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*UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY*

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OSSERRITTA ROBINSON,

*Petitioner,*

v.

MICHAEL CHERTOFF, Secretary,  
Department of Homeland Security;  
et al.,

*Respondents.*

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Hon. Stanley R. Chesler, U.S.D.J.

Civil Action No.: 06-5702 (SRC)

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**RESPONDENTS' BRIEF IN SUPPORT OF MOTION TO  
DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)**

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## **INTRODUCTION**

This motion to dismiss is brought on behalf of the respondents pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The facts of petitioner's case do not warrant the relief sought under the law; accordingly, this matter should be dismissed in its entirety.

## **STATEMENT OF FACTS**

For purposes of a motion under Fed. R. Civ. P. 12(b)(6), the Court must take as true the allegations in the petition. *See Curay-Cramer v. Ursuline Academy of Wilmington, Delaware, Inc.*, 450 F.3d 130, 133 (3d Cir. 2006). Thus, the Court must take the following facts as true. The respondents, in fact, do not dispute the truth of the relevant facts, as set forth herein.

The petitioner, Osserritta Robinson, is neither a citizen nor a national of the United States. She is a national of Jamaica, having been born there in 1977. *See Complaint*, ¶ 10. The petitioner was admitted to the United States as a B-2 nonimmigrant visitor for pleasure on or about January 14, 2002. *See id.*, ¶ 11.

On February 13, 2003, the petitioner married Louis A. Robinson ("the late Mr. Robinson"), a citizen of the United States. *See id.*, ¶ 12. In March 2003, the late Mr. Robinson filed a Form I-130, seeking to have petitioner classified as eligible to apply for an immigrant visa as an "immediate relative." *See id.*, ¶ 13. On the same day, the petitioner filed an application for adjustment of status (Form I-485). *See id.*

On October 15, 2003, the late Mr. Robinson died, eight months into his marriage with petitioner. *See id.*, ¶ 15. Based on the death of the late Mr. Robinson, the respondents terminated action on his Form I-130, and denied the petitioner's Form I-485. *See id.*, ¶ 17.

**LEGAL ARGUMENT**

**I.**

**RESPONDENTS PROPERLY AND LAWFULLY TERMINATED  
ACTION ON THE LATE MR. ROBINSON'S FORM I-130 AND  
THEREBY DENIED PETITIONER'S FORM I-485 AS A RESULT  
OF THE LATE MR. ROBINSON'S DEATH.**

**A. Background on the applicable law**

This case arises under the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101, *et seq.*<sup>1</sup> Sections 201(a), (c) and (d) of the Act, 8 U.S.C. § 1151(a), (c), and (d), impose limits on the number of aliens who may immigrate to the United States as permanent residents each fiscal year. These numerical limits do not apply, however, to aliens who qualify as the “immediate relatives” of a United States citizen. *See* INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). An alien qualifies as an immediate relative if the alien is the child, spouse, or parent of a citizen. *See id.*<sup>2</sup>

A citizen begins the immigration process for a spouse by filing with U.S. Citizenship and Immigration Services (“USCIS”) an alien relative visa petition, which is USCIS Form I-130. *See id.* § 204(a)(1)(A)(i), 8 U.S.C. § 1154(a)(1)(A)(i); 8 C.F.R. §§ 204.1(a)(1) and 204.2(a).<sup>3</sup> USCIS must conduct an investigation in every Form I-130 immigrant visa petition case. *See id.*

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<sup>1</sup> The Reviser of Statutes has informally codified the INA as title 8, United States Code. Title 8 has not, however, been enacted as positive law. This brief, therefore, will cite to the respective INA provisions, with a parallel citation to the informal codification in title 8.

<sup>2</sup> To qualify as a *child* of a citizen, the citizen’s son or daughter must be unmarried and under the age of 21 years. *See* INA § 101(b)(1), 8 U.S.C. § 101(b)(1). Also, the *parent* of a citizen qualifies as an immediate relative only if the citizen (the son or daughter of the alien who seeks to immigrate) is at least 21 years old. *See id.* § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (“in the case of parents, such citizens shall be at least 21 years of age”).

<sup>3</sup> The statute says the petition is filed with the “Attorney General.” *See* INA § 204(a)(1)(A)(i), 8 U.S.C. § 1154(a)(1)(A)(i). The Homeland Security Act of 2002, Pub. L. 107-296 § 451(b), 116 Stat. 2135, 2196 (2002), however, transferred this authority to USCIS, a bureau in the Department of Homeland Security.

§ 204(b), 8 U.S.C. § 1154(b). USCIS may not approve Form I-130 on behalf of a claimed immediate relative unless USCIS finds, as a result of this investigation, “that the facts stated in the petition *are* true and that the alien on behalf of whom the petition is made *is* an immediate relative.” *Id.* (*emphasis added*).

Approval of the visa petition does not actually accord permanent residence to the alien beneficiary. *Cf. id.* § 204(e), 8 U.S.C. § 1154(e) (approval of visa petition does not preclude a later finding that the alien is not eligible to immigrate). Rather, approval of the visa petition simply permits the alien to apply, as an immediate relative, for an immigrant visa (if the alien is abroad) or for adjustment of status (if the alien is in the United States). *Cf. id.* §§ 221(a)(1) and 222(a), 8 U.S.C. §§ 1201(a)(1) and 1202(a)(2) (relating to applications for immigrant visas) and *id.* § 245, 8 U.S.C. § 1255 (relating to adjustment of status). Whether the alien is actually admissible as an immigrant is not determined in the visa petition proceeding. *See Matter of O-*, 8 I&N Dec. 478 (BIA 1959). It is in the subsequent adjudication of the visa application or adjustment of status application that the alien’s actual eligibility to immigrate is addressed. *See id.*

To be eligible for adjustment of status, an immigrant visa must be immediately available to the applicant. *See* INA § 245(a)(3), 8 U.S.C. § 1255(a)(3). An immigrant visa petition must be approved, in order for an immigrant visa to be immediately available. *See* 8 C.F.R. §§ 245.1(g)(1) and 245.2(a)(2)(i)(B).

The Act does permit the widow(er) of a citizen to file a visa petition on her (or his) own behalf. *See* INA § 204(a)(1)(ii), 8 U.S.C. § 1154(a)(1)(ii). To qualify for this benefit, however, the widow(er) and the citizen must have been married at least two years. *See id.* §

201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (second sentence). The widow(er) must also file the petition within two years of the citizen's death, and must not have remarried. *See id.*

**B. The facts of this case do not warrant the relief sought by petitioner.**

Dismissal for failure to state a claim is appropriate if, taking the petitioner's factual claims as true, *see Curay-Cramer, supra*, it is beyond doubt that there is no legal basis for the Court to grant relief. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Carino v. Stefan*, 376 F.3d. 156, 159 (3d Cir. 2004).

As previously noted, this case does not involve any disputed facts. The petitioner claims, and the respondents agree, that petitioner is an alien who was admitted to the United States in 2002 as a B-2 nonimmigrant visitor for pleasure. The petitioner further claims, and the Respondents further agree, that she and the late Mr. Robinson married on February 13, 2003; that in March 2003, the late Mr. Robinson filed a Form I-130 on her behalf; that she then filed a Form I-485; that the late Mr. Robinson died on October 13, 2003, while his Form I-130 was pending; and that as a result of the late Mr. Robinson's death, the respondents terminated action on his Form I-130 and denied the petitioner's Form I-485.

The only issue before this Court, therefore, is the legal issue of whether the respondents acted according to law in terminating action on the late Mr. Robinson's Form I-130 and in denying the petitioner's Form I-485 as a result of the late Mr. Robinson's death.

**1. The INA precludes approval of the late Mr. Robinson's Form I-130 and the petitioner's Form I-485.**

Petitioner contends in her Complaint, paragraph 19, that "[t]here is no provision of law under the INA providing for the automatic termination of immediate relative or spousal status,

for the denial of a relative petition, upon the death of the petitioning spouse.” This proposition, without any supporting citation, is apparently drawn from a judgment of the United States Court of Appeals for the Ninth Circuit. *See Freeman v. Gonzales*, 444 F.3d 1031, 1042 (9<sup>th</sup> Cir. 2006). *Freeman*, of course, is not a binding precedent in this Court. Respondents respectfully suggest that *Freeman* was wrongly decided and that this Court should not follow the *Freeman* decision. *See Turek v. Department of Homeland Security*, 450 F. Supp. 2d 736 (E.D. Mich. 2006).

More significantly, the respondents respectfully suggest that the statute clearly *does* contemplate that the death of the visa petitioner, while the petition is pending, requires the denial of the petition. The respondents may approve a Form I-130 only if, after investigation, it is determined “that the facts stated in the petition *are* true and that the alien in behalf of whom the petition is made *is* an immediate relative.” INA § 204(b), 8 U.S.C. § 1154(b) § 1154(b) (*emphasis added*). To qualify as an immediate relative, the petitioner must be the spouse of a citizen. *See id.* at § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). The petitioner here is not the spouse of a citizen. Thus, the facts stated in the late Mr. Robinson’s petitioner “are [not] true” and she “is [not] an immediate relative.” *Cf. id.* § 204(b), 8 U.S.C. § 1154(b) § 1154(b). There is no authority to approve a Form I-130 after the petitioner has died. *See Burger v. McElroy*, 1999 WL 203353 (S.D.N.Y. April 12, 1999).

Like the term “material,” the term “spouse” “is not a *hapax legomenon*.” *Cf. Kungys v. United States*, 485 U.S. 759, 769 (1988). A spouse, in common meaning, is a married person. *See Black’s Law Dictionary* (definition of spouse) (8<sup>th</sup> ed. 2004). Simply put, a widow is no longer a spouse. *See id.* (definition of widow). For purposes of the Act and every other Federal statute, moreover, “spouse” has a specific statutory meaning. *See* 1 U.S.C. § 7. This statutory

definition follows the common meaning: one must be either the husband or the wife of a lawful, monogamous, heterosexual marriage in order to be a spouse. *See id.*

The rule in the United States is that a marriage terminates when one spouse dies. *See* 52 Am. Jur. 2d, Marriage, § 8. This principle applies in New Jersey, where the petitioner and the late Mr. Robinson resided at the time of his death. For example, a woman's former husband is presumed under New Jersey law to be the father of any child who is born within 300 days after the "marriage is terminated by *death*, annulment, or divorce." *See* N.J. Stat. § 9:17-43(a)(1) (*emphasis added*). New Jersey law also provides that a person's belief that a prior spouse is dead is a defense to a prosecution for bigamy. *See id.* § 2c:24-1. If a person appears to have married more than once, New Jersey law presumes the latest marriage to be the valid marriage, in absence of clear and convincing evidence that the "prior marriage was not terminated by *death* or divorce." *Newburgh v. Arrigo*, 88 N.J. 529, 538 (1982) (*emphasis added*). If a spouse dies while a divorce action is pending in New Jersey, the marriage ends and the court loses jurisdiction over the divorce action. *See Carr v. Carr*, 120 N.J. 336, 342 (1990). A marriage that, under New Jersey law, is voidable, rather than absolutely void, continues until dissolved by a decree or by the death of one of the spouses. *See De Conza's Estate*, 13 N.J. Misc. 41, 42 (N.J. Orph. Ct. 1934).

These New Jersey statutes and cases clearly establish that the marriage between the petitioner and the late Mr. Robinson ended when he died. Because she is no longer, legally, his wife, she is no longer, legally, his spouse. *See* 1 U.S.C. § 7. Since she is no longer his spouse, she is no longer an "immediate relative" as defined in INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). Because the facts stated in the late Mr. Robinson's Form I-130 "are [not] true"

and she “is [not] an immediate relative,” *cf. id.* § 204(b), 8 U.S.C. § 1154(b) § 1154(b), the respondents had no authority to approve his Form I-130 after his death, *see Burger, supra*, and, accordingly, acted pursuant to law in terminating action on it.

Moreover, because the respondents did not approve the late Mr. Robinson’s Form I-130, no immigrant visa was available to the petitioner. *See* 8 C.F.R. §§ 245.1(g)(1) and 245.2(a)(2)(i)(B). Because no immigrant visa was available, the petitioner was not eligible for adjustment of status. *See* INA § 245(a)(3), 8 U.S.C. § 1255(a)(3). The respondents, therefore, also acted pursuant to law in denying the petitioner’s Form I-485.

**2. Other immigration laws, regulations, and precedent support the respondents’ actions in this case.**

Respondents respectfully reiterate that INA §§ 201(b)(2)(A)(i) and 204(b), 8 U.S.C. §§ 1151(b)(2)(A)(i) and 1154(b) clearly provide that the respondents may not approve a Form I-130 after the petitioner’s death. Several related provisions of law and regulation, as well as long-settled precedent, support this interpretation of these statutory provisions.

First, a Form I-130 may not be approved on the basis of a marriage which, although legally valid, was entered into solely to obtain an immigration benefit. *See Lutwak v. United States*, 344 U.S. 604 (1953); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983). The respondents do not intend to suggest that this rule *necessarily* would apply to Mr. Robinson’s Form I-130. There is no factual basis on which the respondents could suggest it, but it does reveal the relevant point -- *i.e.*, his death effectively precludes the respondents from examining this issue. It is obviously now impossible to interview him under oath concerning his marriage to the petitioner.

Second, the Board of Immigration Appeals ("Board" or "BIA") has held that the alien beneficiary of a visa petition does not have standing to seek the petition's approval, after the petitioner's death. *See Matter of Sano*, 19 I & N Dec. 299 (BIA 1985). In an earlier case, in which the Board had assumed that the beneficiary did have standing, the Board held that the petitioner's death requires the denial of the petition. *See Matter of Varela*, 13 I & N Dec. 453, 454 (BIA 1970).

Third, INA § 205, 8 U.S.C. § 1155, provides that the respondents may revoke approval of a visa petition in any case in which it is found that good cause exists for doing so. Had the respondents approved Mr. Robinson's Form I-130 before his death, the approval would have been revoked, automatically, upon his death. *See* 8 C.F.R. § 205.1(a)(3)(i)(C)(2), *as amended* 71 *Fed. Reg.* 35,732, 35,749 (2006). The respondents would have had discretion to leave a pre-death approval in place, assuming there was a suitable substitute sponsor to file an affidavit of support. *See id.* This provision simply reflects that whether to revoke approval of a visa petition rests on the exercise of discretion. *See Jilin Pharmaceutical USA, Inc., v. Chertoff*, 447 F.3d 196 (3d Cir. 2006). Had the respondents approved Mr. Robinson's Form I-130 before his death, a later decision revoking the approval based on his having died would not have been subject to judicial review. *See id.*<sup>4</sup>

Fourth, as the petitioner indicates in the Complaint, paragraph 18, the INA does provide for the approval of a visa petition filed by the widow of a citizen. *See* INA §§ 201(b)(2)(A)(i) (second sentence) and 204(a)(1)(A)(ii), 8 U.S.C. §§ 1151(b)(2)(A)(i) (second sentence) and

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<sup>4</sup> There clearly is a rational basis for permitting a pre-death approval to stand, while precluding a post-death approval. Approval of a petition while the petitioner is alive necessarily indicates that the marriage was found to have been *bona fide*, so that *Lutwak* and *Laureano* do not apply to the case. If the petitioner dies before this finding is made, the death can prevent full consideration of this issue.

1154(a)(1)(A)(ii). To be eligible under this provision, however, the couple must have been married for at least two years when the citizen spouse died. *See id.* The petitioner and the late Mr. Robinson were married less than two years; hence, these provisions do not apply to the petitioner.<sup>5</sup>

The FY2004 National Defense Authorization Act, Public Law 108-136, Division A, § 1703, 117 Stat. 1392, 1693-96 (2003) and the USA Patriot Act, Pub. L. 107-57, § 423, 115 Stat. 272, 360-63 (2001), contain provisions similar to the second sentence of § 201(b)(2)(A)(i). The Ninth Circuit in *Freeman* considered the second sentence of section 201(b)(2)(A)(i) to be irrelevant to the question whether a visa petition may be approved under the first sentence of section 201(b)(2)(A)(i) after the petitioner has died. *See Freeman, supra*, 444 F.3d at 1039. It is true that, as the Ninth Circuit observed, the second sentence of § 201(b)(2)(A)(i) of the Act permits the alien to file his or her own petition, and does not directly address how a petitioner's death affects a pending petition. As argued previously, however, the first sentence of § 201(b)(2)(A)(i), read together with § 204(b), the general rule that marriage ends at death, and 1 U.S.C. § 7, support the conclusion that the petitioner's death precludes approval of a visa petition. Moreover, the second sentence of INA § 201(b)(2)(A)(i), § 1703 of Division A of Public Law 106-136, and § 423 of the USA Patriot Act, taken together, clearly indicate that when Congress has wanted to allow for an individual to immigrate based on his/her former marriage to an individual who is now dead, Congress has done so clearly.

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<sup>5</sup> USCIS regulations do provide for the conversion of a spousal Form I-130 to a widow(er)'s petition under INA § 204(a)(1)(A)(ii), 8 U.S.C. § 1154(a)(1)(A)(ii). *See* 8 C.F.R. § 204.2(i)(1)(iv), *as amended* 71 FR 35,732, 35,479 (2006). This provision does not apply, however, since the petitioner and Mr. Robinson had not been married for two years at the time of this death.

3. *The Court should defer to the respondents' interpretation of the applicable statute*

Respondents respectfully reiterate that INA §§ 201(b)(2)(A)(i) and 204(b), 8 U.S.C. §§ 1151(b)(2)(A)(i) and 1154(b), read in light of 1 U.S.C. § 7, clearly establish that they may not approve a Form I-130 after the petitioner has died. Since Congress has spoken on the issue, the Court, like the respondents, is bound by the clear message of the statutes. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Assuming, however, that the Court considers the statute to be ambiguous concerning the effect of the late Mr. Robinson's death on his Form I-130, the Court must accept the respondents' reasonable interpretation of the statute. *See National Cable & Telecomm. Assn. v. Brand X Internet Services*, 125 S. Ct. 2688, 2699 (2005); *Chevron, U.S.A., Inc. supra*, 467 U.S. at 842-43, 865-66.

Respondents acknowledge that the Ninth Circuit has held that the proposition that a visa petitioner's death precludes approval of the petition is not a permissible interpretation of the statute. *See Freeman, supra*, 444 F.3d at 1038. The *Freeman* panel, however, did not consider the explicit requirement of INA § 204(b), 8 U.S.C. § 1154(b), that the respondents must find that an alien "is an immediate relative" in order to approve a Form I-130 (*emphasis added*). Nor did the *Freeman* panel take note of 1 U.S.C. § 7, and the general legal principle that marriage ends at death, so that one is no longer a spouse once the other spouse is dead. Also absent from its decision was any consideration of the fact that, where a petition has been approved, the petitioner's death automatically revokes the approval. 8 C.F.R. § 205.1(a)(3)(i)(C)(2), *as amended* 71 *Fed. Reg.* at 35,749. In light of these concerns, the respondents' interpretation of the statute is, at least, reasonable. *See Burger*, 1999 WL 203353 at \*5. The *Freeman* panel's

rejection of the respondents' reasonable interpretation was contrary to law. *Brand X Internet Services*, 125 S. Ct. at 2699; *Chevron, U.S.A., Inc.*, 657 U.S. at 842-43.

The gist of the petitioner's claim is that the respondents acted unlawfully in terminating action on the late Mr. Robinson's Form I-130, as a result of his death, and then in denying the petitioners' Form I-485. Once Mr. Robinson died, however, petitioner was no longer the spouse of a citizen or an "immediate relative." Since she was no longer an immediate relative, the respondents could not have approved the Form I-130. See INA §§ 201(b)(2)(A)(i) and 204(b), 8 U.S.C. §§ 1151(b)(2)(A)(i) and 1154(b); *Burger, supra*. Even taking the petitioner's factual claims as true, see *Curay-Cramer, supra*, the respondents clearly acted in accordance with the applicable laws. Dismissal under rule 12(b)(6) is appropriate where on the facts of this case, there is no relief that the Court can grant. See *Hishon, supra*, and *Carino, supra*.

**CONCLUSION**

For the foregoing reasons, respondents respectfully requests that the Complaint be dismissed in its entirety for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

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Dated: February 26, 2007