

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

4	GWENDOLYN NAAG HANFORD,)	Case No. SA-08-CA-0795 XR
5)	Agency Case No. A074 825 152
6	Plaintiff-petitioner,)	
7	vs.)	PLAINTIFF’S RESPONSE TO
8)	DEFENDANTS’ MOTION TO
9	MICHAEL CHERTOFF, Secretary, U.S.))	DISMISS
10	Department of Homeland Security;)	
11	JONATHAN SCHARFEN, Acting)	
12	Director, U.S. Citizenship and)	
13	Immigration Services,)	
14	Defendants-respondents.)	

15
16 **PLAINTIFF’S RESPONSE TO DEFENDANTS’ MOTION TO DISMISS**

17 Plaintiff Gwendolyn Naag Hanford, by and through her counsel Brent W.
18 Renison, respectfully request the Court deny the Defendants’ motion to dismiss for
19 the following reasons:
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21 **I. PLAINTIFF’S COMPLAINT IS TIMELY AND NOT TIME BARRED**

22 As Plaintiff’s counsel outlined to opposing counsel in a letter dated
23 December 5, 2008, Mrs. Hanford¹ was a putative class member of the national
24 class action lawsuit *Hootkins v. Chertoff*, CV07-05696 (CAS) (C.D. Cal., filed
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28 ¹ Defendants refer to Mrs. Hanford as Ms. Hanford in their Motion. Because she retains the right to be addressed as Mrs. Hanford, the proper honorific should be used.

1 August 30, 2007). On June 30, 2008, the Court in *Hootkins* issued tentative civil
2 minutes consisting of a 15-page opinion limiting the class to the Ninth Circuit. *See*
3 Exhibit A. After distribution of the tentative in open court and following oral
4 argument on June 30, 2008, the Court asked the parties to submit their proposed
5 class definitions. Both Defendants and Plaintiffs' versions omit Mrs. Hanford, as
6 both proposed class definitions limit the class to Ninth Circuit cases. The Court
7 must now issue a precise class definition based on the parties' submissions, and
8 enter a final order. Based on the commencement of the class action, Mrs.
9 Hanford's federal claim was tolled for a period of at least 10 months – from
10 August 30, 2007 until June 30, 2008 – while she awaited news of whether her case
11 would be covered by the class action litigation.

12 In the case of *Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983),
13 the Supreme Court held that the commencement of a class action suspends the
14 applicable statute of limitations as to all asserted members of the class who would
15 have been parties had the suit been permitted to continue as a class action. Once
16 the statute of limitations has been tolled, it remains tolled for all members of the
17 putative class until class certification is denied. Plaintiff's suit is therefore not time
18 barred.

19 **II. THIS COURT RETAINS FEDERAL QUESTION JURISDICTION** 20 **OVER PLAINTIFF'S CLAIMS**

21 Following Defendants' foregoing argument that Plaintiff should have filed

1 her lawsuit sooner, they propose that she actually should have waited even longer
2 for the initiation of removal proceedings to challenge her denial.² Her action,
3 however, is neither too late nor is it too early, and the Court retains federal
4 question jurisdiction over Plaintiff's ripe APA claim.
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7 **A. Defendants' Tardy Attempt to Circumvent This Court's Jurisdiction**
8 **by Placing Plaintiff in Removal Proceedings After Commencement of**
9 **the Instant Action While Objectionable is Inconsequential**

10 Plaintiff is not seeking review of a final order of removal. No order of
11 removal has been entered against Plaintiff, and removal proceedings before an
12 immigration judge (IJ) have only recently been commenced in direct response to
13 this lawsuit. The judicial review sections of the Immigration and Nationality Act
14 (INA) cited by Defendants found at 8 U.S.C. § 1252(a)(2)(D), (a)(5), (b)(2), and
15 (b)(9) specifically relate to judicial review of a final order of removal. (Docket
16 No. 12, Def. Mot. p. 8) Pursuant to 8 U.S.C. § 1101(a)(47)(B)(i), a removal order
17 only becomes final when the Board of Immigration Appeals affirms an order of the
18 IJ ordering removal.³ Because no such order exists, and no review of such order is
19 sought, those provisions are inapplicable. Moreover, even in the *final* removal
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24 ² Apparently, Defendants would have her suffer an "indefinite" period of time in limbo,
25 even though she waited half a dozen years for her denial letter, and another half a dozen
26 years beyond that before making the decision to file a lawsuit.

27 ³ The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), created
28 "removal" proceedings with resulting removal orders. Pub. L. No. 104-208, 110 Stat.
3009 (Sept. 30, 1996). IIRIRA § 309(d)(2) provides that references to orders of removal
are deemed to included references to orders of deportation. Accordingly, 8 U.S.C. §
1101(a)(47) applies to orders of removal.

1 context, a number of courts have found jurisdiction to review legal claims due to
2 the narrow language of § 1252(a)(2)(D).⁴
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4 Defendants point out that USCIS' decision to issue Plaintiff a Notice to
5 Appear is not reviewable, citing 8 U.S.C. § 1252(g). In *Reno v. American-Arab*
6 *Anti-Discrimination Committee*, 525 U.S. 471 (1999), the Supreme Court rejected
7 "the unexamined assumption that § 1252(g) covers the universe of deportation
8 claims -- that it is a sort of 'zipper' clause that says 'no judicial review in
9 deportation cases unless this section provides judicial review.'" *Id.* at 482. The
10 Court held that § 1252(g) "applies only to three discrete actions that the Attorney
11 General may take: her 'decision or action' to '*commence* proceedings, *adjudicate*
12 cases, or *execute* removal orders.'" *Id.*; *see also id.* at 483 (Section 1252(g)
13 "performs the function of categorically excluding from *non-final-order* judicial
14 review . . . certain specified decisions and actions of the INS." (Emphasis added)).
15 Therefore, § 1252(g) "is to be read narrowly and precisely" to prevent review only
16 of the three narrow *discretionary* decisions or actions referred to in the statute.
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22 ⁴ Whether the Board applied the correct legal standard to determine if a crime was
23 "particularly serious" for purposes of withholding of removal. *Afridi v. Gonzales*, ___ F.3d
24 ___, 2006 U.S. App. LEXIS 8073 (9th Cir. 2006). Whether the withdrawal of an
25 application for admission constitutes a break in physical presence for cancellation.
26 *Mendez-Reyes v. Attorney General*, 428 F.3d 187 (3d Cir. 2005). Whether the IJ's denial
27 of an adjustment application violated *res judicata*. *Hamdan v. Gonzales*, 425 F.3d 1051
28 (7th Cir. 2005). Whether the agency's interpretation of the hardship standard for
cancellation violated international treaties. *Cabrera-Alvarez v. Gonzales*, 423 F. 1006
(9th Cir. 2005).

1 *Sabhari v. Reno*, 197 F.3d 938, 942 (8th Cir. 1999); see also *Fornalik v. Perryman*,
2 222 F.3d 523, 531 (7th Cir. 2000). None of those *discretionary* decisions are being
3 challenged in the instant action, and § 1252(g) does not bar this Court's review of
4 *non-discretionary* decisions or actions, determined as a matter of law.
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7 Because Defendants *never actually exercised discretion* with respect to
8 Plaintiff's application, and instead *automatically terminated it* in violation of law,
9 jurisdictional bars at 8 U.S.C. § 1251(a)(2)(B) relating to discretionary relief are
10 also inapplicable to this case. With respect to 8 U.S.C. § 1252(a)(2)(B)(i), the
11 phrase "judgment regarding the granting of relief" applies only to the discretionary
12 portion of the decision. *See, e.g., Iddir v. INS*, 301 F.3d 492, 497 (7th Cir. 2002);
13 *Montero-Martinez v. Ashcroft*, 277 F.3d 1137 (9th Cir. 2002); *Mendez-Moranchel*
14 *v. Ashcroft*, 338 F.3d 176 (3d Cir. 2003). Where there has been no exercise of
15 discretion, there is no bar on jurisdiction. Ten Courts of Appeals have
16 unanimously held that § 1252(a)(2)(B)(i) does not apply to non-discretionary
17 questions of statutory eligibility for the enumerated immigration benefits.⁵ Further,
18 The Supreme Court has ruled that § 1252(a)(2)(B)(ii) does not apply to issues that
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⁵ *See Singh v. Gonzales*, 413 F.3d 156, 160, n.4 (1st Cir. 2005); *Sepulveda v. Gonzales*,
407 F.3d 59, 63 (2d Cir. 2005); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176 (3d Cir.
2003); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir. 2003); *Santana-Albarran v.*
Ashcroft, 393 F.3d 699, 703 (6th Cir. 2005); *Morales-Morales v. Ashcroft*, 384 F.3d 418,
423 (7th Cir. 2004); *Ortiz-Cornejo v. Gonzales*, 400 F.3d 610, 612 (8th Cir. 2005);
Montero-Martinez v. Ashcroft, 277 F.3d 1137, 1140 (9th Cir. 2002); *Schroeck v.*
Gonzales, 429 F.3d 947, 950 n.2 (10th Cir. 2005); *Gonzales-Oropeza v. U.S. Attorney*
General, 321 F.3d 1331, 1332 (11th Cir. 2003).

1 do not involve the exercise of discretion, such as a determination of the extent of
2 the Attorney General's authority under the INA. *Zadvydas v. Davis*, 533 U.S. 678,
3 688 (2001).

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5 The Third Circuit in *Pinho v. Gonzales*, 432 F.3d 193, 204 (3d Cir. 2005),
6 found that under the APA, the Court could review the denial of an adjustment of
7 status application by USCIS where the denial was based on a statutory eligibility
8 issue. The court found that the statute set forth standards for eligibility under
9 which the court could review the agency action. It distinguished such statutory
10 eligibility issues from denials of adjustment applications in the exercise of
11 discretion. *See also Shah v. Chertoff*, No. 3:05-CV-1608-BH (K) ECF, 2006 U.S.
12 Dist. LEXIS 73754, *28 (N.D. Tex. 2006) (finding that the issue subject to APA
13 review was the question of eligibility for an extension of L-1A visa – for which
14 there were *statutory guidelines* to apply – and not the *discretionary* denial of such
15 an extension).
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21 **B. The APA Does Not Allow Courts to Require Exhaustion Where**
22 **Administrative Remedies Are Not Mandatory**

23 Defendants complain that Plaintiff should have exhausted administrative
24 remedies through a review of her adjustment of status application in removal
25 proceedings – proceedings which *might never have come* if the instant lawsuit had
26 not been filed. The Supreme Court has held, however, that there are limits on
27 when exhaustion of administrative remedies can be required in a suit under the
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1 APA. *Darby v. Cisneros*, 509 U.S. 137 (1993). Specifically, *Darby* held that in
2 actions brought under the APA, a plaintiff can only be required to exhaust
3 administrative remedies that are *mandated* by either a statute or regulation.
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5 Nothing in the statute or regulations mandates review of an adjustment of
6 status application before the IJ. On the contrary, the applicable regulation states
7 that, “No appeal lies from the denial of an application by the director, but the
8 applicant, if not an arriving alien, retains the right to renew his or her application in
9 proceedings under 8 C.F.R. part 240.” 8 C.F.R. § 245.1(a)(5)(ii). This regulation
10 allows for a “renewal” of the application before an IJ, but *does not require it*. Such
11 renewal option is really designed to allow for the defense of adjustment of status to
12 be raised if ever removal proceedings are initiated, and not as a mandatory step.
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15 Curiously, if an applicant were to have an underlying visa status that was
16 indefinitely renewable (such as an E-2 or O-1 visa, for example), no removal
17 proceedings would *ever* be initiated if such applicant’s adjustment was denied,
18 because the applicant would *never* be out of status. Thus, while renewal is an
19 option, it is not mandatory. Indeed, Defendants conceded that exhaustion was not
20 required by statute or agency rule in the *Hootkins* class action. *Hootkins v.*
21 *Chertoff*, CV07-05696 (CAS) (C.D. Cal., filed August 30, 2007); *See Order*
22 *Granting in Part and Denying in Part Defendants’ Motion to Dismiss Complaint*
23 *Under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), p. 14, Exhibit B.* Plaintiff’s case is
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1 exempt from the exhaustion requirement under *Darby*, because the following
2 criteria have been met: 1) the action is brought pursuant to the APA; 2) there is no
3 statute that mandates an administrative appeal; 3) Either: a) there is no regulation
4 that mandates an administrative appeal; or b) if there is a regulation that mandates
5 an administrative appeal, it does not also stay the administrative decision pending
6 the administrative appeal; and 4) The adverse agency decision being challenged is
7 final for purposes of the APA.
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11 The agency action in this case was final on May 9, 2002, and Defendants'
12 attempt to circumvent the Court's jurisdiction by instituting administrative removal
13 proceedings many years after that final decision is ineffective to strip this Court of
14 authority to hear the case. The Supreme Court has held that two conditions must
15 be satisfied for agency action to be "final": 1) the action must mark the
16 "consummation" of the agency's decision-making process" and cannot be "of a
17 mere tentative or interlocutory nature;" and 2) the action must be one by which
18 "rights or obligations have been determined," or from which "legal consequences
19 will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The requirements of
20 finality are met in this case. First, the agency which determined Plaintiff's
21 application should be automatically terminated following her husband's death
22 (INS, later changed to USCIS) issued its decision in 2002, without the exercise of
23 any discretion whatsoever, and no direct administrative appeal process exists to
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1 challenge the agency denial. Removal proceedings have just been filed with the IJ,
2 which is part of another agency – the Executive Office of Immigration Review
3 within the U.S. Department of Justice. That agency is not even part of Department
4 of Homeland Security or USCIS. Further, Plaintiff’s rights have been determined,
5 and legal consequences have flowed from that determination. Specifically,
6 Defendants’ advised Plaintiff in the denial that her application to register as a
7 permanent resident was terminated, her work and travel permission were
8 terminated, and that she only had the option of asking for voluntary departure,⁶ and
9 that she may be subject to removal if such request was not granted. *See* Complaint,
10 Denial, Exhibit A. Additionally, Plaintiff’s interests have been harmed where, as
11 here, she faced an “indefinite timeframe for administrative action.” *McCarthy v.*
12 *Madigan*, 503 U.S. 140 (1992). Such lack of due process does not conform to the
13 APA nor does it comport with the Due Process Clause of the Fifth Amendment of
14 the United States Constitution.

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16 Defendants claim that *Cardoso v. Reno*, 216 F.3d 512 (5th Cir. 2000)
17 requires Plaintiff to bring her legal challenge in the Courts of Appeal after
18 exhaustion of administrative remedies before an IJ and the Board of Immigration
19 Appeals. (Def. Mot. p. 8). *Cardoso* is distinguishable from Plaintiff’s case, in that
20 Plaintiff lawfully obtained a visa through the U.S. Embassy abroad, entered legally

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⁶ That is, for her to plead with the agency for the privilege of being allowed to leave the U.S. voluntarily.

1 pursuant to that visa, followed all the requirements of the statute, including the
2 filing of an adjustment of status application during her period of authorized stay,
3 was provided work and travel documents and the right to remain lawfully during
4 the pendency of her application, and through no fault of her own suffered the death
5 of her husband before Defendant agency acted. She did nothing but follow the
6 law. Plaintiff only became *allegedly* removable due to *Defendants' own unlawful*
7 *actions*. In contrast, all three plaintiffs in *Cardoso* entered the United States
8 illegally without a visa, without permission, and without inspection by an
9 immigration officer from the very beginning. They were at all times subject to
10 removal from the United States, and two already faced final orders of removal.
11 *Cardoso*, therefore, is not on point.

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16 Should the court find *Cardoso* controlling, however, Plaintiff must
17 respectfully disagree with the holding. The Court in *Cardoso* does not appear to
18 have attempted to distinguish between reviewable non-discretionary legal
19 determinations and non-reviewable discretionary determinations, and for the
20 reasons articulated by the Third Circuit in the *Pinho* decision, that distinction is
21 crucial to determining whether the Supreme Court's rules in *Darby* and *McCarthy*
22 are being followed. *Pinho v. Gonzales*, 432 F.3d 193, 204 (3d Cir. 2005). A
23 violation of Due Process of law guaranteed under the Fifth Amendment of the
24 United States would occur if the Court were to apply *Cardoso* to this case and
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1 dismiss the instant lawsuit, and such application would violate the holding in
2 *Darby*. No such dismissal is required, as *Cardoso* is inapposite.
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4 **III. PLAINTIFF’S COMPLAINT STATES A CLAIM UPON**
5 **WHICH RELIEF CAN BE GRANTED BECAUSE SHE IS**
6 **ELIGIBLE TO ADJUST STATUS**

7 *"One thing I learned about America is that if you work hard and play*
8 *by the rules, this country is truly open to you." – Arnold Schwarzenegger,*
9 *2004 Republican National Convention*

10 The Hanfords played by all the rules in their actions to adjust Mrs.
11 Hanford's status to that of a Lawful Permanent Resident ("LPR"), but the
12 Defendants failed to act before Mr. Hanford's untimely death. Defendants
13 contend, however, that a K visa holder is ineligible to adjust her status to
14 that of an LPR if her husband dies before the agency adjudicates her
15 application for adjustment of status. As the U.S. Court of Appeals for the
16 Ninth Circuit has held in analogous circumstances, the Defendants’ position
17 does not require deference, and is not a permissible construction of the
18 statute. *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006).
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22 **A. Plaintiff Complied With The Statutory Requirements and**
23 **Remains an Alien Spouse**

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

23 8 U.S.C. § 1255(d).
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1 Plaintiff complied with the statutory framework outlined above. A
2 fiancée petition was filed on her behalf and approved, she sought and
3 obtained a K-1 visa for entry, she entered legally, married her petitioner
4 within 90 days as required, and dutifully applied for adjustment of status.
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6 In 1986, Congress enacted the Immigration Marriage Fraud
7 Amendments (“IMFA”). Pub. L. No. 99-639. The purpose of IMFA was
8 “to deter immigration related marriage fraud and other immigration fraud.”
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10 *See Choin v. Mukasey*, 537 F.3d 1116 (9th Cir. 2008). Defendants’ reading
11 of the statute results in a cruel form of punishment for applicants who follow
12 the rules, and through no fault of their own suffer the death of their spouse.
13 It does nothing to deter immigration fraud, and cannot have been intended
14 by Congress. Defendants’ interpretation is not due deference, and is not a
15 permissible construction of the statute.
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19 The definition of the term “spouse” in the INA has remained
20 unchanged since its enactment in 1952:
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22 The term “spouse”, “wife”, or “husband” does not include a spouse,
23 wife, or husband by reason of any marriage ceremony where the
24 contracting parties thereto are not physically present in the presence of
25 each other, unless the marriage shall have been consummated.

26 8 U.S.C. 1101(a)(35)

27 The word “spouse”, therefore, has the meaning that Congress attached
28 to it in 1952 when the law was enacted. The Fourth Edition of *Black's Law*

1 *Dictionary*, which was published in 1951 and was the most up-to-date
2 edition available to the drafters of the 1952 INA, broadly defines "spouse" as
3 "[o]ne's husband or wife," a phrase it derives from *Rosell v. State Indus.*
4 *Accident Comm'n*, 164 Or. 173, 179, 95 P.2d 726, 729 (Or. 1939). *Rosell*, in
5 turn, defines a "widow" as "a married woman whose husband is dead" and a
6 "spouse" as "one's wife or husband." It then defines a "surviving spouse" as
7 "the one, of a married pair, who outlives the other." 164 Or. at 173.

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11 The language of the first sentence of INA 201(b)(2)(A)(i), 8 USC §
12 1151(b)(2)(A)(i), which sets out the definition of "immediate relatives" is
13 succinct:

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

19 As the Court in *Freeman* noted, only "parents" are "subject to any
20 limitation, with the grant of immediate relative status being restricted to
21 those whose citizen child is at least 21 years of age. There is no comparable
22 qualifier to be a 'spouse'—that is, a requirement that the marriage must have
23 existed for at least two years." *Freeman, supra*, 444 F.3d at 1039. Yet
24 Defendants continue to insist that Plaintiff is stripped of the status of spouse,
25 and therefore immediate relative status, upon the death of her citizen spouse
26 where the marriage has existed less than two years.

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

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

11 The second sentence of the immediate relative definition creates a time
12 limitation (at the time of death, the alien must have been a spouse for at least
13 two years) not found in the first sentence, but allows a self petition to be
14 filed under INA 204(a)(1)(A)(ii), 8 USC § 1154(a)(1)(A)(ii),
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17 “An *alien spouse* described in the *second sentence* of section
18 201(b)(2)(A)(i) *also* may file a petition with the Attorney General
19 under this subparagraph for classification of the alien (and the alien’s
20 children) under such section.” (emphasis supplied)

21 Therefore, the citizen spouse files a petition under clause (i) of
22 1154(a)(1)(A) to accord immediate relative status to his or her spouse under
23 the *first* sentence of 1151(b)(2)(A)(i). Separately, the alien spouse (in the
24 absence of the citizen spouse filing) “*also may file*” a petition under 8 USC §
25 1154(a)(1)(A)(ii) (clause (ii) instead of (i)) to accord immediate relative
26 status to him or herself (*and his or her children*) under the *second* sentence
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1 of 1151(b)(2)(A)(i), but only if the alien was a spouse for at least two years
2 at the time of the death of the citizen spouse. Congress clearly created “two
3 different processes, such that one or the other applies – either the citizen
4 spouse petitions or, if he dies without doing so, the alien widow may do so.”
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6 *Freeman, supra*, 444 F.3d at 1042.
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8 In an attempt to apply the standards of one section to the petition
9 requirements of another, Defendants create tragic and anomalous results.
10 Courts have refused to follow the Defendant’s position in analogous
11 circumstances, following *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir.
12 2006); *Robinson v. Chertoff*, 2007 WL 1412284 (D.N.J. May 14, 2007)
13 *appeal docketed*, No. 07-2977 (3d Cir. July 5, 2007); *Taing v. Chertoff*, 526
14 F. Supp 2d 177, 2007 U.S. Dist. LEXIS 911411 (D. Mass 2007), *appeal*
15 *docketed*, No. 08-1179 (1st Cir. Feb. 11, 2008); *Lockhart v. Chertoff*, 2008
16 U.S. Dist. LEXIS 889 (D. Ohio 2008), *appeal docketed*, No. 08-1179 (6th
17 Cir. 2008); *But see Burger v. McElroy*, 97 Civ. 8775 (RPP), 1999 U.S. Dist.
18 LEXIS 4854 (S.D.N.Y. Apr. 12, 1999); and *Turek v. Dep’t of Homeland*
19 *Security*, 450 F. Supp. 2d 736 (E.D. Mich. 2006).
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25 As stated by the Court in *Robinson v. Chertoff, supra*,

26 “Under the Ninth Circuit’s decision in *Freeman*, the petitioner’s
27 volitional act in promptly filing the I-130 petition ensures that the
28 alien is considered an immediate relative under the statute. The
alternative, urged by Defendants, is that the timing of the citizen

1 spouse's death – i.e. whether it occurred before or after two years of
2 marriage – governs. This interpretation yields strange results. A
3 prompt adjudication of the I-130 petition (before the citizen dies) will
4 result in approval. A delay in adjudication (until after the citizen dies)
5 will result in a denial. But a severe delay of two years or more,
6 followed by the citizen's death, will also result in an approval. The
7 Court cannot imagine that Congress intended the time of death
8 combined with the pace of adjudication, rather than the petitioner's
9 conscious decision to promptly file an I-130 petition, to be the proper
10 basis for determining whether the alien qualifies as an immediate
11 relative." *Id.*, p. 8.

12 The Court in *Robinson* recognized the absurd results created by
13 Defendants' reading of the statute. The Court in *Freeman* also noted that,
14 "[t]he government also tells us that, had DHS addressed the Freemans'
15 application before Mr. Freeman died, the adjustment of status could have
16 been granted even though they had not been married for two years."
17 *Freeman, supra*, 444 F.3d at 1040. Mrs. Hanford's case is no different in
18 this respect than Mrs. Freeman's.

19 **B. The Provisions of 8 USC § 1186a Specifically Provide For**
20 **Termination of Conditional Permanent Resident Status On A**
21 **Basis *Other Than* Through The Death of a Spouse**

22 Defendants *are prohibited by statute* from terminating Conditional
23 Permanent Resident (CPR) status through death of the spouse, despite
24 Defendants' statement (Def. Mot. p. 4) that "the alien and the citizen spouse
25 must jointly file a petition with DHS requesting removal of the conditional
26 status." *See* 8 USC § 1186a(b)(1)(A)(ii) (providing reasons for terminating
27 status.)
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1 status, “other than through the death of a spouse.”). Therefore, while an
2 alien spouse with a living spouse must jointly file a petition (or request an
3 exception), an alien spouse whose citizen spouse is deceased need only
4 allege that her spouse is no longer living and the condition is automatically
5 removed.⁷
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8 Under Defendants’ established procedures not challenged here, it is
9 undisputed that if Defendants had performed their ministerial act of
10 reviewing the facts stated in the petition and application before the death of
11 Plaintiff’s spouse, even though she was not a spouse for two years at the
12 time of her spouse’s death, her CPR status could not have been terminated,
13 and the “condition” would be removed, converting her to LPR status. In
14 fact, Defendants will not contest that under their interpretation an alien
15 spouse identically situated to Plaintiff who sees a quick adjudication would
16 be given CPR status, and upon the death of her spouse (even before two
17 years) be converted to LPR status under the provisions of 8 USC § 1186a,
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22 _____
23 ⁷ See 8 USC § 1186a(b)(1)(A)(ii) (providing for termination of status where “the
24 qualifying marriage has been judicially annulled or terminated, other than through the
25 death of a spouse”); 8 USC § 1186a(c)(1)(A) (requiring a timely joint petition by the
26 alien spouse and the petitioning spouse “if not deceased”); 8 USC § 1186a(c)(4)
27 (providing a hardship waiver where “the qualifying marriage was entered into in good
28 faith by the alien spouse, but the qualifying marriage has been terminated (other than
through the death of the spouse”); 8 USC § 1186a(d)(1)(A)(i)(II) (requiring a statement
in connection with the petition to remove the condition that the marriage has not been
judicially annulled or terminated, “other than through the death of a spouse”).

1 whereas Plaintiff faces automatic denial solely due to the death of her spouse
2 before bureaucratic action.
3

4 Congress cannot have intended such strange and unjust results, and no
5 statute shows our country's lawmakers' intent to afflict widows with such a
6 penalty. Our Great Nation cannot be seen to invite foreign citizens to enter
7 as fiancées, authorize them to become married to American citizens,
8 sanction their application for legal status, allow them to establish families
9 and a home life together, then throw the spouses out when the American dies
10 during bureaucratic immigration processing.
11
12

13 **C. Markovski and Choin Are Not Dispositive of Plaintiff's Claims**

14
15 Defendants urge the Court to follow the Fourth Circuit's decision in
16 *Markovski v. Gonzales*, 486 F.3d 108 (4th Cir. 2007), and reject the
17 reasoning of the Ninth Circuit's decision in *Choin v. Mukasey*, 537 F.3d
18 1116 (9th Cir. 2008). The alien in *Markovski*, however, not only divorced
19 his wife, but specifically sought to adjust status on the basis of an
20 employment-based immigrant petition filed on his behalf by his employer,
21 Amtrak. The Court in *Markovski* held that he could not adjust status on the
22 basis of his employer's petition, because the basis for the adjustment was
23 other than through the marriage to the petitioner. In the case at bar, Mrs.
24 Hanford is seeking to adjust status based on her marriage "to the citizen who
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26
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28

1 filed the petition to accord [her K-1 status].” *See* 8 U.S.C. § 1255(d). She,
2 unlike *Markovski*, is not seeking to adjust status on any other basis than her
3 lawful marriage to Mr. Hanford. The latter serves as the basis of Plaintiff’s
4 adjustment eligibility, and she was not stripped of that eligibility when her
5 spouse passed away. Mrs. Hanford has outlived her spouse, though a spouse
6 she remains.
7

8
9 With respect to the *Choin* case, the Court need not follow the Ninth’s
10 Circuit decision in that case to find in Plaintiff’s favor. The *Choin* case
11 involved a divorce, which is distinguishable from the case at bar. A divorce
12 is a legal procedure initiated by the parties, and death is an Act of God.
13
14 Nevertheless, Plaintiffs must respond to a statement in Defendants’ motion
15 relating to the *Choin* holding that has the potential to mislead. Specifically,
16 Defendants state, “The *Choin* holding directly undermines the spirit and
17 intent of the Immigration Marriage Fraud Act. If followed, it would mean
18 that individuals could come to the United States, duly marry the petitioner
19 within the ninety-day period, and shortly thereafter divorce him or her with
20 the confident expectation that they could remain in the United States.” (Def.
21 Mot. p. 13). That is precisely what the current law allows. In fact, with
22 current adjustment of status adjudication times for K-1 entrants reduced to
23 three to four months from filing, and with the waiver provisions of 8 U.S.C.
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1 § 1186a(c)(4)(B), an individual could divorce shortly after entry and still
2 have the conditional basis of the permanent resident status removed,
3
4 provided the strict requirements of the statute are met. It is undisputable that
5 Defendants have made permanent residents of numerous applicants who
6 divorced in less time than Plaintiff shared in this life with her husband. In
7
8 Defendants view, Plaintiff's right to remain in her marital home with her
9
10 child should turn on the pace of adjudication coupled with the uncertainty of
11 death. Congress intended no such result.

12 **IV. CONCLUSION**

13 For the foregoing reasons, Plaintiff respectfully requests that
14
15 Defendants' Motion to Dismiss be denied.

16 DATED this 24th day of December, 2008.

17 PARRILLI RENISON LLC

18
19 By /s/ Brent W. Renison

20 Brent W. Renison (Bar No. 96475)

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26 Attorney for Plaintiff

1 CERTIFICATE OF SERVICE

2
3 I hereby certify that on the 24th 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 24th day of December 2008, at Lake Oswego, Oregon.

14 /s/Brent W. Renison

15 Brent W. Renison