

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES 1

I. STANDARD FOR SUMMARY JUDGMENT..... 1

II. BACKGROUND 2

 A. MATERIAL FACTS..... 2

 B. LEGAL AUTHORITY 2

 1. Immigration Petition Statute and Regulations 3

 2. Matter of Varela 7

 3. Terms Spouse and Marriage..... 9

III. PLAINTIFFS’ CLAIMS ARE APPROPRIATE FOR RESOLUTION BY
SUMMARY JUDGMENT 10

 A. THE CLEAR LANGUAGE OF THE STATUTE SUPPORTS
PLAINTIFFS’ CLAIMS FOR RELIEF WITHIN THE NINTH
CIRCUIT 10

 1. Defendants’ Interpretation Imports Unlawful Discretionary
Admissions Criteria Into a Nondiscretionary Eligibility
Determination..... 11

 2. Defendants Interpretation Relies Upon Revocation Regulations
That Are Ultra Vires..... 18

 B. THE CLEAR LANGUAGE OF THE STATUTE SUPPORTS
PLAINTIFFS’ CLAIMS FOR RELIEF OUTSIDE THE
NINTH CIRCUIT 20

IV. NO GENUINE ISSUE OF MATERIAL FACT EXISTS AND PLAINTIFFS
ARE ENTITLED TO A JUDGMENT AS A MATTER OF LAW 28

V. CONCLUSION..... 29

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) 28

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) 1

Dabaghian v. Civiletti, 607 F.2d 868 (9th Cir. 1979)..... 7

Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006) passim

Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006) 21, 25

Freeman v. USDC, 489 F.3d 966 (9th Cir. 2007)..... 14

Hernandez v. Ashcroft, 345 F.3d 824, 833-34 (9th Cir. 2003) 13

Lockhart v. Chertoff, 2008 U.S. Dist. LEXIS 889 (D. Ohio 2008) 28

Matter of Alarcon, 20 I&N Dec. 557 (BIA 1992) 7

Matter of O, 8 I&N Dec. 295 (BIA 1959) 17

Matter of Sano, 19 I&N Dec. 299 (BIA 1985) 8

Matter of Varela, 13 I&N Dec. 453 (BIA 1970) 7, 8

Matter of Zaidan, 19 I&N Dec. 297 (BIA 1985)..... 8

Plessy v. Ferguson, 163 U.S. 537 (1896)..... 9

Robinson v. Napolitano, 554 F.3d 358 (3d Cir. 2009), *reh’g denied* (2009)21, 24, 26, 27

Rosell v. State Indus. Accident Comm’n, 164 Or. 173, 179, 95 P.2d 726, 729 (Or. 1939)10

Taing v. Chertoff, 2007 U.S. Dist. LEXIS 911411 (D. Mass 2007) 20

United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir.), cert denied, 493 U.S. 809 (1989)..... 2

Statutes

§ 1154 24

§1186a 22, 24, 26

1 8 U.S.C. § 1182(a)(4) 16

2 8 U.S.C. § 1182(a)(4)(C)..... 15

3 8 U.S.C. § 1182(a)(4)(C)(ii)..... 16

4 8 U.S.C. § 1183a 16

5 8 U.S.C. § 1183a(a)(3)(A)..... 16

6 8 U.S.C. § 1183a(c)..... 17

7 8 USC § 1151 24, 26

8 8 USC § 1151(b) passim

9 8 USC § 1151(b)(2)(A)(i) passim

10 8 USC § 1154 19, 26

11 8 USC § 1154(a)(1)(A)(i)..... 3, 5, 12, 14

12 8 USC § 1154(a)(1)(A)(ii)..... 5

13 8 USC § 1154(b) 6, 13

14 8 USC § 1155 19

15 8 USC § 1182(a)..... 13, 14

16 8 USC § 1183a(f)(5)(B) 15

17 8 USC §1154(a)(1)(A)(i)(I)..... 22

18 8 USC §1154(a)(1)(A)(i)(II) 22, 26

19 8 USC §1186a (b)(1)(A)(ii)..... 22, 25

20 8 USC §1186a (c)(1)(A)..... 25

21 8 USC §1186a (c)(4)(B)..... 25

22 8 USC §1186a (d)(1)(A)(i)(II) 25

23 8 USC §1186a (g)..... 25

24 INA 201(b)(2)(A)(i) 3, 5

25 INA 204(a)(1)(A)(ii) 5

26 INA 213A(f)(5)(B)..... 12

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Other Authorities

Black’s Law Dictionary (4th Ed. 1951) 10

Black’s Law Dictionary (6th Ed. 1990) 10

Black’s Law Dictionary (8th Ed. 2004) 9

Rules

AFM Ch. 21.2(a)(4)(B)(2) 12, 19

Federal Rule of Civil Procedure 56(c) 1

L.R. 7-3 1

Regulations

8 C.F.R. § 213a.1 17

8 C.F.R. § 213a.2(e)(2)(ii) 17

8 C.F.R. § 3.1(b) (1985) [now 8 C.F.R. § 1003.1(b)] 8

8 CFR § 205.2(a)(3)(C)(2) 18, 20

Constitutional Provisions

Fifth Amendment to the United States Constitution 14, 19

1 show an absence of a genuine issue of material fact. *Celotex Corp. v.*
2 *Catrett*, 477 U.S. 317, 322 (1986). Once the showing is made, the
3
4 nonmoving party must “go beyond the pleadings” and designate specific
5 facts showing a “genuine issue for trial.” *Id.* At 324, citing FRCP 56(e). A
6
7 “‘*scintilla* of evidence,’ or evidence that is ‘merely colorable’ or ‘not
8 significantly probative,’” does not present a genuine issue of material fact.
9
10 *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542
11 (9th Cir.), cert denied, 493 U.S. 809 (1989) (emphasis in original) (citation
12 omitted).

13 **II. BACKGROUND**

14 **A. MATERIAL FACTS**

15
16 The U.S. citizen spouses of plaintiffs filed petitions to accord
17
18 immediate relative status to plaintiffs. As immediate relatives, plaintiffs
19 sought to apply for status as Lawful Permanent Residents, providing the
20 ability to lawfully reside in the United States, and be allowed to work and
21 travel. Defendants terminated action on the residency petitions filed by
22 plaintiffs’ U.S. citizen spouses when each died prior to defendants acting on
23 the petitions.
24
25

26 **B. LEGAL AUTHORITY**

27 Defendants claim that plaintiffs were stripped of their status as
28

1 immediate relative spouses because each suffered the death of the spouse
2 before any action was taken on a properly filed petition prior to the death.
3

4 As the U.S. Court of Appeals for the Ninth Circuit has held, the defendants'
5 position does not comport with the statute. *Freeman v. Gonzales*, 444 F.3d
6 1031 (9th Cir. 2006).
7

8 **1. Immigration Petition Statute and Regulations**

9 Family relationships form the large part of immigration under our
10 laws established by Congress, and “immediate relatives” have a special
11 place in the statutes. Immediate relatives are exempt from numerical
12 limitation, meaning that immigrant visas are immediately available to them
13 at any time, and they enjoy exemption from many of the restrictions on other
14 categories. Under section 201(b)(2)(A)(i), of the Immigration and
15 Nationality Act (INA), 8 USC § 1151(b)(2)(A)(i), 8 USC § 1154(a)(1)(A)(i),
16 a United States citizen may petition to have his spouse classified as an
17 immediate relative. The language of 8 USC § 1154(a)(1)(A)(i) is as follows,
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22 “Any citizen of the United States claiming that an alien is entitled to
23 classification by reason of a relationship described in paragraph (1),
24 (3), or (4) of section 203(a) or to an immediate relative status under
25 section 201(b)(2)(A)(i) may file a petition with the Attorney General
for such classification.”

26 Under USCIS rules, the form that the citizen files is Form I-130,
27 Petition for Alien Relative (hereinafter “I-130”). Plaintiffs’ citizen spouses
28

1 all concluded such filing, with fee, in accordance with the statute. The
2 language of the first sentence of INA 201(b)(2)(A)(i), 8 USC §
3 1151(b)(2)(A)(i), is succinct:
4

5 “Immediate Relatives. – For purposes of this subsection, the term
6 “immediate relatives” means the children, spouses, and parents of a
7 citizen of the United States, except that, in the case of parents, such
8 citizens shall be at least 21 years of age.”

9 As the Court in *Freeman* noted, only “parents” are “subject to any
10 limitation, with the grant of immediate relative status being restricted to
11 those whose citizen child is at least 21 years of age. There is no comparable
12 qualifier to be a ‘spouse’—that is, a requirement that the marriage must have
13 existed for at least two years.” *Freeman, supra*, 444 F.3d at 1039. Nowhere
14 within the definition of immediate relative spouse is the word marriage, or
15 any quantified time period of marriage. Yet defendants continue to insist
16 that plaintiffs are stripped of the status of spouse, and therefore immediate
17 relative status, upon the death of the citizen spouse where the marriage has
18 existed less than two years.
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22 For alien spouses whose citizen spouses have *not filed an I-130*
23 *immigrant petition*, the INA provides a *separate* self-petitioning right:
24

25 “In the case of an alien (and each child of the alien) who was the
26 spouse of a citizen of the United States for at least two years at the
27 time of the citizen’s death and was not legally separated from the
28 citizen at the time of the citizen’s death, the alien shall be considered,

1 for purposes of this subsection, to remain an immediate relative after
2 the date of the citizen’s death but only if the spouse files a petition
3 under section 204(a)(1)(A)(ii) within two years after such date and
4 only until the date the spouse remarries.”

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

6 The second sentence of the immediate relative definition creates a time
7 limitation (at the time of death, the alien must have been a spouse for at least
8 two years) not found in the second sentence, but allows a self petition to be
9 filed under INA 204(a)(1)(A)(ii), 8 USC § 1154(a)(1)(A)(ii),
10

11 “An *alien spouse* described in the *second sentence* of section
12 201(b)(2)(A)(i) *also* may file a petition with the Attorney General
13 under this subparagraph for classification of the alien (and the alien’s
14 children) under such section.” (emphasis supplied)

15 Therefore, the citizen spouse files a petition under clause (i) of
16 1154(a)(1)(A) to accord immediate relative status to his or her spouse under
17 the *first* sentence of 1151(b)(2)(A)(i). Separately, the alien spouse (in the
18 absence of the citizen spouse filing) “*also may file*” a petition under 8 USC §
19 1154(a)(1)(A)(ii) (clause (ii) instead of (i)) to accord immediate relative
20 status to him or herself (*and his or her children*) under the *second* sentence
21 of 1151(b)(2)(A)(i), but only if the alien was a spouse for at least two years
22 at the time of the death of the citizen spouse. Congress clearly created “two
23 different processes, such that one or the other applies – either the citizen
24 spouse petitions or, if he dies without doing so, the alien widow may do so.”
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1 *Freeman, supra*, 444 F.3d at 1042.

2 In an attempt to apply the standards of one section to the petition
3 requirements of another, defendants create tragic and anomalous results.
4 The Court in *Freeman* noted that, “[t]he government also tells us that, had
5 DHS addressed the Freemans’ application before Mr. Freeman died, the
6 adjustment of status could have been granted even though they had not been
7 married for two years.” *Freeman, supra*, 444. F.3d at 1040. Congress
8 cannot have intended such strange and unjust results.
9

10
11
12 In the Aytes Memorandum (See Dkt. # 8, Def. Mot. Ex. 1,
13 “hereinafter Memorandum”), defendant USCIS opines that that 8 USC §
14 1154(b) supports its interpretation that an I-130 petition cannot be approved
15 for a spouse of a citizen where the alien spouse has outlived her spouse.
16

17 That statute states in relevant part,
18

19 “After an investigation of the facts in each case...the Attorney
20 General shall, if he determines that the facts stated in the petition are
21 true and that the alien in behalf of whom the petition is made is an
22 immediate relative specified in section 201(b)...approve the
23 petition...” 8 USC § 1154(b)

24 Defendants’ position, expressed in the Memorandum, makes much of
25 the portion of the statute that states “are true” and “is an immediate relative”,
26 as supporting its view that it is no longer true that a surviving spouse
27 remains a spouse for immediate relative purposes. This section begs the
28

1 question of whether an alien spouse remains an immediate relative specified
2 in section 201(b).
3

4
5 Defendants mistakenly rely upon a Board of Immigration Appeals
6 decision, *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992) for the
7 proposition that “cases are decided based on the facts as they exist on the
8 date of the decision.” Memorandum, p. 4. The holding in *Alarcon*,
9 however, was limited to admissibility issues. Admissibility issues are
10 determined on a discretionary basis with respect to adjustment of status or
11 entry pursuant to an immigrant visa. Eligibility issues, on the other hand,
12 are determined with respect to the citizen’s petition, and are determined at
13 inception. *Dabaghian v. Civiletti*, 607 F.2d 868 (9th Cir. 1979). As noted
14 above, the Attorney General *shall* approve a petition if the facts stated in the
15 petition are true. The language of the statute governing I-130 petitions is
16 mandatory, rather than discretionary.
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22 **2. Matter of Varela**

23 Defendants’ position flows from an extra-jurisdictional decision of the
24 Board of Immigration Appeals, *Matter of Varela*, 13 I&N Dec. 453 (BIA
25 1970) (see Exhibit 1). The Board in *Varela* “summarily ruled that by the
26 time the non-citizen wife’s adjustment of status petition was being
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28

1 determined, she was no longer [the] spouse of a United States citizen under
2 §1151 because her husband's 'death had stripped her of that status.'"
3
4 *Freeman, supra*, 444 F.3d at 1038 (citing *Varela, supra*, 13 I&N Dec. at
5 454). *Varela*, however, is no longer good law. The Board modified *Varela*
6 in a critical respect in *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985) (See
7 Exhibit 2). The Board in *Sano* determined that the BIA itself, due to
8 regulatory restraints as a court of limited and not general jurisdiction, lacked
9 jurisdiction to hear an appeal from an individual other than the petitioner.
10
11 19 I&N Dec. 299. The Board stated,
12

13
14 "As we recently stated in *Matter of Zaidan*, 19 I&N Dec. 297 (BIA
15 1985), the Board's appellate jurisdiction is defined by the regulations
16 set forth in 8 C.F.R. § 3.1(b) (1985) [now 8 C.F.R. § 1003.1(b)] .
17 Unless the regulations affirmatively grant us power to act in a
18 particular matter, we have no appellate jurisdiction over it... We
19 therefore conclude that we lack jurisdiction to address an appeal by
20 the beneficiary from the denial of a visa petition. *Cf. Matter of
Zaidan, supra*. To the extent that our decision in *Matter of Varela,
supra*, conflicts with this conclusion, it is hereby modified." *Matter of
Sano*, 19 I&N Dec. at 300-01.

21 The Board itself determined that its review in *Matter of Varela* was
22 "inappropriate." *Sano, supra*, at 300. According to the Board, therefore, its
23 previous ruling in *Varela* on the meaning of the word spouse should not
24 have been issued, and modified the decision to accord with *Sano*.
25

26
27 The Ninth Circuit Court of Appeals discussed the level of deference
28

1 owed to *Varela. Freeman*, 444 F.3d at 1038. The Court explained that
2 Varela is an “extra-jurisdictional” decision, suffers from a “lack of statutory
3 analysis” and is “not a permissible construction of the statute.” *Id.* Further,
4 because the Board has decided it has no jurisdiction to ever review this
5 question again, any interpretation giving life to the decision in *Varela*
6 necessarily seals for time immemorial that erroneous interpretation. What
7 an odious world we might live in had *Plessy v. Ferguson*, 163 U.S. 537
8 (1896) enjoyed such absolute immunity from re-evaluation.
9
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11

12 **3. Terms Spouse and Marriage**

13 Defendants’ motion and Memorandum (Dkt # 8) are littered with the
14 word “marriage”, a word not found in the statute. A close review of 8 USC
15 § 1151(b)(2)(A)(i) reveals that the word marriage is not in the first sentence.
16 Instead, the word “spouse” is found. The term spouse is a common term of
17 ordinary usage, and is found in the Eighth Edition of Black’s Law
18 Dictionary (2004): “Spouse. One’s husband or wife by lawful marriage; a
19 married person....Surviving spouse. A spouse who outlives the other
20 spouse.” Spouse is thus defined to include the term surviving spouse, which
21 refers to a “spouse” who has outlived the other spouse.
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26 Black’s Law Dictionary, Sixth Edition, published in 1990 and
27 available at the time of the 1990 INA amendments (which added the self-
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1 petitioning rule), defines spouse as “[o]ne’s husband or wife, and ‘surviving
2 spouse’ is one of a married pair who outlives the other.” Black’s Law
3 Dictionary (6th Ed. 1990). The Fourth Edition of Black’s, which was
4 published in 1951 and was the most up-to-date edition available to the
5 drafters of the 1952 Act (the source of the current immediate relative
6 definition), broadly defines spouse as “[o]ne’s husband or wife,” a phrase it
7 specifically derives from *Rosell v. State Indus. Accident Comm’n*, 164 Or.
8 173, 179, 95 P.2d 726, 729 (Or. 1939). Black’s Law Dictionary (4th Ed.
9 1951). *Rosell*, in turn, defines a widow as “a married woman whose
10 husband is dead” and a spouse as “one’s wife or husband.” It then defines a
11 surviving spouse as “the one, of a married pair, who outlives the other.” 164
12 Or. At 173.

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18 Whether one turns to the most recent 2004 Edition of Black’s Law
19 Dictionary, the 1990 Edition available at the time of the 1990 amendments,
20 or the 1951 Edition that was most current when Congress drafted the INA in
21 1952, “surviving spouse” falls within the definition of “spouse.” Petitioners
22 have outlived their spouses, though spouses they remain.
23

24 25 **III. PLAINTIFFS’ CLAIMS ARE APPROPRIATE FOR** 26 **RESOLUTION BY SUMMARY JUDGMENT**

27 **A. THE CLEAR LANGUAGE OF THE STATUTE SUPPORTS** 28 **PLAINTIFFS’ CLAIMS FOR RELIEF WITHIN THE NINTH CIRCUIT**

1 The Aytes Memorandum does not reflect a lawful interpretation of
2 the holding in *Freeman* or the clear language of the statute.
3

4 **1. Defendants' Interpretation Imports Unlawful**
5 **Discretionary Admissions Criteria Into a**
6 **Nondiscretionary Eligibility Determination**

7 With regard to the "Special rule for Ninth Circuit cases" outlined
8 in the Aytes Memorandum (Dkt # 8, Def. Mot. Ex. 1, p. 6, AFM Ch.
9 21.2(a)(4)(B)(1), hereinafter "Memorandum"), the section purports to follow
10 *Freeman*. Yet, according to the Memorandum, the *Freeman* decision will
11 apparently not be applied to I-130 petitions unless an I-485 application was
12 also filed before the death of the petitioner. The Court in *Freeman* held that,
13 "an alien widow whose citizen spouse filed the necessary immediate relative
14 petition form but died within two years of the qualifying marriage
15 nonetheless remains a spouse for purposes of 8 USC § 1151(b)(2)(A)(i), and
16 is entitled to be treated as such when DHS adjudicates her adjustment of
17 status application." *Freeman*, supra, at 1034. The Court did not hold, for
18 example, that an alien widow whose citizen spouse filed the necessary
19 immediate relative petition form but died within two years of the qualifying
20 marriage nonetheless remains a spouse for purposes of 8 USC §
21 1151(b)(2)(A)(i), *if she has also filed an* adjustment of status application.
22 Such an interpretation is not only in direct conflict with *Freeman*, but also
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1 unsupported by the statute. Defendants' disagreement with the *Freeman*
2 decision has clouded its interpretation of the statute.
3

4 Additionally, the Memorandum imports an unlawful requirement
5 that the beneficiary "present a request under 8 CFR § 205.2(a)(3)(C)(2) for
6 humanitarian reinstatement, supported by a properly completed Form I-864
7 from an individual who qualifies under section 213A(f)(5)(B) of the Act as a
8 qualifying substitute sponsor" or the petition will automatically be revoked.
9
10 Memorandum, p. 7, AFM Ch. 21.2(a)(4)(B)(2). The Memorandum,
11 therefore, makes it clear that defendants will *automatically* revoke a petition
12 approved under the *Freeman* decision for reasons not allowed under the
13
14 *Freeman* decision or the statute.
15

16 After reviewing 8 USC § 1154(a)(1)(A)(i) and 8 USC §
17 1151(b)(2)(A)(i), the Court in *Freeman* concluded that, "through our review
18 of the language, structure, purpose and application of the statute, that
19 Congress clearly intended an alien widow whose citizen spouse has filed the
20 necessary forms to be and to remain an immediate relative (spouse) for
21 purposes of § 1151(b)(2)(A)(i), even if the citizen spouse dies within two
22 years of the marriage." *Freeman v. Gonzales*, 444. F3d. 1031, 1039 (9th
23 Cir. 2006). It is the I-130 petition, filed under 8 USC § 1154(a)(1)(A)(i),
24 which establishes eligibility for immediate relative status. With respect to
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1 the application of the immediate relative to be granted the status of Lawful
2 Permanent Resident (LPR), certain discretionary grounds of inadmissibility
3 may apply to bar the adjustment of status (Form I-485) or issuance of an
4 immigrant visa and admission (Form DS-230). Those inadmissibility
5 grounds are found at 8 USC § 1182(a). Such grounds of inadmissibility are
6 wholly separate from the determination of eligibility for immediate relative
7 status under 8 USC § 1154(a)(1)(A)(i) and 8 USC § 1151(b)(2)(A)(i), and
8 defendants' attempt to apply inadmissibility standards to the validity of a
9 petition for eligibility is prohibited as a matter of law. The Ninth Circuit has
10 held that, "determinations that require application of law to factual
11 determinations are nondiscretionary." *Hernandez v. Ashcroft*, 345 F.3d 824,
12 833-34 (9th Cir. 2003). The determination of immediate relative status is
13 non-discretionary. Defendants efforts to import discretionary criteria into
14 the determination under 8 USC § 1154(a)(1)(A)(i) and 8 USC §
15 1151(b)(2)(A)(i) are illegal, and subject to judicial review as a matter of law.
16 Such efforts also contravene the mandatory language of 8 USC § 1154(b),
17 "the Attorney General shall...". *Id.*

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25 By way of illustration, defendants approved the I-130 petition filed
26 by Robert Freeman on behalf of his wife Carla Freeman, following the
27 decision of the Ninth Circuit in her case. (Dkt. # 9, Exhibit 3). When
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1 adjudicating Mrs. Freeman's I-485 application, however, defendants applied
2 a number of grounds of inadmissibility to her application, and denied the
3 application in discretion. *See* Dkt. #9, Exhibit 4. Because her I-130 was
4 approved, however, she was provided the opportunity to renew her I-485
5 adjustment of status application in removal proceedings. *See Freeman v.*
6 *USDC*, 489 F.3d 966 (9th Cir. 2007). Defendants are free to apply lawful
7 grounds of inadmissibility to plaintiffs' applications for adjustment of status
8 or immigrant visas, but it is unlawful to apply grounds of inadmissibility
9 under 8 USC § 1182(a) to a determination of immediate relative status under
10 8 USC § 1154(a)(1)(A)(i) and 8 USC § 1151(b)(2)(A)(i). Otherwise, a
11 spouse who would ordinarily be able to renew an application for adjustment
12 of status in removal proceedings would be barred from that renewal avenue
13 through the pre-emptive denial of her I-130 petition based only upon
14 discretionary inadmissibility factors that have no place in a nondiscretionary
15 eligibility determination. Such a denial results in the denial of due process
16 of law implicit in the Fifth Amendment to the United States Constitution.

17
18 Specifically, defendants purport to require *as a prerequisite of I-*
19 *130 approval* the additional filing of a Form I-864, Affidavit of Support
20 (hereinafter "Affidavit") by a "substitute sponsor", a requirement linked to
21 the inadmissibility ground found at 8 USC § 1182(a)(4) ("Public Charge").
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1 The substitute sponsor, according to the Memorandum, must be filed by a
2 relative listed in 8 USC § 1183a(f)(5)(B), which under the title “Non-
3 Petitioning Cases” limits the available sponsors to the “spouse, parent,
4 mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son,
5 daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law,
6 grandparent, or grandchild of a sponsored alien”. The Memorandum directs
7 adjudicators to automatically revoke an I-130 petition unless an Affidavit is
8 filed by one of these listed substitute sponsors. Plaintiffs cases, however, are
9 not “Non-Petitioning Cases” and are instead cases in which the petitioning
10 spouse filed the required Affidavit.
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15 Defendants state that a new affidavit of support will be required
16 for I-130 approval, “even if the deceased spouse filed one.” (Dkt. # 8, Def.’s
17 Opp’n Cross Mot. S.J. 8, n. 5.) In support of this requirement, defendants
18 state that “Section 1182(a)(4)(C) of 8 U.S. Code *specifically requires a valid*
19 *affidavit of support* under section 1183a for all immediate relative and
20 family preference cases...” (Dkt. # 8, Def.’s Opp’n. 8, n. 5) (emphasis
21 supplied). Yet, 8 U.S.C. § 1182(a)(4)(C) does *not* specifically require a
22 valid affidavit of support. Instead, that section requires that “the person
23 petitioning for the alien’s admission (and any additional sponsor required
24 under section 213A(f) or any alternative sponsor permitted under paragraph
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1 (5)(B) of such section) has *executed* an affidavit of support described in
2 section 213A with respect to such alien.” 8 U.S.C. § 1182(a)(4)(C)(ii)
3
4 (emphasis supplied). *Execution* of an affidavit by the petitioner is all that is
5 required under the statute. The requirements, found at 8 U.S.C. § 1183a,
6 defining the “enforceability” of executed affidavits of support serve merely
7 to instruct the form and process of the affidavit, and do not add additional
8 requirements for admission as a lawful permanent resident other than those
9 found at 8 U.S.C. § 1182(a)(4). For example, a petitioning sponsor may
10 execute an affidavit of support as required under § 1182(a)(4), but during the
11 pendency of the petition process the alien may work the last of the required
12 40 qualifying quarters of coverage and therefore make the affidavit of
13 support unenforceable. See 8 U.S.C. § 1183a(a)(3)(A). The fact that the
14 duly executed affidavit of support becomes unenforceable does not make the
15 alien inadmissible under 8 U.S.C. § 1182(a)(4), because the petitioner and
16 alien spouse have done all that is required under the statute. Enforceability
17 is not required for the sponsored immigrant to be admissible - only *execution*
18 of the affidavit by the petitioning sponsor. To maintain otherwise would
19 lead to absurd results.
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26 Further, even if enforceability were required at the time of
27 admission, defendants’ argument that the affidavit of support executed by
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1 the petitioner cannot be enforced following the death of the petitioner is not
2 in accordance with the statute. The regulation does, in fact, state that the
3 sponsor's obligation ends when the sponsor dies. 8 C.F.R. §
4 213a.2(e)(2)(ii). Yet this "enforcement ends at death" requirement is not in
5 the statute, and runs contrary to the remedies provided for enforcement
6 under 8 U.S.C. § 1183a(c), which include remedies to enforce obligations
7 against a person's estate. It is true that "sponsor" is defined in the
8 regulations as "an individual who is either required to execute or has
9 executed a Form I-864 under this part." 8 C.F.R. § 213a.1. There is no
10 disagreement that the spouses of plaintiffs executed a Form I-864. This is
11 not the case of a "juridical person" attempting to execute an affidavit of
12 support, because plaintiffs' spouses accomplished the execution of Form I-
13 864 before notaries public, satisfying the requirements of the statute.
14 Nothing further is required of plaintiffs, and defendants' position that the I-
15 130 petition should turn on a substitute affidavit of support under an
16 unrelated provision is unfounded.

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23 It is well established law that the determination of admissibility is
24 not within the scope of visa petition procedure. *Matter of O*, 8 I&N Dec.
25 295 (BIA 1959) (<http://www.usdoj.gov/eoir/vll/intdec/vol08/Pg295.pdf>)
26 (Dkt. # 9, Attachment A). Despite this basic tenet of immigration law,
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1 defendants seek to utilize grounds of inadmissibility in violation of law to
2 deny plaintiffs' visa petitions. In *Matter of O*, the Board of Immigration
3 Appeals reviewed the denial of an immigrant petition filed by a U.S. citizen
4 woman on behalf of her husband, a citizen of Italy. The Board noted that,
5 "The parties were married on September 25, 1929, at Fulton, New York.
6 The petition is supported by the birth certificate of the petitioner and by a
7 marriage certificate. The beneficiary appears, upon the basis of the
8 documents submitted, *prima facie* eligible for a nonquota status under
9 section 101(a)(27)(A) of the Immigration and Nationality Act as the alien
10 husband of a citizen of the United States." *Id.* at 295. The immigration
11 service had denied the visa petition on the basis that the "beneficiary is
12 ineligible to receive a visa and is inadmissible to the United States..." *Id.* at
13 296. The Board disagreed with the visa petition denial, and the court
14 admonished the Service for using admissibility criteria to deny eligibility.
15 Such actions constitute a violation of the Due Process Clause of the Fifth
16 Amendment of the U.S. Constitution.

23 **2. Defendants Interpretation Relies Upon Revocation** 24 **Regulations That Are Ultra Vires**

25 Defendants' Memorandum requires the filing of a request for
26 humanitarian reinstatement under 8 CFR §205.2(a)(3)(C)(2). If a request is
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1 not filed, or if defendants deem the humanitarian reasons insufficient, the
2 petition will be revoked. *See* Dkt. # 8, Def. Mot., Ex. 1, AFM Ch.
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4 21.2(a)(4)(B)(2). By introducing this requirement, defendants raise a very
5 significant issue for the Court's review. This requirement imports
6 discretionary factors into the I-130 immigrant petition process that are not
7 supported by the statute, and more properly lie with the application for
8 adjustment of status or immigrant visa application. For the same reasons
9 noted above, a denial on such grounds presents Constitutional due process
10 concerns under the Fifth Amendment. Additionally, the regulations found at
11 8 CFR § 205.1 dealing with automatic revocation of immediate relative
12 petitions upon the death of the petitioning relative are *ultra vires* and invalid
13 as a matter of law.
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18 The statute governing revocation of approval of petitions states,
19 "The Secretary of Homeland Security may, at any time, *for what he deems to*
20 *be good and sufficient cause*, revoke the approval of any petition approved
21 by him under section 204 [8 USC § 1154]. Such revocation shall be
22 effective as of the date of approval of any such petition." 8 USC § 1155
23 (emphasis supplied). The regulation, however, goes far afield. It provides
24 that a petition is *automatically* revoked upon the death of the petitioner,
25 unless USCIS determines as a *matter of discretion* for humanitarian reasons
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1 that revocation would be inappropriate. 8 CFR § 205.2(a)(3)(C)(2).
2 Defendants have not attempted to justify the humanitarian reinstatement
3 criteria, and such barriers are needless and unlawful. The death of a spouse
4 does not, as a matter of law, constitute “good and sufficient cause” to
5 automatically revoke the approval of a petition that has been properly filed
6 by a United States citizen on behalf of his or her spouse. Such things as
7 fraud, misrepresentation, or mistake may constitute good and sufficient
8 cause, but not an Act of God over which petitioner and beneficiary have no
9 power, nor defendants’ own delay. The automatic revocation regulations are
10 *ultra vires*, and invalid.

15 **B. THE CLEAR LANGUAGE OF THE STATUTE SUPPORTS**
16 **PLAINTIFFS’ CLAIMS FOR RELIEF OUTSIDE THE**
17 **NINTH CIRCUIT**

18 Two District Courts outside the Ninth Circuit have found that the
19 clear language of the statute supports plaintiffs’ claims for relief when
20 reviewing claims of surviving spouses similarly situated to plaintiffs; *Taing*
21 *v. Chertoff*, 2007 U.S. Dist. LEXIS 911411 (D. Mass 2007), *appeal*
22 *docketed*, No. 08-1179 (1st Cir. Feb. 11, 2008); *Lockhart v. Chertoff*, 2008
23 U.S. Dist. LEXIS 889 (D. Ohio 2008), *appeal docketed*, No. 08-1179 (6th
24 Cir. 2008).
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1 Despite the clear language, The Third Circuit in a split decision
2 upheld defendants’ interpretation. *Robinson v. Napolitano*, 554 F.3d 358
3 (3d Cir. 2009), *reh’g denied* (2009). A misleading exchange during oral
4 argument contributed to a failure of proper analysis by the majority. The
5 majority opinion also evidenced a misinterpretation of the “two-year rule”
6 and failed to consider key statutes that were carefully considered by the
7 Ninth Circuit in *Freeman v. Gonzales*, 444. F.3d 1031 (9th Cir. 2006), the
8 only other court of appeals to have ruled on the issues raised herein.
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10 Specifically, the *Robinson* majority held that,
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12 “We agree with the agency that Robinson’s claim must be rejected,
13 not because of any government bureaucracy but because she does not
14 meet one of the Congress’ requirements for immediate relative status,
15 i.e., that she had been married to her citizen spouse for at least two
16 years.”
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18 554 F.3d at 366. This holding is “fatally flawed.” 554 F.3d at 367
19 (Nygaard, J., dissenting). The majority was prevented from recognizing that
20 Congress did not impose a requirement that an immediate relative have been
21 married to a citizen spouse for at least two years as a prerequisite to
22 obtaining permanent resident status. Instead, the two year rule was only
23 intended to guard against marriage fraud, and to therefore allow an
24 individualized determination – not automatic termination. There are two
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1 separate “two-year rule” sections that were conflated by the majority – 1) 8
2 USC § 1186a providing for conditions on permanent resident status granted
3 to alien spouses who entered into the marriage less than two years prior to
4 approval, were beneficiaries of petitions filed by a U.S. citizen spouse under
5 the *first clause* of 8 USC §1154(a)(1)(A)(i)(I), and subject to the definition
6 found under the *first sentence* of 8 USC § 1151(b)(2)(A)(i), and 2) the
7 *second clause* of 8 USC §1154(a)(1)(A)(i)(II) providing a self-petitioning
8 right of alien spouses under the *second sentence* of 8 USC §
9 1151(b)(2)(A)(i). These sections consistently refer to a spouse and a
10 surviving spouse as an “alien spouse” or “the spouse”. These interconnected
11 sections refer to a surviving spouse as an “alien spouse” or “the spouse”, and
12 the two year requirement of the self-petitioning spouse under the *second*
13 *clause* of 8 USC §1154(a)(1)(A)(i) does not explicitly or implicitly limit the
14 alien spouse whose U.S. citizen spouse filed a petition under the first clause
15 of USC §1154(a)(1)(A)(i). The latter is merely subject to the conditions of 8
16 USC § 1186a which only allow for termination of status on a basis “other
17 than through the death of a spouse.” 8 USC § 1186a(b)(1)(A)(ii).

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25 The majority opinion evidenced a fundamental misunderstanding of
26 the routine processing times for administrative adjudication, assuming that
27 the USCIS rarely if ever acts fast enough to grant applications before two
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1 years of marriage. During oral argument, Circuit Judge Sloviter, who
2 authored the majority opinion, asked the government about the “rare case” in
3 which the agency acts within two years of marriage. Contrary to the
4 government response, which was to say that they could not say it never
5 happens, it is not the *rare* case that an application is approved where the
6 marriage has not lasted two years, but the norm. It is commonplace for
7 USCIS to grant adjustment of status to applicants who have been married for
8 several months, because the statutory scheme clearly contemplates that the
9 agency is to do so on a routine basis. USCIS processing times have always
10 been under 24 months since detailed backlog reduction records have been
11 kept, and now average about six months nationwide as a result of earnest
12 backlog reduction efforts initiated in 2003.¹
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19 ¹ 10/2003 average times: **21.2** months; 8/2004 average times **21.7** months
20 http://www.uscis.gov/files/article/BEPQ3v2_1.pdf
21 2004 Q3 average times: **22.4** months
22 <http://www.uscis.gov/files/article/BEPQ4v7.pdf>
23 2004 Q4 average times: **19.8** months
24 <http://www.uscis.gov/files/article/BEPQ4v7.pdf>
25 2005 Q1 average times: **18.6** months
26 <http://www.uscis.gov/files/article/BEPQ1FY2005.pdf>
27 2005 Q3 average times: **15.2** months
28 <http://www.uscis.gov/files/article/BEPQ3FY2005.pdf>
2005 Q4 average times: **13.9** months
<http://www.uscis.gov/files/article/BEPQ4FY2005.pdf>
2006 Q1 average times: **13.4** months
<http://www.uscis.gov/files/article/BEPQ1FY2006.pdf> (cont. next page)

1 It is regrettable that the *Robinson* majority did not have accurate
2 information before it. Had the panel known the realities of USCIS practice
3 and procedure, and therefore had been prompted to analyze more closely the
4 interconnected provisions of § 1154 and §1186a the importance of which are
5 set out below, the majority would have sided with the dissent and upheld the
6 sound judgment of the District Court. The dissent, after all, was entirely
7 correct that,
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11 As a result of the government’s fatally flawed interpretation of §
12 1151(b), Osserritta Robinson will be removed from the United States,
13 in spite of her full compliance with the INA, simply because the
14 petition filed on her behalf by her deceased husband is stuck in the
15 government’s bureaucracy.

16 554 F.3d at 367 (Nygaard, J., dissenting). The *Robinson* majority
17 overlooked the importance of § 1154 and §1186a.

18 The *Robinson* majority found the so-called “two year rule” to require
19 a marriage of two years as a prerequisite to lawful permanent resident status,
20 but did not analyze or refer to a key statute that directly undermines that
21 holding. The Conditional Residence statute, 8 USC § 1186a, was enacted in
22 1986 before the second sentence of 8 USC § 1151 was even inserted in
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25 2006 Q2 average times: **12.5** months

26 <http://www.uscis.gov/files/article/BEPQ2FY06.pdf>

27 2006 Q3 average times: **8.3** months

28 http://www.uscis.gov/files/article/backlog_FY06Q3.pdf

1 1990. The provisions of 8 USC § 1186a specifically address those
2 immediate relative spouses who obtain permanent resident status “by virtue
3 of a marriage which was entered into less than 24 months before the date the
4 alien obtains such status by virtue of such marriage” and further state in five
5 specific sections that termination of that status may not occur “*through the*
6 *death of a spouse.*” See 8 USC §1186a (b)(1)(A)(ii); 8 USC §1186a
7 (c)(1)(A); 8 USC §1186a (c)(4)(B); 8 USC §1186a (d)(1)(A)(i)(II); 8 USC
8 §1186a (g). The Ninth Circuit in *Freeman* stated it thus,
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12 “[T]he government concedes that it had the power to grant the
13 Freemans’ application prior to Mr. Freeman’s death (and the
14 Freemans’ second anniversary). Had it done so, Mrs. Freeman’s LPR
15 could not then have been voided by her husband’s death, as the statute
16 expressly states. See § 1186a(a), (b)(1) (providing that an alien
17 spouse who receives permanent resident status as an immediate
18 relative before the second anniversary of her qualifying marriage does
19 so on a conditional basis, and if the Attorney General determines that
20 prior to the second anniversary of the alien’s obtaining status the
21 alien’s marriage ‘has been judicially annulled or terminated, *other*
22 *than through the death of a spouse,*’ the Attorney General ‘shall
23 terminate the permanent resident status of the alien.’ (emphasis
24 added)). This is compelling evidence that Congress did not intend its
25 provision for a widow’s self-petition for adjustment of status to have
26 an implicit collateral consequence of terminating a spouse’s already
27 pending petition – particularly when the effect would be to foreclose a
28 grieving widow from any adjustment at all ‘through the death of [her]
spouse.’”

26 *Freeman v. Gonzales*, 444 F.3d 1031, 1042 (9th Cir. 2006). Simply stated,
27 compelling evidence exists that Congress did not intend a spouse who
28

1 experienced a quick adjudication of (for example) three months resulting in
2 permanent resident status, followed by the death of her spouse at four
3 months, to be completely insulated from having her permanent resident
4 status terminated (as the government conceded at oral argument would be
5 the case under 8 USC § 1186a), and at the same time have intended a spouse
6 who experienced a long bureaucratic delay to have her petition terminated,
7 where the death of her spouse occurred at eight months. The dissent
8 correctly stated,
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12 “[I]t is inconceivable to me that Congress intended an alien’s status to
13 be contingent upon the amount of time that the executive department
14 takes to process a timely and proper petition – a factor completely
15 outside of the control of the alien. This interpretation creates an
16 arbitrary, irrational and inequitable outcome in which approvable
17 petitions will be treated differently depending solely upon when the
18 government grants the approval.”

19 *Robinson*, 554 F.3d . 358, 371 (Nygaard, J., dissenting). The panel did not
20 analyze § 1186a.

21 The dissent in *Robinson* properly analyzed the importance of
22 Congress’ usage of the phrase “the spouse” in the second sentence of 8 USC
23 § 1151(b)(2)(A)(i), and noted the deliberate use of the word “spouse” in 8
24 USC §1154(a)(1)(A)(i)(II), which refers to a surviving spouse. *Id.* at p. 19.
25 The majority in *Robinson* failed to consider relevant statutes 8 USC § 1154
26 and 8 USC § 1186a, and viewed 8 USC § 1151 in a vacuum. A review of
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1 the entire statutory scheme including the conflict that the government
2 position creates with respect to § 1154 and §1186a, as was undertaken in
3 *Freeman*, yields the conclusion that Congress never intended a duly filed
4 petition to be voided automatically upon the petitioner’s death.
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7 Furthermore, the majority relied on an incorrect definition of “child” when
8 reviewing the INA’s definitional sections:

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10 Significantly, the INA’s definitional section does provide statute-
11 specific definitions of other commonly-used terms such as “child,”
12 which it defines to mean “an unmarried person under twenty-one
13 years of age” who satisfies other specific requirements. 8 U.S.C. §§
14 1101(b)(1), 1101(c)(1). In addition, the INA includes a definition of
15 “parent” that expressly includes a “deceased parent.” 8 U.S.C. §
16 1101(c)(2). Congress’ choice to include specific definitions of these
17 common family words – child and parent – but not to include such a
18 definition of spouse strongly suggests that the ordinary meaning of
19 spouse at the time of the enactment of the immediate relative
20 provision should control.”

21 *Robinson*, 554 F.3d 358, 365. The majority found the INA’s reference to
22 “deceased parent,” and the absence of deceased spouse in § 1101(c)(2)
23 significant. Yet § 1101(c)(2) is the definitional section relating to Title III of
24 the INA (subchapter III of 8 U.S.C.), which is limited to claims of U.S.
25 citizenship, a benefit that does not flow from the spousal relationship. The
26 definition relating to a Title III benefit would never refer to spouse, since
27 U.S. citizenship cannot be derived from a spouse. Titles I and II of the INA
28 (subchapters I and II of 8 U.S.C.) deal specifically with immigration benefits

1 sought in the case at bar, and those definitional statements found at §
2 1101(b) (not (c)) should have been discussed by the majority in *Robinson*.

3
4 The moorings of the *Robinson* majority decision are unsound. Mrs.
5 Robinson’s attorney will petition the U.S. Supreme Court for certiorari.

6
7 With respect to Plaintiff Standifer, if the Court determines that despite
8 the flaws in the *Robinson* majority opinion that her case is nevertheless
9 controlled by that Circuit’s caselaw, we respectfully request that this Court
10 hold in abeyance a decision on her case until the U.S. Supreme Court has
11 denied certiorari or issued an authoritative decision.
12

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14 **IV. NO GENUINE ISSUE OF MATERIAL FACT EXISTS AND**
15 **PLAINTIFFS ARE ENTITLED TO A JUDGMENT AS A**
16 **MATTER OF LAW**

17 The defendants do not contest plaintiffs’ factual allegations in their
18 motion. Moreover, the question that both parties have identified for the
19 Court’s resolution – whether the decision of defendants to automatically
20 deny the properly filed immediate relative petitions is based upon a
21 permissible interpretation of the statute – is a question of law. No factual
22 issues exist that can only be resolved by a finder of fact, because they “may
23 reasonably be resolved in favor of either party.” *Anderson v. Liberty Lobby,*
24 *Inc.*, 477 U.S. 242, 250 (1986). This controversy is suitable for resolution
25
26 on written and oral arguments by counsel, without the need for trial.
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1 **V. CONCLUSION**

2 For the foregoing reasons, plaintiffs respectfully request that summary
3 judgment be entered in plaintiffs' favor.
4

5 DATED March 9, 2009.

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1 PROOF OF SERVICE

2 I, the undersigned, say: On March 9, 2009, true and correct copies of the
3 plaintiffs': PLAINTIFFS' MEMORANDUM IN SUPPORT OF RENEWED MOTION
4 FOR SUMMARY JUDGMENT, were served pursuant to the district court's ECF system
5 as to ECF filers to the following ECF filers:

6 Elizabeth Stevens
7 Office of Immigration Litigation
8 USDOJ Civil Division
9 P.O. Box 878
10 Ben Franklin Station
11 Washington, DC 20044

12 Sheri R. Glaser
13 Patricia E. Bruckner
14 Office of Immigration Litigation
15 USDOJ Civil Division
16 P.O. Box 878
17 Ben Franklin Station
18 Washington, DC 20044

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

21 EXECUTED on March 9, 2009, at Lake Oswego, Oregon.

22 /s/ Brent W. Renison
23 Brent W. Renison, Declarant
24
25
26
27
28