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

MARIA PAULA ROBLEDO, et al.,

Plaintiffs-Petitioners,

vs.

JANET NAPOLITANO, Secretary, U.S. Department of Homeland Security, et al.,

Defendants-Respondents.

Civil Action No. 08-cv-2581-AW

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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I. Introduction

On April 8, 2009 the U.S. Court of Appeals for the Sixth Circuit weighed in on the widow penalty, affirming the District Court's decision finding in Lockhart v. Chertoff, No. 07-823, 2008 U.S. Dist. LEXIS 889 (N.D. Ohio Jan. 7, 2008) that the penalty is unlawful. Lockhart v. Napolitano, No. 08-3321, 2009 U.S. App. LEXIS 7305 (6th Cir. April 8, 2009). The decision relied, in significant part, on the Ninth Circuit's holding in Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006). With two federal circuit courts of appeals and three federal district courts now having decided the relevant statutes do not permit the automatic revocation of spousal petitions upon the death of the citizen spouse, this court has significant support for a finding that Plaintiffs are entitled to the same treatment by USCIS as Mrs. Lockhart and Mrs. Freeman; that is, classification as immediate relatives and immediate approval of their I-130 spousal petitions.

Although the widow penalty has impacted less than 200 widows,[1] the impact of this callous and unlawful policy on each is substantial and reprehensible. The widow penalty rips grieving spouses from their moorings casting them out from their homes, separating them from their citizen families. Take, for example, Raquel Williams, whose husband Derek died unexpectedly of a heart condition. USCIS told her that she had to return to her native Brazil but that her young son, an American citizen by birth, could stay or go to Brazil, leaving his already devastated U.S. citizen grandparents behind.[2] Victims of the widow penalty each have similarly

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[1] Kirk Semple, Losing a Partner, and a Foothold, N.Y. Times, Feb. 2, 2009, at A15, available at http://www.nytimes.com/2009/02/02/nyregion/02spouse.html?_r=1&partner =permalink&exprod=permalink

[2] 60 Minutes: For Better Or For Worse (CBS Television Broadcast Nov. 23, 2008) available at http://www.cbsnews.com/stories/2008/11/21/60minutes/main4625729

tragic stories. Osserritta Robinson's husband was killed in the Long Island ferry disaster[3]; Diana Engstrom's husband died in Iraq while working as a contractor for the U.S. Department of Defense[4]; Khamphee Kells' husband, a U.S. Navy recruiter, died in a motorcycle accident[5]; Plaintiff Robledo's husband took his own life after years battling depression; and Plaintiff Hassan-Norris's husband died from cancer. Plaintiff Hassan-Norris' story is particularly shocking. Because Mr. Norris's chemotherapy session ran late, the couple arrived only minutes after their USCIS interview was scheduled to begin. USCIS refused to go forward with the interview that day. Mr. Norris died from cancer before the interview could be rescheduled. These widows all face deportation because of Defendants' unlawful interpretation of the statute. Plaintiffs urge this Court to add its voice to the growing majority of courts who have struck down this harsh and unlawful penalty.

II. Jurisdiction is Proper in this Court

It is beyond dispute that the Administrative Procedure Act, the Mandamus Act, the Declaratory Judgment Act confer jurisdiction on this court over Defendants claims. Similarly, it is beyond dispute that this challenge to a federal agency's interpretation of a statute presents a federal question. In fact, the Defendants recently conceded these facts in Lockhart – a case that like this case, was brought while plaintiff was in removal proceedings and is, for jurisdictional

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[3] Semple, Losing a Partner, and a Foothold, supra.

[4] Editorial, Time To End Widow's Penalty, Chicago Sun-Times, Sept. 22, 2008, available at http://www.ssad.org/images/SunTimesEditorial.pdf.

[5] Paul Adler, Love Story Turns Into Nightmare For Widow of Sailor, KYTV, Feb. 18, 2009 available at http://www.ky3.com/features/ozarkstoday/39782712.html.

purposes, factually indistinguishable from this case. In their Final Opening Brief to the U.S. Court of Appeals for the Sixth Circuit, Defendants affirmatively stated that

> [t]he district court had jurisdiction over the matter pursuant to 28 U.S.C. § 1331; the Administrative Procedures Act, 5 U.S.C. § 704; and the Mandamus Act, 28 U.S.C. § 1361.

Final Opening Brief for Respondents-Appellants, Lockhart v. Napolitano, 2008 WL 5485392 at 1 (6th Cir. filed August 18, 2008). Notwithstanding this clear statement in Lockhart that the district court had jurisdiction over plaintiff's challenge to the widow penalty, Defendants contend in this case that the IIRIRA and the REAL ID Act of 2005 strip this Court of jurisdiction. They do not.

In determining whether the IIRIRA and the Real ID Act of 2005 strip this Court of jurisdiction to hear Plaintiffs' claims, this Court must be mindful of the Supreme Court's admonition that these provisions be interpreted narrowly. INS v. St. Cyr, 533 U.S. 289, 298 (2001); See also Obioha v. Gonzales, 431 F.3d 400, 405-06 (4th Cir. 2005) (requiring "a showing of clear and convincing evidence of a contrary legislative intent to restrict access to judicial review . . . of administrative action" (internal quotations and citations omitted)). The jurisdictional stripping provisions bar this Court from reviewing only those claims that Congress specifically enumerated. Plaintiffs' challenge to the unlawful and non-discretionary denial of the I-130 petitions filed on their behalf by their now deceased spouses is not such a claim.

A. The Existence of Removal Proceedings Do Not Deprive This Court of Jurisdiction

Defendants continue to assert that the Immigration Judge ("IJ") has exclusive jurisdiction over Plaintiffs' claims because Plaintiffs are currently in removal proceedings. This is essentially an argument that Plaintiffs must first exhaust administrative remedies. See Lockhart

v. Chertoff, No. 07-823, 2008 U.S. Dist. LEXIS 889 at *15 (N.D. Ohio Jan. 7, 2008) (exercising jurisdiction over plaintiff's challenge to widow penalty notwithstanding the fact that plaintiff was in removal proceedings) aff'd Lockhart v. Napolitano, 2009 U.S. App. LEXIS 7305 (6th Cir. April 8, 2009). As Plaintiffs explained, however, the IJ and the BIA, in fact, lack jurisdiction to review the adverse action on the I-130 petitions belying the claim that IJ has exclusive jurisdiction. See Plaintiffs' Memorandum In Opposition To Motion To Dismiss And Cross Motion For Summary Judgment , at 3 (Jan. 26, 2009). Since the IJ and BIA lack jurisdiction, perforce no adequate administrative remedy exists for Plaintiffs to exhaust. See Lockhart v. Chertoff, 2008 U.S. Dist. LEXIS 889 at *15. In their Reply Brief, Defendant makes two arguments in response. First, notwithstanding the IJ and BIA's lack of jurisdiction, Defendants argue that the statutory scheme shows that Congress intended to channel all legal issues with respect to an alien in removal proceedings to the IJ, with appeal to the BIA and then to the Court of Appeals. Second, Defendants argue that Plaintiffs should be required to challenge the BIA's long standing decision that the IJ and BIA lack jurisdiction over the type of claims that Defendants make here. Neither argument is correct.

1. Plaintiffs' Claims Fall Squarely Outside the Scope of the Channeling Provisions

In their Reply Brief, Defendants cite for the first time 8 U.S.C § 1252(9), which Defendants claim has been "interpreted broadly as indicative of Congressional intent to 'channel' all legal issue with respect to an alien in removal proceedings to the immigration judge. . ." Defendants' Reply Brief at 3, citing Aguilar v. United States Immigration and

Customs Enforcement, 510 F.3d 1, 9 (1st Cir. 2007). Neither the statute nor Aguilar support the broad application of § 1252(9) that Defendants advocate.[6]

In fact, Aguilar eschews such an expansive reading of the statute and expressly holds that § 1252(b)(9) does *not* preclude district court jurisdiction over aliens' claims that are collateral to removal. Aguilar, 510 F.3d at 10-11, 19. The First Circuit explained that Congress's use of the phrase "'arising from,'" in § 1252(b)(9) rather than broader language such as "related to" indicates that Congress did not intend that § 1252(b)(9) would be "limitless in its scope." Id. at 11 (citations omitted).

> We thus read the words "arising from" in section 1252(b)(9) to exclude claims that are independent of, or wholly collateral to, the removal process. Among others, claims that cannot effectively be handled through the available administrative process fall within that purview. This reading, we believe, is consistent with the wise presumption that Congress legislates with knowledge of longstanding rules of statutory construction. . . . That presumption traditionally requires that there be clear and convincing evidence of legislative intent before restricting access to judicial review entirely.

Id. at 11-12.

According to Aguilar, "[t]he threshold questions are whether these claims arise from removal and if so, whether they can be deemed independent of, or collateral to, the removal process (and, thus, not subject to the channeling effect of section 1252(b)(9))." Id. at 13. Here,

[6] Defendants also cite an unreported decision from the U.S. District Court for the Central District of California for the proposition that courts construing § 1252 have concluded that initiation of removal proceedings deprive the district court of jurisdiction. Reply Brief at 3 citing Lu v. Chertoff, 2008 WL 4559747 (C.D. Cal. 2008). Lu is inapposite. Significantly, the IJ had jurisdiction to consider Lu's claim. That is not the case here where the IJ and the BIA lack jurisdiction to consider Plaintiffs' claims.

Plaintiffs' claims challenging denial of the I-130's are independent of and/or collateral to the removal process.

Significantly, the automatic denial of the I-130 is not the basis for removal of any plaintiff in this case. As stated in the Notices to Appear ("NTA") (the NTA is the charging document in a removal proceeding), the basis for removal of each of the Plaintiffs is each Plaintiff's overstay of her visa. See Exs. 5 & 16 Memorandum of Law in Support of Respondents' Motion to Dismiss Alternatively for Summary Judgment (Dec. 8, 2000). Indeed, the NTAs make no mention whatsoever of the denial of the I-130 petitions. Moreover, the denial of an I-130 petition does not in-and-of-itself render an alien eligible for removal. Nor does the denial automatically result in the initiation of removal proceedings.

2. No Administrative Remedies Are Available to Plaintiffs to Exhaust

Notwithstanding the fact that the IJ and BIA lack jurisdiction to consider Plaintiffs' challenge to the denial of the I-130 applications filed on their behalf, Defendants maintain that Fourth Circuit precedent mandates exhaustion. Defendants' Reply Brief at 9 citing Balbuena Torres v. Gonzales, 229 F. App'x 261 (4th Cir. 2007). This argument is based on an unpublished, three-paragraph decision that has no bearing on this case. Balbuena involved a challenge to a regulation regarding labor certification; not a challenge to Defendants' unlawful statutory construction of "immediate relative." Moreover, in Balbuena the BIA evidently had jurisdiction to review the adverse action on the petitioner's labor certification and, therefore, administrative remedies were available to the plaintiff. That is not the case here where the IJ and BIA lack jurisdiction to review the denial of the I-130 petitions filed on Plaintiffs' behalf. At

most, Balbuena stands for the unremarkable proposition that where adequate administrative remedies exist, those remedies must be exhausted before judicial review may be sought.[7]

Next, Defendants claim that exhaustion is required because it is possible that, in the face of a challenge by Plaintiffs, the BIA would overturn the seminal jurisdictional holding in Matter of Sano, 19 I. & N. Dec. 299 (B.I.A. 1988) in light of the REAL ID Act of 2005, and consider Plaintiffs' challenge to the denial of the I-130 petitions. That argument is simply not realistic.

Since passage of the REAL ID Act of 2005, Matter of Sano has remained a firmly entrenched fixture of BIA jurisprudence. BIA has had ample opportunity to overturn Matter of Sano. Far from doing so, BIA has cited Matter of Sano in more than a dozen decisions since the REAL ID Act's enactment. See e.g. In re Hesham Abdelfatah Elwerdany, 2009 WL 331214 at *1 (B.I.A. Jan. 16, 2009).

Moreover, the holding in Matter of Sano is based on the fact that federal regulations expressly deny a beneficiary of a petition for a visa standing to appeal adverse action to the IJ or BIA. Matter of Sano, 19 I. & N. Dec. at 300-01; 8 C.F.R. §§ 204.1(a)(3) and (d)(4). Defendants have not amended these regulations in response to the REAL ID Act of 2005, notwithstanding their own argument that the regulations might not be lawful Accordingly, unless and until the Defendants amend the regulations to give the IJ and the BIA jurisdiction over challenges brought

[7] Defendants appear to be suggesting that Balbuena requires plaintiffs to exhaust administrative remedies even where there is no adequate remedy available or exhaustion would be futile. A ruling by the Fourth Circuit that exhaustion was required in all circumstances would represent a radical departure from well settled administrative law in contravention of Supreme Court and Fourth Circuit precedent. As it turns out, the Fourth Circuit did no such thing.

by beneficiaries of visa petitions, the likelihood that Plaintiffs would succeed in challenging Matter of Sano before the IJ and BIA is zero.[8] Plaintiffs are not required to joust at windmills.

B. Plaintiffs Challenge To Defendants' Unlawful Interpretation of 49 USC § 1151 Is Not Subject To the IIRIRA Jurisdictional Stripping Provisions

The sum and substance of this case is a challenge to Defendants' statutory interpretation of § 1151 to require that a surviving spouse have been married to a U.S. citizen for at least two-years in order to qualify for "immediate relative" status. As such, this case presents a straight-forward and pure question of statutory construction of a provision that is not among the provisions enumerated in the jurisdictional stripping provision of § 1252(a)(2)(B)(i).[9] Nonetheless, Defendants attempt to shoehorn this case into the scope of § 1252(a)(2)(B)(i) on the grounds that Plaintiffs' prayer for relief seeks collateral relief in the form of reopening of their I-485 applications. According to Defendants, this request for reopening demonstrates that Plaintiffs are really "challenging a 'judgment' rendered pursuant to authority granted to USCIS under 8 USC § 1255 and thus their case falls squarely within the proscriptions in §

[8] Defendants make the misleading claim that the BIA's decision on the merits of petitioner Hassan's claim for "immediate relative" status is evidence that the BIA will not necessarily reject consideration of plaintiffs' claims on jurisdictional grounds. However, the decision, which consists of three sentences in total, summarily denies Hassan's appeal of the denial of her I-360 self-petition (attached as Ex. 12 to Defendants' Motion to Dismiss) and not her challenge to the I-130 petition filed by her now deceased spouse. Since Hassan herself filed the I-360, under Matter of Sano she had standing to appeal to the BIA. Here, plaintiffs challenge the denial of their I-130 which is subject to Matter of Sano's jurisdictional bar.

[9] Defendants accuse Plaintiffs of engaging in creative pleading similar to the Plaintiffs in Saintha v. Mukasey, 516 F.3d 243 (4th Cir. 2008), in an attempt to avoid the jurisdictional bar. This accusation is way off the mark. In Saintha, the plaintiff challenged a factual finding by the USCIS and argued that the challenge raised a mixed issue of law and fact. The 4th Circuit ruled that Saintha's claim presented a pure question of fact and therefore was barred. Here, no facts are in dispute. Plaintiffs' challenge raises a pure question of law and, therefore, Saintha is inapposite.

1252(a)(2)(B)(i)." Defendants' Reply Brief at 8. As Plaintiffs previously explained, this argument is at odds with Supreme Court and Fourth Circuit precedent and must be rejected.

First, the plain language of the statute bars judicial review only of a "judgment regarding the granting of relief *under* section 1182 (h), 1182 (i), 1229b, 1229c, or 1255 of this title…" Id. (emphasis added). The Fourth Circuit has ruled repeatedly that, in interpreting this provision, "[a] reviewing court . . . must examine the *basis for* the BIA's decision rather than the *end result* of the BIA's decision to determine whether the decision is 'under' a section . . . that precludes judicial review." Obioha, 431 F.3d at 406 (quoting Stewart v. INS, 181 F.3d 587, 595 (4th Cir. 1999)). Here, the proper focus is on the unlawful adverse action on the I-130 Petitions filed on Plaintiffs' behalf by their now deceased spouses. Automatic denial of the I-130 petitions arises under § 1151, which is not a section enumerated in § 1252(a)(2)(B)(i) and, therefore, that statute is no bar to this Court's jurisdiction.

Second, "§ 1252(a)(2)(B)(i) bars review only of discretionary decisions *on the merits* of the enumerated sections." Obioha, 431 F.3d at 406 (§ 1252(a)(2)(B)(i) did not bar review of motion to remand for consideration of application for adjustment; citing decisions from five other Circuit Courts of Appeals) (emphasis added). Claims that seek reopening of a decision in order to seek adjustment of status are not subject to § 1252(a)(2)(B)(i)'s bar. Id.; Stewart v. INS, 181 F.3d 587 (4th Cir. 1999)(court had jurisdiction to consider denial of motion to reopen to apply for an adjustment of status). Here, Plaintiffs do not seek review of a discretionary decision on the merits of their I-485 applications. Rather, Plaintiffs seek collateral relief in the form of reopening of their I-485 applications so that those applications can be considered by Defendants on their merits for the first time. Accordingly, § 1252(a)(2)(B)(i)'s bar is inapplicable.

Third, Defendants' expansive reading of § 1252(a)(2)(B)(i), which seeks to sweep within the jurisdiction bar sections that are not specifically enumerated, violates the Supreme Court and this Circuit's admonition to construe the jurisdiction stripping provisions narrowly and to exclude from their coverage things not specifically mentioned. INS v. St. Cyr, 533 U.S. at 298; Obioha, 431 F.3d at 405-06.

Fourth, the fact that §§ 1151 and 1154 are encompassed in the § 1252(a)(2)(B)(ii) bar of judicial review of *discretionary* decisions, but are not listed in § 1252(a)(2)(B)(i) compels the conclusion that Congress did not intend to subject non-discretionary decisions on "immediate relative" classification to the jurisdictional limitations set forth in § 1252(a)(2)(B). See Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123, 2129-130 (2008) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal quotation marks and citation omitted). Congress was obviously aware of the relationship between an I-130 petition for "immediate relative" status under §§ 1151 and 1154 and an I-485 application for adjustment of status to permanent resident under § 1255; Yet, Congress plainly chose not to include §§ 1151 and 1154 in the sections enumerated in § 1252(a)(2)(B)(i).

C. § 1252(g) Is Inapplicable to Plaintiffs' Claims

Defendants make the sweeping assertion that § 1252(g) bars judicial review where the Attorney General has the power to "adjudicate cases or execute removal orders." Defendants' Reply Brief at 5 n.5. If Defendants were correct -- and they are not -- then virtually no act or decision of Defendants would ever be subject to judicial review and all other jurisdictional stripping provisions would be mere surplusage. In fact, the Supreme Court flatly rejected efforts

to construe 1252(g) broadly. According to the Supreme Court, § 1252(g) is a "narrow provision" that bars judicial review of a circumscribed set of claims.

> [§ 1252(g)] applies only to three discrete actions that the Attorney General may take: [his] 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'

Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999). A challenge to the unlawful interpretation of a statute is not one of the three discrete actions listed in the statute. Bowrin v. INS, 194 F.3d 483, 488 (4th Cir. 1999). Consequently, Plaintiffs' challenge to the unlawful interpretation of § 1151 is not subject to § 1252(g)'s narrowly circumscribed jurisdictional bar.

III. Two Federal Circuit Courts of Appeal Support Plaintiffs' Position That the Statute is Clear and Unambiguous

The U.S. Courts of Appeal for the Sixth and Ninth Circuits are squarely on the record in support of the Plaintiffs' position that 8 U.S.C. § 1151 does not bar Defendant from adjudicating and approving I-130 their spousal petitions and their derivative I-485 applications for adjustment of status following the death of their citizen spouses. In no uncertain terms, both circuits found the language of the statute is clear, the two sentences of 8 U.S.C. § 1151(b)(2)(A)(i) are to be read independently, the term 'spouse' includes 'surviving spouse' and, as a result, Chevron analysis is neither required nor deference appropriate.

A. The Plain Language of the Statute is Clear

Family relationships form the large part of immigration under our laws established by Congress, and "immediate relatives" have a special place in the statutes. Immediate relatives are exempt from numerical limitation, meaning that immigrant visas are immediately available to them at any time, and they enjoy exemption from many of the restrictions on other categories.

Under section 201(b)(2)(A)(i) of the INA, 8 U.S.C. § 1151(b)(2)(A)(i), 8 U.S.C. § 1154(a)(1)(A)(i), a United States citizen may petition to have his or her spouse classified as an immediate relative. 8 U.S.C. § 1154(a)(1)(A)(i).[10] Under USCIS rules, the form that the citizen files is Form I-130, Petition for Alien Relative (hereinafter "I-130"). Plaintiffs' citizen spouses all concluded such filing, with fee, in accordance with the statute. The language of the first sentence of INA 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), is succinct: "Immediate Relatives. – For purposes of this subsection, the 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." 8 U.S.C. § 1154(b)(2)(A)(i).

The Lockhart and Freeman courts noted that only "parents' are subject to any limitation, with the grant of immediate relative status being restricted to those whose citizen child is at least 21 years of age. There is no comparable qualifier to be a 'spouse' — that is, a requirement that the marriage must have existed for at least two years." Lockhart, 2009 U.S. App. LEXIS 7305 at *11; Freeman, 444 F.3d at 1039. Nowhere within the definition of immediate relative spouse is the word marriage, or any quantified time period of marriage.

For alien spouses whose citizen spouses have *not* filed an I-130 immigrant petition, the INA provides a separate self-petitioning right:

> In the case of an alien (and each child of the 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 this subsection, to remain an immediate relative after the date of the citizen's death but only if

[10] 8 U.S.C. § 1154(a)(1)(A)(i) provides that, "any citizen of the United States claiming that an alien is entitled to classification by reason of a relationship described in paragraph (1), (3), or (4) of section 203(a) or to an immediate relative status under section 201(b)(2)(A)(i) may file a petition with the Attorney General for such classification."

> the spouse files a petition under section 204(a)(1)(A)(ii) within two years after such date and only until the date the spouse remarries.

INA 201(b)(2)(A)(i); 8 U.S.C. § 1151(b)(2)(A)(i) (second sentence). The second sentence of the immediate relative definition creates a time limitation (at the time of death, the alien must have been a spouse for at least two years) not found in the first sentence. Thus, under the second sentence, a "spouse" may self petition, provided, *inter alia,* the marriage had lasted at least two years at the time that the citizen spouse died. Significantly, this section twice refers to the surviving spouse as "the spouse". Similarly, INA section 204(a)(1)(A)(ii), under which the "spouse" files her self-petition, refers to the surviving spouse as "An alien spouse described in the second sentence of section 201(b)(2)(A)(i)…" 8 U.S.C. § 1154(a)(1)(A)(ii).

Therefore, the citizen spouse files a petition under clause (i) of 1154(a)(1)(A) to accord immediate relative status to his or her spouse under the first sentence of 1151(b)(2)(A)(i). Separately, the alien spouse (in the absence of the citizen spouse filing) "also may file" a petition under 8 U.S.C. § 1154(a)(1)(A)(ii) (clause (ii) instead of (i)) to accord immediate relative status to him or herself (and his or her children) under the second sentence of 1151(b)(2)(A)(i), but only if the alien was a spouse for at least two years at the time of the death of the citizen spouse. Congress clearly created "two different processes, such that one or the other applies – either the citizen spouse petitions or, if he dies without doing so, the alien widow may do so." Lockhart, 2009 U.S. App. LEXIS 7305 at *15; Freeman, 444 F.3d at 1042.

B. The *Lockhart* and *Freeman* Courts Properly Found the Second Sentence of 8 U.S.C. § 1151(b)(2)(A)(i) Does Not Modify the First Sentence

The Ninth and Sixth Circuits found that "[t]he grammatical structure of the immediate relative provision provides evidence that the first and second sentences of § 1151(b)(2)(A)(i) are two distinct provisions." Lockhart, 2009 U.S. App. LEXIS 7305 at *12. Looking to the plain language of the first sentence, the appellate courts found that spouses are immediate relatives,

without qualification. That is, there is no requirement that the marriage must have existed for at least two years. Citing Freeman, the Sixth Circuit stated "we must assume that Congress intended no limitation on that term beyond the requirement that both parties are present for the marriage ceremony." Lockhart, 2009 U.S. App. LEXIS 7305 at *11 citing Freeman, 444 F.3d. at 1039. The Sixth Circuit then looked at whether the second sentence modifies the first and found, like the Ninth Circuit, that the grammatical structure of that sentence provided evidence they are separate and distinct. Id. Again, citing Freeman, the Sixth Circuit found " [i]t is relevant that Congress introduced the two-year durational requirement for certain alien widows in a separate sentence of the statute. The grammatical structure of this statute suggests that the second sentence stands independent of the first and does not qualify the general definition of spouse. Id. citing Freeman, 444 F.3d at 1041 n.14 (internal citations omitted). On the issue of statutory construction, the Sixth Circuit held

> [W]e conclude that the second sentence expands "immediate relative" status to include a surviving alien-spouse whose citizen spouse failed to file an application on his or her behalf prior to the citizen-spouse's death, but that sentence has no effect on the status of a surviving alien-spouse whose citizen spouse filed a petition for immediate relative status prior to his or her death. The two-year marriage-duration language in the second sentence of the immediate relative provision appears to be a procedural requirement for a self-petition in the event that the citizen-spouse dies, rather than a restriction on who is considered a "spouse" when the citizen-spouse petitions on behalf of the alien spouse.

Id. at *15.

C. The Courts Found the Term 'Spouse' to Include Surviving Spouses

According to Defendants, it is "'illogical' to claim that a 'widow' or a 'surviving spouse' is the same as a 'spouse'" Defendants' Reply Brief at 17. This argument blithely ignores the repeated and clear references in the statute to a "widow" or a "surviving spouse" as a "spouse." Specifically, the second sentence in 8 U.S.C. § 1151(b)(2)(A)(i), provides that an alien "who was

the spouse of a citizen for at least two years" can self-petition after the citizen's death "but only if the *spouse* files a petition under section 204(a)(1)(A)(ii) within two years after such date and only until the date the *spouse* remarries." (emphasis added). These two subsequent references to the "spouse" plainly refer to the widow or surviving spouse. Lockhart, 2009 U.S. App. LEXIS 7305 at * 16-17 (noting that the term "spouse" is used in the second sentence "to refer to a surviving alien-spouse"). Similarly, Section 204(a)(1)(A)(ii) of the INA refers to the "alien spouse described in the second sentence of section 201(b)(2)(A)(i)…", i.e., the widowed or surviving spouse. 8 U.S.C. § 1154(a)(1)(A)(ii).

Indeed, both the Sixth and Ninth circuits looked to the common meaning of the term spouse, finding that both common law precedent and Black's Law Dictionary definitions support the notion that surviving spouses are correctly considered spouses for the purposes of the INA. Lockhart, 2009 U.S. App. LEXIS 7305 at *19 (citing Rosell v. State Indus. Accident Comm'n, 95 P.2d 726 (Or. 1939); Black's Law Dictionary 1574 (4th ed. 1951); Black's Law Dictionary 1402 (6th ed. 1990)).

Next, Defendants contend that 8 U.S.C. § 1154(b) requires that the facts entitling the petitioning alien to relief "are true" at the time of adjudication. Defendants' Reply Brief at 19. Defendants' argument begs the question of whether an alien spouse remains an immediate relative specified in section 201(b) and is fundamentally flawed. Defendants mistakenly rely upon a Board of Immigration Appeals decision, Matter of Alarcon, 20 I. & N. Dec. 557 (B.I.A. 1992) for the proposition that "adjustment of status applications must be adjudicated based on the facts as they stand at the date of decision." Defendants' Reply Brief at 19. The holding in Alarcon, however, is limited to admissibility issues. Admissibility issues are determined on a discretionary basis with respect to adjustment of status or entry pursuant to an immigrant visa.

Lockhart, 2009 U.S. App. LEXIS 7305 at *13. By contrast, this case involves a non-discretionary determination of eligibility.[11]

The Sixth Circuit addressed this issue in Lockhart, finding that 8 U.S.C. §§ 1154(b) and (e) "relate to *visa* petitions and not Form I-130 petitions. Therefore, it is not entirely clear that even if facts must be true at the time visa petitions are adjudicated, the same is true of Form-130 petitions." Lockhart, 2009 U.S. App. LEXIS 7305 at *24 (emphasis added).

Here, Plaintiffs' eligibility for adjustment of status must be based on the non-discretionary approval of the I-130 spousal petition classifying Plaintiffs as immediate relatives. With this classification, USCIS will have no discretion to then deny the I-485 adjustment of status petition as, unlike employment, classification as an immediate relative will have been determined by law, not fact-finding by the agency or IJ.

D. USCIS Does Not Merit *Chevron* Deference

The Sixth and Ninth circuits found the language of the statute to be clear, the structure of the statute to be clear, and the definition of the term 'spouse' to be clear. In the face of this clarity, USCIS is not entitled to Chevron deference in the instant case. Courts "should not defer to an agency's interpretation of a statute if Congress' intent can be clearly ascertained through analysis of the language, purpose and structure of the statute." Freeman, 444 F.3d at 1038 (citation omitted). The Ninth Circuit in Freeman found the statute lacked the necessary ambiguity to accord the agency Chevron deference; the Sixth Circuit in Lockhart reached the

[11] Although Perez-Vargas v. Gonzales, 478 F.3d 191, 192 (4th Cir. 2007), which Plaintiffs cite, addresses an eligibility issue, that case dealt with the ability of an alien to transfer a work visa following the loss of his job. As a matter of statute, except in limited circumstances, work visas are job specific and are not transferable. Id. at 195. The rules governing the continued validity of work visas are entirely different than the rules governing "immediate relative" status. Accordingly, Perez-Vargas v. Gonzales has no bearing on plaintiffs' continued status as "immediate relatives" following the death of their citizen spouses.

same conclusion. Namely, "[b]ecause we find the meaning of the term 'spouse' under the 'immediate relative' provision is plain, we need not defer to the BIA's prior decision [in Matter of Varela]." Lockhart, 2009 U.S. App. LEXIS 7305 at *30-31. Furthermore, Lockhart held that any reliance on Varela would be misplaced, as non-precedential decisions are not to be accorded Chevron deference. Id. at *31. The Court did not stop there, stating Varela lacked the necessary statutory analysis that would entitle it to deference. Id. Thus, Defendants' insistence on Chevron deference and reliance upon Varela have been wholly discredited by two federal courts of appeal.[12]

E. USCIS' Interpretation of the Law Leads to Absurd Results

The Court must assume that, when drafting the INA, Congress did not intend absurd or manifestly unjust results. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509-10 (1989). However, under USCIS' interpretation, absurd and manifestly unjust results is exactly what this Court faces, and the Sixth and Ninth circuits faced. Both the Lockhart and Freeman courts recognized the inherent flaws with USCIS' policy and procedure; one that penalizes the widow for the untimely death of her spouse and the abject failure of USCIS to adjudicate proceedings in a timely manner. Citing the dissent in Robinson, discussed below in Section III, the Lockhart court stated

> a prompt adjudication of the petition for adjustment of status results in approval, even if the couple had not been married for two

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[12] Defendants cite Turek v. DHS, 450 F. Supp. 2d 736 (E.D. Mich. 2006), for the proposition that Matter of Varela, 13 I. & N. Dec. 453 (B.I.A. 1970) is persuasive and should be relied upon by this Court. Defendants' Reply at 20. In light of the Sixth Circuit's decision in Lockhart, however, Turek is no longer good law. Further, Turek ignored the BIA's decision in Matter of Sano which wholly discredited the BIA's position in Varela. Additionally, Turek is factually distinguishable from Plaintiffs' claims. In Turek the alien married *after* being placed in removal proceedings, invoking a presumption that the marriage was not *bona fide*. Nothing could be farther from the facts of the instant case. Here Plaintiffs were married prior to being placed in removal proceedings.

> years before the adjustment of status. However, a delay in adjudication results in denial if the citizen spouse happens to die before the couple's two-year anniversary. But a severe delay of two years followed by the citizen's death results in approval because the alien-spouse could self-petition. This is exactly the type of absurdity to be avoided in the construction of statutes.

Lockhart, 2009 U.S. App. LEXIS 7305 at *26. Neither the Sixth nor Ninth circuits could condone such an arbitrary outcome based solely on the glacial pace of USCIS' operations.

IV. *Robinson* Was Wrongly Decided

Defendants spend a significant portion of their response restating the legal arguments set forth in their Motion to Dismiss, but rely almost entirely upon the split decision of the Court of Appeals for the Third Circuit in Robinson v. Napolitano, 554 F.3d 358 (3d Cir. 2009), for the proposition that their arguments have judicial support and, as such, should be relied upon by this Court, casting aside the decision of the Court of Appeals for the Ninth Circuit in Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006).

Robinson is based upon an interpretation of the relevant statute which the dissent correctly called "fatally flawed." Robinson, 554 F.3d at 367 (Nygaard, J., dissenting). This Court is not bound to apply Robinson to claims arising outside the Third Circuit and, given the split between the Third, Sixth, and Ninth circuits, the Court should decide the instant claims based on the Court's own analysis of the statute, as guided by those decisions which the Court deems persuasive.

A. The Third Circuit's Reasoning Was Fatally Flawed

The Third Circuit's reasoning in Robinson is "fatally flawed" in key respects. Robinson, 554 F.3d at 367 (Nygaard, J., dissenting). First, Robinson is based on the mistaken conclusion that an alien spouse must be married for at least two years in order to qualify for "immediate relative" status. Specifically, the Robinson majority held that,

> 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.

554 F.3d at 367. In fact, Congress imposed no requirement that a spouse have been married to a citizen spouse for at least two years as a prerequisite to obtaining "immediate relative" and permanent resident status. USCIS routinely approves applications for "immediate relative" and permanent resident status before the second wedding anniversary. [13] Once status has been

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[13] The majority in Robinson appears to have based its decision in part on the mistaken assumption that the USCIS rarely, if ever, acts fast enough to grant applications before two years of marriage. During oral argument, Circuit Judge Sloviter, who authored the majority opinion, asked the government about the "rare case" in which the agency acts within two years of marriage. Contrary to the government response, which was to say that they could not say it never happens, it is not the rare case that an application is approved where the marriage has not lasted two years, but the norm. It is commonplace for USCIS to grant adjustment of status to applicants who have been married for several months, because the statutory scheme clearly contemplates that the agency is to do so on a routine basis. USCIS processing times have always been under 24 months since detailed backlog reduction records have been kept, and now average about six months nationwide as a result of earnest backlog reduction efforts initiated in 2003.10/2003 average times: 21.2 months; 8/2004 average times 21.7 months. U.S. Citizenship and Immigration Servs., Backlog Elimination Plan: Fiscal Year 2004, 3rd Quarter Update 1 (2004), available at http://www.uscis.gov/files/article/BEPQ3v2_1.pdf 2004 Q3 average times: 22.4 months. U.S. Citizenship and Immigration Servs., Backlog Elimination Plan: Fiscal Year 2004, 4th Quarter Update 1 (2005), available at http://www.uscis.gov/files/article/BEPQ4v7.pdf 2004 Q4 average times: 19.8 months. Id. 2005 Q1 average times: 18.6 months. U.S. Citizenship and Immigration Servs., Backlog Elimination Plan: Fiscal Year 2005, 1st Quarter Update 1 (2005), available at http://www.uscis.gov/files/article/BEPQ1FY2005.pdf 2005 Q3 average times: 15.2 months. U.S. Citizenship and Immigration Servs., Backlog Elimination Plan: Fiscal Year 2005, 3rd Quarter Update 2 (2005), available at http://www.uscis.gov/files/article/BEPQ3FY2005.pdf 2005 Q4 average times: 13.9 months. U.S. Citizenship and Immigration Servs., Backlog Elimination Plan: Fiscal Year 2005, 4th Quarter Update 3 (2006), available at http://www.uscis.gov/files/article/BEPQ4FY2005.pdf 2006 Q1 average times: 13.4 months. U.S. Citizenship and Immigration Servs., Backlog Elimination Plan: Fiscal Year 2006, 1st Quarter Update 4 (2006), available at http://www.uscis.gov/files/article/BEPQ1FY2006.pdf 2006 Q2 average times: 12.5 months. U.S. Citizenship and Immigration Servs., Backlog Elimination Plan: Fiscal Year 2006, 2nd Quarter Update 4 (2006), available at http://www.uscis.gov/files/article/BEPQ2FY06.pdf 2006 Q3 average times: 8.3 months. U.S. Citizenship and Immigration Servs., Backlog Elimination

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granted, 8 U.S.C. § 1186a expressly prohibits revocation of that status based on the death of a spouse. See 8 U.S.C. §1186a(b)(1)(A)(ii); Id. §1186a(c)(1)(A); Id. §1186a(c)(4)(B); Id. §1186a(d)(1)(A)(i)(II); Id. §1186a(g). The Ninth Circuit in Freeman stated

> [T]he government concedes that it had the power to grant the Freemans' application prior to Mr. Freeman's death (and the Freemans' second anniversary). Had it done so, Mrs. Freeman's LPR could not then have been voided by her husband's death, as the statute expressly states. See § 1186a(a), (b)(1) (providing that an alien spouse who receives permanent resident status as an immediate relative before the second anniversary of her qualifying marriage does so on a conditional basis, and if the Attorney General determines that prior to the second anniversary of the alien's obtaining status the alien's marriage 'has been judicially annulled or terminated, other than through the death of a spouse,' the Attorney General 'shall terminate the permanent resident status of the alien.' (emphasis added)). This is compelling evidence that Congress did not intend its provision for a widow's self-petition for adjustment of status to have an implicit collateral consequence of terminating a spouse's already pending petition – particularly when the effect would be to foreclose a grieving widow from any adjustment at all 'through the death of [her] spouse.'

Freeman v. Gonzales, 444 F.3d 1031, 1042 (9th Cir. 2006). Simply stated, compelling evidence exists that Congress did not intend a spouse who experienced a quick adjudication of, for example, three months resulting in permanent resident status, followed by the death of her spouse at four months, to be completely insulated from having her permanent resident status terminated (as the government conceded at oral argument in Robinson would be the case under 8 U.S.C. § 1186a), and, at the same time, have intended a spouse who experienced a long bureaucratic delay to have her petition terminated, where the death of her spouse occurred at, for example, twenty three months.

Plan: Fiscal Year 2006, 2nd Quarter Update 4 (2006), available at http://www.uscis.gov/files/article/backlog_FY06Q3.pdf

Further, the Robinson majority relied on an incorrect definition of "child" when reviewing the INA's definitional sections:

> 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). 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.

Robinson, 554 F.3d at 365. The majority found the INA's reference to "deceased parent," and the absence of deceased spouse in § 1101(c)(2) significant. Yet § 1101(c)(2) is the definitional section relating to Title III of the INA (subchapter III of Title 8 U.S.C.), which is limited to claims of U.S. citizenship, a benefit that does not flow from the spousal relationship. The definition relating to a Title III benefit would never refer to spouse, since U.S. citizenship cannot be derived from a spouse. Titles I and II of the INA (subchapters I and II of Title 8 U.S.C.) deal specifically with immigration benefits sought in the case at bar, and those definitional statements found at § 1101(b) (not (c)) should have been discussed by the majority in Robinson. The moorings of the Robinson majority decision are unsound. The unanimous Freeman decision and its analysis have been followed by a unanimous panel of the Ninth Circuit in Choin v. Mukasey, 537 F.3d 1116 (9th Cir. 2008).

V. **Conclusion**

For the reasons stated above, Plaintiffs respectfully request that this Court grant Plaintiffs' Cross Motion for Summary Judgment. Further, Plaintiffs request that this Court deny Defendants' Motion to Dismiss or Alternatively for Summary Judgment.

DATED this 15th day of April, 2009.

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