No. 07-2977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OSSERRITTA ROBINSON,

Plaintiff-Appellee,

v.

MICHAEL CHERTOFF, Secretary,
U.S. Department of Homeland Security, et al.,

Defendants-Appellants.

BRIEF FOR PLAINTIFF-APPELLEE

On Appeal from the
United States District Court, District of New Jersey
Hon. Stanley R. Chesler (No. 06-5702)

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STATEMENT OF FACTS AND CASE

This case concerns an issue of first impression in the Third Circuit. The relevant facts are not in dispute. Louis Robinson, a citizen of the United States, filed an I-130 immigrant petition on behalf of his spouse, the Plaintiff-Appellee. Eight months thereafter, in October 2003, Mr. Robinson was tragically killed in the infamous Staten Island Ferry accident. The petition for Mrs. Robinson, and her corresponding application for adjustment of status to lawful permanent resident, remained unadjudicated at the time of her husband's death. Following the death of Louis Robinson, rather than adjudicating the merits of the petition in accordance with law, Appellants determined that "[u]pon the death of your husband ... the I-130 Petition ... is automatically terminated." Def. Appendix at 19.

Since the District Court's decision holding the Appellants' actions unlawful, two other courts have considered the issues presented on this appeal: Lockhart v. Chertoff, No. 07-823, 2008 WL 80225 (N.D. Ohio Jan. 7, 2008), and Taing v. Chertoff, — F. Supp. 2d — , 2007 WL 4348060 (D. Mass. Dec. 12, 2007). Both courts, on materially identical facts, agreed with the decision and reasoning of the District Court and the United States Court of Appeals in Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006), that Mrs. Robinson remains a "spouse" under 8 U.S.C. § 1151(b)(2)(A)(i) and that she is entitled to the process which flows from a duly filed petition and adjustment of status application.

ISSUES PRESENTED

I. Whether the plain language of 8 U.S.C. § 1151(b)(2)(A)(i) automatically strips an alien spouse of her spousal status and eligibility for immigration benefits upon the death of her citizen-spouse if married for less than two years at the time of death.

II. Whether the plain language and structure of the statutory regime compels the conclusion that an alien spouse whose citizen-spouse properly files a petition for "immediate relative" classification remains a surviving "spouse" upon the petitioner's death.

III. Whether an agency's interpretation of a statute it administers is entitled to deference where such interpretation is based on summary analysis, requires the abandonment of fundamental cannons of statutory construction, yields strange and arbitrary results, and is grounded in extra-jurisdictional precedent.

SUMMARY OF ARGUMENT

Appellants claim that Mrs. Robinson was stripped of her status as an immediate relative spouse because her husband died before immigration officials took final action on her duly filed petition. This argument, however, does not comport with the plain language and structure of the Immigration and Nationality Act (the "Act" or "INA"). The Court should sustain the decision of the New Jersey District Court and adopt the persuasive, in-depth analysis of the United States Court of Appeals for the Ninth Circuit in Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006). Under the express terms of the statute, Mrs. Robinson qualified as the immediate relative spouse of a U.S. citizen at the time of filing and, absent a clear statutory provision voiding her spousal status upon her husband's death, she remains a surviving "spouse" for purposes of eligibility for adjustment of status. Neither the definition of immediate relative nor the text and structure of the statutory scheme support the Appellants' position that Mrs. Robinson was stripped of her spousal status. The plain language of the statute defeats the agency's claim that it was divested of authority to adjudicate the petition.

Even if the Court finds the statute ambiguous, it should not defer to the government's reading because the agency's interpretation is not based upon a permissible construction of the statute. Appellants' reading of § 1151(b)(2)(A)(i)

runs counter to the statutory scheme, requires the abandonment of fundamental cannons of statutory construction and yields arbitrary and absurd results that Congress could not have been intended. The agency's construction of the statute is grounded *not* in meaningful statutory analysis, but in an extra-jurisdictional, 1970 decision by the Board of Immigration Appeals (the "Board" or "BIA") that offers only summary treatment of the issues. The Court should decline to stretch the statutory language to the point where agency inaction may disqualify an applicant simply because the passage of time renders obsolete information that is true at the time of filing. The Appellants' position that Congress intended for a citizen-spouse's volitional act in filing a petition to be trumped by circumstances as random as the pace of adjudication and the citizen's untimely death defies logic and should be rejected.

LEGAL ARGUMENT

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

A. The Untimely Death Of Louis Robinson Did Not Divest The Agency Of Authority To Adjudicate The Petition.

1. Statutory Scheme

a. Definitions of "immediate relative" and "spouse"

Family relationships form an integral part of our nation's immigration laws, and Congress gave immediate relatives a special place in the statutes. In addition to being exempt from numerical limitation (meaning that immigrant visas are immediately available), these individuals enjoy protection from many of the restrictions imposed on other categories of immigrants. 8 U.S.C. § 1151(b)(2); see also, 8 U.S.C. § 1255(c) (singular carve-out for "immediate relative(s)" seeking to qualify for adjustment of status to lawful permanent resident).

Under sections 201 and 204 of the Act, a United States citizen may petition to have the status of an alien who is an "immediate relative" adjusted to lawful permanent resident. 8 U.S.C. §§ 1151(b)(2)(A)(i), 1154(a)(1)(A)(i). Immediate relatives are defined as follows:

> *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. In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death ... the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 204(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).

The statute thus provides for two classes of immediate relatives. The first class, defined by first sentence of § 1151(b)(2)(A)(i), includes "children, spouses, and parents" of U.S. citizens. Id. Significantly, "[o]nly alien '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." Freeman, 444 F.3d at 1039.

Pursuant to the *first sentence* of § 1151(b)(2)(A)(i), therefore, an immediate relative includes the "spouse" of a United States citizen. Spouse, in turn, is defined at section 101(a)(35) of the Act, as follows:

> The term "spouse," "wife," or "husband," does 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). Notably, this definition has not changed since its original enactment in 1952 and is a negative definition which does not preclude common understandings of the term.

In order to sponsor an immediate relative under § 1151(b)(2)(A)(i), citizen-spouses must file Form I-130 with DHS. 8 U.S.C. § 1154(a)(1)(A)(i); 8 C.F.R. §§ 204.1(a)(1), 204.2(a). Appellants do not dispute that Mrs. Robinson qualified as an immediate relative "spouse" at the time of filing.

The second class of immediate relatives, defined by the second sentence of § 1151(b)(2)(A)(i), includes certain alien spouses who have been widowed at the time of filing. In the event a citizen spouse dies *without filing* an I-130 petition under the first sentence of the immediate relative definition, the second sentence of the statute provides a *separate right* for alien spouses to *self-petition* for immediate relative classification. 8 U.S.C. §§ 1151(b)(2)(A)(i), 1154(a)(1)(A)(ii) ("An alien spouse described in the second sentence of section 201(b)(2)(A)(i) *also may file* a petition") (emphasis added). This right, however, is qualified. The INA protects alien spouses whose citizen spouse failed to file a petition on their behalf, "but only if" the following conditions are satisfied: (I) the parties had been married at least two years at the time of death; and (II) the alien widow self-petitions for immediate relative classification within two years of the citizen spouse's death. 8

U.S.C. § 1151(b)(2)(A)(i).

Unlike citizen-spouses who are required to file an I-130 petition, alien spouses seeking to qualify under the second sentence of § 1151(b)(2)(A)(i) must self-petition by filing Form I-360. See 8 C.F.R. §§ 204.1(a)(2) & 204.2(b) [widow/I-360 process]; cf. 8 C.F.R. §§ 204.1(a)(1) & 204.2(a) [spouse/I-130 process]. 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" under the conditions set forth in the statute. Freeman, 444 F.3d at 1042.

The instant case falls under the first sentence of § 1151(b)(2)(A)(i) because Louis Robinson's petition for his wife was pending at the time of his death. Pursuant to section 204(a) of the Act, Mrs. Robinson's eligibility for immediate relative classification vested at the time of filing. 8 U.S.C. § 1154(a)(1)(A)(i); 8 C.F.R. §§ 103.2(b)(12), 204.1(a)(1), 204.2(a)(1). The INA contains no language authorizing the agency to terminate action on a duly filed petition.

b. The regulations governing immigrant petitions and the adjustment of status regime demonstrate that Mrs. Robinson's eligibility for immediate relative classification vested at the time of filing.

8 C.F.R. §§ 204.1 and 204.2 govern the processing of immigrant petitions. These regulations provide:

> (a) *Types of relative petitions*. . . . (1) A citizen or lawful permanent resident of the United States petitioning under section 204(a)(1)(A)(i) or 204(a)(1)(B)(i) of the Act for a qualifying relative's classification as an immediate relative under section 201(b) of the Act or as a preference immigrant under section 203(a) of the Act must *file* a Form I-130, Petition for Alien Relative. These petitions are described in § 204.2.

8 C.F.R. § 204.1(a)(1) (emphasis added).

> (a) *Petition for a spouse*. – (1) *Eligibility*. A United States citizen or alien admitted for lawful permanent residence may *file* a petition on behalf of a spouse.

8 C.F.R. § 204.2(a)(1) (emphasis added); see also 8 C.F.R. § 103.2(b)(12) (petition eligibility must be "established at the time of filing"). These regulations clearly support Mrs. Robinson's position that she qualifies as an immediate relative spouse because her eligibility was established *at the time of filing*.

Likewise, the adjustment of status regime requires that an immigrant visa be immediately available to an applicant "at the time the application is filed." INA § 245(a), 8 U.S.C. § 1255(a). This law provides that:

> The status of an alien who was inspected and admitted or paroled into the United States 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*.

Id. (emphasis added).

The same language appears in the regulations governing adjustment of status:

> (a) *General*. Any alien who is physically present in the United States, except for an alien who is ineligible to apply for adjustment of status under paragraph (b) or (c) of this section, may apply for adjustment of status to that of a lawful permanent resident of the United States if the applicant is eligible to receive an immigrant visa and an immigrant visa is immediately available *at the time of filing of the application*.

8 C.F.R. § 245.1(a) (emphasis added).

> (g) *Availability of immigrant visas under section 245 and priority dates* – (1) *Availability of immigrant visas under section 245*. An alien is ineligible for the benefits of section 245 of the Act unless an immigrant visa is immediately available to him or her *at the time the application is filed*.

8 C.F.R. § 245.1(g)(1) (emphasis added).

> (B) If, *at the time of filing*, approval of a visa petition filed for classification under section 201(b)(2)(A)(I) [immediate relative], section 203(a) or section 203(b)(1), (2), or (3) of the act *would make* a visa immediately available to the alien beneficiary, the alien beneficiary's adjustment application *will be considered properly filed* whether submitted concurrently with or subsequent to the visa petition, provided that it meets the filing requirements contained in parts 103 [fees] and 245.

8 C.F.R. § 245.2(a)(2)(i)(B) (emphasis added). The adjustment regulations further undermine the Appellants' argument and support Mrs. Robinson's position that she remains eligible for permanent resident status because an immigrant visa was immediately available to her at the time of filing.

2. DHS Lacks Authority to Terminate Action on a Duly Filed and Unadjudicated Petition.

Significantly, neither the INA nor the corresponding regulations contain any language which provides a basis for the agency's conclusion that Mrs. Robinson was stripped of her spousal status. Nor does the Act authorize DHS to "automatically terminate" action on an unadjudicated and duly filed petition, which is precisely what occurred in the instant matter. See Def. Appendix at 19. The Appellants' claim, therefore, that Louis Robinson's untimely death divested the agency of authority to consider the merits of Mrs. Robinson's petition and corresponding adjustment application is without merit.[1]

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[1] INA § 205 authorizes the Secretary of Homeland Security to revoke *approval* of a petition for "good and sufficient cause." 8 U.S.C. § 1155. This case, however, does not concern an approved petition, so § 1155 does not apply. Furthermore, the agency's regulation implementing its revocation authority goes beyond the statute in two significant respects by providing for *automatic revocation* of an approved petition upon the death of a petitioner, then authorizing the Secretary to "reinstate" the petition for humanitarian reasons. 8 C.F.R. § 205.1(a)(3)(i)(C). First, revocation of a properly filed and approved petition upon the death of the petitioner is not "good and sufficient cause" as contemplated by the statute. Second, the notion that the death of one's spouse could be considered good and sufficient cause to *automatically* revoke an approved petition (or terminate action on an unadjudicated petition) runs contrary to fundamental notions of justice and due process of law, particularly in light of the agency's routine approval of I-130 petitions without examination of the citizen-spouse, as discussed in section II.C.2, supra. Accordingly, a strong argument can be made that the automatic revocation and so-called 'humanitarian reinstatement' provisions of 8 C.F.R. § 205.1 are *ultra vires*.

B. The Intent Of Congress May Be Clearly Ascertained From The Language, Structure, Purpose And Application Of The Statute.

The Supreme Court has famously held that:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.... [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron v. NRDC, 467 U.S. 837, 842-43 (1984). Courts, therefore, "should not defer to an agency's interpretation of a statute if Congress' intent can be clearly ascertained through analysis of the language, purpose and structure of the statute." Freeman, 444 F.3d at 1038 (citation omitted).

Congressional intent is clear with regard to section 201(b) of the Act. Petitioner urges the Court to adopt the reasoned, logical and cogent analysis of § 1151(b)(2)(A)(i) articulated by the United States Court of Appeals in Freeman and followed by the New Jersey District Court. See id. at 1039-43. The Freeman Court determined that:

> Congress clearly intended an alien widow whose citizen spouse has filed all the necessary forms *to be* and *to remain* an immediate relative (spouse) for purposes of § 1151(b)(2)(A)(i), even if the citizen spouse dies within two years of the marriage. As such, the widowed spouse remains entitled to the process that flows from a properly filed

> adjustment of status application. The two-year durational language in the second sentence of § 1151(b)(2)(A)(i) grants a separate right to an alien widow to self-petition, within two years of the citizen spouse's death, by filing a [different] form I-360 where the citizen-spouse had not filed an immediate relative petition prior to his death.
>
> . . .
>
> The language of the first sentence of § 1151(b)(2)(A)(i), which sets out the general definition of immediate relative, is straightforward and succinct, and expressly includes "spouses." Only alien "parents" are subject to any limitation, with the grant of immediate relative status being restricted to those whose citizen child is 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. "This fact only underscores our duty to refrain from reading a phrase into a statute when Congress has left it out. Where Congress includes particular language in one section of a statute but omits it in another ... it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." [Supreme Court citation omitted.] ... Under the express terms of the statute, Mrs. [Robinson] qualified as the *spouse* of a U.S. citizen when she and her husband petitioned for [an immigrant visa and] adjustment of status, and absent a clear statutory provision voiding her spousal status upon her husband's untimely death, she remains a *surviving* spouse. Neither the definition of immediate relative nor the text and structure of the adjustment of status regime provides support for the government's position that Mrs. [Robinson] should be stripped of her spousal status.

Id. at 1039-40 (emphasis in original).

The Ninth Circuit recognized that the first sentence of § 1151(b)(2)(A)(i) – under which the instant case falls – governs I-130 petitions filed by citizen-spouses. The Court recognized further that the Act contains *no* language voiding

such petitions in the event of death. Id. at 1040. The Court understood that, by extending the definition of immediate relative in the second sentence of § 1151(b)(2)(A)(i), Congress provided "separate" protection for widows whose deceased spouses did not file petitions on their behalf. Id. at 1039; see also 8 U.S.C. §§ 1154(a)(1)(A)(i) & (ii). In addressing the very same arguments advanced by Appellants herein, the Freeman Court recognized and rejected the government's "attempt to read the second sentence of § 1151(b)(2)(A)(i) as implicitly importing a two-year requirement into the definition of spouse." Id. at 1040.

The District Court of New Jersey concurred with the persuasive reasoning of the Ninth Circuit. Judge Chesler determined that:

> the Court is convinced that the Ninth Circuit's interpretation is correct. The Court finds that the statute differentiates between an alien who waits to file a petition until after the citizen spouse is deceased and one who [has a petition filed on her behalf] shortly after marriage. In the first case, the [citizen] spouse could have petitioned for an immediate relative visa when the marriage first occurred but did not. In the second case, however, the [parties have] done everything [they] could do to ensure the issuance [of] an immediate relative visa.... 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, No. 06-5702, slip op. at 7 (D.N.J. May 14, 2007).

The logical construction of the statute advanced by Mrs. Robinson, and upheld by the District Court, is further supported by the clear and unambiguous language of section 204 of the Act. 8 U.S.C. § 1154 [“Procedure for Granting Immigrant Status”]. After establishing the right of citizens to petition for “immediate relative status under section 201(b)(2)(A)(i),” 8 U.S.C. § 1154(a)(1)(A)(i), Congress provided, in a separate provision, that:

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

8 U.S.C. § 1154(a)(1)(A)(ii) (emphasis added). 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.” Freeman, 444 F.3d at 1042; see 8 U.S.C. §§ 1154(a)(1)(A)(i) & (ii); cf. 8 C.F.R. §§ 204.1(a)(1) & 204.2(a) [spouse/I-130 process] with §§ 204.1(a)(2) & 204.2(b) [widow/I-360 process].

Simply put, “the plain language of the statute ... does not impose a two year requirement” for spouses to obtain immediate relative classification. Lockhart v. Chertoff, No. 07-823, 2008 WL 80225, at *10 (N.D. Ohio Jan. 7, 2008). Mrs. Robinson qualifies as a spouse under the *first sentence* of § 1151(b)(2)(A)(i). She need not avail herself of the right to self-petition under the *second sentence* of §

1151(b)(2)(A)(i) because she is already the beneficiary of a petition filed by her husband prior to his death. Only where a citizen-spouse fails to file a petition is the alien-spouse required to *self-petition* under the second sentence of the immediate relative definition. See 8 U.S.C. § 1151(b)(2)(A)(i). As a 'first-sentence' spouse, rather than a 'second-sentence' spouse/self-petitioning widow, Mrs. Robinson is "entitled to the process that flows from a properly filed [immigrant petition and] adjustment of status application." Freeman, 444 F.3d at 1039; see also Taing v. Chertoff, — F. Supp. 2d — , 2007 WL 4348060, at **7-10 (D. Mass. Dec. 12, 2007) (analyzing pertinent issue and finding reasoning of the Ninth Circuit and District Court of New Jersey "persuasive").

C. The Appellants' Arguments Lack Merit.

1. Congressional Use of the Present Tense in Section 204(b) of the Act Is Not Significant.

Appellants principal argument on appeal is that, because Congress utilized the present tense in section 204(b) of the Act, which governs the agency's authority to investigate petitions filed under the INA, "the normal reading of this language is that the facts must be true at the time of the determination [of] the visa petition." Def. Brief at 12-13. In addition to ignoring the entirety of the Immigration and Nationality Act beyond this particular provision, the government's position fails to appreciate the distinction between the fundamental

concepts of an alien's *eligibility* for preference status/immediate relative classification (I-130), which is established at the time of filing, and one's *admissibility* as an immigrant (I-485), which is determined at the time of adjudication. See Matter of O-, 8 I&N Dec. 295, 296-97 (BIA 1959).

As a preliminary matter, the District Court addressed the agency's "present tense" argument and found it "unpersuasive." Robinson, supra, at *7. The Court determined that:

> [i]t is true that § [1154](b) requires immigration officials to verify the accuracy of the information contained in the petition. That the statute is written in the present tense is not particularly significant. The Court declines to stretch the language of § [1154](b) to the point where agency inaction may disqualify an applicant simply because the passage of time renders obsolete information that was true and accurate at the time the I-130 petition was filed.... 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.

Id.

In a desperate attempt to justify the agency's interpretation of § 1151(b)(2)(A)(i), Appellants claim that Mrs. Robinson's reading of the statute is "forced" because she "tries to divorce the first and second sentences of the provision." Def. Brief at 13. Of course, "[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 th[is] statute' suggests that the second

sentence 'stands independent' of the first and does not qualify the general definition of spouse." Freeman, 444 F.3d at 1041, n.14 (citing United States v. Ron Pair Enterprises, 489 U.S. 235, 241-42, 109 S.Ct. 1026 (1989)). Indeed, "[i]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of language utilized in one section of a statute but omitted in another. Id. at 1039 (citing Keene Corp. V. United States, 508 U.S. 200, 208 (1993)).

The INA contains no requirement that a spouse be married for two years before immigration benefits may be conferred. The sole limitation placed upon a "spouse" – not relevant to the instant proceedings – may be found in the Act's definition of that term at § 1101(a)(35). Only immediate relative "parents" of citizens are subject to any limitation in § 1151(b)(2)(A)(i), with the qualification that the citizen-petitioner be at least 21 years of age. The plain language of the Act demonstrates that the two-year requirement applies only to alien spouses who are widowed at the time of filing.

Furthermore, as established in section I.A.1, supra, the beneficiary's eligibility for immediate relative classification is determined at the time of filing. 8 U.S.C. §§ 1154(a)(1)(A)(i), 1255(a); 8 C.F.R. §§ 103.2(b)(12), 204.1(a)(1), 204.2(a)(1), 245.1(a) & (g)(1), 245.2(a)(2)(i)(B); see also Matter of Katigbak, 14

I&N Dec. 45, 49 (Reg. Comm. 1971) (eligibility for employment-based immigrant classification must be established at time of filing visa petition). In contrast, an applicant's *admissibility* as an immigrant, governed by section 212 of the Act, is determined at the time of adjudication of an application for adjustment of status or an immigrant visa. 8 U.S.C. § 1182(a), 1255(a); Matter of Alarcon, 20 I&N Dec. 557 (BIA 1992); Matter of O-, supra. Appellants actually acknowledge this distinction in their brief, citing longstanding agency precedent, Matter of O-, for the proposition that "[w]hether the alien is actually admissible as an immigrant is not determined in the visa petition proceeding." Def. Brief at 11. As the Board confirmed a half-century ago:

> It is obvious from a reading of section 205 [now 204] that no provision is made therein for determining admissibility under the immigration laws. The sole concern of this procedure is eligibility for the status claimed.... The visa petition procedure is concerned merely with the question of status. It does not concern itself with substantive questions of inadmissibility.

Matter of O-, 8 I&N Dec. at 296-97; see also Dabaghian v. Civiletti, 607 F.2d 868 (9th Cir. 1979) (discussing distinction between "eligibility" for spousal classification and "admissibility" as an immigrant). The government's analysis nevertheless ignores this important distinction, disregards the plain language and structure of the statutory regime, and yields strange results that could not have been intended by Congress. Indeed, the "fortuity of the citizen spouses's untimely

death is too arbitrary and random a circumstance to serve as a basis for denying the petition" absent an express statutory mandate. Robinson, supra, at 7.

2. The Ordinary Meaning of the Term Spouse Includes a Surviving Spouse.

Appellants next argue that their "reading is consistent with the common, ordinary meaning of the term 'spouse'." Def. Brief at 13. However, this assertion is false. Appellants' reading defies traditional understanding of the term spouse, which includes a *surviving* spouse.

Appellants acknowledge that spouse is a common term and cite to the Eighth Edition of Black's Law Dictionary, published in 2004, for the definition. Notably, Appellants did not include the full definition of spouse in their brief, which is defined as follows:

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

Black's Law Dictionary (8th ed. 2004). Spouse is thus defined to include the term surviving spouse, which refers to a "spouse" who has outlived the other spouse.

Black's Law Dictionary, Sixth Edition, published in 1990 and available at the time of the 1990 INA amendments, defines spouse as "[o]ne's husband or wife, and 'surviving spouse' is one of a married pair who outlives the other." Black's Law Dictionary (6th ed. 1990). Here, the term "surviving spouse" is expressly

incorporated into the definition of “spouse.”

The Fourth Edition of Black’s Law Dictionary, which was published in 1951 and was the most up-to-date edition available to the drafters of the 1952 Act (the source of the current immediate relative definition), broadly defines spouse as “[o]ne’s husband or wife,” a phrase it specifically derives from Rosell v. State Indus. Accident Comm’n, 164 Or. 173, 179, 95 P.2d 726, 729 (Or. 1939). Black’s Law Dictionary (4th ed. 1951). Rosell, in turn, defines spouse as “one’s wife or husband” and surviving spouse as “the one, of a married pair, who outlives the other.” 164 Or. at 173.

Accordingly, whether one turns to the most recent 2004 Edition of Black’s Law Dictionary, the 1990 Edition available at the time of the 1990 amendments, or the 1951 Edition that was most current when Congress drafted the INA in 1952, “surviving spouse” falls within the definition of “spouse.” Mrs. Robinson has outlived her spouse, though a spouse she remains.

a. The definition of spouse in the Defense of Marriage Act supports traditional understanding of the term spouse.

Appellants’ recourse to 1 U.S.C. § 7 does not alter the analysis compelled by the INA. This statute merely defines a spouse as "a person of the opposite sex who is a husband or wife." Because a surviving spouse is a “spouse” who outlives the

other spouse, a surviving spouse is also a spouse within 1 U.S.C. § 7. See Black's Law Dictionary (8th ed. 2004); see also Rosell, supra.

The definition of spouse found at 1 U.S.C. § 7 originated in the Defense of Marriage Act ("DOMA"), Pub L. 104-199, September 21, 1996. It is clear from a review of the legislative history that DOMA was intended to *preserve* the institution of marriage as a legal union between one man and one woman. It was not intended to alter our traditional understanding of the term spouse. For example, Senator Byrd, a co-sponsor of the Senate Bill made the following statement:

> In very simple and easy to read language, this bill says that a marriage is the legal union between one man and one woman as husband and wife, and that a spouse is a husband or wife of the opposite sex. There is not, of course, anything earth-shaking in that declaration. We are not breaking any new ground here. We are not setting any new precedent. We are not overturning the status quo in any way, shape or form. On the contrary, all this bill does is reaffirm for purposes of Federal law what is already understood by everyone.... As I say, in debating the issue, I am not here to bash anyone…But if the State of Hawaii, or any other State, for that matter, redefines those terms, then what will happen at the Federal level? Who knows, for example, what the Social Security Administration is supposed to do when a so-called *"spouse"* of a same-sex marriage walks in and attempts to collect *survivors* benefits under the Social Security program?

Defense of Marriage Act: Hearings on S. 1740, 104th Cong. 10,109-11 (1996) (emphasis added). Likewise, the House Judiciary Committee report on DOMA provides as follows:

> Government currently provides an array of material and other benefits to married couples in an effort to promote, protect, and prefer the institution of marriage. While the Committee has not undertaken an exhaustive examination of those benefits, it is clear that they do impose certain fiscal obligations on the federal government. For example, survivorship benefits paid to the *surviving spouse* of a veteran of the Armed Services plainly cost the federal government money. If Hawaii (or some other State) were to permit homosexuals to "marry," these marital benefits would, absent some legislative response, presumably have to be made available to homosexual couples and *surviving spouses* of homosexual "marriages" on the same terms as they are now available to opposite-sex married couples and spouses.

H. REP. NO. 664, 104th Cong., 2d Sess. 18 (1996) (emphasis added).

The legislative history thus demonstrates that DOMA was intended to prevent Federal recognition of same-sex marriage, not modify or change the common and long-held understanding of the term spouse. Indeed, throughout its discussion of surviving spouse benefits, the House Judiciary Committee recognized that the word "spouse" would commonly be applied in the surviving spouse context. The intent and effect of DOMA was to deny recognition of spousal status to parties of same-sex, not opposite-sex, marriages.

b. State law defining marriage is irrelevant and inapplicable to the federal definition of spouse.

The New Jersey laws to which Appellants refer does not support their claim that Mrs. Robinson lost her status as a spouse for immigration purposes. As a threshold matter, the INA's definition of spouse supercedes state law.

Furthermore, each of the statutes and cases cited relate to a marriage terminated by death, not the status of a surviving spouse. The term "spouse" is relevant, not "marriage." None of the relevant immigration statutes use the term marriage and this term must not be read into the statute.

3. The Case Law Cited by Appellants Underscores the Weakness of their Position.

Appellants cite an unreported district court decision, Burger v. McElroy, 1999 WL 203353 (S.D.N.Y. 1999), in support of their position. Apart from the fact that Burger is an unpublished, lower court opinion which pre-dates Freeman, it does not even address, much less analyze, § 1151(b)(1)(A)(i). The Burger court merely deferred to the BIA's interpretation in Matter of Varela, 13 I&N Dec. 453 (BIA 1970), an extra-jurisdictional decision that has been discredited by subsequent Board precedent.[2]

Appellants also cite to Turek v. Department of Homeland Security, 450 F. Supp. 2d 736 (E.D. Mich. 2006), the sole post-Freeman decision to rule in favor of the agency. Cf. Lockhart v. Chertoff, No. 07-823, 2008 WL 80225 (N.D. Ohio

[2] The Burger court neither discussed nor referred to the Board's subsequent decision in Matter of Sano, 19 I&N Dec. 299 (BIA 1985), calling into question whether the court was even aware of the ruling. In Sano, the Board deemed its review in Varela "inappropriate" and expressly modified that decision. 19 I&N Dec. 299, 300. The Board's decision in Varela, and the lack of deference it is owed, is fully discussed in section II.A, infra.

Jan. 7, 2008); Taing v. Chertoff, — F. Supp. 2d — , 2007 WL 4348060 (D. Mass. Dec. 12, 2007); Robinson v. Chertoff, supra. Turek, however, is "easily distinguishable" and off the mark in numerous material respects. Taing, supra, at *9. As a threshold matter, Mr. Turek entered into the marriage during removal proceedings, which raises a statutory presumption that the marriage was not entered into in good faith. 8 U.S.C. § 1154(g); Turek, 450 F. Supp. 2d at 740. The Court found that because Mr. Turek provided no additional evidence to rebut the presumption, the "immediate relative petition could not be granted at the time Diane Turek passed away." Turek at 740. In the instant matter, there is no allegation, or evidence, that the marriage of Louis and Osserritta Robinson was illegitimate.

Moreover, the "analysis" in Turek is not only brief, but troublingly weak. Without even attempting to meaningfully analyze the statute, the Court relied on the Board's decision in Varela and summarily concluded that "Plaintiff was disqualified from consideration for immediate relative status by Diane Turek's death prior to the approval of the relative petition." Id.[3]

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[3] Notably, counsel in Turek only advised the court of the Freeman decision during a hearing in open court on Monday, 28 August 2006, which preceded the Court's decision on 6 September 2006 by little more than a week. See 450 F. Supp. 2d at 736, 738. In all likelihood, the critical issues analyzed in Freeman were neither raised nor fully briefed or considered by the court in Turek.

Finally, the Turek court made the unfortunate error of conflating the two immediate relative definitions within 8 U.S.C. § 1151(b)(2)(A)(i) – a distinction that the Court of Appeals in Freeman went to great lengths to highlight. Appellants' unlawful "attempt to read the second sentence of § 1151(b)(2)(A)(i) as implicitly importing a two-year requirement into the definition of spouse" violates fundamental cannons of statutory construction and must be rejected. Freeman, 444 F.3d at 1040.

II. EVEN IF THE COURT FINDS THE STATUTE AMBIGUOUS, THE AGENCY'S INTERPRETATION IS NOT ENTITLED TO DEFERENCE.

A. Matter of Varela Fails To Provide A Full-Blown Reasoned Interpretation Of The Statute And Is Not Viable Precedent.

The notion that a bona fide spouse of a U.S. citizen may be stripped of her right to adjudication of a duly filed I-130 petition is grounded in a discredited decision of the Board of Immigration Appeals. See Matter of Varela, 13 I&N Dec. 453 (BIA 1970). Appellants' argue that the Court should defer to the agency's interpretation of § 1151(b)(2)(A)(i) in Varela, where the Board "summarily ruled that by the time the non-citizen wife's adjustment of status petition was being determined, she was no longer [the] spouse of a United States citizen under § 1151 because her husband's 'death had stripped her of that status'." Freeman, 444 F.3d at 1038 (citing Varela, 13 I&N Dec. at 454). Varela, however, is not good law.

The Board modified Varela in Matter of Sano, 19 I&N Dec. 299 (BIA 1985). Contrary to Appellant's assertion (advanced before the District Court) that Sano stands merely for the proposition that the alien beneficiary of a visa petition does not have *standing* to seek the petition's approval after the petitioner's death, Sano was decided on the basis that the BIA itself, due to regulatory constraints, *lacked jurisdiction* to hear an appeal from an individual other than the petitioner. Sano at 299. The Board held as follows:

> As we recently stated in Matter of Zaidan, Interim Decision 2998 (BIA 1985), the Board's appellate jurisdiction is defined by the regulations set forth in 8 C.F.R. 3.1(b)(1985). Unless the regulations affirmatively grant us power to act in a particular matter, we have no appellate jurisdiction over it.... We therefore conclude that we lack jurisdiction to address an appeal by the beneficiary from the denial of a visa petition. Cf. Matter of Zaidan, supra. To the extent that our decision in Matter of Varela, supra, conflicts with this conclusion, it is hereby modified.

Id. at 300-01. While the BIA *could not* overrule its previously issued extra-jurisdictional decision, it explicitly stated that its review in Varela was "inappropriate." Id. at 300.

Even assuming *arguendo* that Varela is viable, deference is inappropriate because it fails to provide a "full-blown reasoned interpretation" of the statute. Singh v. Ashcroft, 383 F.3d 144, 152 (3d Cir. 2004). While an agency's interpretation of a statute which it administers is ordinarily accorded deference,

summary application of the statute without "a full-blown reasoned interpretation [ ] is not entitled to deference." Id. The Ninth Circuit Court of Appeals correctly described the level of deference owed to Varela. See Freeman, 444 F.3d at 1038. The Court explained that Varela is an "extra-jurisdictional" decision, suffers from a "lack of statutory analysis" and does not offer "a permissible construction of the statute." Id.; accord Lockhart v. Chertoff, supra, at *10; Taing v. Chertoff, supra, at *6 ("The Court owes no deference to Varela beyond its persuasive power"). Accordingly, this Court should reject the Appellants' reliance on Varela for the proposition that Louis Robinson's untimely death stripped Mrs. Robinson of her spousal status.

B. The Agency's Construction Of The Statute Is Not Permissible Because It Requires The Abandonment Of Bedrock Principles Of Statutory Construction And Disregards The Plain Language And Structure Of The Text.

"Where Congress includes particular language in one section of the statute but omits it in another ... it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Keene Corp. V. United States, 508 U.S. 200, 208, 113 S.Ct. 2035 (1993) (internal citation and quotation marks omitted); see also Alaka v. Attorney General of U.S., 456 F.3d 88, 97-98 (3d Cir. 2006) ("It is a fundamental cannon of statutory construction that where sections of a statute do not include a specific term used elsewhere in the statute, the

drafters did not wish such a requirement to apply.”). The law condones neither Appellants’ attempt to qualify the definition of “spouse” under § 1101(a)(35), nor their attempt to insert a two-year requirement into the first sentence of the immediate relative definition. Put simply, had Congress intended to prevent surviving spouses from obtaining benefits, or divest immigration officials of their authority to adjudicate duly filed petitions for a particular class of individuals, it would have explicitly done so. See Keene Corp., supra; Alaka, supra.

Furthermore, the government’s reading of the statute is contrary to the plain text and structure of the adjustment of status regime, which provides that eligibility vests upon filing. See section I.A.1, supra. As the Ninth Circuit held:

> [t]he more logical and statutorily substantiated interpretation of the second sentence [of § 1151(b)(2)(A)(i)] is that it applies 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. [Footnote omitted.] The immigration regulations discussing the process to adjust status comport with this reading and offer no support for the government’s contention that alien spouses who have filed the necessary forms should have their spousal status voided upon the premature death of the citizen spouses.

Freeman, 444 F.3d at 1041.

C. The Agency's Reading Of The Statute Is Irrational Because It Yields Absurd Results And Fails To Protect Against Marriage Fraud.

1. Appellants' Position that the Controlling Factor Is the Timeliness of Agency Action, Rather than a Citizen's Volitional Act in Filing the Petition, is Arbitrary and Capricious.

The agency's position that a surviving spouse is stripped of her spousal status if married for less than two years at the time of the citizen-spouse's death creates tragic and absurd results that Congress could not have intended. As the Court below found:

> [u]nder the Ninth Circuit's decision in *Freeman*, the petitioner's volitional act in promptly filing the I-130 petition ensures that the alien is considered an immediate relative under the statute. The alternative, urged by Defendants, is that the timing of the citizen spouse's death – i.e. whether it occurred before or after two years of marriage – governs. This interpretation yields strange results. A prompt adjudication of the I-130 petition (before the citizen dies) will result in approval. A delay in adjudication (until after the citizen dies) will result in a denial. But a severe delay of two years or more, followed by the citizen's death, will also result in an approval. The 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, supra, at 8; accord Lockhart, supra, at *9; Taing, supra, at *9. Indeed, under the government's reading, a spouse whose husband promptly files a petition, but dies 23 months following the marriage, finds herself profoundly worse-off than

a spouse whose husband *never* filed a petition, but dies 24 months following the marriage. This is irrational. The Court should thus "decline to stretch the language of [1154](b) to the point where agency inaction may disqualify an applicant simply because the passage of time renders obsolete information that is true and accurate at the time the I-130 petition is filed.... 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 at 7.

Rather than perform its congressionally mandated duty to adjudicate the petition, Appellants offer the cold, baseless assertion that "the goal of family unity ... can no longer be achieved" once the citizen-petitioner dies. Def. Brief at 16. The existence of citizen children and other family ties destroys this purported justification for automatic termination. Appellants' attempt to have this Court apply the requirements of one section of the statute to another arbitrarily compounds the tragedy of untimely death and creates anomalous results that could not have been intended by Congress. There is no rational basis for the Appellants' position that Congress intended to leave one class of surviving spouses in the lurch, subject to deportation at bureaucratic whim, while protecting another based upon the pace of the agency's adjudicatory function.[4]

[4] Appellants' contention that there is a rational basis for permitting pre-death approvals to stand, while precluding post-death

2. Louis Robinson's Death Does Not Prevent the Agency from Carrying Out the Investigation Required by Section 204(b) of the Act.

Appellants next try to justify their construction of the statute as "reasonable" by arguing that it "is consistent with Congress' concern with identifying and discouraging marriage fraud." Def. Brief at 18. This argument is disingenuous. The purpose of the investigation required by § 1154(b) is to determine the bona fides of the underlying marriage, i.e. whether the marriage was "entered into for the purpose of evading the immigration laws." 8 C.F.R. §§ 204.2(a)(1)(i)(A)-(C), (ii) & (iii)(A)-(B). The notion, however, that the death of the citizen-spouse prevents immigration officials from effectively carrying-out their investigation is false. Appellants *routinely* conduct this investigation without interviewing the petitioning spouse.

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approvals where the parties are married less than two years (Def. Brief at 16-17, n.3), is flimsy and without merit. While approval may be "perceived as a positive step forward," awarding benefits to a surviving spouse who was fortunate enough to have her petition adjudicated prior to her husband's death, while simultaneously (and automatically) punishing a spouse who was less fortunate, is irrational. For example, a surviving spouse who enjoyed a bona fide marital relationship with her husband may be denied benefits, through no fault of her own, where her immigrant petition and adjustment application had been pending for more than 23 months at the time of her husband's death, while another surviving spouse, including one who has been married (or whose petition has been pending for) less time, may be granted resident status if immigration officials happened to perform the ministerial act of approving the petition. Surely, this is not what Congress intended when it enacted the adjustment of status regime. Rather, Congress intended that all duly filed petitions be given just and adequate consideration. See 8 U.S.C. § 1154(b).

In the context of I-130 petitions filed with regional offices for purposes of immigrant visa processing ("consular processing"), including those filed on behalf of immediate relative spouses, immigration officials adjudicate and approve petitions, and issue immigrant visas, without interviewing the petitioning spouse. In fact, these petitions are *always* adjudicated without an interview based strictly on the documentary evidence submitted. See 8 C.F.R. §§ 204.1(f) [*Supporting documentation*], 204.2(a)(1)(i)(B)(1)-(6) [*Documentation*] & (a)(2) [*Evidence for petition for a spouse*]. Once approved, the petition is forwarded overseas to the appropriate U.S. Embassy or consular office for scheduling of an immigrant visa interview. It is extremely rare for a citizen-spouse to fly overseas to attend a visa interview. It thus defies logic for Appellants to contend that they cannot determine the bona fides of the relationship underlying a visa petition without interviewing the petitioning spouse in the context of a properly filed adjustment of status application when they routinely do just that in the context of immigrant visa applications.[5]

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[5] Alien spouses outside the United States must apply for an immigrant visa at a U.S. consular post following approval of the petition. Alien spouses physically present inside the United States at the time of filing, who are otherwise eligible, may simultaneously file for adjustment of status to lawful permanent resident under section 245 of the Act, 8 U.S.C. § 1255. Mrs. Robinson exercised her right to apply under the adjustment of status regime. Notably, adjustment of status is also routinely conferred without an interview of the petitioning spouse in the context of alien spouses

Immigration officials not only have the *authority* to conduct an investigation without interviewing the petitioner, but – whether the citizen-spouse is alive or deceased – the law *mandates* an investigation on the basis of reliable forms of evidence, including testimonial and photographic evidence from the alien-spouse, affidavits and/or testimonial evidence from third-parties with personal knowledge of the relationship, and standard documentary evidence probative of the bona fides of the marriage. See 8 U.S.C. § 1154(b); 8 C.F.R. §§ 204.1(f), 204.2(a)(1)(i)(B)(1)-(6) & (a)(2).

The Court should therefore reject the Appellants' position that their interpretation of the statute is reasonable. Indeed, even where the agency *does* interview the petitioning-spouse, but does not adjudicate the I-130 before the citizen's death, it takes the position that it cannot approve the petition "because the death of the citizen-spouse renders it impossible to determine the validity of the marriage." See Lockhart, supra, at **1, 10. This position illustrates the disingenuous nature of the government's marriage fraud-justification.

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who immigrate based upon an approved fiancee petition. These spouses marry within 90 days of entry, then apply to adjust status under INA § 245. See 8 U.S.C. §§ 1101(a)(15)(K)(i), 1184(d). Interviews in this context are often not required unless the documentation provided is deemed insufficient.

CONCLUSION

By virtue of the foregoing, Mrs. Robinson requests an Order **DISMISSING** the Petition for Review and **SUSTAINING** the Decision and Order of the United States District Court dismissing Defendants/Appellants motion for summary judgment and granting Plaintiff/Appellee's cross-motion for summary judgment.

Dated: 22 January 2008

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COMBINED CERTIFICATIONS

The undersigned hereby certifies that he is a member in good standing of the Bar of this Court; that this Brief complies with applicable Court rules in that its body contains 9,484 words and 1,063 lines of text (including the Tables); that the enclosed Brief has been served upon counsel for Defendants-Appellants, at the address designated for such purpose, on the date hereof via electronic mail and regular mail; that the text of the electronically-filed Brief is identical to the document(s) paper-filed with the Court; and that the virus protection software TREND MICRO *OfficeScan* was run on the file and no viruses were detected.

Dated: 23 January 2008

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JEFFREY A. FEINBLOOM