

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DIANA GECAJ ENGSTROM, and,)
MARIA DEL CARMEN DIAZ-RUIZ)

Plaintiffs,)

vs.)

Case No: 1:09-cv-03185

JANET NAPOLITANO, Secretary,)
U.S. Department of Homeland Security, et al.)

Defendants.)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiffs challenge Defendants' determination that, as a matter of law, Plaintiffs were automatically stripped of their status as "immediate relatives" when their United States citizen spouse died while Plaintiffs' pending immigration applications were awaiting agency action. The Defendants' position does not comport with holdings of the U.S. Courts of Appeal for the Ninth, Sixth, and First Circuits. See *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006); *Lockhart v. Napolitano*, ___F.3d___, No. 08-3321, 2009 WL 2137192 (6th Cir. July 20, 2009), amending 561 F.3d 611 (6th Cir. 2009); *Taing v. Napolitano, et al.*, 567 F.3d 19 (1st Cir. 2009); but see *Robinson v. Napolitano*, 554 F.3d 358 (3rd Cir. 2009) (holding that an "alien married less than two years ceased to be an immediate relative upon her husband's death"). Nor does Defendants' position comport with the recent opinion from the U.S. District Court for the Eastern District of New York. See *Richards v. Napolitano*, 2009 WL 1910961 (E.D.N.Y.) (holding defendants' denial on the basis that plaintiff is no longer a spouse was not in accordance with law); but see *Burger v. McElroy*, No. 97 Civ. 8775 (RPP), 1999 U.S. Dist. LEXIS 4854 (S.D.N.Y. Apr. 12, 1999) (deferring to agency interpretation of spouse). Defendants' position is also contrary to the recent finding of the U.S. District Court for the Central District of California in the *Hootkins* Class Action lawsuit, where the Court issued an order stating that, "[p]laintiffs who reside in the Ninth and Sixth Circuits are entitled to "immediate relative" classification based on their status as surviving spouses of deceased United States citizens." *Hootkins v. Napolitano*, 2009 WL 2222839 (C.D.Cal. 2009). Because the Court in *Hootkins* declined to rule on plaintiffs' claims outside of the Ninth and Sixth Circuits, Plaintiffs filed a separate complaint with this court on May 27, 2009.

II. STATEMENT OF FACTS

A. Plaintiff Engstrom¹

Plaintiff Diana Gecaj Engstrom (“Engstrom”) was born in Kosovo in 1980 and is a citizen of Kosovo, the former Yugoslavia. Mrs. Engstrom resides in Chicago, Illinois.

In 2003, Mrs. Engstrom entered the United States lawfully, and was inspected and admitted. On December 29, 2003, Mrs. Engstrom married Todd Engstrom, a United States citizen and United States Army Contractor responsible for training Iraqi security forces in Iraq. On January 29, 2004, Mrs. Engstrom’s U.S. citizen spouse filed, with the required fee, a Form I-130, Petition for Alien Relative (“Petition”) establishing his citizenship and that his spouse is an immediate relative, and executed an I-864 Affidavit of Support. On the same date, Mrs. Engstrom filed, with the required fee, a Form I-485, Application to Register Permanent Residence or to Adjust Status (“Application”), seeking adjustment of status to lawful permanent resident, relying on the citizen spouse's Petition attesting to the alien's status as spouse. Mrs. Engstrom was assigned an alien registration number (“A-Number”), which is A99 103 420, and was issued a work permit by USCIS. On September 14, 2004, plaintiff’s spouse Todd Engstrom was killed in Iraq when his convoy was hit by a rocket-propelled grenade.

Defendants have withheld approval of the Petition and Application that were filed by the couple more than five (5) years ago, and Mrs. Engstrom has not been accorded adjustment of status to lawful permanent resident status. Mrs. Engstrom was a plaintiff in a class action lawsuit, *Hootkins v. Napolitano*, 2009 WL 2222839 (C.D.Cal.). The court in *Hootkins* limited the class to the Ninth and Sixth Circuits, and in an Order dated April 28, 2009, declined to rule

¹ The complaint contains a mis-spelling in the caption. The correct spelling is Engstrom, not Enstrom. Plaintiffs regret the mis-spelling, which carries over to the electronic system.

on plaintiffs' claims outside of these circuits. *Id.*, at * 8. On May 5, 2009, Mrs. Engstrom filed for voluntary dismissal of claims without prejudice under Fed. R. Civ. P. 41(a)(1)(A)(ii).

B. Plaintiff Diaz-Ruiz

Plaintiff Maria Del Carmen Diaz-Ruiz ("Diaz-Ruiz") was born in Spain in 1973 and is a citizen of Spain. Mrs. Diaz-Ruiz lives in Glencoe, Illinois. Mrs. Diaz-Ruiz entered the United States lawfully, and was inspected and admitted.

On June 29, 2004, Mrs. Diaz-Ruiz married Christopher Rodriguez, a United States citizen. On December 30, 2004, Mrs. Diaz-Ruiz' U.S. citizen spouse filed with the required fee a Form I-130, Petition for Alien Relative ("Petition") establishing his citizenship and that his spouse is an immediate relative, and executed an I-864 Affidavit of Support. On December 30, 2004, Mrs. Diaz-Ruiz filed with the required fee a Form I-485, Application to Register Permanent Residence or to Adjust Status ("Application"), seeking adjustment of status to lawful permanent resident, relying on the citizen spouse's Petition attesting to the alien's status as spouse. Mrs. Diaz-Ruiz was assigned an alien registration number ("A-Number"), which is A99 235 659, and was issued a work permit. On June 13, 2005, plaintiff's spouse Christopher Rodriguez died of congenital heart disease.

On December 22, 2005, defendants denied the Petition and Application that were filed by the couple solely on the basis that Mrs. Diaz-Ruiz was no longer the spouse of a U.S. citizen. On May 18, 2006, Mrs. Diaz-Ruiz filed a motion to reopen which was denied by the USCIS Field Office Director in a written opinion dated October 25, 2006.

Mrs. Diaz-Ruiz was a plaintiff in a class action lawsuit, *Hootkins v. Napolitano*, 2009 WL 2222839 (C.D.Cal. 2009). The court in *Hootkins* limited the class to the Ninth and Sixth

Circuits, and in an Order dated April 28, 2009, declined to rule on plaintiffs' claims outside of its jurisdiction. *Id.*, at * 8. On May 5, 2009, Mrs. Diaz-Ruiz filed for voluntary dismissal of claims without prejudice under Fed. R. Civ. P. 41(a)(1)(A)(ii).

III. THIS COURT HAS SUBJECT MATTER JURISDICTION

Across the nation, courts have found jurisdiction to consider challenges to the "widow penalty." See *Freeman*, 444 F.3d at 1037 (finding jurisdiction and quoting *Wong v. INS*, 373 F.3d 952, 963 (9th Cir. 2004) ("[D]ecisions made on a purely legal basis may be reviewed as they do not turn on discretionary judgment....[The 8 U.S.C. § 1252(a)(2)(B) bar on review of discretionary decisions does not apply to cases] rais[ing] only constitutional or purely legal, nondiscretionary challenge to the decisions in question."); *Robinson*, 554 F.3d at 360, (finding jurisdiction under 28 U.S.C. § 1291 and holding that the "district court had jurisdiction under 28 U.S.C. § 1331 and Section 704 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704, to review the meaning of the term "immediate relative" as it appears in 8 U.S.C. § 1151(b)(2)(A)(i)"); *Lockhart*, 561 F.3d at 614 (citing *Freeman* as support that it has jurisdiction to review, *de novo*, a "purely legal question, such as the proper definition of 'spouse' under 8 U.S.C. § 1151(b)(2)(A)(i)); *Taing*, 567 F.3d at 22-23 (citing 5 U.S.C. § 706(2)(A), (C) and finding that "The APA gives a court power to 'hold unlawful and set aside' not only agency action that is 'arbitrary' or 'capricious,' but also agency action that is 'otherwise not in accordance with law' or is 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'").

Alternatively, the Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1361 of the Mandamus Act. That statute grants district courts "original jurisdiction in any action in the nature of mandamus to compel an officer or employee of the United States or any agency

thereof to perform a duty owed to the plaintiff.” *Id.* “The extraordinary remedy of mandamus under 28 U.S.C. § 1361 will issue only to compel the performance of a clear nondiscretionary duty.” *Pittston Coal Group v. Sebben*, 488 U.S. 105, 121 (1988). In order to obtain relief under the Mandamus Act, the Plaintiffs must show: (1) that they have the clear legal right to the relief sought; (2) that the defendants have a clear legal duty to do the particular act requested; and (3) that no other adequate remedy is available. *Id.* (citing *Asare v. Ferro*, 999 F. Supp. 657, 659 (D. Md. 1998)). Plaintiffs satisfy each of the three criteria and have a clear legal right to the relief sought. *Robinson*, 554 F.3d at 360; *Lockhart*, 561 F.3d at 614; *Taing*, 567 F.3d at 22-23.

IV. EXHAUSTION IS NOT REQUIRED

It is well settled that administrative exhaustion is not required where, as here, exhaustion would be futile. *See Bowen v. City of New York*, 476 U.S. 467 (1986); *McKart v. United States*, 395 U.S. 185 (1969); *Volvo GM Heavy Truck Corp. v. U.S. Dep’t of Labor*, 118 F.3d 205 (4th Cir. 1997). The Executive Office of Immigration Review (“EOIR”) has no jurisdiction over Plaintiffs’ Form I-130 petitions and therefore cannot grant Plaintiffs relief. *See Matter of Sano*, 19 I. & N. Dec. 299, 301 (BIA 1985); *Lockhart*, 2008 WL 80225 at *5 (N.D. Ohio) (*aff’d sub nom Lockhart v. Napolitano*, 561 F.3d 611 (6th Cir. 2009)); *Taing*, 526 F. Supp. 2d at 180-81 (*aff’d sub nom Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009)); and *Richards*, 2009 WL 1910961 at *2 (confirming that there is no form of relief absent relief from the District Court). Furthermore, under 8 C.F.R. § 245.2(a)(5)(ii) (2008), Plaintiffs cannot appeal the denial of their Form I-485 application for adjustment of status. While the regulation provides the opportunity to renew the I-485 application in removal proceedings, it is “functionally meaningless” because the denial of the I-130 petition is a “final agency action” and the I-485 application is dependent on the approved I-130 petition. *Lockhart*, 2008 WL 80225 at *5 (citing *Taing*, 526 F. Supp. 2d

at 182-86) (*aff'd sub nom Lockhart*, 561 F.3d 611). As such, Plaintiffs have no administrative remedies available to them. *Id.* Plaintiffs have exhausted their remedies and any effort by Plaintiffs to seek administrative relief would be an exercise in futility. *Id.*

Moreover, pursuant to U.S. Supreme Court precedent, federal courts may not require Plaintiffs to exhaust administrative remedies before seeking review under the APA unless exhaustion is expressly required by statute or an agency rule. *Darby v. Cisneros*, 509 U.S. 137, 143-44 (1993); *see also Volvo GM Heavy Truck Corp.*, 118 F.3d at 209 (citing *Darby*). Here, no statute or rule mandates exhaustion. The regulation, 8 C.F.R. § 245.2(a)(5)(ii), does not expressly require that an alien renew a denied I-485 application in removal proceedings. Instead, 8 C.F.R. § 245.2(a)(5)(ii) states that an alien “may renew a denied application” in removal proceedings. This language is permissive. In fact, on June 15, 2009, Defendants confirmed that they will take no action to remove widows and widowers of U.S. citizens for at least a two-year period. See Exhibit A. Accordingly, Plaintiffs are not required to await the uncertain possibility that they might be placed in removal proceedings before seeking relief in a federal court.

V. STANDARD FOR SUMMARY JUDGMENT – PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

Federal Rule of Civil Procedure 56(c) authorizes summary judgment if “no genuine issue” exists regarding any material fact and “the moving party is entitled to judgment as a matter of law.” The moving party must show an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the showing is made, the nonmoving party must “go beyond the pleadings” and designate specific facts showing a “genuine issue for trial.” *Id.* at 324, citing FRCP 56(e).

The question before the Court for resolution – whether the statute permits Defendants to automatically deny the properly filed petitions and applications for adjustment of – is a question of law. No factual issues exist that can only be resolved by a finder fact because they “may reasonably be resolved in favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

VI. ARGUMENT

A. Chevron Deference is Not Appropriate Where the Statute is Clear and Unambiguous

Where an agency’s construction of a statute it administers is at issue, the courts are:

[C]onfronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give full effect to the unambiguously expressed intent of Congress . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the [next] question for the court is whether the agency’s answer is based on a permissible construction of the statute.

Chevron USA Inc. v. Nat’l Resources Def. Council, 467 U.S. 837, 842-43 (1984). Four U.S. Courts of Appeals have addressed this issue and have determined: 1) that Chevron does not apply; and 2) that congressional intent is clear and unambiguous. *Freeman*, 444 F.3d at 1039; *Robinson*, 554 F.3d at 365; *Lockhart*, 561 F.3d at 622; *Taing*, 567 F.3d at 23. Furthermore, three of the Courts of Appeals have decided that the plain language of 8 U.S.C. § 1151(b)(2)(A)(i) does not deprive a spouse of “immediate relative” status upon the death of the citizen-spouse. *Freeman v. Gonzales*, 444 F.3d 1031, 1039 (9th Cir. 2006); *Lockhart v. Napolitano et al.*, 561 F.3d 611, 622 (6th Cir. 2009); *Taing v. Napolitano, et al.*, 567 F.3d 19, 23 (1st Cir. 2009) (determining that they need not reach the second step of the *Chevron* framework because the plain language of the statute does not deprive [a spouse] of “immediate relative” status. One

Circuit Court has disagreed. *Robinson v. Napolitano*, 554 F.3d 358, 365 (3rd Cir. 2009) (determining the statute does deprive a spouse of immediate relative status). However, the *Robinson* dissent states that *Chevron* does not apply because, “Congress provided a definition of “immediate relative” and had no reason to delegate further authority to the executive department to further tweak the definition.” *Id.* at 368. The dissent further argues, “I would not defer to the government’s interpretation.” *Id.*

As such, if the statutory text is plain and unambiguous, one need not ask the second question of *Chevron*, “whether the agency’s answer is based on a permissible construction of the statute.” 467 U.S. at 842-43. However, Defendants’ contend that regardless of whether the statute is ambiguous, under *Chevron* principles courts must defer to the agency’s interpretation as in *Matter of Varela* where the BIA held that an alien spouse is no longer a spouse when the citizen-spouse dies prior to adjudication of an adjustment of status application. *Lockhart*, 561 F.3d at 622 (citing *Matter of Varela*, 13 I. & N. Dec. 453 (B.I.A. 1970)).

The Court in *Lockhart* found Defendants’ argument unpersuasive, as 1) a “non-precedential decision like *Matter of Varela* is not entitled to *Chevron* deference” and 2) the BIA’s decision in *Varela* “lacks the necessary statutory analysis that would entitle it to ... *Chevron*...deference.” *Id.* (citing *Freeman*, 444 F.3d at 1038 and *United States v. Mead Corp.*, 533 U.S. 218, 228, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001)). Even assuming, *arguendo*, that *Varela* is viable, deference is inappropriate because it fails to provide a “full-blown reasoned interpretation” of the statute. *Singh v. Ashcroft*, 383 F.3d 144, 152 (3rd Cir. 2004). Furthermore, courts “need not defer to an agency’s construction if they hold the agency’s interpretation to be contrary to congressional intent.” *Taing*, 567 F.3d at 23 (citing *Succar*, 394 F.3d at 23). See *Freeman*, 444 F.3d at 1038 (quoting *NRDC v. Nat’l Marine Fisheries Serv.*, 421 F.3d 872, 877

(9th Cir. 2005)); *Richards*, 2009 WL 1910961 at *3 (citing *N.Y. Public Interest Research Group v. Whitman*, 321 F.3d 316, 324 (2d Cir. 2003) (citing *Chevron* and holding that deference is not “due to an agency’s interpretation that contravenes Congress’ unambiguously expressed intent”).

Defendants’ interpretation of the statute is based on *Matter of Varela*, 13 I. & N. Dec. 453 (BIA 1970), which was later modified by *Matter of Sano*, 19 I. & N. Dec. 299 (BIA 1985). The Ninth Circuit Court of Appeals correctly described the level of deference owed to *Varela*. The Court explained that *Varela* is an “extra-jurisdictional” decision that suffers from a “lack of statutory analysis” and does not offer “a permissible construction of the statute.” *Freeman*, 444 F.3d at 1038. The Sixth Circuit also concluded that “a non-precedential decision like *Matter of Varela* is not entitled to *Chevron* deference.” *Lockhart*, 561 F.3d at 622. Not addressing *Matter of Varela*, the First Circuit determined that the statute was clear, and the Court therefore need not pursue *Chevron* deference any further. *Taing*, 567 F.3d at 23-24; and *Richards*, 2009 WL 1910961 at *3. Accordingly, this Court should reject Defendants’ reliance on *Varela* for the proposition that Plaintiff’s citizen-spouse’s untimely death stripped Plaintiff of her spousal status.

Defendants have also argued that its construction is entitled to *Chevron* deference because “it is based on administrative interpretations of long-standing duration.” Longevity of the policy underlying the statutory interpretation is no cure to the defect in that interpretation as the D.C. Circuit recently recognized, “such deference must still yield to the plain meaning of the statute.” *Port Authority of New York and New Jersey v. Department of Transportation.*, 479 F.3d 21, 32 (D.C. Cir. 2008). Here, the plain meaning of the statute is clear and Petitioners are, as a matter of law, entitled to “immediate relative” classification under the statute. *See Freeman*, 444 F.3d at 1039; *Lockhart*, 561 F.3d at 622; *Taing*, 567 F.3d at 23.

Defendants additionally rely on *Varela*, when they argue that the final affidavit of support rule, 71 Fed. Reg. 35732 (June 21, 2006), supports Defendants' position, by mentioning the holding in *Varela*. As stated by the dissent in *Robinson*,

In *Chevron* the Court ruled that when Congress explicitly or implicitly delegates authority to an executive agency to develop regulations and practices to fill the interstices in the law, the courts must defer to them...In *Chevron* Congress had failed to define a term. The EPA promulgated detailed regulations and national standards defining the term at issue. The court held that because the regulatory scheme was 'technical and complex,' the agency 'considered the matter in a detailed and reasoned fashion, and the decision involve[d] reconciling conflicting policies,' courts must defer to the technical expertise of the agency. *Chevron*, 467 U.S. at 865, 104 S.Ct. 2778. Here Congress provided us with a definition of 'immediate relative' and had no reason to delegate, explicitly or implicitly, any further authority to the executive department to further tweak the definition. The words and phrases at issue are not technical. The agency has no relevant expertise to more fully define them for us. There is no legislative history to suggest there existed any controversy which Congress referred to the agency to resolve.

Robinson, 554 F.3d at 368 (Nygaard, J., dissenting). *Chevron* has no applicability here.

B. Plain Meaning of the Word "Spouse"

The INA provides no affirmative definition of the term "spouse." Instead "spouse" is defined by whom it does not include:

The term "spouse," "wife," or "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). Notably, this definition has not changed since its original enactment in 1952. Where Congress has not defined a term, in determining the term's ordinary meaning, courts refer to dictionary definitions. *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004).

“Spouse” is a common term. The Sixth Edition of Black’s Law Dictionary was published in 1990 and available when the Immigration and Nationality Act (“INA”) was amended that year to include the second sentence of § 1151(b)(2)(A)(i). The Sixth Edition defines “[s]pouse” as “[o]ne’s husband or wife, and ‘surviving spouse’ is one of a married pair who outlives the other.” Black’s Law Dictionary 1402 (6th ed. 1990). This definition of spouse not only expressly includes “surviving spouse” and also reflects that the status as spouse persists despite the death of one member.

Relying on the sixth edition of Black’s Law Dictionary, the edition Congress would have consulted when amending the statute, the First and Sixth Circuits, as well as the U.S. District Court for the Eastern District of New York, recently held that the “ordinary meaning of the term “spouse” includes a “surviving spouse.” *Taing*, 567 F.3d at 25-26; *Lockhart*, 561 F.3d at 618; *Richards*, 2009 WL 1910961 at *7 (holding that because surviving spouse “is subsumed within the dictionary definition of “spouse,” it follows that plaintiff is a “spouse” within the ordinary meaning of that term”). Plaintiff’s status as spouse is not “obliterated” by her husbands’ death. She has outlived her spouse, and a spouse she remains.

C. The Distinction Between ‘Marriage’ and ‘Spouse’

Defendants argue that because marriage ends with the death of one spouse, a surviving spouse is not a “spouse.” *Lockhart*, 561 F.3d at 618. Thus, as their argument goes, when one spouse dies, the survivor is no longer the wife or husband of the deceased, and therefore, no longer a “spouse.” *Taing*, 567 F.3d at 25. Defendants have cited the following statute to support their proposition:

...the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7. Noting that the definition used by Defendants originated from the Defense of

Marriage Act (“DOMA”), the First Circuit found its application misplaced:

The government overreaches here. ... DOMA was intended to limit the institution of marriage to heterosexual unions, not to alter the traditional meaning of the word “spouse,” which, ... includes surviving spouse under its common, ordinary meaning. ...nothing in the legislative history of DOMA contemplates upsetting Congress’s intent behind its use of the word “spouse” in the immigration context. ...it would be improper for us to give the definition of “spouse” in DOMA such unintended breadth.

Taing, 567 F.3d at 25 (emphasis added). *See also Lockhart*, 561 F.3d at 619 (stating that Defendants’ argument fails because the plain language emphasizes that “spouses shall be of the opposite sex, it does not mandate that spouses lose their status as such with the death of either one of them.”). Significantly, Congress did not use the term “marriage” in the first sentence of 8 U.S.C. § 1151(b)(2)(A)(i). Instead, Congress used the term “spouse”, a term that encompasses within its definition a surviving spouse.

Additionally, Defendants have looked to state law to support their contention that there is a distinction between “spouse” and “surviving spouse” such that the latter is separate and apart from the former. Recently, the U.S. District Court for the Eastern District of New York found this argument unconvincing by pointing out that Defendants’ argument focuses on “whether plaintiff remains legally married,” while the issue of this case is whether plaintiff “qualifies as a ‘spouse.’” *Richards*, 2009 WL 1910961 at *8. The court in *Richards* continues to state that,

The fact that plaintiff’s marriage reached its legal conclusion upon her husband’s death does not control whether plaintiff remains her deceased husband’s “spouse,” as that term is commonly understood.

Id. Further, Defendants have pointed to sections in the applicable state’s family code that merely defines what constitutes a valid marriage within the state, providing only that marriage between a man and a woman is valid. As stated in *Lockhart*,

Although federal courts may look to state law for guidance in defining terms, formulating concepts, or delineating policies, courts need not incorporate state-law definitions where to do so would frustrate a federal statute's purposes. See *Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 617 (6th Cir. 1998) (citing *De Sylva v. Ballentine*, 351 U.S. 570 (1956) (noting courts may look to state-law definitions of terms in defining such terms in a federal statute but need not where doing so would frustrate the purpose of the federal statute)). Moreover, the Secretary does not explain why we should elevate Ohio's definition of spouse or marriage above the intent of Congress. Nor does the Secretary argue that Congress considered Ohio law or any other state law when drafting the 'immediate relative' provision or during the amendment of that statute.

561 F.3d at 620. Defendants' recourse to state law frustrates the purpose of the statute, which is designed to provide for a citizen to file a petition on behalf of his or her spouse, and for the spouse to be classified as an "immediate relative".

D. Text and Structure of the Statute

Under 8 U.S.C. § 1151(b)(2)(A)(i) and 8 U.S.C. § 1154(a)(1)(A)(i) a U.S. citizen may petition to have the status of an alien who is an "immediate relative" adjusted to lawful permanent resident. The first sentence of § 1151(b)(2)(A)(i) defines who qualifies as an "immediate relative."

Immediate relatives - For purposes of this subsection, the term "immediate relatives" means that the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.

Id. Most significantly, the first sentence of 8 U.S.C. § 1151(b)(2)(A)(i), includes "children, spouses, and parents" of U.S. citizens. *Id.* Within this group, only alien parents are subjected to any limitation, "with the grant of immediate relative status being restricted to those whose citizen child is at least 21 years of age." *Freeman*, 444 F.3d at 1039; *see also, Lockhart*, 561 F.3d at 616; *Taing* 567 F.3d at 26 (quoting *Freeman*). "The statute places no comparable limitations on a 'spouse', such as a requirement that the marriage must have existed for at least two years."

Freeman, 444 F.3d at 1039.

‘Spouse,’ in turn, is defined by whom it does not include:

The term “spouse,” “wife,” or “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). Notably, this definition has not changed since its original enactment in 1952 and is a negative definition which does not preclude the common understanding of the term.

In order to sponsor immediate relatives for lawful permanent resident status, the United States citizen files a Form I-130, Immigrant Petition, with USCIS. The statute provides as follows:

[A]ny citizen of the United States claiming that an alien is entitled to classification by reason of a relationship described in paragraph (1), (3), or (4) of section 203(a) [preference immigrants subject to quotas] or to an immediate relative status under section 201(b)(2)(A)(i) may file a petition with the Attorney General for such classification.

8 U.S.C. § 1154(a)(1)(A)(i); *see also* 8 C.F.R. §§ 204.1(a)(1), 204.2(a) (2008). Thus, for a *first sentence* spouse, the *first clause* of § 1154(a)(1)(A) applies.

The *second sentence* of § 1151(b)(2)(A)(i) defines a second class of “immediate relatives”: an alien who was the spouse of a U.S. citizen for two years at the time of the U.S. citizen spouse’s death and each child of the alien.

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 . . . 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). In the event a United States citizen spouse dies *without filing* an I-130 petition, the *second sentence* of the statute provides a *separate right* for alien spouses to *self-petition* for immediate relative classification under the *second clause* of § 1154(a)(1)(A):

An alien spouse described in the second sentence of section 1151(b)(2)(A)(i) *also may file* a petition with the Attorney General under this subparagraph for classification of the alien (and the alien's children) under such section.

8 U.S.C. § 1154(a)(1)(A)(ii) (emphasis added); *see also* 8 U.S.C. § 1151(b)(2)(A)(i). This right to self-petition is qualified. The statute allows self-petition by alien spouses whose U.S. citizen spouse failed to file a petition on their behalf only if (1) the alien was a spouse for a period of two years at the time of the U.S. citizen spouse's death and (2) the alien spouse self-petitions for immediate relative classification within two years of U.S. citizen spouse's death. 8 U.S.C. § 1151(b)(2)(A)(i).

Alien spouses seeking to qualify under the second sentence of § 1151(b)(2)(A)(i) must self-petition by filing Form I-360 (U.S. citizen spouses are required to file Form I-130). *See* 8 C.F.R. §§ 204.1(a)(1), 204.2(b) (2008) (self-petition I-360 process); *cf.* 8 C.F.R. §§ 204.1(a)(1), 204.2(a) (2008) (U.S. citizen spouse/I-130 process). Congress intentionally created “two different processes, such that one or the other applies - either the citizen spouse petitions or, if he dies without doing so, the alien widow may do so” under the conditions set forth in the statute. *Freeman*, 444 F.3d at 1042. As explained by the Sixth Circuit in *Lockhart*, the second class of immediate relatives does not modify the first class of immediate relatives:

We agree with the *Freeman* court that ‘the two-year durational language in the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i) grants a separate right to an alien widow to self-petition, within two years of the citizen spouse's death, by filing a [F]orm I-360 where the citizen spouse had not filed an immediate relative petition prior to his death.’”

Lockhart, 561 F.3d at 616 (citing *Freeman*, 444 F.3d at 1039); *Taing*, 567 F.3d at 26 (quoting *Freeman*, 444 F.3d at 1039). Additionally, the First Circuit in *Taing*, further stated that:

...it is clear to us that the first two sentences in § 1151(b)(2)(A)(i) should be read creating separate and independent pathways...There is nothing in the language of the second sentence to imply that it was intended to strip away “spouse” status from a surviving spouse whose deceased spouse had already filed an I-130 petition.

Id.

Nevertheless, in previous litigation, Defendants have contended that the second sentence of § 1151(b)(2)(A)(i) modifies the first. According to Defendants, the alien and U.S. citizen spouse must have been married for at least two years in order for the alien spouse to be considered an “immediate relative” if the U.S. citizen spouse dies. Several courts have rejected this reasoning. *Freeman*, 444 F.3d 1031; *Lockhart*, 561 F.3d 611; *Taing*, 567 F.3d 19.

In the minority, the Third Circuit agreed with Defendants holding that the second sentence qualifies the definition of a spouse to include as an immediate relative the widow(er) of a U.S. citizen spouse who died as long as s/he had been a spouse for at least two years at the time of the U.S. citizen spouse’s death. *Robinson*, 554 F.3d at 364 (determining that the first sentence could not be divorced from the second). As the dissent points out, this holding is “fatally flawed.” *Id.* at 367. Congress did not impose a requirement that the couple be married for two years as a pre-requisite to an alien spouse obtaining resident status. In fact, the Defendants concede that there is no two-year minimum to qualify either as a spouse for filing or for being granted an adjustment of status. *Freeman*, 444 F.3d at 1041.

The Third Circuit conflated two separate “two-year rule” sections: 1) 8 USC § 1186a (conditional residence statute) providing for conditions on permanent resident status granted to

alien spouses who entered into the marriage less than two years prior to approval, were beneficiaries of petitions filed by a U.S. citizen spouse under the *first clause* of 8 USC § 1154(a)(1)(A)(i)(I), and 2) the *second clause* of 8 USC § 1154(a)(1)(A)(i)(II) providing a self-petitioning right of alien spouses under the second sentence of 8 USC § 1151(b)(2)(A)(i). The Conditional Residence statute was enacted in 1986 before the second sentence of 8 USC § 1151 was inserted in 1990 and specifies that termination of conditional residence may not occur “through the death of a spouse.” See 8 USC § 1186a (b)(1)(A)(ii); 8 USC § 1186a (c)(1)(A); 8 USC § 1186a (c)(4)(B); 8 USC § 1186a (d)(1)(A)(i)(II); 8 USC § 1186a(g). Three Circuit Courts and the dissent of the Third Circuit found the evidence compelling enough to conclude that Congress did not intend a spouse who experienced a quick adjudication resulting in permanent resident status followed by the death of her spouse within two years of the marriage to be completely insulated from having her permanent resident status terminated, while at the same time have intended a spouse who experienced a long bureaucratic delay to have her petition terminated, where the death of her spouse occurred within two years of the marriage. *Freeman*, 444 F.3d at 1041; *Robinson*, 554, F.3d at 371 (Nygaard, J. dissenting); *Lockhart*, 561 F.3d at 620 (citing the dissent in *Robinson*); *Taing*, 567 F.3d at 31.

Plaintiffs fall within the definition of “immediate relative” provided by the first sentence of § 1151(b)(2)(A)(i) because their U.S. citizen-spouses filed I-130 petitions to classify them as “immediate relatives” under the statute. Nothing in the statute authorizes the automatic stripping of their eligibility for “immediate relative” classification due to their US citizen husbands’ deaths during Defendants’ bureaucratic processing. 8 U.S.C. § 1154(a)(1)(A)(i).

Plaintiffs urge this Court to adopt the reasoned, logical and cogent analysis of 8 U.S.C. § 1151(b)(2)(A)(i) as set forth by the U.S. Court of Appeals for the Ninth Circuit in *Freeman*, the

U.S. Court of Appeals for the Sixth Circuit in *Lockhart*, and the U.S. Court of Appeals for the First Circuit in *Taing*. See *Freeman*, 444 F.3d at 1039-43; *Lockhart*, 561 F.3d at 615-16; *Taing*, 567 F.3d at 26. The *Freeman* court determined that: [t]he language of the first sentence of §1151(b)(2)(A)(i), which sets out the general definition of “immediate relative,” is straightforward and succinct, and expressly includes “spouses.” 444 F.3d at 1039-43. Only alien “parents” are subject to any limitation, with the grant of “immediate relative” status being restricted to those whose citizen child is at least 21 years of age. *Id.* There is no comparable qualifier to be a “spouse” - that is, there is no requirement that the marriage must have existed for at least two years:

This fact only underscores our duty to refrain from reading a phrase into a statute when Congress has left it out. Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. . . . Under the express terms of the statute, [Plaintiff] qualified as the spouse of a U.S. citizen when [Plaintiff and her] husband petitioned for [an immigrant visa and] adjustment of status, and absent a clear statutory provision voiding her spousal status upon her husband’s untimely death, she remains a surviving spouse. Neither the definition of immediate relative nor the text and structure of the adjustment of status regime provides support for the government’s position [Plaintiff] should be stripped of [her] spousal status.

Freeman, 444 F.3d at 1039-40 (citations and quotations omitted). The *Freeman* court recognized that the first sentence of 8 U.S.C. § 1151(b)(2)(A)(i) – under which the instant case falls – governs I-130 petitions filed by U.S. citizen spouses and that there is no language in the Immigration and Nationality Act voiding such petitions in the event of death. 444 F.3d at 1039-40. Further, the *Freeman* court recognized that the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i) “grants a separate right to an alien widow to self-petition, within two years of the citizen-spouse’s death, by filing a form I-360 where the citizen-spouse has not filed an

immediate relative petition prior to his death.” *Id.* at 1040. Both the *Lockhart* and *Taing* courts agreed with the *Freeman* Court and reached the same conclusion. *See Lockhart*, 561 F.3d at 616; *Taing*, 567 F.3d at 26.

E. Present Tense Language in § 1154(b)

Defendants have argued that because 8 U.S.C. § 1154(b) is worded in the present tense, the facts attested to in the citizen’s petition must be true at the time of the adjudication of the petition for adjustment of status, and not filing of the petition, and that the alien must be an immediate relative at the time of that determination. Defendants point to the usage of the phrases “are true” and “is an immediate relative”, as supporting its view that it is no longer true that a surviving spouse remains a spouse for immediate relative purposes. The Court in *Taing* addressed Defendants’ argument:

[b]ecause we read the first two sentences of § 1154(b)(2)(A)(i) as creating separate and independent pathways,...the use of the present tense in § 1154(b) does not affect our analysis because Mrs. Taing still qualifies as “an immediate relative” despite her husband’s death.

Taing, 567 F.3d at 28.

According to Defendants, however, the phrase “was a spouse” establishes the distinction between a “spouse” and a “surviving spouse” for purposes of the first sentence of 8 USC §1151(b)(2)(A)(i). This conclusion requires that the phrase be read in isolation in contravention of well-settled cannons of statutory interpretation. *See, e.g., TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is a ‘cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant’.”). When read in context, the phrase “was the spouse” is merely a reference to the length of the marriage prior to the citizen’s death. In providing the affirmative right to an “alien spouse” to self-petition where the alien spouse “was the spouse of a

citizen of the United States for at least two years,” the statute does not also destroy the right of a widow whose spouse properly filed an I-130 petition before death. The section merely notes that, in order to self-petition on one’s own (and on behalf of one’s children), the alien must have been a spouse for two years at the time of the death. Thus, the statute sets up a temporal limitation on the right to self-petition – the alien spouse must have been a spouse *for two years* at the time of the death – which does not lead to the conclusion that the alien spouse is no longer a spouse. By analogy, a statutory provision that, for example, allows certain benefits for a person who was a resident of the State for at least two years at the time of the passage of a law would apply to those who were residents for two years, without the incorrect inference that they are no longer residents now. As stated by the Court in *Lockhart*, “[t]he more natural reading of the second sentence indicates that the word ‘was’ does not merely modify the term ‘spouse’ but modifies the entire phrase in order to establish a marriage-duration requirement for self-petitions, i.e., the alien-spouse ‘was a spouse... *for at least two years.*’” *Lockhart*, 561 F.3d at 618 (emphasis in original).

Moreover, the language of 8 USC § 1151(b)(2)(A)(i) confirms that “spouse” includes surviving spouse. *Taing*, 567 F.3d at 26. The court in *Taing* notes:

The fact that within the same subsection, Congress uses the word “spouse” to refer to a living spouse and a surviving spouse lends support to the argument that it intended for “spouse” to include surviving spouse.

Id. (citing *Freeman*, 444 F.3d at 1039-41 and quoting *Robinson*, 554 F.3d at 369 (Nygaard, J., dissenting) (“Congress used ‘spouse’ to refer to a continuing marital bond between the deceased petitioner and a surviving husband or wife.”)); *see also Lockhart*, 561 F.3d at 617 (holding that “spouse” is used to refer to a surviving alien-spouse).

F. Automatic Revocation

Defendants have argued that 8 U.S.C. § 1155 and regulations at 8 C.F.R. § 205.1(a)(3)(i)(C)(2) allow the automatic revocation of the approval of any petition approved under § 1154 at any time for “good and sufficient cause.” *Taing*, 567 F.3d at 28 (citing 8 U.S.C. § 1155). Under 8 U.S.C. § 1155:

The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under 8 U.S.C. § 1154.

8 U.S.C. § 1155. As concluded by the First, Sixth, and Ninth Circuits, automatic revocation is inapplicable because there is no approved petition; instead, plaintiffs’ I-130 petitions are pending. *See, e.g., Freeman*, 444 F.3d 1031; *Lockhart*, 561 F.3d at 622 (stating that it is “not entirely clear that the DHS has in fact used this provision to deny pending “immediate relative” petitions solely on the basis of the citizen-spouse’s death”); *Taing*, 567 F.3d at 29 (holding that “[they] are not convinced that [they] should extend a regulation that applies to the revocation of approved petitions to the pending petition context”).

Furthermore, the Second Circuit has stated that it could “hardly imagine” that Congress intended 8 U.S.C. § 1155 to result in automatic revocation of a visa petition upon the death of the citizen spouse. *Pierno v. INS*, 397 F.2d 949, 951 (2d Cir. 1968). In *Pierno*, the Court reviewed the automatic revocation of a petition approved prior to the death of the petitioner, but where the adjustment of status application had not been adjudicated at the time of the death. The court explained the automatic revocation regulations:

[T]he Service contends that the automatic revocation of approval pursuant to Regulation 206.1(b)(2) [later renumbered 205.1], when Mr. Pierno died, precludes the Service from granting Mrs. Pierno’s application for an adjustment of status. We disagree.

Section 206 [later renumbered 205], under which the automatic revocation regulations are promulgated, provides:

The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition [for nonquota status] approved by him. . .

The section is permissive; it grants the Attorney General discretion in determining what shall constitute good and sufficient cause and whether revocation of approval shall occur or be withheld in those cases where there is good and sufficient cause for revocation. It should not be interpreted to authorize the Attorney General's wooden application of rules for automatic revocation. . . . *We can hardly imagine that Congress would have intended Mrs. Pierno to be deported as a result of her husband's death had he been, for instance, killed in action while the status adjustment proceedings were pending. Yet, such a result would follow from the Service's decision. The purpose of placing such discretion regarding immigration in the hands of the Attorney General, rather than having that field governed by a detailed statute, is to give some flexibility in treating a myriad of possible situations. Regulations issued by the Attorney General should not be so applied as to frustrate that Congressional intent.*

Id. at 950-51 (emphasis added) (alteration in original). The automatic revocation regulations continue to frustrate the intent of Congress and are *ultra vires*. See *Hootkins v. Napolitano*, 2009 WL 2222839 (C.D.Cal. 2009) (holding that 8 C.F.R. § 205.1(a)(3)(i)(C)(2) is *ultra vires* and invalid, finding Plaintiffs' arguments convincing that the relevant question is whether the evidence "would have warranted a denial based on the petitioner's failure to meet his or her burden of proof", quoting *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987), and because *Freeman* holds that death of the petitioning spouse cannot form the basis for the denial, it cannot form the basis for revocation). Consequently, the automatic revocation regulations do not constitute a "permissible construction of the statute" found at 8 U.S.C. § 1155, and are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44.

G. Subsequent Legislation is not Dispositive

Defendants have argued that when Congress wants to permit "immediate relative" status

based on a relationship that has been dissolved by death, Congress enacts specific legislation such as the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 356 §§ 421(a), (b)(1)(B)(i) (2001) and the National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, 117 Stat. 1693, § 1703(a) – (e) (2003). Defendants have argued that if Congress wanted to allow “immediate relative” status to widows/widowers, it would have been explicit. *Taing*, 567 F.3d at 30. The court in *Taing* found these arguments unavailing and held that, “The government’s references to the Patriot Act and NDAA are inapposite because, to the extent that they are relevant, the cited provisions pertain to the second sentence of § 1151(b)(2)(A)(i), not the first sentence.” *Id.*

Regardless of these other Acts, however, recourse to legislative history to determine the intent of Congress is unnecessary as the language of the statute is clear. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004); *United States v. Oregon*, 366 U.S. 643 (1961). Plaintiffs are entitled to classification as “immediate relatives” under the first sentence of the “immediate relative” definition, because their U.S. citizen husbands properly filed immediate relative petitions under the first clause of the statute providing for petitions for “immediate relative” classification.

H. Public Policy

The Ninth, Sixth, and First Circuits have determined that Congress did not intend for the speed at which it takes immigration authorities to process an application and the happenstance of death to be the controlling factors in the outcome of an immediate relative petition. *Freeman*, 444 F.3d at 1043; *Taing*, 567 F.3d at 30-31; *Lockhart*, 561 F.3d at 620-621. The *Taing* Court further notes, “[t]he result the government seeks would create [] an arbitrary, irrational and inequitable outcome in which approvable petitions will be treated differently depending solely

upon when the government grants the approval” *Taing*, 567 F.3d at 30-31 (citing *Lockhart*, 561 F.3d at 620 and quoting *Robinson*, 554 F.3d at 371 (Nygaard, J., dissenting)). Plaintiffs’ interpretation of the statute comports with common sense and does not create arbitrary and “manifestly unjust results.” *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989).

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that summary judgment in Plaintiffs’ favor be granted.

DATED this 31st day of July, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED on the 31st day of July, 2009, at Lake Oswego, Oregon.

/s/ Brent W. Renison
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