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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Carolyn Robb Hootkins, et al.

Plaintiffs,

vs.

Janet Napolitano, U.S. Department of
Homeland Security, et al.

Defendants.

Case No. CV 07-5696-CAS (MANx)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO ALL PLAINTIFFS OUTSIDE THE NINTH CIRCUIT; DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFFS IN THE NINTH CIRCUIT; AND GRANTING IN PART AND DENYING IN PART PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND BACKGROUND

On August 30, 2007, plaintiffs,¹ on behalf of themselves and others similarly

¹ Plaintiffs included in the complaint are Carolyn Robb Hootkins, Ana Maria Moncayo-Gigax, Suzanne Henriette De Mailly, Sara Cruz Vargas de Fisher, Raymond Lockett, Elsa Cecilia Brenteson, Pauline Marie Gobeil, Dahianna Heard, Rose Freeda Fishman-Corman, Khin Thidar Win, Diana Gejac Engstrom, Maria Del Carmen Diaz-Ruiz, Gladys Walsh, Li Ju Lu, Yelena Arias Angulo, Purita Manuel Pointdexter, Tracy Lee Rudl, Dieu Ngoc Nguyen, Agnieszka Bernstein, Sarah Baylor, Stella Standifer, and Farah Batool. On April 28, 2009, plaintiffs and defendants filed a joint stipulation dismissing plaintiffs Heard, Walsh, Win, Simmons (Rudl), and Poindexter, on the ground that these plaintiffs

(continued...)

1 situated, filed the instant class action case. On January 28, 2008, the Court denied
2 plaintiffs' motion for summary judgment without prejudice to its being renewed. On
3 March 17, 2008, the Court granted in part and denied in part defendants' motion to
4 dismiss plaintiffs' complaint. Specifically, the Court granted defendants' motion to
5 dismiss plaintiffs Hootkins', Moncayo-Gigax, Vargas de Fisher's, Lockett's,
6 Brenteson's, Win's, Engstrom's, Pointdexter's, Rudl's, Standifer's, and Batool's claims
7 under the Administrative Procedure Act ("APA") for lack of final agency action, but
8 denied defendants' motion to dismiss plaintiffs claims under the Mandamus Act and
9 denied defendants' motion to dismiss the claims of those plaintiffs residing outside of
10 the jurisdiction of the Ninth Circuit.

11 On March 20, 2008, plaintiffs filed their operative first amended complaint
12 ("FAC"). Plaintiffs seek injunctive, declaratory, and mandamus relief under the
13 Administrative Procedure Act (the "APA"), 5 U.S.C. § 701 et seq.; the Mandamus Act,
14 28 U.S.C. § 1361; and the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq. against
15 Michael Chertoff, Secretary of the Department of Homeland Security ("DHS"); and
16 Jonathan Scharfen, Acting Director of United States Citizenship and Immigration
17 Services ("USCIS"), in their official capacities.² The current defendants in this action
18 are Janet Napolitano, Secretary of DHS, and Michael Aytes, Acting Deputy Director of
19 USCIS, in their official capacities (collectively, "defendants" or the "government").

20 The FAC alleges that defendants wrongfully determined that plaintiffs are not
21 entitled to immediate relative status for purposes of the Immigration and Nationality Act
22

23
24 ¹(...continued)
have been granted Lawful Permanent Resident status.

25
26 ² The original complaint also named Condoleezza Rice, United States Secretary of
27 State, and Maura Harty, Assistant Secretary for the Bureau of Consular Affairs, in their
28 official capacities, as defendants. By order dated March 16, 2008, the Court dismissed the
United States Department of State as a defendant. The plaintiffs terminated Maura Harty
as a defendant when they filed their FAC.

1 (“INA”), 8 U.S.C. §§ 1151 et seq. due to the death of their U.S. citizen spouses.³ In
2 contrast, defendants assert that in order to be considered an “immediate relative” spouse
3 for purposes of 8 U.S.C. § 1151 et seq., a surviving alien spouse must have been married
4 to his or her petitioning citizen spouse for at least two years prior to the U.S. citizen
5 spouse’s death.

6 With respect to plaintiffs’ challenge to defendants’ interpretation of 8 U.S.C. §
7 1151(b)(2)(A)(i), plaintiffs request that the Court compel defendants (1) to find, as a
8 matter of statutory construction, that plaintiffs are “immediate relative” spouses for
9

10 ³ “Immediate relative” is a term defined in 8 U.S.C. § 1154(b)(2)(A)(i):

11
12 For purposes of . . . subsection [1154(b)(2)(A)(i)], the term immediate relative
13 means the children, spouses, and parents of a citizen of the United States,
14 except that, in the case of parents, such citizens shall be at least 21 years of
15 age. In the case of an alien who was the spouse of a citizen of the United
16 States for at least 2 years at the time of the citizen’s death and was not legally
17 separated from the citizen at the time of the citizen's death, the alien (and each
18 child of the alien) shall be considered, for purposes of this subsection, to
19 remain an immediate relative after the date of the citizen’s death but only if
20 the spouse files a petition under section 204(a)(1)(A)(ii) [8 U.S.C. §
21 1154(a)(1)(A)(ii)] within 2 years after such date and only until the date the
22 spouse remarries. For purposes of this clause, an alien who has filed a
23 petition under clause (iii) or (iv) of section 204(a)(1)(A) of this Act [8 U.S.C.
24 § 1154(a)(1)(A)] remains an immediate relative in the event that the United
25 States citizen spouse or parent loses United States citizenship on account of
26 the abuse.

27 8 U.S.C. § 1154(b)(2)(A)(I) (internal quotations omitted).

28 To receive an immigrant visa by virtue of one’s status as an “immediate relative”
spouse, the alien’s United States citizen spouse must first petition the Attorney General,
by filing a Form I-130 petition, claiming that the alien spouse is entitled to “immediate
relative” status. 8 C.F.R. § 204.1(a)(1). With respect to aliens who entered the United
States on a K-1 fiancé visa, the citizen spouse must file a Form I-129F with USCIS. 8
C.F.R. § 214.2(k). The citizen spouse, or a permissible alternative sponsor, must also
execute a Form I-864, affidavit of support. 8 U.S.C. § 1182(a)(4)(C)(ii).

1 purposes of the INA and were not stripped of their status of “spouse” of a United States
2 citizen upon the death of their citizen spouse; (2) to reopen and adjudicate their deceased
3 citizen spouses’ immigrant I-130 petitions; and (3) to reopen and adjudicate (a)
4 plaintiffs’ applications for adjustment of status or (b) plaintiffs’ immigrant visa
5 applications. Plaintiffs also seek an injunction prohibiting defendants from using the
6 death of a citizen spouse as a discretionary factor in the adjudication of I-130 petitions
7 and I-485 applications.⁴

8 The FAC also challenges the legality of 8 C.F.R. § 205.1(a)(3)(C), which calls for
9 automatic revocation of an I-130 upon the death of the citizen spouse in cases where: (1)
10 the I-130 petition has been approved but (2) there has been no final decision on the
11 alien’s I-485 application. 8 C.F.R. § 205.1(a)(3)(C)(2) affords relief from revocation,
12 but requires alien spouses whose U.S. citizen petitioning spouses have died to request
13 humanitarian reinstatement of their I-130 petition, and to come forward with a substitute
14 affidavit of support from a relative willing to serve as a substitute sponsor. In this
15 regard, plaintiffs seek a declaration to the effect that it is improper to revoke the
16 approval of an I-130 petition unless the alien spouse requests humanitarian reinstatement
17 under 8 C.F.R. § 205.1(a)(3)(C)(2), and that 8 C.F.R. § 205.1(a)(3)(C)(2) is invalid as a
18 matter of law. Plaintiffs also seek an injunction prohibiting defendants from revoking,
19 in cases in which the United States citizen spouse previously executed a Form I-864, the
20 approval of an I-130 petition under 8 C.F.R. § 205.1(a)(3)(C)(2).

21 On January 6, 2009, the Court certified a Ninth Circuit class, defined as

22 All aliens whose United States citizen spouse died before the
23 couple’s two-year wedding anniversary, and whose citizen spouse
24 filed an I-130 petition and a Form I-864 or I-864EZ affidavit of
25 support on behalf of the alien spouse, so long as he or she can also

27 ⁴ An I-485 is an application to Register Permanent Resident Status or to Adjust
28 Status.

1 demonstrate that (1) the Form I-130 petition is now pending with
2 or was adjudicated by a USCIS office located within the
3 jurisdiction of the Ninth Circuit, or (2) at the time of the citizen
4 spouse's death, either the citizen spouse or the alien spouse resided
5 within the jurisdiction of the Ninth Circuit.

6 The Court further certified a subclass of alien spouses who entered the United States on
7 fiancé visas, defined as

8 All aliens who, within ninety days of admission to the United
9 States as a nonimmigrant fiancé, married the petitioning
10 United States citizen, and whose citizen spouse died before
11 the couple's two-year wedding anniversary, so long as he or
12 she can also demonstrate that the citizen spouse filed an I-
13 129F petition and a Form I-864 or I-864EZ affidavit of
14 support on behalf of the alien spouse, and (1) the Form I-
15 129F petition is now pending with or was adjudicated by a
16 USCIS office located within the jurisdiction of the Ninth
17 Circuit, or (2) at the time of the citizen spouse's death, either
18 the citizen spouse or the alien spouse resided within the
19 jurisdiction of the Ninth Circuit.

20 However, the Court declined to certify a nationwide class, finding that "other circuits
21 clearly have an interest in having their own Courts of Appeals decide the question of the
22 proper interpretation of 8 U.S.C. § 1151(b)(2)(A)(i)."

23 On March 9, 2009, plaintiffs filed the instant renewed motion for summary
24 judgment. On March 13, 2009, defendants filed the instant motion for partial summary
25 judgment as to the Ninth Circuit plaintiffs and the instant motion for partial summary
26 judgment as to plaintiffs outside the Ninth Circuit. On March 23, 2009, defendants filed
27 an opposition to plaintiffs' renewed motion for summary judgment. On March 27, 2009,
28 plaintiffs filed oppositions to defendants' motions. Replies were filed on April 6, 2009.

1 A hearing was held on April 22, 2009. After carefully considering the arguments set
2 forth by the parties, the Court finds and concludes as follows.

3 **II. FACTUAL BACKGROUND**

4 The facts underlying this action are not materially in dispute. Plaintiffs are all
5 aliens who were previously married to United States citizens. With the exception of
6 plaintiff Nguyen's spouse, the U.S. citizen spouses all filed a Form I-130, Petition for
7 Alien Relative ("I-130 petition"), on behalf of plaintiffs pursuant to 8 U.S.C.

8 §1154(a)(1)(A)(i).⁵ The same day that their citizen spouses filed the I-130 petitions,
9 each of the alien plaintiffs, except for plaintiff Lu, filed a Form I-485, Application to
10 Register Permanent Resident Status or to Adjust Status ("I-485 application").⁶ Citizen
11 petitioners also submitted an affidavit of support ("I-864") in support of their I-485s.

12 Except for plaintiff Lu, plaintiffs' United States citizen spouses each died after
13 filing their respective I-130 petitions, but before adjudication of said petitions.⁷ For the
14 majority of plaintiffs, USCIS then denied the I-130 petitions based on defendants'
15 determination that plaintiffs were not "immediate relative[s]" for purposes of 8 U.S.C. §
16 1151 et seq. because plaintiffs' citizen spouses died before their two-year marriage
17 anniversary.⁸ Plaintiff Lu's I-130 petition was initially approved, but was then

18
19 ⁵ Plaintiff Nguyen previously filed and received a Form I-129F, Petition for Alien
20 Fiancé. Plaintiff Nguyen then lawfully entered the United States under the K-1 visa and
21 married her United States citizen fiancé within ninety days of entry. Plaintiff Nguyen
22 subsequently applied for adjustment of status to lawful permanent resident.

23 ⁶ Because plaintiff Lu was not in the United States, the United States
24 Department of State began processing Lu's immigrant visa after the I-130 petition of Lu's
25 citizen spouse was approved.

26 ⁷ In the cases of plaintiff Lu, plaintiffs' citizen spouse died before the issuance of the
27 immigrant visa, thus resulting in the revocation of the prior approval of their Form I-130's
28 under 8 C.F.R. § 205.1(a)(3)(i)(C).

⁸ In the case of plaintiff Lockett, defendants ultimately approved the Form I-130 that
(continued...)

1 automatically revoked by USCIS upon the death of plaintiff Lu's spouse.

2 **III. LEGAL STANDARD**

3 Summary judgment is appropriate where "there is no genuine issue as to any
4 material fact" and "the movant is entitled to a judgment as a matter of law." Fed. R. Civ.
5 P. 56(c). The moving party has the initial burden of identifying relevant portions of the
6 record that demonstrate the absence of a fact or facts necessary for one or more essential
7 elements of each cause of action upon which the moving party seeks judgment. See
8 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

9 If the moving party has sustained its burden, the nonmoving party must then
10 identify specific facts, drawn from materials on file, that demonstrate that there is a
11 dispute as to material facts on the elements that the moving party has contested. See
12 Fed. R. Civ. P. 56(c). The nonmoving party must not simply rely on the pleadings and
13 must do more than make "conclusory allegations [in] an affidavit." Lujan v. National
14 Wildlife Fed'n, 497 U.S. 871, 888 (1990). See also Celotex Corp., 477 U.S. at 324.
15 Summary judgment must be granted for the moving party if the nonmoving party "fails
16 to make a showing sufficient to establish the existence of an element essential to that
17 party's case, and on which that party will bear the burden of proof at trial." Id. at 322.
18 See also Abromson v. American Pacific Corp., 114 F.3d 898, 902 (9th Cir. 1997).

19 In light of the facts presented by the nonmoving party, along with any undisputed
20 facts, the Court must decide whether the moving party is entitled to judgment as a matter
21 of law. See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631
22 n.3 (9th Cir. 1987). When deciding a motion for summary judgment, "the inferences to
23 be drawn from the underlying facts . . . must be viewed in the light most favorable to the

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25 ⁸(...continued)

26 Lockett's spouse had filed before her death. Plaintiff Batool's petition was denied on the
27 grounds of abandonment, but defendants admit that the death of the citizen petitioner
28 would have otherwise warranted denial of plaintiff Batool's I-130. See Defs' Statement
of Uncontroverted Facts ("SUF") ¶ 2g. Plaintiff Engstrom's petition has not been denied
and is currently pending before USCIS.

1 party opposing the motion.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475
2 U.S. 574, 587 (1986) (citation omitted); Valley Nat’l Bank of Ariz. v. A.E. Rouse & Co.,
3 121 F.3d 1332, 1335 (9th Cir. 1997). Summary judgment for the moving party is proper
4 when a rational trier of fact would not be able to find for the nonmoving party on the
5 claims at issue. See Matsushita, 475 U.S. at 587.

6 **IV. DISCUSSION**

7 **A. Construction of the Immediate Relative Provisions of the Statute**

8 The INA imposes a numerical quota on the number of immigrant visas that may
9 be issued and/or the number of aliens who may otherwise be admitted into the United
10 States for permanent residence. See 8 U.S.C. § 1151(a). However, aliens who are
11 “immediate relative[s]” of United States citizens are exempt from these numerical
12 limitations and may obtain immigrant visas by petitioning for “immediate relative”
13 status.

14 The definition of “immediate relative” is set forth in 8 U.S.C. § 1151(b)(2)(A)(i).
15 The first sentence of 8 U.S.C. § 1151(b)(2)(A)(i) defines “immediate relatives” as
16 “children, spouses, and parents of a citizen of the United States, except that, in the case
17 of parents, such citizens shall be at least 21 years of age.” The second sentence of 8
18 U.S.C. § 1151(b)(2)(A)(i) states

19 In the case of an alien who was the spouse of a citizen of the United
20 States for at least 2 years at the time of the citizen's death and was
21 not legally separated from the citizen at the time of the citizen's
22 death, the alien (and each child of the alien) shall be considered, for
23 purposes of this subsection, to remain an immediate relative after the
24 date of the citizen's death but only if the spouse files a petition under
25 section 204(a)(1)(A)(ii) [8 USCS § 1154(a)(1)(A)(ii)] within 2 years
26 after such date and only until the date the spouse remarries

27 8 U.S.C. § 1151(b)(2)(A)(i).

28 8 U.S.C. § 1154(a)(1)(A) sets forth the petitioning procedure for immediate

1 relative status. Clause (i) of 8 U.S.C. § 1154(a)(1)(A), governs petitions filed by United
2 States citizens on behalf of their alien spouses, and provides that

3 any citizen of the United States claiming that an alien is entitled to
4 classification by reason of . . . an immediate relative status under section
5 201(b)(2)(A)(i) [8 USCS § 1151(b)(2)(A)(i)] may file a petition with the
6 Attorney General for such classification.

7 Clause (ii) of 8 U.S.C. § 1154(a)(1)(A) governs petitions filed by alien spouses on
8 behalf of themselves and provides

9 An alien spouse described in the second sentence of section 201(b)(2)(A)(i)
10 [8 USCS § 1151(b)(2)(A)(i)] also may file a petition with the Attorney
11 General under this subparagraph for classification of the alien (and the
12 alien's children) under such section.

13 The crux of plaintiffs' position in this action is that the relevant statutes create two
14 separate "tracks" by which an alien spouse of a U.S. citizen may obtain "immediate
15 relative status." In the case where a *U.S. citizen spouse* files a petition for his or her
16 alien spouse under clause (i) of 8 U.S.C. § 1154(a)(1)(A), plaintiffs argue, the second
17 sentence of 1151(b)(2)(A)(i) does not apply; in these cases, the term "spouse" is defined
18 by its plain meaning, which, plaintiffs argue, includes a "surviving" spouse of a U.S.
19 citizen. However, if the *alien spouse on his or her own* files a petition under clause (ii)
20 of 8 U.S.C. § 1154(a)(1)(A), the second sentence of 1151(b)(2)(A)(i) applies, and the
21 alien spouse may only petition where the alien was a spouse for at least two years at the
22 time of death of the citizen spouse. Defendants, however, interpret the statute
23 differently. Defendants contend that even in the case where a U.S. citizen spouse files a
24 petition for his or her alien spouse prior to death, in order to be considered an
25 "immediate relative" for the purposes of 8 U.S.C. § 1151(b)(2)(A)(i), the alien spouse
26 must have been married to his or her petitioning citizen spouse for at least two years at
27 the time of the citizen spouse's death.

28 The Court begins by noting that three circuit courts have to date addressed the

1 issues present in the instant action: Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006);
2 Robinson v. Napolitano, 554 F.3d 358 (3rd Cir. 2009); and, most recently Lockhart v.
3 Napolitano, ___ F.3d ___, 2009 U.S. App. LEXIS 7305 (6th Cir. 2009).⁹ The Ninth
4 Circuit and the Sixth Circuit holdings are in conflict with the holding of the Third
5 Circuit. While the certified class in this action contains only Ninth Circuit plaintiffs,
6 many of the named plaintiffs in this action reside outside of the Ninth Circuit.

7 **1. The Ninth Circuit Freeman Holding**

8 In Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006), the Court held that the
9 interpretation of the statute proposed by plaintiffs in the instant action is the correct
10 interpretation. Carla Freeman, (“Mrs. Freeman”), an alien, married Robert Freeman
11 (“Mr. Freeman”), a United States citizen. Id. at 1033. Mr. Freeman filed an I-130
12 petition on Mrs. Freeman’s behalf. Id. That same day, Mrs. Freeman filed an I-485
13 application for adjustment of status to that of lawful permanent resident. Id. Just prior
14 to the couple’s first wedding anniversary, Mr. Freeman was killed in a car accident. Id.
15 Mr. Freeman’s I-130 petition and Mrs. Freeman’s I-485 application were still pending at
16 the time. Id. USCIS then denied Mrs. Freeman’s I-485 application. Id. USCIS found
17 that Mrs. Freeman was not entitled to “immediate relative” status because she was no
18 longer the spouse of a United States citizen. Id. USCIS ordered Mrs. Freeman to leave
19 the United States. Id. She petitioned for a writ of habeas corpus in federal district court
20 challenging this decision. Id. The district court denied her petition, and she appealed to
21 the Ninth Circuit. Id. The government advanced largely the same arguments before the
22 Ninth Circuit as it does now before this Court:

23 The government, relying primarily on the statute’s second sentence
24 (“In the case of an alien who was the spouse of a citizen . . .”),
25 read[] § 1151(b)(2)(A)(i) as “requiring that in order to be an
26

27 ⁹ The decision in Lockhart was issued on April 8, 2009, subsequent to the filing of
28 briefs in the instant action. The Court nevertheless considers it herein.

1 'immediate relative' under immigration law the alien 'spouse'
2 (wife) must have been married to the United States citizen 'spouse'
3 (husband) 'for at least 2 years at the time of the citizen's [sic]
4 death.'" Under the government's proffered reading, if the citizen
5 spouse dies before the second anniversary of the qualifying
6 marriage, the alien spouse is no longer considered a 'spouse' and is
7 no longer entitled to an adjustment of status.

8 Id. at 1038.

9 The Ninth Circuit rejected the government's interpretation, finding that based on
10 its review of the language, structure, purpose, and application of the statute:

11 Congress clearly intended an alien widow [or widower]
12 whose citizen spouse has filed the necessary forms *to be* and
13 *to remain* an immediate relative (spouse) for purposes of
14 §1151(b)(2)(A)(i), even if the citizen spouse dies within two
15 years of the marriage. As such, the widowed spouse remains
16 entitled to the process that flows from a properly filed
17 adjustment of status application. The two-year durational
18 language in the second sentence of § 1151(b)(2)(A)(i) grants
19 a separate right to an alien widow to self-petition, within two
20 years of the citizen spouse's death, by filing a form I-360
21 where the citizen spouse had not filed an immediate relative
22 petition prior to his death.

23 Id. at 1039 (emphasis in original).

24 Furthermore, the Freeman court noted that defendants' proposed interpretation
25 would lead to incongruous results:

26 The government concedes that it had the power to grant the
27 Freemans' application prior to Mr. Freeman's death (and the
28 Freemans' second anniversary). Had it done so, Mrs. Freeman's LPR

1 could not then have been voided by her husband's death, as the
2 statute expressly states. See § 1186a(a), (b)(1) (providing that an
3 alien spouse who receives permanent resident status as an immediate
4 relative before the second anniversary of her qualifying marriage
5 does so on a conditional basis, and if the Attorney General
6 determines that prior to the second anniversary of the alien's
7 obtaining status the alien's marriage 'has been judicially annulled or
8 terminated, other than through the death of a spouse,' the Attorney
9 General 'shall terminate the permanent resident status of the alien.'
10 (emphasis added)). This is compelling evidence that Congress did
11 not intend its provision for a widow's self-petition for adjustment of
12 status to have an implicit collateral consequence of terminating a
13 spouse's already pending petition--particularly when the effect
14 would be to foreclose a grieving widow from any adjustment at all
15 'through the death of [her] spouse.'

16 Freeman, 444 F.3d at 1042. In other words, the Freeman court found that Congress did
17 not intend for the alien spouses who had been accorded a quick adjudication of his or her
18 permanent resident status to be insulated from having that status terminated at the death
19 of their spouse, but that those who experienced a long administrative delay would have
20 their petition terminated at the death of their spouse.

21 2. The Sixth Circuit Lockhart Holding

22 On April 8, 2009, the Sixth Circuit in Lockhart v. Napolitano, ___ F.3d ___, 2009
23 U.S. App. LEXIS 7305 *9 (6th Cir. 2009) stated that it was "persuaded by the reasoning
24 of the Ninth Circuit [in Freeman]" and found that "[t]he two-year marriage-duration
25 language in the second sentence of the immediate relative provision appears to be a
26 procedural requirement for a self-petition in the event that the citizen-spouse dies, rather
27 than a restriction on who is considered a 'spouse' when the citizen-spouse petitions on
28 behalf of the alien spouse." Id. at *2, *16. Therefore, the court held that a "surviving

1 alien-spouse' is a 'spouse' within the 'immediate relative' provision of the INA." Id. at
2 *8.

3 3. Application to Plaintiffs in the Ninth and Sixth Circuits

4 The Court is bound by the holdings of the decisions of Freeman and Lockhart as
5 to plaintiffs in the Sixth and Ninth Circuits. Therefore, the Court finds that plaintiffs in
6 the Sixth and Ninth Circuits, as surviving spouses of U.S. citizen petitioners, are entitled
7 to "immediate relative" classification under 8 U.S.C. § 1154(a)(1)(A).¹⁰

8 4. Application to Plaintiffs Outside the Sixth and Ninth Circuits

9
10
11 ¹⁰ Defendants argue that Freeman is not entitled to any weight, even in the Ninth
12 Circuit, because its holding is inconsistent with prior Ninth Circuit precedent. Specifically,
13 defendants cite Dodig v. INS, 9 F.3d 1418 (9th Cir. 1993) in which a petitioner's I-130,
14 filed by her U.S. citizen spouse, was revoked due to the citizen spouse's death. The Ninth
15 Circuit rejected the petitioner's argument that she should have been granted relief for
16 "humanitarian" reasons under 8 C.F.R. § 205.1(a)(3) because her U.S. citizen husband died
17 prior to the adjudication of the I-130 petition that he had filed on her behalf. Defendants
18 argued that, in so holding, the Ninth Circuit "implicitly endorsed the construction that a
19 widow(er) was not considered a spouse such that she could proceed under the first sentence
20 of § 1151(b)(2)(A)(i). Defs' Mot. as to Ninth Cir. Pls' ("Defs' 9th Cir. Mot.") at 14; see
21 also Abboud v. INS, 140 F.3d 843 (9th Cir. 1998) (citing Dodig and finding that
"humanitarian relief is not available under [8 C.F.R. § 205.1(a)(3)] where the petitioner has
died prior to the approval of the Relative Petition."). Defendants argue that "[b]ecause the
Freeman panel was not free to overturn the holdings of the prior panels absent clarification
en banc or by the Supreme Court" the Freeman decision should not be given any weight
by the Court. Defs' 9th Cir. Mot. at 14.

22 However, defendants are incorrect. In Freeman, the Ninth Circuit explicitly stated
23 that the issue of the proper definition of "spouse" was a matter of first impression before
24 the Court. 444 F.3d at 1033. While Dodig and Abboud could be read as implicitly
25 accepting defendants' construction of the term "spouse" under the statute, it does not
26 appear that the issue of the proper construction of the term "spouse" was ever raised by the
27 parties in either of those cases. Instead, the narrower question in those cases was the
28 application of the humanitarian reinstatement provision. Because the Court in Dodig and
Abboud did not explicitly address the issue of the proper construction of spouse, the
holding of Freeman is not inconsistent with prior Ninth Circuit precedent.

1 Defendants argue that Freeman (and, by extension, Lockhart) are binding only as
2 to cases that arise within the jurisdiction of the Ninth (and Sixth) Circuits. Defendants
3 argue that the Court should therefore apply defendants' statutory construction to all other
4 plaintiffs in this action.

5 First, defendants argue that their interpretation of the statute is entitled to Chevron
6 deference. See Chevron U.S.A., Inc. v NRDC, Inc., 467 U.S. 837, 842-43 (1984). The
7 first step of the Chevron statutory construction analysis is to determine whether the
8 intent of Congress is clear; if so, that clear intent controls. See Chevron, 467 U.S. at
9 842-43. Defendants argue that their construction of the statute is clearly correct because,
10 by its plain terms, the term "spouse" refers to someone who is currently married. Defs'
11 9th Cir. Mot. at 8. Therefore, defendants argue, when their U.S. citizen spouses died,
12 plaintiffs no longer qualified as an "immediate relative" because they were no longer a
13 "spouse" of a U.S. citizen. Defs' 9th Cir. Mot. at 8, 12, citing Black's Law Dictionary
14 1438-39 (8th ed. 2007) (defining spouse as a "married person"); 1 U.S.C. § 7 ("In
15 determining the meaning of any Act of Congress, or of any ruling, regulation, or
16 interpretation of the various administrative bureaus and agencies of the United States . . .
17 the word 'spouse' refers only to a person of the opposite sex who is a husband or a
18 wife.").

19 As a result, defendants argue, the first sentence of 8 U.S.C. § 1151(b)(2)(A)(i) –
20 which states that "spouses" of U.S. citizens are "immediate relatives" for immigration
21 purposes – does not apply to former spouses of deceased U.S. citizens. Instead,
22 defendants argue, the only part of the statute that may apply is the second sentence of
23 §1151(b)(2)(A)(i), which creates a narrow exception for an alien who "*was* the spouse of
24 a citizen of the United States for at least 2 years at the time of the citizen's death . . ."
25 Defs' 9th Cir. Mot. at 9, quoting 8 U.S.C. § 1151(b)(2)(A)(i) (emphasis added). In other
26 words, when an alien is no longer the spouse of a U.S. citizen due to the U.S. citizen's
27 death, the alien is not entitled to "immediate relative" status unless his or her marriage
28 lasted two years or more. Defs' Opp'n at 7.

1 Defendants next argue that, even if the plain language of the statute is ambiguous,
2 defendants' interpretation is nevertheless entitled to deference under the second step of
3 Chevron, because it is consistent with BIA decisions and long-standing administrative
4 interpretations. See 467 U.S. at 842-431 see also 8 C.F.R. 1003.1(g)("[e]xcept as Board
5 decisions may be modified or overruled by the Board or the Attorney General, decisions
6 of the Board . . . shall be binding on all officers and employees of the Department of
7 Homeland Security or immigration judges in the administration of the immigration laws
8 of the United States.").

9 Defendants cite the decision of the Board of Immigration Appeals in Matter of
10 Varela, 13 I&N Dec. 453 (B.I.A. 1970). In Matter of Varela, the Board found that
11 because the alien's United States citizen spouse died before the couple's two year
12 marriage anniversary, the alien lost his or her status as a spouse. See Matter of Varela, at
13 454 ("[s]imply stated, at the time of his decision the beneficiary was not the spouse of a
14 United States citizen. His death had stripped her of that status"). Defendants argue that
15 the Board reaffirmed the result in a later decision, Matter of Sano, 19 I&N Dec. 299
16 (BIA 1985). In Matter of Sano, an alien's petition was denied based on the death of her
17 U.S. citizen spouse. The Board held that it lacked jurisdiction to hear the appeal of the
18 denial of the petition, because such an appeal may only be filed by the visa petitioner
19 (the U.S. citizen spouse), who was deceased.¹¹

21 ¹¹ In Freeman, the Court specifically addressed defendants' contentions regarding
22 Matter of Varela, 13 I&N Dec. 453, and dismissed them. First, the Court in Freeman found
23 that, contrary to defendants' arguments, the decision in Matter of Sano actually
24 undermines, rather than supports, Matter of Varela. In Matter of Sano, 19 I&N Dec. 299
25 (BIA 1985), the BIA held that it lacked jurisdiction to hear an appeal from a beneficiary,
26 and instead could only hear an appeal from a petitioner. Id. at *300-01. The BIA therefore
27 held that its decision in Matter of Varela was "inappropriate" and that "to the extent that
28 our decision in Matter of Varela, *supra*, conflicts with this conclusion, it is hereby
modified." Id. at *300-01. The Freeman court therefore found that the Varela opinion's
weight was undercut by the BIA's finding in Matter of Sano that it was "extra-
(continued...)

1 Furthermore, defendants argue that their interpretation is supported by long-
 2 standing administrative interpretations. Defendants argue that “prior to the enactment of
 3 the INA, the visa petitioner’s death has been a basis for revoking the approval of the visa
 4 petition (e.g., the I-130) since at least 1938.” Defs’ Opp’n at 16, citing, e.g., 8 C.F.R. §
 5 25.2. Defendants also argue that their interpretation is consistent with the purpose of
 6 family-based immigration policy, which is family unity; “once the U.S. citizen passes
 7 away, the purpose is no longer necessarily served by giving the alien widow the ability
 8 to adjust her status.”¹² Defs’ Opp’n at 18.

9 Defendants further argue that the claim of plaintiff Standifer, who resides in the
 10 Third Circuit, is governed by the holding in Robinson v. Napolitano, 554 F.3d 358 (3rd
 11 Cir. 2009), which upheld defendants’ construction of the statute. In Robinson, the court
 12 held that “the two-year marriage requirement applies to both groups of surviving
 13 spouses, those for whom the citizen spouse had filed the petition before his death and
 14 those for whom the citizen spouse had not filed the petition.”^{13 14} Robinson, 554 F.3d at
 15

16 ¹¹(...continued)
 17 jurisdictional.” Freeman, 444 F.3d at 1038. Furthermore, the Freeman court found that
 18 “the BIA’s interpretation [in Varela], to the extent it is entitled to some deference, is not
 19 a permissible construction of the statute.” Id. at 1038.

20 ¹² Plaintiffs, however, argue that “allowing the U.S. citizen’s express wish . . . to be
 21 fulfilled by granting his or her spouse immediate relative classification does, in fact,
 22 promote family unity. In many cases, there are children born of the marriage, and
 23 grandparents who wish to see their deceased son or daughter’s children remain with them
 24 as a family unit in the United States.” Pls’ Reply at 9.

25 ¹³ The majority opinion in Robinson held 8 U.S.C. 1151(b)(2)(A)(i) to be
 26 unambiguous, finding that “the two-year marriage requirement applies to both groups of
 27 surviving spouses, those for whom the citizen spouse had filed the petition before his death
 28 and those for whom the citizen spouse had not filed the petition.” Id. at 364; see also id.
 at 366 (holding that “[t]he fact that Black’s Law Dictionary’s entry for spouse defines
 ‘surviving spouse’ separately disproves Robinson’s hypothesis” and “to conclude that
 ‘spouse’ and ‘surviving spouse’ have the identical meaning is illogical and is contrary to
 (continued...)

1 363.

2 Plaintiffs, however, contend that the reasoning set forth in Freeman is persuasive,
3 and that, therefore, the Court should apply Freeman, 444 F.3d 1031, to the claims of all
4 plaintiffs, even those residing outside of the Ninth and Sixth Circuits. Plaintiffs also
5 argue that the Court should decline to apply Robinson to plaintiff Standifer's claim
6 because the holding in Robinson was "fatally flawed." Pls' 9th Cir. Opp'n at 2, citing

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9 ¹³(...continued)

10 our understanding of the legal effect of death on a marriage."). The court went on to hold
11 that "eligibility for an immediate relative visa depends upon the alien's status at the time
12 USCIS adjudicates the I-130 petition, not when that petition was filed." Id. at 364.
13 Because an alien is not a "spouse" of a U.S. citizen after the spouse's death, the alien
14 automatically becomes ineligible for immediate relative status after the death of his or her
15 spouse, unless the two-year marriage exception applies. In so holding, the Robinson court
16 found the verb tense used in 8 U.S.C. § 1154(b) to be instructive. That provision provides

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After an investigation of the facts in each case, . . . the Attorney General shall,
if he determines that the facts stated in the petition *are* true and that the alien
in behalf of whom the petition is made *is* an immediate relative specified in
section 201(b) . . . approve the petition.

U.S.C. § 1154(b) (emphasis added). The majority in Robinson held that "[t]he use of the
present tense in 8 U.S.C. § 1154(b) belies Robinson's contention that an alien's marital
status at the time of filing the I-130 petition controls, and makes plain that the facts in the
petition - including the alien's spousal status - must be true at the time USCIS decides the
petition." Id.; but see id. at 368 (Nygaard, J., dissenting) ("[I]t is inconceivable to me that
Congress intended an alien's status to be contingent upon the amount of time that the
executive department takes to process a timely and proper petition - a factor completely
outside of the control of the alien").

¹⁴ Defendants also note that, in addition to the Third Circuit holding in Robinson,
other district courts have upheld their construction of the statute. See, e.g., Burger v.
McElroy, 1999 WL 203353 (S.D.N.Y. 1999) ("Plaintiff Burger married Stephen Burger
on July 20, 1996, and had been married to him for less than three months when Stephen
Burger died on October 7, 1996. Therefore, neither she nor her daughter are eligible for
classification as immediate relatives")

1 Robinson, 554 F.3d at 367 (Nygaard, J., dissenting).¹⁵

2 Despite plaintiff's arguments, the Court declines to apply the holdings in Freeman
3 and Lockhart to plaintiffs outside of the Ninth and Sixth Circuits. The Court is mindful
4 of the importance of allowing the government to litigate legal issues before different
5 courts throughout the country. As Justice Rehnquist explained, preventing the
6 government from doing so "would deprive [the] [Supreme] Court of the benefit it
7 receives from permitting several court of appeals to explore a difficult question before
8 [the] [Supreme] Court grants certiorari." United States v. Mendoza, 464 U.S. 154, 159
9 (1984) (holding that the United States may not be collaterally estopped from litigating an
10 issue that was adjudicated against it in a prior lawsuit brought by a different party); see
11 also Nielsen Lithographing Co. v. NLRB, 854 F.2d 1063, 1066-67 (7th Cir. 1988)
12 (holding that a circuit should not make rulings interpreting administrative regulations,
13 which ruling purport to affect other circuits, and that an agency therefore does not have
14 to accept one circuit's ruling as binding throughout the country.). Furthermore the Ninth
15 Circuit, in the context of conflicting circuit law on statutory construction, has recognized
16 that "[t]he courts do not require an agency of the United States to accept an adverse

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18 ¹⁵ Specifically, plaintiffs argue that in Robinson,

19 [t]he majority opinion evinced a fundamental misunderstanding of the
20 routine processing times for administrative adjudication, assuming
21 that USCIS rarely if ever acts fast enough to grant applications before
22 two years of marriage. During oral argument, Circuit Judge Sloviter,
23 who authored the majority opinion, asked the government about the
24 'rare case' in which the agency acts within two years of marriage.
25 Contrary to the government response, which was to say that they
26 could not say it never happens, it is not the rare case that an
27 application is approved where the marriage has not lasted two years,
28 but the norm.

Pls' Mot. at 22-23, citing <http://www.uscis.gov/> articles, in which average wait times are listed as below 24 months.

1 determination . . . by any of the Circuit Courts of Appeals as binding on the agency for
2 all similar cases throughout the United States” and “[i]t is standard practice for an
3 agency to litigate the same issue in more than one circuit” where the circuit has not yet
4 developed precedent. U.S. v. AMC Entertainment, Inc., 549 F.3d 760, 771-72 (9th Cir.
5 2008) (citing Railway Labor Executives’ Ass’n v. I.C.C., 784 F.2d 959 (9th Cir. 1986)
6 (internal quotations omitted). Therefore, the Court declines to apply Freeman and
7 Lockhart to plaintiffs outside the Ninth and Sixth Circuits.¹⁶

8 Furthermore, just as the Court applies the decisions in Freeman in the Ninth
9 Circuit and Lockhart in the Sixth Circuit, the Court applies the holding of Robinson to
10 plaintiff Standifer in the Third Circuit.¹⁷ “In general, a federal circuit applies its own
11 interpretation of federal law, not that of another circuit.” Crowther v. INS, 1995 U.S.
12 App. LEXIS 24352 (9th Cir. 2005). However, to prevent forum shopping, a court may
13 apply a different circuit’s law where the forum-changing party has “no contacts” with
14 the chosen forum.” Crowther, 1995 U.S. LEXIS 24352; see also Maldonado-Cruz v.
15 U.S. Dep’t of Immigration & Naturalization, 883 F.2d 788, 790 (9th Cir. 1989)
16 (analyzing alien’s contacts with the Ninth Circuit and the Fifth Circuit and determining
17 that, based on the contacts, it was appropriate to apply Ninth Circuit law). Plaintiffs do

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19 ¹⁶ Plaintiffs argued at the hearing that defendants have waived the right to have the
20 claims of non-Ninth Circuit plaintiffs decided in another Court, because they did not raise
21 improper venue, and did not move with reasonable promptness for a transfer of venue.
22 However, because the non-Ninth Circuit plaintiffs do not appear to have any Ninth Circuit
23 contacts in this case, in the interests of both preventing forum shopping and allowing other
24 circuits to interpret the laws and regulations challenged herein, the Court declines to apply
25 the Ninth Circuit’s holding in Freeman to plaintiffs outside of the Ninth Circuit.

26 ¹⁷ Plaintiffs further request that if the Court determines that Robinson controls, that
27 the Court nevertheless “hold in abeyance a decision on her case until the U.S. Supreme
28 Court has denied *certiorari* or issued an authoritative decision.” Pls’ Mot at 28.
Defendants, however, note that “whether a petition for *certiorari* will in fact be filed in
Robinson at some future date, and whether the Supreme Court will grant *certiorari*, are
both speculative.” Defs’ Opp’n at 25. The Court therefore declines to hold in abeyance
plaintiff Standifer’s claim.

1 not allege that plaintiff Standifer has any Ninth Circuit contacts. Therefore, in the
2 interests of preventing forum shopping, the Court applies the holding of Robinson to
3 plaintiff Standifer.

4 4. Plaintiff Nguyen

5 Defendants argue that, even under Freeman, 444 F.3d 1031, a Ninth Circuit
6 plaintiff cannot qualify for adjustment of status due to the termination of her marriage
7 upon the death of her U.S. citizen spouse. See Defs' Ninth Cir. Mot. at 30. Unlike other
8 plaintiffs, Nguyen entered the United States on a K-1 fiance(e) visa. Plaintiff married
9 her husband within 90 days of entry, on April 19, 2004, as required by 8 C.F.R. §
10 214.2(k)(6)(ii). Plaintiff Nguyen and her spouse timely filed a Form I-485 to adjust
11 status, and her spouse timely filed the requisite I-864 Affidavit of Support. Plaintiff
12 Nguyen's spouse died on March 24, 2005, and her petition was denied on November 30,
13 2005.

14 8 U.S.C. § 1255(d) provides that "[t]he Attorney General may not adjust . . . the
15 status of a nonimmigrant alien . . ." who entered on a K-1 visa except "on a conditional
16 basis . . . as a result of the marriage of the nonimmigrant . . . to the citizen who filed the
17 petition to accord the alien's nonimmigrant status . . ." Similarly, 8 CFR § 245.1(c)(6)(i)
18 states that an alien is ineligible for adjustment of status on the basis of a K-1 visa unless
19 "the alien is applying for adjustment of status based upon the marriage of the K-1
20 fiance(e) which was contracted within 90 days of entry with the United States citizen
21 who filed a petition on behalf of the K-1 fiance(e) . . ." The statutory scheme further
22 provides that, after two years of conditional permanent resident status, the couple may
23 jointly file to have the "conditional" nature of the permanent resident status removed. If
24 the non-citizen has become ineligible for permanent resident status due to the
25 termination of her marriage "other than through the death of a spouse," he or she may
26 apply for a waiver of the petition requirement by attesting that the marriage was entered
27 into in good faith. 8 U.S.C. § 1186a(c)(4)(B).

28 Defendants begin by correctly noting that the "statutory scheme clearly requires

1 that an alien who enters the United States as a K-1 (like plaintiff Nguyen) may only
2 adjust on a conditional basis after marriage within 90 days of entry to the citizen who
3 filed the fiance(e) petition which allowed the alien entry.” Defs’ 9th Cir. Mot. at 31.
4 However, defendants next argue that defendants were entitled to determine that plaintiff
5 Nguyen was statutorily ineligible for adjustment of status to conditional permanent
6 resident status under 8 U.S.C. § 1255(a) and (d) “due to the fact that upon the death of
7 her husband, her *marriage* no longer existed and she could not qualify as the current
8 spouse of a U.S. citizen.” Defs’ 9th Cir. Mot. at 31. Defendants argue that because,
9 under the law of every state, marriage ends when one spouse dies, Nguyen is no longer
10 in a legal marriage, and is thus no longer eligible for adjustment of status. Defs’ 9th Cir.
11 Mot. at 31, citing 52 Am. Jur. 2d, Marriage, § 8 (“under American law all valid
12 marriages continue in force during the joint lives of the parties or until divorce or
13 annulment”).

14 However, in Choin v. Mukasey, 537 F.3d 1116 (9th Cir. 2008), the Ninth Circuit
15 held that the “as a result of the marriage” language in 8 U.S.C. § 1255(d) was
16 ambiguous. The Court stated

17 The language of [8 U.S.C. § 1255] specifying that a nonimmigrant
18 may adjust status ‘as a result of the marriage’ can plausibly be
19 interpreted in two ways. As the government argues, it could be
20 interpreted to exclude those petitioners whose marriages no longer
21 exist on the date of adjudication. On the other hand, as Choin
22 argues, it could also be interpreted to mean that the application
23 must be based on the fact of the marriage.

24 Id. at 1119-20.

25 Furthermore, although defendants argue that the holding of Freeman is
26 inapplicable to Nguyen, because her spouse filed an I-129F rather than an I-130, this
27 argument is contradicted by the holding in Choin, 537 F.3d 1116. In Choin, the
28 Ninth Circuit relied on Freeman in examining a case regarding K-1 fiancé visas.

1 Although the facts of Choin are somewhat different from those in the instant action,
2 the findings in Choin are instructive. In Choin, plaintiff entered the United States on
3 a K-1 visa and married her U.S. citizen fiancé within the 90 day period. Id. at 1119.
4 However, the Immigration and Naturalization Service (“INS”) did not timely process
5 her application for conditional permanent resident status, and after two and a half
6 years, when she and her husband divorced, she had not yet been granted conditional
7 permanent resident status. Id. The government argued that, to receive conditional
8 permanent resident status, “an immigrant on [a] K visa must stay married until the
9 government gets around to adjudicating her application for adjustment of status.” Id.
10 at 1121. The Court disagreed, stating “[a]s in Freeman, we here similarly find
11 nothing in the plain language of [8 U.S.C. § 1255(d)] suggesting that an application
12 that was valid when submitted should be automatically invalid when the petitioner’s
13 marriage ends by divorce two years later.” Id. The Ninth Circuit therefore
14 remanded to the Board for further proceedings consistent with the opinion.¹⁸

15 Based on the holding in Choin, the Court finds that plaintiff Nguyen is entitled
16 to summary judgment in her favor. As the court stated in Choin, nothing in the plain
17 language of 8 U.S.C. § 1255(d) suggests that plaintiff Nguyen’s application, which
18 was valid when submitted, should be automatically invalid because her marriage later
19 ended due to the death of her spouse. See Choin, 537 F.3d at 1121. Therefore,
20 defendants acted improperly when they denied plaintiff Nguyen’s application solely
21 on the basis that plaintiff Nguyen is no longer married to her deceased United States

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23 ¹⁸ Defendants argue that Choin 537 F.3d 1116, is not valid precedent, arguing that
24 once the Ninth Circuit in Choin found the statute ambiguous, “the panel was not free to
25 make its own interpretation of the governing law. Rather, the remand necessarily required
26 that the issue be addressed by the Board itself.” Defs’ 9th Cir. Reply at 19, citing Gonzales
27 v. Thomas, 547 U.S. 183, 186 (2006) (“A court of appeals is not generally empowered to
28 conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions
based on such an inquiry. . . Rather, the proper course, except in rare circumstances, is to
remand to the agency for additional investigation or explanation.”). Once again,
defendants fail to recognize that the Court must follow the holding of Choin.

1 citizen spouse.¹⁹

2 **B. Whether Defendants' Application of Freeman is Permissible**

3 The issue before the Court is not only to whom Freeman, 444 F.3d 1031,
4 applies, but in addition, whether defendants are currently applying Freeman in the
5 Ninth Circuit correctly. Defendants read the Freeman decision narrowly. In a
6 November 8, 2007, USCIS Interoffice Memorandum from Mike Aytes, then Associate
7 Director of Domestic Operations, USCIS, to the Field Leadership, (the "Aytes
8 Memorandum"), Aytes instructs that although USCIS will follow Freeman in the
9 Ninth Circuit, it will do so only if, prior to the death of the alien's U.S. citizen spouse,
10 the alien and the alien's U.S. citizen spouse had filed, in addition to the I-130 form
11 (the immediate relative petition), an I-485 application (i.e. an application to register
12 permanent residence or adjust status). Such a requirement is, according to USCIS,
13 consistent with the holding in Freeman. Additionally, the Aytes Memorandum states
14 that USCIS will automatically revoke the approval of an I-130 petition for an alien
15 whose spouse has died unless the alien spouse presents a request for humanitarian
16 reinstatement under 8 C.F.R. 205.1(a)(3)(i)(C)(2) and submits a substitute affidavit of
17 support (Form I-864) from a qualified substitute sponsor.

18 **1. Whether Freeman Applies Where an I-485 Application Was**
19 **Not Filed Prior to the U.S. Citizen Spouse's Death**

20 Plaintiffs argue that defendants cannot limit the holding of Freeman to those
21 cases where the alien spouse and his or her U.S. citizen spouse filed an I-485, in
22 addition to the I-130, before the U.S. citizen spouse's death. The crux of plaintiffs'
23 argument is that defendants are impermissibly basing the outcome of a *petition for*
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25 ¹⁹ Defendants also cite Kalal v. Gonzales, 402 F.3d 948, 950 (9th Cir. 2005) to
26 support their argument. However, this case is inapposite. In Kalal, the court found that
27 plaintiff was not entitled to adjustment of status, because she never married her petitioner
28 fiancé, and instead married someone else, in direct contravention to the requirements of the
8 U.S.C. § 1255(d). 402 F.3d at 950.

1 *immediate relative status* (i.e. the approval of an I-130) on the filing of a form
2 governing an alien's *admissibility* (the I-485). Plaintiffs argue that "[d]efendants
3 cannot escape the fundamental rule governing immigrant petitions which states that
4 admissibility concerns are not relevant to petition procedure." Pls' Ninth Cir. Opp'n
5 at 2, citing Matter of O, 8 I&N Dec. 295 (BIA 1959). In Matter of O, the Board
6 determined that "[t]he visa petition procedure is concerned merely with the question
7 of status. It does not concern itself with substantive questions of inadmissibility . . .").

8 Plaintiffs argue that Freeman, 444 F.3d 1031, supports their position. In
9 Freeman, the Court held that an "alien widow whose citizen spouse filed the necessary
10 immediate relative petition form but died within two years of the qualifying marriage
11 nonetheless remains a spouse for purposes of 8 U.S.C. § 1151(b)(2)(A)(i), and is
12 entitled to be treated as such when DHS adjudicates her adjustment of status
13 application." 444 F.3d at 1039. Plaintiffs essentially argue that the "necessary
14 immediate relative petition form" is the I-130, because the I-130 is the form that
15 establishes eligibility for immediate relative status. Pls' Ninth Cir. Opp'n at 9.
16 Plaintiffs acknowledge that the I-485 is also a "necessary form" in that it is necessary
17 to establish an alien's admissibility, but argue that these grounds for admissibility are
18 found at 8 U.S.C. § 1182(a), and are wholly separate from the grounds for immediate
19 relative status found in 8 U.S.C. § 1154(a)(1)(A)(i) and 8 U.S.C. § 1151(b)(2)(A)(i).
20 Plaintiffs argue that, unlike admissibility considerations, the determination of
21 immediate relative status is non-discretionary, and that "[d]efendants['] efforts to
22 import discretionary criteria into determination under 8 U.S.C. § 1154(a)(1)(A)(i) and
23 8 U.S.C. § 1151(b)(2)(A)(i) are improper, and subject to judicial review as a matter of
24 law." Pls' Ninth Cir. Opp'n at 3. In other words, while defendants are free to apply
25 lawful grounds of admissibility to plaintiffs' applications for adjustment of status,
26 plaintiffs argue, defendants are not entitled to apply these grounds to a determination
27 of plaintiffs' petition for immediate relative status. Pls' Ninth Cir. Opp'n at 4.

28 Defendants respond that the holding in Freeman was expressly based on the

1 spouse having filed the “necessary forms” which includes, according to defendants,
2 the I-485. The plaintiff in Freeman had filed an I-485 prior to her spouse’s death, and
3 the Court repeatedly noted that fact. See Freeman, 444 F.3d at 1039-40 (“Mrs.
4 Freeman qualified as the spouse of a U.S. citizen when she and her husband petitioned
5 for adjustment of status . . .”); Id. at 1043 (“Mrs. Freeman completed all the
6 formalities required for an adjustment of [her] status, . . . but the immigration
7 authorities had, through no fault of [her or her husband's], failed as yet to act on [her
8 husband's] petition.”) (internal citations omitted).²⁰

9 The Court finds unconvincing defendants’ argument that the Freeman, 444 F.3d
10 1031 holding only applies to those aliens whose petitioning U.S. citizen spouses
11 submitted an I-485 form. Although plaintiff and her U.S. citizen spouse in Freeman
12 had filed an I-485 form prior to Mr. Freeman’s death, it does not appear that the
13 Court’s holding in Freeman depended on this fact. Instead, Freeman states that where
14 plaintiff and his or her U.S. citizen spouse filed the “necessary immediate relative
15 petition form” – i.e. the I-130 – plaintiff is entitled to be treated as a spouse for
16 purposes of 8 U.S.C. § 1151(b)(2)(A)(i). See 444 F.3d at 1039. Furthermore, the
17 Court agrees with plaintiffs that defendants appear to be improperly conflating
18 immediate relative status classification and admissibility criteria, by conditioning
19 classification as an immediate relative on the submission of an I-485. See Matter of

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21 ²⁰ In addition, defendants argue that, regardless, their contested interpretation of the
22 statute has no effect on plaintiff class members. Defs’ Ninth Cir. Mot. at 21. Specifically,
23 defendants note that, by definition, class members have submitted, in addition to an I-130
24 form, an I-864 form, which is an affidavit of support. See Ninth Circuit Class Definition,
25 Part I., *supra*. Because the I-864 form is related to admissibility, it is not relevant to the
26 I-130 proceedings, and is instead filed in conjunction with an I-485. Defendants argue that
27 if “an alien has not submitted a Form I-485, it is necessarily the case that the visa petitioner
28 did not submit a Form I-864.” Defs’ 9th Cir. Mot. at 21. However, nothing in the certified
class definition requires that plaintiffs in this action to have necessarily filed an I-485.
Therefore, the Court finds defendants arguments that all plaintiffs would have filed an I-485 to be speculative.

1 O., 81 I&N Dec. 295 (BIA 1959). Therefore, the Court finds and concludes that
 2 defendants may not limit the application of the Freeman decision to those cases where
 3 the alien spouse and his or her U.S. citizen spouse filed an I-485 before the U.S.
 4 citizen spouse's death.

5 **B. Whether Defendants May Automatically Revoke Approved I-**
 6 **130s, and Require a Request for Humanitarian Reinstatement**
 7 **and Substitute Affidavit of Support**

8 Plaintiffs also seek declaratory relief that, in the case in which an alien spouse
 9 dies, defendants act improperly when, in spite of the holding in Freeman, they “revoke
 10 the approval of an I-130 petition unless plaintiffs-petitioners present a request under 8
 11 C.F.R. § 205.1(a)(3)(C)(2) for humanitarian reinstatement, supported by a Form I-864
 12 executed by an individual who qualifies under section 213(A)(f)(5)(B) of the
 13 Immigration and Nationality Act as a qualifying substitute sponsor.”²¹ FAC ¶ 172.

14 The challenged regulation at issue is 8 C.F.R. § 205.1(a)(3)(i)(C)(2), which
 15 provides that an approved I-130 is revoked upon the “death of the petitioner” unless
 16 USCIS determines “as a matter of discretion exercised for humanitarian reasons . . .
 17 that it is inappropriate to revoke the approval of the petition. USCIS may make this
 18 determination only if the principal beneficiary of the visa petition asks for
 19 reinstatement of the approval of the petition and establishes that a person related to the

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 21 ²¹ Defendants argued for the first time at the hearing that plaintiffs do not have
 22 standing to challenge 8 C.F.R. § 205.1(a)(3)(i)(C)(2), because the only named plaintiff who
 23 has been subject to automatic revocation of the I-130 petition under 8 C.F.R. §
 24 205.1(a)(3)(i)(C)(2) was otherwise inadmissible and, therefore, revocation had no adverse
 25 immigration impact. However, defendants' argument is without merit. First, there is no
 26 indication that unnamed class members who may be otherwise admissible do not face an
 27 immediate threat of harm under this regulation, in that their approved I-130 petitions may
 28 be improperly revoked upon the death of their spouses. Furthermore, it appears to the
 Court that an alien may be harmed by automatic revocation of the I-130 petition, even if
 the alien is ultimately judged to be otherwise inadmissible, because such revocation forces
 the alien to expend time and resources requesting humanitarian reinstatement of his or her
 I-130 petition.

1 principal beneficiary in one of the ways described in section 213A(f)(5)(B) of the Act
2 is willing and able to file an affidavit of support under 8 C.F.R. part 213a as a
3 substitute sponsor.”).

4 Plaintiffs argue that, by requiring plaintiffs to petition for humanitarian
5 reinstatement of their approved I-130 after their U.S. citizen spouse dies, defendants
6 are importing discretionary factors into the determination of immediate relative status
7 (i.e. the I-130 process), which is a non-discretionary decision. Pls’ Mot. at 19, citing
8 Hernandez v. Ashcroft, 345 F.3d 824, 833-34 (9th Cir. 2003) (“determinations that
9 require application of law to factual determinations are nondiscretionary”); 8 U.S.C.
10 1154(b) (“the Attorney General *shall*, if he determines that the facts stated in the
11 petition are true and that the alien in behalf of whom the petition is made is an
12 immediate relative . . . approve the petition. . .”) (emphasis added). Plaintiffs argue
13 that “[d]efendants’ efforts to import discretionary criteria into the determination under
14 8 U.S.C. § 1154(a)(1)(A)(i) and 8 U.S.C. § 1151(b)(2)(A)(i) are illegal, and subject to
15 judicial review as a matter of law. Pls’ Mot. at 19.

16 The statutory provision governing revocation of approved petitions is 8 U.S.C.
17 § 1155, which states that “[t]he Secretary of Homeland Security may, at any time, for
18 what he deems to be good and sufficient cause, revoke the approval of any petition
19 approved by him under section 204 [8 USC § 1154].” Plaintiffs argue that the
20 automatic revocation upon the death of the petitioner, as codified in 8 C.F.R. § 205.1
21 goes “far afield” of this statutory provision. Pls’ Mot. at 19. Specifically, plaintiffs
22 argue that the death of a spouse does not constitute “good and sufficient cause” under
23 8 U.S.C. § 1155. Pls’ Mot at 20.

24 Plaintiffs first note that the BIA has held that in determining what constitutes
25 “good and sufficient cause” under 8 U.S.C. § 1155, the relevant question is whether
26 the evidence “would have warranted a denial based on the petitioner’s failure to meet
27 his or her burden of proof.” Pls’ 9th Cir. Opp’n at 12-13, quoting Matter of Esteime,
28 19 I&N Dec. 450, 451 (BIA 1987). Plaintiffs argue that because Freeman holds that

1 death of the petitioning spouse cannot form the basis for the denial of an I-130
2 petition, Matter of Estime requires that the death of a spouse cannot form the basis of
3 a revocation of the approval of an I-130 petition. Pls' 9th Cir. Opp'n at 13.

4 Furthermore, plaintiffs cite Pierno v. INS, 397 F.2d 949, 950 (2d Cir. 1968), in
5 which the INS had automatically denied plaintiffs' application for adjustment of status
6 due to her spouse's death. The Second Circuit stated that 8 U.S.C. § 1155 "should not
7 be interpreted to authorize the Attorney General's wooden application of rules for
8 automatic revocation." Id. The Court stated

9 We can hardly imagine that Congress would have intended Mrs. Pierno
10 to be deported as a result of her husband's death had he been, for
11 instance, a member of the armed forces killed in action while the status
12 adjustment proceedings were pending. Yet, such a result would follow
13 from the Service's decision. The purpose of placing such discretion
14 regarding immigration in the hands of the Attorney General, rather than
15 having that field governed by a detailed statute, is to give some flexibility
16 in treating a myriad of possible situations. Regulations issued by the
17 Attorney General should not be so applied as to frustrate that
18 Congressional intent.

19 Id. at 951. See also Leano v. Immigration & Naturalization Service, 460 F.2d 1260,
20 1260-61 (9th Cir. 1972) (INS's automatic order of deportation after plaintiff's
21 petitioning father died was improper, finding that "strict position taken by the Service
22 was not required").

23 Defendants, however, argue that Pierno, 397 F.2d 949 (2d Cir. 1968), is not
24 controlling, because subsequent case law demonstrates that agencies have wide
25 discretion to promulgate generalized rules, such as the automatic revocation regulation
26 at issue here, as long as Congress has not clearly expressed a contrary intent. Defs' 9th
27 Cir. Mot. at 28, citing American Hospital Ass'n v. NLRB, 499 U.S. 606, 612 (1991)
28 ("even if a statutory scheme requires individualized determinations, the decisionmaker

1 has the authority to rely on rulemaking to resolve certain issues of general
2 applicability unless Congress clearly expresses an intent to withhold that authority”);
3 see also Heckler v. Campbell, 461 U.S. 458, 467 (1983) (agency not required to
4 “continually . . . relitigate issues that may be established fairly and efficiently in a
5 single rulemaking proceeding.”). Defendants argue that “the purpose of family-based
6 immigration policy – to promote family unity for the U.S. citizen – establishes that the
7 death of the citizen spouse constitutes ‘good and sufficient cause’ for terminating the
8 petition approval.” Defs’ 9th Cir. Reply at 15.

9 Defendants further argue that it is clear that Congress has not evinced a contrary
10 intent that would bar the automatic revocation regulation. In fact, defendants argue
11 that revocation of visa petitions has been automatic at the death of the visa petitioner
12 since 1952. Defs’ 9th Cir. Mot. at 30. Furthermore, defendants argue that, in enacting
13 the substitute sponsor provision through Public Law 107-150 in 2001, Congress
14 expressly took note of the regulation that revokes approval of a Form I-130 on the
15 petitioners’ death, and did not alter it. Defs’ 9th Cir. Mot. at 30, citing H. Rep. 107-
16 127 at 6 (2001) (“The Committee does not intend this bill to restrict the Attorney
17 General’s ability to revoke any petition, whether as a result of the death of the
18 petitioner or otherwise, for good sufficient cause. . .”).

19 Defendants also argue that the automatic revocation of an I-130 at the citizen’s
20 spouse’s death is valid, because it gives effect to the principle that “an alien cannot
21 immigrate if he or she is not actually eligible when he or she seeks admission with an
22 immigrant visa . . .” Defs’ 9th Cir. Mot. at 29, citing 8 U.S.C. 1154(e) (“Nothing in
23 this section shall be construed to entitle an immigrant, in behalf of whom a petition
24 under this section is approved . . . as an immediate relative under section 201(b) [8
25 USCS § 1151(b)] if upon his arrival at a port of entry in the United States he is found
26 not to be entitled to such classification.”). Specifically, defendants argue that, when
27 the petitioning spouse dies, the affidavit of support filed by the alien’s petitioning
28 spouse – a prerequisite to admissibility – is no longer valid, and, therefore, the alien is

1 not admissible. Hence, defendants argue, they are entitled to automatically revoke,
2 and to require an alien to request reinstatement and to file a substitute affidavit of
3 support from a new sponsor.

4 In general, an affidavit of support (the I-864 form) is a prerequisite to an alien's
5 admissibility. Under 8 U.S.C. § 1182(a)(4)(C), family-sponsored immigrants (like
6 plaintiffs in this action) are inadmissible unless "the person petitioning for the alien's
7 admission (and any additional sponsor required under section 213A(g)) or any
8 alternative sponsor permitted under paragraph 5(B) of such section) has executed an
9 affidavit of support described in section 213A [8 U.S.C. 1183(a)] with respect to such
10 alien." Under 8 U.S.C. § 1183a(a)(1),

11 No affidavit of support may be accepted by the Attorney General or by
12 any consular officer to establish that an alien is not excludable as a public
13 charge under section 212(a)(4) [8 USCS § 1182(a)(4)] unless such
14 affidavit is executed by a sponsor of the alien as a contract-- . . . (B) that
15 is legally enforceable against the sponsor.

16 However, 8 U.S.C. § 1183a(f)(5)(B) provides that a person who is not
17 petitioning on behalf of an alien may nevertheless file an affidavit of support, if such
18 person is a family member of the alien and

- 19 (i) the individual petitioning under section 204 [8 USCS § 1154] for
20 the classification of such alien died after the approval of such petition;
21 and
22 (ii) the Attorney General has determined for humanitarian reasons that
23 revocation of such petition under section 205 [8 USCS § 1155] would
24 be inappropriate.

25 Plaintiffs argue that defendants' requirement that plaintiffs submit a substitute
26 affidavit of support in order to reinstate their approved I-130 form is improper,
27 because, like the I-485, an affidavit of support is related to the section of the statute
28 governing admissibility (8 U.S.C. § 1182, and specifically 8 U.S.C. § 1182(a)(4)

1 (“Public Charge”)), and admissibility is not relevant to an I-130 petition proceeding.
2 First Opp’n at 2, citing Matter of O, 8 I&N Dec. 295 (BIA 1959). Plaintiffs again
3 argue that defendants may not utilize admissibility concerns to withhold approval or
4 revoke approval of an immediate relative petition. Pls’ Mot. at 2, 14.

5 Defendants, however, argue that the imposition of a substitute affidavit of
6 support requirement does not read admissibility criteria into the petition procedure.
7 Instead, the requirement merely addresses “how, once the Form I-130 is approved
8 under Freeman, the alien can ‘overcome inadmissibility on public charge grounds.’”
9 Defs’ 9th Cir. Mot. at 23. Defendants argue that an enforceable affidavit of support
10 (I-864) is a requirement of admissibility. See 8 U.S.C. § 1183a(a)(1)(B) (affidavit of
11 support must be “legally enforceable against the sponsor by the sponsored alien”).
12 Defendants further note that an alien’s eligibility for adjustment of status is decided
13 based on the facts as they exist on the date of decision, and argue that “[u]nder
14 Freeman, an alien may still qualify as the spouse of a citizen, even though the
15 qualifying marriage has terminated by death. All other admissibility factors, however,
16 must still be satisfied at the time of the decision.” Defs’ 9th Cir. Mot. at 23, citing
17 Matter of Alarcon, 20 I&N Dec. 557, 562 (BIA 1992) (“An application for admission
18 to the United States is a continuing application, and admissibility is determined on the
19 basis of the facts and the law at the time the application is finally considered.”).
20 Therefore, defendants argue, an affidavit of support must be legally enforceable at the
21 time of adjudication of admissibility. Because in plaintiffs’ cases admissibility is to
22 be determined after the death of the U.S. citizen spouse who filed the affidavit of
23 support, a substitute affidavit is required, or else the alien is inadmissible.

24 Defendants acknowledge that, by employing the “revoke and reinstate”
25 mechanism, defendants revoke the I-130 form – a form that does not deal with
26 admissibility – but argues that it does so because 8 U.S.C. § 1183a(f)(5)(B) is the only
27 statutory mechanism available which allows for the submission of a substitute I-864
28 after a petitioning U.S. citizen has died. Defs’ 9th Cir. Mot. at 24. Defendants further

1 argue that the mechanism used is largely irrelevant, because “[w]ithout an enforceable
 2 Form I-864 from a substitute sponsor, the alien is inadmissible under 8 U.S.C. §
 3 1182(a)(4)(C) and therefore ineligible for adjustment of status as a matter of law.”
 4 Defs’ 9th Cir. Mot. at 24. In other words, the question of whether automatic
 5 revocation is valid is “largely academic” because “whether the approval of Form I-130
 6 is revoked or not, there must still be a Form I-864 from a qualified substitute sponsor .
 7 . . .”²² Defs’ 9th Cir. Mot. at 27.

8
 9 ²² Plaintiffs, however, dispute not only defendants’ use of the revoke and reinstate
 10 mechanism, but also defendants’ argument that a “valid affidavit” is required, arguing that,
 11 in fact, all that is required is that the alien’s spouse “executed” the requisite I-864 form
 12 prior to his or her death. Pls’ 9th Cir. Opp’n at 6, citing 8 U.S.C. § 1183a(a)(1) (“No
 13 affidavit of support may be accepted . . . unless such affidavit is executed by a sponsor .
 14 . . as a contract – (B) that is legally enforceable against the sponsor”). Because the
 15 petitioning citizen spouses in plaintiff’s cases all executed affidavits of support prior to
 16 death, plaintiffs argue, substitute affidavits are not required. First Opp’n at 6. Plaintiffs
 17 argue that

18 [t]he fact that the duly executed affidavit of support becomes
 19 unenforceable does not make the alien inadmissible under 8 U.S.C.
 20 § 1182(a)(4) [which governs public charge admissibility grounds],
 21 because the petitioner and alien spouse have done all that is required
 22 under the statute. Enforceability is not required for the sponsored
 23 immigrant to be admissible – only execution of the affidavit by the
 24 petitioning sponsor.

25 Pls’ Mot. at 16. Defendants, however, argue that the language of 8 U.S.C. § 1183a(a)(1)
 26 – “no affidavit of support may be accepted” unless it is “legally enforceable” – means that
 27 the affidavit must establish that the alien is not “excludable as a public charge.”

28 The mere filing of a Form I-864 by a sponsor in support of an alien’s
 Form I-485 does not mean that ‘acceptance’ in the relevant sense has
 occurred. . . ‘Acceptance’ in other words, must mean an act of
 adjudication – a decision that the Form I-864 is sufficient to establish
 that the requirements of section 213A are met.

(continued...)

1
2 The Court, however, finds defendants' arguments unpersuasive. By
3 automatically revoking the I-130's of plaintiffs who, under the holdings in Freeman,
4 444 F.3d 1031, qualify as immediate relatives spouses, and by requiring them to
5 request humanitarian reinstatement, defendants are improperly importing discretionary
6 considerations into the non-discretionary determination of whether an alien is an
7 "immediate relative." See 8 U.S.C. 1154(b) ("the Attorney General *shall*, if he
8 determines that the facts stated in the petition are true and that the alien in behalf of
9

10 ²²(...continued)
11 Pls' Reply at 13.

12 Furthermore, plaintiffs argue that even if an enforceable affidavit is required for
13 admission, defendants' requirement of a substitute affidavit is improper, because the
14 affidavit of support executed by the U.S. citizen spouse prior to his or her death is, in fact,
15 enforceable. Once the affidavit was executed, plaintiffs argue, it is a legally enforceable
16 contract against the sponsor, and the death of the sponsor who executed it does not
17 foreclose its enforceability. First Opp'n at 7. Plaintiffs acknowledge that 8 C.F.R. §
18 213a.2(e)(2)(ii) explicitly states that "enforcement ends in death." Pls' Mot. at 17; see 8
19 C.F.R. § 213a.2(e)(2)(ii) ("The support obligation under Form I-864 also terminates if the
20 sponsor, substitute sponsor or joint sponsor dies."). However, plaintiff argues that this
21 regulation is contrary to congressional intent. Specifically, plaintiffs note that Congress
22 explicitly provided that an affidavit of support may become unenforceable when the alien
23 works 40 qualifying quarters of coverage; plaintiffs argue that the fact that Congress
24 specifically stated one way that an affidavit of support could become enforceable, but did
25 not state that an affidavit of support becomes unenforceable upon death, indicates that
26 Congress clearly did not mean for the death of the spouse to render the affidavit
27 unenforceable. Pls' Ninth Cir. Opp'n at 7-8; see 8 U.S.C. 1183a(a)(3)(A). In other words,
28 plaintiffs argue that if Congress intended for an affidavit to be unenforceable at death, it
would have so provided in the statute.

25 Defendants dispute that a petition is enforceable against a deceased petitioner,
26 arguing that because the statute clearly requires that a sponsor be an "individual," the
27 deceased's estate cannot qualify. See 8 U.S.C. § 1183a(f)(1) ("the term "sponsor" in
28 relation to a sponsored alien means an *individual* who executes an affidavit of support . .
. ") (emphasis added).

1 whom the petition is made is an immediate relative . . . approve the petition . . .”) (emphasis added). Furthermore, it is untenable under the holding of Freeman that the
2 death of a U.S. citizen spouse could constitute “good and sufficient cause” for
3 automatic revocation pursuant 8 U.S.C. § 1155.
4

5 Furthermore, in requiring plaintiffs to submit a substitute affidavit of support –
6 a requirement related to the alien’s admissibility – as a prerequisite to reinstating the
7 alien’s I-130 petition for immediate relative status, defendants are impermissibly
8 basing a non-discretionary decision regarding immediate relative status on criteria
9 governing admissibility.²³ See Matter of O, 8 I&N Dec. 295 (BIA 1959) (“[t]he visa
10 petition procedure is concerned merely with the question of status. It does not
11 concern itself with substantive questions of inadmissibility . . .”). Therefore, the Court
12 finds 8 C.F.R. § 205.1(a)(3)(i)(C)(2) invalid under the holdings in Freeman and
13 Lockhart.

14 C. Arguments Regarding Specific Individual Plaintiffs

15 1. Plaintiff Lockett

16 Defendants argue that plaintiff Lockett has returned to the United Kingdom, and
17 that, therefore, his challenge to the denial of his I-485 is moot. Defs’ 9th Cir. Mot. at
18 33. Under 8 C.F.R. § 245.2(a)(4)(B), “[t]he travel outside of the United States by an
19 applicant for adjustment who is not under exclusion, deportation, or removal
20 proceedings shall not be deemed an abandonment of the application *if he or she was*
21 *previously granted advance parole* by the Service for such absence.” (emphasis
22 added). Plaintiffs argue that plaintiff Lockett in fact obtained an advance parole travel
23 document prior to his departure, but due to personal circumstances, did not return
24

25 ²³ The Court finds that it cannot determine, based on the arguments set forth by the
26 parties as summarized in footnote 22, that plaintiffs have established that defendants may
27 not require a substitute affidavit of support as a grounds for admissibility. The Court
28 therefore declines to so find, and limits its holding herein to a finding that defendants may
not require such an affidavit of support as a prerequisite to reinstatement of the alien’s I-
130 petition.

1 before the expiration date of the document. Pls' 9th Cir. Opp'n at 16. Plaintiffs
2 further argue that defendants currently refuse to issue a renewal document, and that
3 this denial derives from defendants' unlawful interpretation of the term "spouse." Pls'
4 9th Cir. Opp'n at 16. Defendants, however, correctly note that the decision of whether
5 to grant advance parole is purely a matter of agency discretion not subject to judicial
6 review. Defs' Reply at 21; see Hassan v. Chertoff, 543 F.3d 564, 566 (9th Cir. 2008)
7 (affirming the district court's holding that it lacked jurisdiction over plaintiff's claim
8 regarding revocation of his advance parole "because the revocation of advance parole,
9 like the grant of advance parole, is discretionary.").

10 2. Plaintiff De Mailly

11 Defendants argue that plaintiff De Mailly has abandoned her adjustment of
12 status application, because she has left the United States and now resides in Belgium.
13 Defs' Opp'n at 24, citing Decl. of Suzanne DeMailly ¶ 2 ("I currently live in
14 Bruxelles, Belgium. I entered the United States lawfully, and lived in Los Angeles,
15 California, but was forced to return to Belgium following the denial of my application
16 for permanent resident status.").

17 Defendants argue that "as an alien who is not in the United States after having
18 been admitted to the United States, and who does not reside in the United States,
19 Plaintiff De Mailly has no right to judicial review of an administrative decision that
20 she is not eligible to immigrate." Defs' Opp'n at 24. Defendants cite Kleindienst v.
21 Mandel, 408 U.S. 753, 762 (1974) in which the Court held that "an unadmitted and
22 nonresident alien . . . had no constitutional right of entry to this country as a
23 nonimmigrant or otherwise" and Braud v. Wirtz, 350 F.2d 702, 706 (9th Cir. 1965)
24 (finding no right of judicial review where appellant aliens, who challenged
25 administrative determinations affecting appellants' eligibility to obtain immigrant
26 visas to enter United States, had not sought admission).

27 4. Conclusion

28 The Court cannot determine, based on the limited evidence before it, the exact

1 status of the I-130 petitions and adjustment of status and visa applications of plaintiffs
2 Lockett and De Maily. However, to the extent that the Court's holding herein
3 regarding the application of Freeman and Lockhart affects the disposition of any of
4 these plaintiffs' petitions and applications, defendants are hereby ordered to apply the
5 holding herein and to adjudicate them accordingly. Furthermore, defendants are
6 cautioned that they may not use factors arising from their improper denial of
7 plaintiffs' applications to again deny the petition and application upon reopening
8 them.

9 V. CONCLUSION

10 The Court herein GRANTS in part and DENIES in part defendants' motion for
11 summary judgment as to all plaintiffs outside of the Ninth Circuit. Specifically, the
12 Court DENIES defendants' motion with regard to the Sixth Circuit plaintiffs. The
13 Court GRANTS defendants' motion with regard to the Third Circuit plaintiffs. The
14 Court DENIES plaintiffs' and defendants' motions with regard to plaintiffs outside the
15 Ninth, Sixth, and Third Circuits.²⁴ The Court DENIES defendants' motion for partial
16 summary judgment as to plaintiffs in the Ninth Circuit. The Court GRANTS in part
17 and DENIES in part plaintiffs' renewed motion for summary judgment.

18 Specifically, the Court finds that plaintiffs who reside in the Ninth and Sixth
19 Circuits are entitled to "immediate relative" classification based on their status as
20 surviving spouses of deceased United States citizens.

21 Furthermore, the Court finds defendants' application of Freeman to Ninth
22 Circuit plaintiffs, in the manner set forth in the Aytes Memorandum, to be invalid.
23 First, the Court holds that the Freeman holding applies equally to those cases in which
24

25 ²⁴ At the hearing, the parties raised the issue of the proper disposition of the claims
26 of plaintiffs outside the Third, Sixth, and Ninth Circuits, and in particular whether such
27 plaintiffs' claims should be dismissed or transferred. This issue has not been briefed by
28 the parties, and the Court has insufficient information before it to decide this question at
this time.

1 an I-485 application was not filed prior to the U.S. citizen spouse's death.
2 Furthermore, the Court finds 8 C.F.R. § 205.1(a)(3)(C)(2), which revokes an alien's I-
3 130 form on the basis of the death of the alien's U.S. citizen spouse and requires the
4 alien to petition for humanitarian reinstatement and to file a substitute affidavit of
5 support as a prerequisite to reinstatement of the I-130, to be invalid as a matter of law
6 as applied to plaintiffs in the Ninth and Sixth Circuits.

7 Defendants are hereby ordered to reopen the immediate relative petitions and
8 applications for adjustment of status and immigrant visas of plaintiffs in the Sixth and
9 Ninth Circuits, and to adjudicate them in a manner consistent with the holding of the
10 Court.²⁵

11 IT IS SO ORDERED

12
13 Dated: April 28, 2009

14 
15 CHRISTINA A. SNYDER
16 UNITED STATES DISTRICT JUDGE
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26
27 ²⁵ At the hearing, defendants requested clarification of the scope of the Court's
28 holding. The instant holding applies to named plaintiffs in the Ninth and Sixth Circuits,
as well as unnamed members of the Ninth Circuit class.