

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DIANA GECAJ ENGSTROM, and,)	
MARIA DEL CARMEN DIAZ-RUIZ,)	
)	
Plaintiffs-petitioners,)	
)	No. 09CV3185
v.)	
)	Judge Guzman
JANET NAPOLITANO, Secretary,)	
U.S. Department of Homeland Security;)	
MICHAEL AYLES, Acting Deputy Director,)	
U.S. Citizenship and Immigration Services,)	
)	
Defendants-respondents)	

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

In support of their motion for summary judgment filed pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, defendants Janet Napolitano and Michael Aytes (collectively, Defendants), by their attorney, Patricia E. Bruckner, Trial Attorney, Civil Division, Office of Immigration Litigation, District Court Section, respectfully submit this memorandum of law pursuant to Local Rule 56.1(a)(2). Defendants file contemporaneously with this memorandum of law, pursuant to Local Rule 56.1(a)(3), a separate statement of material facts, which are not at issue.

Defendants respectfully submit that under either the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq.; the Mandamus Act, 28 U.S.C. § 1361; or the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq.; defendants are entitled to judgment as a matter of law

with respect to all claims brought by plaintiffs because the United States Citizenship and Immigration Services' ("USCIS") actions at issue were in accordance with the law. See Fed. R. Civ. P. 56(c).

I. BACKGROUND

A. Standards of Review

1. Motion for Summary Judgment

Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23; Fed. R. Civ. P. 56(c). The requirement that a fact dispute be genuine means that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

2. Administrative Procedure Act

The APA provides for judicial review of final agency decisions. See 5 U.S.C. §§ 702 and 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); Citizens Against Ruining the Environment v. EPA, 535 F.3d 670, 674 (7th Cir. 2008); Head Start Family Education Program, Inc. v. Cooperative Educations Service Agency 11, 46 F.3d 629, 633 (7th Cir. 1995). "This is a narrow standard of review under which [this Court] may not substitute [its] judgment for that of the agency." Head Start Family Education Program, Inc., 46 F.3d at 633, quoting Motor Vehicle

Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Instead, this court must “determine whether the agency’s decision ‘was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’” Head Start Family Education Program, Inc., 46 F.3d at 633, quoting Motor Vehicle Mfrs. Ass'n of the United States, Inc., 463 U.S. at 43. “If the agency has articulated grounds indicating a rational connection between the facts and the agency’s action, then [this Court’s] inquiry is at an end.” Head Start Family Education Program, Inc., 46 F.3d at 633; Schneider Nat'l, Inc. v. Interstate Commerce Comm'n, 948 F.2d 338, 343 (7th Cir. 1991).

3. Mandamus Act

Under the Mandamus Act, 28 U.S.C. § 1361, a district court is vested 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. A writ of mandamus is an “extraordinary remedy” which courts “do not grant lightly.” Matter of Hatcher, 150 F.3d 631, 637 (7th Cir.1998). 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).

4. Declaratory Judgment Act

The Declaratory Judgment Act, 28 U.S.C. § 2201, does not expand the jurisdiction of federal courts. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950). Instead, it merely extends the scope of remedies available. Id.

B. Relevant Facts

Defendants incorporate herein by reference Defendants' statement of material facts.

II. SUMMARY OF ARGUMENT

In the Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandamus (Complaint) (docket1), plaintiffs Diana Gecaj Engstrom (Engstrom) and Maria Del Carmen Diaz-Ruiz (Diaz-Ruiz) (collectively, plaintiffs) claim relief under, inter alia, the APA, alleging that USCIS's delay in adjudicating the Form I-130, Alien Relative Petition (Petition), which was filed on Engstrom's behalf by her U.S. citizen spouse, and of her Form I-485, Application to Register Permanent Residence or Adjust Status (Application); and USCIS's termination of the Form I-130 filed on Diaz-Ruiz's behalf by her U.S. citizen spouse, and the denial of her Form I-485 on the same basis, were abuses of discretion. See 5 U.S.C. §§ 702, 706; Complaint ¶ 43, Prayers for Relief ¶¶ 2-4. For the reasons set forth below, defendants are entitled to judgment as a matter law with respect to plaintiffs' APA claims because the USCIS actions at issue were in accordance with the law.

Plaintiffs also seek mandamus relief in claiming that USCIS owes plaintiffs a clear and certain duty to treat plaintiffs as "immediate relatives" and adjudicate the Petitions and Applications accordingly. Complaint ¶ 46; Prayers for Relief ¶ 12. However, plaintiffs have not shown that their right to mandamus relief is clear and indisputable because they no longer qualify as immediate relatives. Additionally, plaintiffs have not shown that USCIS has a duty to classify them as "immediate relatives." Further, defendants are entitled to judgment as a matter of law with respect to Engstrom's allegation that defendants have "unlawfully withheld" adjudication of her I-130 petition and I-485 application. Complaint ¶ 43. To the contrary, the

delay in the adjudication of Engstrom's petition and application was not unreasonable.

Because plaintiffs are not entitled to judgment as a matter of law as to their APA or mandamus claims, plaintiffs' claims brought under the Declaratory Judgment Act also fail. See Prayers for Relief ¶¶ 2-4. Further, defendants are entitled to judgment as a matter of law with respect to plaintiffs' requests for declaratory and injunctive relief because plaintiffs challenge a regulatory authority and a USCIS practice that have no application to them. See Prayers for Relief ¶¶ 5-8, 11. Specifically, plaintiffs seek 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 ¶¶ 5-8, 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 plaintiffs, the U.S. citizen petitioner dies before the I-130 petition is approved. Therefore, defendants are entitled to judgment as a matter of law with respect to plaintiffs' challenge to the validity of 8 C. F. R. § 205.1(a)(3)(C)(2). Similarly, plaintiffs seek 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, 11. This requirement has no application to plaintiffs because they have not requested humanitarian reinstatement of the petitions and were therefore never required to submit substitute affidavits of support. Therefore, defendants are entitled to judgment as a matter of law with respect to this requirement.

III. ARGUMENT

Defendants Are Entitled to Judgment As a Matter of Law as to Plaintiffs' APA Claims Because Defendants' Actions Comport with the Statute and Reasonably Interpret the Statute.

On the merits, plaintiffs' 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). First, the Court must begin by analyzing the language of the statute to determine if the intent of Congress is clear. 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." Chevron, 467 U.S. at 843.

For the reasons set forth below, Defendants are entitled to summary judgment based upon a straightforward application of the express terms of the immediate relative provision, 8 U.S.C. § 1151(b)(2)(A)(i). Alternatively, even if the statute is ambiguous, multiple factors make it clear that Congress did not intend to enact the interpretation set forth by Plaintiffs, and the Court should defer to the reasonable interpretation of Defendants.

A. 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).¹

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)”

¹ If this exception applies, and if the alien’s now-deceased spouse had 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 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).

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 Plaintiffs because each was married for less than two years. See Complaint ¶¶ 17, 19, 23, 25.

Plaintiffs argue that USCIS's determination that each no longer qualifies as an "immediate relative" of a U.S. citizen due to the death of their citizen spouses is based on an impermissible interpretation of 8 U.S.C. § 1151(b)(2)(A)(i). Complaint ¶¶ 12, 43, 45. In making this argument, plaintiffs contend that USCIS confused the immediate relative definition applicable to Form I-130 petitions filed by U.S. citizen spouses (the first sentence of Section 1151(b)(2)(A)(i)) with the immediate relative definition applicable to Form I-360 self-petitions filed by alien spouses (the second sentence). Id. ¶ 12.

Reading these two sentences together, 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, Plaintiffs' respective marriages ended with the deaths of their citizen spouses, each

Plaintiff 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 Plaintiffs no longer qualify as an “immediate relative” after the death of their husbands because the marriages lasted less than two years. See also Burger v. McElroy, 1999 WL 203353 (S.D.N.Y. 1999); but see Lockhart v. Napolitano, -- F.3d --, No. 08-3321, 2009 WL 2137192 (6th Cir. July 20, 2009), amending 561 F.3d 611 (6th Cir. 2009); Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006); Taing v. Napolitano, 567 F.3d 19 (1st Cir. 2009); Richards v. Napolitano, 2009 WL 1910961 (E.D.N.Y. June 30, 2009) (Unpublished).

As alien widows of U.S. citizens, plaintiffs qualify as “immediate relatives” only if they meet 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 Plaintiffs do not meet this requirement. Complaint ¶¶ 17, 19, 23, 25. Thus, Plaintiffs are not “immediate relatives” for purposes of Section 1151(b)(2)(A)(i).

Plaintiffs seek to avoid the unambiguous language of the second sentence of Section 1151(b)(2)(A)(i) by contending that each is a “spouse” for purposes of the first sentence of the statute, even though their spouses are deceased. Complaint ¶ 12. The Court should reject this

contention. As explained above, 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 Plaintiffs would have this Court do. See Robinson, 554 F.3d at 365. Thus, under the statutory construction principle inclusio unius est exclusio alterius, alien widows such as Plaintiffs are not “spouses” 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).² 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)). 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

² The definition section of the Immigration and Nationality Act (INA) 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.” 8 U.S.C. § 1101(a)(35). This provision is not a meaningful definition, as it merely repeats, and limits, the terms it purportedly defines. See Robinson, 554 F.3d at 365.

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 (6th ed. 1990). A “wife,” in turn, as commonly understood, was defined as “a woman who has a 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)).³ Therefore, Plaintiffs are not “spouses” as the term is commonly understood because their marriages ended upon the death of their citizen spouses. 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 Plaintiffs cannot be considered “immediate relatives” because each is a “widow” and not a “spouse,” nor are they former spouses to marriages 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, Plaintiffs simply cannot meet the straightforward criteria outlined by Congress for immediate relative classification. See Robinson, 554 F.3d at 364, 366.

³ 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).

B. 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. Chevron, 467 U.S. at 843. 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." 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" INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (quoting INS v. Abudu, 485 U.S. 94, 110 (1988)).⁴ For the reasons set forth below, under the Chevron Step Two analysis, the Court should reject Plaintiffs' interpretation of the statute.

To date, four Courts of Appeals have considered the meaning of "spouse" in Section 1151(b)(2)(A)(i). All have held that the term "spouse" is unambiguous, but have disagreed as to the meaning of that language. Compare Robinson, 554 F.3d at 364; with Freeman, 444 F.3d at 1039; Lockhart, 2009 WL 2137192 at *10; and Taing, 567 F.3d at 22.⁵ The Ninth, Sixth, and First Circuits have concluded that the death of a U.S. citizen petitioner

⁴ 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 agency interpretation of 'longstanding' duration.").

⁵ Accord Richards, 2009 WL 1910961 at *11.

does not terminate eligibility of a surviving alien spouse for immediate relative classification, while the Third Circuit has disagreed with that conclusion in supporting the government's construction of the statute. Robinson, 554 F.3d at 365; Freeman, 444 F.3d at 1034; Lockhart, 2009 WL 2137192 at *3; Taing, 567 F.3d at 23. All the Circuits state that the statutory language is unambiguous, even though they disagree as to what that language means. Therefore, a creditable argument may be made that the term "spouse" within Section 1151(b)(2)(A)(i) is ambiguous.⁶ Then, under Chevron, a court must determine whether the agency's interpretation is based on a permissible construction of the statute. See Chevron, 476 U.S. at 842-43. In this case, the interpretation is permissible.

First, this Court should reject Plaintiff's construction as contrary to Board of Immigration Appeals (Board or BIA) precedent. 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). 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

⁶ Accord De La Cruz et al. v. Attorney General et al., Case No. 8:08-cv-01428-JSM-TGW (M.D. Fla. June 17, 2009) at 16 (Unpublished).

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

Although determinations by the Board are binding on the government in the immigration context, see 8 C.F.R. § 1003.1(g), if 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 Seventh 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 Plaintiffs.

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 – a bill to amend the statute to contain the express relief that Plaintiffs advocate 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.”) Similar to the language in the second sentence of Section 1151(b)(2)(A)(i), the bill would have classified as immediate relatives alien widows and widowers who self-petition but without the two-year marriage requirement present within the statute. 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 Plaintiffs as "immediate relatives."

In the current congressional term (111th), two bills, S. 815 and H.R. 1870, containing the identical language of H.R. 6034, have been introduced to provide the very relief that Plaintiffs claims is already available under the statute. Two additional bills introduced in this session of Congress also would provide the requested relief to alien widow(er)s: S. 1247 was introduced by Senator Menendez on June 11, 2009, and on July 9, 2009, the Senate passed S. 1298 (Department of Homeland Security Appropriations Bill), which includes an amendment introduced by Senator Hatch. In pertinent part, Section 556(c) of the bill amends the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i) by striking “for at least 2 years at the time of the citizen’s death.” The amendment would make it possible for all alien widow(er)s of U.S. spouses to self-petition for an immigrant visa regardless of the duration of their marriage at the time of the U.S. citizen’s death. The bill is now before a conference committee for reconciliation

of the House Department of Homeland Security Appropriations Bill (H.R. 2892) and the Senate version. The fact that Congress is 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."

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. See FY2004 National Defense Authorization Act, Pub. L. No. 108-136, Division A, § 1703, 117 Stat. 1392, 1693-96 (2003) (extending 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, 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 Plaintiffs cannot be considered "spouses" 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 provisions 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 “surviving spouses” such as plaintiffs.

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 Plaintiffs. 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.⁷

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 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

⁷ 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).

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 Plaintiffs as "immediate relatives" 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, Plaintiffs' arguments should be rejected.

C. Any Delay in the Adjudication of Engstrom's Petition and Application Is Reasonable.

Further, Defendants are entitled to judgment as a matter of law with respect to Engstrom's allegation that Defendants have "unlawfully withheld" adjudication of her I-130 petition and I-485 application. Complaint ¶ 43. The APA under 5 U.S.C. § 706(1) permits a court to "compel agency action" that is unreasonably delayed, but such action must be legally required. See Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 63 (2004) (When presented with an unreasonable delay claim under the APA, an agency can only be compelled to

take action where the action in question is “a discrete action that [the agency] is legally required to take.”). Similarly, in order to be entitled to mandamus relief, a plaintiff must demonstrate that (1) she has “a clear right to the relief sought;” (2) “the defendant [has] a duty to perform the act in question;” and (3) “no other adequate remedy [is] available.” Ahmed v. Department of Homeland Security, 328 F.3d 383, 387 (7th Cir. 2003); Iddir v. INS, 301 F.3d 492, 499 (7th Cir. 2002). Here, plaintiffs cannot establish that USCIS has a clear duty to act to adjudicate Engstrom’s I-130 petition or adjustment of status application. Such duties are those which the law prescribes and requires to be performed with such precision as to leave nothing to the exercise of discretion or judgment. See Neal v. Regan, 587 F. Supp. 1558, 1562 (N.D. Ind. 1984), citing 55 C.J.S. Mandamus § 132 and Vishnevsky v. United States, 581 F.2d 1249 (7th Cir. 1978). The act in question is here not whether USCIS has a duty to adjudicate applications for immigration benefits at all, but whether USCIS has a duty to adjudicate applications for immigration benefits – specifically applications for adjustment of status – in a proscribed period of time.

Here, USCIS had no clear, ministerial, and non-discretionary duty to adjudicate immigration benefits within a prescribed period of time. Nothing in the text of 8 U.S.C. §§ 1255 or 1154 provides that USCIS must adjudicate an application to completion within a certain time. Nor do plaintiffs cite to any regulation that provides a fixed time in which the adjudication of an application for adjustment of status must be completed. Rather, it is within USCIS’s discretion to determine what procedures and processes are to be utilized in meeting the statutory requirements of 8 U.S.C. § 1255(a), which provides that the “status of an alien who was inspected and admitted or paroled into the United States . . . may be adjusted . . . under such

regulations as [the Attorney General] may prescribe” 8 U.S.C. § 1255(a) (emphasis added).

Similarly, the agency under 8 U.S.C. § 1154(b) has the authority to determine, following an investigation of the facts of each case, if the facts stated in the petition are true and if the alien relative is an immediate relative. 8 U.S.C. § 1154(b)

That Congress has set no time period for USCIS to adjudicate benefit applications or petitions is further indication that USCIS had no duty to adjudicate such applications or petitions within a particular time frame. Unlike the statutory provisions for naturalization applications, which allow aliens to seek district court review of applications which have been pending for more than 120 days after an examination is conducted, see 8 U.S.C. § 1447(b), there is no statutory or regulatory time-line placed upon USCIS for the adjudication of adjustment of status applications. Similarly, the fact that USCIS publishes the average time it take to complete the adjudication of certain benefit applications and petitions does not accurately reflect the time necessary to complete the adjudication of the petition and application in Engstrom’s case. Moreover, such processing times indicate the time that it actually takes USCIS to process certain petitions and applications on average, but do not reflect a regulatory or statutorily mandated processing time. See, e.g., Razaq v. Poulos, 2007 WL 61884, at * 9 n.14 (N.D. Cal. Jan. 8, 2007) (questioning effectiveness of USCIS’s processing times in determining reasonableness, and finding such processing times of “limited utility.”)

Consequently, the pace at which USCIS processes applications and petitions is not susceptible to APA or mandamus jurisdiction because such processes are within the discretion of the Attorney General and are not subject to any specific time requirements. See Work v. United States, 267 U.S. 175, 177 (1925) (holding that mandamus “cannot be used to compel or control a

duty in the discharge of which by law [the defendant] is given discretion”); Hsieh v. Kiley, 569 F.2d 1179, 1182 (2d Cir. 1978) (holding that matters within the INS’s discretion are unreviewable under the mandamus statute); Maldonado-Coronel v. McElroy, 943 F. Supp. 376, 381 (S.D.N.Y. 1996) (“The process by which the application process for an adjustment of immigration status is conducted is an internal INS procedure and is therefore committed to the INS’s discretion”).

Moreover, the delay in the adjudication of Engstrom’s petition and application reasonably resulted from a number of factors, including the Engstrom’s cancellation of her first interview date with USCIS; the introduction of a private bill by Senator Richard Durbin on her behalf for the purpose of adjusting her status to lawful permanent resident; a district court order in a class action lawsuit naming her as a plaintiff, Hootkins et al. v. Napolitano et al., No. 07-5696 CAS (C.D. Cal., filed Aug. 30, 2007), which prohibited USCIS from taking any adverse action in her case; and a recent policy of deferred action for alien widows and widowers recently announced by the Department of Homeland Security. Declaration of Craig J. Neumeier ¶ 8; Declaration of Donald P. Ferguson ¶¶ 4, 5.

D. The Automatic Revocation Regulation and Substitute Sponsor Provision Are Valid But Not Applicable to Plaintiffs.

Finally, Plaintiffs challenge 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 ¶¶ 38, 39, 40; Prayers for Relief ¶¶ 5-6, 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. § 205.1(a)(3)(C)(2). This reinstatement regulation has no application, however, if, as was the case for Plaintiffs, the U.S. citizen petitioner dies before the I-130 petition is approved. USCIS did not employ its authority to revoke the I-130 petitions filed on behalf of Plaintiffs because the petitions were never granted; rather, Engstrom's petition has not been adjudicated, and Diaz-Ruiz's petition was terminated following her husband's death. Therefore, there is no basis to reinstate the petitions under 8 C. F. R. § 205.1(a)(3)(C)(2). Because neither Plaintiff has applied for nor been denied humanitarian relief, Plaintiffs lack standing to raise this claim, and Defendants are entitled to judgment as a matter of law with respect to 8 C. F. R. § 205.1(a)(3)(C)(2).

In a related claim, Plaintiffs challenge the requirement for a substitute affidavit of support (Form I-864) to be filed along with a humanitarian request for reinstatement. Complaint ¶ 40; Prayers for Relief ¶¶ 7-8, 11; 8 C.F.R. § 205.2(a)(3)(C)(2); 8 U.S.C. § 1183a(f)(5)(B). This claim similarly fails for lack of standing because plaintiffs have not applied for humanitarian reinstatement, were not required to submit substitute affidavits, and were therefore unaffected by the practices they purport to challenge. Therefore, because plaintiffs were not required to submit substitute affidavits, Defendants are entitled to judgment as a matter of law with respect to this requirement.

IV. CONCLUSION

For the reasons set forth above, in viewing the facts in the light most favorable to Plaintiffs, USCIS correctly interpreted the term "immediate relative" in adjudicating Diaz-Ruiz's

Form I-130 and Form I-485, and in holding in abeyance the adjudication of Engstrom's Form I-130 and Form I-485. Because USCIS did not abuse its discretion, neither the APA, Mandamus Act nor Declaratory Judgment Act affords relief to Plaintiffs. On the basis of the foregoing, Defendants respectfully request that this Court grant summary judgment in favor of Defendants.

Dated: August 10, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have electronically filed the foregoing DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT 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 10th day of August, 2009.

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