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I. THE COURT HAS JURISDICTION

Across the nation, courts have ruled that federal district courts have jurisdiction to consider challenges to the “widow’s penalty.” Lockhart v. Chertoff, Case No. 1:07CV823, 2008 U.S. Dist. LEXIS 889, at *18 (N.D. Ohio Jan. 7, 2008) (district court has “jurisdiction to determine, as a matter of law, the meaning of ‘spouse’ and ‘immediate relative’ status”), *aff’d sub nom. Lockhart v. Napolitano*, 2009 WL 928504 (C.A. 6 (Ohio)). Robinson v. Napolitano, 554 F.3rd 358 (3rd Cir. 2009), rehearing denied (2009) (district court had jurisdiction under 28 U.S.C. § 1331 and the Administrative Procedure Act (“APA”)); Taing v. Chertoff, 526 F. Supp. 2d 177 (D. Mass. 2007) (district court had jurisdiction under 28 U.S.C. § 1331, the APA, the Mandamus Act, and the Declaratory Judgments Act), appeal docketed, No. 08-1179 (1st Cir. Feb. 11, 2008); Cf. Pinho v. Gonzales, 432 F.3d 193 (3d Cir. 2005) (district court had jurisdiction under APA over challenge to non-discretionary determination on statutory eligibility for adjustment of status). Notwithstanding, this overwhelming precedent, Defendants seek to have this case dismissed on jurisdictional grounds.

According to Defendants, since United States Citizenship and Immigration Services (“USCIS”) has commenced removal proceedings against the Plaintiff, the immigration judge (“IJ”) has exclusive jurisdiction over Plaintiff’s claims. Defendants further contend that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (“IIRIRA”), and the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, strip this Court of jurisdiction to hear Plaintiff’s claims and require instead that

Plaintiff seek relief first from the IJ, then from the Board of Immigration Appeals (“BIA”), and then in the court of appeals.¹ These arguments are fundamentally flawed and should be rejected.

A. This Court has Jurisdiction over Plaintiff’s Claims Notwithstanding the Existence of Removal Proceedings

Defendants argue that, since Plaintiff is currently in removal proceedings, the IJ has exclusive jurisdiction over Plaintiff’s claims until those proceedings are concluded. Defendants rely on 8 U.S.C. § 1252(g) (2008) and 8 C.F.R. § 1245.2(a)(1) (2008). Neither the statute nor the regulation divests this Court of jurisdiction.

Although Defendants cite to § 1252(g), they fail to provide any explanation as to how it precludes this Court’s jurisdiction. In fact, § 1252(g) is no bar to this Court’s jurisdiction over Plaintiff’s claims. As the Supreme Court explained, § 1252(g) is not some “sort of ‘zipper’ clause that says ‘no judicial review in deportation cases’ unless this section provides juridical review.” Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999). Rather, § 1252(g) is a narrow provision that “applies only to three discrete actions that the Attorney General may take: [his] ‘decision or action’ to ‘commence proceedings, *adjudicate* cases, or *execute* removal orders.” 525 U.S. at 482. A challenge to the unlawful interpretation of a statute simply is not one of the three discrete actions listed in the statute. Bowrin v. INS, 194

¹ In their Motion to Dismiss or For Summary Judgment, Respondents miscalculate the period of marriage in this case. Mr. and Mrs. McKoy had been married over nine (9) months (not four months) when Mr. McKoy died. MTD at 5.

F.3d 483, 488 (4th Cir. 1999). Accordingly, § 1252(g) does not preclude this Court from exercising jurisdiction here.²

Defendants' contention that 8 C.F.R. § 1245.2(a)(1) [and 8 C.F.R. § 1245(a)(2)(D)] vests exclusive jurisdiction in the IJ to adjudicate adjustment of status once removal proceedings have commenced is a red herring. Plaintiff is not challenging the adjudication of their I-485 applications for adjustment of status; rather, Plaintiff challenges the Defendants' unlawful interpretation of "immediate relative" which resulted in the automatic denial of her I-130 petition. As reflected in Defendants' brief, the denial of Plaintiff's I-130 petition is a separate and independent event from the denial of the I-485 application for adjustment of status. Defendants' Motion to Dismiss, or Alternatively, for Summary Judgment at 8-10 ("MTD").

Significantly, the denial of an I-130 petition is a non-discretionary decision³ over which the Executive Office of Immigration Review ("EOIR"), i.e., the IJ and BIA, has *no* jurisdiction. See Matter of Sano, 19 I. & N. Dec. 299, 301 (BIA 1985); Lockhart v. Chertoff, 2008 U.S. Dist. LEXIS 889, at *16 (D. Ohio Jan. 7, 2008), *aff'd sub nom.* Lockhart v. Napolitano, 2009 WL

² Mrs. Lockhart was also in removal proceedings when the District Court in Ohio exercised jurisdiction over her case. Lockhart v. Chertoff, 2008 U.S. Dist. LEXIS 889, at *16 (D. Ohio Jan. 7, 2008), *aff'd sub nom.* Lockhart v. Napolitano, 2009 WL 928504 (C.A. 6 (Ohio))

³ Absent evidence that the marriage was a sham, the district director must approve a properly filed I-130 petition. See 8 U.S.C. § 1154(b) (2000) ("[T]he Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relatives specified in § 1151(b) of this title . . . approve the petition . . ."); Ogbolumani v. United States Citizenship & Immigration Servs., 523 F. Supp. 2d 864, 874-75 (N.D. Ill. 2007) (decisions on petitions for "immediate relative" classification under 8 U.S.C. § 1154 are non-discretionary).

928504 (C.A. 6 (Ohio)); Taing, 526 F. Supp. 2d at 180-81. It is axiomatic that the IJ can not exercise exclusive jurisdiction over an issue over which the IJ has no jurisdiction.

Moreover, the regulation vests the IJ with the jurisdiction to “consider” applications for adjustment of status in the removal proceedings. 8 C.F.R. § 245.2(a)(5)(ii) (2008). Since, as Defendants correctly observe, Plaintiff’s adjustment of status application is dependent on her “immediate relative” classification, Plaintiff is not eligible for, and can not seek adjustment of status in removal proceedings. Accordingly, there is nothing for the IJ to “consider.” See Igwebuike v. Caterisano, 230 Fed. Appx. 278, 282 (4th Cir. 2007) (distinguishing for purposes of jurisdiction between review of exercise of discretion whether to adjust Igwebuike’s status and review of “whether Igwebuike is legally eligible *to be considered for* [such] discretionary relief”).

Defendants cite Perez-Vargas v. Gonzales, 478 F.3d 191 (4th Cir. 2007) and Howell v. INS, 72 F.3d 288 (2d Cir. 1995), for the proposition that once removal proceedings have commenced the IJ has exclusive jurisdiction. However, both cases are clearly distinguishable from the facts and issues here and neither case supports the conclusion that the IJ has exclusive jurisdiction over Plaintiff’s claim. In each case, the appellate court ruled that the IJ and the BIA had jurisdiction over the district director’s determination and could grant petitioner’s relief.⁴

⁴ At issue in Perez-Vargas was whether the IJ had jurisdiction to review the continuing validity of a visa petition in a deportation proceeding. Both the IJ and the BIA had concluded that the IJ lacked such jurisdiction and the alien petitioner appealed to the Fourth Circuit Court

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Accordingly, in each case the appellate court ruled that the petitioner was required to exhaust administrative remedies. Here, the IJ and BIA have no authority to reverse the District Director's unlawful and non-discretionary denial of Plaintiff's I-130 Petitions so there are no administrative remedies available to Plaintiff to exhaust.

of Appeals. The Fourth Circuit ruled that the IJ has jurisdiction to make determinations regarding the continuing validity of the visa petition. Neither visa petitions nor the IJ's jurisdiction is at issue here.

In Howell, the alien plaintiff entered the United States on August 8, 1992 on a passport other than her own. Following her arrival, Howell married a U.S. citizen who then filed a Form I-130 on her behalf seeking "immediate relative" classification. Howell filed an I-485 petition seeking adjustment of status and a Form I-601 seeking a waiver of excludability for her fraudulent entrance to the United States. The District Director granted Howell's I-130 petition, but denied the I-485 adjustment of status application based on Howell's failure to prove that she was in fact the person who presented the fraudulent passport and was inspected on August 8, 1992. While deportation proceedings were pending, Howell sought review of the District Director's denial of adjustment in federal district court in New York. The district court dismissed the complaint for lack of subject matter jurisdiction. On appeal, the Second Circuit ruled that the trial court did not have subject matter jurisdiction because Howell had failed to exhaust her administrative remedies. Significantly, in Howell, USCIS did not strip petitioner of her status as "immediate relative." As a result, she had a meaningful opportunity to seek relief from the denial of her application for adjustment of status in the deportation proceedings. The fact that the deportation proceedings provided Howell with an opportunity to apply and receive *de novo* review of her application for adjustment and that such review would not be futile were key factors in the court's ruling that Howell must exhaust her administrative remedies. Id. at 293. Unlike Howell, Petitioners in this case have been stripped of their status as "immediate relatives" and cannot obtain meaningful relief from an IJ or the BIA who lack jurisdiction over I-130 classifications.

B. Exhaustion Is Not Required

It is well settled that administrative exhaustion is not required where, as here, exhaustion would be futile. See, e.g., Bowen v. City of New York, 476 U.S. 467 (1986); McKart v. United States, 395 U.S. 185 (1969); Volvo GM Heavy Truck Corp. v. U.S. Dep't of Labor, 118 F.3d 205 (4th Cir. 1997). The Executive Office of Immigration Review (“EOIR”) has no jurisdiction over Form I-130 petitions and therefore cannot grant Plaintiff relief. See Matter of Sano, 19 I. & N. Dec. 299, 301 (BIA 1985); Lockhart v. Chertoff, 2008 U.S. Dist. LEXIS 889, at *16 *aff'd sub nom. Lockhart v. Napolitano*, 2009 WL 928504 (C.A. 6 (Ohio)); Taing, 526 F. Supp. 2d at 180-81. Furthermore, under 8 C.F.R. § 245.2(a)(5)(ii) (2008), Plaintiff cannot appeal the denial of her Form I-485 application for adjustment of status. Although the regulation provides that Plaintiff may renew her I-485 applications in removal proceedings, it would be a useless exercise. “Because [Plaintiffs’] Form I-485 applications [are] entirely dependent on an approved Form I-130 petitions, it would be futile for [them] to renew the application in . . . removal proceedings . . .” Lockhart, 2008 U.S. Dist LEXIS 889, at *15-16 (citing Taing, 526 F. Supp. 2d at 182-86). In short, Plaintiff has no administrative remedies available to her, and the denial of her I-130 petition is for all practical purposes a “final agency action.” See Pinho, 432 F.3d at 200-01. Plaintiff has functionally exhausted her remedies and any effort by Plaintiff to seek administrative relief would be an exercise in utter futility. This the law does not require.⁵

⁵ Under Defendants scheme, the Petitioners would have to remain in a untenable state of limbo - unable legally to work or even drive a car - as they go through the motions of the

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Moreover, pursuant to U.S. Supreme Court precedent, federal courts may not require a Petitioner to exhaust administrative remedies before seeking review under the APA unless exhaustion is expressly required by statute, or by an agency rule. Darby v. Cisneros, 509 U.S. 137, 143-44 (1993); see also Volvo GM Heavy Truck Corp., 118 F.3d at 209 (citing Darby). Here, no statute or rule mandates exhaustion. 8 C.F.R. § 103.3(a)(1)(ii) provides that “certain unfavorable decisions on applications, petitions, and other types of cases *may* be appealed.” 8 C.F.R. § 245.2(a)(5)(ii) does not expressly require that an alien renew a denied I-485 application in removal proceedings. Instead, 8 C.F.R. § 245.2(a)(5)(ii) states that an alien “may renew a denied application” in removal proceedings. This language is clearly permissive. Accordingly, Plaintiff is not required to await the inexorable outcome of the removal proceedings before seeking relief in a federal court.

C. The IIRIA and REAL ID Act’s Jurisdictional Stripping Provisions Are Not Applicable to Plaintiff’s Claim

Defendants also contend that 8 U.S.C. § 1252(a)(2) requires that this challenge be brought before the immigration courts in the first instance with appeal directly to a court of appeals. That statute, however, provides for limitations on judicial review of certain

deportation proceedings, notwithstanding the fact that neither the IJ nor the BIA have authority to provide Petitioners any relief from the unlawful denial of their I-130 petitions and therefore authority to afford Petitioners any relief at all.

proceedings in the immigration courts enumerated in the statute. None of the jurisdictional limitations apply to Plaintiff's claim.

Section 1252(a)(2)(B), which was enacted as part of IIRIRA, Pub. L. No. 104-208, strips the courts of jurisdiction as to decisions and actions by the Attorney General or Secretary of Homeland Security that are expressly enumerated in the statute or are assigned by statute to their discretion. *Id.*; Goumilevski v. Chertoff, Civ. Act. No. DKC 2006-3247, 2007 U.S. Dist. LEXIS 59858 (D. Md. July 27, 2007); Ogbolumani, 523 F. Supp. 2d at 873. That statute provides as follows:

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182 (h), 1182 (i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158 (a) of this title.

8 U.S.C. § 1252(a)(2)(B) (Supp. V 2005). Thus, by its express terms, “the jurisdiction-stripping provisions apply *only* to judgments by the Government specified under § 1252(a)(2)(B)(i) and other decisions or actions of the Government that are discretionary under § 1252(a)(2)(B)(ii).” Ogbolumani, 523 F. Supp. 2d at 873 (citing El-Khader v. Monica, 366 F.3d 562 (7th Cir. 2004))

and Holy Virgin Protection Cathedral of the Russian Orthodox Church Outside Russia v. Chertoff, 499 F.3d 658 (7th Cir. 2007)).

In 2005, Congress enacted the Real ID Act which merely confirmed the prevailing view in the circuits that, while the IIRIRA foreclosed judicial review of discretionary decisions themselves, it did not bar review of “constitutional questions or questions of law *arising from the agency’s decision to deny discretionary relief.*” Jean v. Gonzales, 435 F.3d 475, 480 (4th Cir. 2006) (emphasis added). The REAL ID Act provided direct appeal of such questions to the court of appeals. Neither the IIRIRA nor the REAL ID Act address judicial review of non-enumerated and non-discretionary decisions.

Several courts have held that § 1252 “only strips a district court of jurisdiction when the alien is challenging an order of removal.” Bin Lateef v. Jaromin, 2008 WL 3411783, at *3 (E.D. Mo. Aug. 8, 2008) (citing Nnadika v. Attorney Gen., 484 F.3d 626, 632 (3d Cir. 2007); Kellici v. Gonzales, 472 F.3d 416, 419-20 (6th Cir. 2006); Madu v. Attorney Gen., 470 F.3d 1362, 1365-67 (11th Cir. 2006); Nadarajah v. Gonzales, 443 F.3d 1069, 1075-76 (9th Cir. 2006); Gittens v. Menifee, 428 F.3d 382, 383 (2d Cir. 2005); Hernandez v. Gonzales, 424 F.3d 42, 43 (1st Cir. 2005)); but see Kim v. Gonzales, No. Civ. CCB-05-485, 2006 WL 581259, at *1 (D. Md. Mar. 7,

2006).⁶ Plaintiff does not challenge here an order of removal and, therefore, § 1252 is inapplicable.

According to the U.S. Supreme Court, “[j]urisdiction stripping provisions must be interpreted in light of ‘the strong presumption in favor of judicial review of administrative action.’” Khorrami v. Rolince, 493 F. Supp. 2d 1061, 1066 (N.D. Ill. 2007) (quoting INS v. St. Cyr, 533 U.S. 289, 298 (2001)); Obioha v. Gonzales, 431 F.3d 400, 405-06 (4th Cir. 2005). Accordingly, “a showing of clear and convincing evidence of a contrary legislative intent to restrict access to judicial review . . . of administrative action” is required. Obioha, 431 F.3d at 405 (quotations omitted and citations omitted). Applying these principles of statutory construction, the Fourth Circuit has interpreted the § 1252 jurisdictional stripping provisions narrowly. 431 F.3d at 405.

By its plain language, § 1252(a)(2)(B)’s jurisdiction stripping provisions do not apply to Plaintiff’s action. Section 1252(a)(2)(B)(i) bars judicial review of “any judgment regarding the granting of relief” under the specific enumerated statutory sections.⁷ Significantly, Congress omitted from this list § 1151, which defines “immediate relative,” and § 1154(a)(1)(A), which

⁶ While Kim construed § 1252(a)(2)(B) as applying to agency action outside removal proceedings, that construction is necessarily limited to actions enumerated in § 1252(a)(2)(B). As discussed below, Petitioners do not challenge an enumerated action.

⁷ Those enumerated sections are § 1182(h) and (i), providing authority to issue waivers for convictions for illegal drug possession and for fraud and misrepresentation; § 1229(b) providing authority to cancel removal proceedings for certain groups including battered spouses; § 1229(b) providing authority to allow voluntary departure in lieu of deportation; and § 1255 providing for adjustment of status to permanent residence.

authorizes the filing of a petition for “immediate relative” classification. Under the canon of statutory construction *expressio unis, exclusio alterius*, the statute’s jurisdictional bar does not apply to judicial review of Defendants’ unlawful interpretation of 8 U.S.C. § 1151. See Anderson v. XYZ Correctional Health Servs, Inc., 407 F.3d 674, 680 (4th Cir. 2005). Plaintiff’s challenge implicates neither a “judgment” nor the sections enumerated in § 1252(a)(2)(B)(i). Importantly, Defendants’ subsequent reliance on its unlawful denial of the I-130 petitions to deny the I-485 applications and to initiate removal proceedings does not bring Plaintiff’s challenge of that prior act within the ambit of § 1252. See Obioha, 431 F.3d at 406 (“[a] reviewing court, therefore, must examine the *basis for* the BIA’s decision rather than the *end result* of the BIA’s decision to determine whether the decision is ‘under’ a section . . . that precludes judicial review.”) (quoting Stewart v. INS, 181 F.3d 587, 595 (4th Cir. 1999)). Accordingly, § 1252(a)(2)(B)(i) is no bar to judicial review by this Court of Plaintiff’s claims.

Section 1252(a)(2)(B)(ii) bars judicial review only of discretionary decisions and, similarly, is no bar to this Court’s jurisdiction. Specifically, that section provides that the jurisdictional bar applies to any decision or act that is assigned under 8 U.S.C. §§ 1151-1378 (2000 & Supp. V 2005) to the discretion of the Attorney General or Secretary of Homeland Security, with one exception not relevant here.⁸ The canons of statutory construction referenced above, which require this Court to construe the IIRIRA’s jurisdiction stripping provisions narrowly and to exclude from coverage things not specifically mentioned, compel the conclusion

⁸ The exception is for discretionary decisions related to requests for asylum under § 1158(a).

that non-discretionary actions, such as the actions challenged here, are not subject to the jurisdictional stripping provision. See Obioha, 431 F.3d at 405-06; Wong v. INS, 373 F.3d 952, 963 (9th Cir. 2004) (jurisdictional stripping provision should not be “expanded beyond its precise language” and does not preclude district court jurisdiction over claims that raise constitutional or purely legal non-discretionary challenges); Burni v. Frazier, Civ. No. 06-5046 (RAM/JSM), 2008 U.S. Dist. LEXIS 91388 (D. Minn. Feb. 14, 2008) (§ 1252(a)(2)(B)(ii) did not strip district court of jurisdiction over complaint seeking to compel the Government to process and adjudicate application for adjustment of status since the Government’s duty to do so was non-discretionary; U.S. Magistrate decision adopted in 545 F. Supp. 2d 894 (D. Minn. 2008)); Ogbolumani, 523 F. Supp. 2d at 864 (§ 1252 does not strip district court of jurisdiction to consider petitioner’s challenge of the denial of his I-130 petition for classification as “immediate relative”).

Moreover, the fact that §§ 1151 and 1154 are encompassed in the § 1252(a)(2)(B)(ii) bar against judicial review of *discretionary* decisions, but are not listed in § 1252(a)(2)(B)(i) compels the conclusion that Congress did not intend to subject non-discretionary decisions on “immediate relative” classification to the jurisdictional limitations set forth in § 1252(a)(2)(B). See Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123, 2129-130 (2008) (“[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”) (internal quotation marks and citation omitted).

The Fourth Circuit's recent decision in Igwebuike is instructive. There, petitioner sought judicial review in this Court of the District Director's determination that he was not legally eligible for consideration for an adjustment of status. Igwebuike, 230 Fed. Appx. at 281. The Government argued that this Court lacked jurisdiction because the decision to adjust an alien's status is committed to the discretion of the Attorney General under § 1255 and the IIRIRA strips the courts of jurisdiction over discretionary decisions. 230 Fed. Appx. at 281. This Court dismissed for lack of subject matter jurisdiction and Igwebuike appealed. The Fourth Circuit reversed. The appellate court acknowledged that it lacked jurisdiction to review a denial of status of adjustment, but distinguished Igwebuike's challenge:

Igwebuike, however, does not challenge a discretionary decision by the Director. Indeed, the Director did not have the opportunity to exercise discretion because he determined that Igwebuike was an inadmissible alien under § 1182(a)(2)(C)(i) and therefore statutorily ineligible for discretionary relief. See § 1255 (permitting the Attorney General to adjust the status of aliens who are "admissible to the United States"). Igwebuike only seeks review of what he contends is legal error in the determination that rendered him ineligible for an adjustment of status.⁹

Id. at 282. The appellate court also ruled that since Igwebuike did not challenge the order of removal, the REAL ID Act did not apply. Id. at 281.

In this case, as in Igwebuike, Plaintiff challenges a non-discretionary action that rendered her ineligible for adjustment of status; namely, Defendants' action with respect to Plaintiff's

⁹ Although Igwebuike was decided under the IIRIRA transitional rules governing judicial review, which are not identical to the permanent rules, the reasoning continues to apply. See Obioha, 431 F.3d at 406.

“immediate relative” classification. Supra n.2. Accordingly, § 1252 (a)(2)(B)(ii) does not strip this Court of jurisdiction to consider Plaintiff’s challenge.

Although the Fourth Circuit has considered § 1252 jurisdictional issues in other cases, none of those cases have addressed jurisdiction of the district court. See, e.g., Jean, 435 F.3d 475 (considering whether circuit court had jurisdiction over USCIS decisions denying Plaintiff’s motions seeking relief from removal); Higuit v. Gonzales, 433 F.3d 417, 420 (4th Cir. 2006) (appellate court lacked jurisdiction to consider challenge to denial of adjustment of status since challenge raised no constitutional issues or legal questions), cert. denied, 548 U.S. 906 (2006); Obioha, 431 F.3d 400 (gatekeeper provisions are no bar to appellate court’s review of BIA’s denial of motion to remand to IJ in order to pursue cancellation of removal since decision was not on merits under a section enumerated in § 1252); Velasquez-Gabriel v. Crocetti, 263 F.3d 102, 104 n.1 (4th Cir. 2001) (holding that appellate court lacked jurisdiction to review order denying status adjustment). Further Higuit, Velasquez-Gabriel and Jean each involved a challenge to a denial of status of adjustment and therefore are not applicable here.

While Jean does not address district court jurisdiction specifically, the court outlined the scope of the jurisdictional stripping provisions. The appellate court observed that § 1252(a)(2)(B) “appears, by its terms, to create an unqualified bar to judicial review of decisions involving the specified types of discretionary relief . . .” 435 F.3d at 480. The court also observed that the REAL ID Act confirmed that direct review by appellate courts was available for constitutional questions or questions of law arising from the agency’s decision to deny discretionary relief.” Id. Both of these observations support the conclusion that § 1252 does not

strip *any* court of jurisdiction with respect to *non-discretionary* acts under sections not expressly enumerated in § 1252(a)(2)(B).

Recently, this Court addressed its jurisdiction under § 1252 in five unreported decisions.¹⁰ Lee v. USCIS, No. Civ. A. CCB-07-141, 2008 WL 1805749 (D. Md. April 8, 2008); Goumilevski v. Chertoff, Civ. Act. No. DKC 2006-3247, 2007 U.S. Dist. LEXIS 59858 (D. Md. July 27, 2007); Patel v. Chertoff, No. Civ. A. PJM-05-1304, 2006 WL 5908351 (D. Md. Aug. 31, 2006); Kim v. Gonzales, Civ. No. CCB-05-485, 2006 WL 1892426 (D. Md. June 19, 2006) (adopting provisional conclusions on jurisdiction set forth in 2006 WL 581259 (March 7, 2006); Igwebuike v. Caterisano, No. Civ. A. DKC-04-1586, 2005 WL 745577 (D. Md. Mar. 18, 2005), rev'd, 230 Fed. Appx. 278 (4th Cir. 2007). Each of these cases is readily distinguishable from the case at bar and none addressed the precise issue presented here, a challenge to the widow penalty.

Lee and Patel each involved claims that a USCIS regulation violated the language and intent of 8 U.S.C. § 1255. See Lee v. USCIS, at *3 n.1. Since § 1255 is an enumerated provision under § 1252(a)(B)(2)(i), the court held that the plaintiff's claims were subject to the IIRIRA and the REAL ID Act's jurisdictional scheme which required that plaintiff first challenge the USCIS interpretation in removal proceedings and then appeal directly to the Court

¹⁰ As Judge Blake recently recognized, “unpublished opinions are neither precedential nor otherwise binding.” Lee v. USCIS, 2008 WL 1805749, at *3 n. 1.

of Appeals. Here, Plaintiff challenges the widow penalty on the grounds that it violates § 1151, which is not an enumerated provision in the IIRIRA and, therefore, is not subject thereto.

Similarly, Kim involved a challenge to denial of an application for adjustment of status. This Court concluded that the Kims were seeking *de novo* review of an agency decision on the merits of its application for adjustment of status under § 1255. Kim, 2006 WL 581259, at *4. Since § 1255 is an enumerated provision in § 1252(a)(2)(B)(i), the Court concluded that it lacked subject matter jurisdiction. Kim, 2006 WL 1892426, at *1. Significantly, the Court distinguished the Fourth Circuit's decision in Obioha on the grounds that, in Obioha, "the agency decision under review was not a decision on the merits under a section enumerated by the gatekeeper provision." Kim, 2006 WL 581259, at *3. As in Obioha, Plaintiff here does not challenge a decision on the merits of their applications for adjustment of status. Rather, Plaintiff challenges a non-discretionary action by the USCIS prior to and independent of any action by the agency on Plaintiff's I-485 petitions.

In Goumilevski, the petitioner sought an order to compel USCIS to process his I-485 application for adjustment of status under § 1255. This Court held that the pace at which USCIS processed I-485 applications was discretionary. The court, relying on § 1252(a)(B)(2)(ii), which strips the courts of jurisdiction over discretionary decisions with respect to § 1255, ruled that Goumilevski's claim was not subject to judicial review. Unlike in Goumilevski, here, Plaintiff challenges a non-discretionary determination – the unlawful denial of Plaintiff's I-130 petitions for classification as "immediate relatives." Accordingly, jurisdiction in this Court is proper.

D. The Exercise of Jurisdiction is Consistent with Congressional Intent

Defendants also contend that the exercise of jurisdiction by this Court would frustrate Congressional intent. MTD at 11. Specifically, Defendants contend that Congress intended to allow the immigration bodies with expertise to have the opportunity to decide controlling questions of immigration in the first instance and to give the courts of appeals direct jurisdiction from the BIA's decision. There are several flaws in Defendants' argument.

As discussed above, the immigration bodies with expertise, i.e., the IJ and the BIA have no jurisdiction to decide whether the widow penalty is lawful. Further, since the IJ and BIA have no jurisdiction, they cannot create the record for appellate review; it is up to this Court to fill that role. Thus, no conflict exists between the exercise of jurisdiction by this Court and Congressional intent.

At this time it is USCIS official policy to treat similarly situated immigrant widows differently depending on the forum in which they live. In a November 8, 2007 memorandum from Mike Aytes, USCIS Associate Director of Domestic Operations, USCIS revised the Adjudicator's Field Manual in light of the Ninth Circuit's rejection of the widow penalty in Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006) to read as follows:

(4) Effect of the petitioner's death before approval. (A)(1) Except as provided in paragraph (a)(4)(B) of this chapter for cases governed by the precedent decisions of the Ninth Circuit, a Form I-130 must be denied if the visa petitioner dies after the visa petitioner filed the Form I-130 and before USCIS has adjudicated the Form I-130. *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985) and *Matter of Varela*, 13 I&N Dec. 453 (BIA 1970). A USCIS adjudicator will actually deny a Form I-130 in this situation, and not just "terminate action" on it. The denial will give as reasons

for the denial the reasoning stated in paragraph (a)(4)(A)(2) of this chapter.

(A)(2) Effect of *Freeman v. Gonzales* outside the Ninth Circuit. USCIS adjudicators shall not follow the decision in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) in any case arising outside the Ninth Circuit. The USCIS position is that *Freeman* was wrongly decided, for the reasons set forth in this chapter 21.2(a)(4)(A)(2). USCIS adjudicators, moreover, are legally obligated to follow *Sano* and *Varela*, since the Board designated them as precedents. 8 C.F.R. § 1003.1(g).

Memorandum from Mike Aytes, at 3 (Nov. 8, 2007). Thus, widows residing within the Ninth Circuit are not subject to the widow penalty. Widows residing outside the Ninth Circuit, including Plaintiff, are subject to the widow penalty. Presumably, Defendants intend to apply a similar policy in each jurisdiction in which the widow penalty has been or will be ruled unlawful.¹¹ It is thus left to this Court to hear this case and protect the rights of a resident of Maryland.

E. This Court Has Jurisdiction under The Mandamus Act

Regardless of whether the IIRIRA and the REAL ID Act of 2005 applies to Plaintiff's claim - they do not - this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1361 (2000), the Mandamus Act. That statute grants district courts "original jurisdiction in any action in the nature of mandamus to compel an officer or employee of the United States or any agency

¹¹ USCIS has yet to advise how they will handle widows cases in the 6th Circuit, but it is expected that the agency will apply the decision in *Lockhart* where that court has also concluded "that a 'surviving alien-spouse' is a spouse with the meaning of the 'immediate relative' provision of the INA." *Lockhart v. Napolitano*, 2009 WL 928504 (C.A. 6 (Ohio)) at pp 2-3.

thereof to perform a duty owed to the plaintiff.” Id. “The extraordinary remedy of mandamus under 28 U.S.C. § 1361 will issue only to compel the performance of a clear nondiscretionary duty.” Goumilevski, 2007 U.S. Dist. LEXIS 59858, at *11 (quoting Pittston Coal Group v. Sebben, 488 U.S. 105, 121 (1988)). In order to obtain relief under the Mandamus Act, the Plaintiff must show (1) that they have the clear legal right to the relief sought, (2) that the defendants have a clear legal duty to do the particular act requested, and (3) that no other adequate remedy is available. Id. (citing Asare v. Ferro, 999 F. Supp. 657, 659 (D. Md. 1998)). Plaintiff satisfies each of the three criteria.

As discussed in section II, Plaintiff has a clear legal right to the relief sought. Conversely, Defendants have a clear legal duty under the statute to classify Plaintiff as an “immediate relative.”

No adequate alternative remedy is available. Since neither the IJ nor the BIA have jurisdiction over Form I-130 classifications, Plaintiff is foreclosed from pursuing an administrative challenge. Since § 1252 might be construed as granting a right of direct review only of a “final order of removal,” unless and until the Government issues such an order, Plaintiff lacks any avenue of relief other than this Court. Indeed, since the BIA lacks jurisdiction over the “immediate relative” classification, it is unclear that Plaintiff would have a basis to seek relief in the circuit court of appeals in the context of an appeal from a final order of removal. In any event, and in the meantime, Plaintiff is suffering significant and irreparable harm. They exist in an untenable legal limbo, unable to participate legally in society. Denied the ability to work lawfully in this country or even drive a car, their lives are day-to-day struggles. Social

Security Survivor benefits and estate benefits are in imminent jeopardy due to the lack of legal status. Plaintiff is being forced to face difficult decisions when mourning the death of a spouse, including deciding whether to leave behind family she has come to love, and possibly never visiting her spouse's grave again.

II. THE STATUTE IS CLEAR AND UNAMBIGUOUS IN THAT PLAINTIFF REMAINS A SPOUSE FOR PURPOSES OF IMMEDIATE RELATIVE CLASSIFICATION AND ADJUSTMENT OF STATUS

A. Statutory Scheme, Definitions of “Immediate Relative” and “Spouse”

Family relationships form an integral part of our nation's immigration laws; Congress has given immediate relatives a special place in the statutes. Recognizing that the family unit is the bedrock of our national community Congress has granted U.S. citizens the right to have their immediate family present in the United States without delay. Immediate relatives are exempt from numerical limitations imposed on other relatives so that immigrant visas are immediately available. Immediate relatives also receive protections not granted to other categories of immigrants. 8 U.S.C. § 1151(b)(2) (2000); see also 8 U.S.C. § 1251(c) (exempting “immediate relative(s)” applying for adjustment of status to lawful permanent resident from numerous bars to eligibility).

Under 8 U.S.C. §§ 1151(b)(2)(A)(i) and 1154(a)(1)(A)(i) (2000) a U.S. citizen may petition to have the status of an alien who is an “immediate relative” adjusted to lawful

permanent resident. The first sentence of § 1151(b)(2)(A)(i) defines who qualifies as an “immediate relative.”

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

Id. Most significantly, the first sentence of 8 U.S.C. § 1151(b)(2)(A)(i), includes “children, spouses, and parents” of U.S. citizens. Id. Within this group, only alien parents are subjected to any limitation, “with the grant of immediate relative status being restricted to those whose citizen child is at least 21 years of age.” Freeman, 444 F.3d at 1039; see also, Lockhart v. Napolitano, 2009 WL928504 at 5. The statute places no comparable limitations on a ‘spouse’, such as a requirement that the marriage must have existed for at least two years.” Id.

“Spouse,” in turn, is defined at § 1101 as follows:

The term “spouse,” “wife,” or “husband” do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.

8 U.S.C. § 1101(a)(35) (2000). Notably, this definition has not changed since its original enactment in 1952 and is a negative definition which does not preclude the common understanding of the term.

In order to sponsor immediate relatives for lawful permanent resident status, the United States citizen files a Form I-130, Immigrant Petition, with USCIS. The statute provides,

[A]ny citizen of the United States claiming that an alien is entitled to classification by reason of a relationship described in paragraph

(1), (3), or (4) of section 203(a) [preference immigrants subject to quotas] or to an immediate relative status under section 201(b)(2)(A)(i) may file a petition with the Attorney General for such classification.

8 U.S.C. § 1154(a)(1)(A)(i) (2000); See also 8 C.F.R. §§ 204.1(a)(1), 204.2(a) (2008). Thus, for a *first sentence* spouse, the *first clause* of § 1154(a)(1)(A) applies.

The *second sentence* of § 1151(b)(2)(A)(i) defines a second class of “immediate relatives”: an alien who was the spouse of a citizen for two years at the time of the citizen spouse’s death and each child of the alien.

In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen’s death . . . the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen’s death but only if the spouse files a petition under section 1154(a)(1)(A)(ii) of this title within 2 years after such date and only until the date the spouse remarries.

8 U.S.C. § 1151(b)(2)(A)(i). In the event a United States citizen spouse dies *without filing* an I-130 petition, the *second sentence* of the statute provides a *separate right* for alien spouses to *self-petition* for immediate relative classification under the *second clause* of § 1154(a)(1)(A):

An alien spouse described in the second sentence of section 1151(b)(2)(A)(i) *also may file* a petition with the Attorney General under this subparagraph for classification of the alien (and the alien’s children) under such section.

8 U.S.C. § 1154(a)(1)(A)(ii) (emphasis added); see also 8 U.S.C. § 1151(b)(2)(A)(i). This right to self-petition is qualified. The statute allows self-petition by alien spouses whose citizen spouse failed to file a petition on their behalf only if (1) the alien was a spouse for a period of

two years at the time of the citizen spouse's death and (2) the alien spouse self-petitions for immediate relative classification within two years of citizen spouse's death. 8 U.S.C. § 1151(b)(2)(A)(i).

Alien spouses seeking to qualify under the second sentence of § 1151(b)(2)(A)(i) must self-petition by filing Form I-360 (citizen spouses are required to file Form I-130). See 8 C.F.R. §§ 204.1(a)(1), 204.2(b) (2008) (self petition I-360 process); cf. 8 C.F.R. §§ 204.1(a)(1), 204.2(a) (2008) (citizen spouse/I-130 process). Congress intentionally created "two different processes, such that one or the other applies - either the citizen spouse petitions or, if he dies without doing so, the alien widow may do so" under the conditions set forth in the statute. Freeman, 444 F.3d at 1042. As explained by the Sixth Circuit in Lockhart, the second class of immediate relatives does not modify the first class of immediate relatives:

We agree with the *Freeman* court that "the two-year durational language in the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i) grants a separate right to an alien widow to self-petition, within two years of the citizen spouse's death, by filing a [F]orm I-360 where the citizen spouse had not filed an immediate relative petition prior to his death."

Lockhart v. Napolitano, 2009 WL 928504 (C.A. 6 (Ohio)) at p. 5 (citing Freeman, 444 F.3d at 1039).

Nevertheless, Defendants contend that the second sentence of § 1151(b)(2)(A)(i) modifies the first. According to Defendants, the alien and citizen spouse must have been married for at least two years in order for the spouse to be considered an "immediate relative" if the citizen spouse dies. Several courts have rejecting this reasoning. Freeman, 444 F.3d 1031;

Lockhart v. Napolitano, 2009 WL 928504 (C.A. 6 (Ohio)); Taing v. Chertoff, 526 F. Supp. 2d 177 (D. Mass. 2007), appeal docketed, No. 08-1179 (1st Cir. Feb. 11, 2008); but see Robinson v. Napolitano, 554 F.3d 358 (3d. Cir. 2009); Burger v. McElroy, No. 97 Civ. 8775 (RPP), 1999 U.S. Dist. LEXIS 4854 (S.D.N.Y. Apr. 12, 1999).¹²

Petitioner falls within the definition of “immediate relative” provided by the first sentence of § 1151(b)(2)(A)(i) because her citizen-spouse filed an I-130 petition to classify his wife as an “immediate relative” under the statute. In light of the fact that Plaintiff’s citizen spouse filed an I-130 petition, the death of her citizen spouse does not automatically terminate Plaintiff’s classification status. Nothing in the statute authorizes the automatic stripping of her eligibility for “immediate relative” classification due to her husband’s death during bureaucratic processing. 8 U.S.C. § 1154(a)(1)(A)(i).

Defendants argue that because § 1154(b) is worded in the present tense, the facts attested to in the citizen’s petition must be true at the time of the adjudication of the petition and that the alien must be an immediate relative at the time of that determination. MTD at 28. Defendants point to the usage of the phrases “are true” and “is an immediate relative”, as supporting its view that it is no longer true that a surviving spouse remains a spouse for immediate relative purposes.

The Court in Lockhart addressed the argument this way:

¹² Although Defendants claim that their construction “has been endorsed by at least two decisions from federal district courts considering this precise issue,” Defendants cite to the two decisions which are clearly in the minority, and one of them, Turek v. Dep’t of Homeland Sec., 450 F. Supp. 2d 736 (E.D. Mich. 2006), has now been *overruled* by the Sixth Circuit in Lockhart.

“The Secretary also argues that the present-tense language used in sections 204(b), 204(e) and 205 suggests that the citizen spouse must be alive at the time the Secretary adjudicates the citizen-spouse’s petition for adjustment of status...[w]e must assume that when drafting the INA, Congress did not intend an absurd or manifestly unjust result. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509-10 (1989). The Secretary’s ‘interpretation creates an arbitrary, irrational and inequitable outcome in which approvable petitions will be treated differently depending solely upon when the government grants the approval.’ *Robinson*, 554 F.3d at 371 (Nygaard, J., dissenting).”

Lockhart, *id.*, at p. 7. Defendants’ position yields absurd results unintended by Congress.

B. The Ordinary Meaning of the Term “Spouse” Includes a Surviving Spouse

Defendants argue, however, that Plaintiff is no longer the “spouse” of a citizen because, as a matter of law, her marriage to her citizen spouse ended when her husband died. MTD at 21. Significantly, Congress did not use the term “marriage” in the first sentence of 8 U.S.C. § 1151(b)(2)(A)(i). Instead, Congress used the term “spouse”, a term that plainly encompasses within its definition a surviving spouse.

Over the past 50 years the term “spouse” has been used in the law and in ordinary usage to include a surviving spouse. “Spouse” is a common term, which encompasses *surviving* spouse, and has been defined by the Eighth Edition of Black’s Law Dictionary, published in 2004, as follows:

Spouse. One’s husband or wife by lawful marriage; a married person. . .
Surviving spouse. A spouse who outlives the other spouse.

Black’s Law Dictionary 1438, 1439 (8th ed. 2004) (emphasis added). Thus, the definition of spouse includes a surviving spouse, who is a “spouse” who has outlived the other spouse. The Sixth Edition of Black’s Law Dictionary was published in 1990 and available when the

Immigration and Nationality Act (“INA”) was amended that year to include the second sentence of § 1151(b)(2)(A)(i). The Sixth Edition defines “[s]pouse” as “[o]ne’s husband or wife, and ‘surviving spouse’ is one of a married pair who outlives the other.” Black’s Law Dictionary 1402 (6th ed. 1990). This definition of spouse not only expressly includes “surviving spouse” but it also implies that the status as spouse persists despite the death of one member; a surviving spouse “*is one of a married pair.*” Id. (emphasis added).

The current definition of “*immediate relative*” as provided in the INA, has not changed since it was originally included in the Act in 1952. When the 1952 Act was drafted, its authors would have consulted the Fourth Edition of Black’s Law Dictionary, which was published in 1951. The Fourth Edition of Black’s Law Dictionary defined spouse broadly as “[o]ne’s husband or wife,” a phrase it specifically derived from Rosell v. State Industrial Accident Commission, 95 P.2d 726, 729 (Or. 1939). Black’s Law Dictionary (4th ed. 1951). Rosell defines spouse as “one’s wife or husband” and it defines surviving spouse as “the one, of a married pair, who outlives the other.” Rosell, 95 P.2d at 729.

The Massachusetts District Court recently ruled that “spouse” includes “surviving spouse”:

[T]he term “spouse” as defined in the eighth edition of Black’s Law Dictionary is, as the government has stated, “one’s husband or wife.” The government, however, omits the last part of the definition, which states that a “surviving spouse is a spouse who outlives the other.” . . . Therefore, a surviving spouse still remains a spouse and Mrs. Taing’s status as a “spouse” is not obliterated by her husband’s death.

Taing, 526 F. Supp. 2d at 184. Accordingly, whether one turns to the most recent 2004 Edition of Black's Law Dictionary, the 1990 Edition available at the time of the 1990 amendments, or the 1951 Edition that was current when Congress drafted the INA in 1952, "surviving spouse" has been used to define "spouse." Plaintiff's status as spouse is not "obliterated" by her husbands' death. She has outlived her spouse, but a spouse she remains.

Other federal statutes recognize instances where death does not strip the survivor of her status as a spouse. For example, under the Internal Revenue Code, upon the death of a spouse, the surviving spouse may file the couple's joint tax return. I.R.C. § 6013(a)(3). Under this provision the living spouse continues to act on behalf of the decedent and the marital unit. Notably, too, the Code makes no provisions for "widows" and, where the term "widow" has been used in the past, e.g., I.R.C. § 7448, Congress has amended the law to replace the word "widow" with "surviving spouse."

According to Defendants, Maryland law recognizes a distinction between "spouse" and "surviving spouse" such that the latter is separate and apart from the former. Defendants cite § 2-201 of the Maryland family code as evidence both persons must be living. However, that section merely defines what constitutes a valid marriage within the state, providing only that marriage between a man and a woman is valid. Md. Code Fam. Law Ann., § 2-201. It makes no reference whatsoever to whether the man and/or woman are living, despite Defendants intimations to the contrary. MTD at 22 n. 12. Notably, the State of Maryland also grants benefits to men and women as "spouses", not as "surviving spouses", where the decedent was a veteran. Under Executive Order 01.01.2004.61, a qualifying spouse is defined as "[t]he spouse

of a deceased veteran who would otherwise be eligible for admission to Charlotte Hall Veterans Home. Non-Veteran Spousal Admission to Charlotte Hall Veteran's Home, Executive Order 01.01.2004.61(A)(2) (eff. Nov. 11, 2004). Maryland code also defines "legally responsible individual" as "a person who, at the time of the deceased's death, was legally responsible for providing support to the deceased," including "[s]pouse of the deceased." Md. Code Ann., Human Res. § 20-01(B)(3)(a). Compare these provisions with, for example, Md. Code Ann., Indep. Agencies § 09-07(B)(1)(b) which defines a "claimant" to include "a surviving spouse of a deceased employee." Try though as Defendants may, it is difficult to see any recognizable distinction between the usage of the terms "spouse" and "surviving spouse" under Maryland law. Additionally, as stated in Lockhart,

Although federal courts may look to state law for guidance in defining terms, formulating concepts, or delineating policies, courts need not incorporate state-law definitions where to do so would frustrate a federal statute's purposes. See *Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 617 (6th Cir. 1998) (citing *De Sylva v. Ballentine*, 351 U.S. 570 (1956) (noting courts may look to state-law definitions of terms in defining such terms in a federal statute but need not where doing so would frustrate the purpose of the federal statute). Moreover, the Secretary does not explain why we should elevate Ohio's definition of spouse or marriage above the intent of Congress. Nor does the Secretary argue that Congress considered Ohio law or any other state law when drafting the 'immediate relative' provision or during the amendment of that statute."

Lockhart, *id.* at p. 7. Defendants' recourse to state law frustrates the purpose of the statute, which is designed to provide for a citizen to file a petition on behalf of his or her spouse, and for the spouse to be classified as an "immediate relative".

Defendants read too much into the second sentence of § 1151(b)(2)(A)(i). The second sentence of § 1151(b)(2)(A)(i) allows a self-petition under the second clause of § 1154(a)(1)(A) in the case of an alien spouse “who was the spouse of a citizen of the United States for at least two years at the time of the citizen’s death” 8 U.S.C. § 1151(b)(2)(A)(i). This provision simply provides relief to a widow whose citizen-spouse failed to file a Form I-130 petition on his/her behalf prior to death by allowing the widow to self-petition provided that the marriage lasted at least two years. No more, no less.

According to Defendants, however, the phrase “was a spouse” ” establishes the distinction between a “spouse” and a “surviving spouse” for purposes of the first sentence of § 1151(b)(2)(A)(i). MTD at 28. This conclusion requires that the phrase be read in isolation in contravention of well settled canons of statutory interpretation. See, e.g., TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001) (“It is a ‘cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant’.”); see also William v. Gonzales, 499 F.3d 329, 333 (4th Cir. 2007) (citing TRW). Specifically, Defendants omit the rest of the phrase that includes the relevant temporal limitation. When read in context, it is clear that the phrase “was the spouse” is merely a reference to the length of the marriage prior to the citizen’s death. In providing the affirmative right to an “alien spouse”¹³ to self-petition where the alien spouse “was

¹³ The provisions of § 1154(a)(1)(A)(ii) providing for self-petitioning ability for surviving spouses whose citizen spouses died, clearly refer to the surviving spouse petitioner as an “alien spouse.”

the spouse of a citizen of the United States for at least two years,” the statute does not also destroy the right of a widow whose spouse properly filed an I-130 petitioned before death. The section merely notes that, in order to self-petition on one’s own (and on behalf of one’s children), the alien must have been a spouse for two years. Thus, the statute sets up a temporal limitation on the right to self-petition – the alien spouse must have been a spouse *for two years* at the time of the death – which does not lead to the conclusion, suggested by Defendants, that the alien spouse is no longer a spouse. By analogy, a statutory provision that, for example, allows certain benefits for a person who was a resident of the State for at least two years at the time of the passage of a law would apply to those who were residents for two years, without the incorrect inference that they are no longer residents now. As stated by the Court in Lockhart, “[t]he more natural reading of the second sentence indicates that the word ‘was’ does not merely modify the term ‘spouse’ but modifies the entire phrase in order to establish a marriage-duration requirement for self-petitions, i.e., the alien-spouse ‘was a spouse...*for at least two years.*’” Lockhart, *supra*, at p. 6 (emphasis in original).

C. Subsequent Legislation Is Not Dispositive

Defendants cite subsequent proposed legislation as evidence USCIS is currently interpreting 8 U.S.C. § 1151(b)(2)(A)(ii) correctly. Those bills, H.R. 6034 and S. 3369, H.R. 6938 and S. 3514, introduced during the 110th and H.R. 1870 and S. 815, introduced during the 111th Congress, have not been voted on by the Congress nor sent to the President for signature. Indeed, no bill other than H.R. 6034 ever made it out of committee. The Supreme Court has admonished that “[f]ailed legislative proposals are a particularly dangerous ground on which to

rest a prior interpretation of a prior statute.” Solid Waste Mgmt. Agency of N. Cook County v. United States Army Corps of Eng’rs, 531 U.S. 159, 169-170 (2001). Reliance on any part of that draft legislation, including the committee report, would be improper. Cf. e.g., In re Atamian, 247 Fed. Appx. 373 (3d Cir. 2007) (misplaced reliance on proposed legislation); Mobile Commc’ns Corp. v. FCC, 77 F.3d 1399, 1413 (D.C. Cir. 1996) (agency could not rely on “proposed but unenacted legislation as authority”); In re Garfinkels, Inc., 203 B.R. 814, 820 (Bankr. D.D.C. 1996) (court concerned about “dubious nature of relying on unenacted proposed legislation”).

Furthermore, recent legislation ameliorating the effects of the death of a family member for 9/11 victims and military members do not support Defendants’ claims that Congress intended to strip “immediate relative” status from an applicant who has complied with all the statutory prerequisites for lawful permanent residence. Defendants cite to the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 356 §§ 421(a), (b)(1)(B)(i) (2001) and the National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, 117 Stat. 1693, § 1703(a) – (e) (2003) to evidence Congress’ intent. MTD at page 27. Neither Act amends the INA. Moreover, each Act merely created a separate right for immediate relatives to self-petition under the second sentence of the “immediate relative” definition. Neither Act references in any way the first sentence of the immediate relative definition, nor the effect of a properly filed immediate relative petition.

Specifically, “immediate relatives” under the 9/11 legislation were dealt with in Section 423 of the USA Patriot Act, Pub. L. No. 107-56:

Treatment as Immediate Relatives. – (1) Spouses. – Notwithstanding the second sentence of section 201(b)(2)(A)(i) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(2)(A)(i)), in the case of an alien who was the spouse of a citizen of the United States at the time of the citizen’s death and was not legally separated from the citizen at the time of the citizen’s death, if the citizen died as a direct result of a specified terrorist activity, the alien (and each child of the alien) shall be considered, for purposes of section 201(b) of such Act, to remain an immediate relative after the date of the citizen’s death, but only if the alien files a petition under section 204(a)(1)(A)(ii) of such Act within 2 years after such date and only until the date the alien remarries. For purposes of such section 204(a)(1)(A)(ii), an alien granted relief under the preceding sentence shall be considered an alien spouse described in the second sentence of section 201(b)(2)(A)(i) of such Act.

Pub. L. No. 107-56, § 423(a)(1), 115 Stat. 360-61. Thus, the 9/11 legislation provided surviving spouses of citizens the separate right to self-petition for “immediate relative” classification regardless of the length of the marriage, provided that the spouse self-petitions within two years of the death. This legislation has everything to do with the second sentence of the immediate relative definition, and not the first.

The language governing “immediate relatives” found in the National Defense Authorization Act is identical to that of the 9/11 legislation. See Pub. L. No. 108-136, § 1703(a), 117 Stat 1693 (2003). Because both the USA Patriot Act and the National Defense Authorization Act provided special language allowing aliens, other than immediate relatives, with the ability to have adjustment of status applications “adjudicated as if such death had not occurred”, but chose to provide immediate relatives with the distinct right to self-petition under the second sentence of the immediate relative definition, and under the second clause of 8 U.S.C. § 1154(a)(1)(A), the conclusion that Defendants seek to draw cannot be made. Specifically,

neither Act speaks to the case in which an immediate relative is the beneficiary of an immigrant petition filed by his or her relative in the first place (first sentence spouse, first clause petition). See Lockhart, supra, at 7. Whether or not one can gain any insight into the intent of Congress from two Acts passed outside of the INA, the wording of those Acts lends no support to Defendants' erroneous arguments that Congress intended that "immediate relatives" be automatically stripped of the status upon the death of the petitioning relative. Moreover, these Acts simply do not address the issue before the court.

Regardless of these other Acts, however, recourse to legislative history to determine the intent of Congress is unnecessary as the language of the statute is clear. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004); United States v. Oregon, 366 U.S. 643 (1961); United States v. Fraley, 538 F.2d 626 (4th Cir. 1976) (citing United States v. Oregon). Plaintiff is entitled to classification as "immediate relative" under the first sentence of the "immediate relative" definition, because her U.S. citizen husband properly filed an immediate relative petition under the first clause of the statute providing for petitions for "immediate relative" classification.

D. Chevron Deference Is Not Appropriate When The Statute Is Unambiguous Or When An Agency's Interpretation Is Impermissible Because It Is Based On A Discredited Agency Opinion

Where an agency's construction of a statute it administers is at issue, the courts are:

[C]onfronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give full effect to the unambiguously expressed intent of Congress . . . [I]f the statute is silent or ambiguous with respect to the

specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron USA Inc. v. Nat'l Resources Def. Council, 467 U.S. 837, 842-43 (1984); see also Saintha v. Mukasey, 516 F.3d 243, 251 (4th Cir.) cert. denied, 129 S. Ct. 595 (2008). Courts "should not defer to an agency's interpretation of a statute if Congress' intent can be clearly ascertained through analysis of the language, purpose and structure of the statute." Freeman, 444 F.3d at 1038 (citation omitted). Congressional intent is clear with regard to 8 U.S.C. § 1151(b)(2)(A)(i). 444 F.3d at 1038, Lockhart v. Napolitano, 2009 WL 928504 (C.A. 6 (Ohio)) at p. 9.

Plaintiff urges this Court to adopt the reasoned, logical and cogent analysis of 8 U.S.C. § 1151(b)(2)(A)(i) as forth by the U.S. Court of Appeals for the Ninth Circuit in Freeman and the U.S. Court of Appeals for the Sixth Circuit in Lockhart. See 444 F.3d at 1039-43 and 2009 WL 928504 at 4-5, respectively. The Freeman court determined that: [t]he language of the first sentence of §1151(b)(2)(A)(i), which sets out the general definition of "immediate relative," is straightforward and succinct, and expressly includes "spouses." Only alien "parents" are subject to any limitation, with the grant of "immediate relative" status being restricted to those whose citizen child is a least 21 years of age. There is no comparable qualifier to be a "spouse" - that is, there is no requirement that the marriage must have existed for at least two years.

This fact only underscores our duty to refrain from reading a phrase into a statute when Congress has left it out. Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. . . . Under the express terms of the statute, [Plaintiff] qualified as the spouse of a U.S. citizen when [Plaintiff and her] husband petitioned for [an immigrant visa and]

adjustment of status, and absent a clear statutory provision voiding her spousal status upon her husband's untimely death, she remains a surviving spouse. Neither the definition of immediate relative nor the text and structure of the adjustment of status regime provides support for the government's position [Plaintiff] should be stripped of [her] spousal status.

Id. at 1039-40 (citations and quotations omitted). The Freeman court recognized that the first sentence of 8 U.S.C. § 1151(b)(2)(A)(i) – under which the instant case falls – governs I-130 petition filed by citizen-spouses and that there is no language in the Act voiding such petitions in the event of death. Further, the Freeman court recognized that the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i) “grants a separate right to an alien widow to self-petition, within two years of the citizen-spouse's death, by filing a form I-360 where the citizen-spouse has not filed an immediate relative petition prior to his death.” Id. at 1040. The Lockhart court agreed with the Freeman Court and reached the same conclusion. 2009 WL 928504 (C.A. 6 (Ohio)) at pp 4-5.

Defendants' construction of the statute is based on Matter of Varela, 13 I. & N. Dec. 453 (BIA 1970), modified Matter of Sano, 19 I. & N. Dec. 299 (BIA 1985), an extra-jurisdictional and discredited agency opinion that purports to strip the status of “spouse” from Plaintiff upon the death of her husband. In Varela, a citizen of the Philippines married a U.S. citizen, who filed an immediate relative petition a few weeks later. The citizen spouse died before the agency could act on the petition. The District Director denied Mrs. Varela's visa petition and she appealed to the BIA, which upheld the denial in a brief opinion. The Board concluded that “[s]imply stated, at the time of his decision the beneficiary was not the spouse of a United States citizen. His death had stripped her of that status.” Id. at 454. Fifteen years later in Matter of Sano, 19 I. & N. Dec. 299 (BIA 1985), a similarly-situated alien spouse appealed her denial to

the BIA. After acknowledging that it had taken up this issue in Varela, the Board decided that it had lacked jurisdiction under the regulations. While the BIA could not overrule its previously issued extra-jurisdictional decision, it explicitly stated that its review in Varela was “inappropriate.” Id. at 300.

As a general matter, BIA decisions are entitled to Chevron deference only to the extent that they “give[] ambiguous statutory terms ‘concrete meaning through a process of case-by-case adjudication’.” INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (citation omitted). Non-precedential decisions of the BIA are likely not entitled to full Chevron deference. See, e.g., Rotimi v. Gonzales, 473 F.3d 55, 58 (2d Cir. 2007); Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1014 (9th Cir. 2006). Moreover, an informal agency interpretation of a statute is not entitled to deference, but instead deserves respect only to the extent that it has the power to persuade. Christenson v. Harris County, 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters-like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law - do not warrant Chevron-style deference.”); Martin v. OSHRC, 499 U.S. 144, 157 (1991) (informal interpretations entitled to some weight on judicial review); Rosenruist-Gestao E Servicos LDA v. Virgin Enters Ltd., 511 F.3d 437, 448 (4th Cir. 2007), cert. denied, 128 S. Ct. 2508 (2008). Even assuming, *arguendo*, that Varela is viable, deference is inappropriate because it fails to provide a “full-blown reasoned interpretation” of the statute. Singh v. Ashcroft, 383 F.3d 144, 152 (3d Cir. 2004). While an agency’s interpretation of a statute which it administers is ordinarily accorded deference, summary application of the statute without “a full-blown reasoned interpretation . . . is not

entitled to deference.” Id. The Ninth Circuit Court of Appeals correctly described the level of deference owed to Varela. The Court explained that Varela is an “extra-jurisdictional” decision, suffers from a “lack of statutory analysis” and does not offer “a permissible construction of the statute.” Freeman, 444 F.3d at 1038. The Sixth Circuit also concluded that “a non-precedential decision like Matter of Varela is not entitled to Chevron deference.” Lockhart v. Napolitano, 2009 WL 928504 (C.A. 6 (Ohio)) at p 9. Accordingly, this Court should reject the Defendants’ reliance on Varela for the proposition that Plaintiff’s citizen-spouse’s untimely death stripped Plaintiff of her spousal status.

Defendants also argue that its construction is entitled to Chevron deference because “it is based on administrative interpretations of long-standing duration.” MTD at 19. Longevity of the policy underlying the statutory interpretation is no cure to the defect in that interpretation. As the D.C. Circuit recently recognized, “such deference must still yield to the plain meaning of the statute.” Port Authority of New York and New Jersey v. Department of Transportation., 479 F.3d 21, 32 (D.C. Cir. 2008). Here, the plain meaning of the statute is clear and Petitioners are, as a matter of law, entitled to “immediate relative” classification under the statute.

Moreover, Defendants gloss over the fact that the policy to automatically revoke a visa petition upon the death of the petitioner has been rejected repeatedly by Circuit Court of Appeals in the context of the widow penalty. See e.g., Pierno v. INS, 397 F.2d 949 (2d Cir. 1968); Freeman, 444 F.3d 1031; Lockhart v. Napolitano, 2009 WL 928504 (C.A. 6 (Ohio)). Nearly two decades after the automatic revocation provisions were promulgated, the Second Circuit opined that it could “hardly imagine” that Congress intended 8 U.S.C. § 1155 to result in automatic

revocation of a visa petition upon the death of the citizen spouse. Pierno, 397 F.2d at 951. In Pierno the Court reviewed the automatic revocation of a petition approved prior to the death of the petitioner, but where the adjustment of status application had not been adjudicated at the time of the death. The appellate court explained the automatic revocation regulations thus,

[T]he Service contends that the automatic revocation of approval pursuant to Regulation 206.1(b)(2), when Mr. Pierno died, precludes the Service from granting Mrs. Pierno's application for an adjustment of status. We disagree.

Section 206, under which the automatic revocation regulations are promulgated, provides:

The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition [for nonquota status] approved by him. . .

The section is permissive; it grants the Attorney General discretion in determining what shall constitute good and sufficient cause and whether revocation of approval shall occur or be withheld in those cases where there is good and sufficient cause for revocation. It should not be interpreted to authorize the Attorney General's wooden application of rules for automatic revocation. In Stellas v. Esperdy, 388 U.S. 462, 87 S.Ct. 2121, 18 L.Ed. 2d 1322 (1967), reversing 366 F.2d 266 (2d Cir. 1966), the Supreme Court remanded the cause before it for further proceedings before the Service when the Service applied its rule that petition approval is automatically revoked when the petitioning citizen-spouse withdraws his petition. Regulation 206.1(b)(1). See also, United States ex rel. Stellas v. Esperdy, 366 F.2d at 272-274 (Moore, J., dissenting). *We can hardly imagine that Congress would have intended Mrs. Pierno to be deported as a result of her husband's death had he been, for instance, killed in action while the status adjustment proceedings were pending. Yet, such a result would follow from the Service's decision. The purpose of placing such discretion regarding immigration in the hands of the Attorney General, rather than having that field governed by a detailed statute, is to give some flexibility in treating a myriad of possible situations. Regulations issued by the Attorney General should not be so applied as to frustrate that Congressional intent.*

Id. at 950-51 (emphasis added) (alteration in original). The automatic revocation regulations continue to frustrate the intent of Congress, and are *ultra vires*. Consequently, the automatic revocation regulations do not constitute a “permissible construction of the statute” found at 8 U.S.C. § 1155, and are “arbitrary, capricious, or manifestly contrary to the statute.” Chevron, 467 U.S. at 843-44. Defendants’ interpretation of 8 U.S.C. § 1155 is directly contrary to 8 U.S.C. § 1154 and, therefore, is entitled to no deference. See, Lockhart v. Napolitano, 2009 WL 928504 (C.A. 6 (Ohio)).

Defendants rely again on *Varela*, when they argue that the final affidavit of support rule, 71 Fed. Reg. 35732 (June 21, 2006), supports Defendants’ position, by mentioning the holding in *Varela*. Defendants do not explain how this allows *Chevron* to operate. Further, as stated by the dissent in *Robinson*,

In *Chevron* the Court ruled that when Congress explicitly or implicitly delegates authority to an executive agency to develop regulations and practices to fill the interstices in the law, the courts must defer to them...In *Chevron* Congress had failed to define a term. The EPA promulgated detailed regulations and national standards defining the term at issue. The Court held that because the regulatory scheme was ‘technical and complex,’ the agency ‘considered the matter in a detailed and reasoned fashion, and the decision involve[d] reconciling conflicting policies,’ courts must defer to the technical expertise of the agency. *Chevron*, 467 U.S. at 865, 104 S.Ct. 2778. Here Congress provided us with a definition of ‘immediate relative’ and had no reason to delegate, explicitly or implicitly, any further authority to the executive department to further tweak the definition. The words and phrases at issue are not technical. The agency has no relevant expertise to more fully define them for us. There is no legislative history to suggest there existed any controversy which Congress referred to the agency to resolve.

Robinson, 554 F.3d at 368 (Nygaard, J., dissenting). There being no lack of a definition for the agency to fill with regulations, such regulations are of no effect on Congress’ choice of words.

III. CONCLUSION

For the reasons set forth above, Plaintiff respectfully request this Court find jurisdiction is proper, deny Defendant's Motion to Dismiss, and enter an order granting Plaintiff's Motion for Summary Judgment.

DATED this 15th day of April, 2009.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION**

)	
)	
FERNANDA VICTORIA MCKOY,)	
)	Civil Action No. DKC-08-3274
Plaintiff-petitioners,)	08-cv-3274
)	
vs.)	
)	PLAINTIFF’S CROSS MOTION FOR
JANET NAPOLITANO , Secretary, U.S.)	SUMMARY JUDGMENT
Department of Homeland Security, et al.,)	
)	
Defendants-respondents.)	
)	
)	

COME NOW Plaintiff Fernanda Victoria McKoy (“Plaintiff”), by and through her counsel, and pursuant to Fed. R. Civ. P. 12 and 56 hereby move for summary judgment.

In further support of their motion Plaintiff respectfully refer the Court to the attached Memorandum of Law, which is incorporated by reference.

WHEREFORE, Plaintiff respectfully request that this Court deny Defendants Motion to Dismiss and alternative Motion for Summary Judgment, and grant summary judgment in favor of Plaintiff.

DATED this 15th day of April, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th of April, 2009, I also submitted a paper copy of this filing to the Court and to Ariana Arnold at the addresses below.

I hereby certify that on the 15th day of April, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Ariana Wright Arnold
Email: Ariana.Arnold@usdoj.gov
Assistant United States Attorney
36 South Charles Street, Fourth Floor
Baltimore, Maryland 21201

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

/s/ Maria Pia Torretti Gekas

Maria Pia Torretti Gekas