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*UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY*

OSSERRITTA ROBINSON,

Petitioner,

v.

MICHAEL CHERTOFF, Secretary,
Department of Homeland Security;
et al.,

Respondents.

Hon. Stanley R. Chesler, U.S.D.J.

Civil Action No.: 06-5702 (SRC)

**RESPONDENTS' REPLY BRIEF IN FURTHER SUPPORT
OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. P.
12(b)(6) AND IN OPPOSITION TO PETITIONER'S
MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Respondents submit this reply brief in further support of their motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, and in opposition to petitioner's motion for summary judgment. The parties agree that no genuine issues of facts are in dispute and that this case is ripe for disposition on motion.

LEGAL ARGUMENT

I.

PETITIONER'S RELIANCE ON THE NINTH CIRCUIT'S *FREEMAN* DECISION IS MISPLACED AS THAT DECISION IS NOT BINDING ON THIS COURT AND IS CONTRARY TO THE RELEVANT STATUTE.

In support of her position, petitioner relies heavily throughout her brief on *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), citing it as if it were binding authority on this issue. *Freeman*, however, is not the law in this jurisdiction and does not have to be followed by this Court. Moreover, as discussed in the respondents' moving brief, the *Freeman* decision is contrary to the relevant statute and fails to accord the legally required judicial deference to the settled administrative interpretation of that statute. Indeed, the logical interpretation of the statute is that the status of an "immediate relative" is established at the time the I-130 petition is adjudicated, not – as petitioner and the *Freeman* decision contend – at the time of filing.

A. *The Form I-130 petitioner must be alive at the time of adjudication in order for USCIS to approve the petition, and common usage of the terms "spouse," "marriage," and "widow" support this position.*

Petitioner misconstrues the respondents' position concerning the proper interpretation of § 201(b)(2)(A)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1151(b)(2)(A)(I). Respondents are not attempting to "insert a two-year requirement into the first sentence" of § 201(b)(2)(A)(I);

indeed, nowhere in respondents' brief do they suggest that spouses must be married for two years before USCIS can approve a Form I-130. Rather, respondents' position is quite simply that the citizen petitioner must be alive, and still married to the beneficiary, in order for USCIS to approve the Form I-130.

Respondents are authorized to approve a U.S. citizen's spousal Form I-130 only if respondents find that the factual allegations in the petition "*are true and that the alien . . . is an immediate relative.*" INA § 204(b), 8 U.S.C. § 1154(b). In this case, the facts supporting the late Mr. Robinson's claim that petitioner *is* currently his wife are no longer true. As a matter of law, the marriage that made her his spouse terminated with his death. Petitioner cannot get around the fact that the rule in the United States is that a marriage terminates when one spouse dies. *See* 52 Am. Jur. 2d, Marriage, § 8. There is no dispute that this principle applies in New Jersey, where the petitioner and the late Mr. Robinson resided at the time of his death.

Petitioner argues that the term "spouse" necessarily includes a widow or, in the petitioner's term, a "surviving spouse." In support of this claim, petitioner cites several editions of *Black's Law Dictionary*. As a matter of simple logic and grammar, however, these definitions do not support petitioner's position but, rather, support respondents' arguments. The definition of "surviving spouse" is provided *along with* the definition of spouse, but cannot properly be said to be "incorporated" into the definition of spouse. A spouse is a married person. *Black's Law Dictionary* (8th ed.). A "surviving spouse" is obviously not a married person, but someone who was previously married but is no longer, due to the death of the other. *Id.* If the term "spouse" necessarily included someone whose spouse has died, there simply would be no need at all for the concept of a "surviving spouse."

Nor would there be any need for the concept of “widow” or “widower” or the principle that marriage terminates at the time of death so that the widow/widower is free to remarry and once again become a “spouse.” Indeed, by definition, a widow is a woman, like the petitioner, whose husband has died and who has not remarried. *Black’s Law Dictionary* (8th ed.). A spouse transforms into a widow/widower the moment his/her spouse dies, and is thereafter commonly referred to as the widow/widower of the late spouse and not as the “surviving spouse.” Indeed, the INA does provide some recourse for the widow/widower of a U.S. citizen by allowing that individual to file a visa petition on his/her own behalf. *See* INA § 204(a)(1)(ii), 8 U.S.C. § 1154(a)(1)(ii). In order to do so, however, the widow/widower and the deceased citizen must have been married for at least two years, the petition must be filed within two years of the citizen’s death, and the widow/widower must not have remarried. *See id.* § 201 (b)(2)(A)(I), 8 U.S.C. § 1151(b)(2)(A)(I). That petitioner in this case does not fall within this category because she and the late Mr. Robinson were married for less than two years at the time of his unexpected death is indeed an unfortunate circumstance for petitioner, but does not warrant the relief she seeks that is contrary to the relevant statute and common usage of the terms “spouse,” “marriage,” and “widow.”

Petitioner further maintains that in this case, “[t]he term spouse is relevant, not marriage.” These terms, however, are inextricably intertwined and cannot be separated. As previously noted, a spouse is a married person. 1 U.S.C. § 7; *Black’s Law Dictionary* (8th ed.).¹ The petitioner here is no longer a married person and is, therefore, no longer a spouse.

¹ Despite the petitioner’s contention, the argument that Congress enacted 1 U.S.C. § 7 to prevent Federal recognition of homosexual relationships as marriage does not undercut the fact that, under § 7, one must be a partner to an existing marriage to be a spouse, any more than it undercuts the fact that § 7 also bars recognition of polygamous heterosexual marriages.

Moreover, contrary to petitioner's assertion, respondents did not cite the second sentence of § 201 (b)(2)(A)(I) to "import" a two-year requirement into the first sentence. Nor did respondents cite for this purpose § 1703 of the FY2004 National Defense Authorization Act, Pub. L. 108-136, Division A, 117 Stat. 1392, 1693-96 (2003) or § 423 of the USA Patriot Act, Pub. L. 107-57, 115 Stat. 272, 360-63 (2002). Rather, respondents cited these provisions as clearly indicating that when Congress has wanted to allow for an individual to immigrate based on his/her former marriage to an individual who is now dead, Congress has done so clearly.

Another provision of the USA Patriot Act, moreover, provides an even clearer indication. Pub. L. 107-56 § 421, 115 Stat. at 356. Under § 421, Congress provided a special benefit to the beneficiaries of Forms I-130, among other types of petitions and applications, if the Form I-130 was "revoked or terminated (or otherwise rendered null), either before or after its approval" because the beneficiary died as a result of the September 11, 2001 terrorist attacks on the United States. *See id.* § 421(a), (b)(1)(B)(I), and 428(b), 115 Stat. at 356-7. It should be particularly noted that § 421(a) provides for the beneficiary's classification as a "special immigrant," not as an "immediate relative" or other family-based or employment-based immigrant. *See id.* § 421(a), 115 Stat. at 356. There would have been no need for Congress to enact § 421(a) if the Form I-130 petitioner's death does not "terminate (or otherwise render[] null)," the Form I-130, *id.* § 421(b)(1)(B)(I), or if "surviving spouses" were still eligible.

B. *The death of Mr. Robinson effectively precludes the respondents from examining whether the marriage was legally valid or entered into solely to obtain an immigration benefit.*

As set forth in more detail in respondents' moving brief, USCIS must conduct an investigation in every Form I-130 immigrant visa petition case, and it may not approve a Form I-130

on behalf of a claimed immediate relative unless it finds, as a result of this investigation, “that the facts stated in the petition *are* true and that the alien on behalf of whom the petition is made *is* an immediate relative.” *See* INA § 204(b), 8 U.S.C. § 1154(b) (emphasis added). USCIS may conduct this investigation into the validity of the underlying marriage in any number of ways within its discretion, whether through documentary evidence, affidavits, and/or by interviewing the petitioner and/or his/her spouse. That USCIS may not always conduct in-person interviews in other contexts does not undermine the fact that Mr. Robinson’s death effectively prevents the agency from interviewing him, as part of its investigation, and fully considering the issue.

C. *The Court should defer to the respondents’ interpretation of the relevant statute and the BIA’s relevant decisions.*

Petitioner maintains that the “express terms” of the statute provide that a Form I-130 can be approved, notwithstanding the petitioner’s death. In point of fact, that statute nowhere “expressly” states anything about the effect of a Form I-130 petitioner’s death on the validity of the petition. Respondents reiterate that the proper interpretation of § 204(b) resolves this question adversely to the petitioner. On the assumption that the statute can be said to be ambiguous, the Court is bound by law to defer to the settled administrative interpretation. *See National Cable & Telecomm. Assn. v. Brand X Internet Services*, 125 S. Ct. 2688, 2699 (2005); *Chevron, U.S.A., Inc, supra*, 467 U.S. at 842-43, 865-66.

Petitioner nonetheless maintains that the respondents mischaracterized the decision of the Board of Immigration Appeals in *Matter of Sano*, 19 I & N Dec. 299 (BIA 1985), in an attempt to discredit that decision. According to petitioner, *Sano* was about the Board’s jurisdiction to act on a case, not about the beneficiary’s standing. This distinction is meaningless. The Board always has jurisdiction of an appeal from the denial of an alien relative visa petition (Form I-130), if the

appeal is filed timely by a proper appellant. *See* 8 C.F.R. § 1003.1(b)(5).² The ground for the Board's conclusion that it lacked jurisdiction was, precisely, that the beneficiary had no standing to file the appeal. 19 I & N Dec. at 300-301. That is, *Sano* establishes that a Form I-130 case cannot go forward after the petitioner dies. *See id.* In an earlier case, in which the Board had assumed (albeit, improperly, in light of the later *Sano* decision) that the beneficiary did have standing, the Board held that the petitioner's death requires the denial of the petition.³ *See Matter of Varela*, 13 I & N Dec. 453, 454 (BIA 1970). The ultimate conclusions of *Sano* and *Varela* are otherwise consistent with one another and support respondents' arguments in this matter. Thus, to the extent that the INA does not clearly address the effect of the Form I-130 petitioner's death on the validity of the petition, the Court must accept this settled administrative interpretation. *See Brand X Internet Services and Chevron, USA, supra.*

The fact that the 9th Circuit's *Freeman* decision, which is not binding on this Court, takes issue with the BIA's decisions is irrelevant to the issue at hand. Moreover, as explained in respondents' moving brief, the *Freeman* panel overlooked certain crucial issues in rendering its decision. For example, the panel did not consider the explicit requirement of INA § 204(b), 8 U.S.C. § 1154(b), that the respondents must find that an alien "is an immediate relative" in order to approve a Form I-130 (emphasis added). Nor did the *Freeman* panel take note of 1 U.S.C. § 7, and the general legal principle that marriage ends at death, so that one is no longer a spouse once the other spouse is dead. Also absent from its decision was any consideration of the fact that, where a petition

² At the time of the Board's decision in *Sano*, this regulation was codified as 8 C.F.R. § 3.1(b)(5) (1985). The substantive provision remains unchanged.

³ *Sano* merely found that the Board's decision to review the *Varela* case was inappropriate, not that the ultimate conclusion was erroneous. *See* 19 I & N Dec. 299, 300.

has been approved, the petitioner's death automatically revokes the approval. 8 C.F.R. § 205.1(a)(3)(i)(C)(2), *as amended* 71 *Fed. Reg.* at 35,749. The *Freeman* panel's rejection of the respondents' reasonable interpretation of the statute was contrary to law. *See Brand X Internet Services and Chevron, U.S.A., Inc., supra.*

Finally, the district court in *Turek v. Department of Homeland Security*, 450 F. Supp. 2d 736 (E.D. Mich. 2006), similarly concluded that *Freeman*, while controlling law in the Ninth Circuit, was an incorrect interpretation of the statute and therefore declined to accept its reasoning. *Turek* recognized that the "statute makes clear that 'immediate relative' status is reserved for an alien who is the spouse of a citizen of the United States 'for at least 2 years at the time of the citizen's death'" *Id.* at 740. Moreover, the fact that the *Turek* court had serious doubts about the validity of plaintiff's marriage lends further support to respondents' position here that USCIS is unable to grant the Form I-130 without conducting the crucial investigation of the marriage between petitioner and her deceased spouse. Further, contrary to petitioner's assertion, the *Turek* court did not simply rely on *Varela*, but conducted its own analysis of the statute after considering the arguments of all parties, and is a sound decision.

CONCLUSION

While respondents are mindful that petitioner's circumstances are indeed unfortunate, as set forth in respondents' moving brief and herein, the proper interpretation of the INA supports the respondents' decision to terminate action on the late Mr. Robinson's Form I-130 and deny petitioner's Form I-485. Thus, petitioner is not entitled to judgment as a matter of law. Respondents therefore respectfully request that the Court grant their motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, and deny petitioner's cross-motion for summary judgment.

Respectfully submitted,

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