

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

-----X	:	
<b>OSSERRITTA ROBINSON,</b>	:	
	:	<b>Docket No. 06-5702 (SRC)</b>
Petitioner,	:	
	:	
v.	:	
	:	
<b>MICHAEL CHERTOFF,</b> Secretary,	:	
Department of Homeland Security; and	:	Agency Case No.: A96 428 797
<b>EMILIO GONZALEZ,</b> Director, U.S.	:	(Immigration)
Citizenship and Immigration Services	:	
	:	
Respondents.	:	
-----X	:	

**PETITIONER’S BRIEF IN OPPOSITION TO MOTION TO DISMISS AND  
IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

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## **STATEMENT OF JURISDICTION, FACTS AND RELIEF REQUESTED**

This Court has jurisdiction pursuant to the federal statutes cited in ¶ 1 of the Complaint and in accordance with the decision of the United States Court of Appeals for the Third Circuit in Pinho v. Gonzales, 432 F.3d 193 (3d Cir. 2005). Respondents have not challenged the jurisdiction of the Court.

No facts are in dispute. Petitioner hereby incorporates by reference the facts alleged in the Complaint. In their motion papers, Respondents acknowledged the truth of the facts alleged by Petitioner.

Petitioner seeks an Order denying the Respondent's motion to dismiss and granting her cross-motion for summary judgment. Petitioner seeks a further Order awarding her costs and legal fees in an amount to be determined by the Court.

## **ISSUES PRESENTED**

- I. Whether Respondents acted lawfully in terminating, rather than adjudicating, a properly filed petition for immediate relative classification under section 201(b) of the Immigration and Nationality Act and by concluding that, as a matter of law, an alien-spouse is stripped 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 an agency's interpretation of a statute it administers should be accorded deference where such interpretation is contrary to the law's language, structure, purpose and application and is grounded in discredited precedent.

## **SUMMARY OF ARGUMENT**

This case concerns an issue of first impression in the Third Circuit.

Immigration officials terminated action on a residency petition filed on Petitioner's behalf by her late-husband, Mr. Louis Robinson, a citizen of the United States who was tragically killed in October 2003 during the Staten Island Ferry accident. The petition for Mrs. Robinson, and her corresponding adjustment of status application, had been pending for eight months at the time of her husband's death, but remained adjudicated. Following the death of Louis Robinson, rather than adjudicate the petition in accordance with law, government officials terminated action the petition, then denied Mrs. Robinson's adjustment application.

Respondents argue that Mrs. Robinson was stripped of her status as an immediate relative "spouse" under section 201(b)(2)(A)(i) of the Immigration and Nationality Act (the "Act") by virtue of her husband's untimely death and that, accordingly, she was no longer eligible for resident status. Respondents further contend that they were divested of authority to adjudicate Mrs. Robinson's immigrant petition as a result of her husband's death. These arguments, however, are unsupported by the statutory scheme governing immigrant petitions and adjustment of status applications, run contrary to the clearly expressed intent of Congress, and are grounded in a 1970 decision by the Board of Immigration

Appeals (“BIA”) that the BIA, itself, subsequently deemed “inappropriate” and extra-jurisdictional.

Mrs. Robinson urges this Court to adopt the reasoning set forth by the United States Court of Appeals for the Ninth Circuit in Freeman v. Gonzales, 444 F.3d 1031 (9<sup>th</sup> Cir. 2006), and hold that termination of the petition was unlawful. The Court should determine that Respondents are duty-bound to adjudicate the petition because, under the express terms of the statute, Mrs. Robinson qualified as the “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 provide support for the Respondents’ position that Mrs. Robinson was stripped of her spousal status.

## LEGAL ARGUMENT

### **I. RESPONDENTS UNLAWFULLY TERMINATED ACTION ON THE SUBJECT IMMIGRANT PETITION BECAUSE MRS. ROBINSON REMAINS AN IMMEDIATE RELATIVE SPOUSE FOR PURPOSES OF ADJUSTMENT OF STATUS.**

#### **A. Mr. Robinson's Untimely Death Did Not Divest Respondents Of Authority To Adjudicate The Petition.**

Respondents 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 does not comport with the relevant provisions of the INA. As the U.S. Court of Appeals for the Ninth Circuit confirmed on materially identical facts in Freeman v. Gonzales, 444 F.3d 1031, 1044-45 (9<sup>th</sup> Cir. 2006), Mrs. Robinson's status as an immediate relative was established at the time of filing the petition and corresponding application for adjustment of status. For the reasons set forth below, Respondents' arguments to the contrary cannot withstand close scrutiny.

#### **1. Immigrant Petition Statute and Regulations**

##### **a. Mrs. Robinson's eligibility for immediate relative classification was established at the time of filing.**

Under section 201 of the Act, 8 U.S.C. § 1151, a United States citizen may petition to have the status of an alien who is an immediate relative adjusted to lawful permanent resident. "Immediate relative" is a defined term that, pursuant to

the first sentence of § 1151(b)(2)(A)(i), includes the “spouse” of a United States citizen. Spouse, in turn, is defined at section 101(a)(35) of the Act, as follows:

[t]he 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.

The second sentence of § 1151(b)(2)(A)(i) goes on to provide a *separate* right for alien-widows to *self-petition* for immediate relative classification. The statute provides:

[i]n 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 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)(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).

As the Ninth Circuit held in Freeman, the logical construction of § 1151(b)(2)(A)(i) is that, under the first sentence, eligibility for immediate relative classification vests at the time of filing. See 444 F.3d at 1039-40. The beneficiary is not stripped of her status as an immediate relative “spouse” by virtue of the

citizen-spouse's untimely death. In this scenario, the alien spouse "remains a *surviving* spouse" for purposes of adjustment of status. Id. at 1040.

In fact, contrary to the Respondents' baseless assertion that sections 201(b)(2)(A)(i) and 204(b) of the Act "clearly provide" that an I-130 petition may not be approved following the death of the citizen-spouse (Resp. Brief at 7), neither statutory provision contains such language. 8 U.S.C. §§ 1151(b)(2)(A)(i) & 1154(b).

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.

Freeman, 444 F.3d at 1044-45.

Mrs. Robinson thus 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 valid petition filed by her husband prior to his death.

**b. The regulations governing immigrant petitions support the Freeman Court's construction of § 1151(b)(2)(A)(i).**

Respondents point to 8 C.F.R. § 204.1(a)(1) and § 204.2(a) to justify their construction of § 1151(b)(2)(A)(i). (Resp. Brief at 2.) These regulations govern the processing of immigrant petitions and provide:

(a) Types of 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).

The regulations provide no basis for concluding that Mrs. Robinson was stripped of her spousal status after filing. To the contrary, the regulations support Mrs. Robinson's position that eligibility for the requested benefit was established *at the time of filing*. See id.

These provisions, moreover, are consistent with the construction of § 1151(b)(2)(A)(i) adopted in Freeman. While the above-cited regulations address petitions by U.S. citizens on behalf of their spouses, 8 C.F.R. §§ 204.1(a)(2) and 204.2(b) address self-petitions by alien widows and widowers who are not the

beneficiaries of petitions filed by their U.S. citizen-spouses prior to their deaths.

As the Ninth Circuit noted in Freeman, the regulations are “consistent with a congressional intent to create 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” [provided the alien and citizen were married at least two years].

444 F.3d at 1041-42.

**c. Louis Robinson’s death does not prevent Respondents from carrying out the investigation required by section 204(b) of the Act.**

Respondents also cite to INA § 204(b), 8 U.S.C. § 1154(b), for the proposition that officials must investigate and determine the truth of the facts alleged in the petition. They note that “USCIS may not approve Form I-130 on behalf of a claimed immediate relative unless USCIS finds, as a result of this investigation, ‘that the facts stated in the petition are true and that the alien on behalf of whom the petition is made is an immediate relative.’ 8 U.S.C. § 1154(b)” (Resp. Brief at 3). Petitioner agrees. Respondents, however, make a fatal assumption about the authority, and ability, of the government to conduct the required investigation following the death of the petitioning spouse.

The purpose of the investigation required by section 204(b) of the Act is to determine the bona fides of the underlying marriage and 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). As Respondents correctly note, a petition may not be approved on the basis of a marriage which, although legally valid, was entered into solely to obtain an immigration benefit. However, the Respondents’ assertion that Mr. Robinson’s death “effectively precludes [immigration officials] from examining this issue” (Resp. Brief at 7) is baseless as a matter of law.

In fact, immigration officials routinely approve I-130 petitions, and issue immigrant visas, without interviewing the petitioning spouse in the context of petitions filed with regional offices for purposes of immigrant visa (consular) processing, including those filed on behalf of immediate relative spouses.<sup>1</sup> These petitions are *always* adjudicated without an interview based on the documentary evidence submitted. 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 to argue that Respondents cannot determine the bona

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<sup>1</sup> 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. Aliens spouses outside the United States must apply for an immigrant visa at a U.S. consular post following approval of the petition. Mrs. Robinson exercised her right to apply under the adjustment of status regime.

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. Immigration officials not only have the *authority* to conduct this investigation, but, whether the citizen-spouse is alive or deceased, the law *mandates* an investigation on the basis of testimonial evidence from the alien-spouse, affidavits and/or testimonial evidence from third-parties with personal knowledge of the relationship, and standard forms of documentary evidence. See 8 U.S.C. § 1154(b); 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]. Moreover, *nothing* in the Act or regulations authorizes immigration officials to terminate action on a petition upon the death of a petitioning-spouse.

## **2. Adjustment of Status Statute and Regulations**

Respondents' also note that, "[t]o be eligible for adjustment of status, an immigrant visa must be immediately available to the applicant" (Resp. Brief at 3) and cite INA § 245(a)(3), 8 U.S.C. § 1255(a)(3). However, they fail to note that § 1255(a)(3) requires only that an immigrant visa be available to the applicant *at the time the application is filed*. The law provides:

[t]he 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*.

INA § 245(a), 8 U.S.C. § 1255(a) (emphasis added). The same language appears in the regulations concerning adjustment of status cited by Respondents, which provide:

(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 foregoing regulations thus support Mrs. Robinson's position that she remains eligible for adjustment of status because an immigrant visa was immediately available to her at the time of filing. In addition, the general regulation governing adjustment of status applications, not cited by Respondents, further supports Mrs. Robinson's position:

(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).

Accordingly, the Respondents' claim that Louis Robinson's death divested them of authority to consider Mrs. Robinson's petition and corresponding adjustment of status application has no support in either the statutory scheme or applicable regulations.

**B. Respondents Lack Authority To Terminate Action On, Or Revoke, A Petition That Has Never Been Adjudicated.**

Respondents next point to the revocation provisions of the Act and regulations to justify their termination of Mr. Robinson's petition. (Resp. Brief at 8.) Section 205 of the Act and Part 205 of 8 C.F.R. govern Respondents' authority to revoke approved petitions. While INA § 205 authorizes the Secretary of Homeland Security to revoke approval of a petition for "good and sufficient cause" (8 U.S.C. § 1155), the regulations go well beyond the authority of the statute and provide for *automatic* revocation of an approved petition upon the death of the petitioner. 8 C.F.R. § 205.1(a)(3)(i)(C).<sup>2</sup> Curiously, the regulations authorize the

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<sup>2</sup> 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*. Automatic revocation of a properly filed and approved petition

Secretary to “reinstate” approval of a revoked petition for "humanitarian reasons."

Id.

As a preliminary matter, the government’s revocation authority concerns “approved” (as opposed to unadjudicated) petitions and, accordingly, does not apply to Mrs. Robinson. 8 U.S.C. § 1155; Dodig v. INS, 9 F.3d 1418 (9th Cir. 1993). Moreover, it is impossible to reconcile the automatic revocation and reinstatement regulation with Respondents’ claim that a surviving spouse is no longer a “spouse” for purposes of adjustment of status. According to the government’s theory, the law allows Respondents to pick and choose which class of surviving spouses may be approved for lawful resident status. By its express terms, the regulation sanctions the grant of lawful resident status to the surviving spouse of a U.S. citizen where, at the time of death, there is an approved immigrant petition, but not yet an approved adjustment application, in a process whereby the approved petition is automatically revoked and then “reinstated” at the

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upon the death of the petitioner is not "good and sufficient cause" as contemplated by the statute. The mere 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 government’s routine approval of I-130 petitions without examination of the citizen-spouse, as discussed in section I.A.1.c, supra.

government’s discretion for humanitarian reasons. See 8 C.F.R. § 205.1(a)(3)(i)(C). By recognizing this path to legal residence, Respondents treat certain surviving spouses of U.S. citizens as qualifying immediate relatives – precisely what officials claim they lack authority to do in the case at bar – while arguing that other surviving spouses lose their spousal status upon the untimely death of their loved ones. This is arbitrary and illustrates how Respondents’ interpretation of § 1151(b)(2)(A)(i) has yielded, and will continue to yield, absurd results in direct contravention of congressional intent.

In refusing to perform its congressionally mandated duty to adjudicate the petition filed on behalf of Mrs. Robinson, Respondents determined that “[u]pon the death of your husband . . . the I-130 Petition . . . is automatically terminated” (Pet’r Comp. ¶ 17). While Respondents contend that there is a “rational basis for permitting a pre-death approval to stand, while precluding a post-death approval” (Resp. Brief at 8, n. 4), in fact, this distinction is arbitrary and irrational. Contrary to the government’s assertions, the citizen-spouse’s death does not preclude consideration of the bona fides of a marriage. Indeed, the issue may be – and is routinely – given due consideration without the petitioner’s testimony (see section I.A.1.c, supra).<sup>3</sup>

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<sup>3</sup> There is no rational basis for awarding benefits to a surviving spouse was fortunate enough to have her petition adjudicated prior to her

## II. THE AGENCY'S INTERPRETATION OF SECTION 201(b) OF THE ACT IS NOT ENTITLED TO DEFERENCE

### A. Respondents' Construction Of The Statute Is Not Based On Viable Precedent.

The notion that a bona fide spouse of a U.S. citizen may be stripped of her right to an adjudication of an I-130 petition filed on her behalf, including the corresponding notion that an approved petition shall be automatically revoked upon the death of the petitioning-spouse, flows not from the "good and sufficient cause" language of the statute, but from a discredited decision of the Board of Immigration Appeals. In Matter of Varela, 13 I&N Dec. 453 (BIA 1970), 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,

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husband's death, while simultaneously (and automatically) punishing a spouse who was less fortunate. 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 several months, even years, 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.

is not good law.

The Board modified Varela in a critical respect in Matter of Sano, 19 I&N Dec. 299 (BIA 1985). Contrary to Respondents' assertion that Sano stands 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" (Resp. Brief at 8), 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. 19 I&N Dec. 299. The Board determined 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 that case was "inappropriate." Id. at 300.

The Ninth Circuit Court of Appeals discussed 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 is

“not a permissible construction of the statute.” Id. 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.” Singh v. Ashcroft, 383 F.3d 144, 152 (3d Cir. 2004). Hence, the Respondents’ reliance on Varela for the proposition that death of the citizen-spouse automatically terminates the petition is misplaced.

**B. Congress Intended For Surviving Spouses Married Less Than Two Years At The Time Of Death To Remain Eligible For Immigration Benefits.**

**1. The Intent of Congress May Be Clearly Ascertained from the Language, Structure, Purpose and Application of the Statute.**

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

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 full effect to the unambiguously expressed intent of Congress. . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

Chevron v. NRDC, 467 U.S. 837, 842-43 (1984). Courts “should not defer to an agency’s interpretation of a statute if Congress’ intent can be clearly ascertained through analysis of the language, purpose and structure of the statute.” Freeman,

444 F.3d at 1038 (citation omitted). Congressional intent is clear with regard to section 201(b) of the Act.

Petitioner urges the Court to adopt the reasoned, logical and cogent analysis of INA § 201(b)(2)(A)(i) set forth by the United States Court of Appeals in

Freeman. See 444 F.3d at 1039-43. The Court determined that:

[t]he language of the first sentence of § 1151(b)(2)(A)(i), which sets out the general definition of immediate relative, is straightforward and succinct, and expressly includes “spouses.” Only alien “parents” are subject to any limitation, with the grant of immediate relative status being restricted to those whose citizen child is 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 Freeman court 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

and that there is no language in the Act voiding such petitions in the event of death. The Court further recognized that 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 has not filed an immediate relative petition prior to his death.*” Id. at 1039 (emphasis added). Congress provided separate protection for widows whose deceased spouses did not file petitions on their behalf. The Court must therefore reject the Respondents’ misguided and 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.” Id. at 1040.

In rejecting the Respondents’ position that immigration officials act lawfully by refusing to adjudicate duly filed I-130 petitions, the Ninth Circuit reasoned as follows:

The government, relying primarily on the statute's *second* sentence (“In the case of an alien who was the spouse of a citizen ...”), reads § 1151(b)(2)(A)(i) as “requir[ing] that in order to be an 'immediate relative' under immigration law the alien 'spouse' (wife) must have been married to the United States citizen 'spouse' (husband) 'for at least 2 years at the time of the citizen's death.’” ... Mrs. Freeman disputes the government's reading. Relying on the *first* sentence of the statute (“For purposes of this section, the term 'immediate relative' means the children, spouses, and parents ...”), she argues that she qualified for adjustment of status as an immediate relative – i.e., a spouse – because of her marriage to a U.S. citizen at the time her husband (and she) filed the forms required to initiate the adjustment of

status process. She further argues that the statute does not impose a two-year marriage requirement to be considered an immediate-relative spouse, nor does it void that spousal status upon her husband's death. To the extent the second sentence the government invokes is relevant, it simply grants an alien-spouse whose deceased citizen-spouse had *not* filed an I-130 the right to self-petition so long as the parties were married for two years prior to the citizen's death.

444. F.3d at 1037-38 (emphasis in original).

The Court in Freeman thus recognized that, where a citizen-petitioner properly files for his/her spouse, the petition is filed under the definition of the first sentence of the immediate relative definition. Only where the United States citizen-spouse never filed 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). Mrs. Robinson thus qualifies as a ‘first sentence’ spouse, not a ‘second sentence’ spouse/self-petitioning widow. Because her husband had already filed a petition on her behalf, Mrs. Robinson is not required to self-petition as a widow.

## **2. Case Law Cited by Respondents Underscores the Weakness of their Position.**

Respondents argue that there is "no authority to approve a Form I-130 after the petitioner has died" (Resp. Brief at 5) and cite an unreported 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 opinion from a foreign jurisdiction, the

court merely deferred to the BIA's interpretation in Varela. The Burger court did not discuss or even refer to the BIA's decision in Sano, calling into question whether the court was aware of the Board's subsequent ruling, and did not address or analyze the issues presented in the case at bar.

Respondents also cite to Turek v. Department of Homeland Security, 450 F. Supp. 2d 736 (E.D. Mich. 2006), which was issued after the Ninth Circuit's decision in Freeman. Turek, however, is distinguishable and off the mark in numerous material respects. As a threshold matter, the "analysis" in Turek is not only brief, but troublingly weak. See 450 F. Supp. 2d at 740. Without even attempting to meaningfully analyze the statute, the Turek 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. 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 id. at 736, 738. Like the Burger court, the Turek court failed to recognize or discuss the extra-jurisdictional nature of Varela and that the BIA, itself, deemed the decision "inappropriate" and modified it accordingly in Sano. 19 I&N Dec. 299, 300. Indeed, the critical issues analyzed in

Freeman were likely not even raised, much less fully briefed and considered.

Furthermore, the Turek court distinguished Freeman by noting that Mr. Turek entered into the marriage during removal proceedings, which raises a "presumption that the marriage was not done in good faith." Turek, 450 F. Supp. 2d at 740; see 8 U.S.C. § 1154(g). 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." 450 F. Supp. 2d at 740.

Finally, and perhaps most significantly, the Turek court made the fatal 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. Respondents' 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 a fundamental canon of statutory construction and must be rejected. Freeman, 444 F.3d at 1040.

**3. Even if the Court Finds Section 201(b) Ambiguous, Respondents' Construction of the Statute Is Not Permissible.**

- a. The government's reading requires the abandonment of bedrock principles of statutory interpretation and disregards the plain language and structure of the text.**

“It is a fundamental canon 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.” Alaka v. Attorney General of U.S., 456 F.3d 88, 97-98 (3d Cir. 2006) (citation omitted). Simply put, had Congress intended to divest immigration officials of their authority to adjudicate I-130 petitions for a particular class of individuals, or prevent surviving spouses from obtaining immigration benefits, it would have explicitly done so. The law condones neither Respondents' attempt to insert a two-year requirement into the first sentence of the immediate relative definition, nor their attempt to extend the definition of “spouse” under section 101(a)(35) of the Act to preclude surviving spouses from obtaining benefits. See 8 U.S.C. §§ 1101(a)(35), 1151(b)(2)(A)(i).

Furthermore, as previously set forth, the government's interpretation of the statute is irrational and contrary to the text and structure of the adjustment of status regime, which plainly provides that eligibility vests upon filing (see section I.A, supra). The Court should therefore hold that Mrs. Robinson remains eligible for

immigration benefits because nothing in the language, structure, purpose and application of the Act suggests – much less “clearly provide[s],” as the government brashly contends – that Congress intended for the death of a citizen-spouse to divest officials of authority to adjudicate a duly filed petition. See Freeman, 444 F.3d at 1039-43.

**b. Respondents’ construction of the statute defies the traditional understanding of the term spouse, which includes surviving spouses.**

**i. Spouse is a common term of ordinary usage and includes a spouse who outlives the other spouse.**

As previously discussed, Respondents’ interpretation of who qualifies as a “spouse” in the context of § 1151(b)(2)(A)(i) is grounded in the BIA’s discredited decision in Matter of Varela, *supra*. Apart from the fact that the holding in Varela was “inappropriate,” as determined by the very administrative body that issued it, no deference should be given to the agency's interpretation of the ordinary term spouse.

Respondents admit that spouse is a common term and cite to Black’s Law Dictionary for the definition. (Resp. Brief at 5.) Although Respondents did not include the full definition of spouse in their brief, the Eighth Edition of Black’s, published in 2004, defines spouse 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 (8<sup>th</sup> 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 (6<sup>th</sup> ed. 1990). 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 (4<sup>th</sup> ed. 1951). Rosell, in turn, defines a widow as "a married woman whose husband is dead" and a spouse as "one's wife or husband." It then defines a surviving spouse as "the one, of a married pair, who outlives the other." 164 Or. at 173.

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.

**ii. The definition of spouse in the Defense Of Marriage Act supports the traditional understanding of the term spouse.**

Respondents’ recourse to 1 U.S.C. § 7 does not alter the analysis advanced by Petitioner. That statute merely defines a spouse as "a person of the opposite sex who is a husband or wife." Because a surviving spouse is the one, of a married pair, who outlives the other, a surviving spouse is also a spouse within 1 U.S.C. § 7. See Black’s Law Dictionary (8<sup>th</sup> 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. Mr. President, throughout the annals of human experience, in dozens of civilizations and cultures of varying value systems, humanity has discovered that the permanent relationship between men and women is a keystone to the stability, strength, and health of human society – a relationship worthy of legal recognition and judicial protection. The purpose of this kind of union between human beings of opposite gender is primarily for the establishment of a home atmosphere in which a man and a woman pledge themselves exclusively to one another and who bring into being children for the fulfillment of their love for one another and for the greater good of the human community at large... 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.

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

The New Jersey law to which Respondents refer does not support the claim that Mrs. Robinson lost her status as a spouse for immigration purposes. Each of the cited cases 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.

In addition, the traditional definition of spouse for federal purposes, found at 1 U.S.C. § 7, supersedes state law. While the Respondents' brief is littered with references to "petitioner and *the* late Mr. Robinson," distinctly absent is reference to petitioner and *her* late husband. In our society, Petitioner has the right to use the title "Mrs." and to hear others speak of Louis Robinson as *her* late husband.

## CONCLUSION

By virtue of the foregoing, Mrs. Robinson requests an Order: (I) denying Respondents motion to dismiss; (II) granting her cross-motion for summary judgment; and (III) awarding her costs and reasonable attorney's fees in an amount to be determined by the Court.

Dated: 4 April 2007

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