

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

**MARIA PAULA ROBLEDO, et al.,** )

**Petitioners,** )

**v.** )

**Civil Action No. AW-08-2581**

**JANET NAPOLITANO,<sup>1</sup>** )

**Secretary, United States Department of** )

**Homeland Security, et al.,** )

**Respondents.** )

**REPLY BRIEF IN SUPPORT OF RESPONDENTS’ MOTION TO DISMISS,  
OR ALTERNATIVELY, FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

As Petitioners’ response brief makes clear, Petitioners are asking this Court for a radical and extraordinary remedy. Petitioners in this case invite this Court to exercise jurisdiction over a matter currently in removal proceedings before an Immigration Judge (IJ), contrary to the clear dictates of 8 U.S.C. § 1252 and 8 C.F.R. § 1245.2(a)(1). In addition, Petitioners ask this District Court to reach a question of law which concerns their eligibility for adjustment of status, despite the fact that 8 U.S.C. § 1252(a)(2)(D) vests Courts of Appeal with exclusive jurisdiction to consider such questions. Finally, assuming there is jurisdiction over this matter, Petitioners invite this Court to ignore the plain language of 8 U.S.C. § 1151(b)(2)(A), to legislate into the statute additional language that Congress did not expressly provide, and to disregard Congressional intent which is unambiguously expressed in subsequent legislation proposed by

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<sup>1</sup> Pursuant to Fed. R. Civ. P. 25(d), Janet Napolitano, as the confirmed successor to former Secretary Michael Chertoff, who was named as a defendant in this action in his official capacity, is automatically substituted as the proper party defendant in this action.

Congress to *amend* the statute to read in the precise manner that Petitioners advocate for here. And Petitioners seek this extraordinary remedy notwithstanding the Supreme Court’s admonition that immigration-related issues are uniquely entrusted to the political branches and thus should be “largely immune from judicial control.” Fiallo v. Bell, 430 U.S. 787, 792 (1977); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953). As detailed more fully infra, Petitioners simply ask too much. And indeed, a recent published decision from the U.S. Court of Appeals for the Third Circuit considering the precise issue raised here has rejected all of the arguments raised by Petitioners in their response brief. See Robinson v. Napolitano, \_\_\_ F.3d \_\_\_, 2009 WL 223856 (3rd Cir. Feb. 2, 2009).<sup>2</sup> As such, for these reasons and those in Respondents’ initial moving brief, Respondents’ motion should be granted, and Petitioners’ complaint and cross-motion should be dismissed.

## II. ARGUMENT

### A. **Petitioners’ Claims Must Be Dismissed For Lack Of Jurisdiction Because, Pursuant To 8 U.S.C. § 1252 And 8 C.F.R. § 1245.2(a)(1), Exclusive Jurisdiction Over Petitioners’ Claims Is Vested With The IJ Because Petitioners Robledo And Hassan Have Been Placed In Removal Proceedings.**

As detailed more fully in Respondents’ initial moving brief, once an alien is placed in removal proceedings, federal law strips District Courts of subject matter jurisdiction and vests exclusive jurisdiction with the immigration judge (IJ). Particularly, 8 U.S.C. § 1252(b)(9) provides that “no court shall have jurisdiction” to review any question of law or fact, including the “interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien . . . .” This provision has been interpreted

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<sup>2</sup> For the Court’s convenience, a copy of the Robinson decision is attached hereto as Exhibit A. In addition, it should be noted that Petitioners in their response brief relied heavily on the District Court decision in Robinson which the Third Circuit reversed.

broadly as indicative of Congressional intent to “channel” all legal issues with respect to an alien in removal proceedings to the immigration judge (IJ), with the right to appeal up to the Board of Immigration Appeals (BIA) and ultimately to a Court of Appeals. See Aguilar v. United States Immigration and Customs Enforcement, 510 F.3d 1, 9 (1st Cir. 2007). Likewise, 8 U.S.C. § 1252(g) strips District Courts of jurisdiction to review any issue “arising from” a decision to “adjudicate cases, or execute removal orders” for aliens in removal proceedings. Finally, tracking these statutory provisions, federal regulations provide that once an “alien . . . has been placed in deportation proceedings or in removal proceedings . . . , the immigration judge hearing the proceeding has *exclusive jurisdiction* to adjudicate any application for adjustment of status the alien may file.” See 8 C.F.R. § 1245.2(a)(1) (emphasis added). Courts construing these provisions have determined that once removal proceedings have been initiated, district courts lack jurisdiction to consider claims about the denial of adjustment of status. See, e.g., Lu v. Chertoff, 2008 WL 4559747 at \*2 (C.D. Cal. Oct. 7, 2008) (granting motion to dismiss for lack of jurisdiction and holding that “[s]ince the removal proceeding is ongoing, the immigration judge has exclusive jurisdiction to adjudicate Plaintiff’s claim for adjustment of status under 8 C.F.R. § 1245.2(a)(1)(I).”).

Here, it is undisputed that Petitioners Robledo and Hassan are currently in removal proceedings. See Exhibit<sup>3</sup> 5; Exhibit 16; Exhibit 17; Exhibit 18. Accordingly, pursuant to 8 U.S.C. § 1252(b)(9) and 8 C.F.R. § 1245.2(a)(1), this Court lacks jurisdiction to consider the claims arising from USCIS’s denial of Petitioners’ I-485 applications as exclusive jurisdiction is vested with the immigration judge.

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<sup>3</sup> Unless otherwise noted, all references herein to exhibits shall be to the exhibits attached to Respondents’ initial moving brief.

In their response brief, Petitioners make two arguments in retort, both of which should be rejected. First, they claim broadly that several federal courts have found there is jurisdiction to consider the issues raised here, and so this Court should likewise hold that it has subject matter jurisdiction. See Response Brief at 1 (citing Robinson, Taing, Lockhart). However, at least with respect to Robinson and Taing, the petitioners in those cases were not in removal proceedings, and so those cases are inapposite. And while the petitioner in Lockhart was in removal proceedings when the action was filed, there is no indication that the Court in that case considered the effect of 8 C.F.R. § 1245.2(a)(1). Accordingly, the cases cited by Petitioners are readily distinguishable and provide no retort to the unambiguous language of 8 U.S.C. § 1252 and 8 C.F.R. § 1245.2(a)(1).

Second, Petitioners claim they are not challenging the denial of their I-485 applications, but are rather only seeking the Court's declaration with respect to USCIS's denial of their I-130 petitions. See Response Brief at 3 ("Plaintiffs are not challenging the adjudication of their I-485 applications for adjustment of status."). And on the basis of this representation, they claim their suit is not barred by either 8 U.S.C. § 1252 or 8 C.F.R. § 1245.2(a)(1). This argument fails for two reasons. First, Petitioners' representations are belied by the allegations in their own Complaint. In their Prayer for Relief, Petitioners specifically ask this Court to "[i]ssue a writ of mandamus compelling Defendants to . . . reopen Plaintiffs' adjustment of status Applications on the ground that the Applications were unlawfully denied . . . ." Complaint at 17 (Prayer for Relief ¶ 7). Petitioners are thus quite plainly challenging the adjudications by USCIS which resulted in the denials of their I-485 petitions.

And second, even if these allegations were not in the Complaint, Petitioners' argument should still be rejected because it is simply not credible. Petitioners are not challenging USCIS's

interpretation of § 1151(b)(2)(A) merely as an academic exercise. They themselves acknowledge that their adjustment of status applications are dependent upon their interpretation of the statute being credited in order to allow them to be classified as an “immediate relative.” See Response Brief at 4. Indeed, it was on the failure of the I-130 petitions filed on their behalf that their I-485 applications were denied. See Complaint at ¶¶ 28, 40, 51. As such, the I-130 petitions are part and parcel of their bids to have their status adjusted, particularly because without a subsequent grant of adjustment of status the grant of an I-130 alone does not convey immigration status. See id. Achieving lawful permanent resident status by the grant of their I-485 applications is thus clearly Petitioners’ goal and the reason they brought this case. See Complaint at 16-17. Accordingly, for Petitioners to claim that they are not challenging the denial of their I-485 applications—but rather are only seeking a declaration with respect to their I-130 petitions and the interpretation of § 1151(b)(2)(A)—is simply not credible, and hence their argument should be rejected.<sup>4</sup> Accordingly, because Petitioners are in fact asking this Court to effectively overturn the denials of their I-485 applications,<sup>5</sup> 8 U.S.C. § 1252 and 8 C.F.R. § 1245.2(a)(1) require that the instant suit be dismissed because exclusive jurisdiction is vested

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<sup>4</sup> And indeed, as detailed more fully infra, the Fourth Circuit has admonished against allowing aliens to “repackage[] [their] primary argument[s] in various ways in an attempt to create a reviewable legal question where there is none.” Saintha v. Mukasey, 516 F.3d 243, 250 (4th Cir. 2008). By claiming they are only challenging the denials of their I-130 petitions and not the denials of their I-485 applications, Petitioners here are attempting to do precisely what the Saintha Court proscribed.

<sup>5</sup> In their response brief, Petitioners cite Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482-83 (1999) for its explication that § 1252(g) bars judicial review where the Attorney General has the power to “adjudicate cases, or execute removal orders.” See Response Brief at 2. And here, because Petitioners actually are seeking to obtain judicial review of the adjudications of their denied I-485 applications while at the same time they are in removal proceedings, see Complaint at 16-17, this case falls within the class of cases that the Court in Reno held fell within the ambit of § 1252(g).

with the IJ.<sup>6</sup>

Accordingly, notwithstanding the arguments raised by Petitioners, 8 U.S.C. § 1252(b)(9) and 8 C.F.R. § 1245.2(a)(1) are clear: once an alien is placed in removal proceedings, exclusive jurisdiction with respect to an application for adjustment is vested with the IJ. Thus, because Petitioners Robledo and Hassan are in removal proceedings, this Court lacks jurisdiction to consider their claims.

**B. Petitioners' Claims Must Be Dismissed Because, Pursuant To 8 U.S.C. § 1252(a)(2)(D), "Questions Of Law" With Respect To The Denial Of Petitioners' I-485 Applications Such As Those Raised Here Must First Be Presented To An IJ, And Then To The BIA, And Then Up To The Court Of Appeals; Such Claims Cannot Be Brought In District Courts.**

As detailed more fully in Respondents' initial moving brief, Petitioners' Complaint should be dismissed because the statutory scheme adopted by Congress for judicial review of denials of adjustment of status applications requires that "questions of law" must first be presented to the administrative entities with expertise in immigration matters (e.g., an IJ, and then to BIA), and only then can those issues be appealed to a Court of Appeals; and in no event shall such issues be litigated in a federal District Court in the first instance. See 8 U.S.C. § 1252(a)(2)(B)(i) (providing that "no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under [8 U.S.C. § 1255] . . ."); 8 U.S.C. § 1252(a)(2)(D) (providing that "questions of law [may be] raised upon a petition for review filed with an appropriate court of appeals" following exhaustion before an IJ and the BIA).

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<sup>6</sup> Indeed, underscoring all the more that this is a matter over which the IJ should have exclusive jurisdiction, Petitioners inform the Court that Petitioner Hassan has recently filed a motion to reopen his removal proceedings. See Response Brief at 38. The statutory scheme set up by Congress in enacting § 1252 was designed to prevent precisely this scenario wherein parallel proceedings were being conducted before immigration judges and District Courts at the same time regarding the same alien.

This was the express scheme adopted by Congress in its passage of the Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231. See Patel v. Chertoff, 2006 WL 5908351 at \*3 (D. Md. Aug. 31, 2006) (detailing legislative history and purpose behind REAL ID Act). And pursuant to this statutory scheme, District Courts in this Circuit—including three decisions from this very District Court—have held that the *only* procedure by which a petitioner can obtain any judicial review on a legal question associated with the denial of his or her I-485 is by raising it during removal proceedings before an immigration judge, and then on appeal to the BIA, and then on a petition from the BIA to a Court of Appeals. See Lee v. USCIS, 2008 WL 1805749 (D. Md. Apr. 8, 2008) (holding that § 1252(a)(2) precluded review by district court of petitioner’s legal challenge to USCIS’s regulations which resulted in denial of I-485 application; rather, such a legal challenge has to be raised before an IJ and then up to BIA and then to a Court of Appeals); Patel, 2006 WL 5908351 at \*4 (same); Kim v. Gonzales, 2006 WL 1892426 at \*1-\*2 (D. Md. June 19, 2006) (same); see also Rodas v. Chertoff, 399 F. Supp. 2d 697, 706 (E.D. Va. 2005) (holding that, pursuant to § 1252(a)(2)(D), district courts lack jurisdiction to consider legal challenges associated with USCIS’s denials of applications for temporary protective status).

Notwithstanding this clear statutory scheme by which Congress has ordained that questions of law affecting adjustment of status should be funneled through those bodies with expertise in immigration-related statutes and regulations, i.e. an immigration judge and the BIA, Petitioners in this case invite this Court to exercise jurisdiction over their claims. In doing so, Petitioners make three arguments, all of which should be rejected.

First, as discussed supra, Petitioners again claim that they are not challenging the denial of their I-485 applications, but rather are simply seeking a declaration with respect to USCIS’s application of § 1151(b)(2)(A) to deny their I-130 petitions. See Response Brief at 3. This

argument is simply not credible given the allegations in the Complaint, see Complaint at 17 (seeking a court order reopening the denials of their I-485 applications), and given that Petitioners admit that their I-485 “adjustment of status application is dependent on their ‘immediate relative’ classification” on their I-130 applications. Response Brief at 4. As such, Petitioners are challenging a “judgment” rendered pursuant to authority granted to USCIS under 8 U.S.C. § 1255, and thus their case falls squarely within the proscriptions in § 1252(a)(2)(B)(i).<sup>7</sup> And to the extent Petitioners seek to avoid § 1252(a)(2)(B)(i) by disclaiming that they are making such a challenge but are only seeking review of the denials of their I-130 petitions, it should be noted that this is precisely the kind of creativity in argument that the Fourth Circuit admonished against in Saintha v. Mukasey, 516 F.3d 243, 250 (4th Cir. 2008). In that case, a petitioner sought to avoid the jurisdictional bar set forth in § 1252(a)(2) by arguing that his complaint presented a question of law, when in fact he was merely challenging a factual determination upheld by the BIA. Id. at 250-51. In rejecting the petitioner’s argument, the Fourth Circuit cautioned against permitting an alien to plead around Congress’s intent that bodies with expertise in immigration-related matters should decide such issues in the first instance because otherwise petitioners could easily “convert every immigration case into a question of law, and thereby undermine Congress’s decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive.” Id. Similarly, here, Petitioners are seeking to evade the jurisdictional bar set forth in § 1252(a)(2) by arguing

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<sup>7</sup> And to the extent that Petitioners cite a host of cases construing § 1252(a)(2)(B)(*ii*), and then claim that jurisdiction is not barred here because the denial of their I-130 petition was a non-discretionary determination, see Response Brief at 10-16, these cases are inapposite because the jurisdiction-stripping provisions of § 1252(a)(2)(B)(i) apply to “any judgment” regarding the grant or denial of an I-485. Thus, because Petitioners are patently challenging in this lawsuit the judgments denying their I-485 applications, it is § 1252(a)(2)(B)(*i*) which bars the exercise of jurisdiction here.

that they are not challenging the denials of their I-485 applications, but rather are only seeking review under the Administrative Procedure Act (APA) or the Mandamus Act of the Agency's legal interpretation and application of § 1151(b)(2)(A) to deny their I-130 petitions. Pursuant to Saintha, and the express allegations in the Complaint, such an argument should be rejected.

Second, Petitioners claim that exhaustion before the immigration judge and the BIA is not required here because these bodies do not have jurisdiction to review the denials of Petitioners' I-130 petitions, and thus exhaustion would be futile. See Response Brief at 3-7 (citing Matter of Sano, 19 I. & N. Dec. 299 (BIA 1985) for the proposition that the BIA lacks jurisdiction to review denials of I-130 petitions).

This argument should be rejected for two reasons.

First, the Fourth Circuit has indicated that exhaustion is required when an alien seeks to raise a legal challenge to the application of USCIS's regulations which resulted in the denial of an I-485 application. See Balbuena Torres v. Gonzales, 229 Fed. Appx. 261, 261 (4th Cir. 2007) (holding that the Court was "without jurisdiction to review [petitioner's claims] due to failure to exhaust administrative remedies" where petitioner did not raise his arguments first before the IJ); see also Lee, 2008 WL 1805749 (requiring exhaustion of claims before an IJ and the BIA). Moreover, and more importantly, because Petitioners Robledo and Hassan are in removal proceedings, federal law requires exhaustion of administrative remedies before they can obtain judicial review. See 8 U.S.C. § 1252(d)(1).

Second, Petitioners' argument relying on the 1985 BIA decision in Sano should be rejected because it fails to take into consideration the fundamental changes in the law wrought by Congress's adoption of the REAL ID Act in 2005, and the fact that the BIA has reached the issue on the merits with respect to Petitioner Hassan. As detailed supra, when Congress adopted

the REAL ID Act of 2005, it expressed its clear intent that all questions of law that affect denials of I-485 applications were to be funneled first to an IJ, and then to the BIA, with a right to appeal then to a federal Court of Appeals. See Patel, 2006 WL 5908351 at \*3 (detailing legislative history and purpose behind REAL ID Act). This is the express mechanism for review ordained by Congress. As such, Petitioners cannot simply evade the ordained procedures by declaring sua sponte that exhaustion would be futile. Rather, Petitioners are required to seek review before an immigration judge, and would be permitted to raise the issue of Sano's continuing vitality post-REAL ID Act there. And if the immigration judge rejected their claim and Sano were upheld, they could then appeal to the BIA and raise the argument that the REAL ID Act foreclosed all other avenues of review, and thus the BIA is required to address the issue lest Petitioners be left without a remedy. And if the BIA rejected their argument and still upheld Sano, then that claim could be appealed pursuant to § 1252(a)(2)(D) to the Fourth Circuit. And indeed, case law from after the enactment of the REAL ID Act is replete with instances in which the Fourth Circuit has reviewed precisely whether the IJ and BIA properly exercised their jurisdiction over an alien's claims. See, e.g., Perez-Vargas v. Gonzales, 478 F.3d 191, 194 (4th Cir. 2007) (reversing BIA's determination that IJ lacked jurisdiction, and remanding so that IJ could exercise jurisdiction to consider claim raised with respect to visa petition supporting adjustment of status application).

And indeed, underscoring even further that Petitioners' argument should be rejected, Petitioner Hassan himself raised his claim about his immediate relative status before the BIA, and the BIA rejected his claim *on the merits* and did not dismiss the claim for lack of jurisdiction. See Exhibit 13 (BIA holding that Hassan could not be considered an immediate relative because she had not been married to her U.S. citizen spouse for 2 years prior to his death). Thus, while the BIA decision attached as Exhibit 13 was not published and did not

reference Sano, it provides evidence that Petitioners are incorrect to claim that the BIA will necessarily reject on jurisdictional grounds pursuant to Sano their challenges to USCIS's determination that Petitioners are not immediate relatives of U.S. citizen spouses.<sup>8</sup>

In sum, because of the changes implemented by the REAL ID Act, Petitioners' citation to Sano as conclusive that exhaustion is futile is misplaced.<sup>9</sup> Rather, the REAL ID Act requires that Petitioners raise any legal challenges with respect to the denial of their I-130s and I-485s (including a facial challenge to the continuing vitality to the decision in Sano) before the IJ and then to the BIA and then to the Fourth Circuit. As such, Petitioners' argument should be rejected, and they should be required to exhaust administrative remedies before seeking judicial review in a Court of Appeals as per the procedure outlined by Congress in § 1252(a)(2)(D).

Third, Petitioners make the curious and circular claim that this Court should ignore the danger of having divergent rulings issue from various District Courts creating a patchwork of immigration law across the country on this issue simply because the Ninth Circuit in Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006) has already reached the issue, and USCIS has indicated that it is bound to follow that decision in those nine States covered by the Ninth Circuit. See Response Brief at 17. In making this argument, Petitioners ostensibly argue that USCIS should abandon all attempts to create a uniform forum for deciding this issue and a uniform body of law

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<sup>8</sup> And indeed, if Petitioner Hassan believed that the BIA was incorrect in its ruling, it was incumbent on him to appeal that decision to a Court of Appeals. He did not do so. As such, he has failed to exhaust administrative remedies and cannot bring the claim here. See 8 U.S.C. § 1252(d)(1).

<sup>9</sup> Indeed, in all the cases cited by Petitioners in their response brief on this issue, those District Courts simply *assumed* that Sano remained good law and did not consider the impact that the REAL ID Act might have on the BIA's interpretation of its own jurisdiction. See Lockhart v. Chertoff, 2008 WL 80225 at \*5 (N.D. Ohio Jan. 7, 2008) (assuming without any discussion that Sano remained good law); Taing v. Chertoff, 526 F. Supp. 2d 177, 180 (D. Mass. 2007) (same).

for aliens living in the other 11 Circuits, which cover 41 States and the District of Columbia, Puerto Rico, and the Virgin Islands, simply because one Circuit covering nine States has decided the issue. In other words, Petitioners argue that the only way to serve uniformity is for the law of the Ninth Circuit to be applied nationwide simply because a Ninth Circuit court reached the issue first. Petitioners' argument should be rejected out of hand. As Petitioners recite in their brief, USCIS's position is that Freeman was wrongly decided, and thus while USCIS is bound to follow the decision in the Ninth Circuit, it is not controlling elsewhere. See Response Brief at 17 (recounting USCIS's position that "*Freeman* was wrongly decided"). Patently, the law of the Ninth Circuit is not controlling here, see COMSAT Corp. v. NSF, 190 F.3d 269, 277 (4th Cir. 1999) (declining to follow Ninth Circuit decision), and it is of no moment that aliens living outside the Ninth Circuit are treated differently than those living within the Ninth Circuit based on differences in the law. See Minotti v. Whitehead, 584 F. Supp. 2d 750, 760 & n.12 (D. Md. 2008) (declining to follow Ninth Circuit decision and rejecting argument that simply because federal inmates in the Ninth Circuit are treated one way does not mean the same erroneous ruling must be applied to inmates across the country); see also Turek v. Dep't of Homeland Sec., 450 F. Supp. 2d 736, 740 (E.D. Mich. 2006) (declining to follow Freeman and holding that "the Court does not find a constitutional violation insofar as the Ninth Circuit precedent favors Plaintiff while similarly situated plaintiffs in other circuits do not benefit from that decision"). And indeed, with the recent Third Circuit decision in Robinson, which rejected the Ninth Circuit's Freeman decision, it is clear that the pendulum is swinging away from the Ninth Circuit's decision in Freeman, or at the very least a Circuit split is emerging. Thus, Petitioners' argument that the law of the Ninth Circuit must be adopted here simply because it applies to aliens living in the Ninth Circuit should be rejected. Instead, pursuant to § 1252(a)(2)(D), this Court should

hold that the exclusive means to obtain judicial review over the questions raised here is through an IJ and then up to the BIA. Only by using this mechanism intended by Congress in its passage of the REAL ID Act of 2005 will the legitimate interests of uniformity be served and will the BIA be allowed to create a uniform rule that is applicable to aliens nationwide.

Based on the foregoing then, and notwithstanding any of the arguments raised by Petitioners in their brief, § 1252(a)(2)(D) clearly holds that the kind of legal challenge that Petitioners present here—i.e. that the I-485 applications were denied based on an allegedly erroneous interpretation of the term “spouse” in 8 U.S.C. § 1151(b)(2)(A)(i) which led to the denial of the I-130 petitions on which their I-485 applications were based—is one that cannot be raised in the District Court in the first instance, but rather must be raised before an IJ, and then the BIA, and then up to a Court of Appeals. As such, this Court should dismiss Petitioners’ Complaint for lack of jurisdiction.

**C. Even Assuming This Court May Exercise Jurisdiction Over Petitioners’ Complaint, Their Claims Should Be Dismissed As A Matter Of Law Because, Pursuant To The Unambiguous Language In 8 U.S.C. § 1151(b)(2)(A)(i), Petitioners No Longer Qualify As “Immediate Relatives” Of A U.S. Citizen.**

Finally, even assuming *arguendo* that this Court may exercise jurisdiction over the claims brought by Petitioners, their claims should still be rejected pursuant to a straightforward application of the express terms of 8 U.S.C. § 1151(b)(2)(A)(i). And alternatively, even if there is some ambiguity in the statutory construction, resort to subsequent legislative history makes it pellucidly clear that Congress did not intend to enact the kind of strained interpretation which Petitioners invite this Court to adopt here, particularly given that Congress was recently attempting to *amend* the statute to include the very terms that Petitioners claim are already in the statute as it currently exists. And while Petitioners offer myriad arguments in their response

brief in an attempt to fit their cases under the terms of § 1151(b)(2)(A)(i), the Third Circuit in Robinson, considered and rejected each of these arguments. As such, Petitioners' claims should be dismissed as lacking in merit.

**1. 8 U.S.C. § 1151(b)(2)(A)(i) Clearly And Unambiguously Defines "Immediate Relative" As Including A Current "Spouse" or "Child," And Thus Petitioners' Status As "Widows" Or As A "Surviving Step-Child" Render Them Ineligible For Adjustment Under The Immediate Relative Classification.**

As detailed more fully in Respondents' initial moving brief, Petitioners' Complaint alleges an issue of statutory construction, and thus this Court must engage in a two-step process. First, the Court must begin by analyzing "the language of the statute." Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425, 441 (4th Cir. 2003). "If congressional intent is clear from application of 'traditional tools of statutory construction,' . . . 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Id. (citing Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-43 (1984)). However, "[i]f the statute is silent or ambiguous with respect to the specific issue," the Court must proceed to the second step of the analysis wherein the Court must afford deference to the Agency's interpretation of the statute provided it is a "permissible construction of the statute." Id.

Here, Petitioners' Complaint should be dismissed because, under Step One of the Chevron analysis, 8 U.S.C. § 1151(b)(2)(A)(i) provides a clear definition of "immediate relative" which includes only a current "spouse" and does not include a "widow" or a "surviving spouse" or a "surviving step-child." And moreover, while the second sentence of the statute carves out a narrow exception for those widows who were married to their decedent spouses for more than two years, this exception does not apply to Petitioners' cases here. As such, Petitioners'

Complaint inviting this Court to legislate into the statute the additional terms of “widows,” “surviving spouse,” and/or “surviving heir” when the statute refers only to a current “spouse,” should be rejected under the Step One Chevron analysis because, inter alia: (1) it is contrary to the express terms of the statute and the ordinary understanding of such terms; (2) it is contrary to BIA precedent on this precise issue; and (3) it is inconsistent with recent congressional activity wherein Members of Congress have articulated that the current statute is drafted in a way that supports Respondents’ interpretation and that only by amending the statute could the view endorsed by Petitioners be upheld. Each of these bases, along with the arguments in Petitioners’ brief attempting to respond to them, will be discussed in turn.

**a. Respondents’ Construction Of § 1151(b)(2)(A)(i) Is Consistent With The Express Scheme Of The Statute And The Plain Ordinary Meaning Of The Term “Spouse.”**

First, Petitioners’ contentions should be rejected as contrary to the express terms that Congress placed in the statute. The first sentence of section 201(b)(2)(A)(i) defines the term “immediate relative” as the spouse, parent, or child of a U.S. citizen. 8 U.S.C. § 1151(b)(2)(A)(i). As noted, Petitioners Robledo and Hassan no longer qualify as an “immediate relative” under this first sentence because neither is currently a “spouse” of a citizen. Rather each is now unfortunately a “widow” of a U.S. citizen. The second sentence of section 201(b)(2)(A)(i) then goes on to provide a narrow exception for someone who “was the spouse of a citizen,” but provides that that exception is only applicable where the marriage lasted more than two years. Id. (emphasis added). Accordingly, here, since the marriages of Petitioners Robledo and Hassan ended with their respective husband’s deaths, they are each “an alien who was the spouse of a citizen.” Id. (emphasis added). Thus, the second sentence of § 1151(b)(2)(A)(i) clearly provides the rule that determines whether they each qualify as an

“immediate relative” after the death of their husbands. Since both had been married to their respective husbands for less than two years when he died, Petitioners Robledo and Hassan do not satisfy the statutory requirements. Likewise, Petitioner Pinzon is no longer considered a “step-child” of his late step-father, but rather is to be considered a “surviving step-child” or an “heir,” and hence he is ineligible to adjust his status on the basis of an immediate relative classification. Accordingly, the terms of the statute are clear, and under a straightforward application of the terms of the statute, Petitioners fail to satisfy the standards mandated by Congress for classification as immediate relatives of a U.S. citizen.

And indeed, the Third Circuit in Robinson made the precise finding that the terms in § 1151(b)(2)(A)(i) are clear and unambiguous, and do not permit an immediate relative classification to be applied to aliens who are widows like Petitioners here who were married to their citizen decedents for less than two years. See Robinson, 2009 WL 223856 at \*5 (“The underlying issue of statutory construction is not complicated.”); id. at \*6 (“The language [of § 1151(b)(2)(A)(i)] and this interpretation is straightforward.”); see also Turek, 450 F. Supp. 2d at 740 (holding that the statute is “clear” and does not permit an immediate relative classification to be applied to a widow who was married to the decedent citizen for less than two years).

In their Response Brief, Petitioners cite the definition of “spouse” in the INA found at 8 U.S.C. § 1101(a)(35) and otherwise offer an alternative reading of the statute. See Response Brief at 19-25. There are several problems with the arguments raised by Petitioners.

First, Petitioners’ citation to the definition of a “spouse” is ineffectual because that definition does not assist either party’s cause in this case. As the Third Circuit observed in Robinson, the definition of a spouse in the INA is wholly inapplicable and unrelated to the issues raised here. See 2009 WL 223856 at \*6 (“The INA does not provide a helpful definition of the

term ‘spouse’ in its definitional section.”). As such, Petitioners’ citation to the § 1101(a)(35) should be disregarded as ineffectual.

Second, while Petitioners offer an alternative interpretation of the statute, their interpretation runs afoul of the commonly-understood legal distinction between a “spouse” and a “widow” and several canons of statutory construction. Particularly, Petitioners invite this Court to hold that the first and second sentences of § 1151(b)(2)(A)(i) provide wholly “separate right[s]” and thus should not be read together *in pari materia*, because the first sentence purportedly applies where an I-130 petition has been filed before the U.S. citizen dies, and the second sentence purportedly applies only where an I-130 has not yet been filed prior to the death of the U.S. citizen. See Response Brief at 21-22. And in making this argument, Petitioners claim that they can still qualify for coverage under the first sentence of § 1151(b)(2)(A)(i) because the term “spouse” also includes implicitly coverage for “widows” and “surviving spouses.” See id. These arguments should be rejected out of hand. As the Third Circuit held in Robinson, it is simply “illogical” to claim that a “widow” or a “surviving spouse” is the same as a “spouse.” See 2009 WL 223856 at \*7 (“[T]o conclude that ‘spouse’ and ‘surviving spouse’ have the identical meaning is illogical and is contrary to our understanding of the legal effect of death on a marriage.”).

In addition, Petitioners’ reading of the statute violates several canons of statutory construction, which the Fourth Circuit has indicated this Court must apply in interpreting a statute under Step One of the Chevron analysis. See Kentuckians for the Commonwealth, Inc., 317 F.3d at 441. For example, Petitioners’ reading of the statute violates the canon of reading statutory provisions *in pari materia* with nearby related provisions because they would have this Court find that the first sentence of § 1151(b)(2)(A)(i) is wholly divorced from the second and

creates a separate right from that created in the first sentence. See Robinson, 2009 WL 223856 at \*5 (holding that “[t]he first sentence of the immediate relative definition cannot be divorced from the second sentence” but rather the two provisions must be read together); see also Va. Int’l Terminals, Inc. v. Edwards, 398 F.3d 313, 317 (4th Cir. 2005) (discussing requirement to read statutes *in pari materia*). Likewise, while Petitioners contend that the narrow exception provided for a person who “was a spouse” in the second sentence of § 1151(b)(2)(A)(i) should not preclude them from also seeking coverage under the first sentence, this reading of the statute violates the canon that the expression of one specific exception should be interpreted as exclusive of any others. See Robinson, 2009 WL 223856 at \*5 (citing canon of *inclusio unius est exclusio alterius* and holding that “[t]he immediate relative provision contains one exception . . . i.e., the exception covering the situation of a couple who had been married for two years at the time of the citizen-spouse’s death,” and thus courts are not permitted to infer additional exceptions which would allow aliens who are now widows to be classified as immediate relatives). Thus, the reading of § 1151(b)(2)(A)(i) offered by Petitioners should be rejected.<sup>10</sup>

Third, while Petitioners claim that the verb tense used in § 1151(b)(2)(A)(i) and § 1154(b) is not relevant, and thus if an alien is a spouse at some point they can be considered a spouse forever thereafter for purposes of any I-130 application filed at the time of the citizen spouse’s death, this argument runs contrary to well-established rules of statutory construction. See United States v. Wilson, 503 U.S. 329, 333 (1992) (“Congress’ use of a verb tense is significant in construing statutes.”). Indeed, the Third Circuit in Robinson expressly overruled

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<sup>10</sup> Moreover, it should be noted that the primary support for Petitioners’ reading of the statute comes from a block quote from the District Court decision in Robinson which the Third Circuit subsequently reversed. See Response Brief at 23 (quoting at length the District Court decision in Robinson).

the District Court on this point and held that the verb tense in the INA mattered, and only allowed a current spouse to be eligible for immediate relative classification. See Robinson, 2009 WL 223856 at \*4 (“The use of the present tense in 8 U.S.C. § 1154(b) belies Robinson’s contention that an alien’s marital status at the time of filing the I-130 petition controls, and makes plain that the facts in the petition—including the alien’s spousal status—must be true at the time USCIS decides the petition.”). As such, because § 1154(b) requires that the facts entitling the petitioning alien to relief “are true” at the time of adjudication, that means that Petitioners were required to be *current* spouses at the time of adjudication of their I-130 petitions in order for them to be granted. Indeed, that an alien seeking relief must satisfy the standards for relief up until the moment relief is granted is supported by ample precedent from the BIA and this Circuit. See, e.g., Matter of Alarcon, 20 I. & N. Dec. 557, 562 (BIA 1992) (adjustment of status applications must be adjudicated based on the facts as they stand on the date of decision); see also Perez-Vargas v. Gonzales, 478 F.3d 191, 192 (4th Cir. 2007) (noting that alien must satisfy standards for adjustment of status up until, and at, the time of adjudication; alien may lose eligibility for adjustment during pendency of application). As such, Petitioners’ interpretation of the statute should be rejected as contrary to canons of construction evaluating the verb tense choices made by Congress in its adoption of relevant statutory provisions.

In sum, despite the myriad arguments proffered by Petitioners straining to fit their cases under the first sentence of § 1151(b)(2)(A)(i), these arguments should be rejected because the statutory provision is pellucidly clear: the first sentence of § 1151(b)(2)(A)(i) is inapplicable to Petitioners because it only applies to current “spouses,” and Petitioners are now “widows;” and the second sentence of § 1151(b)(2)(A)(i) does not apply to their cases because their marriages lasted less than two years. As such, pursuant to the Step One Chevron analysis, Petitioners

simply do not meet the straightforward criteria outlined by Congress for immediate relative classification. And this conclusion is not, as Petitioners claim, assigning a “penalty” against them. See Response Brief at 37. Rather, it is merely applying the criteria established by Congress balancing various and divergent needs, interests, and public policy goals. See Robinson, 2009 WL 223856 at \* 8 (noting how, in enacting § 1151(b)(2)(A)(i), “Congress created a balance” that took into consideration the presumption that a marriage lasting less than two years may not be bona fide with the fact that an alien spouse may develop legitimate ties to the United States where the marriage lasts more than two years).

**b. Respondents’ Construction Of § 1151(b)(2)(A)(i) Is Consistent With BIA Precedent On This Precise Issue.**

Second, BIA precedent further confirms the ordinary meaning that should be given to the express terms of the statute. Indeed, the BIA has reached the precise issue presented here, and held that a widow shall not be considered a “spouse” for purposes of an immediate relative classification, and thus the death of the U.S. citizen who filed the I-130 petition on which the beneficiary’s I-485 was dependent means that the I-130 must be denied as a result of the U.S. citizen’s passing, and in turn the I-485 must be denied because a visa is unavailable. See Matter of Varela, 13 I. & N. Dec. 453 (BIA 1970), *available at* 1970 WL 18713. In addition, the BIA reached the same decision in its denial of Petitioner Hassan’s appeal because it held that after the death of U.S. citizen Norris, Petitioner Hassan was no longer a “spouse” as defined in the first sentence of § 1151(b)(2)(A)(i), and the exception set forth in the second sentence of the statute was inapplicable. See Exhibit 13.

In their response brief, Petitioners’ only retort to the substantive holding in Varela is to claim that a later BIA decision determined that it was procedurally inappropriate for the panel in

Varela to reach the merits of the case. See Response Brief at 34 (discussing how the BIA in Sano concluded that the Varela panel should not have exercised jurisdiction over the case). Petitioners' claim should be rejected because the BIA decision in Varela simply cannot be so lightly tossed aside. Indeed, this Circuit has indicated as a general matter that BIA decisions should be consulted for guidance by courts in deciphering immigration-related statutes. Puentes Fernandez v. Keisler, 502 F.3d 337, 343 (4th Cir. 2007). Thus, simply because the Sano panel made the procedural determination that the Varela petitioner lacked standing to bring her claim does not mean that the substantive holding in Varela is entitled to no weight at all in this case. The Varela panel reached the very issue presented here, and thus it deserves much greater attention than Petitioners would afford it. Indeed, the Court in Turek found the BIA's Varela opinion particularly instructive. See Turek, 450 F. Supp. 2d at 740 (citing Varela and holding that it is "persuasive that the BIA had previously determined that the beneficiary of a spousal immediate relative petition would be ineligible for that status if the petitioning spouse dies before the statutory two-year time period"). Accordingly, contrary to Petitioners' invitation to simply ignore a BIA decision directly on point with the issue presented here, Varela should be given due consideration, and indeed it further confirms that the language of the statute is clear and unambiguous and does not permit the construction offered by Petitioners.

**c. Respondents' Construction Of § 1151(b)(2)(A)(i) Is Consistent With Subsequent Congressional Action.**

Finally, as detailed more expansively in Respondents' initial moving brief, recent Congressional action demonstrates that Respondents' construction of § 1151(b)(2)(A)(i) is correct. The United States Supreme Court has concluded that when Congress takes subsequent action, it can be indicative of the Congressional intent and understanding behind existing

statutes. See Heckler v. Turner, 470 U.S. 184, 208-09 (1985). And here, that is precisely what took place. In the last Congressional term, HR 6034—which was a bill to amend the statute to contain the express relief that Petitioners advocate for here—was voted out of committee and referred to the entire Congress for passage on October 3, 2008. See 154 Cong. Rec. D. 867, 869; 154 Cong. Rec. H. 10827, 10827; see also 110 H. Rpt. 911 (Congressional report stating: “When a couple is married less than 2 years and the U.S. citizen petitioner dies before the petition is filed and adjudicated, the spouse is no longer eligible for permanent residence and must immediately return to his or her home country or be subject to deportation.”) (emphasis added). Thus, while HR 6034 was not voted on by the full Congress nor sent to the President, House Committee report shows that Members of Congress understand the statute to read the same way the Agency does. In addition, the fact that Congress was in the process of seeking to amend the statute in a way that would provide for the relief that Petitioners advocate for here provides further support that Respondents’ interpretation of the statute is the correct one.

Further, in this current Congressional term, a similar bill has recently been introduced to amend § 1151(b)(2)(A)(i) to provide the very relief that Petitioners here claim is already available under the statute. See H.R. 264 (introduced January 7, 2009, and currently pending before a House Committee). Accordingly, subsequent congressional activity makes it clear that Congress’s understanding of the statute supports USCIS’s position.

Moreover, aside from these bills which seek to amend the statute at issue here, other Congressional activity shows that when Congress wants to provide exceptions for widows to be eligible for immediate relative classification without any durational requirement for the marriage, it will do so expressly, and not, as Petitioners contend, sub silentio. For example, in passing the FY2004 National Defense Authorization Act, Pub. L. No. 108-136, Division A, §

1703, 117 Stat. 1392, 1693-96 (2003), Congress extended eligibility to alien widows of U.S. citizen military personnel who died as a result of combat. Likewise, in the USA PATRIOT Act, Pub. L. No. 107-56, §§ 421 and 423, 115 Stat. 272, 360-363, Congress extended I-130 eligibility to alien spouses of U.S. citizens killed as a result of terrorist activity. These statutes indicate that when Congress wants to extend benefits to widows without regard to how long the marriage lasted, it will do so expressly. See Robinson, 2009 WL 223856 at \*6 n.7

In their response brief, Petitioners' only retort to this subsequent legislative action is to attempt to downplay its significance. See Response Brief at 30-32. Indeed, rather than confront the proposed amendments head-on, Petitioners brush them aside, and in the process ask the Court to ignore subsequent Congressional action which speaks to the precise issue raised here. Again, such evidence pertaining to the meaning of § 1151(b)(2)(A)(i) cannot be so lightly tossed aside. Subsequent Congressional activity in this instance is telling and illustrative of Congress's understanding of the statute it previously enacted. As such, it should be given due weight by this Court, and confirms that Respondents' position is the correct one.

In sum, the terms in § 1151(b)(2)(A)(i) are clear and unambiguous and afford no room for Petitioners' construction of the statute. Hence, Petitioners' Complaint fails as a matter of law, and thus should be dismissed under Step One of the Chevron analysis.

**2. Alternatively, Even If The Definition Of "Immediate Relative" Is Not Clear Under These Circumstances, The Agency's Determination Should Still Be Given Deference And Upheld As A Reasonable Construction Of The Statute.**

As detailed supra, if the Court determines that the Congressionally-enacted language is not clear, the Court must proceed to Step Two of the Chevron analysis. See Kentuckians for the Commonwealth, Inc., 317 F.3d at 441. In this Step Two analysis, the Agency's interpretation is to be credited and given deference provided the Agency's construction is "permissible." Id.

And in determining whether to defer to an Agency's interpretation, courts should afford particular deference where the Agency's interpretation of a statute is related to an area uniquely entrusted to the Agency's expertise. See id. This is particularly true where, as here, the issue involves immigration statutes. See INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (“[J]udicial deference to the Executive Branch is especially appropriate in the immigration context . . .”).

Here, as detailed more fully in Respondents' initial moving brief, under a Step Two Chevron analysis, the Agency's interpretation of the definition of an “immediate relative” in § 1151(b)(2)(A)(i) should be afforded deference and upheld as a reasonable construction of the statute because: (1) it avoids rendering any part of the statute redundant or superfluous; (2) it is consistent with the purpose of the immediate relative classification, i.e. to promote family unity *for the U.S. citizen*; and (3) it is consistent with the long-established administrative position that an alien must satisfy the conditions for adjustment up until, and at, the time of adjudication.

In their response brief, Petitioners raise only two arguments regarding the Step Two analysis, both of which should be rejected. First, Petitioners claim that this Court need not even reach Step Two of the Chevron analysis because the terms of the statute are clear. See Response Brief at 33. Respondents agree that the terms of the statute are clear and thus the Court need not reach Step Two; however, Respondents disagree with Petitioners' claims that the statute can be read in a way that provides them with any relief because the clear terms of the statute demonstrate that Respondents' construction of the statute is the correct one and Petitioners' interpretation is unfounded. Second, the other argument Petitioners raise as to the Step Two Chevron analysis is that the agency's position is based solely on Varela, which they claim was held to be extra-judicial. See Response Brief at 33. Petitioners' argument here errs in two

respects. First, as detailed supra, the substantive holding in Varela cannot be so lightly disregarded, notwithstanding the subsequent procedural ruling in Sano. Second, Petitioners are simply wrong to indicate that Respondents' position is derived solely from Varela. Rather, Respondents' construction of the statute is supported by: (1) the clear terms of the statute; (2) BIA precedent (which includes not only Varela but also the per curiam BIA ruling rejecting Petitioner Hassan's appeal, which is attached as Exhibit 13); (3) one Circuit Court decision (Robinson) and two District Court opinions (Turek and Burger); (4) other related INA provisions, including § 1154(b); and (5) subsequent Congressional activity wherein Members of Congress expressed their understanding that the statute as currently drafted comported with Respondents' position. Thus, Petitioners' arguments should be rejected. And indeed, if the Court proceeds to a Chevron Step Two analysis, it should be noted that Petitioners have failed to take issue with any of the other rationales offered by Respondents in their initial moving brief as to why their construction is a permissible one. See generally Response Brief at 33-38 (failing to address Respondents' arguments as to the Step Two Chevron analysis). Accordingly, because Petitioners have failed to demonstrate that the Agency's interpretation of § 1151(b)(2)(A)(i) is not permissible, if the Court proceeds to a Step Two Chevron analysis, the Agency's construction of the statute should be upheld because it is a reasonable interpretation of the statute that is not inconsistent with its purpose and is based on long-standing administrative policies from agencies uniquely entrusted with construing immigration-related statutes.

### **III. CONCLUSION**

Based on the foregoing, Respondents respectfully request that this Court dismiss Petitioner's Complaint, or alternatively, grant summary judgment in favor of Respondents.

Respectfully submitted,

Rod J. Rosenstein  
United States Attorney

By: \_\_\_\_\_/s/\_\_\_\_\_  
Jason D. Medinger (Bar No. 28470)  
Assistant United States Attorney  
36 South Charles Street, Fourth Floor  
Baltimore, Maryland 21201  
(410) 209-4800

Of Counsel:  
Elizabeth J. Stevens  
Patricia Bruckner  
Office of Immigration Litigation  
District Court Section  
Department of Justice, Civil Division  
P.O. Box 868, Ben Franklin Station  
Washington, DC 20044  
(202) 616-1246

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OSSERRITTA ROBINSON v. JANET NAPOLITANO, \* Secretary of the Department of Homeland Security; MICHAEL AYLES, \* Acting Deputy Director, U.S. Citizenship and Immigration Services, Appellants

\* Amended pursuant to F.R.A.P. 43(c)(2)

No. 07-2977

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2009 U.S. App. LEXIS 1946

September 9, 2008, Argued  
February 2, 2009, Filed

**PRIOR HISTORY: [\* 1]**

On Appeal from the United States District Court for the District of New Jersey. (D.C. No. 06-cv-05702). District Judge: Honorable Stanley R. Chesler.

[Robinson v. Chertoff, 2007 U.S. Dist. LEXIS 34956 \(D.N.J., May 14, 2007\)](#)

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Appellee applicant sued appellants, the Secretary of the Department of Homeland Security and the Director of U.S. Citizenship and Immigration Services (USCIS), seeking a writ of mandamus and declaratory and injunctive relief requiring USCIS to process requests for an immigrant visa and adjustment of status. The district court denied appellants' motion to dismiss and granted summary judgment for the applicant. Appellants sought review.

**OVERVIEW:** The applicant, a citizen of Jamaica, married a U.S. citizen. The applicant's husband filed a visa petition on behalf of the applicant as an immediate relative (an I-130 petition) under [8 U.S.C.S. § 1154\(a\)](#), and the applicant filed an adjustment of status application (an I-485 application) under [8 U.S.C.S. § 1255\(a\)](#). The husband died before the I-130 petition was processed and less than two years after the couple's marriage. Appellants argued that the I-130 petition terminated automatically upon the death of the applicant's husband because the applicant was no longer an "immediate relative" within the meaning of [8 U.S.C.S. § 1151\(b\)\(2\)\(A\)\(i\)](#). The court of appeals agreed with appellants' interpretation. For purposes of granting an immigrant visa under [§ 1154\(b\)](#), the applicant's marital status at the time the I-130 petition was decided--not when the petition was filed--was controlling. Under [§ 1151\(b\)\(2\)\(A\)\(i\)](#), an alien spouse ceased to be an immediate relative when the citizen spouse died unless the couple had been married at least two years at the time of death. "Surviving spouse" did not have the same meaning as "spouse" under [§ 1151\(b\)\(2\)\(A\)\(i\)](#).


**OUTCOME:** The district court's judgment was reversed with directions to grant appellants' motion to dismiss.

**CORE TERMS:** spouse's, alien, sentence, visa, surviving spouse, married, marriage, immigration, immigrant, widow, died, self-petition, terminate, qualify, Black's Law Dictionary's, eligibility, beneficiary, dies, time of filing, statutory construction, classification, eligible, couple, defer, petitioning, qualifying, deceased, remarry, marital, tense

## LEXISNEXIS® HEADNOTES

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[Immigration Law](#) > [Judicial Review](#) > [Discretionary Actions](#) 

**HN1**  Where a matter is a purely legal question and does not implicate agency discretion, the Immigration and Nationality Act's jurisdictional bar, [8 U.S.C.S. § 1252\(a\)\(2\)\(B\)\(ii\)](#), which precludes judicial review of most discretionary immigration decisions, is not applicable. [More Like This Headnote](#)


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[Civil Procedure](#) > [Appeals](#) > [Standards of Review](#) > [De Novo Review](#) 

[Governments](#) > [Legislation](#) > [Interpretation](#) 


**HN2**  A court of appeals exercises plenary review of a district court's statutory interpretation, but affords deference to a reasonable interpretation adopted by an agency. [More Like This Headnote](#)

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**HN3**  A United States citizen who seeks to gain lawful permanent resident status for an eligible family member must begin the process by filing an I-130 petition with the United States Citizenship and Immigration Services on behalf of an alien who is an "immediate relative." [8 U.S.C.S. §§ 1151\(b\)\(2\)\(A\)\(i\)](#), [1154\(a\)\(1\)\(A\)\(i\)](#), [8 C.F.R. § 204.1\(a\)\(1\)](#). Concurrently, or thereafter, the alien spouse for whom the I-130 petition was filed (the "immediate relative") must file an I-485 application for adjustment of status. [8 U.S.C.S. § 1255\(a\)](#), [8 C.F.R. § 245.1\(a\)](#). [More Like This Headnote](#)

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**HN4**  "Immediate relatives" are defined in the Immigration and Nationality Act as: 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. In the case of an alien who was the spouse of a citizen of the United States for at least two years at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, the alien shall be considered, for purposes of [8 U.S.C.S. § 1151\(b\)](#), to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under [8 U.S.C.S. § 1154\(a\)\(1\)\(A\)\(ii\)](#) (an I-360 petition) within two years after such date and only until the date the spouse remarries. [8 U.S.C.S. § 1151\(b\)\(2\)\(A\)\(i\)](#). [More Like This Headnote](#)


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**HN5**  An I-360 petition allows a widow/er of a U.S. citizen to self-petition for lawful


permanent residence status if, inter alia, she or he was married for at least two years and the petition is filed within two years of the citizen spouse's death. [8 U.S.C.S. § 1154\(a\)\(1\)\(A\)\(ii\)](#), [8 C.F.R. § 204.2\(b\)](#), [\(i\)\(1\)\(iv\)](#). [More Like This Headnote](#)

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**HN6**  The United States Citizenship and Immigration Services "shall" approve an I-130 petition filed by a citizen spouse only if it determines, after an investigation, 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. [8 U.S.C.S. § 1154\(b\)](#). [More Like This Headnote](#)

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**HN7**  Approval of an I-130 petition renders an immediate relative eligible for adjustment of status under [8 U.S.C.S. § 1255\(a\)](#). [More Like This Headnote](#)


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**HN8**  See [8 U.S.C.S. § 1255\(a\)](#).


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**HN9**  Because immediate relative visas are not subject to numerical visa limitations, [8 U.S.C.S. § 1151\(b\)\(2\)\(A\)\(i\)](#), once an I-130 petition is approved the immigrant visa is immediately available to the alien spouse at the time her I-485 application is filed, [8 U.S.C.S. § 1255\(a\)](#). Thus, eligibility to adjust status to that of an lawful permanent resident is contingent upon approval of the I-130 petition. [More Like This Headnote](#)

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**HN10**  [8 U.S.C.S. § 1154\(b\)](#), the statutory provision governing the grant of immigrant visas, states that the Attorney General (now the Secretary of Homeland Security) 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 relative specified in [8 U.S.C.S. § 1151\(b\)](#), approve the petition. [8 U.S.C.S. § 1154\(b\)](#). [More Like This Headnote](#)

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**HN11**  The use of the present tense in [8 U.S.C.S. § 1154\(b\)](#) belies the contention that an alien's marital status at the time of filing an I-130 petition controls, and makes plain that the facts in the petition--including the alien's spousal status--must be true at the time the United States Citizenship and Immigration Services decides the petition. [More Like This Headnote](#)

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**HN12**  [8 U.S.C.S. § 1255](#), the section governing adjustment of status, provides that the Attorney General may adjust the status of an alien if: (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant


visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed. [8 U.S.C.S. § 1255\(a\)](#). [More Like This Headnote](#)


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**HN13**  The natural reading of [8 U.S.C.S. § 1255\(a\)](#) is that the final clause applies to only the third requirement. [More Like This Headnote](#)


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**HN14**  The doctrine of the last antecedent teaches that qualifying words, phrases, and clauses are to be applied to the words or phrases immediately preceding and not to others more remote. [More Like This Headnote](#)

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**HN15**  [8 C.F.R. §§ 204.1\(a\)\(1\)](#) and [103.2\(b\)\(12\)](#) merely set up the procedures by which a citizen petitions for an immigrant visa for a relative. [8 C.F.R. §§ 204.1\(a\)\(1\)](#), [204.2\(a\)\(1\)](#). They do not suggest that the agency must grant the application of a surviving spouse by considering only the marital status at the time the petition was filed. Likewise, the regulation that provides that the agency must deny the petition if it receives additional evidence that shows that the surviving spouse was not eligible at the time of filing, [8 C.F.R. § 103.2\(b\)\(12\)](#), merely shows that eligibility at the time of filing is a necessary condition for the grant of a petition; it does not establish that eligibility at that time is sufficient if the citizen spouse dies before the adjudication. [More Like This Headnote](#)


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**HN16**  Eligibility for an immediate relative visa depends upon the alien's status at the time the United States Citizenship and Immigration Services adjudicates the I-130 petition, not when that petition was filed. This becomes dispositive in the situation when a citizen spouse dies before the citizen spouse and the alien were married for two years. [More Like This Headnote](#)


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**HN17**  See [8 U.S.C.S. § 1151\(b\)\(2\)\(A\)\(i\)](#).


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**HN18**  The first sentence of the immediate relative definition under [8 U.S.C.S. § 1151\(b\)\(2\)\(A\)\(i\)](#) cannot be divorced from the second sentence. The first sentence provides a general definition of immediate relatives based on familial relationships to a U.S. citizen. In the same sentence, the definition of parent is qualified by adding that a parent is deemed an immediate relative only if his or her child is at least twenty-one years old. The second sentence qualifies the definition of spouse by including as an immediate relative the widow or widower of a citizen spouse who died as long as s/he had been the spouse of the United States citizen for at least two years at the time of the citizen spouse's death. For those surviving spouses who had been married for two years but for whom no petition for immediate relative status had yet been filed, the section also provides an opportunity to remedy that gap by authorizing the surviving spouse to self-petition within two years of the death of the citizen spouse. [More Like This Headnote](#)

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**HN19**  The two-year marriage requirement under [8 U.S.C.S. § 1151\(b\)\(2\)\(A\)\(i\)](#) applies


to both groups of surviving spouses, those for whom the citizen spouse had filed a petition for an immediate relative visa before his death and those for whom the citizen spouse had not filed the petition. [More Like This Headnote](#)


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**HN20**  The immediate relative provision under [8 U.S.C.S. § 1151\(b\)\(2\)\(A\)\(i\)](#) contains one exception to the rule that the death of the citizen spouse terminates immediate relative status if the death occurs before the petition is granted, i.e., the exception covering the situation of a couple who had been married for two years at the time of the citizen-spouse's death. [More Like This Headnote](#)


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**HN21**  It is a canon of statutory construction that the inclusion of certain provisions implies the exclusions of others. The doctrine of *inclusio unius est exclusio alterius* informs a court to exclude from operation those items not included in a list of elements that are given effect expressly by the statutory language. [More Like This Headnote](#)


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**HN22**  Under [8 U.S.C.S. § 1151\(b\)\(2\)\(A\)\(i\)](#), a spouse ceases to be an immediate relative when the citizen spouse dies unless the couple had been married at least two years at the time of death. In effect, the second sentence qualifies which spouses of deceased citizens are immediate relatives, just as the last clause of the first sentence qualifies which parents of citizens are immediate relatives. [More Like This Headnote](#)


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**HN23**  A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute. [More Like This Headnote](#)

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**HN24**  The Immigration and Nationality Act does not provide a helpful definition of the term "spouse" in its definitional section. [8 U.S.C.S. § 1101](#). Instead, it negatively defines spouse by stating who is not a spouse: The terms "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.S. § 1101\(a\)\(35\)](#). This cannot be considered a "definition" in any meaningful way because it repeats the terms it seeks to define and does not preclude common understandings of the term. [More Like This Headnote](#)

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**HN25**  Congress's choice to include specific definitions of common family words--child and parent--in the Immigration and Nationality Act but not to include such a definition of spouse strongly suggests that the ordinary meaning of spouse at the time of the enactment of the immediate relative provision should control. [More Like This Headnote](#)

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**HN26**  To conclude that "spouse" and "surviving spouse" have the identical meaning


under [8 U.S.C.S. § 1151\(b\)\(2\)\(A\)\(i\)](#) is illogical and is contrary to one's understanding of the legal effect of death on a marriage. The standard legal effect of death on marriage is that it terminates the legal union. [More Like This Headnote](#)


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[Family Law](#) > [Paternity & Surrogacy](#) > [Proof of Paternity](#) > [Presumptions](#) > [Factors](#) 


**HN27**  The domestic relations law of New Jersey suggests that a marriage terminates upon the death of one spouse. [N.J. Stat. Ann. § 9:17-43\(a\)\(1\)](#) (2002) provides that a former husband is presumed to be the father of a child born within 300 days after the marriage is terminated by death, annulment or divorce; under N.J. Stat. Ann. § 2C:24-1a(1) (2005), the belief that a spouse is dead is a defense to bigamy. [More Like This Headnote](#)


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**HN28**  The very language of the immediate relative provision under the Immigration and Nationality Act distinguishes between a living spouse and a surviving spouse when it states that an alien who was the spouse of a citizen of the United States for at least two years at the time of the citizen's death shall be considered to remain an immediate relative. [8 U.S.C.S. § 1151\(b\)\(2\)\(A\)\(i\)](#). [More Like This Headnote](#)

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**HN29**  A court's obligation is to interpret a statute according to its language. [More Like This Headnote](#)

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**HN30**  The core purpose of the U.S. family-based immigration policy is the promotion of family unification for U.S. citizens and lawful permanent residents. [8 U.S.C.S. § 1151\(b\)\(2\)\(A\)\(i\)](#). Reunification of families is emphasized as the foremost consideration of the legislation. [More Like This Headnote](#)

**COUNSEL:** [Alison R. Drucker](#)  (Argued), United States Department of Justice, Office of Immigration Litigation, Washington, D.C.; [Alex Kriegsmann](#) , Office of United States Attorney, Newark, N.J., Attorneys for Appellants.

Jeffrey A. Feinbloom (Argued), Feinbloom Bertisch, New York, N.Y., Attorney for Appellee.

**JUDGES:** Before: [SLOVITER](#) , [FUENTES](#) , and [NYGAARD](#) , Circuit Judges. [NYGAARD](#) , Circuit Judge, dissenting.

**OPINION BY:** [SLOVITER](#) 

## OPINION

OPINION OF THE COURT

[SLOVITER](#) , Circuit Judge.

The issue before us is whether an alien married to a United States citizen remains an "immediate relative," within the meaning of the Immigration and Nationality Act ("INA"), if the couple had been married for less than two years when her citizen spouse died. It is an issue this court has never addressed.

I.

### Factual and Procedural History

Osserritta Robinson ("Robinson"), a citizen and national of Jamaica, entered the United States on January 14, 2002, as a non-immigrant visitor on a B-2 visa and married Louis Robinson ("Mr. Robinson"), a United States citizen, in February 2003. In March 2003, Mr. Robinson filed [\*2] a Petition for Alien Relative ("I-130 petition") for an immigrant visa on behalf of his wife as an "immediate relative." At the same time, Robinson filed an I-485 application to adjust her immigration status to that of a lawful permanent resident ("LPR").

Mr. Robinson died on October 15, 2003, in the Staten Island Ferry accident. On October 15, 2005, the U.S. Citizenship and Immigration Services ("USCIS") informed Robinson that her I-130 petition had been automatically terminated upon the death of her husband. According to USCIS, Robinson was no longer an "immediate relative" within the meaning of the INA because her husband's death occurred before the couple had been married for two years.

Robinson filed a petition for a writ of mandamus and a complaint for declaratory and injunctive relief in the United States District Court for the District of New Jersey against Michael Chertoff, the Secretary of the Department of Homeland Security, and Emilio Gonzalez, Director, U.S. Citizenship and Immigration Services,<sup>1</sup> requesting that the court order USCIS to reopen her I-130 petition and I-485 application and treat her as an "immediate relative" of a United States citizen. The complaint also [\*3] asked the court "to enjoin USCIS from using the death of Mr. Robinson as a discretionary factor in adjudicating Mrs. Robinson's I-485 application." [Robinson v. Chertoff, No. 06-5702, 2007 U.S. Dist. LEXIS 34956, 2007 WL 1412284, at \\*1 \(D.N.J. May 14, 2007\)](#). The District Court denied the Government's motion to dismiss and granted summary judgment in favor of Robinson. Thereupon, the District Court set aside USCIS' determination that Robinson was not a spouse, ordered USCIS to process her I-130 petition and I-485 application, and granted a declaratory judgment that Robinson "is an immediate relative under [8 U.S.C. § 1151\(b\)\(2\)\(A\)\(i\)](#) and for the purposes of adjudicating an I-130 petition." App. at 14.<sup>2</sup> The Government appeals.

### FOOTNOTES

<sup>1</sup> For purposes of convenience, we will refer to them jointly as "Government."

<sup>2</sup> The District Court also denied Robinson's "request for injunctive relief limiting the discretion of the USCIS in adjudicating her I-485 application . . . [because the] question has not been briefed and is not properly before the Court." [Robinson, 2007 U.S. Dist. LEXIS 34956, 2007 WL 1412284, at \\*5](#). Robinson did not appeal that order.

II.

### Jurisdiction and Standard of Review

The District Court had jurisdiction under [28 U.S.C. § 1331](#) and [Section 704 \[\\*4\]](#) of the APA, [5 U.S.C. § 704](#), to review the meaning of the term "immediate relative" as it appears in [8 U.S.C. § 1151\(b\)\(2\)\(A\)\(i\)](#). <sup>HNT</sup> Because this is a "purely legal question and does not

implicate agency discretion," the INA's jurisdictional bar, [8 U.S.C. § 1252\(a\)\(2\)\(B\)\(ii\)](#), which precludes judicial review of most discretionary immigration decisions, is not applicable in this case. [Pinho v. Gonzales, 432 F.3d 193, 204 \(3d Cir. 2005\)](#).

We have jurisdiction under [28 U.S.C. § 1291](#). <sup>HN2</sup> "We exercise plenary review of the District Court's statutory interpretation, but afford deference to a reasonable interpretation adopted by the agency." [Pinho, 432 F.3d at 204](#).

### III.

#### Statutory Scheme

<sup>HN3</sup> A United States citizen who seeks to gain lawful permanent resident status for an eligible family member must begin the process by filing an I-130 petition with USCIS on behalf of an alien who is an "immediate relative." [8 U.S.C. §§ 1151\(b\)\(2\)\(A\)\(i\), 1154\(a\)\(1\)\(A\)\(i\)](#); [8 C.F.R. § 204.1\(a\)\(1\)](#). Concurrently, or thereafter, the alien spouse <sup>3</sup> for whom the I-130 petition was filed (the "immediate relative") must file an I-485 application for adjustment of status. [8 U.S.C. § 1255\(a\)](#); [8 C.F.R. § 245.1\(a\)](#). <sup>HN4</sup> "Immediate relatives" [**\*5**] are defined in the INA as:

[T]he 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. 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 and was not legally separated from the citizen at the time of the citizen's death, 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 [an I-360 petition] within 2 years after such date and only until the date the spouse remarries.

[8 U.S.C. § 1151\(b\)\(2\)\(A\)\(i\)](#) (emphasis added). <sup>4</sup>

#### FOOTNOTES

<sup>3</sup> The statute is gender neutral. Because in this case, the citizen spouse was a male, we refer to the gender as applicable to the facts.

<sup>4</sup> <sup>HN5</sup> An I-360 petition allows a widow/er of a U.S. citizen to self-petition if, inter alia, she or he was married for at least two years and the petition is filed within two years of the citizen spouse's death. See [8 U.S.C. § 1154\(a\)\(1\)\(A\)\(ii\)](#); [8 C.F.R. §§ 204.2\(b\), \(i\)\(1\)\(iv\)](#).

<sup>HN6</sup> USCIS "shall" approve [**\*6**] the I-130 petition filed by the citizen spouse only if it determines, after an investigation, "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." [8 U.S.C. § 1154\(b\)](#).

<sup>HN7</sup> Approval of the I-130 petition renders the immediate relative eligible for adjustment of status under [8 U.S.C. § 1255\(a\)](#), which provides, in pertinent part:

<sup>HN8</sup> The status of an alien . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is

admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

[8 U.S.C. § 1255\(a\)](#). <sup>HN9</sup> Because immediate relative visas are not subject to numerical visa limitations, [8 U.S.C. § 1151\(b\)\(2\)\(A\)\(i\)](#), once the I-130 petition is approved the "immigrant visa is immediately available" to the alien spouse at the time her I-485 application is filed, [8 U.S.C. § 1255\(a\)](#). Thus, eligibility to adjust status [**\*7**] to that of an LPR is contingent upon approval of the I-130 petition.

#### IV.

#### Discussion

Robinson argues that she remained an "immediate relative" within the meaning of [8 U.S.C. § 1151\(b\)\(2\)\(A\)\(i\)](#) after the death of her husband. The Government counters that Robinson is no longer a "spouse" eligible to be considered an "immediate relative" because she had not been married to her citizen spouse for two years at the time of his death. The Government reads the second sentence of [section 1151\(b\)\(2\)\(A\)\(i\)](#) as qualifying the term "spouse" in the first sentence of the section. In other words, the Government argues that a spouse remains an "immediate relative" within the meaning of the INA after the death of his or her citizen spouse only if the couple had been married for two years at the time of the citizen's death.

Robinson argues in response that because the first sentence of the provision does not in any way qualify the term "spouse," she remains a spouse after her husband's death. She interprets the second sentence (which contains the two-year marriage requirement) as granting a separate right for widows to self-petition for visas rather than as a limitation on the definition of spouse.

More than [**\*8**] thirty-five years ago the Bureau of Immigration Appeals ("BIA") considered the effect of a citizen spouse's death on a pending petition for an immigrant visa on behalf of the alien spouse. In [In re Varela, 13 I. & N. Dec. 453, 453-54](#) (B.I.A. 1970), the BIA held that an alien spouse was no longer a "spouse" because her citizen spouse died prior to a determination of her I-130 petition. The Government argues that we should defer to the BIA precedent.

The District Court, without even citing *In re Varela*, agreed with Robinson's interpretation of the immediate relative provision, relying on the reasoning of the Court of Appeals for the Ninth Circuit in [Freeman v. Gonzales, 444 F.3d 1031 \(9th Cir. 2006\)](#). The Ninth Circuit refused to accord deference to *Varela* because it stated that the BIA's decision "lack[ed] . . . statutory analysis, . . . [and] is further undercut by the BIA's later finding [in [In re Sano, 19 I. & N. Dec. 299](#) (B.I.A. 1985)] that it was 'extra-jurisdictional.'" <sup>5</sup> [Freeman, 444 F.3d at 1038](#) (citation added).

#### FOOTNOTES

<sup>5</sup> In *Sano*, the BIA held that it had no jurisdiction to address an appeal by the beneficiary from the denial of a visa petition; the BIA held that it had authority to [**\*9**] hear appeals by only a visa petitioner (i.e., the citizen spouse who filed a visa petition on behalf of his alien spouse, but died before its approval). [19 I. & N. Dec. at 301](#).

Instead, the Ninth Circuit held that the first and second sentences of the statutory provision "stand[] independent" of each other and provide for "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." [Freeman, 444 F.3d at 1041 n.14, 1042](#). It reasoned that because

the only limitation on the definition of "immediate relative" in the first sentence relates to alien parents (the grant of immediate relative status is limited to those whose citizen child is at least 21 years old) and "[t]here is no comparable qualifier to be a 'spouse,'" the term "immediate relative" means the spouse of a U.S. citizen, "without exception." [Id. at 1039](#). Thus, according to that court, "Mrs. Freeman qualified as the spouse of a U.S. citizen when she and her husband petitioned for adjustment of status, and absent a clear statutory provision voiding her spousal status upon her husband's untimely death, she remains a surviving [\*10] spouse." [Id. at 1039-40](#) (emphasis in original).

The Freeman court rejected the Government's argument that the second sentence implicitly qualifies the general definition of spouse by imposing a two-year marriage requirement. Instead, it viewed the second sentence as applying "to those aliens whose citizen spouses did not initiate an adjustment of status proceeding before they died, granting such surviving spouses a beneficial right to file an immediate relative petition even without a living citizen spouse to vouch for the fact of the marriage." [Id. at 1041](#).

Relying on Freeman, the District Court held that Robinson remained an immediate relative after the death of her spouse and noted that, "[t]he Court cannot imagine that Congress intended the time of death combined with the pace of adjudication, rather than the petitioner's conscious decision to promptly file an I-130 petition, to be the proper basis for determining whether the alien qualifies as an immediate relative." [Robinson, 2007 U.S. Dist. LEXIS 34956, 2007 WL 1412284, at \\*5](#).

Robinson argues that the death of her husband did not affect her status as an immediate relative which, she contends, "vested" at the time her husband filed the I-130 petition. The Government [\*11] contends that "immediate relative status" is not determined at the time the I-130 petition was filed but at the time the petition is adjudicated. It supports that argument by noting that the present tense is used in <sup>HN10</sup> [8 U.S.C. § 1154\(b\)](#), the statutory provision governing the grant of immigrant visas. This provision states that the Attorney General (now the Secretary of Homeland Security) <sup>6</sup> "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 relative specified in [section 1151\(b\)](#) . . . , approve the petition." [8 U.S.C. § 1154 \(b\)](#) (emphasis added).

## FOOTNOTES

<sup>6</sup> The Homeland Security Act of 2002 transferred the authority to grant visas from the Attorney General to the Secretary of the Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, § 402(4), 116 Stat. 2135, 2178 (codified at [6 U.S.C. § 202\(4\)](#)).

The District Court believed that the fact that "the statute is written in the present tense is not particularly significant," [Robinson, 2007 U.S. Dist. LEXIS 34956, 2007 WL 1412284, at \\*4](#), but we disagree. <sup>HN11</sup> The use of the present tense in [8 U.S.C. § 1154\(b\)](#) belies Robinson's contention that an alien's marital status [\*12] at the time of filing the I-130 petition controls, and makes plain that the facts in the petition - including the alien's spousal status - must be true at the time USCIS decides the petition.

The present tense is also used in <sup>HN12</sup> the section governing adjustment of status, which provides that the Attorney General may adjust the status of an alien if:

- (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time

his application is filed.

[8 U.S.C. § 1255\(a\)](#) (emphasis added).

Robinson relies on the last clause of the subsection ("at the time his application is filed") to argue that eligibility for immediate relative status at the time of filing the application is controlling. Robinson's statutory construction of the provision is not persuasive. Instead, <sup>HN13</sup> the natural reading of this provision is that the final clause applies to only the third requirement. See [United States v. Hodge, 321 F.3d 429, 436 \(3d Cir. 2003\)](#) (<sup>HN14</sup> "The doctrine of the last antecedent teaches that 'qualifying words, phrases, and clauses are to be [\*13] applied to the words or phrases immediately preceding' and not to 'others more remote.'" (quoting [Resolution Trust Corp. v. Nernberg, 3 F.3d 62, 65 \(3d Cir. 1993\)](#)). If the phrase, "at the time his application is filed" applied to more than the third requirement, its natural placement would be before the second as well as the third requirement.

In addition to her attempt to find support in the statutory language, Robinson also argues that under the regulations governing the processing of petitions her eligibility for a visa is to be determined at the time of filing. She notes, for example, that [8 C.F.R. § 204.1\(a\)\(1\)](#) provides that the citizen spouse must "file" Form I-130 for a qualifying relative and [8 C.F.R. § 103.2\(b\)\(12\)](#) provides that evidence in response to a request must establish eligibility at "time of filing." <sup>HN15</sup> However, these regulations merely set up the procedures by which a citizen petitions for a relative. [8 C.F.R. §§ 204.1\(a\)\(1\), 204.2\(a\)\(1\)](#). They do not suggest that the agency must grant the application of a surviving spouse by considering only the marital status at the time the petition was filed. Likewise, the regulation to which Robinson points that provides that the [\*14] agency must deny the petition if it receives additional evidence that shows that the surviving spouse was not eligible at the time of filing, [8 C.F.R. § 103.2\(b\)\(12\)](#), merely shows that eligibility at the time of filing is a necessary condition for the grant of a petition; it does not establish that eligibility at that time is sufficient if the citizen spouse dies before the adjudication. As such, the regulations do not support Robinson's argument.

Accordingly, we hold that <sup>HN16</sup> eligibility for an immediate relative visa depends upon the alien's status at the time USCIS adjudicates the I-130 petition, not when that petition was filed. This becomes dispositive in the situation when a citizen spouse dies before the citizen spouse and the alien were married for two years.

The underlying issue of statutory construction is not complicated. To repeat, [section 1151\(b\)\(2\)\(A\)\(i\)](#) provides:

<sup>HN17</sup> [T]he term "immediate relatives" means 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. 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 [\*15] death and was not legally separated from the citizen at the time of the citizen's death, 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\(b\)\(2\)\(A\)\(i\)](#).

<sup>HN18</sup> The first sentence of the immediate relative definition cannot be divorced from the second sentence. The first sentence provides a general definition of immediate relatives based on familial relationships to a U.S. citizen. In the same sentence, the definition of parent is qualified by adding that a parent is deemed an immediate relative only if his or her

child is at least twenty-one years old. The second sentence qualifies the definition of spouse by including as an immediate relative the widow or widower of a citizen spouse who died as long as s/he had been the spouse of the United States citizen for at least two years at the time of the citizen spouse's death. For those surviving spouses who had been married for two years but for whom no petition for immediate relative [\*16] status had yet been filed, the section also provides an opportunity to remedy that gap by authorizing the surviving spouse to self-petition within two years of the death of the citizen spouse.

The language and this interpretation is straightforward. Significantly, <sup>HN19</sup> the two-year marriage requirement applies to both groups of surviving spouses, those for whom the citizen spouse had filed the petition before his death and those for whom the citizen spouse had not filed the petition.

<sup>HN20</sup> The immediate relative provision contains one exception to the rule that the death of the citizen spouse terminates immediate relative status if the death occurs before the petition is granted, i.e., the exception covering the situation of a couple who had been married for two years at the time of the citizen-spouse's death. <sup>7</sup> As we stated in [United States v. McQuilkin](#), 78 F.3d 105 (3d Cir. 1996), <sup>HN21</sup> "It is a canon of statutory construction that the inclusion of certain provisions implies the exclusions of others. The doctrine of *inclusio unius est exclusio alterius* [\*17] 'informs a court to exclude from operation those items not included in a list of elements that are given effect expressly by the statutory language.'" [Id.](#) at 108 (quoting [In re TMI](#), 67 F.3d 1119, 1123 (3d Cir. 1995)). As a result, we conclude that <sup>HN22</sup> a spouse ceases to be an immediate relative when the citizen spouse dies unless the couple had been married at least two years at the time of death. In effect, the second sentence qualifies which spouses of deceased citizens are immediate relatives, just as the last clause of the first sentence qualifies which parents of citizens are immediate relatives.

## FOOTNOTES

<sup>7</sup> The only other exceptions to the rule that immediate relative status terminates upon the death of the citizen spouse are in the cases of abused spouses or children of U.S. citizens and widows of members of the U.S. armed forces killed in combat. A self-petition by an abused spouse or child "shall not [be] adversely affect[ed]" by the death of the citizen-abuser after the filing of a self-petition. [8 U.S.C. § 1154\(a\)\(1\)\(A\)\(vi\)](#). Similarly, a widow of a member of the U.S. armed forces killed in combat "shall be considered . . . to remain an immediate relative after the date of the citizen's [\*18] death" if she self-petitions within two years and does not remarry. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703, 117 Stat. 1392, 1693 (2003). There is no two-year marriage requirement in these situations.

Our reading of the immediate relative provision comports with the ordinary meaning of the term "spouse." <sup>HN23</sup> "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute." [Perrin v. United States](#), 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979). <sup>HN24</sup> The INA does not provide a helpful definition of the term "spouse" in its definitional section. [8 U.S.C. § 1101](#). Instead, it negatively defines spouse by stating who is not a spouse: "The term [sic] '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\(a\)\(35\)](#). This cannot be considered a "definition" in any meaningful way because it repeats the terms it seeks to define and, [\*19] as Robinson herself notes, "does not preclude common understandings of the term." Appellee's Br. at 7.

Significantly, the INA's definitional section does provide statute-specific definitions of other commonly-used terms such as "child," which it defines to mean "an unmarried person under twenty-one years of age" who satisfies other specific requirements. [8 U.S.C. §§ 1101\(b\)\(1\), 1101\(c\)\(1\)](#). In addition, the INA includes a definition of "parent" that expressly includes a "deceased parent." [8 U.S.C. § 1101\(c\)\(2\)](#). <sup>HN25</sup> Congress' choice to include specific definitions of these common family words - child and parent - but not to include such a definition of spouse strongly suggests that the ordinary meaning of spouse at the time of the enactment of the immediate relative provision should control. See [Perrin, 444 U.S. at 42](#).

The original immediate relative provision of the INA was enacted in 1965 and stated in pertinent part: "[I]mmediate relatives' . . . shall mean the children, spouses and parents of a citizen of the United States: *Provided*, That in the case of parents, such citizen must be at least twenty-one years of age." Act to Amend the Immigration and Nationality Act, Pub. L. No. 89-236, § 1, 92 Stat. 911, 911 (1965) [**\*20**] (codified as amended at [8 U.S.C. § 1151\(b\)\(2\)\(A\)\(i\)](#)) (emphasis in original). The common, ordinary meaning of spouse in 1965, according to Black's Law Dictionary covering that period, was "[o]ne's wife or husband." Black's Law Dictionary 1574 (4th ed. 1951). <sup>8</sup> That entry also cites a 1939 Oregon Supreme Court decision in which the Court separately defined "surviving spouse" to mean "the one, of a married pair, who outlives the other." [Rosell v. State Indus. Acc. Comm'n, 164 Ore. 173, 95 P.2d 726, 729 \(Or. 1939\)](#).

#### FOOTNOTES

<sup>8</sup> After the 1951 edition, no new or revised edition of Black's was issued until the revised 4th edition was published in 1968. Black's Law Dictionary, (4th ed. rev. 1968). The 1968 edition's definition of spouse is identical to the 1951 version quoted above. *Id.*

In 1990, Congress amended the INA to add the second sentence of the immediate relative provision, which, for the first time, extends the term to cover the situation of the death of the citizen spouse and includes the two-year marriage requirement. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 4981 (1990). By that time, Black's Law Dictionary had added the following to its definition of spouse: "'surviving spouse' is one [**\*21**] of a married pair who outlive the other." Black's Law Dictionary 1402 (6th ed. 1990). We reject Robinson's argument that the inclusion of "surviving spouse" in the 1990 Black's Law Dictionary entry for "spouse" proves that she remains legally a spouse even though her husband is deceased. The fact that Black's Law Dictionary's entry for spouse defines "surviving spouse" separately disproves Robinson's hypothesis.

Moreover, <sup>HN26</sup> to conclude that "spouse" and "surviving spouse" have the identical meaning is illogical and is contrary to our understanding of the legal effect of death on a marriage. The standard legal effect of death on marriage is that it terminates the legal union. See [52 Am. Jur. 2d Marriage § 8](#) (2000) ("[M]arriage . . . is terminable only by death or presumption of death, or by a judicial decree of divorce, dissolution, or annulment."). <sup>HN27</sup> The domestic relations law of New Jersey (the state in which Robinson and her husband resided at the time of his death and the state in which this action was brought) also suggests that a marriage terminates upon the death of one spouse. See [N.J. Stat. Ann. § 9:17-43\(a\)\(1\)](#) (West 2002) (former husband is presumed to be father of child born within [**\*22**] "300 days after the marriage is terminated by death, annulment or divorce"); [N.J. Stat. Ann. 2C:24-1\(a\)\(1\)](#) (West 2005) (belief that spouse is dead is defense to bigamy).

<sup>HN28</sup> The very language of the immediate relative provision distinguishes between a living spouse and a surviving spouse when it states that "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 . . . shall be

considered . . . to remain an immediate relative." [8 U.S.C. § 1151\(b\)\(2\)\(A\)\(i\)](#) (emphasis added). Because Robinson's citizen spouse died before the couple was married for two years, Robinson does not qualify as an "immediate relative" under the INA.

Our dissenting colleague argues that Robinson will be removed because her petition "is stuck in the government's bureaucracy." Dissent typescript op. at 16. That misstates the facts and the law. We agree with the agency that Robinson's claim must be rejected, not because of any government bureaucracy but because she does not meet one of the Congress' requirements for immediate relative status, i.e., that she had been married to her citizen spouse for at least two years. Congress has imposed a requirement of a particular **[\*23]** length of a petitioner/claimant's prior marriage in a variety of situations. For example, one of the ways in which a surviving spouse can qualify for veterans' benefits is by showing that the surviving spouse was married to the veteran for one year or more. See [38 U.S.C. § 1304 \(2\)](#); see also [10 U.S.C. § 1447\(7\)\(A\)](#) (Armed Forces Act); [42 U.S.C. §§ 416 \(b\), \(c\)](#) (Social Security Act).

We are aware that the result of our holding is that Robinson is ineligible for LPR status as a result of a tragic accident that neither she nor her citizen spouse could have avoided or anticipated. But <sup>HN29</sup>our obligation is to interpret the statute according to its language. Our holding is consistent with <sup>HN30</sup>the core purpose of the U.S. family-based immigration policy: the promotion of family unification for U.S. citizens and lawful permanent residents. See Act to Amend the Immigration and Nationality Act, Pub. L. 89-236, § 1, 79 Stat. at 911 (codified as amended at [8 U.S.C. § 1151\(b\)\(2\)\(A\)\(i\)](#)); H.R. Rep. No. 89-745, at 1, 12 (1965) ("Reunification of families is emphasized as the foremost consideration [of the legislation].")

Admittedly, inclusion of a surviving spouse as an immediate relative if s/he was married **[\*24]** for two years also does not promote unification of the marital unit but Congress undoubtedly recognized that other considerations become relevant once the alien spouse builds increased ties with the United States. A marriage that lasted two years can be presumed to have been bona fide, and in that period the surviving spouse would have developed settled expectations. <sup>9</sup> Congress could reasonably determine that an alien with a pending I-130 petition who had been married to a U.S. citizen for less than two years at the time of the citizen spouse's death is not entitled to LPR status. Congress created a balance between the goal of family unity and the legitimate expectations of an alien-spouse whose connections to the United States were likely to have become solidified during the two-year marriage period.

#### FOOTNOTES

<sup>9</sup> A regulation promulgated after the USCIS's decision 9 in this case provides that, if the two-year marriage requirement is satisfied when the spouse dies, the I-130 immediate relative petition is automatically converted into a I-360 widow/er petition. [8 C.F.R. § 204.2\(i\)\(1\)\(iv\)](#), as amended, [71 Fed. Reg. 35,732, at 35,749 \(2006\)](#).

V.

#### Conclusion

For the reasons set forth, we will reverse the **[\*25]** order of the District Court and direct it to grant the Government's motion to dismiss.

**DISSENT BY:** [NYGAARD](#) ▼

**DISSENT**

[NYGAARD](#) ▼, Circuit Judge, *dissenting*

As a result of the government's fatally flawed interpretation of [§1151\(b\)](#), Osseritta Robinson will be removed from the United States, in spite of her full compliance with the INA, simply because the petition filed on her behalf by her deceased husband is stuck in the government's bureaucracy. The government argues, and the majority agrees, that both the plain language of the statute and deference to their implementation of this provision dictate this result. I disagree for three reasons. First, I believe the plain language leads to a contrary result. Second, even were this definition ambiguous, I would not defer to the government's interpretation. Third, I do not think that [Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 \(1984\)](#) even applies. I will discuss these reasons in inverse order.

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. The Court held that "[t]he power **[\*26]** of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." (Quoting [Morton v. Ruiz, 415 U.S. 199, 94 S. Ct. 1055, 39 L. Ed. 2d 270 \(1974\)](#)). 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](#).

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. The only reasonable inference to draw is that Congress **[\*27]** did not intend to delegate any authority to the agency on this issue at all. As a result it is for the court to use our standard, time-honored means of statutory construction. The mere fact that the panel is divided on how to read the definition at issue is no reason to call upon *Chevron* to bail us out.

Even were this a *Chevron* matter, I would not defer to the government's interpretation. The government stated that, historically, it has interpreted [§1151\(b\)\(2\)\(A\)\(i\)](#) and the term "spouse" to exclude aliens like Robinson from the grant of an immediate relative classification. To me, the government's argument is an attempt to use *Chevron* to defend an errant interpretation of the statute primarily because the same error has been made for a number of years. Moreover, even the government's claim of consistency does not withstand scrutiny. I would consider it an abdication of my judicial obligation to construe and apply the statute, and a denial of Robinson's right-of-access to the courts, to defer to departmental interpretations that are as unfounded as this.

The government, and the majority, refer to [Matter of Varela 13 I. & N. Dec. 453](#) (BIA 1970), as primary evidence of its persistent approach **[\*28]** to this statute. Yet, I am persuaded by the analysis of the Court of Appeals of the Ninth Circuit that *Varela* was invalidated because it was deemed extra-jurisdictional. [Freeman v. Gonzales, 444 F.3d 1031 \(9th Cir. 2005\)](#). I simply do not regard *Varela* as carrying any weight.

Moreover, the government's reference to a 1938 INS amendment to a regulation is not on

point. This amendment states that the issuance of a visa will be withheld and approval of a petition may be revoked "if it is ascertained that the petitioner . . . has died." 3 Fed. Reg. 263 (1938). The amendment refers to the government's general authority to revoke an approved I-130 petition or withhold the grant of a visa. Neither of these actions deal with the topic at hand, which is whether the government has authority to terminate a properly filed I-130 petition that is still pending, based only upon the death of the petitioner. Additionally, the regulation refers generically to petitioners rather than "spouse." The government's use of the 1938 amendment as evidence of a consistent interpretation of [§1151\(b\)\(2\)\(A\)\(i\)](#) is specious.

With regard to the plain meaning of the statute, I disagree with the majority's definition **[\*29]** of "spouse." The government argues and the majority contends that the terms "surviving spouse" or "former spouse" are distinct from the common understanding of the word "spouse." The majority attempts to bolster its position by, among other things, emphasizing Congress' use of the phrase "was the spouse" in [§1151\(b\)\(2\)\(A\)\(i\)](#). Yet, we need look no further than the language used later in the same sentence to appreciate the inconsistency that this restrictive definition creates.

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 and was not legally separated from the citizen 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. (Emphasis added).

[8 U.S.C. §1151\(b\)\(2\)\(A\)\(i\)](#). Similarly, in discussing which foreign nationals may self-petition after the death of a husband or wife who was a citizen or legal permanent **[\*30]** resident of the United States, the statute states:

For purposes of subclause (I), an alien described in this subclause is an alien . . . (CC) who was a bona fide spouse of a United States citizen within the past 2 years and -- (aaa) whose spouse died within the past 2 years.

[8 U.S.C.A. § 1154\(a\)\(1\)\(A\)\(i\)\(II\)](#). In both sections of this statute, the word "spouse" is used without any qualifying terms such as "former" or "surviving."

It is obvious to me that Congress used "spouse" to refer to a continuing marital bond between the deceased petitioner and a surviving husband or wife. Therefore, the majority's interpretation fails to meet one of the principal rules of statutory construction, which is to give terms consistent meaning. In light of this, I cannot accept the government's narrow definition of "spouse." As the statute plainly reads, "spouse" is an inclusive term that includes aliens such as Robinson who survive the death of their petitioning husband or wife.

I am also unpersuaded by the majority's reliance upon the present tense verbs that appear in [8 U.S.C. §1154\(b\)](#), a provision that focuses upon the government's "[i]nvestigation; consultation; approval; [and] authorization to grant **[\*31]** preference status." (Emphasis added.) Although the majority masterfully reviews the immediate relative petitioning process, its opinion exposes a fundamental confusion between an I-130 petition, which is filed to request an alien's classification as an immediate relative, and an I-485 petition, which is filed to request the grant of an alien's change of status. By extracting a sentence from [§1154\(b\)](#), the majority opinion succeeds only in raising the question of whether the petitioning spouse must be alive during the investigation of the I-485 petition for change of status, a question that is not at issue here. I view the discussion of [§1154\(b\)](#) as irrelevant. This appeal focuses only upon Robinson's classification as an immediate relative, not her change of status.

Regarding the majority's structural interpretation of [8 U.S.C. 1151\(b\)\(2\)\(A\)\(i\)](#), I do not agree that the second sentence clearly modifies the first sentence. To the contrary, I submit that the only reasonable way to understand these two sentences is if they are read as independent. The District Court correctly found that the first sentence lists spouse, without any qualifying terms, as one type of relationship that enables **[\*32]** an alien to be given an immediate relative classification. The second sentence refers to scenarios in which the petitioning spouse has died, but it concludes by saying that an alien in this circumstance can be classified as an immediate relative "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." The statute does not mandate the termination of I-130 petitions upon the death of a petitioner, and even the regulations make it clear that a pending or approved I-130 eliminates the need for the filing of a self-petition.<sup>10</sup> Therefore, the only person to whom this second sentence in [§1151\(b\)\(2\)\(A\)\(i\)](#) can refer is an alien who is not the beneficiary of a pending or approved I-130 at the time of the death of the petitioner.

#### FOOTNOTES

<sup>10</sup> "A currently valid visa petition previously approved 10 to classify the beneficiary as an immediate relative as the spouse of a United States citizen must be regarded, upon the death of the petitioner, as having been approved as a Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant for classification under paragraph (b) of this section, if, on **[\*33]** the date of the petitioner's death, the beneficiary satisfies the requirements of paragraph (b)(1) of this section. If the petitioner dies before the petition is approved, but, on the date of the petitioner's death, the beneficiary satisfies the requirements of paragraph (b)(1) of this section, then the petition shall be adjudicated as if it had been filed as a Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant under paragraph (b) of this section." [8 C.F.R. 204.2\(i\)\(1\)\(iv\)](#).

To me, applying this two-year marital requirement to even those who have already filed an I-130 implicitly presumes to be invalid the marriage of those who are wed less than two years before the petitioning spouse dies. This is inconsistent with the statute. As a result, after reviewing both the language and the structure of [section 1151\(b\)\(2\)\(A\)\(i\)](#) it is clear to me that the two sentences are to be read as describing two distinct tracks for an alien spouse to obtain an immediate relative classification: petition by a living spouse, or self-petitioning.

I also oppose granting the government an expanded scope of authority under [8 U.S.C. §1155](#).<sup>11</sup> The government argued that since [§1155](#) already gives **[\*34]** it power to revoke the acceptance of an I-130 petition upon the death of the petitioner, it implicitly already has the power to terminate pending I-130 petitions upon the death of the petitioner. In my view, this interpretation of [§1155](#) is seriously flawed.

#### FOOTNOTES

<sup>11</sup> "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under [section 1154](#) of this title. Such revocation shall be effective as of the date of approval of any such petition." [8 U.S.C.A. § 1155](#).

As the government would certainly concede, the plain language of [§1155](#) does not provide governmental authority to terminate pending I-130 petitions. Its authority is limited to revoking approved petitions. Moreover, upon examining the regulations that implement

[§1155](#), it is clear to me that the government's interpretation of [§1155](#) and [§1151\(b\)\(2\)\(A\)\(i\)](#) results in an arbitrary outcome that defies both reason and equity. The statutory interpretation argued by the government and approved by the majority will not only summarily terminate Robinson's properly filed I-130 petition, it will also create a regulatory crevice into which Robinson will **[\*35]** be dropped.

Under the regulations, the government has discretion to both withhold automatic revocation of an approved I-130 petition, and to refrain from denying a visa in cases where humanitarian concerns justify such relief. [8 C.F.R. 205.1\(a\)\(3\)\(i\)\(C\)\(2\)](#).<sup>12</sup> The problem created in the majority's interpretation of [§1151\(b\)](#) and [§1155](#) is that it denies Robinson's opportunity for discretionary relief, even though she would have qualified for it but for the delays of the government in approving Robinson's I-130. The practical effect of the majority's opinion is not only that Robinson's I-130 will be terminated because of the government's dilatory action -- or inaction -- on her husband's petition, but also that she will be removed from the country, since no other relief is available to her under the INA.<sup>13</sup> The District Court was correct in stating that "the fortuity of the citizen spouse's untimely death is too arbitrary and random a circumstance to serve as a basis for denying the petition." [Robinson v. Chertoff, 2007 U.S. Dist. LEXIS 34956, 2007 WL 1412284, 4 \(D.N.J.\)](#).

#### FOOTNOTES

<sup>12</sup> "The approval of a petition or self-petition made 12 ade under section 204 of the Act and in accordance with part 204 of this chapter is revoked **[\*36]** as of the date of approval: . . . Upon the death of the petitioner, unless: . . . U.S. Citizenship and Immigration Services (USCIS) determines, as a matter of discretion exercised for humanitarian reasons in light of the facts of a particular appeal, that it is inappropriate to revoke the approval of the petition. USCIS may make this determination only if the principal beneficiary of the visa petition asks for reinstatement of the approval of the petition and establishes that a person related to the principal beneficiary in one of the ways described in section 213A(f)(5)(B) of the Act is willing and able to file an affidavit of support under 8 CFR part 213a as a substitute sponsor." [8 C.F.R. 205.1\(a\)\(3\)\(i\)\(C\)\(2\)](#).

<sup>13</sup> I am aware that Robinson can seek from Congress a private bill to prevent her removal, but this extraordinary relief is outside of the scope of the INA. Our task in interpreting statutes is to remain within the four corners of the statute and regulations to ascertain whether a particular interpretation yields unreasonable or arbitrary results.

Finally, it is inconceivable to me that Congress intended an alien's status to be contingent upon the amount of time that the executive **[\*37]** department takes to process a timely and proper petition -- a factor completely outside of the control of the alien. This 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. Nor do I believe that Congress intended to sanction the disregard that the department has shown towards persons like Osseritta Robinson. She has committed no crime. She is innocent of any misbehavior. She is a grieving widow and the lone parent of the Robinsons' U.S. citizen child. This same department whose delay or inaction forecloses Osseritta Robinson's chance of becoming an American, now so diligently pursues the avenues of her expulsion. It contends that the statute is ambiguous and then urges upon us the least reasonable and least humane alternative. My view, wholly in the margin, is that it is untoward of this nation of immigrants, we who have passed through the portals of citizenship, to coldly and impassively slam the door behind us on innocent aspirants who dream to follow.

Because I read the plain language and structure of [§1151\(b\)\(2\)\(A\)\(i\)](#) as enabling Robinson **[\*38]** to be classified as an immediate relative, I dissent.







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