

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| 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, ¹ Director, |) | |
| U.S. Citizenship and Immigration Services, |) | |
| |) | |
| Defendants-respondents |) | |

**DEFENDANTS’ OPPOSITION TO PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT**

Defendants oppose Plaintiffs’ Motion for Summary Judgment (docket 11) and file contemporaneously a response to Defendants’ Statement of Material Facts (docket 13), which are not at issue. L.R. 56.1(b)(2), (3). Plaintiffs seek relief under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., and related mandamus, declaratory and injunctive relief, in challenging the decisions by United States Citizenship and Immigration Services (USCIS) related to the respective alien relative petitions filed on behalf of Plaintiffs and their adjustment of status applications. Complaint (docket 1). For the reasons set forth below and in Defendants’ Memorandum in Support of Motion for Summary Motion (docket 15), USCIS’s actions were not

¹ Pursuant to Fed. R. Civ. P. 25(b), Alejandro Mayorkas, the confirmed successor as the head of the agency to Michael Aytes, is automatically substituted as the proper party defendant in this action.

an abuse of discretion, and Defendants are entitled to judgment as a matter of law with respect to all claims brought by Plaintiffs. See 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.

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).² Defendants' Memorandum at 6-11. Under Step One of the Chevron analysis, the statute provides a clear definition of "immediate relative" which includes only a current "spouse," and does not include a "widow(er)" or a "surviving spouse." Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-844 (1984); Robinson v. Napolitano, 554 F.3d 358, 364-65 (3d Cir. 2009), rehearing denied (2009); 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); accord Richards v. Napolitano, 2009 WL 1910961 (E.D.N.Y. 2009). 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. 8 U.S.C.

§ 1151(b)(2)(A)(i); Defendants' Memorandum at 8. 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 of section 1151(b)(2)(A)(i). The second sentence "qualifies which spouses of deceased citizens are immediate relatives," and provides the rule that determines that Plaintiffs no longer qualify as an "immediate relative" after

² Defendants do not contest that this Court has subject matter jurisdiction over Plaintiffs' claims. See Plaintiffs' Memorandum at 4-6.

the death of their husbands because the marriages lasted less than two years. See Robinson, 554 F.3d at 364-65; see also Burger v. McElroy, 1999 WL 203353 at *5 (S.D.N.Y. 1999).

Plaintiffs argue that the statute is clear and unambiguous but contend that it supports their interpretation of the statute that the death of a citizen spouse does not terminate an alien widow(er)'s spousal status for purposes of immediate relative classification. Plaintiffs' Memorandum at 7-10. Plaintiffs cite, inter alia, three Circuit Court of Appeals opinions that agree with their construction of the statute. Lockhart, 573 F.3d 251; Freeman, 444 F.3d 1031; Taing, 567 F.3d 19; accord Richards, 2009 WL 1910961. But the Third Circuit's conclusion in Robinson that the only exception to the termination of immediate relative classification upon the death of the citizen spouse is the one explicitly stated in the statute – for marriages lasting more than two years – is more persuasive and should be followed by this Court. See Robinson, 554 F.3d at 365; Defendants' Memorandum at 8-11.

i. The Two Sentences in Section 1151(b)(2)(A)(i) Must Be Read Together.

The first sentence in Section 1151(b)(2)(A)(i) cannot be divorced from the second. Robinson, 554 F.3d at 364. If the citizen spouse dies, the two-year marriage requirement applies to the widow(er), and this rule applies both to surviving spouses whose citizen spouse filed an immediate relative petition prior to death and to surviving spouses whose citizen spouse did not file the petition. Id. The Third Circuit fully considered and rejected the analysis of the only Circuit Court opinion on point at the time, the Ninth Circuit opinion in Freeman, after analyzing numerous additional sources, including, inter alia, Board of Immigration Appeals (BIA or Board) precedents directly on point, verb tenses contained within Section 1151(b)(2)(A)(i) and other Immigration and Nationality Act (INA) provisions, canons of statutory construction, regulatory

authority, and prior legislative history. Id., 554 F.3d 358.

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). Plaintiffs' Memorandum at 16. Reading these two sentences together, however, 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. This construction is supported by the canon of statutory construction inclusio unius est exclusio alterius (the inclusion of certain provisions implies the exclusion of others), which 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 8-9. Therefore, this Court should reject Plaintiffs' attempt to avoid the unambiguous language of the second sentence by contending that each is a "spouse" for purposes of the first sentence, even though their spouses are deceased. See Plaintiffs' Memorandum at 9-10 (citations omitted).

ii. The Court Should Apply the Ordinary Meaning of "Spouse."

Further, the ordinary meaning of the term "spouse" does not include widows like Plaintiffs. Defendants' Memorandum at 10-11. At the time of the enactment of the second sentence of Section 1151(b)(2)(A)(1), the dictionary definition of "spouse" was "[o]ne's husband or wife." See Black's Law Dictionary 1402 (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). 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)).

Plaintiffs also cite the 1990 enactment of Black’s Law Dictionary in arguing that Congress’s use of the term “spouse” in the statute encompasses the term “surviving spouse.” Plaintiffs’ Memorandum at 10-11 (additional citations omitted). But Plaintiffs overemphasize the fact that the dictionary has separate references to a “surviving spouse” under the definition of “spouse.” Id. Rather, the drafters of the dictionary saw a need to differentiate a “surviving spouse” from a “spouse” with the addition of the qualifier “surviving.” A “surviving spouse” is distinct from a “spouse,” thereby undermining Plaintiffs’ claim to qualify as “spouses” under the first sentence of the statute despite the death of their citizen spouses. It is significant that the statute does not explicitly include the term “surviving spouse.” Defendants submit that this Court should adopt the Third Circuit’s analysis. See Robinson, 554 F.3d at 366 (“The fact that Black’s Law Dictionary’s entry for spouse defines “surviving spouse” separately disproves Robinson’s hypothesis,” and “to conclude that ‘spouse’ and ‘surviving spouse’ have the identical meaning is illogical and is contrary to our understanding of the legal effect of death on a marriage.”).

The common, ordinary meaning of “spouse” also refutes Plaintiffs’ argument that they are entitled to immediate relative classification because the statute does not explicitly qualify the term “spouse” in the first sentence. See Plaintiffs’ Memorandum at 13-14, 18 (contrasting the term “spouse” in the immediate relative statute which does not include a qualifier, with the term “parents” within the statute, which includes the condition that a citizen child must be at least 21

years of age to petition for a parent). As explained above, the common, ordinary meaning of “spouse” implicitly limits the immediate relative definition to current spouses (in addition to the other named relatives). Therefore, there is no significance to the fact that Congress did not further limit the term “spouse” in the first sentence to current spouses at the time of adjudication. Based on the common, ordinary meaning of “spouse,” there was no need to qualify the term.

iii. The Contextual Use of “Spouse” Leads to the Conclusion that a “Spouse” Must be a “Current Spouse.”

In arguing that Plaintiffs are “spouses” for purposes of the first sentence, Plaintiffs also point to the use of the term “spouse” in the second sentence of the statute, which refers to a “surviving spouse” in that context. Plaintiffs’ Memorandum at 20 (citations omitted). This assertion, however, overlooks the special context in which “spouse” was used in the statute. 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 a different meaning in different parts of the same enactment. See, e.g., id. at 595 (“age” has different meanings in different parts of the Age Discrimination in Employment Act). 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 2 years at the time of the citizen’s death” and thereafter refers to the “spouse” filing a petition and remarrying (emphasis added). 8 U.S.C. § 1151(b)(2)(A)(i). 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. Indeed, the fact

that the second sentence states that the alien “was” a spouse shows that the alien no longer “is” a spouse. See 8 U.S.C. § 1151(b)(2)(A)(i) (emphasis added). By contrast, the first sentence, which determines whether Plaintiffs qualify as immediate relatives, does not include similar language making that provision applicable to surviving spouses.

iv. Federal Law Defines a “Spouse” as a “Current Spouse.”

Further supporting USCIS’s interpretation of Section 1151(b)(2)(A)(i) is the definition of “spouse” under Federal law. Defendants’ Memorandum at 11, note 3, citing 1 U.S.C. § 7 (additional citation omitted). 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). Plaintiffs attempt to counter this by reference to the purpose of the statute, i.e., “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.” Plaintiffs’ Memorandum at 11-12, quoting Taing, 567 F.3d at 25 (emphasis added). This argument should be dismissed because it fails to counter the statutory language that a “spouse . . . is a husband or a wife,” and is based on the faulty premise that a “surviving spouse” remains a “spouse.”

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. 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.

B. USCIS's Construction is Entitled to Chevron Deference.

Alternatively, this Court may determine that the Congressionally-enacted language is not clear on the issue in question, especially in view of the fact that the four Courts of Appeal that have considered the meaning of "spouse" in Section 1151(b)(2)(A)(i) have all held that the term is unambiguous, but have disagreed on the meaning of that language. Compare Robinson, 554 F.3d 358; with Lockhart, 573 F.3d 251; Freeman, 444 F.3d 1031; Taing, 567 F.3d 19. Under Step Two of the Chevron analysis, if the Court determines that the statute is ambiguous, multiple factors make it clear that Congress did not intend to enact the interpretation set forth by Plaintiffs, and that this Court should defer to Defendants' reasonable interpretation.

i. This Court Should Apply Board Precedent.

First, this Court should reject Plaintiff's construction as contrary to Board precedent holding 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); Defendants' Memorandum at 13; see Plaintiffs' Memorandum at 8-9. Plaintiffs attempt to undermine the validity of Varela by reference to Matter of Sano, 19 I. & N. Dec. 299 (BIA 1985). Plaintiffs' Memorandum at 9. Although the Board in Sano concluded that it had erred in Varela by asserting jurisdiction to review the denial of an alien relative petition, the Board did not question Varela's conclusion on the merits that a widowed alien is no longer a "spouse," and is therefore not an "immediate relative" once the petitioning citizen spouse had died. Sano, 19 I. & N. Dec. 299. Rather, the Board held merely that the beneficiary's lack of standing would have been the more proper basis for the decision in Varela. Id. Simply because the Sano panel made

the procedural determination that the beneficiary in Varela lacked standing to bring her claim does not mean that the substantive holding in Varela is entitled to no weight at all in this case.

ii. Subsequent Congressional Action Confirms That Congress Shares Defendants'

Interpretation of the Statute.

Subsequent congressional action confirms that Defendants' interpretation of Section 1151(b)(2)(A)(i) is the correct one. Defendants' Memorandum at 14-16 (citations omitted). Legislative attempts in the current and prior congressional terms to amend the statute to provide the express relief that Plaintiffs advocate here indicate that Congress shares Defendants' interpretation of the statute. Id. 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); USA PATRIOT Act, Pub. L. No. 107-56, §§ 421 and 423, 115 Stat. 272, 360-363; Defendants' Memorandum at 16; see Robinson, 554 F.3d at 365, n.7. Plaintiffs counter that the National Defense Authorization Act and the USA Patriot Act 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.’” Plaintiffs' Memorandum at 23, quoting Taing, 567 F.3d at 30. The conclusion that those statutes pertain to the second sentence does not undermine Defendants' position but rather is consistent with its interpretation that a surviving spouse of a marriage lasting less than two years does not qualify for immediate relative classification under the first sentence, and therefore must rely upon an exception for self-petitioning spouses available under the second sentence.

iii. Congressional Intent and Legislative History Lead to the Conclusion that Plaintiffs are not “Spouses.”

Deference to the agency’s construction of the statute is further warranted by Congress’s enactment of other provisions in the INA, where Congress expressly contemplated that an alien seeking to adjust status to lawful permanent resident 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.”

Defendants’ Memorandum at 16-17, citing 8 U.S.C. §§ 1154(b), (e); Matter of Alarcon, 20 I. & N. Dec. 557, 562 (BIA 1992). Plaintiffs respond that the words “was the spouse” in the second sentence merely “sets up a temporal limitation on the right to self-petition [that] the alien spouse must have been a spouse for two years at the time of death,” and does not lead to the conclusion that the surviving spouse is no longer a spouse for purposes of the first sentence. Plaintiffs’ Memorandum at 14-16, 19-20 (citations omitted). However, this 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.”

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 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 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” but Congress did not expressly define the term “spouse” to extend to a spouse of a deceased person. Defendants’ Memorandum at 18, citing 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. Defendants’ Memorandum at 18-19 (citations omitted). 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. 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); Defendants’ Memorandum at 19. 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); Defendants’ Memorandum at 19-20. 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.

Defendants' Memorandum at 20. Plaintiffs' argument that recourse to legislative history is unnecessary to determine the intent of Congress because the statutory language is clear fails to take into account that four Circuit Courts of Appeal could not agree on the interpretation of the statutory language. See Plaintiffs' Memorandum at 23 (citation omitted). Similarly, Plaintiffs fail to understand the significance of the Circuit split in arguing that "[l]ongevity of the policy underlying the statutory interpretation is no cure to the defect in that interpretation . . ." when the meaning of the statute is clear." See id. at 9 (citations omitted).

iv. Plaintiffs' 8 U.S.C. § 1186a Argument is Misplaced.

Plaintiffs cite to an unrelated marriage fraud provision, 8 U.S.C. § 1186a, in arguing that Congress could not have intended a spouse who obtains a quick adjudication during the lifetime of the citizen petitioner to obtain permanent residence despite being married less than two years, while a spouse who obtains a longer adjudication has a petition denied or terminated upon the death of the petitioner. Plaintiffs' Memorandum at 16-17. Section 1186a(b)(1)(A)(ii) was enacted as part of the Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986). These amendments were enacted in order to prevent fraudulent marriages, *i.e.*, marriages entered into for the sole purpose of obtaining an immigration benefit. See Aziz v. Thornburgh, 908 F.2d 1130, 1132 (2d Cir. 1990); Alamario v. Attorney General, 872 F.2d 147, 149-50 (6th Cir. 1989).

Under these amendments, an alien who marries a United States citizen is granted lawful permanent resident status on a conditional basis for a period of two years. Aziz, 908 F.2d at 1132 (citing 8 U.S.C. §§ 1186a(1), (b)). Section 1186a(b)(1)(A)(ii) permits the Attorney

General -- now USCIS -- to terminate this conditional status, within two years of the granting of the status, if the marriage was “judicially annulled or terminated other than through the death of a spouse.” 8 U.S.C. § 1186a(b)(1)(A)(ii). Section 1186a(b)(1)(A)(ii) created an exception for marriages terminated “through the death of a spouse” in order to distinguish between marriages which may have been fraudulent and marriages which were likely bona fide. 8 U.S.C.

§ 1186a(b)(1)(A)(ii). Generally speaking, there is a substantial probability that a marriage was fraudulent if the marriage terminated during that two-year period. However, if the marriage terminated within the two-year period because one spouse died, there is much less likelihood that the marriage was fraudulent. Thus, the “death of a spouse” exception in § 1186a(b)(1)(A)(ii) deals solely with the issue of whether a marriage is lawful, the condition required to be met before proceeding to the next stage of the adjustment process, and cannot support Plaintiffs’ assertion that each is a “spouse” for purposes of the first sentence of section 1151(b)(2)(A)(i).

Plaintiffs’ argument also ignores the fact that the two statutes deal with different situations. Section 1186a applies to a widow(er) whose I-130 petition and I-485 application have been approved, and thereby has obtained lawful permanent resident status on a conditional basis. Section 1151(b)(2)(A)(i), by contrast, applies to a widow(er) whose I-130 petition and I-485 application have not yet been adjudicated. A prompt adjudication would result in the first widow(er) maintaining her status despite the termination of her marriage. By contrast, the widow(er) in the second situation cannot remain eligible for immediate relative classification because USCIS never made an eligibility determination on her I-130 and I-485 and may not have had an opportunity to interview the couple on the bona fides of the marriage. Thus, contrary to Plaintiffs’ arguments, Defendants’ interpretation of Section 1151(b)(2)(A)(i) is based on

legitimate policy objectives and does not produce arbitrary results.

v. The Automatic Revocation Regulation is Valid.

It is well-settled that the Executive may establish by rule that its officers will exercise its discretion in a certain way in specific situations, "unless Congress clearly expresses an intent to without that authority." American Hospital Ass'n v. NLRB, 499 U.S. 606, 612 (1991). Thus, the National Labor Relations Board properly exercised its authority to determining how many collective bargaining units should be permitted "in each case," 29 U.S.C. § 159(b), by establishing by rule that, with certain exceptions, eight, and only eight, bargaining units would be allowed at acute care hospitals. American Hospital, 499 U.S. at 614; accord, Lopez v. Davis, 531 U.S. 230 (2001); INS v. National Center for Immigrants' Rights, Inc., 502 U.S. 183 (1991).

Thus, Plaintiff's reliance on Pierno v. INS, 397 F.2d 949 (2d Cir. 1968), is misplaced because the principle of these cases is that an agency is not required repeatedly to re-visit "issues that may be established fairly and efficiently in a single rulemaking proceeding." Heckler v. Campbell, 461 U.S. 458, 467 (1983); see id. at 21-22. A categorical rule avoids the risk of "favoritism, disunity and inconsistency." Lopez, 531 U.S. at 244. Thus, 8 C.F.R. § 205.1(a)(3)(i)(C) is a valid and proper exercise of the Secretary's authority to revoke approval of a visa petition.

Plaintiffs' challenge to the automatic revocation regulation also fails for lack of standing. Defendants' Memorandum at 23-24. The regulation provides that a widow(er) may apply for humanitarian reinstatement of a petition following its revocation upon the death of the petitioner, and requires that a substitute sponsor file a new affidavit of support under 8 C.F.R. part 213a. Complaint ¶¶ 38, 39, 40; Prayers for Relief ¶¶ 5-8, 11; see 8 C.F.R. § 205.1(a)(3)(i)(C)(2);8

U.S.C. § 1183a(f)(5)(B). 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. Significantly, Plaintiffs concede this point in their Memorandum: “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.” Plaintiffs’ Memorandum at 21 (citations omitted). Because neither Plaintiff has applied for or 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 the validity of 8 C. F. R. § 205.1(a)(3)(C)(2).

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. Thus, Plaintiffs’ arguments should be rejected.

II. CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court grant summary judgment in favor of Defendants.

Dated: September 8, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have electronically filed the foregoing DEFENDANTS' OPPOSITION TO PLAINTIFFS' 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 8th day of September, 2009.

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