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15 UNITED STATES DISTRICT COURT
 16
 17 CENTRAL DISTRICT OF CALIFORNIA
 18
 19 WESTERN DIVISION

14 CAROLYN ROBB HOOTKINS,	) Case No. CV07-05696 (CAS)
15 et al.,)
16 Plaintiffs,	) Date: April 20, 2009
17 v.	) Time: 10:00 a.m.
	) Courtroom: 5
	) Honorable Christina A. Snyder
18 JANET NAPOLITANO, Secretary,)
19 U.S. Department of Homeland	) DEFENDANTS' NOTICE OF MOTION
20 Security, et al.,	) AND MOTION FOR PARTIAL
	) SUMMARY JUDGMENT AS TO
	) NINTH CIRCUIT CLASS PLAINTIFFS
21 Defendants.	) AND
	) MEMORANDUM OF POINTS AND
	) AUTHORITIES IN SUPPORT OF
	) DEFENDANTS' MOTION FOR
	) PARTIAL SUMMARY JUDGMENT

22 **PLEASE TAKE NOTICE** that on April 20, 2009, at 10:00 a.m., or as soon
 23 thereafter as the parties may be heard, Defendants Janet Napolitano, Secretary of
 24 Homeland Security, and Michael Aytes, Acting Deputy Director, U.S. Citizenship
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1 and Immigration Services (collectively the "Defendants"), will bring for hearing a
2 motion pursuant to Federal Rules of Civil Procedure 56 for partial summary
3 judgment with respect to the class certified on January 6, 2009, and a separate
4 motion for partial summary judgment as to the Plaintiffs whose cases arise outside
5 the jurisdiction of the Ninth Circuit. The hearing will take place before the
6 Honorable Christina A. Snyder, Courtroom 5, 312 North Spring Street, Los
7 Angeles, California 90012.

8
9 This motion is based on the Memorandum of Points and Authorities attached
10 hereto, all pleadings, papers and files in this action, and such oral argument as may
11 be presented at the hearing on this motion.
12

13 This Motion is made following the ongoing conference of counsel pursuant
14 to L.R. 7-3 which took place between January 20, 2009, and February 27, 2009.

15 Dated: March 13, 2009

16 Respectfully submitted,

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18 United States Department of Justice
19 Acting Assistant Attorney General

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendants, by and through their undersigned counsel, respectfully
4 move this Court for an order granting partial summary judgment in favor of
5 Defendants as to the claims of the Plaintiffs whose cases arise within the
6 jurisdiction of the Ninth Circuit and who are identified members either of the class
7 or subclass certified by this Court pursuant to the Order Granting Plaintiff's
8 Motion for Class Certification (Order Granting Class Certification) (dkt # 108).¹

9
10
11 The Court certified the following class of alien spouses whose citizen spouse
12 filed an immediate relative petition on their behalf:

13 All aliens whose United States citizen spouse died before the couple's
14 two-year wedding anniversary, and whose citizen spouse filed an I-130
15 petition and a Form I-864 or I-864EZ affidavit of support on behalf of the
16 alien spouse, so long as he or she can also demonstrate that (1) the Form I-
17 130 petition is now pending with or was adjudicated by a USCIS office
18 located within the jurisdiction (2) at the time of the citizen spouse's death,
19 either the citizen spouse or the alien spouse resided within the jurisdiction of
20 the Ninth Circuit.

21 The Court further certified the following subclass of alien spouses who entered the
22 United States on fiancé(e) visas:

23 All aliens who, within ninety days of admission to the United States as a
24 nonimmigrant fiancé, married the petitioning United States citizen, and
25 whose citizen spouse died before the couple's two-year wedding
26 anniversary, so long as he or she can also demonstrate that the citizen spouse
27 filed an I-129F petition and a Form I-864 or I-864EZ affidavit of support on
28 behalf of the alien spouse, and (1) the Form I-129F petition is now pending
with or was adjudicated by a USCIS office located within the jurisdiction of

¹ To date, the identified class members are: Carolyn Robb Hootkins, Ana Maria Moncayo-Gigax, Suzanne Henriette De Mailly, Sara Cruz Vargas De Fisher, Raymond Lockett, Elsa Cecilia Brenteson, Pauline Marie Gobeii, Rose Freeda Fishman-Corman, Khin Thidar Win, Li Ju Lu, Purita Manuel Pointdexter, Tracy Lee Rudl, and Dieu Ngoc Nguyen.

1 the Ninth Circuit, or (2) at the time of the citizen spouse's death, either the
2 citizen spouse or the alien spouse resided within the jurisdiction of the Ninth
3 Circuit.

4 *Id.*

5 Pursuant to the Court's Order Directing Notice to Class (dkt # 112), Defendants
6 file the instant motion as to the Ninth Circuit Class Plaintiffs and a separate Motion
7 for Partial Summary Judgment as to the Plaintiffs whose cases arise outside the
8 jurisdiction of the Ninth Circuit. This memorandum is within the 35-page limit
9 ordered by the Court (dkt #14).

10 Plaintiffs filed a putative class action seeking injunctive, declaratory, and
11 mandamus relief. Plaintiffs alleged that Defendants wrongfully determined that
12 Plaintiffs are not entitled to "immediate relative" status under 8 U.S.C.
13 § 1151(b)(2)(A)(i), following the death of their United States citizen spouses prior
14 to the two-year anniversary of their respective marriages.

15 In its Order Granting in Part and Denying in Part Defendants' Motion to
16 Dismiss Complaint Under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Order re: Motion
17 to Dismiss) (dkt # 36), the Court ruled that judicial review under the
18 Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, is not available for
19 lack of final agency action as to certain Class Plaintiffs and Plaintiffs outside the
20 Ninth Circuit. However, the Court retained jurisdiction to adjudicate their claims
21 under the Mandamus Act, 28 U.S.C. § 1361. (Order re: Motion to Dismiss at 17).

22 Accordingly, Defendants respectfully submit that under either the APA or
23 Mandamus Act, Defendants are entitled to judgment as a matter of law because
24 United States Citizenship and Immigration Services ("USCIS") did not abuse its
25

1 discretion in denying or revoking Plaintiffs' immediate relative petitions (Form I-
2 130) and adjustment of status applications (Form I-485), and there is no genuine
3 issue at to any material fact. *See* Fed. R. Civ. P. 56(c).

4 **II. BACKGROUND**

5 **A. Standards of Review**

6 **1. Motion for Summary Judgment**

7
8 Summary judgment is appropriate when the evidence, viewed in the light
9 most favorable to the nonmoving party, demonstrates that there are no genuine
10 issues of material fact and the moving party is entitled to judgment as a matter of
11 law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L.
12 Ed. 2d 265 (1986); Fed. R. Civ. P. 56(c). The requirement that a fact dispute be
13 genuine means that "the mere existence of some alleged factual dispute between
14 the parties will not defeat an otherwise properly supported motion for summary
15 judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct.
16 2505, 2510, 91 L. Ed. 2d 202 (1986).

17 **2. Administrative Procedure Act**

18
19 The APA provides for judicial review of final agency decisions. *See* 5
20 U.S.C. §§ 702 and 706. Under the APA, a court can only hold unlawful and set
21 aside agency action, findings, and conclusions it finds to be "arbitrary, capricious,
22 an abuse or discretion, or otherwise not in accordance with the law." 5 U.S.C.
23 § 706(2)(A); *Family Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d
24 1313, 1315 (9th Cir. 2006). A court may not "substitute its own construction of a
25 statutory provision for a reasonable interpretation made by the administrator of an
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1 agency.” *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837,
2 844, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984).

3 **3. Mandamus Act**

4 Under the Mandamus Act, 28 U.S.C. § 1361, the district court is vested with
5 “original jurisdiction of any action in the nature of mandamus to compel an officer
6 or employee of the United States or an agency thereof to perform a duty owed to
7 the plaintiff.” 28 U.S.C. § 1361. Plaintiffs must demonstrate that “(1) [his or her]
8 claim is clear and certain; (2) the official duty is nondiscretionary, ministerial, and
9 so plainly prescribed as to be free from doubt; and (3) no other adequate remedy if
10 available.” *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1997).

11 **B. Relevant Facts**

12 A separate Proposed Statement of Uncontroverted Facts and Conclusions of
13 Law accompanies this Memorandum as required by Local Rule 56-1.

14 **III. ARGUMENT**

15 **A. Defendants’ Interpretation of 8 U.S.C. § 1151(b)(2)(A)(i) Is**
16 **Correct.**

17 Section 204 of the Immigration and Nationality Act (“INA”), 8 U.S.C.
18 § 1154 (2007), provides United States citizens and alien spouses, under certain
19 conditions, the right to petition the Attorney General (now the Secretary of
20 Homeland Security) for classification of an alien as an “immediate relative.” The
21 INA allows a United States citizen to file a petition (Form I-130) on behalf of a
22 spouse claiming the spouse is entitled to classification as an “immediate relative.”
23 8 U.S.C. § 1154(a)(1)(A)(i). “Immediate relative” is a defined term, as set forth in
24 8 U.S.C. § 1151(b)(2)(A)(i):
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1 For purposes of this subsection, the term "immediate relatives" means the
2 children, spouses, and parents of a citizen of the United States, except that,
3 in the case of parents, such citizens shall be at least 21 years of age. In the
4 case of an alien who was the spouse of a citizen of the United States for at
5 least 2 years at the time of the citizen's death and was not legally separated
6 from the citizen at the time of the citizen's death, the alien (and each child of
7 the alien) shall be considered, for purposes of this subsection, to remain an
8 immediate relative after the date of the citizen's death but only if the spouse
9 files a petition under section 204(a)(1)(A)(ii) of this title within 2 years after
10 such date and only until the date the spouse remarries.

11 *Id.*

12 As a result, those married less than two years at the time of the death of the
13 petitioning spouse no longer qualify for "immediate relative" status as legally
14 married spouses of United States citizens. *Matter of Varela*, 13 I. & N. Dec. 453
15 (BIA 1970). In *Varela*, the Board of Immigration Appeals ("BIA" or Board"),
16 determined that the death of the citizen spouse ends the legal marriage, and thus
17 also ends "immediate relative" status as well. *Id.* The Board reaffirmed the result
18 in *Varela* in a later decision, although the Board stressed the lack of the alien's
19 standing even to pursue the matter after the citizen spouse had died. *Matter of*
20 *Sano*, 19 I. & N. Dec. 299 (BIA 1985). Determinations by the Board are binding
21 on the government in the immigration context and apply nation-wide. *See* 8 C.F.R.
22 § 1003.1(g).

23 Nevertheless, on April 21, 2006, the U.S. Court of Appeals for the Ninth
24 Circuit issued a precedent decision with a different interpretation of the relevant
25 statutory language. *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006). The
26 *Freeman* Court concluded that the death of the United States citizen spouse did not
27 necessarily strip the alien spouse of immediate relative status. *Id.* at 1040-43. The
28 Court also concluded it was not required to follow the rule of deference to an

1 authoritative administration interpretation, *see National Cable & Telecomm. Ass'n*
2 *v. Brand X Internet Services*, 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820
3 (2005); *Chevron*, 467 U.S. 837, because, according to the panel, the Board decision
4 in *Sano* undermined the validity of *Varela*. *Freeman*, 444 F.3d at 1038, n.10.
5 Without acknowledging the general rule that marriage ends at death, moreover, the
6 Court held that *Varela* did not reflect a permissible interpretation of the statute. *Id.*
7 at 1038.
8

9 However, on February 2, 2009, the U.S. Court of Appeals for the Third
10 Circuit issued a precedent decision in accordance with the general rule in the
11 United States that marriage legally ends when one spouse dies. In *Robinson v.*
12 *Napolitano*, 554 F.3d 358 (3rd Cir. 2009) (rehearing denied), the Third Circuit
13 made the precise finding that the terms in 8 U.S.C. § 1151(b)(2)(A)(i) are clear and
14 unambiguous, and do not permit an immediate relative classification to be applied
15 to widow(er)s who were married to their U.S. citizen spouse for less than two
16 years, like Plaintiffs. *See Robinson*, 554 F.3d at 364. The first sentence in section
17 1151(b)(2)(A)(i) cannot be divorced from the second. *Id.* If the citizen spouse
18 dies, the two-year marriage requirement applies to the widow(er), and this rule
19 applies both to surviving spouses whose citizen spouse filed an immediate relative
20 petition prior to death and to surviving spouses whose citizen spouse did not file
21 the petition. *Id.* In the Third Circuit, therefore, widow(er)s, like Plaintiffs, who
22 were married to their U.S. citizen spouse for less than two years, and did not obtain
23 conditional permanent resident status before the U.S. citizen's death, may not
24 immigrate on the basis of their former marital relationship. *Id.* Additionally, the
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1 Agency's interpretation has been endorsed by at least two decisions from federal
2 district courts considering this precise issue. *See* Turek, 450 F. Supp. 2d 736 (E.D.
3 Mich. 2006); *Burger v. McElroy*, 1999 WL 203353 (S.D.N.Y. 1999); *cf. Taing v.*
4 *Chertoff*, 526 F. Supp. 2d 177 (D. Mass. 2007); *Lockhart v. Chertoff*, 2008 WL
5 80225 (N.D. Ohio Jan. 7, 2008).

7 Because the *Robinson* decision directly contradicts the rationale of *Freeman*,
8 and this Court earlier cited to the fact of “no conflicting law from another circuit”
9 in denying Defendants’ Motion to Dismiss, Defendants respectfully request this
10 Court to adopt the *Robinson* analysis, in accordance with the arguments set forth
11 *infra*. *See* Order re: Motion to Dismiss at 31 (dkt #36).

13 First, Plaintiffs’ claims should be rejected pursuant to a straightforward
14 application of the express terms of 8 U.S.C. § 1151(b)(2)(A)(i). Alternatively,
15 even if there is some ambiguity in the statute, numerous factors including two
16 recent legislative enactments and the subsequent legislative history of the statute
17 make it clear that Congress did not intend to enact the interpretation that Plaintiffs
18 invite this Court to adopt.

20 **1. Under 8 U.S.C. § 1151(b)(2)(A)(i), An “Immediate Relative”**
21 **Includes A Current “Spouse.”**

22 The first step of any question of statutory construction is the analysis of the
23 statute to determine whether the intent of Congress is clear; if so, that is the end of
24 the matter. *Chevron*, 467 U.S. at 842-43; *Moreno-Morante v. Gonzales*, 490 F.3d
25 1172, 1174 (9th Cir. 2007). Only if the statute is silent or ambiguous as to the
26 issue in question will the court determine whether the agency’s interpretation is
27

1 based on a permissible construction of the statute. *Chevron*, 467 U.S. at 842-43.

2 Under Step One of the *Chevron* analysis, 8 U.S.C. § 1151(b)(2)(A)(i)
3 provides a clear definition of “immediate relative” which includes only a *current*
4 “spouse,” and does not include a “widow” or a “surviving spouse.” Moreover,
5 while the second sentence of the statute carves out a narrow exception for those
6 widows who were married to their decedent spouses for more than two years to
7 self-petition, this exception does not apply to Plaintiffs here because each was
8 married for less than two years.
9

10 Plaintiffs argue that they remain immediate relatives under
11 § 1151(b)(2)(A)(i) and are eligible for adjustment of status despite the death of
12 their respective spouses. *See* First Amended Complaint for Declarative and
13 Injunctive Relief and Petition for Writ of Mandamus (First Amended
14 Complaint)(dkt #37) at ¶¶165-167. Plaintiffs’ interpretation, however, requires
15 this Court to legislate into the statute the additional terms of “widow(er),” or
16 “surviving spouse.”
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19 The first sentence of § 1151(b)(2)(A)(i) defines the term “immediate
20 relative” as the spouse, parent, or child of a U.S. citizen. 8 U.S.C.
21 § 1151(b)(2)(A)(i). As noted, Plaintiffs no longer qualify as an “immediate
22 relative” under this first sentence because they are not currently a “spouse” of a
23 U.S. citizen. Rather, each is now unfortunately a “widow(er)” of a citizen and
24 ineligible to adjust status because a visa petition is unavailable to them. The
25 second sentence of § 1151(b)(2)(A)(i) provides a narrow exception for someone
26 who “*was* the spouse of a citizen,” but makes an exception applicable only when
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1 the marriage lasted more than two years. *Id.* (emphasis added). Since Plaintiffs'
2 respective marriages ended with the deaths of their citizen spouses, each is now an
3 "alien who *was* the spouse of a citizen." *Id.* (emphasis added). Thus, the second
4 sentence of § 1151(b)(2)(A)(i) clearly provides the rule that determines whether
5 Plaintiffs qualify as "immediate relatives" after the death of their spouses. Since
6 Plaintiffs had been married for less than two years at the time of each citizen
7 spouse's death, Plaintiffs cannot satisfy the statutory requirements. Accordingly,
8 the terms of the statute are clear, and under a straightforward application of the
9 statute, Plaintiffs fail to satisfy the standards mandated by Congress for
10 classification as immediate relatives. *See Robinson*, 554 F.3d at 364; *see also*
11 *Turek*, 450 F. Supp. 2d at 740.

14 Moreover, Defendants' interpretation of the statute is consistent with the
15 general rule in the United States that a marriage ends upon the death of one spouse.
16 *See 52 Am. Jur. 2d Marriage*, § 8. In addition, the common, ordinary meaning of
17 the term "spouse" is a married person. *See Black's Law Dictionary* 1438-39 (8th
18 ed. 2007) (defining "spouse"). Federal law has adopted this same basic definition
19 of "spouse" for purposes of the administration of every Federal statute and
20 regulation. 1 U.S.C. § 7 ("[T]he word 'spouse' refers only to a person of the
21 opposite sex who *is* a husband or a wife") (emphasis added). Unless Congress
22 clearly intended a specific technical meaning, a statute is to be interpreted
23 according to the common, ordinary meaning of the words of the statute at the time
24 of the enactment. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 184
25 (2004), 124 S. Ct.1587, 1593-94, 158 L. Ed. 2d 338. In sum, in applying the
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1 ordinary understanding and meaning of the term "spouse," Plaintiffs are no longer
2 "spouses" but rather are "widow(er)s." Hence, they no longer qualify for
3 immediate relative status.

4 In sum, the statute is unambiguous and plainly provides that Plaintiffs
5 cannot be considered "immediate relatives" under the statute because they are
6 "widow(er)s" and not "spouses," nor are they former spouses to a marriage that
7 lasted more than two years. As such, pursuant to the Step One *Chevron* analysis,
8 Plaintiffs simply do not meet the straightforward criteria outlined by Congress for
9 immediate relative classification, and Defendants are entitled to judgment as a
10 matter of law. *See Robinson*, 554 F.3d at 364, 366.

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13 **2. Alternatively, Even If The Definition Of “Immediate**
14 **Relative” Is Not Clear Under These Circumstances, The**
15 **Agency’s Determination Should Be Given Deference And**
16 **Upheld As A Reasonable Construction Of The Statute.**

17 Even if the plain language of the statute were ambiguous, which it is not, the
18 agency's interpretation would be entitled to deference. *See Chevron*, 467 U.S. at
19 842-43; *Moreno-Morante*, 490 F.3d at 1174. When an element of the agency's
20 determination includes an interpretation and application of the INA's terms, that
21 interpretation is entitled to deference in accordance with *Chevron*, and must be
22 judicially accepted if it “is based on a permissible construction of the statute.” *INS*
23 *v. Aguirre-Aguirre*, 526 U.S. 415, 424, 119 S. Ct. 1439, 1445, 143 L. Ed. 2d. 590
24 (1999) (internal quotation and citation omitted). While the agency's interpretation
25 of immigration laws is entitled to deference, such deference is required only after
26 the Court determines that a statute is ambiguous. *See Moreno-Morante*, 490 F.3d
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1 at 1174; *Kankamalage v. INS*, 335 F.3d 858, 862 (9th Cir. 2003); *but see*
2 *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1112 (9th Cir. 2006).

3 **a. Defendants’ Interpretation of § 1151(b)(2)(A)(i) Is**
4 **Consistent With BIA Precedent On the Issue.**

5 Under *Chevron* Step Two, if the Court finds the statute ambiguous, it should
6 reject Plaintiffs’ construction as contrary to BIA precedent. The BIA has expressly
7 reached the issue presented here, and held that a widow(er) shall not be considered
8 a “spouse” for purposes of an immediate relative classification. *Varela*, 13 I. & N.
9 Dec. 453.

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11 Plaintiffs challenge the validity of *Varela* on the merits due to the BIA’s
12 later decision that it was procedurally inappropriate for the panel in *Varela* to reach
13 the merits of the case. Plaintiffs’ Memorandum in Opposition to Motion to
14 Dismiss and Cross Motion for Summary Judgment at 18-20 (Plaintiff’s Opposition
15 and Cross Motion (dkt #9) . Simply because the *Sano* panel made the procedural
16 determination that the *Varela* Plaintiff lacked standing to bring her claim does not
17 mean that the substantive holding in *Varela* is entitled to no weight at all in this
18 case. Indeed, the Court in *Turek* found the BIA’s *Varela* opinion particularly
19 instructive. *See Turek*, 450 F. Supp. 2d at 740 (citing *Varela* and holding that it is
20 “persuasive that the BIA had previously determined that the beneficiary of a
21 spousal immediate relative petition would be ineligible for that status if the
22 petitioning spouse dies before the statutory two-year time period”); *cf. Robinson*,
23 554 F.3d at 362 (noting that the District Court failed to cite *Varela*). Thus, *Varela*
24 should be given due consideration.
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1 **b. Defendants' Interpretation of § 1151(b)(2)(A)(i) Is**
2 **Consistent With Subsequent Congressional Action.**

3 Further supporting the BIA's interpretation, recent congressional action
4 demonstrates that *Varela* is correctly decided regarding the construction of
5 § 1151(b)(2)(A)(i). When Congress takes subsequent action, it can be indicative of
6 the congressional intent and understanding behind existing statutes. *See Heckler v.*
7 *Turner*, 470 U.S. 184, 208-09 (1985), 105 S. Ct. 1138, 1151, 84 L. Ed. 2d. 138
8 (noting that "[w]ere there any doubt remaining as to Congress' intention in 1981,
9 subsequent congressional action would dispel it" given that a House Committee
10 had voted on a proposed amendment to the statute in question). Here, subsequent
11 congressional action confirms that Defendants' interpretation of
12 § 1151(b)(2)(A)(i) is the correct one. In the prior Congressional term (110th), H.R.
13 6034—which was a bill to amend the statute to contain the express relief that
14 Plaintiffs advocate here—was voted out of committee and referred to the entire
15 Congress for passage on October 3, 2008. *See* 154 Cong. Rec. D. 867, 869; 154
16 Cong. Rec. H. 10827, 10827; *see also* 110 H. Rpt. 911. Thus, while H.R. 6034
17 was not voted on by the full Congress nor sent to the President, the fact that
18 Congress was in the process of seeking to amend the statute to address alien
19 widows whose marriages lasted less than two years provides further support that
20 the language as currently enacted by Congress is clear and unambiguous and does
21 not support the classification of Plaintiffs as "immediate relatives."
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26 Further, in this current congressional term, a similar bill has recently been
27 introduced to amend § 1151(b)(2)(A)(i) to provide the very relief that Petitioners
28 here claim is already available under the statute. *See* H.R. 264 (introduced January

1 7, 2009, and currently pending before a House Committee). Accordingly,
2 subsequent congressional activity makes it clear that Congress's understanding of
3 the statute supports Defendants' position.

4 Moreover, aside from these bills which seek to amend the statute at issue
5 here, other congressional activity shows that when Congress wants to provide
6 exceptions for widows to be eligible for immediate relative classification without
7 any durational requirement for the marriage, it will do so expressly, and not, as
8 Petitioners contend, *sub silentio*. See *Robinson*, 554 F.3d at 365, n.7. Specifically,
9 in passing the FY2004 National Defense Authorization Act, Pub. L. No. 108-136,
10 Division A, § 1703, 117 Stat. 1392, 1693-96 (2003), Congress extended eligibility
11 to alien widows of U.S. citizens who served honorably on active duty in the U.S.
12 Armed Forces, and who died as a result of combat. Likewise, in the USA
13 PATRIOT Act, Pub. L. No. 107-56, §§ 421 and 423, 115 Stat. 272, 360-363,
14 Congress extended I-130 eligibility to alien spouses of U.S. citizens killed as a
15 result of terrorist activity. Subsequent congressional activity in this instance is
16 illustrative of Congress's understanding of the statute previously enacted.
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20 c. **Freeman Was Wrongly Decided And Does Not Lead To the**
21 **Conclusion That Defendants' Interpretation of**
22 **§ 1151(b)(2)(A)(i) Is Incorrect.**

23 The Ninth Circuit in the *Freeman* decision erred in several respects, and thus
24 it should not be followed, nor should any weight be given to the District Court
25 decisions which rely on *Freeman*. The Ninth Circuit erred because its decision in
26 *Freeman* is inconsistent with the Ninth Circuit's own prior precedent. Particularly,
27 in *Dodig v. INS*, 9 F.3d 1418 (9th Cir. 1993), the Ninth Circuit rejected petitioner's
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1 argument that she should have been granted relief for "humanitarian" reasons under
2 8 C.F.R. § 205.1(a)(3) because her U.S. citizen husband died prior to the
3 adjudication of his I-130 petition on her behalf, and thereby implicitly endorsed the
4 construction that a widow(er) was not considered a spouse such that she could
5 proceed under the first sentence of § 1151(b)(2)(A)(i). *Dodig*, 9 F.3d at 1420.
6 Likewise, in *Abboud v. INS*, 140 F.3d 843 (9th Cir. 1998), citing *Dodig*, the Ninth
7 Circuit concluded that "humanitarian relief is not available under [8 C.F.R. §
8 205.1(a)(3)] where the petitioner has died prior to the approval of the Relative
9 Petition." *Abboud*, 140 F.3d at 849. Accordingly, the *Freeman* decision is at odds
10 with *Dodig* and *Abboud*. Because the *Freeman* panel was not free to overturn the
11 holdings of the prior panels absent clarification *en banc* or by the Supreme Court,
12 *see Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003), the *Freeman*
13 decision should not be given any weight as it is inconsistent with its own Circuit's
14 law.
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18 **d. The Final Affidavit of Support Rule Supports Defendants'**
19 **Interpretation of § 1151(b)(2)(A)(i) Is Incorrect.**

20 In addition, the final affidavit of support rule, 71 Fed. Reg. 35732 (June 21,
21 2006), also supports Defendants' interpretation. The Government received several
22 comments on the prior interim rule, dealing with the validity of a visa petition once
23 the Plaintiff has died. 71 Fed. Reg. at 35735. In response to the comments, the
24 Attorney General and the Secretary of Homeland Security specifically endorsed the
25 Board's holding in *Varela* that the visa Plaintiff's death requires denial of the Form
26 I-130. *Id.* The Government also crafted a special humanitarian exception for those
27 with previously-approved I-130 petitions for cases with special humanitarian
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1 circumstances, by providing for the conversion of a spousal I-130 petition into a
2 widow's I-360 petition, if the requirements of the second sentence in §
3 1151(b)(2)(A)(i) are met when the citizen spouse dies. 8 C.F.R.
4 §§ 204.2(b)(1)(i)-(iv) (2006); 8 C.F.R. § 205.1(a)(3)(i)(C)(2).
5

6 In sum, if the Court proceeds to a Step Two *Chevron* analysis, the Agency's
7 construction of the statute should be upheld because it is a reasonable
8 interpretation as it is consistent with BIA precedent on the issue, subsequent
9 congressional action, Third Circuit precedent, and the final Affidavit of Support
10 rule, and it is not invalidated by the *Freeman* decision, which was wrongly
11 decided. Because USCIS correctly interpreted the term "immediate relative" in
12 adjudicating Plaintiff's I-130's and I-485s, the agency's actions do not constitute an
13 abuse of discretion, and neither the APA nor the Mandamus Act afford relief to
14 Plaintiffs.
15

16 **B. Defendants Properly Require a Substitute Affidavit of Support**
17 **After the Death of the Petitioner/Sponsor.**

18 Additionally, Plaintiffs ask this Court for declaratory relief stating that
19 Defendants "improperly attempt to revoke the approval of an I-130 petition unless
20 plaintiffs-petitioners present a request under 8 C.F.R. § 205.1(a)(3)(C)(2) for
21 humanitarian reinstatement, supported by a Form I-864 executed by an individual
22 who qualifies under section 213A(f)(5)(B) of the Immigration and Nationality Act
23 as a qualifying substitute sponsor." First Amended Complaint at ¶ 172 (dkt #37).
24 For those individuals whose spouses die after an I-130 relative petition has been
25 approved, revocation of that petition is automatic. 8 C.F.R. § 205.1(a)(3)(i)(C)
26 (2006). USCIS may reinstate the approval of I-130 petition, as a matter of
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1 discretion, when the beneficiary of the petition requests reinstatement for
2 humanitarian reasons and another relative (as described in 8 U.S.C.
3 § 1183a(f)(5)(B)) is willing and able to file an affidavit of support as a substitute
4 sponsor. For the foregoing reasons, Defendants are entitled to judgment as a
5 matter of law on this issue because the policies followed by Defendant USCIS in
6 handling requests by beneficiaries residing in the Ninth Circuit for humanitarian
7 reinstatement are fully consistent with *Freeman*.

9 On November 8, 2007, USCIS provided guidance to its field adjudicators
10 concerning the application of the *Freeman* decision. See Defendants' Notice of
11 Motion and Motion to Dismiss (dkt #8), Exhibit 1, *Effect of Form I-130 Plaintiff's*
12 *Death on Authority to Approve the Form I-130* (USCIS Memorandum). The
13 USCIS Memorandum amended the USCIS Adjudicators' Field Manual ("AFM")
14 by adding a new chapter 21.2(a)(4)(A) and (B) to inform adjudicators of this
15 policy. Defendants' guidance specifies that, for cases arising outside the Ninth
16 Circuit, USCIS adjudicators will continue to follow *Sano* and *Varela* and the
17 general rule that marriage ends when one spouse dies. *Id.* at 3. For cases arising
18 in the Ninth Circuit, USCIS adjudicators may, under *Freeman*, approve a Form
19 I-130 after the Plaintiff has died, if the case involves the same essential facts,
20 including the fact that alien filed the adjustment application before the Plaintiff
21 died, and if the alien proves that the now-terminated marriage was legally valid,
22 and that the spouses did not marry to confer an immigration benefit on the alien.
23 *Id.* A 6-7. If the Form I-130 is approved, USCIS will exercise its discretion to
24 reinstate the petition upon the Plaintiff's death under 8 C.F.R. § 205.1(a)(3)(i)(C),
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1 if there is a person who is willing and able to file an affidavit of support (USCIS
2 Form I-864) on the alien's behalf, in place of the Form I-864 that the citizen spouse
3 would have been required to submit. *Id.* at 7.

4
5 Approval of a Form I-130, however, is simply a precursor to the alien's
6 application for an immigrant visa or adjustment of status. To be eligible actually to
7 immigrate, the alien must still establish that he or she is admissible. Neither an
8 immigrant visa under 8 U.S.C. § 1182(a), nor adjustment of status under 8 U.S.C. §
9 1255(a)(2), is available to an inadmissible alien. An immediate relative, with
10 certain exceptions, is inadmissible unless a qualifying sponsor has filed an affidavit
11 of support (Form I-864) that meets the requirements of the Act. 8 U.S.C. §§
12 1182(a)(4)(C) and 1183a. A primary requirement of section 213A of the Act is
13 that the affidavit of support must be enforceable against the individual who signed
14 it. 8 U.S.C. § 1183a(a)(1)(B). "No affidavit of support may be accepted," if it is
15 not enforceable. *Id.*

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18 If the original visa petitioner has died, Defendants are permitted to accept a
19 Form I-864 from a qualified substitute sponsor. 8 U.S.C. § 1183a(f)(5)(B), as
20 amended, Family Sponsor Immigration Act of 2002, Pub. L. 107-150, 116 Stat. 74
21 (2002). Following the example of section 213A(f)(5)(B), the USCIS
22 Memorandum provides for submission of a new Form I-864 through the revocation
23 and reinstatement of the approval of the Form I-130. USCIS Memorandum at 7,
24 adopting AFM chapter 21.2(a)(4)(B)(2). This step brings the case under the
25 statutory provision for the submission of a Form I-864 by someone other than the
26 original visa petitioner. If this step is taken, and the alien is otherwise eligible for
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1 adjustment, USCIS may, as a matter of discretion, approve the adjustment
2 application. If there is no substitute sponsor, the necessary implication is that the
3 adjustment application will be denied.

4
5 The dispute in this case related to the requirement to submit a substitute
6 affidavit of support, therefore, is not a factual dispute, but a legal dispute. The
7 Plaintiffs contend that AFM 21.2(a)(4)(B)(2), by providing for the submission of a
8 substitute sponsor's Form I-864 if a Form I-130 is approved under *Freeman* after
9 the petitioner's death, is contrary to the statute. First Amended Complaint at ¶ 172
10 (dkt #37). Defendants respectfully submit that, for the reasons stated *supra*, AFM
11 21.2(a)(4)(B)(2) correctly states the law for Ninth Circuit cases.

12
13 In earlier pleadings, Plaintiffs raised several challenges to the USCIS
14 Memorandum. First, Plaintiffs contended that the USCIS Memorandum has a
15 "direct conflict with *Freeman*." Plaintiffs' Opposition and Cross Motion at 22 (dkt
16 #9). The basis for this claim is that AFM 21.2(a)(4)(B)(1) advises USCIS
17 adjudicators to follow *Freeman* in a Ninth Circuit case only if the alien in that case
18 had filed a Form I-485 before the petitioner died. *Id.* Second, Plaintiffs claim that
19 the USCIS Memorandum makes approval of the Form I-130 dependent on whether
20 the alien is admissible to the United States, and so is contrary to law. *Id.* at 24-25;
21 Plaintiffs' Reply in Support of Cross Motion for Summary Judgment ("Plaintiffs'
22 Summary Judgment Reply") at 4-5 (dkt #21), citing *Matter of O-*, 8 I. & N. Dec.
23 295 (BIA 1959); *cf.* First Amended Complaint at 40 (dkt #37), Prayer for Relief
24 # 8. Third, they argue that the visa petitioner's death does not void any Form I-864
25 that the visa petitioner may have submitted before his or her death. Plaintiffs'

1 Summary Judgment Reply at 3-4 (dkt #21); First Amended Complaint at 38 ¶ 174
2 (dkt #37). Finally, they argue that the automatic revocation regulation, 8 C.F.R.
3 § 205.1, is "invalid as a matter of law." First Amended Complaint at 38, ¶ 173 (dkt
4 # 37).
5

6 Defendants argue *supra* in Part III.A.2.c. that *Freeman* was wrongly decided
7 and should not be credited. In the alternative, even if this Court credits *Freeman*,
8 for the foregoing reasons this Court should determine that the USCIS
9 Memorandum states the legally correct standard for adjudicating the adjustment of
10 status application of an alien who is applying on the basis of a Form I-130 that is
11 approved under *Freeman* after the visa petitioner's death.
12

13 **1. Freeman does not apply to any alien who did not apply for**
14 **adjustment before the deceased citizen died.**

15 As noted *supra*, Plaintiffs contend USCIS Memorandum has a "direct
16 conflict with *Freeman*." Plaintiffs' Opposition and Cross Motion at 23 (dkt #9).
17 The basis for this contention is that AFM 21.2(a)(4)(B)(1) indicates that USCIS
18 will follow *Freeman* only if the alien beneficiary of the Form I-130 had filed a
19 Form I-485 before the deceased citizen died. On this point, Defendants' position is
20 fully consistent with *Freeman*. In making their argument, Plaintiffs cite a sentence
21 from an introductory paragraph of the *Freeman* opinion. *Id.*, citing *Freeman*, 444
22 F.3d at 1033-34. But the sentence that immediately precedes that sentence makes
23 it clear that the fact that Mrs. Freeman had applied for adjustment of status was
24 essential to the Court's holding. In its more extended discussion of Mrs. Freeman's
25 claim to continue to qualify as an immediate relative, the Court repeatedly referred
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1 to the fact that Mrs. Freeman had filed a Form I-485 while Mr. Freeman was alive.
2 The Court pointed out that Mrs. Freeman was Mr. Freeman's spouse when she filed
3 her adjustment application. *Freeman*, 444 F.3d at 1039-40. The Court relied on
4 the requirement that the spouse must file a Form I-485 to actually obtain
5 permanent residence, and that Mrs. Freeman had done so. *Id.* at 1039. The panel
6 stressed that Mrs. Freeman had "completed all the formalities required for an
7 adjustment of [her] status" prior to Mr. Freeman's death. *Id.* at 1043 (citations
8 omitted).
9

10
11 When a panel examines an issue and resolves it deliberatively, the analytical
12 basis for its conclusion becomes part of the law of the Circuit. *See United States v.*
13 *Johnson*, 256 F.3d 895, 916 (9th Cir. 2001). The *Freeman* panel's repeated
14 references to the fact that Mrs. Freeman had applied for adjustment before Mr.
15 Freeman died make it clear that this fact was essential to the panel's decision.
16 This Court, therefore, should not extend *Freeman* to cases in which the alien did
17 not file a Form I-485 before the visa petitioner died.
18

19 Additionally, the class definition itself supports the conclusion that *Freeman*
20 does not apply to aliens who are in the United States but who did not file a Form
21 I-485 before the visa petitioner died. Only certain aliens whose citizen petitioner
22 died while the Form I-130 was pending and before the second wedding anniversary
23 are class members. Class membership also requires that the visa petitioner must
24 have submitted a Form I-864. Order Granting Class Certification at 15-16 (dkt
25 #108). For an alien in the United States, however, the visa petitioner submits the
26 Form I-864 in conjunction with the filing of a Form I-485. *See* 8 C.F.R. §
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1 213a.2(a)(1)(ii)(B). The Form I-864 is not submitted as part of, and would not be
2 relevant in, the Form I-130 proceeding, since the Form I-864 relates to the alien's
3 admissibility, which is a requirement for adjustment of status. *See* 8 U.S.C. §
4 1255(A)(2). Admissibility issues, as the Plaintiffs correctly point out, are not
5 relevant to the adjudication of a Form I-130. Plaintiffs' Reply in Support of Cross
6 Motion for Summary Judgment (Plaintiffs' Summary Judgment Reply) at 4-5 (dkt
7 #21), citing *Matter of O-*, 8 I. & N. Dec. 295. If the alien has not submitted a Form
8 I-485, it is necessarily the case that the visa petitioner did not submit a Form I-864.
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12 Similar reasoning applies to a prospective immigrant visa applicant. A Form
13 I-864 is filed, not with the Form I-130, but with the immigrant visa application.
14 *See* 8 C.F.R. § 213a.2(a)(1)(ii)(A). More significantly, however, an unadmitted
15 alien who does not reside in the United States has no right to challenge an
16 administrative determination that he or she is not entitled to enter the United States
17 under the immigration laws. *Kleindienst v. Mandel*, 408 U.S. 753, 762, 92 S. Ct.
18 2576, 2581, 33 L. Ed. 2d 683 (1974) (noting that alien who has not arrived at the
19 border may not challenge from abroad a decision that he or she is not eligible to
20 immigrate); *Braude v. Wirtz*, 350 F.2d 702, 706 (9th Cir. 1965).
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23 Defendants are correct, therefore, in maintaining that *Freeman* has no application
24 at all in any case in which the visa petitioner died while the Form I-130 is pending,
25 unless the alien beneficiary also filed a Form I-485 before the visa petitioner died.
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1 **2. The USCIS Memorandum does not make inadmissibility a basis**
2 **for denying a Form I-130.**

3 As the Board held in *Matter of O-*, 8 I. & N. Dec. 295, the fact that an alien
4 is inadmissible does not warrant denial of a visa petition. Defendants respectfully
5 submit, however, that any confusion concerning the difference between the
6 approval of a visa petition and the alien's actual admissibility rests with the
7 Plaintiffs' argument, and not the USCIS Memorandum.
8

9 There are two separate provisions in the USCIS Memorandum that apply to
10 the Defendants' implementation of *Freeman*. One provision, codified in AFM
11 chapter 21.2(a)(4)(B)(1), addresses whether a Form I-130 may be approved after
12 the underlying marriage has been terminated by the visa petitioner's death. This
13 provision, quite simply and correctly, states the rule in *Freeman*: a Form I-130 can
14 still be approved, even if the underling marriage has ended by the petitioner's
15 death. All the alien needs to do to obtain approval of the Form I-130 is to prove
16 that the alien was the spouse of the petitioner when the petitioner died, and that the
17 marriage was not an immigration sham. A.F.M. chapter 21.2(a)(4)(B)(1). On this
18 point, Defendants' policy is fully consistent with *Freeman*. Chapter
19 21.2(a)(4)(B)(1) is also consistent with *Matter of O-* because it does not require
20 that admissibility be considered in adjudicating a Form I-130.
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23 The actual dispute with Plaintiffs, therefore, relates to the second provision,
24 codified as AFM chapter 21.2(a)(4)(B)(2). The first sentence of AFM chapter 21.2
25 clearly indicates that this provision addresses not whether the Form I-130 can be
26 approved, but the later question of whether, once the Form I-130 is approved, the
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1 alien can actually immigrate. The very issue that chapter 21.2(a)(4)(B)(2)
2 addresses is how, once the Form I-130 is approved under *Freeman*, the alien can
3 "overcome inadmissibility on public charge grounds." USCIS Memorandum at 7,
4 adopting AFM chapter 21.2(a)(4)(B)(2).
5

6 An adjustment applicant must be admissible as an immigrant, 8 U.S.C.
7 § 1255(a)(2), and the applicant must establish "clearly and beyond doubt." 8
8 U.S.C. § 1225(b)(2). This burden of proof applies to an adjustment applicant, as
9 well as to an applicant for admission with a visa. *See Blanco v. Mukasey*, 518 F.3d
10 714, 720 (9th Cir. 2008); *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 709 (AG
11 2008). Approval of a visa petition does not establish that the alien is actually
12 admissible. 8 U.S.C. § 1153(e) (approval of visa petition does not preclude later
13 finding of inadmissibility). Admissibility is not an issue in the visa petition
14 proceeding. *Matter of O-*, 8 I. & N. Dec. 295. An alien's eligibility for adjustment
15 of status is decided based on the facts of the case as they exist on the date of
16 decision. *Alarcon*, 20 I. & N. Dec. 557, 562 (BIA 1992). Under *Freeman*, an alien
17 may still qualify as the spouse of a citizen, even though the qualifying marriage has
18 terminated by death. All other admissibility factors, however, must still be
19 satisfied at the time of the decision. *Id.*
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22 An alien seeking to immigrate as an immediate relative is inadmissible
23 unless the visa petitioner submits an affidavit of support, Form I-864, that meets
24 the requirements of INA section 213A. 8 U.S.C. § 1182(a)(4)(C). Defendants may
25 not accept an Form I-864 unless it is enforceable. 8 U.S.C. § 1183a(a)(1)(B). The
26 regulations implementing this requirement are located at 8 C.F.R. § 213a. The visa
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1 petitioner/sponsor has no support obligation unless the alien actually acquires
2 permanent residence. 8 C.F.R. § 213a.2(e)(1). The obligation ends if the visa
3 petitioner/sponsor dies. 8 C.F.R. § 213a.2(e)(2)(ii). The clear implication of the
4 regulation, therefore, is that a Form I-864 is not "enforceable" if the visa
5 petitioner/sponsor dies before the alien immigrates.
6

7 Defendants acknowledge, of course, that AFM chapter 21.2(a)(4)(B)(2) uses
8 the "revoke and reinstate" mechanism under 8 C.F.R. § 205.1(a)(3)(i)(C) to provide
9 the adjustment applicant with a means for submission of a substitute sponsor's
10 Form I-864. But this provision reflects the fact that the statute provides one, and
11 only one, basis for submission of a Form I-864 if the visa petitioner has died. If
12 the Form I-130 has been approved, but the visa petitioner has died, the statute
13 permits Defendants to accept a Form I-864 from someone else if Defendants have
14 "determined for humanitarian reasons" that revocation of the approval would not
15 be appropriate. 8 U.S.C. § 1183a(f)(5)(B). Congress, quite simply, provided no
16 mechanism for the submission of a Form I-864 after the petitioner has died. Thus,
17 Defendants provided in AFM chapter 21.2(a)(4)(B)(2) that a Form I-130 that is
18 approved under AFM chapter 21.2(a)(4)(B)(1) should be revoked and reinstated
19 precisely to facilitate the alien's immigration, if a substitute sponsor is available.
20 Without an enforceable Form I-864 from a substitute sponsor, the alien is
21 inadmissible under 8 U.S.C. § 1182(a)(4)(C) and therefore ineligible for
22 adjustment of status as a matter of law. 8 U.S.C. § 1255(a)(2).
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1 **3. An alien whose visa petitioner has died is inadmissible,**
2 **unless a substitute sponsor submits a Form I-864 in lieu of**
3 **any Form I-864 that the visa petitioner may have submitted.**

4 Plaintiffs' next contention is that, if the visa petitioner submitted a Form
5 I-864 before his or her death, then no substitute sponsor's Form I-864 is required,
6 despite the death of the petitioner/sponsor. Plaintiffs' Summary Judgment Reply at
7 3-4 (dkt #21); First Amended Complaint at ¶ 174 (dkt # 37). According to
8 Plaintiffs, it is enough for the sponsor simply to sign the Form I-864. Plaintiffs'
9 Summary Judgment Reply at 3 (dkt #21). They contend it is not necessary at all
10 for the Form I-864 to meet the requirements of 8 C.F.R. § 213a because those
11 requirements "serve merely the form and process of the affidavit." *Id.*

12 Plaintiffs' argument must be dismissed as meritless. 8 U.S.C.
13 § 1182(a)(4)(C)(ii) expressly says the alien must have a Form I-864 "described in
14 section 213A of the Act." 8 U.S.C. § 1182(a)(4)(C)(ii). A Form I-864 "described"
15 in that section is, by definition, a Form I-864 that is "legally enforceable."
16 8 U.S.C. § 1183a(a)(1)(B). Section 213A states explicitly that a Form I-864 may
17 not be accepted unless it is enforceable against the individual who signed it. *Id.*
18 The legislative history of section 213A is particularly instructive here, as it states
19 the provision was needed because "[v]arious State court decisions and decisions by
20 immigration courts have held that the affidavits of support, as currently constituted,
21 do not impose a binding obligation on the sponsor." H.Rep. 104-725 at 387
22 (1996); *cf.* H.Rep. 104-641 at 1451 (1996). To say, as Plaintiffs do, that a Form
23 I-864 does not actually need to be enforceable is to say that enactment of section
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1 213A failed to accomplish its purpose. *See* Plaintiffs' Summary Judgment Reply at
2 3-4 (dkt #21).

3 As noted *supra*, the support obligation does not even begin unless the
4 sponsored immigrant acquires permanent residence. 8 C.F.R. § 213a.2(e)(1).
5 Further, the support obligation terminates when the visa petitioner dies. 8 C.F.R. §
6 213a.2(e)(2)(ii). In a case in which the visa petitioner dies while the Form I-130
7 and Form I-485 are pending, therefore, no actual support obligation ever comes
8 into force. Thus, there is no longer a valid and enforceable Form I-864. But
9 requiring the submission of an enforceable support obligation is the cardinal
10 feature of the Form I-864 requirement. 8 U.S.C. § 1183a(a)(1)(B). Thus, the Form
11 I-864 requirement can be met only by the submission of a Form I-864 from a living
12 sponsor who meets the requirements of 8 C.F.R. § 213a.

13 Citing 8 U.S.C. § 1183a(c), Plaintiffs suggest that the estate of a deceased
14 petitioner could be deemed to be the sponsor. Plaintiffs' Summary Judgment Reply
15 at 4, (dkt 21). But that statute clearly requires that the sponsor must be an
16 "individual." 8 U.S.C. § 1183a(f)(1). An estate is not an individual. Moreover,
17 8 U.S.C. § 1183a(c) provides no support at all for the proposition that an estate can
18 be liable for a support obligation after the sponsor dies. First, section 213A(c)
19 makes no reference at all to any estate. The provision allows a judgment creditor
20 whose judgment is based on a Form I-864 to enforce the judgment using the
21 procedures under Federal law that apply generally to enforcement of judgments.
22 One of these remedies, under 28 U.S.C. § 3205(d)(2), does permit execution of a
23 judgment lien against the estate of a judgment debtor. But section 3502(d)(2)
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1 applies if the judgment debtor dies "after a writ of execution is issued." Thus,
2 section 3502(d)(2) allows an estate to be held responsible for a debt that was
3 reduced to judgment while the individual was alive. The Form I-864 rule is
4 consistent with this statutory arrangement. *See* 8 C.F.R. § 213a.2(e)(3) (estate may
5 be liable for support or reimbursement obligation that accrued before decedent's
6 death).

8 Thus, regardless of whether the Form I-130 is approved and reinstated, or
9 simply approved, the alien, unless completely exempt from the Form I-864
10 requirement, may obtain adjustment of status only if there is a Form I-864 from a
11 living sponsor whose Form I-864 meets the requirements of 8 C.F.R. § 213a. If the
12 visa petitioner has died, the Form I-864 must be from a substitute sponsor, who
13 must be related in the manner specified in 8 U.S.C. § 1183a(f)(5)(B). Accordingly,
14 AFM chapter 21.2(a)(4)(B)(2) is consistent with the law.

17 **4. The automatic revocation regulation is valid.**

18 Finally, Plaintiffs argue that the automatic revocation regulation located at
19 8 C.F.R. § 205.1(a)(3)(i)(C) is invalid. First Amended Complaint at 38, ¶ 173 (dkt
20 #37). This argument is largely academic since, whether the approval of Form
21 I-130 is revoked or not, there must still be a Form I-864 from a qualified substitute
22 sponsor, as Defendants argue *supra*. Plaintiffs' argument that the regulation is
23 invalid, however, is meritless, for the reasons set forth *infra*.

25 The basis for Plaintiffs' argument that the regulation is invalid seems to be
26 the decision of the Second Circuit in *Pierno v. INS*, 397 F.2d 949 (2d Cir. 1968).
27 *See* Plaintiffs' Response in Opposition to Defendants' Supplemental Memorandum
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1 of Law in Support of Motion to Dismiss at 13ff (dkt #33). In *Pierno*, the Second
2 Circuit remanded the alien's case for an individualized decision on whether the
3 petitioner's death warranted revocation of the approval of the Form I-130. *Id.* The
4 Ninth Circuit reached a similar conclusion in *Leano v. INS*, 460 F.2d 1260. (9th
5 Cir. 1972).

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7 More recent Supreme Court and Ninth Circuit opinions, however, deprive
8 *Leano* and *Pierno* of all precedential value. It is now well-settled that the
9 Executive may establish by rule that its officers will exercise its discretion in a
10 certain way in specific situations, "unless Congress clearly expresses an intent to
11 without that authority." *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 612
12 (1991), 111 S. Ct. 1539, 1543, 113 L. Ed. 2d. 675. Thus, the National Labor
13 Relations Board properly exercised its authority to determining how many
14 collective bargaining units should be permitted "in each case," 29 U.S.C. § 159(b),
15 by establishing by rule that, with certain exceptions, eight, and only eight,
16 bargaining units would be allowed at acute care hospitals. *American Hospital*, 499
17 U.S. at 614.

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20 Similarly, the Bureau of Prisons validly exercised its authority concerning
21 the exercise of discretion to grant early release by establishing, categorically by
22 rule, that offenders who engaged in certain misconduct could not qualify for early
23 release. *Lopez v. Davis*, 531 U.S. 230 (2001), 121 S. Ct. 714, 148 L. Ed. 2d 635.
24 In the administration of the immigration laws, the Supreme Court held that the
25 Attorney General could establish, by rule, that the discretion to release a detained
26 alien from custody would not be exercised unless the alien agreed not to engage in
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1 unauthorized employment. *INS v. National Center for Immigrants' Rights, Inc.*,
2 502 U.S. 183 (1991), 112 S. Ct. 551, 116 L. Ed. 2d 546. The Ninth Circuit, finally,
3 has held that the Attorney General could establish, categorically by regulation, that
4 the discretion to grant asylum to a refugee would not be exercised favorably, if the
5 alien had firmly resettled in a country other than the country of persecution. *Yang*
6 *v. INS*, 78 F.3d 932 (9th Cir. 1996).

8 The principle of these cases is that an agency is not required repeatedly to
9 re-visit "issues that may be established fairly and efficiently in a single rulemaking
10 proceeding." *Heckler*, 461 U.S. at 467. A categorical rule avoids the risk of
11 "favoritism, disunity and inconsistency." *Lopez*, 531 U.S. at 244. As noted *supra*,
12 8 U.S.C. § 1154(e) makes clear that, even if a visa petition is approved, the alien
13 cannot immigrate if he or she is not actually eligible when he or she seeks
14 admission with an immigrant visa. The categorical rule that death revokes
15 approval of a visa petition gives effect to that principle. Thus, 8 C.F.R.
16 § 205.1(a)(3)(i)(C) is a valid and proper exercise of the Secretary's authority to
17 revoke approval of a visa petition.

20 Also, Congress has several times amended section 205 while the automatic
21 revocation regulation has been in effect. Since 1938, the death of a visa petitioner
22 has warranted revocation of approval of a visa petition. 3 Fed. Reg. 263 (1938).
23 Since 1952, this revocation has been automatic, and effective as of the date of
24 approval. 17 Fed. Reg. 11469, 11482-83 (1952), promulgating former 8 C.F.R.
25 § 206.1(b)(2) and (3). Plaintiff's Opposition and Cross Motion at 28ff (dkt #9).
26 The enactment through Public Law 107-150 of the substitute sponsor provision,
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1 8 U.S.C. § 1183a(f)(5)(B), is particularly telling on this point. Congress expressly
2 took note of the regulation that automatically revokes approval of a Form I-130 on
3 the petitioner's death. H. Rep. 107-127 at 6 (2001). This legislative history
4 establishes that Public Law 107-150 was not intended to alter in any way the
5 regulatory provisions for revocation of an approval on the petitioner's death. *Id.*
6 A petitioner's death, therefore, revokes approval as of the date of approval, unless
7 USCIS decides, as a matter of discretion, to let the approval stand. 8 C.F.R.
8 § 205.1(a)(3)(i)(C)(2).
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11 **C. Plaintiff Nguyen Does Not Qualify As An Immediate Relative**
12 **Under § 1151(b)(2)(A)(i).**

13 Defendants are entitled to judgment as a matter of law as to Plaintiff
14 Nguyen, who entered the United States on K-1 fiance(e) visa, because she cannot
15 qualify for adjustment of status due to the termination of her marriage upon the
16 death of her U.S. citizen spouse. 8 U.S.C. § 1255(d) restricts adjustment of status
17 for an alien admitted as a K-1 nonimmigrant fiancée except as a result of the
18 marriage to the very U.S. citizen who filed the petition in the first place to grant
19 that alien's nonimmigrant status. *See* 8 U.S.C. § 1255(d); *see also* H.R. Rep. No.
20 906, 99th Cong., 2d Sess. 6. Similarly, 8 C.F.R. § 245.1(c)(6) states that an alien is
21 ineligible for adjustment of status on the basis of a K-1 visa unless “the alien is
22 applying for adjustment of status based upon the *marriage* of the K-1 fiancée
23 which was contracted within 90 days of entry with the United States citizen who
24 filed a petition on behalf of the K-1 fiance(e)” (emphasis added). 8 C.F.R.
25 § 245.1(c)(6). The statutory scheme clearly requires that an alien who enters the
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1 United States as a K-1 (like Plaintiff Nguyen) may only adjust on a conditional
2 basis after marriage within 90 days of entry to the citizen who filed the fiance(e)
3 petition which allowed the alien entry. 8 U.S.C. §§ 1155(a) and (d), 1184(d),
4 1186a(a) and (g), and 8 C.F.R. § 1245.1(c)(6)(i).
5

6 In the instant case, USCIS properly determined that Plaintiff Nguyen was
7 statutorily ineligible for adjustment of status to conditional resident status under
8 8 U.S.C. § 1255(a) and (d), due to the fact that upon the death of her husband, her
9 *marriage* no longer existed and she could not qualify as the current spouse of a
10 U.S. citizen. Unless Congress clearly intended a specific, technical meaning, a
11 statute is to be interpreted according to the common, ordinary meaning of the
12 words of the statute at the time of enactment. *See BedRoc Ltd., LLC.*, 541 U.S. at
13 184. In the United States, under the law of *every* State, marriage ends when one
14 spouse dies. *See* 52 Am. Jur. 2d, Marriage, § 8. Because the petitioning United
15 States citizen is no longer living, Plaintiff Nguyen is no longer in a legal marriage.
16 Accordingly, she is no longer eligible for adjustment of status on the basis of the
17 marriage to the citizen who petitioned for the K nonimmigrant visa. *See Kalal v.*
18 *Gonzales*, 402 F.3d 948 (9th Cir. 2005); *cf. Choin v. Mukasey*, 537 F.3d 1116 (9th
19 Cir. 2008) (petitioner who entered the United States on a K-1 visa, married her K-1
20 visa sponsor within 90 days, and then divorced him in under two years, should be
21 permitted to adjust to legal permanent resident status, despite the language of INA
22 § 245(d)).
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26 However, even if the plain language of the statute were ambiguous, which it
27 is not, the agency's interpretation would be entitled to deference. *See Chevron*,
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1 467 U.S. at 842-43; *Moreno-Morante*, 490 F.3d at 1174. To the extent that this
2 Court should find that the language of 8 U.S.C. § 1255(d) is ambiguous, it should
3 defer to the agency’s interpretation because it is a “permissible construction” of the
4 word “marriage” in 8 U.S.C. § 1255(d) and 8 C.F.R. § 245.1(c)(6). *See*
5 *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 492 (9th Cir. 2007) (*en banc*),
6 *quoting Chevron*, 467 U.S. at 843 n.11.

8 As Plaintiff Nguyen’s claims relate to the interpretation of the word
9 “marriage” in 8 U.S.C. § 1255(d) and 8 C.F.R. § 245.1(c)(6), unlike the other
10 Plaintiffs, she does not claim “immediate relative” status under the definition of
11 “spouse” in 8 U.S.C. § 1151(b)(2)(A)(i). Therefore, the holding in *Freeman* is
12 inapplicable to her case. Plaintiff Nguyen’s former spouse filed a Form I-129F,
13 which admitted her on a conditional basis to the United States as a nonimmigrant.
14 The *Freeman* Court concluded that the death of the United States citizen spouse
15 did not necessarily strip the alien spouse of her immediate relative status, which is
16 an immigrant status obtained by filing a Form I-130, which was not filed on behalf
17 of Plaintiff Nguyen. *Id.* at 1040-43. Under the *Freeman* analysis, the “immediate
18 relative” status “vests” in the alien once the spouse has filed the I-130 and the alien
19 has filed the I-485. However, because Plaintiff Nguyen’s former husband filed an
20 I-129F, “immediate relative” status was not sought and did not “vest” in her on the
21 basis of the I-129F.
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25 **D. Plaintiff Lockett Has Abandoned His Adjustment of Status**
26 **Application.**

27 On May 7, 2008, on the basis of the USCIS Memorandum, Defendants
28 approved the Form I-130 petition that now deceased U.S. citizen Catherine Lockett

1 had filed on behalf of Plaintiff Lockett. Declaration of Michael J. Sheridan and
2 Evidence in Support of Defendants' Motion for Partial Summary Judgment as to
3 Ninth Circuit Class Plaintiffs, Exhibit A. Thus, Plaintiff Lockett's challenge to the
4 validity of the USCIS Memorandum is moot. Additionally, Plaintiff Lockett
5 challenges the denial of his I-485. While this action was pending, however,
6 Plaintiff Lockett returned to the United Kingdom. Lockett Declaration at 4, ¶ 7
7 (dkt #66). On information and belief, it appears that Plaintiff Lockett has chosen to
8 remain in the United Kingdom after the expiration of his advance parole document.
9 *See* Declaration of Julia L. Harrison, attached to this Memorandum as Exhibit A.
10 Therefore, Plaintiff Lockett no longer has any basis to return to the United States
11 to pursue his Form I-485 as he has effectively abandoned his Form I-485. *See* 8
12 C.F.R. § 245.2(a)(4)(B) (alien must leave and return under an advance parole grant
13 in order for a departure not to result in abandonment of a I-485).
14
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16
17 Plaintiff Lockett's abandonment of his Form I-485 does not leave him
18 without a remedy. Approval of the Form I-130 provides a basis for him to apply
19 for an immigrant visa. *See* 22 C.F.R. § 42.21(a). Because USCIS has granted the
20 I-130 filed on behalf of Plaintiff Lockett, and he abandoned his adjustment of
21 status application, Defendants are entitled to judgment as a matter of law as to
22 Plaintiff Lockett.
23

24 **IV. CONCLUSION**

25 In viewing the evidence in light most favorable to Plaintiffs, it is clear that
26 USCIS correctly interpreted the term "immediate relative" in adjudicating the
27 respective Form I-130s filed on behalf of the Ninth Circuit class Plaintiffs, and
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1 appropriately required a substitute affidavit of support following the death of the
2 citizen spouses. Because USCIS did not abuse its discretion, neither the APA nor
3 the Mandamus Act afford relief to Plaintiffs. On the basis of the foregoing,
4 Defendants request that this Court grant partial summary judgment in favor of
5 Defendants with respect to the claims of the Ninth Circuit class Plaintiffs.
6

7 Date: March 13, 2009

8 Respectfully Submitted,

9
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1
2 **CERTIFICATE OF SERVICE**
3

4
5 Case No. CV07-05696 (CAS)

6 I hereby certify that on this 13th day of March 2009, true and correct copies
7 of the foregoing **DEFENDANTS' MOTION FOR PARTIAL SUMMARY**
8 **JUDGMENT AS TO NINTH CIRCUIT CLASS PLAINTIFFS** was served
9 pursuant to the district court's ECF system as to ECF filers on March 13, 2009, to
10 the following ECF filers:
11

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