

1 MICHAEL F. HERTZ
 2 United States Department of Justice
 3 Acting Assistant Attorney General
 4 ELIZABETH J. STEVENS VSB 47445
 5 Assistant Director, District Court Section
 6 PATRICIA E. BRUCKNER NYSB 2632156
 7 Trial Attorney, District Court Section
 8 Office of Immigration Litigation
 9 P.O. Box 868, Ben Franklin Station
 10 Washington, D.C. 20044
 11 Telephone: (202) 532-4325
 12 Facsimile: (202) 616-8962
 13 E-mail: Patricia.Bruckner@usdoj.gov

14 Attorneys for Defendants.

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

18 CAROLYN ROBB HOOTKINS,) Case No. CV07-05696 (CAS)
19 et al.,)
20 Plaintiffs,) Date: April 20, 2009
21 v.) Time: 10:00 a.m.
22) Courtroom: 5
23) Honorable Christina A. Snyder
24 JANET NAPOLITANO, Secretary,)
25 U.S. Department of Homeland,)
26 et al.,) DEFENDANTS' REPLY
27) MEMORANDUM IN SUPPORT OF
28 Defendants.) MOTION FOR PARTIAL
) SUMMARY JUDGMENT AS TO
) NINTH CIRCUIT CLASS PLAINTIFFS

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Janet Napolitano and Michael Aytes, by and through their undersigned counsel, respectfully submit this reply memorandum in support of their motion for partial summary judgment as to the claims of Plaintiffs whose cases arise within the jurisdiction of the Ninth Circuit (Plaintiffs). Plaintiffs are identified members either of the class or subclass certified by this Court pursuant to the Order Granting Plaintiffs’ Motion for Class Certification (Order Granting Class Certification) (dkt # 108).¹ Defendants submit a separate reply memorandum in support of their motion for partial summary judgment as to Plaintiffs outside the Ninth Circuit.

For the reasons set forth *infra*, in the Memorandum of Points and Authorities in Support of Defendants’ Motion for Partial Summary Judgment as to Ninth Circuit Class Plaintiffs (Defendants’ Ninth Circuit Summary Judgment Motion) (dkt #124), and in the Memorandum of Points and Authorities in Support of Defendants’ Opposition to Plaintiffs’ Renewed Motion for Summary Judgment (Defendants’ Opposition) (dkt #137), United States Citizenship and Immigration Services (USCIS or the Agency) correctly concluded that Plaintiffs are not entitled to "immediate relative" status under 8 U.S.C. § 1151(b)(2)(A)(i). Therefore, the agency did not abuse its discretion in denying or revoking the immediate relative

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 petitions (Form I-130) filed on behalf of the respective Plaintiffs and the adjustment
2 of status applications (Form I-485) filed by Plaintiffs. Accordingly, neither the
3 Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, nor the Mandamus
4 Act, 28 U.S.C. § 1361, affords relief to Plaintiffs. Because there is no genuine issue
5 as to any material fact, Defendants are entitled to judgment as a matter of law. *See*
6 *Fed. R. Civ. P. 56(c)*.

8 **II. ARGUMENT**

9 Defendants acknowledge that this Court is bound by appropriate, direct
10 precedent of the Ninth Circuit. However, because Defendants believe that
11 *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), is both distinguishable and in
12 conflict with other Circuit precedent, for the reasons explained *infra*, this Court may
13 choose to conduct its own analysis. To the extent that this Court has determined
14 that it will follow *Freeman* as to these Plaintiffs, Defendants have incorporated their
15 arguments to the contrary to preserve them for appeal.

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

19 USCIS correctly interpreted the term "immediate relative" in 8 U.S.C.
20 § 1151(b)(2)(A)(i) in determining that alien widow(er)s who have not yet adjusted
21 status to lawful permanent resident no longer qualify for immediate relative status
22 as legally married spouses of United States citizens if their marriage lasted less than
23 two years at the time of the death of the petitioning U.S. citizen spouse. *See* 8
24 U.S.C. § 1151(b)(2)(A)(i).

27 Defendants’ interpretation comports with a straightforward application of the

1 express terms of section 1151(b)(2)(A)(i), as demonstrated by canons of statutory
2 interpretation, the importance of verb tenses and related statutory provisions, and
3 the general rule in the United States that marriage ends with the death of one
4 spouse. Defendants' Opposition at 4-13 (dkt #137). Alternatively, even if there is
5 some ambiguity in the statute, the following factors also support the agency's
6 interpretation as reasonable: Board of Immigration Appeals ("Board") precedent
7 directly on point (*Matter of Varela*, 13 I. & N. Dec. 453 (BIA 1970)), subsequent
8 congressional action, the final affidavit of support rule, long-standing
9 administrative interpretations, and the purpose of family-based immigration policy.
10 Defendants' Opposition at 13-18. Additionally, the agency's interpretation has
11 been endorsed by the Third Circuit Court of Appeals in *Robinson v. Napolitano*,
12 554 F.3d 358 (3rd Cir. 2009), *rehearing denied* (2009), and at least two federal
13 district courts considering this precise issue. *See Turek v. Dep't of Homeland*
14 *Security*, 450 F. Supp. 2d 736 (E.D. Mich. 2006); *Burger v. McElroy*, 1999 WL
15 203353 (S.D.N.Y. 1999); *cf. Taing v. Chertoff*, 526 F. Supp. 2d 177 (D. Mass.
16 2007); *Lockhart v. Chertoff*, 2008 WL 80225 (N.D. Ohio Jan. 7, 2008). The
17 foregoing reasons necessarily lead to the conclusion that USCIS's interpretation is
18 reasonable.

19 Specifically, the first sentence of section 1151(b)(2)(A)(i) defines the term
20 "immediate relative" as the spouse, parent, or child of a U.S. citizen. 8 U.S.C.
21 § 1151(b)(2)(A)(i). The second sentence provides a narrow exception for someone
22 who "was the spouse of a citizen," but makes an exception applicable only when the
23 marriage lasted more than two years. *Id.* (emphasis added). Thus, the second
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1 sentence clearly provides the rule that determines whether Plaintiffs qualify as
2 “immediate relatives” after the death of their spouses. Because Plaintiffs had been
3 married for less than two years at the time of each citizen spouse’s death, Plaintiffs
4 cannot satisfy the statutory requirements.
5

6 The Third Circuit in *Robinson* agreed with the Agency’s position that the first
7 sentence in section 1151(b)(2)(A)(i) cannot be divorced from the second, and made
8 the precise finding that the terms of the statute are clear and unambiguous and do
9 not permit immediate relative classification to be applied to widow(er)s who were
10 married to their U.S. citizen spouses for less than two years. *See Robinson*, 554
11 F.3d at 364. If the citizen spouse dies, the two-year marriage requirement applies to
12 the widow(er), and this rule applies both to surviving spouses whose citizen spouse
13 filed an immediate relative petition prior to death and to surviving spouses whose
14 citizen spouse did not file the petition. *Id.*
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17 **B. The Court Should Distinguish *Freeman*.**

18 Plaintiffs ask this Court to adopt the interpretation of the Ninth Circuit in
19 *Freeman*. Plaintiffs’ Response to Defendants’ Motion for Partial Summary
20 Judgment as to Ninth Circuit Class Plaintiffs (Plaintiffs’ Ninth Circuit Response) at
21 1 (dkt #139). The *Freeman* court concluded that the death of the United States
22 citizen spouse did not necessarily strip the alien spouse of immediate relative status.
23 *Freeman*, 444 F.3d at 1040-43. Without acknowledging the general rule that
24 marriage ends at death, moreover, the court held that *Varela* did not reflect a
25 permissible interpretation of the statute. *Id.* at 1038.
26

27 Defendants submit that this Court should distinguish *Freeman* because it is
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1 inconsistent with the Ninth Circuit's own precedent. *See* Defendants' Ninth Circuit
2 Summary Judgment Motion at 13-14. Particularly, in *Dodig v. INS*, 9 F.3d 1418
3 (9th Cir. 1993), the Ninth Circuit rejected petitioner's argument that she should have
4 been granted relief for "humanitarian" reasons under 8 C.F.R.
5 § 205.1(a)(3) after her U.S. citizen husband died prior to the adjudication of his
6 I-130 petition filed on her behalf, and thereby *implicitly* endorsed the construction
7 that a widow(er) is not considered a spouse such that s/he can proceed under the
8 first sentence of section 1151(b)(2)(A)(i). *See Dodig*, 9 F.3d at 1420. Similarly, in
9 *Abboud v. INS*, 140 F.3d 843 (9th Cir. 1998), the Ninth Circuit cited *Dodig* in
10 concluding that "humanitarian relief is not available under [8 C.F.R. § 205.1(a)(3)]
11 where the petitioner has died prior to the approval of the Relative Petition."
12 *Abboud*, 140 F.3d at 849. Accordingly, the Ninth Circuit in both cases implicitly
13 endorsed the statutory interpretation that a widow(er) is not a spouse under the first
14 sentence. Therefore, the Ninth Circuit in *Freeman* failed to follow the prior
15 precedents of *Dodig* and *Abboud*.

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19 Plaintiffs summarily dismiss Defendants' analysis on the ground that unlike
20 the Ninth Circuit in *Freeman*, neither the *Dodig* nor *Abboud* court explicitly
21 analyzed and interpreted the definition of "spouse" under section 1151(b)(2)(A)(i).²
22 Plaintiffs' Ninth Circuit Response at 1. This argument fails to recognize that the
23 Ninth Circuit in both *Dodig* and *Abboud* *implicitly* endorsed the construction that a
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27 ² *Dodig* involved the humanitarian reinstatement provision located at 8 C.F.R. §
28 205.1(a)(3)(i)(C)(2), and *Abboud* involved an equal protection claim to be treated as an alien
eligible for humanitarian reinstatement. *Id.*

1 widow(er) is not considered a spouse under the first sentence of section
2 1151(b)(2)(A)(i). *See Dodig*, 9 F.3d at 1420 (affirming Board decision that
3 immigration judge lacked jurisdiction to grant immediate relative status following
4 death of citizen petitioner and revocation of approval of petition under 8 C.F.R.
5 § 205.1(a)(3)); *see Abboud*, 140 F.3d at 849 (citing holding in *Dodig* that
6 humanitarian relief is unavailable when citizen petitioner dies prior to approval of
7 alien relative petition.)
8

9 Further supporting Defendants' position that this Court should distinguish
10 *Freeman* is other Ninth Circuit precedent establishing that a Ninth Circuit panel
11 lacks authority to overrule precedent. *See Dawson v. City of Seattle*, 435 F.3d 1054,
12 1066 (9th Cir. 2006), *citing U.S. v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir.
13 2005); *see Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003). The Ninth Circuit
14 has determined that when two panel decisions conflict, the earlier decision stands as
15 the binding precedent, until *en banc* resolution of the issue. *See Obrey v. Johnson*,
16 400 F.3d 691, 700 (9th Cir. 2005) (holding that a panel "must follow" the earlier
17 precedent, rather than a later decision); *Rodriguez-Lara*, 421 F.3d at 943, *citing H*
18 *& D Tire & Automotive-Hardware, Inc. v. Pitney-Bowes, Inc.*, 227 F.3d 326, 330
19 (5th Cir. 2000) ("When panel opinions appear to conflict, we are bound to follow
20 the earlier opinion.").³
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25 ³ This principle refutes Plaintiffs' claim that *Freeman* does not conflict with prior
26 decisions because *Freeman* purportedly dealt with an "issue of first impression." *See* Plaintiffs'
27 Ninth Circuit Response at 6. In the context of the *Freeman* case - a petition for review of a
28 removal order -- the Ninth Circuit simply did not have jurisdiction to adjudicate the issue of an
immigrant visa petition. *See Freeman*, 444 F.3d at 1033, n.4; *Dodig*, 9 F.3d at 1420 (I-130
immediate relative petition); *Olivar v. INS*, 967 F.3d 1381, 1383, n.1 (9th Cir. 1992) (same);

1 **C. Defendants Properly Require a Substitute Affidavit of Support**
2 **After the Death of the Petitioner/Sponsor.**

3 Contrary to Plaintiffs' assertions, USCIS lawfully requires a substitute
4 affidavit of support following the death of the petitioner/sponsor, pursuant to
5 appropriate statutory and regulatory authority as described in the USCIS
6 Memorandum, *Effect of Form I-130 Petitioners' Death on Authority to Approve the*
7 *Form I-130* (Defendants' Notice of Motion and Motion to Dismiss, Exhibit 1, dkt
8 #8) (USCIS Memorandum). *See* Plaintiffs' Ninth Circuit Response at 2-9;
9 Plaintiffs' Renewed Motion for Summary Judgment at 11-20. The reasons set forth
10 in Defendants' Ninth Circuit Summary Judgment Motion establish that Defendants
11 do not import unlawful discretionary admissions criteria into the non-discretionary
12 immediate relative eligibility determination by requiring that following the death of
13 the citizen spouse, a humanitarian request for reinstatement be filed under 8 C.F.R.
14 § 205.2(a)(3)(C)(2), supported by a properly filed affidavit of support (Form I-864)
15 executed by an individual who qualifies under 8 U.S.C. § 1183a(f)(5)(B).
16 Plaintiffs' Ninth Circuit Summary Judgment Motion at Part III.B (dkt #124). The
17 USCIS Memorandum does not make inadmissibility a basis for denying a Form
18 I-130, and an alien whose visa petitioner has died is inadmissible, unless a
19 substitute sponsor submits a Form I-864 in lieu of any Form I-864 that the visa
20 petitioner may have submitted. *Id.* at Parts III.B (introduction), and III.B.2 & 3.
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25 An alien seeking to immigrate as an immediate relative is inadmissible unless

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28 *Dong Yup Lee v. INS*, 407 F.2d 1110 (9th Cir. 1969) (I-140 employment-based petition) and
Yamada v. INS, 384 F.2d 214 (9th Cir. 1967) (same).

1 the visa petitioner submits an affidavit of support, Form I-864, that meets the
2 requirements of Immigration and Nationality Act section 213A. 8 U.S.C.
3 § 1182(a)(4)(C). Defendants may not accept an Form I-864 unless it is enforceable.
4
5 8 U.S.C. § 1183a(a)(1)(B). The regulations implementing this requirement are
6 located at 8 C.F.R. § 213a. The visa petitioner/sponsor has no support obligation
7 unless the alien actually acquires permanent residence. 8 C.F.R. § 213a.2(e)(1).
8 The obligation ends if the visa petitioner/sponsor dies. 8 C.F.R.
9 § 213a.2(e)(2)(ii). The clear implication of the regulation, therefore, is that a Form
10 I-864 is not "enforceable" if the visa petitioner/sponsor dies before the alien
11 immigrates.
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13 Plaintiffs' arguments that the estate of a deceased petitioner could be deemed
14 to be the sponsor are meritless. *See* Plaintiffs' Ninth Circuit Response at 7, *citing*
15 30 Williston on Contracts 77:75 (4th Ed.) Plaintiffs also cite to 8 U.S.C.
16 § 1183a(a)(3)(A), which provides that one way that an affidavit becomes
17 unenforceable is upon completion of a certain period of employment by the alien
18 beneficiary; Plaintiffs note that death of the petitioner is not listed as a basis for
19 termination of the enforceability period. *Id.* at 7-8. But section 1183a clearly
20 requires that the sponsor must be an "individual." 8 U.S.C. § 1183a(f)(1). An estate
21 is not an individual. Moreover, 8 U.S.C. § 1183a(c), which identifies the remedies
22 available to enforce an affidavit of support, provides no support at all for the
23 proposition that an estate can be liable for a support obligation after the sponsor
24 dies and makes no reference at all to any estate. 8 U.S.C. § 1183a(c). 8 U.S.C.
25 § 1182(a)(4)(C)(ii) expressly says the alien must have a Form I-864 "described in
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1 section 213A of the Act." 8 U.S.C. § 1182(a)(4)(C)(ii). A Form I-864 "described"
2 in that section is, by definition, a Form I-864 that is "legally enforceable." 8 U.S.C.
3 § 1183a(a)(1)(B). Section 213A states explicitly that a Form I-864 may not be
4 accepted unless it is enforceable against the individual who signed it. *Id.* The
5 legislative history of section 213A is particularly instructive here, as it states the
6 provision was needed because "[v]arious State court decisions and decisions by
7 immigration courts have held that the affidavits of support, as currently constituted,
8 do not impose a binding obligation on the sponsor." H.Rep. 104-725 at 387 (1996);
9 *cf.* H.Rep. 104-641 at 1451 (1996).

12 Plaintiffs further argue that because immigration judges are not authorized to
13 grant alien relative petitions, the USCIS Memorandum effectively bars a widow(er)
14 from renewing an adjustment application in removal proceedings by authorizing the
15 denial of the Form I-130 when a substitute affidavit of support is not submitted.
16 Defendants' Ninth Circuit Response at 4. Plaintiffs raise a distinction without a
17 difference. Whether the Form I-485 is adjudicated by the agency or by an
18 immigration judge, admissibility of the applicant is a requirement for eligibility
19 under 8 U.S.C. § 1255. Therefore, irrespective of whether the adjudicator is the
20 agency or the immigration judge, it is the widow(er)'s failure to produce a qualified
21 sponsor to file a substitute affidavit of support that bars his/her adjustment of status
22 in either forum, due to the inability of the widow(er) to overcome inadmissibility on
23 public charge grounds under 8 U.S.C. § 1182(a)(4).

26 Plaintiffs also seek to make an issue of the title of 8 U.S.C. § 1183a(f)(5),
27 which defines the term "sponsor" of an affidavit of support in "Non-petitioning
28

1 cases.” *See* Plaintiffs’ Ninth Circuit Response at 5; 8 U.S.C. § 1183a(f)(5). The
2 USCIS Memorandum cites to this statute and 8 C.F.R. § 205.1(a)(3)(C)(2) in
3 providing guidance to USCIS adjudicators that reinstatement of an approved Form
4 I-130 requires the submission of a Form I-864 by a qualified person as a substitute
5 sponsor to the petitioner. USCIS Memorandum at 4 (dkt #8). Plaintiffs mistakenly
6 allege that 8 U.S.C. § 1183a(f)(5) is inapplicable to Plaintiffs because their cases are
7 not “Non-petitioning cases;” rather, Plaintiffs view these as “petitioning cases”
8 because the deceased citizen petitioner previously filed an affidavit of support.
9 Plaintiffs’ Ninth Circuit Response at 5.
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12 However, as explained *supra*, the crux of the parties’ dispute on the issue of
13 the requirement for a substitute sponsor is whether an affidavit of support filed by a
14 deceased petitioner is enforceable. Because Defendants maintain it is not, a
15 substitute sponsor must be identified, and the statutory authority located at 8 U.S.C.
16 § 1183a(f)(5) permits Plaintiffs to identify a substitute sponsor “who does not meet
17 the requirement of paragraph (1)(D),” *i.e.*, who has not petitioned for the alien
18 under 8 U.S.C. § 1154. Because the affidavit of support filed by the deceased
19 petitioner is not enforceable, in effect these cases become “non-petitioning cases,”
20 and 8 U.S.C. § 1183a(f)(5) is applicable.
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23 Plaintiffs also take issue with Defendants’ reliance within the USCIS
24 Memorandum on the language within 8 U.S.C. § 1183a(f)(5) that establishes a list
25 of relatives who may qualify as a substitute sponsor when the petitioner under 8
26 U.S.C. § 1154 dies *after* approval of the petition. *See* Plaintiffs’ Ninth Circuit
27 Response at 5; 8 U.S.C. § 1183a(f)(5)(B)(i) (emphasis added). While it is true that
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1 the citizen petitioners married to Plaintiffs died prior to approval of the respective
2 alien relative petitions or, in the revocation cases, prior to the adjudication of the
3 adjustment of status applications, the Ninth Circuit decision in *Freeman* effectively
4 requires the agency to ignore the petitioner's death in adjudicating the petition and
5 adjustment application. When this statutory provision was drafted, Congress did
6 not have knowledge that the Ninth Circuit would later issue the *Freeman* decision
7 effectively ordering USCIS to implement the court's interpretation of the term
8 "spouse" for all cases within the jurisdiction of the Ninth Circuit. As an
9 administrative agency of limited, delineated authority, USCIS is required to act
10 within its statutory and regulatory authority. In locating existing authority to
11 effectuate the *Freeman* decision, the agency appropriately relies in part on 8 U.S.C.
12 § 1183a(f)(5) because the Ninth Circuit has made the petitioner's death irrelevant to
13 the determination of a "spouse."

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17 Because the affidavit of support filed by the petitioner is no longer
18 enforceable, the widow(er) is required to identify a substitute sponsor because as an
19 immediate relative, with certain exceptions, s/he is inadmissible unless a qualifying
20 sponsor has filed an affidavit of support that meets the requirements of the Act. *See*
21 8 U.S.C. §§ 1182(a)(4)(C) and 1183a. Plaintiffs aver that 8 U.S.C.
22 § 1182(a)(4)(C) does not specifically require a *valid* affidavit of support; rather, it
23 requires that the petitioner and any additional sponsor or alternative sponsor has
24 *executed* the affidavit. Plaintiffs' Ninth Circuit Response at 6; *see* 8 U.S.C.
25 § 1182(a)(4)(C)(ii) (emphasis added). In support of this argument, Plaintiffs offer
26 their statutory interpretation of the provision related to enforceability of an
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1 affidavit, 8 U.S.C. § 1183a(a)(1), which states that “[n]o affidavit of support may be
2 *accepted* by the Attorney General or by any consular officer *to establish that an*
3 *alien is not excludable as a public charge* under [8 U.S.C. § 1182(a)(4)] unless such
4 affidavit is *executed* by a sponsor of the alien as a contract” Plaintiffs’ Ninth
5 Circuit Response at 6; *see* 8 U.S.C. § 1183a(a)(1) (emphasis added). Therefore,
6 Plaintiffs argue that they have satisfied the statute because the respective citizen
7 petitioners have *executed* an affidavit, and each affidavit was “*accepted* for filing.”
8 Plaintiffs’ Ninth Circuit Response at 6 (emphasis added).

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10
11 Plaintiffs misinterpret the statutory language requiring that an affidavit of
12 support “be accepted by the Attorney General or by any consular officer to establish
13 that an alien is not excludable as a public charge under [8 U.S.C.
14 § 1182(a)(4)],” to mean the affidavit must be executed, filed and accepted for filing.
15 *Id.*, *see* 8 U.S.C. § 1183a(a)(1). To the contrary, the plain meaning of the provision
16 is that the affidavit must *establish* that the alien is not excludable as a public charge.
17 The mere filing of a Form I-864 by a sponsor in support of an alien’s Form I-485
18 does not mean that “acceptance” in the relevant sense has occurred. The only
19 requirements for a successful filing are for the filing to be signed, and the proper fee
20 paid. 8 C.F.R. § 103.7(a)(7)(i). “Acceptance” of a Form I-864 is not defined in
21 section 213A but must mean more than simple filing. Otherwise, the requirement
22 of section 213A that the affidavit of support must be enforceable against the
23 individual who signed it would be meaningless. *See* 8 U.S.C. § 1183a(a)(1)(B).
24 “Acceptance,” in other words, must mean an act of adjudication - a decision that the
25 Form I-864 is sufficient to establish that the requirements of section 213A are met.
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1 Thus, regardless of whether the Form I-130 is approved and reinstated, or
2 simply approved, the alien, unless completely exempt from the Form I-864
3 requirement, may obtain adjustment of status only if there is a Form I-864 from a
4 living sponsor whose Form I-864 meets the requirements of 8 C.F.R. § 213a. If the
5 visa petitioner has died, the Form I-864 must be from a substitute sponsor, who
6 must be related in the manner specified in 8 U.S.C. § 1183a(f)(5)(B). Accordingly,
7 AFM chapter 21.2(a)(4)(B)(2) is consistent with the law.
8

9
10 **D. Freeman Is Limited to Aliens Who Filed for Adjustment Prior to
the Death of the Citizen Petitioner.**

11 Further, Plaintiffs assert that the USCIS Memorandum contravenes *Freeman*
12 by instructing adjudicators to implement the *Freeman* decision in Ninth Circuit
13 cases only when a Form I-485 was filed prior to the citizen petitioner's death.
14 Plaintiffs' Ninth Circuit Response at 9-11; USCIS Memorandum at 6. To the
15 contrary, Defendants' position is fully consistent with *Freeman*, as explained in
16 Defendants' Ninth Circuit Summary Judgment Motion at 19-21.
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18
19 **E. The Automatic Revocation and Humanitarian Reinstatement
Regulation is Valid.**

20 Contrary to Plaintiffs' assertions, for the reasons set forth *infra*, the automatic
21 revocation and humanitarian reinstatement regulation located at 8 C.F.R. §
22 205.1(a)(3)(i)(C) is valid as a matter of law. *See* First Amended Complaint at 38, ¶
23 173 (dkt #37), Plaintiffs' Ninth Circuit Response at 11-15 (dkt #139). Defendants'
24 position is further supported by Ninth Circuit precedent. *See Dodig*, 9 F.3d 1418,
25 1420 (the Ninth Circuit rejected petitioner's argument that she should have been
26 granted relief for "humanitarian" reasons under the regulation after her U.S. citizen
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1 husband died prior to the adjudication of his I-130 petition filed on her behalf).

2 Plaintiffs make a two-pronged attack on the regulation: 1) the automatic
3 termination provision is an impermissible expression of the underlying statute, 8
4 U.S.C. § 1155, which provides that USCIS “may ... for good and sufficient cause”
5 revoke the approval of a petition; and 2) the regulatory requirement for an alien
6 widow(er) to apply for humanitarian reinstatement, which USCIS may exercise in
7 its discretion, imports unsupported discretionary factors into the I-130 petition
8 process. Plaintiffs’ Ninth Circuit Response at 11-12 (dkt #139). Plaintiffs’ first
9 argument contesting the automatic termination provision is meritless in part for the
10 reasons set forth in Defendants’ Ninth Circuit Summary Judgment Motion at 27-29,
11 which are adopted herein by reference.
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14 Additionally, USCIS is not restricted by the terms of 8 U.S.C. § 1155 as to
15 the considerations that may be relied upon or the procedure by which the discretion
16 provided to the agency within that statute should be exercised. *See Jay v. Boyd*,
17 351 U.S. 345, 353-54, 76 S. Ct. 919, 924-25, 100 L. Ed. 1242 (1956). Section 1155
18 used the permissive language “may” in providing the agency discretionary authority
19 to revoke petitions for “good and sufficient cause,” which is the only limit Congress
20 placed on the revocation authority. In its discretion, USCIS further defined “good
21 and sufficient cause” in the automatic termination provision as the death of the
22 petitioner, rather than resorting to the need for individualized determinations in all
23 such cases, which the statute does not require. Because the plain language of
24 section 1155 does not restrict how the agency may choose to exercise its discretion
25 and does not require individualized determinations, 8 C.F.R § 205.1(a)(3)(i)(C) is
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1 not an impermissible election. To the contrary, that USCIS has elected to exercise
2 discretion as authorized by 8 U.S.C. § 1155 by means of the automatic termination
3 regulation is unremarkable. *See Stellas v. Esperdy*, 366 F.2d 266, 269 (2d Cir.
4 1966), *vacated and remanded on other grounds*, 388 U.S. 462 (1967) ("[T]he
5 Attorney General may govern the exercise of his discretion by written or unwritten
6 rules; indeed it would be remarkable if he did not. Any such decision is an
7 application of facts to principles[;] regulation[s] provide a substitute for the exercise
8 of discretion on a case by case basis. But there has been an exercise of discretion.").

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10
11 Plaintiffs further assert that the death of a citizen petitioner does not
12 constitute "good and sufficient cause" for automatic termination. Plaintiff's Ninth
13 Circuit Response at 12-13 (dkt #139). To the contrary, Defendants aver that the
14 purpose of family-based immigration policy -- to promote family unity for the U.S.
15 citizen -- establishes that death of the citizen spouse constitutes "good and sufficient
16 cause" for terminating the petition approval. *See* Defendants' Opposition at 17-18
17 (dkt #137). Once the citizen petitioner passes away, that purpose is no longer
18 necessarily served by providing the widow(er) the opportunity to adjust status.

19
20 Additionally, as explained in Defendants' Opposition at 16-17 (dkt #137),
21 since 1938, the settled administrative interpretation has been that the visa
22 petitioner's death is "good and sufficient cause," 1952 Act, § 206, 66 Stat. at 180,
23 for revocation of the approval of the visa petition. *Cf.* 8 U.S.C. § 1155. Therefore,
24 because the death of a visa petitioner revokes approval of a Form I-130 petition for
25 alien relative as of the date of the approval of the petition, 8 C.F.R.
26 § 205.1(a)(3)(i)(C), it also necessarily follows that the petitioner's death while the
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1 Form I-130 is pending also warrants denial of the petition. Accordingly, deference
2 should be afforded because the Agency's interpretation that the death of a citizen
3 petitioner constitutes "good and sufficient cause" is based on administrative
4 interpretations of long-standing duration.
5

6 Further, Plaintiffs mistakenly rely on *Matter of Estime*, 19 I. & N. Dec. 450,
7 451 (BIA 1987), in challenging the revocation regulation. Plaintiffs' Ninth Circuit
8 Response at 13. The Board in *Estime* found the operative question in determining
9 what constitutes "good and sufficient cause" for the issuance of a notice of intention
10 to revoke a petition to be "whether the evidence of record at the time the notice was
11 issued, if unexplained and unrebutted, would have warranted a denial based on the
12 petitioner's failure to meet his or her burden of proof." *Estime*, 19 I. & N. Dec. at
13 451. Plaintiffs erroneously infer that "[b]ecause *Freeman* holds that death of the
14 petitioning spouse cannot form the basis of a denial of a visa petition, *Matter of*
15 *Estime* commands that [death of the petitioning spouse] cannot form the basis of
16 revocation of the approval of a visa petition." Plaintiffs' Ninth Circuit Response at
17 13 (dkt #139).
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20 Plaintiffs' argument is fatally flawed, however, because the Board in *Estime*
21 analyzed a different revocation regulation -- 8 C.F.R. § 205.2 -- which provides for
22 an individualized determination (not automatic termination) for any ground other
23 than those specified in 8 C.F.R. § 205.1, for notice of an intention to revoke to be
24 provided to the petitioner, and for an opportunity for the petitioner to rebut adverse
25 information. 8 C.F.R. § 205.2. The Board did not question the validity of the
26 automatic termination of a petition upon the death of the petitioner in section
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1 205.1(a)(3)(i)(C). In fact, in other published decisions, the Board has recognized
2 the automatic termination authority and the exception for humanitarian reasons
3 located at 8 C.F.R. § 205.1. *See Matter of Zaidan*, 19 I. & N. Dec. 297, 298 (BIA
4 1985) (Board lacks jurisdiction to hear beneficiary’s appeal of automatic revocation
5 of petition upon death of citizen petitioner because 8 C.F.R. § 205.1 does not
6 provide for appellate review); *see Matter of Aurelio*, 19 I. & N. Dec. 458, 460-61
7 (BIA 1987) (same, *citing Zaidan*).

8
9 Plaintiffs’ second argument questions the requirement that humanitarian
10 reasons be satisfied for a petition to be reinstated under 8 C.F.R.
11 § 205.1(a)(3)(i)(C)(2). Plaintiffs assert this regulatory requirement imports
12 unsupported discretionary factors into the I-130 petition process. Plaintiffs’ Ninth
13 Circuit Response at 11-12 (dkt #139). To the contrary, for the reasons set forth
14 *supra*, 8 U.S.C. § 1155 provides discretionary revocation authority to the agency,
15 and USCIS is not restricted by the terms of the statute as to the considerations that
16 may be relied upon or the procedure by which the discretion provided to the agency
17 within that statute should be exercised. *See Jay*, 351 U.S. at 353-54. Section 1155
18 used the permissive language “may” in providing the agency discretionary authority
19 to revoke petitions for “good and sufficient cause,” which is the only limit Congress
20 placed on the revocation authority. In its discretion, USCIS further defined “good
21 and sufficient cause” in providing an exception for humanitarian reasons. Because
22 the plain language of section 1155 does not restrict how the agency may choose to
23 exercise its discretion, 8 C.F.R § 205.1(a)(3)(i)(C)(2) is not an impermissible
24 election.
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1 **F. Plaintiff Nguyen Does Not Qualify As An Immediate Relative**
2 **Under § 1151(b)(2)(A)(i).**

3 Defendants are entitled to judgment as a matter of law as to Plaintiff Nguyen
4 -- and all subclass members represented by Plaintiff Nguyen -- because they
5 cannot qualify for adjustment of status due to the termination of their respective
6 marriages upon the death of their U.S. citizen spouses. Defendants' Ninth Circuit
7 Summary Judgment Motion at 30-32 (dkt #124). USCIS properly determined that
8 Plaintiff Nguyen was statutorily ineligible for adjustment of status to conditional
9 resident status under 8 U.S.C. § 1255(a) and (d), due to the fact that upon the death
10 of the petitioner, her *marriage* no longer existed and she could not qualify as the
11 current spouse of a U.S. citizen. As no I-130 petition is required for those entering
12 on a K-1 fiance(e) visa, the appropriate statutory language is that found at 8 U.S.C.
13 § 1255(d) and 8 C.F.R. § 245.1(c)(6). Accordingly, the holding in *Freeman* is
14 inapplicable to their cases.
15
16

17 Plaintiffs now focus on the Ninth Circuit decision in *Choin v. Mukasey*, 537
18 F.3d 1116 (9th Cir. 2008), which held that a petitioner who entered the United
19 States on a K-1 visa, married her K-1 visa sponsor within 90 days, and then
20 divorced him in under two years, should be permitted to adjust to legal permanent
21 resident status, despite the statutory language providing for conditional resident
22 status as a result of the *marriage* to the citizen petitioner. *Choin*, 537 F.3d 1116; 8
23 U.S.C. § 1255(d) (emphasis added). The operative question for the Ninth Circuit
24 was the requirement that a K-1 beneficiary may only adjust to conditional resident
25 status "as a result of the *marriage* of the nonimmigrant ... to the citizen who filed
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1 the [K visa petition].” *Id.* at 1119, *quoting* 8 U.S.C. § 1255(d) (emphasis added).

2 The Ninth Circuit rejected the Agency’s argument that the statute requires an
3 existing marriage on the date of adjudication of the adjustment application, and
4 instead concluded that the fact of a good faith marriage, even if the marriage has
5 been terminated by divorce, sufficed in that case. *Id.* at 1119-21.

7 It is significant, however, that the *Choin* panel remanded the case to the
8 Board for further proceedings. *See Choin*, 537 F.3d at 1121. Supreme Court
9 precedent makes clear that *Choin* cannot, and therefore it does not, establish as
10 Ninth Circuit law that a K-1 nonimmigrant remains eligible for adjustment even
11 after divorce. *See Gonzales v. Thomas*, 547 U.S. 183, 186, 126 S. Ct. 1613, 1615,
12 164 L. Ed. 358, (2006), *INS v. Ventura*, 537 U.S. 12, 123 S. Ct. 353, 154 L. Ed 2d
13 272 (2002). The *Choin* panel squarely held that 8 U.S.C. § 1255(d) is ambiguous
14 but did not support the Board's interpretation of the statute. *Id.* at 1119-21. The
15 basis for not accepting the Board's interpretation was that it was not set forth in a
16 precedent and was not fully explained, according to the Ninth Circuit. *Id.* at 1120
17 (internal citations omitted). The panel did, of course, proceed to set out its own
18 interpretation of the ambiguous statute. Having found the statute ambiguous,
19 however, the panel was not free to make its own interpretation the governing law.
20 Rather, the remand necessarily required that the issue be addressed by the Board
21 itself. *See Gonzales*, 547 U.S. 183; *Ventura*, 537 U.S. 12.

25 Additionally, Defendants submit that under *Chevron* Step Two, USCIS’s
26 interpretation of the statute should be upheld as a permissible construction of the
27 statute. *See Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837,
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1 843, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984). Courts should afford
2 particular deference where the Agency's interpretation of a statute is related to an
3 area uniquely entrusted to the Agency's expertise. *See id.* This is particularly true
4 where, as here, the issue involves immigration statutes. *See INS v. Aguirre-Aguirre*,
5 526 U.S. 415, 425, 119 S. Ct. 1439, 1445, 143 L. Ed. 2d 590 (1999) ("[J]udicial
6 deference to the Executive Branch is especially appropriate in the immigration
7 context . . .").
8

9 Finally, a K-1 nonimmigrant who seeks adjustment of status is subject to the
10 same Form I-864 requirements as beneficiaries of Forms I-130. 8 C.F.R.

11 § 213a.2(b)(1). If the citizen spouse dies before the K-1 adjusts, the Form I-864 no
12 longer qualifies as an "enforceable" affidavit of support. 8 C.F.R.

13 § 213a.2(e)(2)(ii). Thus, as with the Form I-130 beneficiaries, a K-1 whose spouse
14 has died must have a substitute sponsor who is willing to submit a Form I-864. 8
15 C.F.R. § 213a.2(c)(2)(iii)(D).
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17
18 Plaintiffs seek to make an issue of the fact that conditional resident status
19 may be terminated only on bases "other than through the death of a spouse."
20 Plaintiffs' Ninth Circuit Response at 15-16; 8 U.S.C. § 1186a(b)(1)(A)(ii).
21 However, Plaintiff Nguyen was never granted conditional residence status because
22 her adjustment of status application was not adjudicated prior to the death of the
23 citizen petitioner. Contrary to Plaintiffs' assertions, this Court should not confuse
24 the fact that while death cannot form the basis of termination of conditional resident
25 status following an adjustment adjudication, for cases not yet adjudicated, death
26 does terminate eligibility for adjustment of status because USCIS interprets the
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1 statute to require an existing marriage at the time of adjudication.

2 For the above reasons, this Court should decertify the subclass and enter
3 judgment as a matter of law with respect to the claims of Plaintiff Nguyen and all
4 subclass members she represents.
5

6 **G. Plaintiff Lockett Has Abandoned His Adjustment of Status**
7 **Application.**

8 Plaintiffs concede that Plaintiff Lockett returned to the United Kingdom
9 (Declaration, dkt #66) and did not return to the United States prior to the expiration
10 of his advance parole document due to unstated “personal circumstances.”
11 Plaintiffs’ Ninth Circuit Response at 16 (dkt #139). He cannot return to the United
12 States without a valid and unexpired visa or other travel document. *See* 8 U.S.C. §
13 1182(a)(7). Therefore, Plaintiff Lockett no longer has any basis to return to the
14 United States to pursue his Form I-485 as he has effectively abandoned his
15 adjustment application. *See* 8 C.F.R. § 245.2(a)(4)(B) (alien must leave and return
16 under an advance parole grant in order for a departure not to result in abandonment
17 of a Form I-485).
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19 Plaintiffs now allege that “Defendants refuse to issue a renewal document,”
20 yet set forth no facts that Plaintiff Lockett has ever re-applied for advance parole.
21 See Plaintiffs’ Ninth Circuit Response at 16 (dkt #139). The decision whether to
22 grant advance parole, moreover, is purely a matter of agency discretion. 8 U.S.C. §
23 1182(a)(5)(A). This exercise of discretion is not subject to judicial review. *See* 8
24 U.S.C. § 1252(a)(2)(B). Thus, Plaintiff Lockett has no legally enforceable claim to
25 advance parole.
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1 Plaintiff Lockett's abandonment of his Form I-485, however, does not leave
2 him without a remedy. Approval of Mrs. Lockett's Form I-130 in May 2008
3 provides a basis for him to apply for an immigrant visa. *See* 22 C.F.R. § 42.21(a).
4
5 Plaintiffs do not aver whether Plaintiff Lockett is currently seeking an immigrant
6 visa. His admission with the visa would provide him the status of lawful permanent
7 resident, and, thus, he would have no further need for advance parole to pursue his
8 adjustment application.

9
10 Plaintiffs also make the new allegation that the regulation located at 8 C.F.R.
11 § 245.2(a)(4)(B) is *ultra vires*, because the INA purportedly does not permit USCIS
12 "to deem an application automatically abandoned where Defendants by their own
13 unlawful actions may withhold an advance parole travel document." Plaintiffs'
14 Ninth Circuit Response at 17. But 8 U.S.C. § 1255 says nothing at all that would
15 support the argument that an adjustment applicant has a right to travel abroad while
16 the application is pending. Adjustment may not be granted while the applicant is
17 outside the United States. *See In Re Freeman*, 489 F.3d 966, 968 (9th Circ. 2008).
18 Plaintiff Lockett *chose* to leave the United States voluntarily with a valid travel
19 document in hand authorizing his return to the United States. He *chose* not to
20 return, and the document is now invalid. Therefore, Defendants are not responsible
21 for Plaintiff Lockett's failure to return to the United States. Because USCIS
22 granted the I-130 filed on behalf of Plaintiff Lockett, and he abandoned his
23 adjustment of status application, Defendants are entitled to judgment as a matter of
24 law as to Plaintiff Lockett.
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/s/Elizabeth J. Stevens
Elizabeth J. Stevens
Assistant Director
District Court Section
Office of Immigration Litigation

/s/ Patricia E. Bruckner
Patricia E. Bruckner
Trial Attorney, District Court Section
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 532-4325
Facsimile: (202) 616-8962
Email: Patricia.Bruckner@usdoj.gov

1
2 **CERTIFICATE OF SERVICE**

3
4
5 Case No. CV07-05696 (CAS)

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

12 Alan R. Diamante, Esq.
13 Law Office of Alan R. Diamante
14 523 W. Sixth Street, Suite 210
15 Los Angeles, California 90014

16 Brent W. Renison, Esq.
17 Parrilli Renison LLC
18 5285 SW Meadows Road, Suite 175
19 Lake Oswego, Oregon 97035

20 /s/ Patricia E. Bruckner
21 Patricia E. Bruckner
22 Trial Attorney, District Court Section
23 Office of Immigration Litigation
24 P.O. Box 868, Ben Franklin Station
25 Washington, DC 20044
26 Telephone: (202) 532-4325
27 Facsimile: (202) 616-8962
28 Email: Patricia.Bruckner@usdoj.gov