

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;)	
ALEJANDRO MAYORKAS, Director,)	
U.S. Citizenship and Immigration Services,)	
)	
Defendants-Respondents)	

**DEFENDANTS’ REPLY MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

For the reasons set forth below, United States Citizenship and Immigration Services (USCIS) did not abuse its discretion in denying or abeying the adjudication of Plaintiffs’ immediate relative petitions and adjustment of status applications. Because there is no genuine issue as to any material fact, Defendants are entitled to judgment as a matter of law with respect to all claims brought by Plaintiffs. See Defendants’ Memorandum (docket 15); Defendants’ Opposition (docket 19); Fed. R. Civ. P. 56(c); L.R. 56(1).

I. ARGUMENT

A. 8 U.S.C. § 1151(b)(2)(A)(i) Includes A Current Spouse By Its Express Terms.

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). Defendants’ Memorandum at 6-11; Defendants’ Opposition at 2-7. The first sentence of 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." Robinson v. Napolitano, 554 F.3d 358, 364-65 (3d Cir. 2009), rehearing denied (2009); Burger v. McElroy, 1999 WL 203353 at *5 (S.D.N.Y. 1999); but see Lockhart v. Napolitano, 573 F.3d 251 (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. 2009). The second sentence provides an exception for “an alien who was the spouse of a citizen . . . for at least two years” to self-petition for immediate relative classification. See 8 U.S.C. § 1151(b)(2)(A)(i). That narrow exception does not apply to Plaintiffs because each was married for less than two years.¹ Id.

Plaintiffs’ argument that “[r]eference to a surviving spouse as an alien spouse [in the second sentence of Section 1151(b)(2)(A)(i) and the second clause of 8 U.S.C. § 1154(a)(1)(A)] shows inclusion of surviving spouse within the broader ambit of spouse” overreaches. See Plaintiffs’ Response at 2, quoting Taing, 567 F.3d at 26. It fails to take into account the context of the use of the term “spouse” in both sections. It is well-established that a term in a statute must be read in light of “the words around it.” General Dynamics Land Systems Inc. v. Cline, 540 U.S. 581, 596 (2004). Thus, the same word can have different meanings in different parts of the same enactment. See, e.g., id. at 595. The second sentence of Section 1151(b)(2)(A)(i) begins with the phrase “[i]n the case of an alien who was the spouse of a citizen . . . for at least two years at the time of the citizen’s death” and thereafter refers to the “spouse” filing a petition

¹ 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, 554 F.3d at 365; Defendants’ Memorandum at 6-12. Plaintiffs’ argument that the narrow exception in the second sentence should not preclude them from also seeking coverage as a “spouse” under the first sentence violates the canon that the expression of one specific exception should be interpreted as exclusive of any others. See Complaint ¶ 12 (docket 1).

and remarrying. See 8 U.S.C. § 1151(b)(2)(A)(i) (emphasis added). Since the first part of the sentence unambiguously provides that the sentence applies only if the citizen died, it is clear that the “spouse” referred to later in the sentence is a widow or widower. By contrast, the first sentence of Section 1151(b)(2)(A)(i) makes no reference to death, so that sentence applies only when both spouses are living. See id. Indeed, the fact that the second sentence states that the alien “was” a spouse shows that the alien no longer “is” a spouse. See id. By contrast, the first sentence of Section 1151(b)(2)(A)(i), which determines whether Plaintiffs qualify as immediate relatives, does not include similar language making that provision applicable to surviving spouses. See id.

Similarly, the second clause of Section 1154(a)(1)(A) by its terms applies to “[a]n alien spouse described in the second sentence of Section 1151(b)(2)(A)(i).” 8 U.S.C. § 1154(a)(1)(A). It is clear from the text of the latter section that only an alien who “was the spouse of a citizen” can self-petition. See 8 U.S.C. § 1151(b)(2)(A)(i). When viewed in context, the “alien spouse” referred to in the second clause of Section 1154(a)(1)(A) must be a surviving spouse, and Plaintiffs’ attempt to give additional meaning to that term fails. See 8 U.S.C. § 1154(a)(1)(A).

B. USCIS’s Construction of the Statute Is Entitled to Chevron Deference.

If the Court agrees that the statutory language is ambiguous, Defendants’ construction of the statute should be afforded deference and upheld as reasonable because it is consistent with Board of Immigration Appeals (BIA or Board) precedent on the issue, Matter of Varela, 13 I. & N. Dec. 453 (BIA 1970), as endorsed by the final affidavit of support rule; legislative history and subsequent congressional action; other statutes related to adjustment of status; a comparison to other Immigration and Nationality Act (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. See Defendants' Memorandum at 12-20; Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984). Plaintiffs' assertion that Chevron does not apply fails because, although the four Courts of Appeal that have considered the meaning of the term "spouse" in Section 1151(b)(2)(A)(i) have all held that the term is unambiguous, the courts have disagreed on the meaning of that language. See Plaintiffs' Response at 2; compare Robinson, 554 F.3d at 364; with Lockhart, 573 F.3d at 258; Freeman, 444 F.3d at 1039; Taing, 567 F.3d at 22. This supports the conclusion that the congressionally-enacted language is not clear.

Plaintiffs rely on the holding in Taing that, because the first two sentences of Section 1151(b)(2)(A)(i) created "separate and independent pathways," a widow(er) still qualifies for immediate relative classification as a "spouse" under the first sentence. See Plaintiffs' Response at 3, quoting Taing, 567 F.3d at 28. This reliance is not supported by the language in the INA. Congress 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 8 U.S.C. §§ 1154(b), (e); Matter of Alarcon, 20 I. & N. Dec. 557, 562 (BIA 1992). Plaintiffs' argument is weakened by its assumption that a "surviving spouse" is a "spouse," a conclusion that is contrary to the common, ordinary meaning of the term "spouse." See Defendants' Memorandum at 10-11.

Moreover, 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 supported by Congress's use of the term "surviving spouse" in at least six sections within the INA. See 8 U.S.C. §§ 1101(a)(27)(H) & (I)(ii); 1430

(a), (b) & (d); 1439(g); 1612(a)(2)(C)(iii); 1613(b)(2)(C); & 1622(b)(3)(C); Defendants' Memorandum at 17-18. By contrast, Congress chose not to include the term "surviving spouse" in the first sentence of Section 1151(b)(2)(A)(i).

Further, Plaintiffs' argument that it would be inappropriate to consider recent congressional activity is misplaced. See Plaintiffs' Response at 2. Neither the bill introduced in the most recent session of Congress (110th), H.R. 6034, nor the four bills introduced in the current session can be described as "failed legislative proposal[s]" that are not indicative of Congress's prior and current interpretation of the statutory language in this case. Rather, these legislative attempts to amend the statute make patently clear that Congress shares the agency's view that the statutory language must be revised in order to afford relief to widows like Plaintiffs. H.R. 6034 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. Congress's interpretation of the immediate relative provision was made abundantly clear in the committee report: "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." See 110 H. Rpt. 911. Contrary to Plaintiffs' assertion, that language in the committee report is particularly salient. The introduction of four bills during this session further demonstrates that Congress continues to view a legislative fix as necessary to provide the requested relief in this case.

Finally, Plaintiffs allege that the two exceptions for widow(er)s to qualify for immediate relative classification without any durational requirement for the marriage are "inapposite"

because they pertain to the second sentence of section 1151(b)(2)(A)(i), while Plaintiffs maintain that they qualify as “spouses” under the first sentence. Plaintiffs’ Response at 3, quoting Taing, 567 F.3d at 30 (citing FY2004 National Defense Authorization Act, Pub. L. No. 108-136, Division A, § 1703, 117 Stat. 1392, 1693-96 (2003); USA PATRIOT Act, Pub. L. No. 107-56, §§ 421 and 423, 115 Stat. 272, 360-363). However, these exceptions are consistent with Defendants’ interpretation that surviving spouses of marriages lasting less than two years, such as Plaintiffs, do not qualify for immediate relative classification under the first sentence. Rather, a surviving spouse must either qualify under the National Defense Authorization Act or the USA PATRIOT Act. These statutes demonstrate that when Congress has wanted to provide exceptions to surviving spouses, it has done so expressly.

C. The Adjudication Of Engstrom’s Petition and Application Was Not Unreasonably Delayed.

Engstrom’s allegation that Defendants have “unlawfully withheld” adjudication of her I-130 petition and I-485 application should be dismissed. See Complaint ¶ 43; Defendants’ Memorandum at 20-23; 5 U.S.C. § 706(1). Engstrom argues that the adjudication has been unreasonably delayed under the Administrative Procedure Act (APA). Plaintiffs’ Response at 4, citing 5 U.S.C. § 555(b). But 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).

Rather, Plaintiffs’ references to case law construing Section 555(b) to require agencies to resolve agency matters within a reasonable time fail to address in any way what might constitute a “reasonable” amount of time to complete the adjudications under the unique circumstances of

these cases. See id. at 4-6. Plaintiffs' conclusory statement that "[u]nder the circumstances of this case, it is unreasonable for the agency to take nearly six years to determine whether Mrs. Engstrom is an immediate relative," id. at 6, is without merit. During the pendency of the adjudication, USCIS has not been attempting to determine whether Engstrom qualifies for immediate relative classification. To the contrary, the delay in the adjudication of Engstrom's petition and application reasonably resulted from a number of factors, including 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, which prohibited USCIS from taking any adverse action in her case, Hootkins v. Chertoff, 2008 WL 1735146, *6 (C.D. Cal., Apr. 7, 2008) (Unpublished); and a new policy of deferred action for alien widows and widowers recently announced by the Department of Homeland Security. Declaration of Craig J. Neumeier ¶ 8 (docket 16-2); Declaration of Donald P. Ferguson ¶¶ 4, 5 (docket 16-3); Defendants' Memorandum at 23. Plaintiffs fail to address any of these factors, including the role Engstrom played in bringing about the delay in her adjudication. Further, with the recent issuance by USCIS of revised guidance implementing the deferred action policy, Engstrom (and Diaz-Ruiz) may now apply for deferred action to remain in the United States. Second Declaration of Craig J. Neumeier, Exhibit A, Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children. The application of this guidance and the desire of USCIS to withhold a negative action on Engstrom's adjudications are surely "[w]ith due regard for the convenience and necessity of the parties" See 5 U.S.C. § 555(b).

D. Defendants Properly Require A Substitute Affidavit Of Support After The Death Of The Petitioner/Sponsor.

Plaintiffs are not entitled to declaratory relief that 8 C.F.R. § 205.1(a)(3)(C)(2) is invalid as a matter of law, see Defendants' Memorandum at 23-24, and in fact concede that the regulation "is inapplicable to a pending petition." See Plaintiffs' Response at 4. Plaintiffs thus acknowledge that the regulation is inapplicable to the adjudication of Plaintiffs' petitions, since neither was approved and subsequently revoked.

Plaintiffs also seek declaratory relief that the initial filing by a citizen spouse of a Form I-864, affidavit of support, satisfies the requirement that an applicant for adjustment of status must be admissible. Complaint, Prayers for Relief ¶ 7, citing 8 U.S.C. §§ 1181(a)(4)(C)(ii), 1183a(f)(5)(B). Rather, for those individuals whose spouses die after an I-130 relative petition has been approved, revocation of that petition is automatic. 8 C.F.R. § 205.1(a)(3)(i)(C). USCIS may reinstate the approval of I-130 petition, as a matter of discretion, when the beneficiary of the petition requests reinstatement for humanitarian reasons and another relative (as described in 8 U.S.C. § 1183a(f)(5)(B)) is willing and able to file an affidavit of support as a substitute sponsor.

Plaintiffs refer to the USCIS policy guidance implementing the Freeman decision in an attempt to evade the substitute sponsor requirement. See Plaintiffs' Response at 6-7; Second Declaration of Craig J. Neumeier, Exhibit B, Effect of Form I-130 Plaintiff's Death on Authority to Approve the Form I-130 (USCIS Memorandum).² The USCIS Memorandum amended the USCIS Adjudicators' Field Manual ("AFM") by adding a new chapter 21.2(a)(4)(A) and (B) to

² The USCIS Memorandum remains in effect for adjudications arising within the jurisdictions of the Ninth and Sixth Circuits to the extent that it comports with the order issued in the class action, Hootkins v. Napolitano, __ F.Supp.2d. __, 2009 WL 2222839 (C.D.Cal., Apr. 28, 2009).

inform adjudicators of this policy implementing Freeman.

Defendants' guidance specified that, for cases arising outside the Ninth Circuit, USCIS adjudicators follow Matter of Varela and the general rule that marriage ends when one spouse dies. Id. at 3. For cases arising in the Ninth Circuit, the USCIS memorandum instructed that, under Freeman, adjudicators approve a Form I-130 after the petitioner has died, if the case involves the same essential facts. Id. at 6-7. If the Form I-130 was approved, USCIS was to exercise its discretion to reinstate the petition upon the petitioner's death under 8 C.F.R. § 205.1(a)(3)(i)(C), if a substitute affidavit of support was filed. Id. at 7.

Approval of a Form I-130, however, is simply a precursor to the alien's application for an immigrant visa or adjustment of status. To be eligible actually to immigrate, the alien must still establish that he or she is admissible. Neither an immigrant visa under 8 U.S.C. § 1182(a), nor adjustment of status under 8 U.S.C. § 1255(a)(2), is available to an inadmissible alien. An immediate relative, with certain exceptions, is inadmissible unless a qualifying sponsor has filed an affidavit of support that meets the requirements of the Act. 8 U.S.C. §§ 1182(a)(4)(C) and 1183a. A primary requirement of Section 1183a of the Act is that the affidavit of support must be enforceable against the individual who signed it. 8 U.S.C. § 1183a(a)(1)(B). "No affidavit of support may be accepted," if it is not enforceable. Id.

If the original visa petitioner has died, Defendants are permitted to accept a Form I-864 from a qualified substitute sponsor. 8 U.S.C. § 1183a(f)(5)(B), as amended, Family Sponsor Immigration Act of 2002, Pub. L. 107-150, 116 Stat. 74 (2002). Following the example of Section 1183a(f)(5)(B), the USCIS Memorandum provides for submission of a new Form I-864 through the revocation and reinstatement of the approval of the Form I-130. USCIS

Memorandum at 7, adopting AFM chapter 21.2(a)(4)(B)(2). This step brings the case under the statutory provision for the submission of a Form I-864 by someone other than the original visa petitioner. If this step is taken, and the alien is otherwise eligible for adjustment, USCIS may, as a matter of discretion, approve the adjustment application. If there is no substitute sponsor, the necessary implication is that the adjustment application will be denied. In sum, AFM 21.2(a)(4)(B)(2) properly provides for the submission of a substitute sponsor's Form I-864 if a Form I-130 is approved under Freeman after the petitioner's death.

E. The USCIS Memorandum Does Not Make Inadmissibility a Basis for Denying a Form I-130.

Plaintiffs argue that “Defendants seek to utilize grounds of inadmissibility in violation of law to deny Plaintiffs’ visa petitions.” See Complaint, Prayers for Relief, ¶ 8; Plaintiffs’ Response at 9. As the Board held in Matter of O-, the fact that an alien is inadmissible does not warrant denial of a visa petition. 8 I. & N. Dec. 295, 297-98 (BIA 1959). Any confusion concerning the difference between the approval of a visa petition and the alien's actual admissibility rests with Plaintiffs’ argument, not the USCIS Memorandum. There are two separate provisions in the USCIS Memorandum that apply to the Defendants' implementation of Freeman. One provision, codified in AFM chapter 21.2(a)(4)(B)(1), addresses whether a Form I-130 may be approved after the underlying marriage has been terminated by the visa petitioner's death. This provision states the rule in Freeman: a Form I-130 can still be approved, even if the underlying marriage has ended by the petitioner's death. All the alien needs to do to obtain approval of the Form I-130 is to prove that the alien was the spouse of the petitioner when the petitioner died, and that the marriage was not an immigration sham. AFM chapter 21.2(a)(4)(B)(1). On this point, Defendants' policy is fully consistent with Freeman. Chapter

21.2(a)(4)(B)(1) is also consistent with Matter of O- because it does not require that admissibility be considered in adjudicating a Form I-130.

Plaintiffs' actual dispute, rather, relates to the second provision, codified as AFM chapter 21.2(a)(4)(B)(2). The first sentence of AFM chapter 21.2 clearly indicates that this provision addresses whether the alien can actually immigrate, once a Form I-130 is approved. The very issue that chapter 21.2(a)(4)(B)(2) addresses is how, once the Form I-130 is approved under Freeman, the alien can "overcome inadmissibility on public charge grounds." USCIS Memorandum at 7, adopting AFM chapter 21.2(a)(4)(B)(2).

An adjustment applicant must be admissible as an immigrant, 8 U.S.C. § 1255(a)(2), and the applicant must establish admissibility "clearly and beyond doubt." 8 U.S.C. § 1225(b)(2). This burden of proof applies to an adjustment applicant, as well as to an applicant for admission with a visa. See Matter of Silva-Trevino, 24 I. & N. Dec. 687, 709 (AG 2008). Approval of a visa petition does not establish that the alien is actually admissible. 8 U.S.C. § 1153(e) (approval of visa petition does not preclude later finding of inadmissibility). An alien's eligibility for adjustment of status is decided based on the facts of the case as they exist on the date of decision. Matter of Alarcon, 20 I. & N. Dec. at 562. Under Freeman, an alien may still qualify as the spouse of a citizen, even though the qualifying marriage has terminated by death. All other admissibility factors, however, must still be satisfied at the time of the decision regarding adjustment of status. Matter of Alarcon, 20 I. & N. Dec. at 562.

An alien seeking to immigrate as an immediate relative is inadmissible unless the visa petitioner submits an affidavit of support, Form I-864, that is enforceable. 8 U.S.C. §§ 1182(a)(4)(C), 1183a(a)(1)(B). The visa petitioner/sponsor has no support obligation unless

the alien actually acquires permanent residence. 8 C.F.R. § 213a.2(e)(1). The obligation ends if the visa 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 visa petitioner/sponsor dies before the alien immigrates.

AFM chapter 21.2(a)(4)(B)(2) uses the "revoke and reinstate" mechanism under 8 C.F.R. § 205.1(a)(3)(i)(C) to provide the adjustment applicant with a means for submission of a substitute sponsor's Form I-864. But this provision reflects the fact that the statute provides only one basis for submission of a Form I-864 if the visa petitioner has died. If the Form I-130 has been approved, but the visa petitioner has died, the statute permits Defendants to accept a Form I-864 from someone else if Defendants have "determined for humanitarian reasons" that revocation of the approval would not be appropriate. 8 U.S.C. § 1183a(f)(5)(B). Congress provided no mechanism for the submission of a Form I-864 after the petitioner has died. Thus, Defendants provided in AFM chapter 21.2(a)(4)(B)(2) that a Form I-130 that is approved under AFM chapter 21.2(a)(4)(B)(1) should be revoked and reinstated precisely to facilitate the alien's immigration, if a substitute sponsor is available. Without an enforceable Form I-864 from a substitute sponsor, the alien is inadmissible under 8 U.S.C. § 1182(a)(4)(C) and therefore ineligible for adjustment of status as a matter of law. 8 U.S.C. § 1255(a)(2).

F. An Alien Whose Visa Petitioner Has Died Requires A Substitute Sponsor To Be Admissible.

Plaintiffs' argument that a substitute sponsor's Form I-864 is not required despite the death of the petitioner/sponsor is without merit. See Plaintiffs' Response at 7; Complaint, Prayers for Relief ¶ 7. According to Plaintiffs, it is enough for the sponsor simply to sign the Form I-864. Plaintiffs' Response at 7-8. They contend that it is not necessary at all for the Form

I-864 to meet the requirements of 8 C.F.R. § 213a because those requirements "serve merely the form and process of the affidavit." Id. Plaintiffs' reliance on Pierno v. INS, 397 F.2d 949 (2d Cir. 1968) is misplaced for the reasons set forth earlier. See Plaintiffs' Response at 7; Defendants' Opposition at 14. Their citation to the district court decision in Hootkins v. Napolitano, ___ F.Supp.2d ___, 2009 WL 2222839, as invalidating the humanitarian revocation regulation is also mistaken. See Plaintiffs' Response at 7. Plaintiffs fail to discuss that the district court in Hootkins was bound to implement the Freeman decision, as binding Ninth Circuit precedent, and did so in invalidating the regulation. See id. By contrast, Freeman is not binding authority on this Court.

Plaintiffs' argument that execution of the Form I-864 satisfies the INA is meritless. See Plaintiffs' Response at 7-8. Section 1182(a)(4)(C)(ii) expressly says the alien must have a Form I-864 "described in Section 213A of the Act." 8 U.S.C. § 1182(a)(4)(C)(ii). Section 213A states explicitly that a Form I-864 may not be accepted unless it is enforceable against the individual who signed it. 8 U.S.C. § 1183a(a)(1)(B). The legislative history of Section 213A is particularly instructive here, as it states the provision was needed because "[v]arious State court decisions and decisions by immigration courts have held that the affidavits of support, as currently constituted, do not impose a binding obligation on the sponsor." H.Rep. 104-725 at 387 (1996); cf. H.Rep. 104-641 at 1451 (1996). To say, as Plaintiffs do, that a Form I-864 does not actually need to be enforceable is to say that enactment of Section 213A failed to accomplish its purpose. See Plaintiffs' Response at 7-8. As noted above, the support obligation does not even begin unless the sponsored immigrant acquires permanent residence. 8 C.F.R. § 213a.2(e)(1). Further, the support obligation terminates when the visa petitioner dies. 8 C.F.R. § 213a.2(e)(2)(ii). In a

case in which the visa petitioner dies while the Form I-130 and Form I-485 are pending, therefore, no actual support obligation ever comes into force. Thus, there is no longer a valid and enforceable Form I-864. But requiring the submission of an enforceable support obligation is the cardinal feature of the Form I-864 requirement. 8 U.S.C. § 1183a(a)(1)(B). Thus, the Form I-864 requirement can be met only by the submission of a Form I-864 from a living sponsor who meets the requirements of 8 C.F.R. § 213a.

Citing 8 U.S.C. § 1183a(c), Plaintiffs suggest that the estate of a deceased petitioner could be deemed the sponsor. Plaintiffs' Response at 8-9. But that statute clearly requires that the sponsor must be an "individual." See 8 U.S.C. § 1183a(f)(1). An estate is not an individual. Moreover, 8 U.S.C. § 1183a(c) provides no support at all for the proposition that an estate can be liable for a support obligation after the sponsor dies. See 8 U.S.C. § 1183a(c). First, Section 213A(c) makes no reference at all to any estate. The provision allows a judgment creditor whose judgment is based on a Form I-864 to enforce the judgment using the procedures under Federal law that apply generally to enforcement of judgments. One of these remedies, under 28 U.S.C. § 3205(d)(2), does permit execution of a judgment lien against the estate of a judgment debtor. But Section 3502(d)(2) applies if the judgment debtor dies "after a writ of execution is issued." Thus, Section 3502(d)(2) allows an estate to be held responsible for a debt that was reduced to judgment while the individual was alive. The Form I-864 rule is consistent with this statutory arrangement. See 8 C.F.R. § 213a.2(e)(3) (estate may be liable for support or reimbursement obligation that accrued before decedent's death).

Plaintiffs also cite to 8 U.S.C. § 1183a(a)(3)(A), which provides that one way that an affidavit becomes unenforceable is upon completion of a certain period of employment by the

alien beneficiary; Plaintiffs note that death of the petitioner is not listed as a basis for termination of the enforceability period. Plaintiffs' Response at 8. But, as noted above, Section 1183a requires that the sponsor must be an "individual," 8 U.S.C. § 1183a(f)(1), and an estate is not an individual.

Thus, regardless of whether the Form I-130 is approved and reinstated, or simply approved, the alien, unless completely exempt from the Form I-864 requirement, may obtain adjustment of status only if there is a Form I-864 from a living sponsor whose Form I-864 meets the requirements of 8 C.F.R. § 213a. If the visa petitioner has died, the Form I-864 must be from a substitute sponsor, who must be related in the manner specified in 8 U.S.C. § 1183a(f)(5)(B). Accordingly, AFM chapter 21.2(a)(4)(B)(2) is consistent with the law.

II. CONCLUSION

On the basis of the foregoing, Defendants respectfully request that this Court grant summary judgment in favor of Defendants.

Dated: September 14, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have electronically filed the foregoing DEFENDANTS' REPLY 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 14th day of September, 2009.

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