nichols, and denied the I-485 because Plaintiff was ineligible to receive an immigrant visa. Id. ¶ 21; Complaint Exhibit C.

## **II. ARGUMENT AND CITATION TO LEGAL AUTHORITIES**

### **A. Plaintiff Has Failed to State a Claim**

Plaintiff claims relief under the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq., which provides for judicial review of final agency decisions. See 5 U.S.C. §§ 702, 706. Under the APA, a court can only hold unlawful and set aside agency action, findings, and conclusions it finds to be "arbitrary, capricious, an abuse or discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); Pollgreen v. Morris, 770 F.2d 1536, 1543-1544 (11th Cir. 1985); Cernuda v. Neufeld, 307 Fed. Appx. 427 (11th Cir. 2009). Plaintiff's APA claim must fail because the administrative closure of the I-130 and denial of the I-485 were in accordance with law.

Plaintiff also claims relief under the Mandamus Act, 28 U.S.C. § 1361, which vests the district court with "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or an agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. The mandamus statute does not provide an independent ground for jurisdiction, and can only be invoked if a party seeking the issuance of said relief satisfies the "burden of showing that [his or her] right

to issuance of the writ is “clear and indisputable,” the defendant has a clear duty to perform, and there is no other adequate remedy available. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980); Cash v. Barnhart, 327 F.3d 1252, 1258 (11<sup>th</sup> Cir. 2003). Plaintiff asks this Court to issue a writ of mandamus ordering USCIS to treat Plaintiff as an “immediate relative” and re-adjudicate the I-130 accordingly, and to re-open the I-485 on the ground that the application was unlawfully denied and adjudicate it in discretion. Complaint, Prayers for Relief ¶ 12. However, Plaintiff has not shown that his right to mandamus relief is clear and indisputable because he no longer qualifies as an immediate relative. Additionally, Plaintiff has not shown that USCIS has a duty to classify him as an “immediate relative.”

Further, Plaintiff seeks declaratory and injunctive relief in challenging a regulatory authority terminating a petition upon the death of a petitioner, including its provision that a widow(er) may apply for humanitarian reinstatement of a revoked petition upon identifying a substitute sponsor to file a new affidavit of support (Form I-864). Complaint, Prayers for Relief, ¶¶ 5-7, 11; 8 C.F.R. § 205.1(a)(3)(C)(2); 8 C.F.R. part 213a. This reinstatement regulation has no application, however, if, as was the case for Plaintiff, the U.S. citizen petitioner dies before the I-130 petition is approved. Therefore, Plaintiff has failed to state a claim under 8 C. F. R. § 205.1(a)(3)(C)(2).

Similarly, Plaintiff seeks declaratory and injunctive relief in challenging the practice of USCIS to require a substitute affidavit of support executed by an individual who qualifies under 8 U.S.C. § 1183a(f)(5)(B) after the death of the petitioner/sponsor. Complaint, Prayers for Relief, ¶¶ 7-8. To the contrary, USCIS lawfully requires a substitute affidavit of support pursuant to statutory and regulatory authority. See USCIS Memorandum, *Effect of Form I-130 Petitioners' Death on Authority to Approve the Form I-130* (Attachment A). Additionally, this requirement has no application to Plaintiff because he has not requested humanitarian reinstatement of the petition and was therefore never required to submit a substitute affidavit of support. Therefore, Plaintiff has failed to state a claim with respect to this requirement.

On the merits, Plaintiff's Complaint alleges an issue of statutory construction. In analyzing such a claim, federal courts must engage in a two-step process articulated in Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-844 (1984). Usmani v. U.S. Att'y Gen., 483 F.3d 1147, 1149-50 (11th Cir. 2007). First, the Court must begin by analyzing the language of the statute to determine if the intent of Congress is clear. Id., quoting Chevron, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") If the court determines the

statute to be ambiguous, it must defer to the agency's interpretation if it "is based on a permissible construction of the statute." *Id.* at 1150, quoting Chevron, 467 U.S. at 843. Under Chevron deference, a court must defer to "an agency's reasonable interpretation of an ambiguous statute, 'even if the agency's reading differs from what the court believes is the best statutory interpretation.'" Sierra Club v. Administrator, U.S. E.P.A., 496 F.3d 1182, 1186 (11th Cir. 2007), quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (citing Chevron, 467 U.S. at 843-44 & n. 11).

For the reasons set forth infra, the Complaint should be dismissed pursuant to a straightforward application of the express terms of 8 U.S.C. § 1151(b)(2)(A)(i). Alternatively, even if the statute is ambiguous, multiple factors set forth infra make it clear that Congress did not intend to enact the interpretation set forth by Plaintiff.

**1. 8 U.S.C. § 1151(b)(2)(A)(i) Includes A Current "Spouse."**

The process by which an immediate relative of a U.S. citizen adjusts status is governed by 8 U.S.C. § 1101 et seq. The U.S. citizen begins the petitioning process for his or her immediate alien relative, by filing an I-130 petition with USCIS. 8 U.S.C. § 1154(a)(1)(A)(i); 8 C.F.R. §§ 204.1(a)(1), 204.2(a). Approval of the I-130 petition classifies the U.S. citizen's alien relative as within a specific immigrant visa class, and

permits the alien to apply for an immigrant visa (if the alien is abroad) or to seek adjustment of status (if the alien is present in the United States) to that of a lawful permanent resident. 8 U.S.C. §§ 1201(a)(1), 1202(a), 1255.

By statute, Congress defined “immediate relatives” as the following:

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 parents, such citizens shall be at least 21 years of age.

8 U.S.C. § 1151(b)(2)(A)(i). In the same subsection, Congress provided a narrow exception to the general definition of “immediate relative” in the case of an individual who was married to a U.S. citizen for *more* than two years, and after such two-year period the U.S. citizen died:

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).<sup>2</sup>

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<sup>2</sup>If this exception applies, and if the alien’s now-deceased spouse has already filed an I-130 petition on the alien’s behalf, under USCIS regulations the pending I-130 petition is automatically converted to a widow(er)’s “self-petition” and the I-130 petition is adjudicated. 8 C.F.R. § 204.2(b), as amended by, 71 Fed. Reg. 35732, 35749 (June 21, 2006). If no I-130 petition is pending at the time of

Under Step One of the Chevron analysis, the statute provides a clear definition of "immediate relative" which includes only a current "spouse," and does not include a "widow(er)" or a "surviving spouse." Moreover, the narrow exception for widow(er)s married to their decedent spouses for more than two years to self-petition does not apply to Plaintiff because he was married for less than two years.

Plaintiff argues that USCIS's determination that he no longer qualifies as an "immediate relative" of a U.S. citizen due to the death of his citizen spouse is based on an impermissible interpretation of 8 U.S.C. § 1151(b)(2)(A)(i). See Complaint ¶¶ 13, 15, 35. In making this argument, Plaintiff contends that USCIS confused the immediate relative definition applicable to I-130 petitions filed by United States citizen spouses (the first sentence of section 1151(b)(2)(A)(i)) with the immediate relative definition applicable to I-360 self-petitions filed by alien spouses (the second sentence). Id. ¶ 13.

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the citizen's death, the alien may file his or her own petition if he or she meets the conditions set forth in 8 U.S.C. § 1151(b)(2)(A)(i), i.e., if (1) the alien petitioner had been married to the now-deceased United States citizen for at least two years; (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 petitioner has not remarried. 8 C.F.R. § 204.2(b).

Reading these two sentences together, as we must, Shotz v. City of Plantation, Fla., 344 F.3d 1161, 1169-1172 (11th Cir. 2003) (court's task when construing a statute is to read statute harmoniously as a whole), it is clear that Congress has generally defined "immediate relative" as a current "spouse" in the first sentence of section 1151(b)(2)(A)(i). And further, in the second sentence, Congress provided a narrow exception to the general definition for an alien who "was the spouse" of a U.S. citizen, i.e., a "widow(er)," provided the marriage lasted two years.

The canon of statutory construction inclusio unius est exclusio alterius (the inclusion of certain provisions implies the exclusion of others) instructs that items not included within a list in a statute are excluded from the list. See Robinson v. Napolitano, 554 F.3d 358, 365 (3rd Cir. 2009), rehearing denied (2009). In a case directly on point, the Third Circuit in Robinson concluded that the only exception to the termination of immediate relative status was for the one explicitly stated in the statute -- marriages lasting more than two years. Id. Because, as a matter of law, Plaintiff's marriage ended with Nichols's death, he is "an alien who was the spouse of a citizen" under the second sentence. As the second sentence clearly "qualifies which spouses of deceased citizens are immediate relatives," id., it provides the rule that determines that Plaintiff no longer qualifies as an "immediate relative" after the death of his wife

because his marriage lasted less than two years. See also Burger v. McElroy, 1999 WL 203353 (S.D.N.Y. 1999); but see Lockhart v. Napolitano, 561 F.3d 611 (6<sup>th</sup> Cir. 2009); Freeman v. Gonzales, 444 F.3d 1031 (9<sup>th</sup> Cir. 2006); Taing v. Napolitano, \_\_\_ F.3d \_\_\_, 2009 WL 1395836 (C.A.1 (Mass.)).

Both Robinson and Burger correctly construed section 1151(b)(2)(A)(i) consistent with fundamental principles of statutory construction that are applied by the Supreme Court and the Eleventh Circuit. See Mayers v. United States Department of Immigration and Naturalization Services, 175 F.3d 1289, 1302-1303 (11th Cir. 1999) (superseded by statute on a separate point of law); Nunnally v. Equifax Information Services, LLC, 451 F.3d 768, 774 (11th Cir. 2006). As an alien widow(er) of a U.S. citizen, Plaintiff is an “immediate relative” only if he meets the requirements of the second sentence of section 1151(b)(2)(A)(i), which governs “an alien who was the spouse of a [U.S.] citizen” (emphasis added). See Robinson, 554 F.3d at 365 (the second sentence of section 1151(b)(2)(A)(i) “qualifies which spouses of deceased citizens are immediate relatives”); see also Burger, 1999 WL 203353 at \*5 (the second sentence of section 1151(b)(2)(A)(i) “specifically addresses when widows and widowers of U.S. citizens will be considered ‘immediate relatives’”). The second sentence, by its unambiguous terms, requires that the alien and the citizen have been

married “for at least 2 years at the time of the citizen’s death.” It is undisputed that Plaintiff does not meet this requirement. As Plaintiff states in his Complaint, he was married to Nichols for less than one year and six months at the time she died – from January 26, 2004, until July 5, 2005. Complaint ¶¶ 18, 20. Thus, Plaintiff is not an “immediate relative” for purposes of section 1151(b)(2)(A)(i).

Plaintiff seeks to avoid the unambiguous language of the second sentence of section 1151(b)(2)(A)(i) by contending that he is a “spouse” for purposes of the first sentence of the statute, even though Nichols is deceased. The Court should reject this contention. As explained supra, the second sentence of the statute expressly limits “immediate relative” status for alien widow(er)s to those who had been married at least two years at the time of the citizen’s death. Courts may not circumvent this limitation by construing the term “spouse” in the first sentence of the statute to include alien widow(er)s who had been married less than two years at the time of the citizen’s death, as Plaintiff would have this Court do. See Robinson, 554 F.3d at 365. Thus, under the statutory construction principle inclusio unius est exclusio alterius, an alien widow(er) such as Plaintiff is not a “spouse” for purposes of the first sentence of section 1151(b)(2)(A)(i), because the expression of one specific exception in the second sentence necessarily excludes other exceptions not listed in the statute. Id. See also

TRW Inc. v. Andrews, 534 U.S. 19, 28 (2001) (“Congress implicitly excluded a general [statute of limitations] discovery rule by explicitly including a more limited one”).

Finally, the ordinary meaning of the term “spouse” does not include a widow(er).<sup>3</sup> In construing a term within a statute, courts look to “the language employed by Congress and [assume] that the ordinary meaning of that language accurately expresses the legislative purpose.” Engine Manufacturers Ass’n v. South Coast Air Quality Management District, 541 U.S. 246, 252 (2004)(quoting Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)); Nat’l Coal Ass’n v. Chater, 81 F.3d 1077, 1081 (11th Cir.1996) (“Terms that are not defined in the statute ... are given their ordinary or natural meaning.”). In determining the ordinary meaning of a word, courts use the dictionary definition. Engine Manufacturers Ass’n, 541 U.S. at 252. At the time of the enactment of the second sentence of section 1151(b)(2)(A)(1), the dictionary definition of “spouse” was “[o]ne’s husband or wife.” See Black’s Law Dictionary 1402 (6<sup>th</sup> ed. 1990). A “wife,” in turn, as commonly understood, was defined as “a woman who has a

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<sup>3</sup>A provision in the INA definition section, 8 U.S.C. § 1101(a)(35), states that the terms “spouse”, “wife” and “husband” “do not include a spouse, wife or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.” This provision is not a meaningful definition, as it merely repeats, and limits, the terms it purportedly defines. Robinson, 554 F.3d at 365.

lawful husband living.” Id. at 1628 (emphasis added). The concept that marriage ends at the death of one spouse is well-established in American law. Marriage “is terminable only by death or presumption of death, or by a judicial decree of divorce, dissolution or annulment.” Robinson, 554 F.3d at 366 (quoting 52 Am. Jur.2d Marriage § 8 (2000)).<sup>4</sup> Therefore, Plaintiff is not a “spouse” as the term is commonly understood because his marriage ended upon the death of Nichols. See Robinson, 554 F.3d at 366 (citing, inter alia, Black’s Law Dictionary 1402 (6th ed. 1990)).

In sum, the statute is unambiguous and plainly provides that Plaintiff cannot be considered an "immediate relative" because he is a "widower" and not a "spouse," nor is he a former spouse to a marriage that lasted more than two years. The canons of statutory construction in pari materia and inclusio unius est exclusio alterius, the Robinson and Burger decisions, and the ordinary meaning of “spouse” all support this conclusion. Accordingly, pursuant to the Step One Chevron analysis, Plaintiff simply

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<sup>4</sup> Furthermore, Federal law has adopted this same basic definition of “spouse” for purposes of the administration of every Federal statute and regulation. 1 U.S.C. § 7 (“[T]he word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife”) (emphasis added). Indeed, that Congress intends the term “spouse” to only include a current spouse and not a surviving spouse is underscored by Congress’s “significant” choice to use a present tense verb (“is”) in 1 U.S.C. § 7. See United States v. Wilson, 503 U.S. 329, 333 (1992).

cannot meet the straightforward criteria outlined by Congress for immediate relative classification. See Robinson, 554 F.3d at 364, 366.

## **2. The Agency's Determination Should Be Given Deference.**

If the Court determines that the Congressionally-enacted language is not clear on the issue in question, the Court must proceed to Step Two of the Chevron analysis. Usmani, 483 F.3d at 1149-50. In this Step Two analysis, the question for the court is whether the agency's construction "is based on a permissible construction of the statute." Id. at 1150, quoting Chevron, 467 U.S. at 843. In determining whether the Agency's determination is "permissible," this Court "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction." Chevron, 467 U.S. at 843 n.11. Nor must the Agency's interpretation be the one that "the court would have reached if the question initially had arisen in a judicial proceeding." Id. A court's deference to an agency interpretation is "especially appropriate in the immigration context...." Scheerer v. U.S. Attorney General, 513 F.3d 1244 (11th Cir. 2008), quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999)(quoting INS v. Abudu, 485 U.S. 94, 110 (1988)).<sup>5</sup> For the reasons set forth

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<sup>5</sup>Likewise, the Agency's interpretation should also be given particular deference if it is one of long-standing duration. See Barnhart v. Walton, 535 U.S. 212, 220 (2002) ("[T]his Court will normally accord particular deference to an

infra, under the Step Two analysis, the Court should reject Plaintiff's interpretation of the statute.

Under Chevron Step Two, this Court should reject Plaintiff's construction as contrary to BIA precedent. The BIA has expressly reached the issue presented here, and held that an alien married less than two years at the time of the citizen spouse's death no longer qualifies as an "immediate relative." Matter of Varela, 13 I. & N. Dec. 453 (BIA 1970). In Varela, the BIA determined that the death of the citizen spouse ends the legal marriage, and thus also ends "immediate relative" status as well. Id. The Board reaffirmed the result in Varela in a later decision, although the Board stressed the lack of the alien's standing even to pursue the matter after the citizen spouse had died. Matter of Sano, 19 I. & N. Dec. 299 (BIA 1985).

The final affidavit of support rule, 71 Fed. Reg. 35732 (June 21, 2006), also supports Defendants' interpretation of section 1151(b)(2)(A)(i). The Government received several comments on the prior interim rule, dealing with the validity of a petition once the petitioner has died. See 71 Fed. Reg. at 35735. In response to the comments, the Attorney General and the Secretary of Homeland Security, who have

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agency interpretation of 'longstanding' duration.").

primary responsibility for implementing administrative immigration law specifically endorsed Varela's holding that the petitioner's death requires denial of the I-130. Id.

Determinations by the Board are binding on the government in the immigration context and apply nation-wide. See 8 C.F.R. § 1003.1(g). If, however, a Court of Appeals comes to a position contrary to the BIA in a precedential decision, the government follows that position only within the jurisdiction of that particular Court of Appeals. See Matter of Anselmo, 20 I. & N. Dec. 25, 31 (BIA 1989). Here, because there is no Eleventh Circuit decision on this issue, the BIA decision should be treated as controlling. Accordingly, Varela further confirms that the language of section 1151(b)(2)(A)(i) does not permit the construction offered by Plaintiff.

Further supporting Defendants' interpretation, recent congressional action demonstrates that Varela was correctly decided regarding the construction of section 1151(b)(2)(A)(i). When Congress takes subsequent action, it can be indicative of the congressional intent and understanding behind existing statutes. See Heckler v. Turner, 470 U.S. 184, 208-09 (1985) (noting that "[w]ere there any doubt remaining as to Congress' intention in 1981, subsequent congressional action would dispel it" given that a House Committee had voted on a proposed amendment to the statute in question). Here, subsequent congressional action confirms that Defendants' interpretation of

section 1151(b)(2)(A)(i) is the correct one. In the prior Congressional term (110th), H.R. 6034—which was a bill to amend the statute to contain the express relief that Plaintiff advocates here—was voted out of committee and referred to the entire Congress for passage on October 3, 2008. See 154 Cong. Rec. D. 867, 869; 154 Cong. Rec. H. 10827, 10827; see also 110 H. Rpt. 911 (“When a couple is married less than 2 years and the U.S. citizen petitioner dies before the petition is filed and adjudicated, the spouse is no longer eligible for permanent residence and must immediately return to his or her home country or be subject to deportation.”) Thus, while H.R. 6034 was not voted on by the full Congress nor sent to the President, the fact that Congress was in the process of seeking to amend the statute to address alien widow(er)s whose marriages lasted less than two years provides further support that the language as currently enacted by Congress does not support the classification of Plaintiff as an “immediate relative.”<sup>6</sup>

Moreover, Congressional activity shows that when Congress wants to provide exceptions for widow(er)s to be eligible for immediate relative classification without any durational requirement for the marriage, it will do so expressly. In support of this, Defendants cite the FY2004 National Defense Authorization Act, Pub. L. No. 108-136,

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<sup>6</sup>In the current Congressional term, two bills, S. 815 and H.R. 1870, containing the identical language of H.R. 6034, were introduced to provide the very relief that Plaintiff claims is already available under the statute.

Division A, § 1703, 117 Stat. 1392, 1693-96 (2003), in which Congress extended immediate relative eligibility to, inter alia, alien widow(er)s of U.S. citizen military personnel who died as a result of combat. Likewise, in the USA PATRIOT Act, Pub. L. No. 107-56, §§ 421 and 423, 115 Stat. 272, 360-363, in language similar to the FY2004 National Defense Authorization Act, Congress extended immediate relative eligibility to, inter alia, alien widow(er)s of U.S. citizens killed as a result of terrorist activity. These statutes indicate that when Congress wants to extend benefits to widow(er)s without regard to how long the marriage lasted, it will do so expressly. See Robinson, 554 F.3d at 365, n.7.

Further supporting Defendants' position that Plaintiff cannot be considered a "spouse" under the statute, is the fact that Congress, in enacting other provisions in the INA, expressly contemplated that an alien seeking to adjust status would have to be a current "spouse" at the time of adjudication and not a widow(er) in order to qualify as an "immediate relative." See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000) (a court must interpret a statute so as to make the statute consistent with the broader statutory framework). Particularly, in enacting 8 U.S.C. § 1154(b), Congress required that the Secretary investigate every visa petition case. The plain language of this section specifies that the Attorney General (now the Secretary of

Homeland Security) shall approve the immediate relative visa petition only if, “[a]fter an investigation of the facts in each case, . . . he determines that the facts stated in the petition *are* true and that the alien in behalf of whom the petition is made *is* an immediate relative . . . .” 8 U.S.C. § 1154(b) (emphasis added). Because Congress chose to use the present tense in this code provision, the plain reading is that the facts attested to in the citizen’s petition and developed through investigation must be true at the time of the adjudication of the petition and that the alien must be an immediate relative at the time of that determination. See Wilson, 503 U.S. at 333 (Congress’s use of present tense is significant to statutory construction). This interpretation comports with the INA requirement that a grant of a petition is not sufficient to entitle an alien to adjustment of status but rather the alien must demonstrate eligibility in all respects at the time of adjudication. See 8 U.S.C. § 1154(e) (which provides that an alien who is the beneficiary of an “immediate relative” petition is not entitled to be admitted into the United States if, upon arrival at a port of entry, he or she is found not to qualify as an “immediate relative”). This construction also comports with Board precedent. See Matter of Alarcon, 20 I. & N. Dec. 557, 562 (BIA 1992) (adjustment of status applications must be adjudicated based on the facts as they stand on the date of decision).

The conclusion that an alien widow(er) is not a “spouse” for purposes of the first sentence of section 1151(b)(2)(A)(i) is further supported by Congress’s use of the term “surviving spouse” in many other provisions of the INA. In at least six statutes within the INA, Congress has expressly distinguished between a “spouse” and a “surviving spouse” by using the two terms in the same statute. See 8 U.S.C. § 1101(a)(27)(H) and (I)(ii) (definitions of “special immigrant”); 8 U.S.C. § 1430 (a), (b) and (d) (naturalization of certain individuals); 8 U.S.C. § 1439(g) (naturalization through service in the armed forces); 8 U.S.C. § 1612(a)(2)(C)(iii) (eligibility of aliens for certain federal programs); 8 U.S.C. § 1613(b)(2)(C) (eligibility for federal means-tested public benefits); 8 U.S.C. § 1622(b)(3)(C) (eligibility for certain state programs). By enacting these statutes, Congress has shown that when it wants a statute to apply to a surviving spouse, Congress knows how to do so – it uses the term “surviving spouse.” That term does not appear in the first sentence of section 1151(b)(2)(A)(i). Thus, the term “spouse,” as it appears in that sentence, does not include a “surviving spouse” such as Plaintiff.

Similarly, Congress has shown that it knows how to provide for a familial relation to continue after death for immigration purposes, if Congress wishes to do so. The INA’s definition of “parent” in 8 U.S.C. § 1101(c)(2) expressly includes a “deceased

parent.” However, the INA does not expressly define the term “spouse” to extend to a spouse of a deceased person. See 8 U.S.C. § 1101(a)(35). Thus, the court should not construe the term “spouse” in the first sentence of section 1154(b)(2)(A)(i) as applying to surviving spouses such as Plaintiff. See Robinson, 554 F.3d at 365.

USCIS’s interpretation of section 1151(b)(2)(A)(i) is also supported by reference to the legislative history of the 8 U.S.C. § 1155, which provides discretionary authority to revoke a petition for “good and sufficient cause.” 8 U.S.C. § 1155. Congress has several times amended this section while the regulatory authority providing for automatic termination of a petition upon the death of the petitioner has remained in effect, and has not taken issue with the regulation.<sup>7</sup> See 8 C.F.R. § 205.1.

Since 1938, the death of a petitioner has warranted revocation of approval of a petition. 3 Fed. Reg. 263 (1938). Since 1952, this revocation has been automatic, and effective as of the date of approval. 17 Fed. Reg. 11469, 11482-83 (1952). By twice reenacting section 1155, Congress is deemed to have adopted the settled administrative

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<sup>7</sup>Congress re-enacted the revocation statute in 1965, Act of October 3, 1965, Pub. L. 89-236, § 5, 79 Stat. 911, 916 (1965), without changing what constitutes “good cause” for revocation or questioning this settled administrative interpretation of the statute. Congress also amended the statute in 2004, again without changing or challenging what qualifies as “good cause” for revocation. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, § 5304(c), 118 Stat. 3638, 3736 (2004).

interpretation of section 1155 that the death of the petitioner results in the revocation of a petition. See Boeing v. United States, 537 U.S. 437, 456 (2000); Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).

The enactment through Public Law 107-150 of the substitute sponsor provision, 8 U.S.C. § 1183a(f)(5)(B), is particularly telling on this point. Congress expressly took note of the regulation that automatically revokes approval of a Form I-130 on the petitioner's death. H. Rep. 107-127 at 6 (2001). This legislative history establishes that Public Law 107-150 was not intended to alter in any way the regulatory provisions for revocation of an approval on the petitioner's death. Id. Further, the precise text of section 1183a(f)(5)(B) makes clear that Congress has ratified the text of the automatic revocation regulation and shares the agency's view that death terminates a petition. See 8 U.S.C. § 1183a(f)(5)(B) (providing an avenue for a substitute sponsor to come forward after a petitioner has died after the approval of a petition, and the agency has declined to revoke the petition on humanitarian grounds). A petitioner's death, therefore, revokes an approved petition as of the date of approval unless USCIS decides, in discretion, to let the approval stand. 8 C.F.R. § 205.1(a)(3)(i)(C)(2).

Since the death of a visa petitioner revokes the approval of a Form I-130 petition, it necessarily follows that the petitioner's death while the Form I-130 petition is pending

warrants denial of the petition. This principle is, of course, subject to the limited exception set forth in the second sentence of section 1151(b)(2)(A)(i), which Congress added in 1990, but that sentence indisputably does not apply here. Thus, USCIS properly declined to classify Plaintiff as an “immediate relative” under section 1151(b)(2)(A)(i).

In sum, if the Court proceeds to a Chevron Step Two analysis, the Agency's construction of the statute should be afforded deference and upheld as reasonable because it is consistent with BIA precedent on the issue as endorsed by the final affidavit of support rule, subsequent congressional action, other statutes related to adjustment of status, a comparison to other INA sections that include the term “surviving spouse” or otherwise provide for a familial relationship to continue after death, the legislative history of the petition revocation statute, and the enactment and text of the substitute sponsor statute. Thus, Plaintiff's arguments should be rejected.

**B. 8 C.F.R. § 205.1(a)(3)(C)(2).**

Finally, Plaintiff challenges as a matter of law the automatic revocation regulation, including its provision that a widow(er) may apply for humanitarian reinstatement of a petition following its automatic revocation upon the death of the petitioner, and its requirement that a substitute sponsor file a new affidavit of support

under 8 C.F.R. part 213a. Complaint, Prayers for Relief, ¶¶ 5-7, 11; see 8 C.F.R. § 205.1(a)(3)(i)(C)(2). Under the regulation, for humanitarian reasons, USCIS may reinstate a revoked petition previously granted on behalf of a widow(er) who was married to a U.S. citizen petitioner for less than two years and who thus cannot take advantage of the exception set forth in the second sentence of section 1151(b)(2)(A)(i). See 8 C.F.R. section 205.1(a)(3)(C)(2). This reinstatement regulation has no application, however, if, as was the case for Plaintiff, the U.S. citizen petitioner dies before the I-130 petition is approved. USCIS did not employ its authority to revoke the I-130 petition filed on behalf of Plaintiff because the petition was never granted; rather, it was denied following the petitioner's death. Therefore, there is no basis to reinstate the petition under 8 C. F. R. § 205.1(a)(3)(C)(2). Because Plaintiff has neither applied for nor been denied humanitarian relief, he has failed to state a claim with respect to 8 C. F. R. § 205.1(a)(3)(C)(2).

In a related claim, Plaintiff challenges the requirement for a substitute affidavit of support (Form I-864) to be filed along with a humanitarian request for reinstatement. Complaint, Prayers for Relief, ¶¶ 7-8; 8 C.F.R. § 205.2(a)(3)(C)(2); 8 U.S.C. § 1183a(f)(5)(B). This claim similarly fails because Plaintiff has not applied for humanitarian reinstatement and was therefore not required to submit a substitute

affidavit. Furthermore, the substitute affidavit requirement is lawful and does not import unlawful discretionary admissions criteria into the non-discretionary immediate relative determination. See Attachment A. Specifically, USCIS does not make inadmissibility a basis for denying or revoking a Form I-130; rather, an alien whose petitioner has died is inadmissible unless a substitute sponsor submits a new Form I-864 that meets the requirements of Immigration and Nationality Act section 213A. 8 U.S.C. § 1182(a)(4)(C). Defendants may not accept a Form I-864 unless it is enforceable. 8 U.S.C. § 1183a(a)(1)(B). The petitioner/sponsor has no support obligation unless the alien actually acquires permanent residence, 8 C.F.R. § 213a.2(e)(1), and the obligation ends if the petitioner/sponsor dies. 8 C.F.R. § 213a.2(e)(2)(ii). The clear implication of the regulation, therefore, is that a Form I-864 is not "enforceable" if the petitioner/sponsor dies before the alien immigrates. Therefore, because Plaintiff was not required to submit a substitute affidavit, and because an enforceable affidavit is an admissibility requirement for those required to do so, Plaintiff has failed to state a claim with respect to the requirement for a substitute filing.

### **CONCLUSION**

For the reasons set forth above, Defendants respectfully request the Court to dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6), and enter judgment against Plaintiff and for Defendants.

Respectfully submitted this 26th day of May, 2009,

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**CERTIFICATE OF COMPLIANCE**

I certify that the document to which this certificate is attached has been prepared with one of the font and point section approved by the Court in LR 5.1B for documents prepared by computer.

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**CERTIFICATE OF SERVICE**

I certify that I have electronically filed the foregoing **DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT** with the Clerk of the Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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This 26<sup>th</sup> day of May, 2009.

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