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2 **UNITED STATES DISTRICT COURT**  
3 **FOR THE WESTERN DISTRICT OF TEXAS**  
4 **SAN ANTONIO DIVISION**

4	<b>GWENDOLYN NAAG HANFORD,</b>	)	<b>Case No. SA-08-CA-0795 XR</b>
5		)	<b>Agency Case No. A074 825 152</b>
6	<b>Plaintiff-petitioner,</b>	)	
7	<b>vs.</b>	)	<b>MOTION FOR SUMMARY</b>
8		)	<b>JUDGMENT (OPPOSED)</b>
9	<b>MICHAEL CHERTOFF, Secretary, U.S.)</b>	)	
10	<b>Department of Homeland Security;</b>	)	
11	<b>JONATHAN SCHARFEN, Acting</b>	)	
12	<b>Director, U.S. Citizenship and</b>	)	
13	<b>Immigration Services,</b>	)	
14	<b>Defendants-respondents.</b>	)	

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16 **MOTION FOR SUMMARY JUDGMENT**

17 NOW COMES Gwendolyn Naag Hanford, Plaintiff-petitioner  
18 (“Plaintiff”) in the above styled matter, by and through Brent W. Renison,  
19 counsel for Plaintiff, and respectfully moves this Court to enter judgment as  
20 a matter of law in her favor, and hereby submits this Motion for Summary  
21 Judgment pursuant to Federal Rule of Civil Procedure 56(c). Counsel  
22 conferred on December 5, 2008 in a good faith attempt to resolve the matter  
23 by agreement pursuant to local rule CV-7(h). The parties were unable to  
24 resolve the matter due to the parties disagreement over the interpretation of  
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1 the statute at issue. Defendants oppose this motion.

2 **I. STANDARD FOR SUMMARY JUDGMENT**

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

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13 **II. BACKGROUND**

14 **A. MATERIAL FACTS**

15 The facts material to Plaintiff’s claims are set out in the complaint.  
16 Plaintiff’s spouse, pursuant to 8 C.F.R § 214.2(k)(1), filed a Form I-129F  
17 Petition for Alien Fiance(e) (Petition) with fee which was approved, and  
18 Plaintiff was subjected to quasi-immigrant visa processing through United  
19 States Department of State, resulting in the issuance of a K-1 visa affixed in  
20 Plaintiff’s passport. Plaintiff made a lawful entry to the United States in K-1  
21 status, and was inspected and admitted on October 15, 1996. On December  
22 12, 1996, Plaintiff married Stewart Allen Hanford, a United States citizen,  
23 within the 90 days from her entry as required by the K-1 visa category.  
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1 Pursuant to 8 C.F.R § 214.2(k)(6)(ii), Plaintiff filed with the required fee a  
2 Form I-485, Application to Register Permanent Residence or to Adjust  
3 Status ("Application"), also within the 90 day period, seeking adjustment of  
4 status to Lawful Permanent Resident. Plaintiff was assigned an Alien  
5 Number "A-Number", which is A074 825 152, and issued an Employment  
6 Authorization Document and an Advance Parole Travel Document. She was  
7 authorized to reside lawfully while her application was being processed.  
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11 More than a year passed, during which time the couple welcomed the  
12 birth of their son, and carried on their life together. Tragically, on January 8,  
13 1998, Plaintiff's spouse died of cardiogenic shock, before Defendants had  
14 taken any action on Plaintiff's application for permanent residence. On May  
15 9, 2002, defendants denied Plaintiff's application for status as a permanent  
16 resident solely on the basis that Plaintiff was "no longer the spouse of a  
17 citizen of the United States."  
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## 20 **B. LEGAL AUTHORITY**

21 Defendants claim that Plaintiff was stripped of her status as an  
22 immediate relative spouse because she suffered the death of her spouse  
23 before any action was taken on her properly filed application prior to the  
24 death. As the U.S. Court of Appeals for the Ninth Circuit has held in  
25 analogous circumstances, the Defendants' position does not comport with  
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1 the statute. *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006).

2 **III. ARGUMENT**

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4 *"One thing I learned about America is that if you work hard and play*  
5 *by the rules, this country is truly open to you." – Arnold Schwarzenegger,*  
6 *2004 Republican National Convention*

7 The Hanfords played by all the rules in their actions to adjust  
8 Mrs.Hanford's status to that of a Lawful Permanent Resident ("LPR"), but  
9 the Defendants failed to act before Mr. Hanford's untimely death.

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11 Defendants contend, however, that a K visa holder is ineligible to adjust her  
12 status to that of an LPR if her husband dies before the agency adjudicates  
13 her application for adjustment of status.

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15 Family relationships form the large part of immigration under our  
16 laws established by Congress, and “immediate relatives” have a special  
17 place in the statutes. Immediate relatives are exempt from numerical  
18 limitation, meaning that immigrant visas are immediately available to them  
19 at any time, and they enjoy exemption from many of the restrictions on other  
20 categories. In order to become an LPR, the fiancée of a U.S. citizen first  
21 obtains a K-1 visa at a U.S. Embassy abroad through a visa petition (the I-  
22 129F petition) filed by her U.S. citizen fiancé. 8 U.S.C. §1184(d); 8 C.F.R §  
23 214.2(k)(1). Visa petition approval requires that the couple have met in  
24 person within two years of the filing of the petition and must have a bona  
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1 fide intention to marry within ninety days of the non-citizen's arrival. 8  
2 U.S.C. §1184(d)(1). Once the K-1 visa is approved, the fiancée can legally  
3 enter the United States to be married. If the couple does not marry within  
4 ninety days of the non-citizen's entry, the non-citizen is required to depart  
5 from the United States. If the couple is married within ninety days, the non-  
6 citizen spouse can apply to adjust her status to that of a lawful permanent  
7 resident. 8 U.S.C. § 1255(d); 8 C.F.R. § 245.2(c). The non-citizen spouse is  
8 considered an "alien spouse" for purposes of obtaining permanent resident  
9 status. 8 U.S.C. § 1186a(g)(1)(B). The fiancée adjustment statute provides  
10 in relevant portion as follows:  
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15 The Attorney General may not adjust...the status of a [K visa  
16 holder] except to that of an alien lawfully admitted to the  
17 United States on a conditional basis under section 1186a of this  
18 title as a result of the marriage of the nonimmigrant...to the  
19 citizen who filed the [K visa petition].

20 8 U.S.C. § 1255(d).

21 Plaintiff complied with the statutory framework outlined above. A  
22 fiancée petition was filed on her behalf and approved, she sought and  
23 obtained a K-1 visa for entry, she entered legally, married her petitioner  
24 within 90 days as required, and dutifully applied for adjustment of status.  
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26 In 1986, Congress enacted the Immigration Marriage Fraud  
27 Amendments ("IMFA"). Pub. L. No. 99-639. The purpose of IMFA was  
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1 “to deter immigration related marriage fraud and other immigration fraud.”  
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3 *See Choin v. Mukasey*, 537 F.3d 1116 (9th Cir. 2008). Defendants’ reading  
4 of the statute results in a cruel form of punishment for applicants who follow  
5 the rules, and through no fault of their own suffer the death of their spouse.  
6 It does nothing to deter immigration fraud, and cannot have been intended  
7 by Congress. Defendants’ interpretation is not a permissible construction of  
8 the statute. The language of the first sentence of INA 201(b)(2)(A)(i), 8  
9 USC § 1151(b)(2)(A)(i), which sets out the definition of “spouse” is  
10 succinct:  
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13           “Immediate Relatives. – For purposes of this subsection, the term  
14           “immediate relatives” means the children, spouses, and parents of a  
15           citizen of the United States, except that, in the case of parents, such  
16           citizens shall be at least 21 years of age.”

17           As the Court in *Freeman* noted, only “parents” are “subject to any  
18           limitation, with the grant of immediate relative status being restricted to  
19           those whose citizen child is at least 21 years of age. There is no comparable  
20           qualifier to be a ‘spouse’—that is, a requirement that the marriage must have  
21           existed for at least two years.” *Freeman, supra*, 444 F.3d at 1039. Yet  
22           Defendants continue to insist that Plaintiff is stripped of the status of spouse,  
23           and therefore immediate relative status, upon the death of her citizen spouse  
24           where the marriage has existed less than two years.  
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28           For alien spouses whose citizen spouses have *not filed a petition*, the

1 INA provides a *separate* self-petitioning right:

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3 “In the case of an alien (and each child of the alien) who was the  
4 spouse of a citizen of the United States for at least two years at the  
5 time of the citizen’s death and was not legally separated from the  
6 citizen at the time of the citizen’s death, the alien shall be considered,  
7 for purposes of this subsection, to remain an immediate relative after  
8 the date of the citizen’s death but only if the spouse files a petition  
9 under section 204(a)(1)(A)(ii) within two years after such date and  
10 only until the date the spouse remarries.”

11 INA 201(b)(2)(A)(i), 8 USC § 1151(b)(2)(A)(i) (second sentence).

12 The second sentence of the immediate relative definition creates a time  
13 limitation (at the time of death, the alien must have been a spouse for at least  
14 two years) not found in the first sentence, but allows a self petition to be  
15 filed under INA 204(a)(1)(A)(ii), 8 USC § 1154(a)(1)(A)(ii),

16 “An *alien spouse* described in the *second sentence* of section  
17 201(b)(2)(A)(i) *also* may file a petition with the Attorney General  
18 under this subparagraph for classification of the alien (and the alien’s  
19 children) under such section.” (emphasis supplied)

20 Therefore, the citizen spouse files a petition under clause (i) of  
21 1154(a)(1)(A) to accord immediate relative status to his or her spouse under  
22 the *first* sentence of 1151(b)(2)(A)(i). Separately, the alien spouse (in the  
23 absence of the citizen spouse filing) “*also may file*” a petition under 8 USC §  
24 1154(a)(1)(A)(ii) (clause (ii) instead of (i)) to accord immediate relative  
25 status to him or herself (*and his or her children*) under the *second* sentence  
26 of 1151(b)(2)(A)(i), but only if the alien was a spouse for at least two years  
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1 at the time of the death of the citizen spouse. Congress clearly created “two  
2 different processes, such that one or the other applies – either the citizen  
3 spouse petitions or, if he dies without doing so, the alien widow may do so.”  
4 *Freeman, supra*, 444 F.3d at 1042.

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6 In an attempt to apply the standards of one section to the petition  
7 requirements of another, Defendants create tragic and anomalous results.  
8 Courts have refused to follow the Defendant’s position in analogous  
9 circumstances, following *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir.  
10 2006); *Robinson v. Chertoff*, 2007 WL 1412284 (D.N.J. May 14, 2007)  
11 *appeal docketed*, No. 07-2977 (3d Cir. July 5, 2007); *Taing v. Chertoff*, 2007  
12 U.S. Dist. LEXIS 911411 (D. Mass 2007), *appeal docketed*, No. 08-1179  
13 (1st Cir. Feb. 11, 2008); *Lockhart v. Chertoff*, 2008 U.S. Dist. LEXIS 889  
14 (D. Ohio 2008), *appeal docketed*, No. 08-1179 (6th Cir. 2008); *But see*  
15 *Burger v. McElroy*, 97 Civ. 8775 (RPP), 1999 U.S. Dist. LEXIS 4854  
16 (S.D.N.Y. Apr. 12, 1999); and *Turek v. Dep’t of Homeland Security*, 450 F.  
17 Supp. 2d 736 (E.D. Mich. 2006).

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19 As stated by the Court in *Robinson v. Chertoff, supra*,

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21 “Under the Ninth Circuit’s decision in *Freeman*, the petitioner’s  
22 volitional act in promptly filing the I-130 petition ensures that the  
23 alien is considered an immediate relative under the statute. The  
24 alternative, urged by Defendants, is that the timing of the citizen  
25 spouse’s death – i.e. whether it occurred before or after two years of  
26 marriage – governs. This interpretation yields strange results. A  
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1 prompt adjudication of the I-130 petition (before the citizen dies) will  
2 result in approval. A delay in adjudication (until after the citizen dies)  
3 will result in a denial. But a severe delay of two years or more,  
4 followed by the citizen's death, will also result in an approval. The  
5 Court cannot imagine that Congress intended the time of death  
6 combined with the pace of adjudication, rather than the petitioner's  
7 conscious decision to promptly file an I-130 petition, to be the proper  
8 basis for determining whether the alien qualifies as an immediate  
9 relative." *Id.*, p. 8.

8 The Court in *Robinson* recognized the absurd results created by  
9 Defendants' reading of the statute. The Court in *Freeman* also noted that,  
10 "[t]he government also tells us that, had DHS addressed the Freemans'  
11 application before Mr. Freeman died, the adjustment of status could have  
12 been granted even though they had not been married for two years."  
13 *Freeman, supra*, 444 F.3d at 1040. Defendants cannot terminate status  
14 through death of the spouse. *See* 8 USC § 1186a(b)(1)(A)(ii) (providing  
15 reasons for terminating status, "other than through the death of a spouse.")).  
16 Congress cannot have intended such strange and unjust results, and no  
17 statute shows their intent to afflict widows with such a penalty. Our Great  
18 Nation cannot be seen to invite foreign citizens to enter as fiancées,  
19 authorize them to become married to American citizens, sanction their  
20 application for legal status, allow them to establish families and a home life  
21 together, then throw the spouses out when the American dies during  
22 bureaucratic immigration processing.  
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1 **IV. NO GENUINE ISSUE OF MATERIAL FACT EXISTS AND**  
2 **PLAINTIFF IS ENTITLED TO A JUDGMENT AS A MATTER**  
3 **OF LAW**

4 The question that is before the Court for resolution – whether the  
5 decision of Defendants to automatically deny the properly filed application  
6 for adjustment of status is based upon a permissible interpretation of the  
7 statute – is a question of law. No factual issues exist that can only be  
8 resolved by a finder of fact, because they “may reasonably be resolved in  
9 favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250  
10 (1986). This controversy is suitable for resolution on written arguments by  
11 counsel, without the need for trial.  
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15 **V. CONCLUSION**

16 For the foregoing reasons, Plaintiff respectfully requests that summary  
17 judgment in Plaintiff’s favor be granted.  
18

19 DATED this 16th day of December, 2008.

20 PARRILLI RENISON LLC

21  
22 By /s/ Brent W. Renison

23 Brent W. Renison (Bar No. 96475)  
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Attorney for Plaintiff

1 CERTIFICATE OF SERVICE

2  
3 I hereby certify that on the 16th day of December, 2008, I electronically filed the  
4 foregoing with the Clerk of Court using the CM/ECF system which will send  
5 notification of such filing to the following:

6 Gary L. Anderson  
7 Email: Gary.Anderson@usdoj.gov  
8 Assistant United States Attorney  
9 601 NW Loop 410, Suite 600  
10 San Antonio, TX 78216

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

13 EXECUTED on the 16th day of December 2008, at Lake Oswego, Oregon.

14 /s/Brent W. Renison

15 Brent W. Renison