

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

KHAMPHEE KELLS, ET AL.,)	
)	
)	
Petitioners/Plaintiffs,)	
)	Case No. 4:08CV01582 CAS
v.)	
)	
MICHAEL CHERTOFF, Secretary, Department)	
of Homeland Security; JONATHAN)	
SCHARFEN, Acting Director, U.S. Citizenship)	
and Immigration Services,)	
)	
Respondents/Defendants.)	

**RESPONDENTS’ MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS AND, IN THE ALTERNATIVE, MOTION
FOR SUMMARY JUDGMENT**

Respondents Michael Chertoff and Jonathan Scharfen (collectively, “Respondents”), both sued in their official capacities as officers of or with authority over United States Citizenship and Immigration Services (“USCIS”), by and through their undersigned counsel, respectfully move this Court for an Order dismissing Petitioners’ Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandamus because the Court lacks subject matter jurisdiction over Petitioners’ claims in part, and the Complaint fails to state a claim upon which relief may be granted in part. *See* Fed. R. Civ. P. 12(b)(1), (6). In the alternative, Respondents, by and through their undersigned counsel, respectfully move this Court for an Order granting summary judgment because Respondents are entitled to judgment as a matter of law and there are no disputed issues of material fact. *See* Fed. R. Civ. P. 56(c).

Petitioners seek lawful permanent resident status through their prior status as legally married spouse or stepchildren of a United States citizen. Complaint at 1. Petitioners seek relief through the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*; the Mandamus Act, 28 U.S.C. § 1361; and the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* The Petitioners have not, and cannot, meet their burden of establishing subject matter jurisdiction. None of the three statutes cited in the Complaint, the APA, the Mandamus Act and the Declaratory Judgment Act, provide a proper basis for jurisdiction.

Respondents assert that this Court lacks subject matter jurisdiction for failure of the Petitioners to exhaust available administrative remedies and the lack of final agency action, and assert that Petitioners have failed to state a claim upon which relief may be granted because USCIS appropriately denied their immediate relative petitions (Form I-130) and adjustment of status applications (Form I-485). In the alternative, should the Court not dismiss the Complaint, Respondents assert they are entitled to judgment as a matter of law because the denials of the petitions and applications were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

I. BACKGROUND

A. Legal Authority

1. Standard of Review for Motion To Dismiss For Lack Of Jurisdiction

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for the filing of a motion to dismiss an action when the Court lacks jurisdiction over the subject matter of the action. The Court has authority to consider matters outside the pleadings when subject matter jurisdiction is challenged under Rule 12(b)(1). *Osborn v. United States*, 918 F.2d 724, 728 (8th Cir. 1990), citing *Land v. Dollar*, 330 U.S. 731 (1947). Courts have broader power to decide their own right

to hear a case than they have when the merits of the case are reached. *Osborn*, 918 F.2d at 729.

The Eighth Circuit explained:

Jurisdictional issues, whether they involve questions of law or of fact, are for the court to decide....Moreover, because jurisdiction is a threshold question, judicial economy demands that the issue be decided at the outset rather than deferring it until trial, as would occur with denial of a summary judgment motion.

Id. The *Osborn* Court further noted that:

because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attached to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Id. at 730.

2. Standard of Review for Motion To Dismiss For Failure to State a Claim

In considering a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the court must assume all factual allegations of the complaint are true and must construe those allegations in favor of the plaintiff. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989); *Klutho v. Fourth Fleet Financial*, 529 F.Supp.2d 1016, 1018 (E.D. Mo. 2007). To survive a motion to dismiss, a complaint must show that the pleader is entitled to relief in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. *Bell Atlantic Corp. v. Twombly*, -- U.S. -- , 127 S.Ct. 1955, 1964 (2007). Factual allegations must “raise a right to relief above the speculative level.” *Id.* at 1959; *Giandinoto v. Chemir Analytical Services, Inc.*, 545 F.Supp.2d 952, 956-57 (E.D. Mo. 2007).

When considering a motion to dismiss, a court must primarily consider the allegations contained in the complaint, but other matters referenced in the complaint may also be taken into account. *Deerbrook Pavilion, LLC v. Shalala*, 235 F.3d 1100, 1102 (8th Cir. 2000). Documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleadings may be considered when deciding a motion to dismiss. *Kushner v. Beverly Enters., Inc.*, 317 F.3d 820, 831 (8th Cir. 2002). Additionally, a district court may take judicial notice of public records and may consider them on a motion to dismiss. *Faibisch v. Univ. of Minnesota*, 304 F.3d 797, 802-03 (8th Cir. 2002); *EEOC v. Apria Healthcare Group, Inc.*, 222 F.R.D. 608, 610 n.1 (E.D. Mo. 2004) (charge of discrimination and bankruptcy petition and schedules considered on a motion to dismiss).

3. Standard of Review for Motion for Summary Judgment

Summary judgment is appropriate when the evidence, viewed in light most favorable to the nonmoving party, demonstrates that there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); FED. R. CIV. P. 56(c). Summary judgment motions “can be a tool of great utility in removing factually insubstantial cases from crowded dockets freeing court’s trial time for those that really do raise genuine issues of material fact.” *Irwin v. Hoover Treated Wood Products, Inc.*, 906 F. Supp. 530, 531 (E.D. Mo. 1995), citing *City of Mt. Pleasant Iowa v. Associated Elec. Co-op., Inc.*, 838 F.2d 268, 273 (8th Cir. 1988). The requirement that a fact dispute be genuine means that “the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.”

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

Summary judgment is proper if “the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.” *Id.* at 323. Once the moving party has properly supported its motion, the burden shifts to the nonmoving party, who “may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.” *Id.* at 256; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (“Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial’”). Thus, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. In fact, in order to preclude the entry of summary judgment, it is incumbent upon the nonmoving party to make a sufficient showing on every essential element of its case on which it bears the burden of proof. *Osborn v. E.F. Hutton & Co., Inc.*, 853 F.2d 616, 618 (8th Cir. 1988), citing *Celotex Corp.*, 477 U.S. at 322-323. Similarly, conclusory allegations of the complaint do not suffice to create a controverted issue of fact. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990). To survive a motion for summary judgment, the nonmoving party must be able to substantiate his allegations with sufficient probative evidence that would permit a finding in his favor based on more than mere speculation, conjecture or fantasy. *Wilson v. Int’l Bus. Machs. Corp.*, 62 F.3d 237, 241 (8th Cir. 1995).

4. Adjustment of Status on the Basis of an Immediate Relative Petition

Section 204 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1154 (2007), provides United States citizens and alien spouses, under certain conditions, the right to petition

[USCIS] for classification of an alien as an "immediate relative." The INA allows a United States citizen to file a Form I-130 on behalf of a spouse claiming the spouse is entitled to classification as an "immediate relative." 8 U.S.C. § 1154(a)(1)(A)(i). "Immediate relative" is a defined term, as set forth in 8 U.S.C. § 1151(b)(2)(A)(i):

For purposes of this subsection, the term "immediate relatives" means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age. In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 204(a)(1)(A)(ii) of this title within 2 years after such date and only until the date the spouse remarries. *Id.*

As a result, those married less than two years at the time of the death of the petitioning spouse no longer qualify for "immediate relative" status as legally married spouses of United States citizens.¹ See *Matter of Varela*, 13 I. & N. Dec. 453 (BIA 1970). In *Varela*, the Board of Immigration Appeals ("BIA" or Board") addressed the question of whether the death of a United States citizen deprived his alien spouse of her legal status as a spouse, and therefore an "immediate relative." According to the Board's interpretation of the statutory language, the death of the citizen spouse ends the legal marriage, and thus also ends "immediate relative" status as well. *Id.* The Board reaffirmed the result in *Varela* in a later decision, although the Board stressed the lack of the alien's standing even to pursue the matter after the citizen spouse

¹During the 110th Congress, which adjourned on January 3, 2009, bills were introduced in the House and Senate that would have provided relief to aliens in the same situation as Petitioners if they could prove that the marriage to the U.S. citizen was bona fide. Enactment of either S. 3369, as introduced in the Senate on July 30, 2008, or H.R. 6034, as amended by the House Committee on the Judiciary on July 16, 2008, would have amended the INA as above. However, prior to the adjournment of the 110th Congress, neither bill was enacted. Nevertheless, based upon the makeup of the incoming 111th Congress, Respondents believe that H.R. 6034, which was reported (Amended) by the Committee on the Judiciary and placed on the Union Calendar, Calendar No. 586, on October 3, 2008, has a greater likelihood of passage than in the 110th Congress. Respondents are unable to predict any time frame for the passage of the legislation.

had died. *Matter of Sano*, 19 I. & N. Dec. 299 (BIA 1985). These precedent decisions remain valid, although they are subject to the later-enacted exception contained in the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i) (widows married at least 2 years when the citizen spouse died), and in two specific exceptions created by Congress for spouses of those who died in the 9/11 terrorist attacks in the United States, Pub. L. 107-56, 115 Stat. 272, §§ 421(a), (b)(1)(B)(i) (2001), and for spouses of those who were active-duty military and died as a result of injury or disease incurred in or aggravated by combat, Pub. L. 108-36, Div. A, Title XVII, § 1703(a)-(e) (2003). The decisions in *Sano* and *Varela* reflect the general rule in the United States that marriage legally ends when one spouse dies. *See* 52 Am. Jur. 2d, Marriage, § 8.

B. Statement of Facts

A separate Statement of Material Uncontroverted Facts accompanies this Memorandum as required by Local Rule 7 - 4.01(E).

II. ARGUMENT

A. This Court Lacks Subject Matter Jurisdiction Because Petitioners Have Failed to Exhaust Administrative Remedies Or Due To The Lack Of A Final Decision.

1. Petitioners Have Failed to Exhaust Available Administrative Remedies.

This Court should dismiss Petitioners' Complaint, in part, because this Court lacks subject matter jurisdiction over Petitioners' claims. Fed. R. Civ. P. 12(b)(1). The APA, by its terms, provides a right to judicial review of all "final agency actions for which there is no other adequate remedy in a court." 5 U.S.C. § 704. In *Darby v. Cisneros*, 509 U.S. 137, 113 S. Ct. 2539, 125 L. Ed. 2d 113 (1993), the Supreme Court held generally that when a party challenges a final agency decision under the APA, an appeal to "superior agency authority" is a prerequisite

to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review.

Darby, 509 U.S. at 153.

Petitioners erroneously assert that “there are no administrative remedies available for plaintiffs to exhaust.” Complaint at 3, lines 13-14. To the contrary, in its discretion, USCIS has thus far declined to issue Notices to Appear commencing removal proceedings against Petitioners. Declaration of Chester Moyer (“Moyer Decl.”) ¶ 12. Rather, USCIS has granted deferred action for all three Petitioners, which is currently in place. Gov. Ex. Q-T; Moyer Decl. ¶¶ 8-9. Upon the commencement of removal proceedings, Petitioners would be have an opportunity to file an adjustment of status application for consideration by the Immigration Judge and review by the Board. Therefore, Petitioners have failed to exhaust their administrative remedies.

Aliens who have yet to enter removal proceedings may be determined to have failed to exhaust their administrative remedies. *See Rivera-Durmaz v. Chertoff*, 456 F. Supp. 2d 943, 951-52 (N.D. Ill. 2006) (declining to review plaintiffs eligibility for adjustment of status until they exhausted their administrative remedies - specifically, consideration of the matter by an Immigration Judge and review by the Board); *Soliz v. U.S. Citizenship and Immigration Services*, 2007 WL 1753543 (S.D. W. Va. June 18, 2007) (concluding that Petitioner had failed to exhaust his administrative remedies in regard to his application for adjustment of status until he entered removal proceedings).

In *Rivera-Durmaz*, the court considered the language of the INA and the relevant agency regulations, as required by *Darby*. *Rivera-Durmaz*, 456 F. Supp. 2d at 952. While finding no

explicit exhaustion requirement in the INA, the court concluded that language contained in the regulations did contain such a requirement. *Id.* Specifically, the court concluded that the language in 8 C.F.R. § 245.2(a)(5)(2) (2006), which governs decisions on I-485 applications, imposes a mandatory exhaustion requirement. *Id.* The court found it relevant that many of the courts of appeal had come to the same conclusion under factually similar circumstances. *Id.* at 953 (*citing Cardoso v. Reno*, 216 F.3d 512, 518 (5th Cir. 2000) (the option of a rehearing on the agency's refusal to adjust petitioner's status imposes an exhaustion requirement); *Howell v. INS*, 72 F.3d 288, 294 (2nd Cir. 1995) (finding petitioner seeking review of the denial of his application for adjustment of his status must exhaust administrative remedies through deportation proceedings)).

Here, the Petitioners are in the same situation as the Plaintiffs in *Rivera-Durmaz*: their I-485 applications have been denied but they have yet to be placed into removal proceedings as a matter of prosecutorial discretion. Moyer Decl. ¶¶ 8-9, 12. This Court should follow the example of *Rivera-Durmaz*, and decline to rule on Petitioners' APA claim until they have exhausted their administrative remedies through the renewal of their applications for adjustment of status in removal proceedings. As a result, this Court should dismiss Petitioners' claims.

2. Petitioners Claims Must Be Dismissed For Lack of Final Agency Action.

In order for an action to be final, and thus reviewable pursuant to the APA, the action must (1) "mark the 'consummation' of the agency's decision-making process," and (2) the action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 178, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997).

With regard to the first prong, the question courts ask is whether the agency "has rendered its last word on the matter." *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 465 F.3d 977, 984 (9th Cir. 2006) (citing *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001)). The last word has yet to be given in the cases of Petitioners, as USCIS has thus far declined to issue Notices to Appear commencing removal proceedings in an exercise of its prosecutorial discretion. Moyer Decl. ¶ 12. Therefore, because an Immigration Judge and the Board have yet to review the denial of Petitioners' adjustment applications, it is clear that the "final word" has yet to be given on that issue, thereby rendering relief under the APA inappropriate for Petitioners.

B. The Complaint Fails To State A Claim Upon Which Relief May Be Granted

1. USCIS Appropriately Denied the I-130s and I-485s.

In addition, this Court should dismiss Petitioners' Complaint for failure to state a claim under Rule 12(b)(6) because Petitioners' claims fail under the law of their jurisdiction. *See* Fed. R. Civ. P. 12(b)(6). Petitioners argue that Respondents "have confused the immediate relative definition applicable to I-130 petitions filed by United States citizen spouses (the first sentence of 8 U.S.C. § 1151(b)(2)(A)(i)) with the immediate relative definition applicable to I-360 self-petitions filed by alien spouses (the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i))."

Complaint a 5, ¶ 12. That argument is incorrect.

The first sentence of section 201(b)(2)(A)(i) defines the term "immediate relative" as the spouse, parent, or child of a U.S. citizen (the parent is eligible only if the child is at least 21 years old). INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). As noted, Khamphée Kells no longer qualifies as an immediate relative under this first sentence because she is no longer the

spouse of a citizen and, in turn, her children can no longer qualify as the step-children of a citizen. Gov. Ex. I, M; Moyer Decl. ¶ 6.

The second sentence of section 201(b)(2)(A)(i) provides:

In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 204(a)(1)(A)(ii) of this title within 2 years after such date and only until the date the spouse remarries.

Id. (emphasis added).

It is correct, of course, that a qualifying widow(er) can file his or her own petition. INA § 204(a)(1)(A)(ii), 8 U.S.C. § 1154(a)(1)(A)(ii). This fact, however, simply does not support the Petitioners' conclusion that the second sentence has no bearing on the scope of the first sentence.

The second sentence explicitly states that it applies "[i]n the case of an alien who was the spouse" of a U.S. citizen. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). Since, as a matter of law, Khampee Kells's marriage ended with her husband's death, she is "an alien who was the spouse of a citizen." *Id.* (emphasis added). The second sentence, clearly, is the rule that determines whether she qualifies as an "immediate relative" after the death of her husband. Since she and her husband had been married for less than two years when he died, she does not. Gov. Ex. A; Moyer Decl. ¶¶ 4, 9.

This interpretation of the INA is consistent with the common ordinary meaning of the term "spouse" and the definition of "spouse" in Federal law. Unless Congress clearly intended a specific technical meaning, a statute is to be interpreted according to the common, ordinary meaning of the words of the statute at the time of the enactment. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 184 (2004); *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Burns*

v. Alcala, 420 U.S. 575, 580-81 (1975). The general rule in the United States is that a marriage ends upon the death of one spouse. *See* 52 Am. Jur. 2d Marriage, § 8. In addition, the common, ordinary meaning of the term "spouse" is a married person. *See* Black's Law Dictionary 1438-39 (8th ed. 2007) (defining "spouse"). Federal law has adopted this same basic definition of "spouse" for purposes of the administration of every Federal statute and regulation. 1 U.S.C. § 7.² A person is a "spouse" only if he or she is either the husband or the wife within a legal marriage. *Id.* Khamphée Kells is no longer the wife of her deceased husband. Hence, she is no longer his "spouse" and she and her children no longer qualify for immediate relative status.

In the immigration context, determinations by the Board are binding on the government and apply nation-wide. *See* 8 C.F.R. § 1003.1(g) (2006). If, however, a court of appeals comes to a position contrary to the Board in a precedent decision, the government follows that position only within the jurisdiction of that particular Court of Appeals.³ *Matter of Anselmo*, 20 I. & N.

²1 U.S.C. § 7 provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who *is* a husband or a wife.

(*emphasis added*) .

³On January 6, 2009, in a case directly on point, the U.S. District Court for the Central District of California certified as to Plaintiffs whose cases arise within the jurisdiction of the Ninth Circuit, a class of "[a]ll aliens whose United States citizen spouse died before the couple's two-year wedding anniversary, and whose citizen spouse filed an I-130 petition and a Form I-864 or I-864EZ affidavit of support on behalf of the alien spouse ..." and a subclass of "[a]ll aliens who, within ninety days of admission to the United States as a nonimmigrant fiancé, married the petitioning United States citizen, and whose citizen spouse died before the couple's two-year wedding anniversary, so long as he or she can also demonstrate that the citizen spouse filed an I-129F petition and a Form I-864 or I-864EZ affidavit of support on behalf of the alien

Dec. 25 (BIA 1989). In addition, if a federal district court issues a final decision contrary to the Board, the government complies with the judgment only with respect to the individual case. *See Matter of K-S-*, 20 I. & N. Dec. 715 (BIA 1993). In *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), the Ninth Circuit has concluded that the death of the United States citizen spouse did not necessarily strip the alien spouse of her immediate relative status. *Freeman*, 444 F.3d at 1040-43. However, as no other court of appeals has issued a published decision following the Ninth Circuit's *Freeman* analysis, the applicable Board determination is the law this Court must apply to the claims of those residing outside of the jurisdiction of the Ninth Circuit.

The governing Board precedents specify that a Form I-130 is to be denied if the citizen petitioner has died. *Matter of Sano*, 19 I. & N. Dec. 299 (BIA 1985); *Matter of Varela*, 13 I. & N. Dec. 453 (BIA 1970). The precedents, of course, are subject to the exceptions that Congress has enacted more recently, which permit only a narrow subset of widowed aliens, who were married less than two years, to retain their "immediate relative" status after the death of their spouses. These later exceptions indicate that Congress clearly intended that aliens married less than two years at the time their U.S. citizen spouse dies are no longer entitled to "immediate relative" status.

Moreover, the fact that Congress has passed two specific, narrowly-tailored exceptions to the general rule supports the government's position that *Freeman* was wrongly decided, and buttresses the agency's determination not to follow *Freeman* outside of the Ninth Circuit. *See* Pub. L. 107-56, 115 Stat. 272, §§ 421(a), (b)(1)(B)(i) (2002) (creating a specific exception for

spouse..."

See Hootkins et al. v. Chertoff et al., CV 07-5696 CAS (MANx)(U.S. District Court, Central District of California, January 6, 2009)(unpublished) at 16.

"surviving spouses" of those who died in the 9/11 terrorist attacks in the United States); Pub. L. 108-36, 117 Stat. 1693, Div. A, Title XVII, § 1703(a)-(e) (2003) (creating a specific exception for spouses of those who were active-duty military and died as a result of injury or disease incurred in or aggravated by combat). Section 421 of Pub. L. 107-56 is particularly telling on this point. For family-sponsored and immediate relative cases, Congress intended § 421 to benefit an alien relative whose relative's visa petition "was revoked or terminated (or otherwise rendered null)" by the petitioner's death. Pub. L. 107-576, § 421(b)(1)(B)(i), 115 Stat. at 356. There would be no need for the enactment of § 421 if, as the *Freeman* panel found, the petitioner's death does not render the visa petition null.

In addition, the final affidavit of support rule, 71 Fed. Reg. 35732 (June 21, 2006), also supports the Government's interpretation. The Government received several comments on the prior interim rule, dealing with the validity of a visa petition once the petitioner has died. 71 Fed. Reg. at 35735. In response to the comments, the Attorney General and the Secretary of Homeland Security specifically endorsed the Board's holding in *Matter of Varela* that the visa petitioner's death requires denial of the Form I-130. *Id.* The Government has also crafted a special humanitarian exception for those with previously-approved I-130 petitions for cases with special humanitarian circumstances, by providing for the conversion of a spousal I-130 petition into a widow's I-360 petition, if the requirements of the second sentence in § 1151(b)(2)(A)(i) are met when the citizen spouse dies. 8 C.F.R. §§ 204.2(b)(1)(i)-(iv) (2006); 8 C.F.R. § 205.1(a)(3)(i)(C)(2).

Hence, the law as it exists outside of the Ninth Circuit is that an alien married less than two years at the time of his or her United States citizen's spouse's death automatically loses

"immediate relative" status if the I-130 petition has not been approved or adjustment of status has not been granted. Accordingly, the Court should dismiss Petitioners' claims for failure to state a claim upon which relief may be granted. For the foregoing reasons, USCIS correctly interpreted the term 'immediate relatives' under INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), and appropriately denied the Form I-130's and Form I-485s submitted by Mr. Kells and the Petitioners on the basis of his death. Gov. Ex. A-F, N-P; Moyer Decl. ¶ 7.

2. *Freeman* Does Not Apply To The Present Case.

In support of their argument that Respondents adjudicate their immediate relative petitions and adjustment applications on the basis that Petitioners remain in family-sponsored preference status, Petitioners cite *Freeman*. See *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006). *Freeman*, however, does not apply here. First and foremost, *Freeman* is not binding on this Court. In the immigration context, determinations by the BIA are binding on the government and apply nation-wide. See 8 C.F.R. § 1003.1(g). If, however, a court of appeals comes to a position contrary to the BIA in a precedent decision, the government follows that position only within the jurisdiction of that particular Court of Appeals. *Matter of Anselmo*, 20 I.&N. Dec. 25 (BIA 1989), available at 1989 WL 331861. Therefore, since the present case does not arise in the Ninth Circuit, the holding in *Freeman* does not apply.

Furthermore, since no other court of appeals has issued a published decision following the Ninth Circuit's *Freeman* analysis, the applicable BIA determination is the law this Court must apply to Petitioners' claims. The BIA has held that the death of the petitioner compels denial of a Form I-130. In *Matter of Varela*, 13 I. & N. Dec. 453 (BIA 1970), available at 1970 WL 18713, the BIA, concluding that it had jurisdiction of the appeal, held that the petitioner's

death required denial of the Form I-130 because the alien for whom immediate relative classification was being sought was no longer the spouse of a citizen. 13 I. & N. Dec. at 454. In *Matter of Sano*, 19 I. & N. Dec. 299, 300-01 (BIA 1985), available at 1985 WL 56053, the BIA concluded that it had erred in *Varela* by asserting jurisdiction to review a denial of a Form I-130 petition. But in *Sano*, the BIA did not question *Varela*'s conclusion that an alien is no longer a "spouse," and is therefore not an "immediate relative" once the petitioning citizen spouse had died. Rather, the BIA held that the beneficiary's lack of standing would have been the more proper basis for the decision in *Varela*. *Sano*, 19 I. & N. Dec. at 300-01. Therefore, under the governing BIA precedents, because Robert Kells died, Petitioners simply no longer remain in immediate relative status. Gov. Ex. I, M; Moyer Decl. ¶ 6. The Secretary of Homeland Security and the Attorney General have endorsed the conclusion from *Varela* that "[t]here is no authority to approve a visa petition after the petitioner dies." 71 Fed. Reg. 35732, 35,735 (June 21, 2006).

3. Petitioners Fail to State a Claim With Respect to Revocation and Humanitarian Reinstatement.

Additionally, Petitioners ask this Court for declaratory relief stating that Respondents "improperly attempt to revoke the approval of an I-130 petition unless plaintiffs present a request under 8 C.F.R. § 205.1(a)(3)(C)(2) for humanitarian reinstatement, supported by a Form I-864 executed by an individual who qualifies under section 213A(f)(5)(B) of the [INA] as a qualifying substitute sponsor." Complaint at 14-15. For those individuals whose spouses die after an I-130 relative petition has been approved, revocation of that petition is automatic. 8 C.F.R. § 205.1(a)(3)(i)(C) (2006). USCIS may reinstate the approval of I-130 petition, as a matter of discretion, when the beneficiary of the petition requests reinstatement for humanitarian reasons and another relative (as described in 8 U.S.C. § 1183a(f)(5)(B)) is willing and able to file an

affidavit of support as a substitute sponsor.

Petitioners fail to state a claim in making this argument because Petitioners are not eligible for, have not applied for, and were not denied humanitarian relief under the statute. Humanitarian reinstatement is applicable when an I-130 has been granted and subsequently revoked. 8 C.F.R. § 205.1(a)(3)(i)(C)(3). Because the I-130s filed on behalf of Petitioners were denied and not subsequently granted and revoked, humanitarian reinstatement is not available to Petitioners and declaratory relief is not an appropriate remedy. Gov. Ex. A-C; Moyer Decl. ¶ 7.

Petitioners also argue that this Court should declare that Petitioners whose U.S. Citizen spouse or parent executed a Form I-864 Affidavit of Support when filing an I-130 petition, have satisfied the requirements of INA § 212(a)(4)(c)(ii); therefore they are not required to submit a Form I-864 from a qualifying sponsor under INA section 213A(f)(5)(B) when they request humanitarian reinstatement. Complaint at 14-15. Similarly, that argument lacks merit because Petitioners are not eligible for, have not applied for, and were not denied humanitarian relief under the statute. Therefore, declaratory relief is not an appropriate remedy.

III. CONCLUSION

On the basis of the foregoing, Respondents request that this Court grant the Motion to Dismiss or, in the alternative, grant summary judgment in favor of Respondents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2009, the foregoing was filed electronically with the Clerk of the Court, and mailed via United States Postal Service to the following non-participants in Electronic Case Filing:

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