

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

Gwendolyn Naag Hanford,)	
)	
Petitioner,)	
)	
v.)	CIVIL NO. SA-08-CA-0795-XR
)	
Michael Chertoff,)	
Secretary, U.S. Department of)	
Homeland Security;)	
<i>et al,</i>)	
)	
Respondents.)	

**RESPONDENTS’ MOTION TO DISMISS &
MOTION TO STAY BRIEFING ON PETITIONER’S
MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, Michael Chertoff, Secretary, U.S. Department of Homeland Security, *et al.*, Respondents in the above-styled matter, by and through Johnny Sutton, United States Attorney for the Western District of Texas and the undersigned Assistant United States Attorney, and move this Court to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim upon which relief can be granted. In support of this motion, Respondents state to the Court as follows:

INTRODUCTION

Petitioner Gwendolyn Naag Hanford (Hanford) brought this action under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*, the Mandamus Act, 28 U.S.C. § 1361, the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and 28 U.S.C. § 1331, seeking to have this

Court grant declaratory and other injunctive relief regarding the denial of her application for lawful permanent residence (“LPR”) status (Form I-485). (Complaint.)

The Court should dismiss the complaint because the Court lacks subject matter jurisdiction over the underlying controversy. Hanford filed her complaint after the six year statute of limitations on her claim expired, and the United States has not otherwise waived sovereign immunity. 28 U.S.C. § 2410. Even if Hanford had timely filed her complaint, this court lacks subject matter jurisdiction over her claim because USCIS placed her into removal proceedings on November 14, 2008, which vests exclusive jurisdiction over her claims with the Immigration Judge (“IJ”). *See Cardosa v. Reno*, 216 F.3d 512, 518 (5th Cir. 2000).

Even if the Court does exercise jurisdiction over this action, the Court should dismiss the complaint, because Hanford seeks declaratory and injunctive relief to which she is not entitled by law. The statutory language of 8 U.S.C. §§ 1255(a) & (d) is clear and unambiguous; only a person who entered the United States on a K-1 visa, married the U.S. citizen petitioner, and continues to be married to the U.S. citizen petitioner is eligible for adjustment of status. Hanford’s marriage ended with the death of her U.S. citizen husband. Even if the Court finds that the statutory language is ambiguous, the Court should afford the agency’s interpretation of the statute the deference to which it is entitled under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

STATEMENT OF CASE

A. Facts Pertaining To Ms. Hanford.

Hanford is a citizen of the Philippines. (Complaint ¶ 15.) She entered the United States legally on a K-1 visa as the fiancée of a United States citizen on October 15, 2006, based upon a Petition for Alien Fiancé(e) (Form I-129F) approved by USCIS. (*Id.* ¶¶ 16, 18.) On December 12,

1996, she married Stewart Allen Hanford, a United States citizen. (*Id.* ¶ 17.) She then filed an Application to Register for Permanent Residence or to Adjust Status (Form I-485), the denial of which is the subject of this action. (*Id.* ¶ 18.) Mr. Hanford died on January 8, 1998, just short of 13 months after their marriage. (*Id.* ¶ 21.)

On May 9, 2002, USCIS denied Ms. Hanford's application for adjustment of status, finding that she was no longer eligible for adjustment because she was no longer the spouse of a United States citizen. (*Id.* ¶ 22.) Since that time, Hanford has been residing in the United States illegally. Hanford was served with a Notice to Appear (NTA) on November 3, 2008. (Exhibit A, Notice to Appear). The NTA was filed with the immigration court on December 4, 2008, commencing removal proceedings,¹ and a master calendar hearing before an immigration judge is scheduled for January 20, 2009. (Exh. B, Notice of Hearing in Removal Proceedings).

B. Adjustment of Status on the Basis of a Fiancé(e) Visa.

Until 1970, a United States citizen whose alien fiancée lived in a foreign country was required to travel to that foreign country to participate in the marriage, and the foreign spouse then had to apply for an immigrant visa abroad and await processing of the visa application before coming to the United States. *See* 2 C. Gordon, S. Mailman, S. Yale-Loehr, eds., *Immigration Law and Procedure* § 23.01 at 23-2 (2001) (hereinafter "Immigration Law").

¹ Removal proceedings are considered to have been "initiated" when an alien is issued a Notice to Appear before an immigration judge to show cause why he or she should not be removed. *See* 8 U.S.C. § 1229(a)(1); 8 C.F.R. § 1003.14(a); *Xiu Mei Wei v. Mukasey*, 545 F.3d 1248, 1250 (10th Cir. 2008) ("A removal proceeding is initiated by issuing to the alien a 'notice to appear,' . . ."); *Becker v. Gonzales*, 473 F.3d 1000, 1002 (9th Cir. 2007) ("Removal proceedings were initiated against Becker on February 14, 2005, when a Notice to Appear ('NTA') was filed with the Immigration Court . . .").

To reduce the hardship caused by this requirement, Congress enacted 8 U.S.C. § 1101(a)(15)(K)(i), which established the nonimmigrant classification of an alien fiance(e) for aliens seeking to enter the United States in order to marry a United States citizen (the K-1 category of nonimmigrants). *See id.* § 23.02 at 23-3. The United States citizen files a Form I-129F with U.S. Citizenship and Immigration Services in order to classify the alien fiance(e) as a fiance(e). *See* 8 C.F.R. § 214.2(k).

In 1986, in an effort to curtail marriage fraud, Congress enacted the Immigration Marriage Fraud Amendments of 1986 (“IMFA”). Pub. L. 99-639, § 2, 100 Stat. 3537 (Nov. 10, 1986). In relevant part, the IMFA amendments provide that where a marriage was entered into less than 24 months prior to the date an alien obtains permanent resident status by virtue of the marriage, an alien spouse of a citizen may be conditionally admitted for permanent residence for a two-year probationary period. *See* 8 U.S.C. §§ 1186a(a) and (d). During the 90 days prior to expiration of the probationary period, the alien and the citizen spouse must jointly file a petition with the DHS requesting removal of the conditional status. 8 U.S.C. §§ 1186a(c) and (d).

As part of IMFA, Congress specifically restricted adjustment of status for an alien admitted as a K-1 nonimmigrant fiancée. *See* 8 U.S.C. § 1255(d); *see also* H.R. Rep. No. 906, 99th Cong., 2d Sess. 6. This statutory bar states, in pertinent part:

[t]he Attorney General may not adjust, under subsection (a) of this section, the status of the nonimmigrant alien described in section 1101(a)(15)(K) of this title except to that of an alien lawfully admitted to the United States on a conditional basis under section 1186a of this title as a result of the marriage of the nonimmigrant... to the citizen who filed the petition to accord that alien's nonimmigrant status under section 1101(a)(15)(K) of this title.

8 U.S.C. § 1255(d). Thus, the Attorney General is specifically precluded from adjusting the status of a nonimmigrant alien except as a result of the marriage of the nonimmigrant to the very U.S. citizen who filed the petition in the first place to grant that alien's nonimmigrant status.

The implementing federal regulation states:

[t]he following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act... [a]ny alien admitted to the United States as a nonimmigrant defined in section 101(a)(15)(K) of the Act, unless ... [i]n the case of a K-1 fiancée(e) under section 101(a)(15)(K)(i) of the Act... the alien is applying for adjustment of status based upon the marriage of the K-1 fiancée(e) which was contracted within 90 days of entry with the United States citizen who filed a petition on behalf of the K-1 fiancée(e).

8 C.F.R. § 1245.1(c)(6)(i). If an alien has been admitted as a nonimmigrant fiancée(e) to marry a United States citizen, and the marriage takes place within ninety days after entry, the alien is eligible to adjust to conditional permanent residence based upon his or her status as the spouse of the United States citizen who filed the K-1 visa petition. *See* 8 U.S.C. § 1255(d). If, however, a valid marriage does not occur within ninety days after the admission of an alien fiancée(e), he or she is required to depart from the United States and upon failure to do so is subject to deportation. *See* 8 U.S.C. § 1184(d). The statute contains no adjustment provision for former spouses or widows.

ARGUMENT

I. THE COURT SHOULD DISMISS THE CASE FOR LACK OF JURISDICTION AS BARRED BY THE STATUTE OF LIMITATIONS AND BECAUSE HANFORD HAS FAILED TO EXHAUST HER ADMINISTRATIVE REMEDIES.

The Federal Rules of Civil Procedure provide that “[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” Fed. R. Civ. P. 12(h)(3); 12(b)(1). As the party asserting federal district court jurisdiction, petitioner bears the burden of establishing that jurisdiction is proper. Fed. R. Civ. P.

8(a); *Stockman v. Fed. Election Comm'n.*, 138 F.3d 144, 151 (5th Cir. 1998). In determining jurisdiction, the court may base its decision on the complaint alone, the complaint supplemented by undisputed facts, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The burden of proof is on the party asserting jurisdiction. *Id.*

Here, Hanford seeks relief under the Immigration and Nationality Act, the Administrative Procedure Act, the federal question doctrine, the Mandamus Act and the Declaratory Judgment Act. As an initial matter, neither the Mandamus Act nor the Declaratory Judgment Act provide an independent source of federal jurisdiction. *Kielczynski v. United States Central Intelligence Agency*, 128 F. Supp. 2d 151, 155 (E.D.N.Y. 2001).

A. The Federal Statute Of Limitations Bars Hanford's Claim.

The United States, as sovereign, may only be sued to the extent that it has consented to suit by statute. *United States v. Dalm*, 494 U.S. 596, 608 (1990); *Dunn McCampbell Royalty Interest*, 112 F.3d 1283, 1287 (5th Cir. 1997). The terms of the United States' consent to waiver of sovereign immunity circumscribe district court and appellate court jurisdiction. *Dunn McCampbell*, 112 F.3d at 1287. The federal question statute, 28 U.S.C. § 1331, only confers subject matter jurisdiction where some other statute provides a waiver of sovereign immunity. *See Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1385 (5th Cir. 1989). Although the APA serves as a limited waiver of sovereign immunity, *Stockman v. Fed. Election Com'n.*, 138 F.3d 144, 152 n. 13 (5th Cir. 1998), the general federal statute of limitations provision of 28 U.S.C. § 2401(a) limits the time under which such actions may be brought. *Davis Mountains Trans Pecos Heritage Ass'n v. Federal Aviation Admin.*, 116 Fed. Appx. 3, 17 (5th Cir. 2004) (Claims under the APA are subject to the

general six year statute of limitations for claims against the government). Under 28 U.S.C. § 2401(a), every civil action against the United States is barred unless brought within six years after the right of action first accrues. *Id.* If a waiver of sovereign immunity contains a limitations period, a petitioner's failure to file her action within that period deprives the court of subject matter jurisdiction. *See id.*; *Gandy Nursery, Inc., v. United States*, 318 F.3d 631, 637 (5th Cir. 2003).

The parties do not dispute that USCIS denied Hanford's I-485 application on May 9, 2002. Thus, the statute of limitations to bring such a claim began to run on May 9, 2002, and expired six years later, on May 9, 2008. *See* 28 U.S.C. § 2401. Hanford filed her complaint on September 25, 2008, over four months after the statute of limitations expired. The failure to file Hanford's complaint within the statute of limitations period deprives this Court of subject matter jurisdiction over her claim. Accordingly, the complaint should be dismissed.

B. Exclusive Jurisdiction over Petitioner's Claims is Vested with the IJ because Petitioner has been Placed in Removal Proceedings.

This Court lacks jurisdiction to consider Hanford's claim seeking relief from USCIS's denial of her I-485 application, and her complaint should be dismissed because she was placed into removal proceedings by USCIS on December 4, 2008.² Federal courts are courts of limited jurisdiction, and they do not have subject matter jurisdiction over a claim unless that jurisdiction is conferred by

² Additionally, the decision by USCIS to issue Hanford a Notice to Appear is not reviewable by this court pursuant to 8 U.S.C. § 1252(g).

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

statute. *See Dunn-McCampbell Royalty Interest*, 112 F.3d at 1286. Here, the statutory scheme adopted by Congress for judicial review of denials of adjustment of status applications requires that “questions of law” be raised in the form of petitions for review of administratively final removal orders before the courts of appeal. *See* 8 U.S.C. §§ 1252(a)(2)(D), (a)(5), (b)(2), and (b)(9). Thus, the only avenue through which petitioner could properly bring such a legal challenge would be in the Courts of Appeal after exhaustion of administrative remedies before an Immigration Judge and the Board of Immigration Appeals. *See Cardoso v. Reno*, 216 F.3d 512, 518 (5th Cir. 2000) (“As a matter of jurisdiction, courts may not review the administrative decisions of INS unless the appellant has just exhausted ‘all administrative remedies.’”) (citing *Randall v. Meese*, 854 F.2d 482, 482 (D.C. Cir. 1988)); *see also McBreaty v. Perryman*, 212 F.3d 985, 987 (7th Cir. 2000) (a court may not review the denial of an adjustment of status application because there is a requirement to exhaust administrative remedies “if and when the immigration service institutes removal (*i.e.*, deportation proceedings)”).³

Like in *Cardosa*, the statutory and regulatory scheme regarding the non-appealability of denials of adjustment of status applications, the INA’s jurisdictional provisions regarding the review of applications for adjustment of status in removal proceedings, and the requirement that individuals exhaust administrative remedies before they may petition for review of a final order of removal, should be read in concert to require administrative exhaustion through the re-application for adjustment of status before the immigration court in the course of removal proceedings. *See* 8 U.S.C. §§ 1252(b)(9), 1252(d)(1); 8 C.F.R. §§ 245.2(a)(1) (“After an alien, other than an arriving

³ Further, Petitioner may be able to demonstrate eligibility for adjustment of status before the Immigration Judge if she can provide a substitute affidavit of support. *See, e.g.*, 8 U.S.C. § 1183a(f); 8 C.F.R. §§ 213a.1, 213.2(b)(1), and (c)(2)(iii)(D).

alien, is in deportation or removal proceedings, his or her application for adjustment of status under section 245 of the Act or section 1 of the Act of November 2, 1966, shall be made and considered only in those proceedings”), 245.2(a)(5)(ii) (“No appeal lies from the denial of an application by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 C.F.R. part 240.”).

Consequently, Hanford’s unexhausted claims are not properly before the district court.⁴ *See Cardosa*, 216 F.3d at 518; *Howell v. INS*, 72 F.3d 288, 293 (2d Cir. 1995) (holding that “the district court lacked jurisdiction to review the district director’s denial of Howell’s application for adjustment of status once deportation proceedings commenced”). Here, Defendants have shown that Hanford is currently in removal proceedings. *See* Exhibit B. Thus, the Immigration Judge has exclusive jurisdiction over her application for adjustment of status, the gravamen of her complaint, and the complaint should be dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

II. HANFORD’S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED BECAUSE SHE IS INELIGIBLE TO ADJUST STATUS.

If the Court exercises jurisdiction over this cause of action, it must dismiss the complaint under Fed. R. Civ. P. 12(b)(6), because Hanford has failed to state a claim upon which relief can be granted. Dismissal is appropriate when a petitioner's complaint fails to provide enough factual allegations to "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, --- U.S. ----, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007). On a motion to dismiss, the Court must construe the complaint in the light most favorable to the petitioner and accept the factual

⁴ This exhaustion analysis is applicable both to Hanford’s APA claims by function of 5 U.S.C. § 704, and her Mandamus claim, where Hanford has failed to exhaust all avenues of relief. *See Heckler v. Ringer*, 466 U.S. 602, 617-28 (1984).

allegations as true. *See Fernandez-Montez v. Allied Pilots Assoc.*, 987 F.2d 278, 284 (5th Cir. 1993); *see also Capital Parks, Inc.*, 30 F.3d at 629 (citing *Baton Rouge Bldg. & Constr. Trades Council AFL-CIO v. Jacobs Constructors, Inc.*, 804 F.2d 879, 881 (5th Cir. 1986)) (“A court’s decision to dismiss for failure to state a claim may be upheld ‘only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations.’”); *O’Quinn v. Manuel*, 773 F.2d 605, 608 (5th Cir. 1985). The court need not accept unsupported legal allegations, legal conclusions couched as factual allegations, or conclusory factual allegations devoid of any reference to actual events. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Revene v. Charles County Comm’rs*, 882 F.2d 870, 873 (4th Cir. 1989), *United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979).

A. Hanford is Ineligible for Adjustment of Status by Virtue of the Plain Language of the Statute.

The starting point for any issue of statutory construction is the plain language of the statute. *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004). If the language in question has an unambiguous meaning, the Court’s inquiry must cease. *See Moreno-Morante v. Gonzales*, 490 F.3d 1172, 1174 (9th Cir. 2007); *Montero-Martinez*, 277 F.3d at 1141. Here, the plain language at issue is unambiguous, and Hanford simply fails to satisfy its express terms.

When read together as a whole, 8 U.S.C. §§ 1155(a) and (d), 1184(d), 1186a(a) and (g), and 8 C.F.R. § 1245.1(c)(6)(i), the statutory scheme clearly requires that an alien who enters the United States as a K-1 (like Hanford) may only adjust on a conditional basis after marriage within 90 days of entry to the citizen who filed the fiance(e) petition which allowed the alien entry. In the instant case, Ms. Hanford received a nonimmigrant fiance(e) visa on the basis of being a beneficiary of an approved K-1 visa petition submitted by a United States citizen, Mr. Hanford. *See* 8 U.S.C. §

1184(d). She subsequently gained admission to the United States on the basis of a that visa and married the U.S. citizen petitioner who filed the visa petition on her behalf within 90 days of entry to the United States. *See* 8 U.S.C. § 1101(a)(15)(K)(i). She applied for conditional residence status based on her marriage to the K-1 U.S. citizen petitioner by filing Form I-485. *See* 8 U.S.C. §§ 1186(a) and (g), 1255(d); 8 C.F.R. § 1245.1(c)(6)(i).⁵

Nevertheless, USCIS properly determined that Ms. Hanford was statutorily ineligible for adjustment of status to conditional resident status under 8 U.S.C. § 1255(a), due to the fact that upon the death of her husband, her marriage no longer existed and she could not qualify as the current spouse of a U.S. citizen. Here, the agency's determination that, at the time of adjudication, Ms. Hanford was statutorily ineligible to adjust her status to that of a conditional permanent resident followed the clear directive of 8 U.S.C. § 1255(d). As noted earlier, 8 U.S.C. § 1255(d) does not permit an alien who entered the United States on a K-1 visa to adjust her status “except to that of an alien lawfully admitted to the United States on a conditional basis under [INA § 216] as a result of the *marriage* of the nonimmigrant.” 8 U.S.C. § 1255(d) (emphasis added). Similarly, 8 C.F.R. § 245.1(c)(6) states that an alien is ineligible for adjustment of status on the basis of a K-1 visa unless “the alien is applying for adjustment of status based upon the *marriage* of the K-1 fiancée which was contracted within 90 days of entry with the United States citizen who filed a petition on behalf of the K-1 fiancée(e)” (emphasis added). 8 C.F.R. § 245.1(c)(6).

⁵ Conditional permanent resident status lasts for two years. *See* 8 U.S.C. § 1186a(a)(2)(A) and (d)(2)(A). An alien whose status has been adjusted to that of a conditional resident will lose that status unless she applies for removal of the condition within ninety days before termination of the two-year conditional period. *See id.*

The use of the term “marriage” in both the statute and regulation is key. Unless Congress clearly intended a specific, technical meaning, a statute is to be interpreted according to the common, ordinary meaning of the words of the statute at the time of enactment. *See BedRoc Ltd., LLC., v. United States*, 541 U.S. 176, 184 (2004); *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Burns v. Alcala*, 420 U.S. 575, 580-81(1975). In the United States, under the law of every State, marriage ends when one spouse dies. *See* 52 Am. Jur. 2d, Marriage, § 8. Because the petitioning United States citizen is no longer living, Hanford is no longer in a legal marriage. Accordingly, she is no longer eligible for adjustment of status on the basis of the marriage to the citizen who petitioned for the K nonimmigrant visa. Because at the time of adjudication Ms. Hanford was seeking adjustment of status on the basis of her former marriage to her deceased husband, the statute precludes her adjustment of status.

While this appears to be a case of first impression within this circuit, the United States Court of Appeals for the Fourth Circuit, in *Markovski v. Gonzales*, 486 F.3d 108 (4th Cir. 2007), addressed whether an alien who entered the United States on a K-1 fiancée visa can adjust his status on a basis other than his marriage to his fiancée United States citizen sponsor. In *Markovski*, the Fourth Circuit found that an alien who arrived in the United States on a K-1 fiancée visa, as did Ms. Hanford, could not adjust his status on any basis other than marriage to the visa sponsor. *Markovski*, 486 F.3d at 110. Like Ms. Hanford, *Markovski* married his fiancée, a U.S. citizen, within ninety days of entry to the United States as is required by law. *Id.* at 109; 8 U.S.C. § 1184(d). Also, both filed adjustment of status applications while still married to the petitioners but the marriage ended -- for Markovski in divorce and for Ms. Hanford in the death of her husband -- before the agency's adjudication of the adjustment of status applications. *Id.*

In *Markovski*, the Fourth Circuit found the statutory language in 8 U.S.C. § 1255(d), to be “clear and speaks directly to petitioner's situation.” 486 F.3d at 110. “On its face, subsection (d) prohibits an alien who arrived on the K-1 fiancé visa from adjusting his status on any basis whatever save for the marriage to the K-1 visa sponsor.” *Id.* Noting that it was the court's “duty to give the statutory language effect,” the Fourth Circuit concluded that “the language of [8 U.S.C. § 1255(d)] itself is not ambiguous and bars beneficiaries of the K-1 visa from adjusting status on any basis other than marriage to the petition sponsor.” *Markovski*, 486 F.3d at 111.

In *Choin v. Mukasey*, the Court of Appeals for the Ninth Circuit found that a petitioner who entered the United States on a K-1 visa, married her K-1 visa sponsor within 90 days, and then divorced him in under two years, should be permitted to adjust to legal permanent resident status, despite the language of INA § 245(d). 537 F.3d 1116 (9th Cir. 2008). The *Choin* court held that the statutory language was ambiguous, and looked to the “purpose of the statute and its context in the statutory scheme.” The Court should follow the *Markovski* opinion, which correctly holds that the language of the statute is not ambiguous, and uphold the agency decision. As the agency correctly concluded, 8 U.S.C. §§ 1255(a) and (d) permit adjustment of status to a conditional lawful permanent resident of K-1 visa holders only as a result of the marriage to the citizen who filed the petition. The *Choin* holding directly undermines the spirit and intent of the Immigration Marriage Fraud Act. If followed, it would mean that individuals could come to the United States, duly marry the petitioner within the ninety-day period, and shortly thereafter divorce him or her with the confident expectation that they could remain in the United States. The Fourth Circuit correctly found that section 245(d) bars beneficiaries of the K-1 visa from adjusting their status on any basis other than marriage to the petitioner. The statute makes no distinction between those aliens who married

and later divorced, those who were widowed, or those who failed to marry altogether. Ms. Hanford's claim is analogous to that of Markovski, and accordingly, the Court should follow *Markovski* and dismiss her complaint.

D. Alternatively, If the Language of the Statute Is Ambiguous, Deference Should Be Given to the Board's Interpretation Because it is a Permissible Construction of the Statute.

However, even if the plain language of the statute were ambiguous, which it is not, the agency's interpretation would be entitled to deference. *See Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984); *Moreno-Morante*, 490 F.3d at 1174. When an element of the agency's determination includes an interpretation and application of the INA's terms, that interpretation is entitled to deference in accordance with *Chevron*, and must be judicially accepted if it "is based on a permissible construction of the statute." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (internal quotation and citation omitted). While the agency's interpretation of immigration laws is entitled to deference, such deference is required only after the Court determines that a statute is ambiguous. *See Moreno-Morante v. Gonzales*, 490 F.3d 1172, 1174 (9th Cir. 2007); *Kankamalage v. INS*, 335 F.3d 858, 862 (9th Cir. 2003), *but see Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1112 (9th Cir. 2006).

To the extent that this Court should find, contrary to the Fourth Circuit's decision in *Markovski*, that the language of 8 U.S.C. § 1255(d) is ambiguous, it should defer to the agency's interpretation because it is a "permissible construction of the statute." *Morales-Izquierdo v. Gonzales*, 486 F.3d 484,492 (9th Cir. 2007) (en banc), *quoting Chevron*, 467 U.S. at 843 n.11 ("we 'need not conclude that the agency construction was the only one it permissibly could have adopted . . . , or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.'") Rather, "Congress, when it left ambiguity in a statute meant for implementation by

an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.” *Morales-Izquierdo*, 486 F.3d at 492, quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 125 S. Ct. 2688, 2700, 162 L. Ed.2d 820 (2005).

Here, the agency's determination that Ms. Hanford was statutorily ineligible to adjust her status to that of CLPR status based on her marriage to Mr. Hanford (which subsequently was terminated by his death before the adjustment application was adjudicated) was a permissible construction of 8 U.S.C. §§ 1255(a) and (d). As noted earlier, 8 U.S.C. § 1255(d), does not permit an alien who entered the United States on a K-1 visa to adjust her status “except to that of an alien lawfully admitted to the United States on a conditional basis under [INA § 216] *as a result of the marriage of the nonimmigrant.*” 8 U.S.C. § 1255(d) (emphasis added). Similarly, 8 C.F.R. § 245.1(c)(6) states that an alien is ineligible for adjustment of status on the basis of a K-1 visa unless “the alien is *applying for adjustment of status based upon the marriage of the K-1 fiancée* which was contracted within 90 days of entry with the United States citizen who filed a petition on behalf of the K-1 fiancée(e)” (emphasis added). As the agency properly concluded, Ms. Hanford was no longer eligible for adjustment of status on the basis of her K-1 visa because her marriage to Mr. Hanford (U.S. citizen who filed petition) was terminated by his death and consequently, she could no longer adjust her status “*based upon the marriage of the K-1 fiancée*” as no such marriage existed at the time of the adjudication of Ms. Hanford’s adjustment application. 8 C.F.R. § 245.1(c)(6).

The holding in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) is inapplicable to this case. Hanford’s former spouse filed a Form I-129F, which admitted her on a conditional basis to the United States as a nonimmigrant. The *Freeman* Court concluded that the death of the United States

citizen spouse did not necessarily strip the alien spouse of her immediate relative status. *Id.* at 1040-43. Under the *Freeman* analysis, the “immediate relative” status “vests” in the alien once the spouse has filed the I-130 and the alien has filed the I-485. However, because Hanford’s former husband filed an I-129F, “immediate relative” status cannot “vest” in her on the basis of the I-129F. The K-1 nonimmigrant visa admits an alien for the sole purpose of marrying a specific United States citizen. In *Kalal v. Gonzales*, 402 F.3d 948 (9th Cir. 2005), the Court held that an alien who was admitted on a K-1 nonimmigrant visa for the specific purpose of marrying the United States citizen who filed the visa petition on her behalf, and who failed to marry that person, could not avoid removal by filing an application for adjustment of status based on her later marriage to another United States citizen. Hanford’s K-1 nonimmigrant visa only allows her to adjust her status based on her marriage to the United States citizen who filed the visa petition on her behalf, and Hanford was no longer married to her petitioner at the time of the adjudication of her Form I-485.

III. THE COURT SHOULD STAY BRIEFING ON PETITIONER’S MOTION FOR SUMMARY JUDGMENT PENDING A DECISION ON THE INSTANT MOTION TO DISMISS.

Respondents answer or responsive pleading was initially due on December 5, 2008. On December 5, 2008, Respondents filed an *unopposed* motion for extension of time to file their answer or responsive pleading, which this Court granted on December 8, 2008 – setting the deadline for Respondents filing as December 19, 2008 (emphasis added). Pursuant to the unopposed extension motion and the Court’s subsequent order, Respondents are timely filing their responsive pleading in the form of a motion to dismiss. *See supra* Sections I and II.

Three days prior to the deadline, Petitioner filed a motion for summary judgment. Respondents aver that because of their now pending motion to dismiss, which challenges the

jurisdiction of this Court, it would be more efficient and expedient for the Court and the parties to stay briefing on Petitioner's motion for summary judgment until the instant motion to dismiss is decided. As a matter of judicial efficiency, other courts have placed briefing on a pending motion for summary judgment into abeyance pending the resolution of a motion to dismiss. *See, e.g., Means v. Cullen*, Case No. 02-C-0695-C, 2003 WL 23100259, * 1 (W.D. Wis. July 25, 2003) (unpublished) (it will be helpful to the parties to know the resolution of [defendant's] motion to dismiss plaintiff's claims against her for plaintiff's failure to exhaust his administrative remedies, so that the parties can limit the scope of their work on the remaining motion if need be); *Jockey Intern., Inc. v. M/V LEVERKUSEN EXPRESS*, 217 F. Supp. 2d 447, 450 (S.D.N.Y. 2002).

CONCLUSION

This Court should dismiss Hanford's complaint because it lacks subject matter jurisdiction over the claims contained therein. Alternatively, if the Court does exercise jurisdiction over the complaint, the Court should dismiss it because Hanford does not meet the plain statutory qualifications for the relief she seeks.

Respectfully submitted,

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Counsel for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2008, the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ _____
GARY L. ANDERSON
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Gwendolyn Naag Hanford,)	
)	
Petitioner,)	
)	
v.)	CIVIL NO. SA-08-CA-0795-XR
)	
Michael Chertoff,)	
Secretary, U.S. Department of)	
Homeland Security;)	
<i>et al,</i>)	
)	
Respondents.)	

ORDER

On this day, came on for consideration Respondents' Motion to Dismiss Petitioner's Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief. The Court having reviewed Petitioner's Application and the Motion to Dismiss filed by Respondents finds that Petitioner's Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief should be **DENIED** on all grounds. Petitioner's Motion for Summary Judgment is denied as moot.

It is so **ORDERED**.

Signed this the _____ day of _____, 2008.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE