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Ending the Widow Penalty: Why Are Surviving Alien Spouses of Deceased Citizens Being Deported?

Cover Page Footnote
J.D. Candidate, 2010, Fordham University School of Law. I would like to thank Professor Aaron Saiger for his guidance, Amanda Sue Nichols for her inspiration, and Brian, my parents, and my sisters, Stacy and Randi, for all of their support and encouragement.
ENDING THE WIDOW PENALTY:
WHY ARE SURVIVING ALIEN SPOUSES OF
DECEASED CITIZENS BEING DEPORTED?

Jayme A. Feldheim*

Although our nation generally permits aliens to apply to become lawful permanent residents of this country through their marriages to American citizens, U.S. Citizenship and Immigration Services (USCIS) automatically denies these applications when the citizen spouse dies within two years of the marriage. Termed the “widow penalty,” certain federal courts have rejected this policy as being both unreasonable and in opposition to the plain meaning of 8 U.S.C. § 1151, the statute which categorizes aliens as immediate relatives of U.S. citizens and thus grants them this opportunity. This conflict between the Agency and the judiciary, in turn, has caused a circuit split in the federal courts over the proper construction of the statute. This Note argues that the courts that do not award deference to the Agency’s interpretation are correct, and that USCIS should reform its policy to conform to their rulings. The statute unambiguously grants alien spouses the ability to be and to remain immediate relatives of U.S. citizens, despite the death of their citizen spouse before the couple’s two-year wedding anniversary.

INTRODUCTION

Mrs. Carla Arabella Freeman and Mrs. Osserritta Robinson were two women from opposite sides of the world with no apparent connection. Mrs. Freeman was a dual citizen of South Africa and Italy, while Mrs. Robinson was a citizen and national of Jamaica. However, both women eventually found themselves facing a potentially similar fate. Mrs. Freeman came to the United States to work as an au pair when she met Mr. Robert Freeman, a U.S. citizen, in a karaoke bar in Chicago. The two then wed in February of 2001. Mrs. Robinson came to the United States a year later in January of 2002 under a nonimmigrant visitor’s visa. She then met and wed Mr. Louis Robinson, a U.S. citizen. Each woman’s husband, hoping to adjust his wife’s status to that of a Lawful Permanent Resident (LPR), filed a Petition

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for Immediate Relative (Form I-130) attesting to the fact that his marriage was legitimate. Mr. Freeman filed his petition with U.S. Immigration and Naturalization Service (INS), while Mr. Robinson filed his with INS's successor, U.S. Citizenship and Immigration Services (USCIS). While waiting for these applications to be processed, both women were confronted with tragic circumstances: Mr. Freeman was killed in a car accident when a Pepsi truck jumped a median strip and pulverized his vehicle;¹ Mr. Robinson died in the Staten Island Ferry crash in October of 2003.² Each man's death occurred before his first wedding anniversary.

Mrs. Freeman and Mrs. Robinson then encountered the same predicament, a "bizarre quirk in immigration law known as the 'widow penalty.'"³ USCIS automatically turned down their immediate relative petitions because of their husbands' deaths. The basis of this decision was a USCIS procedure that denies a pending petition for alien relative status if the citizen spouse dies within two years of the marriage. The rationale of this policy, according to USCIS, is that an individual like Mrs. Freeman or Mrs. Robinson can no longer qualify as an immediate relative of an American citizen because her husband's death stripped her of her spousal status. Acting under the relevant immigration statute, 8 U.S.C. § 1151(b)(2)(A)(i), USCIS acknowledges that the definition of "immediate relative" in the first sentence contains the word "spouse." However, USCIS claims that the second sentence of the statute mandates that spousal status for immigration benefits can be only obtained if the alien was "the spouse of a citizen of the United States for at least [two] years at the time of the citizen's death."⁴ Hence, there is a general maxim in immigration law that "[t]he I-130 petition dies with the Petitioner."⁵ Once their immediate relative petitions were denied, Mrs. Freeman and Mrs. Robinson were ordered to leave the country or face deportation. These women were not alone in their predicament; there are currently over 180 of these cases across the country affecting women, mothers, and children.⁶

Both women filed suits against U.S. immigration services, with Mrs. Freeman's earlier case being the first federal court challenge to the widow

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⁶. Surviving Spouses Against Deportation, http://www.ssad.org/home.html (last visited Feb. 23, 2009). Males are also affected by this policy, and therefore this Note remains gender neutral. However, "[s]pouse-based immigration has been and continues to be predominately female." Janet Calvo, A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, but Not Its Demise, 24 N. ILL. U. L. REV. 153, 154 (2004).
penalty since the Immigration Act of 1990. Although their factual dilemmas were nearly identical, their legal battles resulted in contradictory outcomes. Mrs. Freeman’s case was ultimately reviewed in the U.S. Court of Appeals for the Ninth Circuit. In 2006, this court ruled against USCIS and held that an alien widow whose citizen spouse filed the necessary immediate relative petition form but died within two years of the qualifying marriage nonetheless remains a spouse for immigration functions. However, Mrs. Robinson’s case came before the U.S. Court of Appeals for the Third Circuit in Robinson v. Napolitano, and in 2009 that court decided in favor of USCIS, holding that, because Mrs. Robinson’s citizen spouse died before the couple was married for two years, she could not qualify as an “immediate relative” under the statute. As the very recent ruling in Robinson demonstrates, this dispute is not only alive but highly contentious; any clear trend of the courts to rule against the agency was eradicated in that decision.

Thus, two women in the same position before they encountered the American legal system ended up in very different situations, solely due to which court was ultimately reviewing their case. In essence, one woman had the ability to become an LPR and therefore stay in this country, while the other was faced with deportation. These two circuits are not the only courts to weigh in on this issue; the Freeman v. Gonzales decision was the first in a line of cases constituting a circuit split as to the correct definition of “spouse” for the purpose of an immediate relative petition. U.S. citizens may petition for an unlimited number of immediate relatives each year, and this fact “makes this important status highly appealing and thus frequently controverted. This status has an important consequence to the interests of both immigrants and the government.”

The subject of this Note is a single statutory section of the Immigration and Nationality Act (INA): the current conflict of authority with respect to the definition of “spouse” and “immediate relative” status under 8 U.S.C. § 1151(b)(2)(A)(i). As stated above, USCIS claims that this statute permits

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7. Surviving Spouses Against Deportation, Litigation to End the Widow Penalty, http://www.ssad.org/litigation.html (last visited Feb. 23, 2009); see infra notes 81–84. The earliest challenge took place in 1968 in Pierno v. INS, 397 F.2d 949 (2d Cir. 1968).
8. Freeman v. Gonzales, 444 F.3d 1031, 1043 (9th Cir. 2006).
10. Id. at *22.
11. 444 F.3d 1031.
12. See infra note 16.
it to deny a Form I-130 petition filed on behalf of an alien spouse if the citizen spouse dies before the petition is adjudicated and within two years of the couple’s marriage. The basic notion underlying this position is that once a citizen spouse is deceased, the alien’s spousal status is dissolved. The Robinson court and other federal district courts have accepted USCIS’s construction of the statute. However, the Freeman court as well as other federal district courts have squarely rejected this interpretation and held instead that § 1151(b)(2)(A)(i) requires USCIS to treat an alien spouse as an “immediate relative” for purposes of adjudicating a Form I-130 petition, even if their citizen spouse has died within two years of the marriage.15 Thus, beyond a clear clash between the interpretations of a government agency and the judiciary, this issue has also precipitated a circuit split. Beyond Freeman and Robinson, four other district courts have ruled on this issue, aligning themselves with either the Ninth Circuit or with USCIS and the Third Circuit.16 As of the date of publication of this Note, there are approximately twelve more cases currently pending.17 U.S. district courts in the First and Sixth Circuits have expressly adopted the Ninth Circuit’s interpretation.18 Additionally, the Ninth Circuit has followed the reasoning of Freeman to rule analogously in the context of divorce.19 However, beyond Robinson, two district courts in the Second and Sixth Circuits have followed the opposite approach urged by USCIS.20 In essence, there are two conflicting ways to interpret the statute: “[e]ither the time of filing controls or the time of the citizens death controls.”21

15. Freeman, 444 F.3d at 1034.
18. See Lockhart, 2008 U.S. Dist. LEXIS 889, at *30 (“As the well-reasoned opinion[] of the Ninth Circuit (Freeman) . . . conclude[d], the plain language of the statute simply does not impose a two year requirement on ‘immediate relative’ status for a surviving alien-spouse.”); Taing, 526 F. Supp. 2d at 187 (“This Court agrees with the Ninth Circuit’s interpretation of [§ 1151(b)(2)(A)(i)]. Mrs. Taing remains an immediate relative and ought therefore to have her Applications adjudicated as such.”).
19. See Choin v. Mukasey, 537 F.3d 1116, 1121 (9th Cir. 2008) (“As in Freeman, we here similarly find nothing . . . suggesting that an application that was valid when submitted should be automatically invalid when the petitioner’s marriage ends by divorce two years later.”).
20. See Turek, 450 F. Supp. 2d at 740 (finding persuasive that “the BIA had previously determined that the beneficiary of a spousal immediate relative petition would be ineligible for that status if the petitioning spouse dies before the statutory two-year time period”); Burger, 1999 U.S. Dist. LEXIS 4854, at *19 (finding that the death of the citizen spouse after three months of marriage meant that the alien wife and daughter were not eligible for classification as immediate relatives under the statutory provision).
In Part I, this Note explains several facets of the immigration process relating to Form I-130 immediate relative petitions as well as the source of USCIS's position in this controversy. Part I continues to explore the basic scope of judicial review of agency interpretations of statutes such as USCIS's construction of § 1151(b)(2)(A)(i), particularly administrative deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Part II examines the current conflict surrounding the relevant statute through the lens of the various steps of *Chevron* deference. Lastly, Part III concludes that the Ninth Circuit correctly applied the appropriate definition of “spouse” for purposes of a Form I-130 petition. This part argues that USICS should reform its policy to comport with the holding of the Ninth Circuit in *Freeman*. Doing so would clarify this statute and mandate that people in Mrs. Freeman’s and Mrs. Robinson’s positions would no longer have to face the consequences of the widow penalty.

I. THE WIDOW PENALTY IN PRACTICE

Part I introduces the process by which alien spouses of U.S. citizens can acquire LPR status under the INA; specifically it discusses the I-130 Petition for Alien Relative. This part also explores the statute at issue—8 U.S.C. § 1151—considering both its language and structure. Then, Part I explains the theory underlying judicial review of agency statutory interpretations, mainly discussing the notion of *Chevron* deference. Lastly, this part examines the three main events that contributed to this judicial-agency clash: (1) the agency decision that established USCIS’s policy; (2) the *Freeman* judgment at length as well as the other court decisions in the circuit split including *Robinson*; and (3) the subsequent memorandum by USCIS clarifying its current position.

A. The Immigration and Nationality Act and U.S. Citizenship and Immigration Services

For those persons who are not born in the United States, Congress has plenary power to determine who can be admitted into this country and who may be expelled. Congress has the ability to give aliens rights through various statutes, and therefore a court’s power is limited to interpretation of that specific statute. In 1952, Congress enacted the McCarran-Walter Act, otherwise known as the INA. The Act consolidated all previous
immigration laws into one comprehensive statute.\textsuperscript{26} The INA has been amended many times, but continues to be the basic body of immigration law today.\textsuperscript{27} Since the INA was enacted, Congress has delegated broad authority and discretion to "myriad government agencies" to enforce the various immigration statutes.\textsuperscript{28}

The INS administered immigration law under the U.S. Department of Justice beginning in 1940.\textsuperscript{29} However, in 2003, Congress moved certain service and benefit functions of the INS into the newly created U.S. Department of Homeland Security (DHS).\textsuperscript{30} Under the new legislation, the INS was abolished and transformed into USCIS on March 1, 2003.\textsuperscript{31} The duties of USCIS mainly consist of the "administration of immigration and naturalization adjudication functions and establishing immigration services policies and priorities."\textsuperscript{32} One specific responsibility of USCIS—and the focus of this Note—is to "adjudicate" or process Immigrant Visa Petitions such as the Form I-130, Petition for Alien Relative.\textsuperscript{33}

1. Petitions, Paperwork, and Processing: How Alien Spouses Become American Citizens

a. Establishing the Relationship: Form I-130, Petition for Alien Relative

Under the INA, an alien\textsuperscript{34} who is married to a U.S. citizen\textsuperscript{35} may acquire permanent residency (LPR status) as a result of his or her classification as an immediate relative of their citizen spouse.\textsuperscript{36} The Form I-130 petition is a

\textsuperscript{26} DAVID WEISSBRODT \& LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE: IN A NUTSHELL 15 (5th ed. 2005).

\textsuperscript{27} Immigration and Nationality Act, http://www.uscis.gov/portal/site/uscis (follow "Laws and Regulations" hyperlink; then follow "Immigration and Nationality Act" hyperlink) (last visited Feb. 23, 2009).

\textsuperscript{28} BOSWELL, supra note 23, at 1.

\textsuperscript{29} THOMAS ALEXANDER ALENIKOFF ET AL., IMMIGRATION: PROCESS AND POLICY 101 n.2 (3d ed. 1995).


\textsuperscript{31} FRAGOMEN \& BELL, supra note 13, § 1:4, at 20. U.S. Citizenship and Immigration Services (USCIS) is one component of the U.S. Department of Homeland Security (DHS) along with U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement. Id. § 1:2, at 4. This Note uses "USCIS" as the designation for both the INS prior to March 1, 2003, and the current USCIS within DHS.


\textsuperscript{33} Id.

\textsuperscript{34} Aliens" are defined as any persons not citizens or nationals of the United States. 8 U.S.C. § 1101(a)(3) (2006).

\textsuperscript{35} The term "citizen" is not defined within the INA. FRAGOMEN \& BELL, supra note 13, § 1:3, at 26.

\textsuperscript{36} See Lockhart v. Chertoff, No. 1:07CV823, 2008 U.S. Dist. LEXIS 889, at *2 (N.D. Ohio Jan. 7, 2008) ("'Immediate relative' status is a prerequisite to eligibility for adjustment of status under 8 U.S.C. § 1255(a) .''). In fact, "[o]ne of the principal objectives of the [INA] is family reunification. The high priority assigned to this objective is readily apparent in the preference given to the family members of U.S. citizens and permanent residents in immigrating to the United States." FRAGOMEN \& BELL, supra note 13, § 3:1, at 2.
necessary part of this process.\textsuperscript{37} Citizens or LPRs may submit this particular form on behalf of the immediate relative as a way to establish the necessary qualifying family relationship to an alien relative who desires to immigrate to the United States.\textsuperscript{38} "Evidence of the relationship is usually required and, in some cases, evidence of the petitioner's status as a citizen or resident is also required."\textsuperscript{39}

If the U.S. citizen dies without having filed the necessary Form I-130 petition on behalf of his or her alien spouse, the widowed alien spouse may self-petition for classification as an "immediate relative" by filing a Form I-360 (Petition for Amerasian, Widow(er), or Special Immigrant).\textsuperscript{40} However, there are four qualifications an alien widow or widower must meet in order to self-petition.\textsuperscript{41} One crucial condition is that "[h]e or she had been married for at least two years to a United States citizen," at the time of the citizen's death.\textsuperscript{42} Another essential aspect of the immigration process worth noting is that a filed spousal Form I-130 is automatically converted to a widow(er)'s Form I-360 if, on the date of the petitioner's death, the couple was married for at least two years and the beneficiary is otherwise eligible.\textsuperscript{43} This automatic conversion applies, regardless of whether the citizen spouse dies before or after approval of the Form I-130.\textsuperscript{44}

Once the Form I-130 petition is prepared, the papers are mailed to a USCIS service center with jurisdiction over the place of residence of the petitioner.\textsuperscript{45} It is the responsibility of USCIS to investigate the merits and determine eligibility to approve the petition.\textsuperscript{46} In the course of the investigation, USCIS may conduct a field examination, interview the

\begin{footnotes}
\item[38.] Petition for Alien Relative, http://www.uscis.gov/portal/site/uscis/ (follow "Immigration Forms"; then follow hyperlink "Petition for Alien Relative") (last visited Feb. 23, 2009).
\item[40.] See 8 U.S.C. § 1154(a)(1)(A)(i) (mentioning that "[a]n alien spouse described in the second sentence of section 1151(b)(2)(A)(i) ... also may file a petition).
\item[41.] \textsc{Fragomen \& Bell}, supra note 13, § 3:3.1, at 43.
\item[42.] 8 C.F.R. § 204.2(b)(1).
\item[43.] Id. §§ 204.2(j)(1)(iv), 205.1(e)(3)(i)(C)(1).
\item[44.] Id. Thus, the specific conflict discussed by this Note does not involve cases where the marriage lasted for more than two years prior to the petitioner's death. Rather, the relevant dispute implicates marriages in which the citizen spouse died prior to their two-year wedding anniversary but filed the necessary paperwork.
\item[45.] 8 C.F.R. § 316.3. Although the statute says the petition is filed with the "Attorney General," 8 U.S.C. § 1154(a)(1)(A)(i), the Homeland Security Act of 2002, Pub. L. No. 107-296 § 451(b), 116 Stat. 2135, 2196, transferred this authority to USCIS.
\item[46.] \textsc{Fragomen \& Bell}, supra note 13, § 3:1.2, at 8.
\end{footnotes}
b. Becoming a Permanent Resident: I-485 Application to Register Permanent Residence or Adjust Status

Once an I-130 petition is approved under the family-sponsored visa allocation system, then the next step on the road to citizenship is completed and aliens may apply for an immigration visa (if the alien is abroad) or seek an adjustment of status to that of an LPR (if the alien is present in the United States). In order to accomplish the latter, the alien can file an I-485 Application to Register Permanent Residence or Adjust Status. Sometimes, an alien spouse will file the Form I-485 application at the same time their citizen spouse files the Form I-130 petition in order to expedite the process. However, this may only be done if the sponsored alien is physically present in the United States and an immigrant visa is "immediately available." If an immigrant visa is not "immediately available," then USCIS cannot adjudicate the Form I-485 application, and the petition must be filed separately. However, physical presence in the United States is really the determining factor. For immediate relatives of American citizens, visas always are deemed to be "immediately available" because there are no numerical caps on their admission as immigrants.

If the adjustment of status application is approved, then the alien will be admitted to permanent residence temporarily until he or she is processed for an alien registration receipt card (a "green card"). Approval of the I-485 application is dependent upon the approval of the I-130 visa petition; the denial of the petition makes the beneficiary ineligible for an adjustment of status. Section 1155 of the U.S. Code contemplates that USCIS may revoke approval of an I-130 visa petition at any time for "good and sufficient cause." Further regulations beyond this statute provide that a

47. Id. § 3:3, at 36–37.
48. Id. § 3:1, at 2. There is, however, an overall cap for family-sponsored immigrants at 480,000. Id. § 3:1, at 6.
50. See id. § 1255(a).
53. FRAGOMEN & BELL, supra note 13, § 3:1.2, at 9.
54. Freeman, 444 F.3d at 1033; FRAGOMEN & BELL, supra note 13, § 3:1.2, at 9.
55. FRAGOMEN & BELL, supra note 13, § 2:10.2, at 127.
56. Id. § 3:1.2, at 9.
57. Id. § 3:3, at 27 ("USCIS must first adjudicate the alien's eligibility for immigration under the family-sponsored visa allocation system before the alien may actually apply for . . . adjustment of status to permanent resident.").
petitioner’s death automatically revokes approval of an I-130 visa petition.59 The current regulations also permit the U.S. Secretary of State to leave a predeath approval undisturbed (or alternatively, to reinstate approval).60 However, this discretionary provision does not provide authority for approving a Form I-130 petition if the visa petitioner dies while the Form I-130 is pending.61

B. The Road to Federal Court

If an I-130 petition is denied, the petitioner may file an appeal to the Board of Immigration Appeals (BIA),62 “the highest administrative body for interpreting and applying immigration laws.”63 The Board then can render a final administrative decision on the matter.64 However, the BIA does not have the jurisdiction to rule on an I-130 petition if it is brought by a beneficiary and not by the petitioner.65 There is also no administrative appeal if a petitioner’s Application to Adjust Status, Form I-485, is denied.66 An alien who files to adjust his status through an I-485 application may renew the adjustment of status application in removal (deportation) proceedings67 before the Executive Office for Immigration Review (EOIR). However, initiation of these proceedings is at the sole discretion of DHS, and one cannot apply for their initiation.68

In 1952, the INA “had no specific provision for federal court review.”69 Until fairly recently, there were myriad means for judicial oversight. One such method was a habeas corpus action in a federal district court followed by further review in a federal appellate court.70 There were also other alternative federal remedies such as mandamus, declaratory relief, or injunctive relief.71 However, in 1996 and 2005, Congress enacted three separate statutes that “significantly impacted” the arena of judicial review of immigration laws.72 Together, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),73 the Illegal Immigration Reform and

60. Id.
61. Dodig v. INS, 9 F.3d 1418, 1420 (9th Cir. 1993).
62. 8 C.F.R. § 1003.1(b)(5).
64. 8 C.F.R. § 1003.1(d)(2)(H)(ii).
67. For a detailed discussion of removal (deportation) proceedings, see 8 C.F.R. § 240.
68. See Cortez-Felipe v. INS, 245 F.3d 1054, 1057 (9th Cir. 2001) (“The Attorney General has discretion regarding when and whether to initiate deportation proceedings.”).
69. BOSWELL, supra note 23, at 163.
70. Id.; see, e.g., Heikkila v. Barber, 345 U.S. 229 (1953); Chin Yow v. United States, 208 U.S. 8 (1908).
71. BOSWELL, supra note 23, at 163.
72. Id.
Immigrant Responsibility Act of 1996 (IIRIRA),\textsuperscript{74} and the REAL ID Act of 2005,\textsuperscript{75} have severely limited judicial review. Currently, only three legal remedies remain: "(1) direct petitions for review to the appellate courts of all final orders of removal; (2) habeas corpus in district court where the matter being challenged involves constitutional claims or questions of law; and (3) certain mandamus and declaratory actions brought in an appropriate federal district court."\textsuperscript{76} The line of cases this Note analyzes fall within the latter two appeals processes.


The issue addressed by this Note surrounds the intersection of Form I-130 petitions and 8 U.S.C. § 1151(b)(2)(A)(i), the statute under which a U.S. citizen or LPR can petition immigration authorities to adjust the status of an alien who is their immediate relative. The specific contention involves the definition of immediate relative in the statute and what, if any, requirements a spouse must meet in order to be classified as such. This Note focuses on a specific set of circumstances—when an I-130 petition has been filed properly, but was not adjudicated prior to the petitioner’s death. Can the surviving wife or husband still be considered a spouse under the statute?

An immediate relative is defined by 8 U.S.C. § 1151(b)(2)(A)(i) as follows:

Immediate relatives.—For purposes of this subsection, the term "immediate relatives" means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age. In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen’s death 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 1154(a)(1)(A)(ii) of this title within 2 years after such date and only until the date the spouse remarries.\textsuperscript{77}

Spouse, in turn, is defined in title 1, § 7 of the U.S. Code: "the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife."\textsuperscript{78} It is then further discussed at § 1101(a)(35) of the Code, as follows: "The term ‘spouse’, ‘wife’, or ‘husband’ do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated."\textsuperscript{79}

\textsuperscript{76} Boswell, supra note 23, at 165.
\textsuperscript{79} 8 U.S.C. § 1101(a)(35).
Notably, the latter explanation "has not changed since its original enactment in 1952 and is a negative definition which does not preclude common understandings of the term." The two-year durational requirement in § 1151 was added in the 1990 amendments to the INA, considered the most comprehensive reform of immigration laws in sixty-six years. One main purpose of the amendments was to establish "procedures to deter fraud by aliens seeking permanent resident status in the United States," and specifically to address the widespread concern regarding aliens' use of sham marriages to acquire "green cards" for permanent residence.

Subsection (b) of § 1151 goes on to "define[] several categories of aliens, including 'immediate relatives,' who are not subject to the numerical limitations in the INA." This section was "enacted as part of the Immigration Reform Act of 1965 and is intended to ensure that relatives of U.S. citizens and legal aliens are allowed to enter and remain in the United States."

D. The Scope of Judicial Review of Agency Action

"More than at any time in recent years, a threshold question—the scope of judicial review—has become one of the most vexing in regulatory cases." The extent of judicial review for USCIS's definition of "spouse" in § 1151(b)(2)(a)(i) for immediate relative purposes is the central focus of this Note's analysis. If the Agency's interpretation is entitled to deference, that would legally end the matter. Although legislative action would remain a possibility, complete deference to the Agency's interpretation would preclude any further action in the federal courts. Thus, it is imperative to discuss the general legal theory underlying judicial review of agency action.

80. Petitioner's Brief in Opposition to Motion to Dismiss and in Support of Cross-Motion for Summary Judgment at 6, Robinson v. Chertoff, 2007 U.S. Dist. LEXIS 34956 (D.N.J. May 14, 2007) (No. 06-5702) [hereinafter Robinson, Plaintiff's Brief in Opposition to MTD].
84. Harden, supra note 1.
88. The Agency interpretation of 8 U.S.C. § 1151(b)(2)(A)(i) was set forth in In re Varela, 13 I. & N. Dec. 453 (BIA 1970). The Board of Immigration Appeals held in that case that an alien spouse was no longer a "spouse" under the statute because her citizen husband died prior to the adjudication of her adjustment of status application. Id. at 454. See infra notes 128–30 and accompanying text.
1. The Administrative Procedure Act

The Administrative Procedure Act (APA)\(^89\) describes the standards a court must apply when reviewing agency findings. The Act recognizes different standards depending on whether a court is reviewing questions of law or questions of fact.\(^90\) In the line of cases at issue there are no disputable questions of fact. Rather, the statutory issue the court must resolve is purely a matter of law.\(^91\) In *North American Industries, Inc. v. Feldman*,\(^92\) the U.S. Court of Appeals for the First Circuit explained the role of the federal courts in the specific context of reviewing immigrant petitions. The court acknowledged that a decision to grant or deny an immigrant petition was within the discretion of the INS, and therefore a federal court could only overturn such a decision if the INS abused its discretion (such as by basing its decision on an improper understanding of the law).\(^93\) The court went on to state,

> While it is true that an appellate court must give great deference to the construction accorded a statute by the agency charged with its administration, deference to an agency's interpretation of the law does not equate with blind faith. A court is obliged to accept the administrative construction of a statute only so far as it is reasonable, and consistent with the intent of Congress in adopting the statute. Thus, if the agency's interpretation of the statute is found to be inconsistent with the statutory language, legislative history, or purpose of the statute, it must be invalidated. Moreover, an administrative decision based on erroneous legal standards cannot stand.\(^94\)

Under the APA, the final word on statutory interpretation resides in the courts, which may substitute their judgment on questions of law for that of

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90. See *Local 144, Hotel, Hosp. Nursing Home & Allied Servs. Union v. NLRB*, 9 F.3d 218, 221 (2d Cir. 1993) ("[C]ourts have the final say in matters of statutory interpretation... and an administrative agency, like the National Labor Relations Board, is bound to follow the law of the Circuit." (citing *Ithaca Coll. v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980))). *But see* *Hyatt Corp. v. NLRB*, 939 F.2d 361, 367 (6th Cir. 1991) (observing that "'[the court's] scope of review over administrative decisions is limited and we are entitled to have the benefits of the Board's expertise in this area before we are called upon to rule on important questions of law and policy'" (quoting *Flav-o-Rich, Inc. v. NLRB*, 531 F.2d 358, 362 (6th Cir. 1976))).
92. 722 F.2d 893 (1st Cir. 1983).
93. *Id.* at 898.
94. *Id.* at 899–99 (citations omitted).
the agency when it is determined under the relevant standard of review that
the agency’s interpretation must be reversed.\textsuperscript{95}

2. \textit{Chevron} Deferece: Steps Zero Through Two

The leading case on the scope of judicial review of agency statutory
construction is the seminal U.S. Supreme Court decision in \textit{Chevron U.S.A.,
Inc. v. Natural Research Defense Council, Inc.} There, the Court prescribed
two inquiries that a reviewing court should conduct when reviewing an
agency’s construction of a statute that it is responsible for administering.\textsuperscript{96}
First, a court must consider whether “Congress has directly spoken to the
precise question at issue.”\textsuperscript{97} If the intent of Congress is clear, then the court
need not inquire any further, “for the court, as well as the agency, must give
effect to the unambiguously expressed intent of Congress.”\textsuperscript{98} This “Step
One” inquiry “ensures that agencies will lose if Congress has clearly
forbidden them from acting as they have chosen.”\textsuperscript{99} However, if Congress
“has not directly addressed the precise question at issue,”\textsuperscript{100} and therefore
the statute is silent or ambiguous, then the court must move onto the second
step. The crucial determination then becomes whether “the agency’s
answer is based on a permissible construction of the statute” in light of the
underlying law.\textsuperscript{101} “Step Two operates as a safeguard against insufficiently
justified interpretations.”\textsuperscript{102} This two-pronged standard is commonly
referred to as “\textit{Chevron} deference.” Since the statutory interpretation
advanced by the government in the issue at hand is that adopted by its
agency, USCIS, this Note considers whether that interpretation is entitled to
\textit{Chevron} deference.

Cases have applied \textit{Chevron} in a variety of ways over the years, and thus
the role it takes in each case is often unpredictable.\textsuperscript{103} “\textit{Chevron}
deference . . . is not accorded merely because the statute is ambiguous and
an administrative official is involved.”\textsuperscript{104} Ambiguity itself is usually a
matter of degree.\textsuperscript{105} However, there is “a more or less orderly
framework”\textsuperscript{106} that makes one thing fairly clear: courts will not defer to an

\textsuperscript{95} See 5 U.S.C. § 706 (2006) (“To the extent necessary to decision and when presented,
the reviewing court shall decide all relevant questions of law, interpret constitutional and
statutory provisions, and determine the meaning or applicability of the terms of an agency
action.”).
\textsuperscript{96} 467 U.S. 837 (1984).
\textsuperscript{97} Id. at 842.
\textsuperscript{98} Id. at 842–43.
\textsuperscript{99} Sunstein, supra note 87, at 228.
\textsuperscript{100} \textit{Chevron}, 467 U.S. at 843.
\textsuperscript{101} Id.
\textsuperscript{102} Sunstein, supra note 87, at 228.
\textsuperscript{103} ERNEST GELLHORN & RONALD M. LEVIN, \textit{ADMINISTRATIVE LAW AND PROCESS: IN A
NUTSHELL} 83, 90 (5th ed. 2006).
\textsuperscript{104} Freeman v. Gonzales, 444 F.3d 1031, 1038 (9th Cir. 2006) (quoting Gonzales v.
Oregon, 546 U.S. 243, 258 (2006)).
\textsuperscript{105} GELLHORN & LEVIN, supra note 103, at 84.
\textsuperscript{106} Id. at 90.
agency’s interpretation of a statute “if Congress’ intent can be clearly ascertained through analysis of the language, purpose and structure of the statute.”

Over time, judicial attention and academic debate has not focused solely on Chevron’s two-step inquiry, but additionally on what Professors Thomas W. Merrill and Kristin E. Hickman have termed “Chevron Step Zero.” This initial step is the threshold question: does Chevron apply at all? Through a number of cases, the Supreme Court has carved out certain exceptions where Chevron does not provide the governing framework and thus courts will not use the two-pronged test to review agency interpretations of law. First, under some circumstances, the responsibility to interpret the statute does not lie with the agency because the statute does not grant it such power. This lack of agency discretionary authority makes Chevron deference inapplicable. Another exception regarding the applicability of the Chevron standard of review concerns the “format” or type of pronouncement in which the interpretation has been articulated. Opinion letters and other “interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference.” For example, statements found in tariff ruling letters, issued without formal processes and carrying no precedential weight, will lack the force of law. Statements made in opinion letters and their analogues have, at maximum, the “power to persuade.” However, formal adjudications or final rules after notice-and-comment would normally qualify for Chevron deference; the grant of such authority usually is considered a grant to act with the force of law.

The Court has not provided a clear explanation of what it means by “force of law,” but has made clear that it is only a sufficient, not necessary condition for Chevron applicability. In Barnhart v. Walton, the Court

107. Freeman, 444 F.3d at 1038 (quoting Natural Res. Def. Council, Inc. v. Nat’l Marine Fisheries Serv., 421 F.3d 872, 877 (9th Cir. 2005)).
109. GELLHORN & LEVIN, supra note 103, at 90.
110. Id. at 90–91; see, e.g., Skidmore v. Swift & Co., 323 U.S. 134, 137 (1944) (“Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts.”).
111. GELLHORN & LEVIN, supra note 103, at 91–93.
114. Id. at 228 (quoting Skidmore, 323 U.S. at 140).
115. See id. at 230.
116. The Court in United States v. Mead Corp. recommended that Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. apply “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” Id. at 226–27.
117. See Sunstein, supra note 87, at 218.
upheld a Social Security Administration interpretation not based upon notice-and-comment rulemaking, but on an agency manual, informal ruling, and a letter.\textsuperscript{119} Thus, it made clear that \textit{Chevron} could still be utilized as the governing framework even when the agency was not acting with the force of law.\textsuperscript{120} The Court mentioned a number of factors, such as the interstitial nature of the legal question, the related expertise of the agency, and the consideration the agency has given the question over a period of time, that bear on whether \textit{Chevron} provides "the appropriate legal lens."\textsuperscript{121} According to Professor Cass R. Sunstein, the "real question is Congress's (implied) instructions \textit{in the particular statutory scheme}."\textsuperscript{122} The Supreme Court has expressed its desire for flexibility as to whether something can qualify for \textit{Chevron} deference.\textsuperscript{123} Likely, whether \textit{Chevron} deference is applicable to an agency determination will depend on the circumstances of an individual case.\textsuperscript{124} Ultimately, "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."\textsuperscript{125}

E. The Basis of USCIS's Interpretation of 8 U.S.C. § 1151

The interpretation adopted by USCIS of what requirements a spouse must meet to attain "immediate relative" status under 8 U.S.C. § 1151 was established in the BIA decision of \textit{In re Varela}.\textsuperscript{126} Beyond \textit{Varela}, the BIA has not otherwise addressed the statutory question at issue.\textsuperscript{127} Whether the decision in \textit{Varela} is entitled to \textit{Chevron} deference is at the heart of the debate explored by this Note.

1. \textit{In re Varela}

\textit{Varela} was a 1970 BIA decision regarding whether an alien remained the spouse of a U.S. citizen who had died of a heart attack while on active duty in the U.S. Armed Forces a few months after their wedding.\textsuperscript{128} The BIA ruled that the District Director properly denied the petition because "at the time of his decision the beneficiary was not the spouse of a United States

\begin{itemize}
\item \textsuperscript{118} 535 U.S. 212 (2002).
\item \textsuperscript{119} Id.
\item \textsuperscript{120} Id. at 221–22.
\item \textsuperscript{121} Sunstein, supra note 87, at 217 (quoting \textit{Barnhart}, 535 U.S. at 222).
\item \textsuperscript{122} Id. at 218.
\item \textsuperscript{123} See \textit{Barnhart}, 535 U.S. at 217 ("Courts grant an agency's interpretation of its own regulations considerable legal leeway."); United States v. Mead Corp., 533 U.S. 218, 227, 228 (2001) (holding that delegated authority from Congress "may be shown in a variety of ways" and that "[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances").
\item \textsuperscript{124} GELLHORN & LEVIN, supra note 103, at 93.
\item \textsuperscript{126} 13 I. & N. Dec. 453 (BIA 1970).
\item \textsuperscript{127} \textit{Freeman} v. \textit{Gonzales}, 444 F.3d 1031, 1038 (9th Cir. 2006).
\item \textsuperscript{128} \textit{In re Varela}, 13 I. & N. Dec. at 453.
\end{itemize}
citizen. His death had stripped her of that status."\(^{129}\) Although the majority was aware of the "sympathetic features" of the case, it nonetheless ordered that the appeal be dismissed.\(^{130}\)

One board member, Thomas J. Griffin, wrote a separate opinion regarding the BIA's own jurisdiction in issuing the ruling. In a foreshadowing of *In re Sano*,\(^{131}\) Griffin wrote, "It is my position that the appellant herein has no legal standing to prosecute an appeal to this Board. Accordingly, any consideration of the merits of the appeal is totally unwarranted."\(^{132}\)

2. *In re Sano*

Fifteen years later, the BIA modified *Varela* in *In re Sano*.\(^ {133}\) In the latter case, the BIA found that the review in *Varela* was improper because the BIA had no appellate jurisdiction to decide the case.\(^ {134}\) The Board stated that its appellate jurisdiction was defined by 8 C.F.R. § 3.1(b),\(^ {135}\) and that if the regulations did not affirmatively grant it the power to act in a particular manner, than it had no appellate jurisdiction.\(^ {136}\) Specifically, it noted that 8 C.F.R. § 204.1(a)(3) spoke only of "the petitioner's right to appeal to the Board."\(^ {137}\) Therefore, the BIA concluded that it "lack[ed] jurisdiction to address an appeal by the beneficiary from the denial of a visa petition."\(^ {138}\) It went on to directly characterize its decision in *Varela* as "inappropriate" and stated that, to the extent its decision conflicted with its conclusion, it was "hereby modified."\(^ {139}\)

As a result of this decision, none of the cases discussed in this Note—including *Freeman* and *Robinson*—were brought before the Board of Immigration Appeals. Unlike the alien wife in *Varela*, who had the opportunity to appeal the District Director's decision administratively,\(^ {140}\) the beneficiaries after *Sano* were forced to resort to strictly judicial means of recovery. Thus, although two of the rejected beneficiaries initially filed

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129. *Id.* at 454.
130. *Id.* at 455.
132. *In re Varela*, 13 I. & N. Dec. at 455 (separate opinion by Board Member Thomas J. Griffin).
133. 19 I. & N. Dec. at 301.
134. *Id.; see supra* note 65 and accompanying text.
135. 8 C.F.R. § 3.1(b) (1985) (stating that "[a]ppeals shall lie to the Board of Immigration Appeals from . . . [d]ecisions on petitions filed in accordance with section 204 of the act . . . as provided in Parts 204 and 205, respectively, of this chapter").
137. *Id.* at 300. 8 C.F.R. 204.1(a)(3) states in its entirety that, "[t]he petitioner will be notified of the decision, and, if the petition is denied, of the reasons for the denial, and of the petitioner's right to appeal to the Board within 15 days after mailing the notification of the decision."
139. *Id.* at 300-01.
motions to INS/USCIS directly to reconsider its decision, all of the beneficiaries ultimately filed suit in a federal district court.

F. Controversy in the Courts: Facts of the Cases in the Circuit Split

Within the context of the courtroom, the rejected beneficiaries and the government have confronted each other regarding the correct interpretation of "spouse" in 8 U.S.C. § 1151(b)(2)(A)(i). The conflict between USCIS and the judiciary has been demonstrated in six cases thus far, with no clear consensus in the verdicts. The first of these cases was Freeman v. Gonzales, discussed at length in this Note's introduction. The facts of the case, as well as its holding and rationale, are summarized in this section. This section also discusses the basic facts of the other cases in this controversy, including Robinson v. Napolitano, as well as what makes two of them distinct.

Mrs. Freeman, a dual citizen of South Africa and Italy, married Mr. Freeman, a U.S. citizen, in February 2001. In September of that year, Mr. Freeman filed a Form I-130 petition on his wife's behalf in order to establish her current spousal status. While the application was pending, Mr. Freeman was killed in a car accident. This incident occurred within a year after their marriage began. In September of 2004, the District Director of USCIS ruled that Mrs. Freeman could no longer qualify for an adjustment of status because she was a widow and therefore technically no longer a spouse for purposes of the INA. She was ordered to leave the United States.

Mrs. Freeman petitioned for and was denied a writ of habeas corpus in the federal district court, so she appealed to the Ninth Circuit. The Ninth Circuit recognized that the BIA decision, relied upon by the district court below, ruled in the opposite manner as that urged by the petitioner. However, in applying the Chevron standard of deference to an agency interpretation, the Ninth Circuit concluded that neither prong of the Chevron test was satisfied because (1) the intent of Congress was clear.

142. See, e.g., Freeman v. Gonzales, 444 F.3d 1031, 1033 (9th Cir. 2006).
143. See supra notes 1, 3-8 and accompanying text.
144. See infra notes 154-71 and accompanying text.
145. Freeman, 444 F.3d at 1032.
146. Id. at 1033. On that same day, Mrs. Carla Freeman filed an Application to Register Permanent Resident or Adjust Status (Form I-485), which initiated the formal process to adjust her status to a Lawful Permanent Resident (LPR). See id.
147. Id.
148. Id.
149. Id.
150. Id.
based on the plain language of the statute, and (2) "the BIA's interpretation, to the extent it [was] entitled to some deference, [was] not a permissible construction of the statute." The court then reviewed the language, structure, purpose, and application of the statute and concluded "that Congress clearly intended an alien widow whose citizen spouse has filed the necessary forms to be and to remain an immediate relative (spouse) for purposes of § 1151(b)(2)(A)(i), even if the citizen spouse dies with two years of the marriage."

Beyond Freeman, the five subsequent cases forming this circuit split all follow a similar fact pattern, and therefore it is unnecessary to discuss the specifics of each. The cases all involve suits by Form I-130 beneficiaries claiming that their petitions and dependent I-485 applications were unlawfully denied. In each case, an alien wed a U.S. citizen and subsequently the citizen spouse filed the Form I-130 petition and the alien spouse filed an I-485 application. Both were done so that the alien

152. Freeman, 444 F.3d at 1038.
153. Id. at 1039.
156. In March of 2003, Mr. Robinson filed an I-130 petition, and Mrs. Robinson filed an I-485 application, so that her status could be adjusted to that of a permanent resident. Robinson, 2009 U.S. App. LEXIS 1946, at *2. On February 1, 2004, Mr. Lockhart filed a Form I-130 petition with USCIS to attest to the fact that Mrs. Lockhart was his spouse and therefore would qualify as an "immediate relative." On that same day, Mrs. Lockhart filed her Form I-485 Application to Adjust Status. Lockhart, 2008 U.S. Dist. LEXIS 889, at *2. In December of 2004, Mr. Taing filed an I-130 immigrant visa petition on behalf of his wife, and Mrs. Taing filed the I-485 adjustment of status application. Taing, 526 F. Supp. 2d at 179. Mrs. Taing also filed a request for work authorization, which was immediately granted. Id. On September 4, 1996, Mr. Burger filed an I-130 Petition on behalf of his wife and step-daughter. On the same date, Mrs. Burger and her daughter filed the I-485 adjustment of status petitions. Burger, 1999 U.S. Dist. LEXIS 4854, at *3. The Turek v. Department of Homeland Security opinion makes no mentioning of when any petition or applications were filed.
spouse’s status could be adjusted to that of an LPR. However, before the applications were approved and before the couples celebrated their two-year wedding anniversary, the citizen spouses were killed in a variety of circumstances: Mr. Robinson was killed in a Staten Island Ferry accident, Mr. Techumsen Chip Taing died suddenly of a stroke, Mr. Gerald Lockhart suffered a fatal heart attack, and Mr. Stephen Burger passed away from far advanced metastatic lung cancer. The cause of Mrs. Diane Turek’s death is unclear from the court’s opinion.

In every case, as per USCIS policy, the Form 1-130 petition was denied (and as a result, the alien spouse’s dependent 1-485 application was also denied). USCIS consistently based its decision solely upon the death of the citizen spouse, claiming that the alien was no longer a spouse of a U.S. citizen and therefore no longer entitled to “immediate relative” status under 8 U.S.C. § 1151(b)(2)(A)(i).

There are only two important factual distinctions between these cases that are worth noting. The first feature involves Turek v. Department of Homeland Security, one of two post-Freeman decisions to rule in favor of USCIS. In Turek, the alien (Jerzy Turek) was arrested and placed in removal proceedings while he was married to his first wife; he received a divorce shortly thereafter. Approximately one month later, Jerzy married a U.S. citizen, Diane Turek. The court in this case noted that the timing of the marriage, because it was entered into while in removal proceedings, raised a presumption that the marriage was not entered into in good faith.

157. The opinion in Lockhart v. Chertoff also mentions that approximately one year after the petition and application were filed, USCIS interviewed Mr. and Mrs. Lockhart and requested additional evidence from Mrs. Lockhart. 2008 U.S. Dist. LEXIS 889, at *3–4.
158. Semple, supra note 2.
162. See supra note 57 and accompanying text.
163. See, e.g., Burger, 1999 U.S. Dist. LEXIS 4854, at *5 (discussing INS’s denial letter, which stated, “you can no longer be classified as the spouse of a United States citizen as the relationship the petition seeks to establish no longer exists”).
165. Id. at 739; see supra note 155.
166. Turek, 450 F. Supp. 2d at 739; see supra note 155.

Plaintiff’s marriage was presumptively fraudulent because he entered into the marriage in question after he was placed in removal proceedings. Indeed, Plaintiff had divorced his wife, Jadwiga Turek, the mother of his two minor children, Lukasz and Mateusz, after he had been placed in removal proceedings.

... [T]he court finds that the timing of Plaintiff's marriage to Diane Turek raises a presumption that the marriage was not done in good faith. Federal law makes clear that an immediate relative petition cannot be granted if the marriage in question was entered into while the alien was in removal proceedings unless the alien can establish with clear and convincing evidence that the marriage was entered into in good faith.
The second relevant distinction involves \textit{Burger v. McElroy},\cite{Burger_McElroy} another decision that supports the Agency's position. \textit{Burger} is an unpublished, lower court opinion that predates \textit{Freeman}.
\cite{Freeman} Furthermore, it does not address, or even analyze, § 1151(b)(1)(A)(i).\cite{1151b1a1151b1a} It relies on the BIA decision in \textit{Varela}, but does not mention the jurisdictional issue raised by \textit{Sano}.\cite{Sano}

The rejected beneficiaries have pointed to these factual distinctions as a way to minimize any relevance of the two decisions. However, USCIS has consistently relied upon these precedents to support their position.

\textbf{G. USCIS's Policy Reconfirmed After Freeman}

After the ruling in \textit{Freeman}, Mike Aytes, the Associate Director of Domestic Operations for USCIS, issued an interoffice memorandum to "Field Leadership." The memorandum's subject was the "Effect of Form I-130 Petitioner's Death on Authority to Approve the Form I-130," and a portion was dedicated to making revisions to the "Adjudicators Field Manual (AFM) Chapter 21.2."\cite{Aytes_Memorandum} The stated purpose was to reaffirm USCIS's policy and the traditional view—that if a Form I-130 visa petitioner dies before USCIS acts on the petition, then USCIS must deny the form—for cases brought in states other than Alaska, Arizona, California, Idaho, Guam, Hawaii, Northern Marianas, Nevada, Montana, Oregon, and Washington (the Ninth Circuit).\textsuperscript{173} The memorandum acknowledged that USCIS was legally obligated to follow a "supervening precedent decision of a court of appeals," and therefore USCIS adjudicators would have to treat the \textit{Freeman} precedent as controlling for cases within the Ninth Circuit.\textsuperscript{174} However, the memorandum strongly reminded USCIS adjudicators that they should not follow \textit{Freeman} in cases arising outside of the Ninth Circuit.\textsuperscript{175} Aytes also wrote a harsh criticism of the \textit{Freeman}
decision, believing it to be "wrongly decided." According to Aytes, "A person who had been married is no longer, legally, a 'spouse' once the other spouse has died. Moreover... the Ninth Circuit failed to give the deference to the Board's interpretation of the statute that, under decisions of the Supreme Court, a court is legally bound to give." 

The practical effect of this memorandum is that it will probably be followed everywhere outside of the Ninth Circuit, regardless of the decisions in *Lockhart v. Chertoff* and *Taing v. Chertoff*. The memorandum explicitly stated that USCIS is legally obligated to follow precedent of the BIA "in the absence of a supervening precedent decision of a court of appeals." Thus, because *Lockhart* and *Taing* are district court decisions, not court of appeals decisions, the district adjudicators will likely ignore their rulings in cases outside of the Ninth Circuit. In the Third Circuit especially, because of the recent court of appeals ruling in *Robinson*, USCIS's policy will most certainly be followed. Additionally, it is possible that the policy reconfirmed in the memorandum could be followed inside of the Ninth Circuit as well as long as the facts of a case are distinguishable from *Freeman*. Aytes specifically wrote a caveat in his memorandum that within the Ninth Circuit, USCIS adjudicators should follow *Freeman* only "in cases involving the same essential facts."

II. SEEING THE WIDOW PENALTY CONTROVERSY THROUGH THE LENS OF CHEVRON

The essence of the conflict analyzed in this Note is a clash between an administrative agency and the judiciary, and the subsequent circuit split in the federal courts. The Agency, USCIS, has consistently urged for one interpretation of a statute over which it is responsible for administering; however, certain federal courts have disregarded this interpretation and made an independent determination as to the correct definition of a term in the relevant statute. Ever since the disagreement between the Ninth Circuit in *Freeman* and USCIS's responding memorandum, the battle has continued as the courts outside of the Ninth Circuit have been in conflict.

176. *Id.*
181. Charles H. Kuck & Ana C. Aleman, *Ana C. Aleman & Charles H. Kuck on Taing v. Chertoff*, 526 F. Supp. 2d 177 (D. Mass. 2007), 2008 EMERGING ISSUES 2855, at *3 (LEXIS), Aug. 4, 2008; see Aytes Memorandum, *supra* note 172, at 6 ("USCIS will not... consider the district court judgment to be a binding precedent for any subsequent case, since the Board has held that district court judgments do not have binding effect for other cases." (citing In re K–S–, 20 I. & N. Dec. 715 (BIA 1993))).
over the appropriate definition of "immediate relative" and "spouse" under 8 U.S.C. § 1151, and what deference is owed, if any, to USCIS's interpretation. Most notably, two district courts in the First and Sixth Circuits have directly followed the holding in Freeman as well as its reasoning. However, there are two significant district court cases, which the government has consistently relied upon, to support the interpretation of USCIS in regard to this debate. Additionally, the Third Circuit has recently handed down a decision recognizing the validity of the Agency's statutory construction. The court cases discussed in this part have illuminated the debate between the Agency and the judiciary. On one side, the rejected beneficiaries have urged the courts to follow the Freeman precedent and rule against the Agency’s interpretation. On the other side, the Agency (and more broadly, the government itself) has insisted that the courts demonstrate deference to USCIS's interpretation of the statute. Part II of this Note thoroughly analyzes both perspectives and also discusses the results reached by the various district and appellate courts.

Specifically, this section analyzes the various arguments on both sides of the debate concerning three main issues: (1) whether USCIS's interpretation established in the BIA decision In re Varela qualifies for Chevron deference (Chevron Step Zero); (2) if Chevron deference is applicable, whether Congress has clearly spoken to the precise question at issue (Chevron Step One); and (3) if the statute is ambiguous, whether the Agency’s understanding is based upon a reasonable and permissible construction of the statute (Chevron Step Two). Most of the relevant court opinions do not satisfactorily address all of the petitioners’ and the government’s arguments. Thus, in order to fully discuss and analyze all relevant considerations, this Note makes substantial references to the briefs submitted by opposing sides in a majority of the cases.

A. Step Zero: Does Chevron Deference Apply?

As discussed in Part I, the appropriate standard of review by a federal court when reviewing administrative agency actions can vary depending on several circumstances. If it is found by a federal court that Chevron deference is not applicable, then it is proper for the court to substitute its own judgment on questions of law for that of the agency. However,

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186. See supra notes 103, 109 and accompanying text.
187. Ayala-Chavez v. INS, 945 F.2d 288, 294 (9th Cir. 1991) ("Questions of law that can be answered with 'traditional tools of statutory construction' are within the special expertise of courts, not agencies, and are therefore answered by the court de novo." (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1989))).
before a court even reaches the two-pronged test of *Chevron*, it is necessary to answer the threshold question of whether *Chevron* applies at all, a step that has been titled "*Chevron Step Zero."

Determining whether *Chevron* provides the appropriate governing framework requires an analysis of the BIA decision embodying USCIS’s policy, *Varela*.

1. The Step Zero Debate

Throughout the relevant cases, the government has consistently maintained that *Chevron* deference is applicable to USCIS’s determination of what constitutes an “immediate relative” under 8 U.S.C. § 1151(b)(2)(A)(i) for purposes of an I-130 petition. Specifically, the government has argued that *Chevron* is appropriate based upon *Varela*, the precedential administrative decision that embodies its position. The Supreme Court has determined that *Chevron* deference is generally applicable to BIA interpretations of the statutes it administers. To bolster the merit of *Varela*, the government has also pointed to a regulation promulgated in 2006 by the Secretary of Homeland Security and Attorney General and published after notice-and-comment that reconfirms the holding in that case.

The rejected beneficiaries, on the other hand, have argued that the Agency’s interpretation is grounded on an “extra-jurisdictional and discredited agency opinion,” citing the decision in *Sano*. Their argument hinges on the continuing vitality of *Varela*; that because the decision of the BIA was nonprecedential, it is not entitled to full *Chevron* deference. The plaintiffs have emphasized that, at most, *Varela* is an informal agency interpretation of a statute, and thus under *United States v. Mead Corp.* it

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188. *See supra* notes 108–23 and accompanying text.
190. See INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999) (explaining that the BIA should be accorded *Chevron* deference when it gives meaning to “ambiguous statutory terms” through its authority in case-by-case adjudication).
192. *Appellee’s Final Brief at 21, Lockhart v. Chertoff, No. 08-3321 (6th Cir. Aug. 5, 2008) [hereinafter Lockhart, Plaintiff’s Final Brief]; see also Opposition to Respondents’ Motion to Dismiss at 9–10, Taing v. Chertoff, 526 F. Supp. 2d 177 (D. Mass. 2007) (No. 07-10499) [hereinafter Taing, Plaintiff’s Opposition to MTD] (“[T]he notion [argued by the government] ... flows not from the ‘good and sufficient cause’ language of the statute, but from a discredited decision of the Board of Immigration Appeals. ... *Varela*, however, is not good law.”); Robinson, Plaintiff’s Brief in Opposition to MTD, *supra* note 80, at 16–17 (“*Varela*, however, is not good law. ... [R]eview in that case was ‘inappropriate.’”) (citing *In re Sano*, 191 I. & N. Dec. 299, 300 (BIA 1985)).
193. Lockhart, Plaintiff’s Final Brief, *supra* note 192, at 22; Brief for the Plaintiff-Petitioner-Appellee at 20, *Taing*, 526 F. Supp. 2d 177 (No. 08-1179) [hereinafter Taing, Plaintiff’s Brief] (citing Lagandaon v. Ashcroft, 383 F.3d 983, 987 (9th Cir. 2004); Hernandez v. Ashcroft, 345 F.3d 824, 839 (9th Cir. 2003)).
would not be entitled to *Chevron* deference.\(^\text{194}\) Lastly, even assuming *arguendo* that *Varela* is a legitimate and authoritative decision, the plaintiffs have maintained that the opinion "fails to provide a 'full-blown reasoned interpretation' of the statute" and therefore is not entitled to deference.\(^\text{195}\)

The government has responded to these arguments by insisting that the consequence of the *Sano* decision is not as extreme as the plaintiffs asserted.\(^\text{196}\) According to the government, the BIA's ruling in *Sano* modified *Varela* only to the extent that the beneficiary's lack of standing would have been a more proper basis for the decision.\(^\text{197}\) However, *Sano* did not abandon the holding in *Varela* that an alien was no longer a "spouse," and therefore no longer an "immediate relative," once the petitioning U.S. citizen spouse dies.\(^\text{198}\) In fact, according to the government, *Sano* establishes that a Form I-130 case "cannot go forward after the petitioner dies."\(^\text{199}\)

The government has bolstered this contention by arguing that the position taken in *Varela* was ratified by regulation in 2006, when DHS issued a final rule titled "Affidavits of Support on Behalf of Immigrants."\(^\text{200}\) The stated purpose of this final rule—effective on July 21, 2006, after notice-and-comment—was to adopt an interim rule that had been published by the former INS on October 20, 1997, and to clarify some of the issues raised under it.\(^\text{201}\) The specific portion of the immigration procedure being regulated is the affidavit of support process; this includes "who needs an affidavit of support, how sponsors qualify, what information and

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194. Lockhart, Plaintiff's Final Brief, *supra* note 192, at 22; Taing, Plaintiff's Brief, *supra* note 193, at 20–21 (citing United States v. Mead Corp., 533 U.S. 218 (2001); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Padash v. INS, 358 F.3d 1161, 1168 n.6 (9th Cir. 2004)).


197. Respondents' Reply Brief in Further Support of Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and in Opposition to Petitioner's Motion for Summary Judgment at 5, Robinson v. Chertoff, 2007 U.S. Dist. LEXIS 34956 (D. D.C. May 14, 2007) (No. 06-5702) [hereinafter Robinson, Government's Reply Brief in Further Support of MTD] (noting that the assertion of *Sano* being about the Board's jurisdiction to act on a case, and not the beneficiary's standing, is a meaningless distinction).

198. Lockhart, Government's Final Reply Brief, *supra* note 196, at 12 (citing *In re Sano*, 19 I. & N. Dec. 299, 300–01 (1985)); Opening Brief for Respondents-Defendants-Appellants at 24–25, Taing v. Chertoff, No. 08-1179 (1st Cir. May 9, 2008) [hereinafter Taing, Government's Opening Brief]; see also Robinson, Government's Reply Brief in Further Support of MTD, *supra* note 197, at 6 n.3 ("*Sano* merely found that the Board's decision to review the *Varela* case was inappropriate, not that the ultimate conclusion was erroneous.").


201. *Id.*
documentation they must present, and when the income of other persons may be used to support an intending immigrant's application for permanent residence." The government has expressly pointed to portion G, titled "The Effect of the Visa Petitioner's Death," which states, "There is no authority to approve a visa petition after the petitioner dies. If the petitioner dies before approval of the visa petition, there is no basis for approving the visa petition." The specific class of future I-130 applications discussed in this Note is not under the authority of these regulations. Rather, this rule amended 8 C.F.R. § 205.1, and thus had an effect on the regulation governing the revocation of approved petitions or self-petitions under 8 U.S.C. § 1154. Nonetheless, the articulation of the Agency's interpretation followed by formal regulation, according to the government, merits Chevron deference.

Furthermore, the government has responded to the plaintiffs' assertion that Chevron deference is inappropriate because Varela did not provide sufficient analysis. It has stated that there was no "actual lack of analysis" in Varela "because the plain meaning of the statute plainly required the result."

2. The Step Zero Conflict: Where the Courts Stand

Most of the relevant court decisions do not go into an analysis of whether the Agency decision in Varela even qualifies for Chevron deference. If such analysis is mentioned, it is muddled with the analysis under the two prongs of Chevron. However, a consistent disagreement regarding this issue nevertheless exists. The cases that have followed Freeman have all found that Varela warrants weak, if any, Chevron deference. On the other hand, the three cases supporting USCIS's construction of the statute—Burger, Turek, and Robinson—have found the applicability of Chevron deference to the decision in Varela warranted.

In Freeman, the court conducted an initial inquiry as to whether, and to what extent, Chevron deference was owed. The court was "mindful" that its answer for which reading of the statute was correct "implicate[d] an agency's construction of a statute which it administers." If this was not the case, then there would be a clear exception to Chevron applicability as

202. Id.
203. Id. at 35,735.
204. Lockhart, Government's Final Reply Brief, supra note 196, at 13 (citing Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005)).
205. Id. at 13 n.5.
206. See, e.g., Freeman v. Gonzales, 444 F.3d 1031, 1038 (9th Cir. 2006) (finding that the defendants were not entitled to deference under Chevron, but only because their construction of the statute was impermissible, not because Varela did not qualify under Chevron).
207. See infra note 215.
208. See infra notes 216–21 and accompanying text.
209. Freeman, 444 F.3d at 1038.
210. Id. (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999)) (internal quotation marks omitted).
discussed in Part I.\textsuperscript{211} However, at no point did any of the plaintiffs argue, nor did a court find, that \textit{Chevron} deference was not owed because the Agency was interpreting a statute it was not responsible for administering.\textsuperscript{212} Therefore, the court went on to consider the decision in \textit{Varela}.

Although the \textit{Freeman} opinion did not explicitly state that \textit{Chevron} deference for \textit{Varela} was absolutely inapplicable, it severely weakened any such deference. The court found that in \textit{Varela}, there was a lack of statutory analysis, and that the opinion’s weight was “further undercut by the BIA’s later finding that it was ‘extra-jurisdictional.’”\textsuperscript{213} The court expressed that it was “cautioned” against awarding significant deference to the BIA’s conclusion in \textit{Varela}.\textsuperscript{214} The courts in \textit{Taing} and \textit{Lockhart} concurred with the Ninth Circuit regarding the precedential value of \textit{Varela} without much further explanation.\textsuperscript{215}

The \textit{Burger} and \textit{Turek} courts both held that the Agency’s interpretation established in \textit{Varela} was sufficient to warrant the applicability of \textit{Chevron} deference. In \textit{Burger}, the court stated that, “[i]n light of the deference owed to the BIA’s interpretation of statutory law[,] . . . it cannot be said that this is an impermissible construction of the statute.”\textsuperscript{216} However, it is important to note that the \textit{Burger} court merely deferred to the BIA’s interpretation in \textit{Varela}, without even mentioning the Board’s subsequent decision in \textit{Sano}. The plaintiff in \textit{Robinson} called into question “whether the court was even aware of the ruling.”\textsuperscript{217}

The \textit{Turek} court similarly found “persuasive that the BIA had previously determined that the beneficiary of a spousal immediate relative petition would be ineligible for that status if the petitioning spouse dies before the statutory two-year time period.”\textsuperscript{218} However, similarly to \textit{Burger}, the court did not analyze the applicability of \textit{Chevron} deference or make any reference to the decision in \textit{Sano}.

\textsuperscript{211}. See supra note 110 and accompanying text.
\textsuperscript{212}. See, e.g., \textit{Taing v. Chertoff}, 526 F. Supp. 2d 177, 182 (D. Mass. 2007) (recognizing \textit{Chevron}’s applicability when a court reviews an agency’s construction of the statute that it administers).
\textsuperscript{213}. \textit{Freeman}, 444 F.3d at 1038 (citing \textit{In re Sano}, 19 l. & N. Dec. 299 (BIA 1985)).
\textsuperscript{214}. \textit{Id.} at 1038 n.10 (“We have also indicated that nonprecedential BIA decisions might receive less deference than those designated as precedential.” (quoting \textit{Lagandaon v. Ashcroft}, 383 F.3d 983, 987 n.2 (9th Cir. 2004) (internal quotation marks omitted))).
\textsuperscript{217}. \textit{Robinson}, Plaintiff’s Brief, supra note 169, at 24 n.2. As mentioned in Part I, supra note 169 and accompanying text, the brief also emphasized the fact that \textit{Burger} is an unpublished lower court opinion that predates \textit{Freeman} and “does not even address, much less analyze, § 1151(b)(1)(A)(i).” \textit{Robinson}, Plaintiff’s Brief, supra note 169, at 24.
The most recent court to rule in favor of USCIS, the Third Circuit in Robinson, did not even mention Chevron.\textsuperscript{219} At no point in the majority's opinion did it discuss the validity of Varela, nor did it discuss Chevron deference.\textsuperscript{220} The opinion merely mentioned the government's argument that the court should defer to BIA precedent established in Varela, but never fully addressed the issue.\textsuperscript{221}

B. Step One: If Chevron Applies, Has Congress Spoken?

Even if one takes the position that the Chevron framework applies to the policy established by Varela, it is still necessary to consider whether there should be Chevron deference through an analysis of Steps One and Two. This section discusses the arguments surrounding the first prong of Chevron: whether Congress has spoken directly to the precise question at issue. As discussed in Part I, if congressional intent is clear, then the court and agency must give effect to the unambiguously expressed intent of Congress.\textsuperscript{222} However, if Congress has not directly addressed the precise question at issue and the statute is silent or ambiguous, then the court should move on to analyze the second prong of Chevron.\textsuperscript{223}

In order to ascertain congressional intent, this Note explores three distinct yet related areas of the U.S. immigration system. Part II.B.1 concentrates on the statute itself, particularly on 8 U.S.C. §1151's language and structure. The next subsection deals with two other statutes, 8 U.S.C. §§1154 and 1155—as well as other related regulations—which involve the adjustment of status regime as a whole and thus may shed light on Congress's intentions in enacting §1151. Part II.B.3 briefly explores the USA PATRIOT Act and National Defense Authorization Act, which have also been cited by the government as relevant to congressional intent.


a. The Linguistic Debate: What the Parties Have Argued

Opposing sides throughout the relevant cases have sought to utilize the language and structure of 8 U.S.C. §1151(b)(2)(A)(i) to demonstrate that Congress has spoken to this issue. Thus, both parties have attempted to use the same statute, but have construed it differently, in order to support their posited theory. As the Freeman court stated, "'The starting point for our interpretation of a statute is always its language.'"\textsuperscript{224}

\begin{itemize}
\item \textsuperscript{220} See id.
\item \textsuperscript{221} Id. at *8.
\item \textsuperscript{222} See supra notes 97–98 and accompanying text.
\item \textsuperscript{223} See supra notes 100–01 and accompanying text.
\item \textsuperscript{224} Freeman v. Gonzales, 444 F.3d 1031, 1039 (9th Cir. 2006) (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989)).
\end{itemize}
The main thrust of the plaintiffs' statutory construction argument is that the first and second sentences of § 1151(b)(2)(A)(i) refer to two separate immigration processes, or alternatively, that the statute provides for two different classes of immediate relatives.\textsuperscript{225} The first sentence of § 1151(b)(2)(A)(i) states, "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."\textsuperscript{226} Thus, it defines "immediate relative[s]" as "children, spouses, and parents" of U.S. citizens.\textsuperscript{227} The plaintiffs claim that the definition of "immediate relative" is absolutely unequivocal, and "under a plain reading" would include the plaintiffs in these cases.\textsuperscript{228} The second sentence of § 1151(b)(2)(A)(i) states,

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 . . . 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 1154(a)(1)(A)(ii) of this title within 2 years after such date and only until the date the spouse remarries.\textsuperscript{229}

According to the plaintiffs, this sentence provides a separate and additional right under 8 U.S.C. § 1154(a)(1)(A)(ii) for alien widows to self-petition for immediate relative classification in the event that their citizen spouse dies without filing an I-130 petition.\textsuperscript{230} Thus, the second sentence does not narrow the scope of the phrase "immediate relative" in the first sentence, but rather broadens it.\textsuperscript{231} It is an independent safeguard created by Congress for widows whose spouses died without filing petitions on their behalf.\textsuperscript{232} However, the plaintiffs have urged that the second sentence is inapplicable to their cases, because congressional intent is clear that they qualify "as a 'first sentence' spouse, not a 'second sentence' spouse/self-petitioning widow."\textsuperscript{233}

The government has replied to this proposed statutory dichotomy by asserting that 8 U.S.C. § 1151(b)(2)(A)(i) requires a foreign national, who is the surviving spouse of a U.S. citizen, to have been married for two years before the U.S. citizen spouse's death in order to classify as an "immediate

\textsuperscript{225} See Robinson, Plaintiff's Brief, supra note 169, at 6.
\textsuperscript{227} Id.
\textsuperscript{228} See Lockhart, Plaintiff's Final Brief, supra note 192, at 10.
\textsuperscript{231} Taing, 526 F. Supp. 2d at 184.
\textsuperscript{232} See Robinson, Plaintiff's Brief in Opposition to MTD, supra note 80, at 20.
\textsuperscript{233} Id. at 21.
relative," regardless of whether an application is pending.\textsuperscript{234} However, the plaintiffs have defended their stance by positing that this is an incorrect interpretation of the statute that "flies in the face of logic and is in opposition to USCIS procedural interpretations and requirements."\textsuperscript{235} They have maintained that "[t]he second sentence of the statute [only] applies to those foreign national spouses whose U.S. citizen spouse dies \textit{without filing} an I-130 petition on behalf of his/[her] foreign national [spouse]."\textsuperscript{236} The plaintiffs have pointed to the fact that alien spouses who qualify under the second sentence are processed under a different procedure than those included in the first sentence.\textsuperscript{237} Thus, the second category of immediate relatives does not alter the first.\textsuperscript{238}

Moreover, the plaintiffs have urged that "[t]he princip[al] rule of statutory interpretation requires that one presumes that Congress says in the statute what it means and means in a statute what it says there."\textsuperscript{239} The plaintiffs have pointed out that there is no explicit wording in the Act that voids I-130 petitions filed by a beneficiary in the event of that individual's death.\textsuperscript{240} "It is a fundamental can[on] of statutory construction that where sections of a statute do not include a specific term used elsewhere in the statute, the drafters did not wish such a requirement to apply."\textsuperscript{241} The plaintiffs have reasoned that if "Congress intended to divest immigration officials of their authority to adjudicate I-130 petitions for a particular class of individuals . . . it would have explicitly done so."\textsuperscript{242} Furthermore, within § 1151 (b)(2)(A)(i), the only "qualifier limitation" applies to alien parents (restricting "immediate relative" status to parents of a citizen child who is at least 21 years of age).\textsuperscript{243} However, there is no analogous qualifier to be a "spouse,"\textsuperscript{244} and where a statute has a qualifier in one part, but is silent or has no qualifier in another, there is a duty to refrain from importing that

\textsuperscript{235} Lockhart, Plaintiff's Final Brief, \textit{supra} note 192, at 12; Taing, Plaintiff's Brief, \textit{supra} note 193, at 11.
\textsuperscript{236} Lockhart, Plaintiff's Final Brief, \textit{supra} note 192, at 12; Taing, Plaintiff's Brief, \textit{supra} note 193, at 11.
\textsuperscript{237} See 8 C.F.R. §§ 204.1(a)(1), 204.2(b) (2008) (self-petition I-360 process); cf. 8 C.F.R. §§ 204.1(a)(1), 204.2(a) (citizen spouse/I-130 petition process).
\textsuperscript{238} See Taing, Plaintiff's Brief, \textit{supra} note 193, at 12.
\textsuperscript{240} Robinson, Plaintiff's Brief in Opposition to MTD, \textit{supra} note 80, at 20.
\textsuperscript{241} \textit{Id. at} 24 (quoting Alaska v. Attorney Gen. of the U.S., 456 F.3d 88, 97–98 (3d Cir. 2006)).
\textsuperscript{242} \textit{Id.}
\textsuperscript{243} Lockhart, Plaintiff's Final Brief, \textit{supra} note 192, at 10; Robinson, Plaintiff's Brief, \textit{supra} note 169, at 6.
qualifying language into a part of a statute that Congress has expressly omitted.245

The government has refuted this allegation by requesting that the courts look to the words expressly included in the statute, such as "spouse" and "for purposes of this subsection," and to "give them their intended plain meaning and effect."246 It has consistently argued that the statute clearly contemplates that the death of the petitioner while the petition is pending requires the denial of an I-130 petition.247 There are several facets to the government's statutory argument.

First, the government takes issue with the plaintiffs trying to "divorce" the first and second sentences of the provision248 and relying on a "forced reading" of 8 U.S.C. § 1151(b)(2)(A)(i).249 Instead, the government has contended that, because the second sentence specifically delineates a defined group to remain immediate relatives after the death of the petitioning U.S. citizen, the implication is that outside of this group, immediate relative status (including "spouse") terminates with the citizen's death.250 Furthermore, if Congress intended a surviving spouse to be included as an immediate relative within the first sentence, it would have explicitly stated so.251

The next facet of the argument involves the use of the phrase "for purposes of this subsection" at the beginning of the relevant statute. According to the government, this phrase signifies an intent for the first and second sentences to be read together as an unfragmented whole.252 Thus, the phrase is an "explicit directive" that the words in each sentence should be understood to effect the entirety of section 1151(b), including the first sentence.253 "Congress ordinarily adheres to a hierarchical scheme in subdividing statutory sections,"254 and the government has pointed to this

245. Lockhart, Plaintiff's Final Brief, supra note 192, at 10 (citing Keene Corp. v. United States, 508 U.S. 200, 208 (1993)).
247. Id. at 5.
251. Lockhart, Government's Final Opening Brief, supra note 191, at 17.
hierarchical scheme laid down in drafting manuals generated by the legislative counsels' offices in the House of Representatives and the Senate.\textsuperscript{255} The House manual, which is practically identical to the Senate's, provides, "To the maximum extent practicable, a section should be broken into—(A) subsections (starting with (a)); (B) paragraphs (starting with (1)); (C) subparagraphs (starting with (A)); (D) clauses (starting with (i))."\textsuperscript{256} Therefore, according to the government, the language "for purposes of this subsection" applies to the whole of the statute, particularly to the first sentence of §1151(b)(2)(A)(i), and "cannot be cabined as a stand-alone sentence within that provision."\textsuperscript{257} The plaintiffs' response has been a refutation of any notion that the drafting manual helps to establish that the second sentence modifies the first sentence rather than to provide an additional and distinct right.\textsuperscript{258} According to the plaintiffs, the government can offer no explanation of how the order of sentences in a subsection or clause makes them related.\textsuperscript{259}

The government has further contended that if the plaintiffs' interpretation was correct that the two-year marriage requirement applies only to self-petitioners, then that material would be more appropriate in a different portion of the INA.\textsuperscript{260} It has been maintained that it would be "more natural" to place that requirement in 8 U.S.C. §1154(a)(1)(A)(ii), the statutory section that creates the procedure for self-petitioning.\textsuperscript{261}

Thus, the government's argument can be summarized as such: the second sentence is the rule that determines whether an alien can qualify as an "immediate relative" after the death of his/her spouse.\textsuperscript{262} If he or she was married for less than two years when the citizen dies, it is clear that the plaintiff does not qualify.\textsuperscript{263}

However, the plaintiffs have deemed the government's assertions "baseless"\textsuperscript{264} and urged the courts to reject the government's attempt to read the second sentence of the statute as "implicitly importing a two-year requirement into the definition of spouse."\textsuperscript{265} According to the plaintiffs, either the citizen's spouse files the petition, or if he/she dies without doing so, the alien may self-petition as long as the marriage lasted at least two years.\textsuperscript{266}

\textsuperscript{255} Id.
\textsuperscript{256} Id. (quoting House Legislative Counsel, HLC Doc. No. 104-1, at 24 (1995)).
\textsuperscript{257} Taing, Government's Memorandum of Law, supra note 254, at 7.
\textsuperscript{258} Taing, Plaintiff's Opposition to MTD, supra note 192, at 16–17.
\textsuperscript{259} Id. at 16.
\textsuperscript{260} Robinson, Government's Reply Brief, supra note 249, at 4; Lockhart, Government's Final Reply Brief, supra note 196, at 5.
\textsuperscript{261} Robinson, Government's Reply Brief, supra note 249, at 4.
\textsuperscript{262} Taing, Government's Opening Brief, supra note 198, at 16; Lockhart, Government's Final Opening Brief, supra note 191, at 18.
\textsuperscript{263} Taing, Government's Opening Brief, supra note 198, at 16; Lockhart, Government's Final Opening Brief, supra note 191, at 19.
\textsuperscript{264} Robinson, Plaintiff's Brief in Opposition to MTD, supra note 80, at 7.
\textsuperscript{265} Id. at 20 (quoting Freeman v. Gonzales, 444 F.3d 1031, 1040 (9th Cir. 2006)).
\textsuperscript{266} Id. at 7.
b. The Linguistic Debate: Where the Courts Stand

In response to the statutory language and structure arguments made by the plaintiffs and the government, the courts have come out on two different sides, consistent with the larger circuit split. The *Freeman* court found "that Congress clearly intended an alien widow whose citizen spouse has filed the necessary forms *to be* and *to remain* an immediate relative (spouse) for purposes of § 1151(b)(2)(A)(i), even if the citizen spouse dies within two years of the marriage." Thus, the court ruled that the more logical and statutorily substantiated interpretation is that the two-year durational language in the second sentence of the statute merely grants a separate right for an alien widow to self-petition. The court wrote that the first sentence is "straightforward and succinct," and that the word spouse, unlike alien "parents," does not contain a qualifier requiring a two-year marriage requirement. Instead, "immediate relative" means a spouse of a citizen of the United States, without exception. Relevant to this conclusion was the "'grammatical structure of [the] statute'" that suggested "that the second sentence 'stands independent' of the first and does not qualify the general definition of spouse." The court recognized that this interpretation "harmonizes and is consistent with the language and structure of the statute" urged by the plaintiffs. Additionally, the court refused to recognize any "'talismanic significance' of a "two-year anniversary" in the immigration context.

The two cases adhering to the conclusion in *Freeman*, *Taing*, and *Lockhart*, similarly found that congressional intent was clear based upon the language of the statute. In *Taing*, the court looked at the structure of the statute, and agreed with both the plaintiff and the court in *Freeman* that the second sentence's two-year limitation applies only when a "citizen spouse dies before initiating an adjustment of status proceedings on behalf of his

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267. *Freeman*, 444 F.3d at 1039.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.* at 1041.
273. *Id.* at 1042. The court also discussed the framework laid out by 8 C.F.R. §§ 204.1 and 204.2 and found that it supported this conclusion. *Id.* at 1041–42. Specifically, the court stated that the distinction between the rights of a citizen spouse to petition compared to the rights of an alien widow to self-petition within the regulations "is consistent with a congressional intent to create two different processes, such that one or the other applies—either the citizen spouse petitions or, if he dies without doing so, the alien widow may do so." *Id.* at 1042.
274. *Id.* at 1041 n.13.
alien spouse." In the most recent decision to rule against the government, the Lockhart court based its decision on the "well-reasoned opinions of the Ninth Circuit (Freeman), Massachusetts District Court (Taing) and New Jersey District Court (Robinson)," in holding that "an alien-spouse whose citizen-spouse dies after properly filing a Form I-130 petition on behalf of an alien-spouse is entitled to 'immediate relative' status under 8 U.S.C. § 1151(b)(2)(A)(i)." The court simply pointed to the other decisions in support of its finding without ample discussion of the statutory language.

On the other hand, the three cases to rule in favor of the government have found congressional intent clearly inapposite. The earlier opinions of Burger and Turek do not include substantial statutory analysis but merely conclusory statements. For example, according to the court's opinion in Turek, the statute unambiguously states that "'immediate relative' status is reserved for an alien who is the spouse of a citizen of the United States 'for at least 2 years at the time of the citizen's death.'" That is the entirety of the court's analysis on this point.

However, the Robinson court devoted a substantial part of its opinion to the structure of the statute, and delved into a detailed analysis of the linguistic debate. The Third Circuit found the underlying statutory construction to be uncomplicated, for the language and interpretation was "straightforward." It decided that the first sentence of the statute could not be divorced from the second, and therefore the second sentence qualified the definition of spouse "by including as an immediate relative the widow or widower of a citizen spouse who died as long as s/he had been the spouse of the United States citizen for at least two years at the time of the citizen spouse's death." The court did not view the statute as laying out two distinct tracks with only one requiring a two-year marriage requirement. Rather, the court found the durational condition applied regardless of whether the citizen spouse filed the petition prior to his/her death. Thus, it concluded that "the second sentence qualifies which spouses of deceased citizens are immediate relatives."

275. Taing v. Chertoff, 526 F. Supp. 2d 177, 186 (D. Mass. 2007) (quoting Freeman, 444 F.3d at 1042). In Taing v. Chertoff, the court also found further support for its interpretation in the second paragraph of 8 U.S.C. § 1154, allowing an alien spouse described in the second sentence of § 1151(b)(2)(A)(i) to petition. Id. According to the court, this section clearly displays Congress's intention to provide a separate, additional right to alien spouses to self-petition if their citizen spouse died without initiating the immigrant proceeding. Id.


279. Id. at *16.

280. Id. at *15.

281. Id. at *16.

282. Id. at *17.
2. Adjustment of Status Regime: Other Related Immigration Statutes and Regulations

Another method for ascertaining congressional intent is to look not just to the words contained in the statute, but rather to also look at the broader statutory scheme governing immigrant petitions and adjustment of status applications. Through an investigation of the latter, light may be shed on whether Congress has spoken to the precise question at issue in 8 U.S.C. § 1151, and thus assists in a determination of *Chevron* Step One. It is especially important to explore other provisions of the INA, because “[i]n understanding and applying a regulatory scheme, [the court] should interpret statutes to be coherent and internally consistent.” 283 Within this section, this Note discusses two statutory provisions that deal specifically with the matter in controversy—8 U.S.C. § 1154 and 8 U.S.C. § 1155—as well as several other INA implementing regulations.

a. 8 U.S.C. § 1154: Present Tense and Investigation

A further contention between the parties, explicitly established in their case briefs, involves 8 U.S.C. § 1154—the section concerning the procedure for granting immigrant status. According to part (b) of the statute, as discussed in Part I, the Attorney General (now the Secretary of Homeland Security) must conduct an investigation in every Form I-130 immigrant visa petition case. 284 USCIS may not approve a Form I-130 petition on behalf of a claimed immediate relative unless it finds, as a result of this investigation, “that the facts stated in the petition are true and that the alien on behalf of whom the petition is made is an immediate relative.” 285 The government has steadfastly relied on the present tense in the statute to argue that Congress authorized the approval of a visa petition only if, at the time of the investigation, the facts are true and the alien is an immediate relative. 286 Therefore, the government maintains that the facts stated in the late spouses’ petitions are not true and that the plaintiffs are not immediate relatives. 287 Rather, if this was not Congress’s intention, then


284. 8 U.S.C. § 1154(b) (2006) (requiring the Attorney General to investigate the facts of each case, and directing that “if he determines that the facts stated in the petition are true,” he “shall” approve the immediate relative petition); see supra notes 46-47 and accompanying text.


287. Robinson, Government’s Reply Brief, supra note 249, at 5 (“[T]he use of the present tense in the context of the investigation of the visa petition is meaningful.”); Robinson, Government’s Brief in Support of MTD, supra note 285, at 5; see United States v. Wilson,
the government contends Congress could have "easily... written this statutory section to mandate approval if the facts were true at the time the application was filed and/or if the alien was an immediate relative at the time the application was filed."\textsuperscript{288} The argument concludes that USCIS had no authority to approve the I-130 petition after the petitioner's death and accordingly acted pursuant to law in terminating action on it.\textsuperscript{289} 8 U.S.C. § 1154(b) "supports the interpretation that Congress did not provide for a 'once an immediate relative, always an immediate relative' approach."\textsuperscript{290} The government's assertion is further buttressed by the impossibility of an investigation following the death of a petitioner. A Form I-130 petition may not be approved based upon a marriage that was entered into solely to obtain an immigration benefit.\textsuperscript{291} The petitioner's death could preclude the government from conducting a complete investigation of this issue, because it is obviously impossible to interview the petitioner under oath regarding his or her marriage to the beneficiary.\textsuperscript{292} Therefore, the government has argued that its construction of the statute "is consistent with Congress'[s] concern with identifying and discouraging marriage fraud."\textsuperscript{293}

The response to the present tense argument made by the government is that it is "absurd" and "yields results unintended by Congress."\textsuperscript{294} The plaintiffs have argued that the government's stance fails to recognize the distinction between an alien's eligibility for immediate relative classification, which "vests at the time of filing,"\textsuperscript{295} and one's admissibility as an immigrant, which is determined at the time of adjudication.\textsuperscript{296} According to the plaintiffs, it is clear from various statutory provisions and regulations, in addition to relevant cases, that Congress intended a beneficiary's eligibility for immediate relative classification to be determined at the time of filing.\textsuperscript{297} In contrast, under 8 U.S.C. § 1182, an

\textsuperscript{288} Robinson, Government's Reply Brief, \textit{supra} note 249, at 6; Lockhart, Government's Final Reply Brief, \textit{supra} note 196, at 8.

\textsuperscript{289} Robinson, Government's Brief in Support of MTD, \textit{supra} note 285, at 11.

\textsuperscript{290} Lockhart, Government's Final Reply Brief, \textit{supra} note 196, at 7.

\textsuperscript{291} \textit{See} Lutwak v. United States, 344 U.S. 604, 611–12 (1953); \textit{In re} Laureano, 19 I. & N. Dec. 1 (BIA 1983); \textit{see also} \textit{supra} note 39 and accompanying text.

\textsuperscript{292} Robinson, Government's Brief in Support of MTD, \textit{supra} note 285, at 7.

\textsuperscript{293} Robinson, Plaintiff's Brief, \textit{supra} note 169, at 32.

\textsuperscript{294} Lockhart, Plaintiff's Final Brief, \textit{supra} note 192, at 15.

\textsuperscript{295} Taing, Plaintiff's Opposition to MTD, \textit{supra} note 192, at 2; Robinson, Plaintiff's Brief in Opposition to MTD, \textit{supra} note 80, at 6.

\textsuperscript{296} Robinson, Plaintiff's Brief, \textit{supra} note 169, at 16–17; \textit{see also} Robinson v. Napolitano, No. 07-2977, 2009 U.S. App. LEXIS 1946, at *10 (3d Cir. Feb. 2, 2009) ("Robinson argues that... her status as an immediate relative... 'vested' at the time her husband filed the I-130 petition.").

\textsuperscript{297} Robinson, Plaintiff's Brief, \textit{supra} note 169, at 18 (citing 8 U.S.C. §§ 1154(a)(1)(A)(i), 1255(a) (2006); 8 C.F.R. §§ 103.2(b)(12), 204.1(a)(1), 204.2(a)(1), 245.1(a), 245.1(g)(1), 245.2(a)(2)(I)(B) (2008)); \textit{see also} \textit{In re} Katigbak, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971) (finding that Congress intended eligibility for employment-based immigrant classification to be established at the time of filing a visa petition). It is
applicant's admissibility as an immigrant for adjustment of status is determined at the time of adjudication. The plaintiffs have argued that the government's analysis disregards this crucial distinction.

To further prove their position, the plaintiffs have pointed to specific clauses within various other statutes and regulations. For example, §1255(a)(3) requires only that an immigrant visa be available to the applicant at the time the application is filed. The same language appears in the regulations concerning adjustment of status, i.e. "unless an immigrant visa is immediately available to him or her at the time the application is filed." Additionally, similar provisions mentioning the time of filing appear in the regulations governing the processing of immigrant petitions. The plaintiffs have argued that all these statutes and regulations support the position that they remain eligible for adjustment of status because an immigrant visa was immediately available and their eligibility was established at the time their citizen spouse filed the Form I-130 petition, regardless of subsequent events. Conversely, the plaintiffs have argued that these regulations provide no foundation for presuming that their spousal status somehow dissolved after filing.

However, the government has rebutted this by claiming that "to initiate a process is not to complete it." The government has stressed that filing/applying and adjudicating are two separate stages in the administrative process and, therefore, a regulation pertaining to one is not relevant to one pertaining to the other. Thus, according to the government, immediate relative status is determined at the time the I-130 petition is adjudicated, not at the time it was filed.

As for the Agency investigation issue, the corresponding response by the plaintiffs has been that "[r]espondents ... make a fatal assumption about the authority, and ability, of the government to conduct the required

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undisputed that the plaintiffs did qualify as immediate relative "spouses" at the time of filing. Robinson, Plaintiff's Brief, supra note 169, at 7.

298. Robinson, Plaintiff's Brief, supra note 169, at 19 (citing 8 U.S.C. §§ 1182(a), 1255(a); In re Alarcon, 20 I. & N. Dec. 557 (BIA 1992); In re O—, 8 I. & N. Dec. 295 (BIA 1959)).

299. Id.


301. 8 C.F.R. § 245.1(g)(1); see also id. § 245.2(a)(2)(B) (similarly specifying "at the time of filing").

302. See, e.g., id. § 204.1 (stating that a citizen or LPR who petitions for a qualifying relative's classification must file a Form I-130 petition); id. § 204.2(a)(1) ("A United States citizen or alien admitted for lawful permanent residence may file a petition on behalf of a spouse.").

303. Taing, Plaintiff's Opposition to MTD, supra note 192, at 7; Robinson, Plaintiff's Brief in Opposition to MTD, supra note 80, at 11–12; Robinson, Plaintiff's Brief, supra note 169, at 9–10.

304. Taing, Plaintiff's Opposition to MTD, supra note 192, at 3.


306. Id.

investigation following the death of the petitioning spouse."\(^{308}\) The plaintiffs have acknowledged that the purpose of an investigation is to discover marriages that are legally valid, but were entered into solely to obtain an immigration benefit.\(^{309}\) However, the plaintiffs have also pointed out that I-130 petitions are routinely approved if the petition is filed on behalf of an alien spouse who is not physically located in the United States.\(^{310}\) In other words, in the context of I-130 petitions filed at regional offices for the purpose of immigrant visa processing (consular processing), immigration officials always approve I-130 petitions without interviewing the petitioning spouse.\(^{311}\) Instead, these petitions are routinely adjudicated solely on the basis of the documentary evidence submitted.\(^{312}\) Thus, it "defies logic" for the government to insist that it cannot determine the bona fides of a relationship without interviewing the petitioning spouse when it does so in the context of immigrant visa applications.\(^{313}\) Therefore, the plaintiffs have emphasized that immigration officials do have the authority to conduct an investigation without interviewing the I-130 petitioner, whether the citizen spouse is alive or deceased.\(^{314}\) Another gap in the government’s argument, stressed in the plaintiffs’ briefs, is that even where the Agency does interview the petitioning spouse prior to the citizen’s death, but has not yet adjudicated the I-130 petition, the Agency still takes the position that it cannot approve the petition because of the impossibility of determining the bona fides of the marriage.\(^{315}\) The plaintiffs have claimed that this point "illustrates the disingenuous nature of the government’s marriage fraud-justification."\(^{316}\)

The government insists that this argument is illogical because USCIS may conduct the investigation in a number of ways within its discretion, including documentary evidence, affidavits, and/or by interviewing the petitioner and his/her spouse.\(^{317}\) Thus, USCIS’s discretion to conduct in-person interviews in other contexts does not undermine the fact that to do so would be impossible within the facts of these cases.\(^{318}\)

\(^{308}\) Robinson, Plaintiff’s Brief in Opposition to MTD, \textit{supra} note 80, at 9.

\(^{309}\) \textit{Id.} at 9–10.

\(^{310}\) \textit{Id.} at 10.

\(^{311}\) Taing, Plaintiff’s Opposition to MTD, \textit{supra} note 192, at 4–5.

\(^{312}\) Robinson, Plaintiff’s Brief, \textit{supra} note 169, at 33 (citing 8 C.F.R. §§ 204.1(f), 204.2(a)(1)(i)(B)(1)-(6), 204.2(a)(2) (2008)).

\(^{313}\) Robinson, Plaintiff’s Brief in Opposition to MTD, \textit{supra} note 80, at 10–11; Robinson, Plaintiff’s Brief, \textit{supra} note 169, at 33.

\(^{314}\) Taing, Plaintiff’s Opposition to MTD, \textit{supra} note 192, at 5; Robinson, Plaintiff’s Brief, \textit{supra} note 169, at 34.

\(^{315}\) Robinson, Plaintiff’s Brief, \textit{supra} note 169, at 34.

\(^{316}\) \textit{Id.}

\(^{317}\) Robinson, Government’s Reply Brief in Further Support of MTD, \textit{supra} note 197, at 5.

\(^{318}\) \textit{Id.}
b. *Give and Take: 8 U.S.C. § 1155—Revocation and Humanitarian Discretion*

The last argument made by the government under the adjustment of status regime involves the authority to revoke immigrant visa petitions. As discussed in Part I, 8 U.S.C. § 1155 permits the Secretary of Homeland Security to revoke approval of an immigrant visa petition at any time for what the Secretary deems "good and sufficient cause."319 Through regulation, the Secretary has established that a petitioner's death automatically revokes approval of a visa petition.320 An immigrant visa petitioner's death has been "good and sufficient cause" for revocation since at least 1938.321 Although there is an opportunity for the Secretary to reinstate predeath approval through humanitarian discretion,322 this authority does not apply if the petitioner dies while the Form I-130 is pending (postdeath approval).323

The logic of the government proceeds as such: if the visa petitioner's death is a sufficient basis to revoke a petition after it is approved, it should also be a sufficient basis to deny a petition before it is approved.324 Although the government concedes that § 1151 does not expressly authorize the denial of an unapproved visa petition, the Secretary has used the statute to demonstrate that Congress manifestly intended alien widows to be ineligible as "immediate relatives."325 To strengthen this argument, the government has pointed to a "settled administrative rule" that once a visa petition is approved, it can only be revoked for a reason sufficient to also warrant denial of the petition.326

The plaintiffs have characterized the distinction between predeath approval and postdeath approval as "arbitrary and irrational."327 They argue that there is "no rational basis" to grant benefits to a surviving spouse who was lucky enough to have his/her I-130 petition processed before his/her spouse's death, while punishing another surviving spouse who was "less fortunate."328 Additionally, they have pointed out that § 1155 does not apply in their cases because the government's revocation authority

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319. *See supra* note 58 and accompanying text.
320. *See supra* note 59 and accompanying text.
322. *See supra* note 60 and accompanying text.
323. Dodig v. INS, 9 F.3d 1418, 1420 (9th Cir. 1993).
327. Robinson, Plaintiff's Brief in Opposition to MTD, *supra* note 80, at 15.
328. Taing, Plaintiff's Opposition to MTD, *supra* note 192, at 9 n.4.
concerns only approved (as opposed to unadjudicated) petitions. In their cases, their I-130 petitions were not approved and therefore cannot be revoked.

Furthermore, the plaintiffs have claimed that the Agency’s regulations regarding its revocation authority is ultra vires, going beyond the power of the statute. First, the statute itself does not contemplate revocation of a properly filed and approved petition as “good and sufficient cause.” Second, the idea that the death of a petitioner can be considered “good and sufficient cause” to automatically revoke an approved petition or to terminate action on an adjudicated petition “runs contrary to fundamental justice and due process of law,” particularly in light of the fact that the government will routinely approve I-130 petitions without interviewing the citizen spouse.

c. The Step One Debate Continues: Where the Courts Stand

Although the arguments surrounding §§ 1154 and 1155 are pervasive in the plaintiffs’ and government’s briefs, the actual court decisions were sparse in their discussion of the relevant issues. In fact, the Robinson opinion was the only one to discuss the language “at the time of filing” in other statutory and regulatory provisions, and no court analyzed the humanitarian discretion and revocation matter.

In Freeman, the court found that the structure of the adjustment of status regime supported the plaintiffs’ interpretation of the statute. The court discussed how the government was unable to point to anything in the procedure that would suggest that properly filed forms are “entirely voided upon the citizen petitioner’s death.” However, the Freeman court did not specifically consider the present tense or investigation arguments. In

329. Lockhart, Plaintiff’s Final Brief, supra note 192, at 26; Taing, Plaintiff’s Opposition to MTD, supra note 192, at 8; Robinson, Plaintiff’s Brief, supra note 169, at 11 n.1.

330. Lockhart, Plaintiff’s Final Brief, supra note 192; Taing, Plaintiff’s Brief, supra note 193, at 25.

331. Taing, Plaintiff’s Opposition to MTD, supra note 192, at 7.

332. Id. at 7 n.3; Robinson, Plaintiff’s Brief, supra note 169, at 11 n.1.

333. Taing, Plaintiff’s Opposition to MTD, supra note 192, at 7–8 n.3; Robinson, Plaintiff’s Brief, supra note 169, at 11 n.1 (also arguing that this practice “runs contrary to fundamental notions of justice and due process of law”).


336. Freeman v. Gonzales, 444 F.3d 1031, 1040 (9th Cir. 2006) (“Neither the definition of immediate relative nor the text and structure of the adjustment of status regime provides support for the government’s position that Mrs. Freeman should be stripped of her spousal status.”).

337. Id.
Lockhart, the court did not explicitly discuss investigation but did specifically mention that in the facts of the case, USCIS had interviewed the deceased spouse and “thus had an opportunity to question him regarding the validity of his marriage to Ms. Lockhart.” The Taing and Turek courts did not delve into any analysis of the present tense in § 1154 nor the revocation issue in § 1155.

The only two cases to analyze the present tense arguments were Robinson and Burger. The Robinson court rejected the lower court’s conclusion that the statute being written in the present tense was “not particularly significant.” The court found that the use of present tense in the statute “belie[d]” Robinson’s position that eligibility for immediate relative status is determined at the time of filing and instead demonstrated that the facts in the petition must be true at the time USCIS adjudicates it. Furthermore, the Robinson court rejected the plaintiff’s attempt to utilize other regulations containing the language “at the time of filing.”

The regulations, according to the court, do not suggest USCIS must only consider facts at the time the petition was filed.

On the same side of the circuit split, the Burger court concluded that there was no authority under existing statutory or regulatory law for the approval of the immediate relative petitions. Moreover, the court acknowledged that § 1154(b) was in the present tense, and thus affirmed BIA’s requirement that “the immediate family relation exist at the time the petition is adjudicated.”

3. Other Relevant Statutes: The USA PATRIOT Act and National Defense Authorization Act

Beyond the INA regulatory scheme discussed thus far, the government has also cited to two independent statutes as evidence of the congressional intent underlying 8 U.S.C. § 1151. Similar to the arguments laid out in Part II.B.2(a), which compared 8 U.S.C. §§ 1154 and 1155 with § 1151, the government has utilized the acts discussed below to demonstrate that Congress has spoken on the precise question at issue, as Chevron Step One requires.

The basis of the government’s argument regarding clear congressional intent supporting USCIS’s interpretation is the notion that, “when Congress has wanted to allow for an individual to immigrate based on his/her former

340. Id. at *11–12.
341. Id. at *12–15.
342. Id. at *13.
344. Id. at *17.
marriage to an individual who is now dead, Congress has done so clearly. 345 In support of this proposition, the government has pointed to the similarities between the second sentence of § 1151(b)(2)(A)(i) and two other statutes: the National Defense Authorization Act for Fiscal Year 2004, 346 extending immigration eligibility to alien spouses of U.S. citizen military personnel who died as a result of combat, and the USA PATRIOT Act, 347 extending immigration eligibility to alien spouses of U.S. citizens killed as a result of terrorist activity. 348

The government has cited to a specific provision of the USA PATRIOT Act, § 421, 349 to further support its idea of congressional intent. Section 421 provides special advantages to beneficiaries of Form I-130 petitions that were revoked or terminated either before or after its approval because the petitioner died as a result of the September 11, 2001, terrorist attacks on the United States. 350 The beneficiaries of § 421 are classified as “special immigrants,” not as “immediate relatives.” 351 Thus, the logic underlying these statutory provisions, according to the government, is that there would have been no need for Congress to enact this statute if the Form I-130 petitioner’s death did not “terminate[] (or otherwise render[] null),” the Form I-130 petition. 352

The plaintiffs do not agree that legislation regarding deaths in the context of 9/11 or the military in any way demonstrates “that it is Congress’[s] intent to strip immediate relative status from an applicant who has complied with all the statutory prerequisites for lawful permanent residence.” 353 Furthermore, these statutes were legislated after the enactment of the INA and are completely independent of it. 354 The acts cited by the government merely generate a separate right for immediate relatives to self-petition under the second sentence of § 1151; they do not reference the immediate relative definition in the first sentence. 355

No court decisions analyze either of these two statutes. 356

351. Taing, Government’s Opening Brief, supra note 198, at 28.
352. Lockhart, Government’s Final Opening Brief, supra note 191, at 30; Robinson, Government’s Reply Brief in Further Support of MTD, supra note 197, at 4 (citing § 421 (b)(1)(B)(i)).
353. Taing, Plaintiff’s Brief, supra note 193, at 21.
354. Lockhart, Plaintiff’s Final Brief, supra note 192, at 23; Taing, Plaintiff’s Brief, supra note 193, at 22.
355. Lockhart, Plaintiff’s Final Brief, supra note 192, at 23–24; Taing, Plaintiff’s Brief, supra note 193, at 23.
356. The court in Robinson does mention these statutes in a footnote. Robinson v. Napolitano, No. 07-2977, 2009 U.S. App. LEXIS 1946, at *17–18 n.7 (3d Cir. Feb. 2, 2009). However, there is no statement of how either impacted the court’s analysis.
C. Step Two: Ambiguity Granted, Reasonableness Uncertain

Throughout the relevant cases, the government has consistently argued that, even if the Court considers the language of the statute ambiguous because congressional intent is unclear, the decisions to deny the petitioners’ I-130 applications were based on a permissible interpretation of 8 U.S.C. § 1151 and therefore should be entitled to deference under Chevron. This section explores the arguments surrounding Chevron Step Two: whether USCIS’s statutory interpretation is reasonable. This step involves an investigation into two separate realms: first, the acceptable definitions of “spouse” in other legal contexts and, second, the policy considerations that underlie the relevant immigration issue in dispute.

1. What Does the Word “Spouse” Really Mean?

The plaintiffs have pointed out numerous times throughout their case briefs that the word “spouse” is found in 8 U.S.C. § 1151(b)(2)(A)(i), but that the term “marriage” appears nowhere in it. Their argument continues that, over the past fifty years, spouse has been a common term of ordinary usage and includes a spouse who outlives the other spouse. The government, on the other hand, disputes this claimed meaning and believes that, quite simply, a spouse is a married person. Accordingly, both terms, marriage and spouse, are “inextricably intertwined and cannot be separated.” Thus, the plaintiffs and the government have both attempted to establish that the definition of the term “spouse” supports their interpretation, for a determination of the common ordinary meaning of the word could lend support to either side as to whether the Agency’s interpretation is “reasonable.” To ascertain the meaning of “spouse”, the parties have looked to three different sources: (1) Black’s Law Dictionary; (2) the U.S. Code; and (3) various state marriage laws. The reasonableness of each is discussed in this section.

a. Black’s Law Dictionary

Most of the contention regarding the common meaning of “spouse” involves its definition in various editions of Black’s Law Dictionary. The plaintiffs point to the eighth edition of Black’s published in 2004, for the following definition: “Spouse. One’s husband or wife by lawful marriage; a married person. . . . Surviving spouse. A spouse who outlives..."
the other spouse.”

Thus, the plaintiffs assert that the definition of spouse includes the term “surviving spouse.” A similar definition of spouse is found in the sixth edition, published in 1990, which was available at the time of the enactment of the 1990 INA amendments. Again, the term “surviving spouse” was expressly incorporated into the definition. Moreover, this definition of spouse also implies that spousal status continues notwithstanding the death of one member because of the language in the surviving spouse definition: “is one of a married pair.”

The plaintiffs have also discussed that the current definition of “immediate relative” has not changed since the time of the original INA 1952 enactment. At that time, the Black’s Law Dictionary available was the fourth edition, published in 1951. The definition of spouse in that edition is broadly stated as “one’s wife or husband,” but this phrase was derived from Rosell v. State Industrial Accident Commission. This case, in turn, defined a surviving spouse as “the one, of a married pair, who outlives the other.” Overall, the plaintiffs have utilized the various editions of Black’s to conclude that “surviving spouse” falls within the broader definition of spouse.

The government, on the other hand, has urged the courts that “[t]he Secretary’s reading of the INA is consistent with the common, ordinary meaning of the term “spouse.”“ 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 enactment. Therefore, the government claims that “[t]he common, ordinary meaning of the term ‘spouse’ is a married person.” The government has maintained that the general rule in the United States is that marriage legally ends when one spouse dies. As for the definitions in Black’s Law Dictionary provided by the plaintiffs, the government has insisted that “[a]s a matter of simple logic and grammar . . . these definitions do not support [plaintiff]’s position but, rather, support respondents’ arguments.” The government has asserted that the
The definition of "surviving spouse" is merely provided in conjunction with the definition of spouse, as opposed to being incorporated within it.\textsuperscript{377} Moreover, \textit{Black's Law Dictionary} defines "husband" as "[a] married man; a man who has a lawful wife living" and defines "wife" as "[a] married woman; a woman who has a lawful husband living."\textsuperscript{378} "Spouses" are "composed exclusively of husbands and wives."\textsuperscript{379} Furthermore, according to the government's briefs, if the plaintiff's argument was accepted, there would be no need for the concept of "widow" or "widower."\textsuperscript{380} Instead, a spouse transforms into a widow or widower the instant that his or her spouse dies.\textsuperscript{381}

\textbf{b. Husband and Wife: The Defense of Marriage Act}

The government has also pointed out that federal law implements the same fundamental definition of "spouse" in a variety of other contexts for purposes of the administration of every federal statute and regulation.\textsuperscript{382} Thus, the government has argued that within 1 U.S.C. § 7,\textsuperscript{383} a person is only a "spouse" if he or she is either the husband or the wife in a legal marriage while both spouses are alive.\textsuperscript{384}

The plaintiffs have responded to this contention, first, by stressing that because a surviving spouse is the one, of a married pair, who outlives the other, a surviving spouse is still a spouse within 1 U.S.C. § 7.\textsuperscript{385} Second, they point to the historical development of 1 U.S.C. § 7. The definition found in the statute originated in the Defense of Marriage Act (DOMA).\textsuperscript{386} It is apparent from the legislative history that Congress enacted DOMA to preserve the institution of marriage as a legal union between one man and one woman and thus to prevent federal recognition of homosexual relationships as marriage.\textsuperscript{387} However, DOMA "was not intended to alter

\begin{itemize}
\item \textsuperscript{377} \textit{Id.}
\item \textsuperscript{378} \textit{BLACK'S LAW DICTIONARY} 758, 1628 (8th ed. 2004).
\item \textsuperscript{379} Robinson, Government's Reply Brief, \textit{supra} note 249, at 7.
\item \textsuperscript{380} Robinson, Government's Reply Brief in Further Support of MTD, \textit{supra} note 197, at 3.
\item \textsuperscript{381} \textit{Id.}
\item \textsuperscript{382} Taing, Government's Opening Brief, \textit{supra} note 199, at 12.
\item \textsuperscript{383} 1 U.S.C. § 7 provides,
\begin{quote}
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.
\end{quote}
\item \textsuperscript{1} 1 U.S.C. § 7 (2006).
\item \textsuperscript{384} Taing v. Chertoff, 526 F. Supp. 2d 177, 184 (D. Mass. 2007).
\item \textsuperscript{385} Taing, Plaintiff's Opposition to MTD, \textit{supra} note 192, at 18.
\item \textsuperscript{386} Pub. L. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7); \textit{see also} Robinson, Plaintiff's Brief in Opposition to MTD, \textit{supra} note 80, at 27.
\item \textsuperscript{387} Robinson, Plaintiff's Brief in Opposition to MTD, \textit{supra} note 80 at 27–28; \textit{see e.g., H.R. REP. No. 104-664, at 2 (1996), reprinted in 1996 U.S.C.C.A.N. 2905 (stating one of two primary purposes as "defend[ing] the institution of traditional heterosexual marriage").
traditional understanding of the term spouse." The government's response has been that the definition in 1 U.S.C. § 7 is expressed in the present tense, and therefore requires that someone "is," not "was," a husband or a wife.

c. State Marriage Laws

The last main sources of authority for the government's interpretation of the common meaning of "spouse" are the state laws defining marriage in the state where the petitioner lives. In three cases, Robinson, Taing, and Lockhart, the government has pointed to domestic relations law in New Jersey, Massachusetts, and Ohio respectively. In one of the government's briefs, it points to a number of New Jersey statutes to support the notion that a marriage terminates when one spouse dies. For example, it discusses a New Jersey law that provides that if a person believes that a prior spouse is dead, that is a viable defense if he or she is prosecuted for bigamy. Another example is that if a person has been married more than once, then New Jersey law will presume the latest marriage to be the valid marriage, in the absence of clear and convincing evidence that the "prior marriage was not terminated by death or divorce." Similarly, in Taing and Lockhart, the government's briefs pointed to a number of marital laws in Massachusetts and Ohio to demonstrate the application of the general rule that a marriage ends upon the death of one spouse. These statutes, such as those involving prosecution for polygamy, are virtually identical to the ones used by the government in Robinson.

In response to the utilization of these domestic regulations, the plaintiffs have claimed that state laws defining marriage are irrelevant and inapplicable. The statutes and corresponding cases "relate to a marriage terminated by death, not the status of a surviving spouse." Furthermore, the term at issue is spouse, not marriage, and the plaintiffs have contested any reading of 8 U.S.C. § 1151(b)(2)(A)(i) that implies "marriage" in the meaning of the statute. Finally, the plaintiffs have emphasized that the

388. Robinson, Plaintiff's Brief in Opposition to MTD, supra note 80, at 27.
389. Taing, 526 F. Supp. 2d at 184.
394. Id. (citing N.J. STAT. ANN. § 2c:24-1 (West 2005)).
395. Id. (emphasis omitted) (quoting Newburgh v. Arrigo, 443 A.2d 1031, 1035 (N.J. 1982)) (internal quotation marks omitted).
398. Robinson, Plaintiff's Brief in Opposition to MTD, supra note 80, at 29.
399. Id.
traditional definition of spouse for federal purposes "supersedes state law." But, according to the government, when immigration cases raise marital issues, those issues are always governed by the law of the jurisdiction in which the alleged marriage was performed.

2. The Step Two Conflict: Where the Courts Stand

There are two decisions that discuss the common meaning of the term "spouse"—one on each side of the circuit split. The Taing court recognized the validity of the government's argument that the eighth edition of Black's Law Dictionary defined "spouse" as "one's husband or wife." However, the court criticized the government for omitting the last part of the definition, "which states that a 'surviving spouse is a spouse who outlives the other.'" Additionally, the court discussed the argument under U.S.C. § 7 and found that a statute that mandates that a spouse be of the opposite sex does not mandate that spouses lose their status as such when one of the pair dies. The government's forced interpretation of the present tense in the statute was rejected, and the court emphasized that the entire thrust of the statute was to ensure heterosexual marital unions.

The Robinson court also conducted a thorough analysis of the ordinary meaning of the term "spouse," but reached a result contradictory to that in Taing. The Third Circuit initially recognized that the INA itself did not provide a "helpful definition" of the term and thus went on to address the arguments utilizing Black's Law Dictionary. In doing so, the court found that "[t]he fact that Black's Law Dictionary's entry for spouse defines 'surviving spouse' separately disproves Robinson's hypothesis" that she remained a spouse even after her husband's death. Furthermore, the court deemed it "illogical" to conclude that the terms "spouse" and "surviving spouse" have an identical meaning, basing its decision on the legal standard that death terminates a marital union. Lastly, the court went on to address domestic relations law of New Jersey (Mrs. Robinson's home state) and found that it also supported the notion that "a marriage terminates upon the death of one spouse."

400. Id.
401. The "law of the place of marriage governs the validity of a marriage." Robinson, Government's Reply Brief, supra note 249, at 7 (citing In re H—, 9 I. & N. Dec. 640, 641 (BIA 1962)).
403. Id. (quoting BLACK'S LAW DICTIONARY 1402 (8th ed. 2004)).
404. Id.
405. Id.
407. Id. at *21.
408. Id. (citing 52 AM. JUR. 2D Marriage § 8 (2000)).
409. Id. (citing N.J. STAT. ANN. § 2C:24-1(a)(1) (West 2005)).
D. Policy Implications

Part II.D discusses the policy considerations involved in this conflict. Although this Note focuses on a narrow statutory construction issue, it is worth noting that there are broader policy implications at stake discussed by both sides of the conflict. The policy arguments utilized by both sides may also contribute to the "reasonableness" of their statutory interpretation, discussed above. Part II.D.1 discusses the policy choices underlying the immigration regime as a whole. Part II.D.2 briefly mentions other policy considerations, such as the immense number of applications before USCIS and the speed of adjudication. Finally, Part II.D.3 explains the various legislative initiatives that have been considered or passed in connection with this issue.

1. Policy Choices Underlying Statutory and Regulatory Structure

"The overall purpose of the 'immediate relative' provisions is to promote the goal of family unity on behalf of the [U.S. citizen] . . ."410 However, the government has urged that once the citizen dies, this purpose can no longer be achieved.411 The exception in the second sentence of the statute extending the ability to remain in the United States to only some surviving spouses is legitimate, because it "recogniz[es] ties between an alien and the country of the alien's deceased spouse."412

The plaintiffs have criticized the Agency's position as being both "[a]rbitrary and [c]apricious."413 They view the purported government justification, that family unity can no longer be achieved, as "baseless" because the existence of citizen children and other family ties defeats this assertion.414 Their opinion is that USCIS's policy yields "tragic and absurd results that Congress could not have intended."415 Under the government's reading, the pace of adjudication, rather than a petitioner's conscious decision to promptly file an I-130 petition, would be the basis for USCIS's determination. The plaintiffs have attempted to illustrate the irrationality of the government's position with the following example: a spouse, whose husband punctually files an I-130 petition but dies twenty-three months after the marriage, is in a much worse position than a spouse whose husband never filed a petition but dies twenty-four months after the marriage.416 These "anomalous results . . . could not have been intended by Congress."417

411. Id. at 15–16.
414. Id. at 31.
415. Id. at 30.
416. Id. at 30–31.
417. Id. at 31.
In *Freeman*, the court agreed that the government’s contention that spousal status is stripped by the husband’s untimely death is “‘contrary to congressional intent and frustrate[s] congressional policy.’”\(^{418}\) However, in *Robinson*, the court noted that Congress has imposed durational requirements for marriage in a variety of contexts, and thus its ruling was in harmony with congressional intent.\(^{419}\) The *Robinson* court then went on to assert that its holding was “consistent with the core purpose of the U.S. family-based immigration policy: the promotion of family unification for U.S. citizens and lawful permanent residents.”\(^{420}\) Congress, according to the court, in imposing a two-year marriage requirement, “created a balance between the goal of family unity and the legitimate expectations of an alien-spouse whose connections to the United States were likely to have become solidified during the two-year marriage period.” However, the court was aware that this durational trigger was not met because of a tragic accident that neither spouse could avoid or anticipate.\(^{421}\) Moreover, although the court inferred that congressional intent was based upon the fact that a marriage lasting two years “can be presumed to have been bona fide,”\(^{422}\) at no point is the legitimacy of the Robinson’s marriage questioned.

2. Other Relevant Policy Considerations

Two-thirds of legal permanent residents come to the United States on the basis of a family relationship, with the largest subcategory being spouses of U.S. citizens.\(^{423}\) In fact, spouses of U.S. citizens comprised approximately twenty-five percent of all legally admitted immigrants to the United States each year during the last quarter of the twentieth century.\(^{424}\) Thus, there are an immense number of pending applications before USCIS at any given time.\(^{425}\) The issue of the widow penalty is further complicated by the slow-moving nature of the entire system; USCIS can take several years to review pending applications.\(^{426}\) The court in *Freeman* noted that,

> It is understandable that the immigration authorities may require a considerable amount of time to process the many applications that come

\(^{418}\) Freeman v. Gonzales, 444 F.3d 1031, 1043 (9th Cir. 2006) (quoting Akhtar v. Burzynski, 384 F.3d 1193, 1202 (9th Cir. 2004)).


\(^{420}\) Id. at *23.

\(^{421}\) Id.

\(^{422}\) See supra note 127 and accompanying text.


\(^{424}\) Calvo, *supra* note 6, at 156 n.7 (citing FRANK BEAN, *AMERICA’S NEWCOMERS AND THE DYNAMICS OF DIVERSITY* 197 (2003)).


\(^{426}\) See generally Sasser, *supra* note 51 (discussing the litigation over the “bureaucratic nightmare” of delayed adjustment of status applications).
before them; however, an alien’s status as a qualified spouse should not turn on whether DHS happens to reach a pending application before the citizen spouse happens to die.\textsuperscript{427}

According to a complaint in a relevant pending case, USCIS has “created a system under which combination of spousal death and [USCIS’s] inability to quickly adjudicate petitions severely penalizes grieving widows.”\textsuperscript{428}

3. Congressional Initiatives

There are two separate types of legislation (private and public) that can be enacted to assist those dealing with the widow penalty: one has already affected a number of women, the other has the potential to affect every individual facing these circumstances.

\textit{a. Private Legislation}

Currently, there is a possibility for these widow(er)s to become LPRs through private legislation.\textsuperscript{429} A Committee on the Judiciary report accompanying H.R. 6034\textsuperscript{430} stated that “one of the two most common circumstances for granting private bill relief relates to a conditional permanent resident petition for an alien spouse not being approved before the untimely death of a U.S. citizen spouse.”\textsuperscript{431} However, there has been a “precipitous decline” in private laws, despite the relative steadiness in the

\begin{footnotes}
\item[428] Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandamus at 7, Robledo v. Chertoff, Civ. No. AW-08-CV-2581 (D. Md., Oct. 2, 2008). For certain plaintiffs, [t]hese actions have exacted grief, suffering, loss of work authorization, loss of travel authorization, separation of family members, and other injuries flowing from forced unlawful status such as loss of entitlement to estate benefits, social security benefits, loss of driving privileges due to state laws requiring proof of legal status, and loss of accrued lawful residence time that is a prerequisite for eventual U.S. citizenship. \textit{Id.} at 8.
\item[429] One example of such private law relief is the case of Anisha Goveas Foti. She was married to a U.S. citizen, Seth Foti, who died in an airplane crash while performing official duties for the U.S. government on August 23, 2000. The bill was introduced by Representative Tom Lantos, a Democrat from California, on June 19, 2001. President George W. Bush signed the private legislation in 2002, which resulted in Foti becoming a legal resident in 2002. H.R. 2245, 107th Cong. (2002). “The House Report noted that, ‘By all accounts this was a legitimate marriage, and it is through no fault of her own that Mrs. Foti has not met the marriage requirements of the I.N.A. This case mirrors several other private laws enacted in the last few years.’” MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., PRIVATE IMMIGRATION LEGISLATION 27 (2005), available at http://www.ilw.com/immigdaily/news/2005,0819-crs.pdf.
\item[430] See \textit{infra} notes 434–36 and accompanying text.
\end{footnotes}
One commentator has suggested that private bills may be dying and will "soon find a place atop the dustbin of congressional history."433

b. Public Legislation

Legislation has also been proposed that would give USCIS adjudicators the discretion to grant LPR status to surviving spouses of deceased U.S. citizens or naturalized citizens. Both of the following pieces of legislation were considered in the 110th Congress and could conceivably be reintroduced this session.

i. Widow Penalty ("McGovern-Udall") Bill

On May 13, 2008, a bill was introduced in the House of Representatives to "amend the Immigration and Nationality Act to provide for relief to surviving spouses and children."434 The bill was sponsored by James P. McGovern (a Democrat from Massachusetts) and Mark Udall (a Democrat from Colorado). They "believe that case-by-case consideration of these survivor's cases, and not an automatic denial, would serve the interests of the American people."435 The bill would amend the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i) by inserting "(or if, married for less than two years at the time of the citizen's death, an alien who proves by a preponderance of the evidence that the marriage was entered into in good faith and not solely for the purpose of obtaining an immigration benefit)" after the phrase "for at least two years at the time of the citizen's death."436

The bill was approved by the House Immigration Subcommittee on July 10, 2008, and was approved by the full House Judiciary Committee on July 16, 2008. On July 30, 2008, Senator Bill Nelson (a Democrat from Florida) introduced Senate Bill 3369, a companion bill to House Bill 6034.437 The House Judiciary Committee reported the Widow Penalty Bill to the full House of Representatives on October 3, 2008.

432. Matthew Mantel, Private Bills and Private Laws, 99 Law Libr. J. 87, 90 (2007). Matthew Mantel lists the following number of private bills enacted since the 96th Congress (1979–1980) in support of his position: 96th Congress, 122 private bills; 97th Congress, 56 private bills; 98th Congress, 54 private bills; 99th Congress, 24 private bills; 100th Congress, 48 private bills; 101st Congress, 16 private bills; 102nd Congress, 20 private bills; 103rd Congress, 8 private bills; 104th Congress, 4 private bills; 105th Congress, 10 private bills; 106th Congress, 24 private bills; 107th Congress, 6 private bills; and 108th Congress, 6 private bills. Id. at 90 n.24.
433. Id. at 100.
436. H.R. 6034.
ii. The Reuniting Families Act of 2008

On September 18, 2008, Senator Robert Menendez (a Democrat from New Jersey) and Congressman Mike Honda (a Democrat from California) introduced the Reuniting Families Act of 2008. Similar to the proposed Widow Penalty Bill, a portion of the Reuniting Families Act of 2008 would define spouse as,

An alien who was the spouse of a citizen of the United States or lawful permanent resident for not less than 2 years at the time of the citizen's or resident's death or, if married for less than 2 years at the time of the citizen's or resident's death, proves by a preponderance of the evidence that the marriage was entered into in good faith and not solely for the purpose of obtaining an immigration benefit and was not legally separated from the citizen or resident at the time of the citizen's or resident's death... shall be considered, for purposes of this subsection, an immediate relative after the date of the citizen's or resident's death if the spouse files a petition under section 204(a)(1)(A)(ii) before the earlier of—

(I) 2 years after such date; or
(II) the date on which the spouse remaries.438

The 110th Congress ended without passing either bill, thus making them technically "dead." Since the Senate and House of Representatives have convened from recess on November 17, 2008, and January 6, 2009, respectively, no further action has been taken on either bill. Both bills, however, may be resubmitted in the new Congress.

III. REFORMING USCIS'S POLICY: HOPE IN THE FACE OF INDIFFERENCE

Parts I and II of this Note described the conflict between a government agency and a number of federal courts over the definition of one term within a single statutory section of the INA. The resolution of this dispute necessarily involves the intricate dissection of the words contained in the statute, as well as an investigation into the broader immigration regulatory scheme. Part III begins by evaluating the various arguments regarding the three main issues explored in Part II: Chevron Steps Zero, One, and Two. It then concludes that the disagreement surrounding the correct interpretation of "spouse" in 8 U.S.C. § 1151 must be resolved against USCIS and in favor of federal courts like that of the Ninth Circuit—that a surviving spouse is included under a general definition of spousal status and hence is eligible for immediate relative classification.

The legal implications are thus clear: an administrative agency should not be permitted to rely on their extrajurisdictional and discredited decision and then claim it deserves Chevron deference. Additionally, an agency should not be permitted to enact a policy that is either in opposition to clear

congressional intent, flatly unreasonable, or both. This part argues that for these reasons, and the Agency's consequent failure to pass *Chevron* Steps Zero, One and Two, the Ninth Circuit's reading of the statute is the only permissible interpretation. Beyond the legal implications, Part III explores the plethora of policy considerations that are at stake in the resolution of this issue.

A. Deference Defeated

1. The Failure of Step Zero: *Chevron* Is Inapplicable

The threshold issue discussed in Part II is *Chevron* Step Zero: whether the Agency's position established in *In re Varela* qualifies for *Chevron* deference.439 If *Chevron* provides the governing framework, then a reviewing court would proceed with an inquiry into the two prongs of *Chevron* to determine if deference is owed to the Agency's determination.440 For a number of reasons, the answer to this preliminary question is that the *Chevron* framework should not be applicable to the Agency's interpretation in *Varela*.

The government has consistently relied upon *Varela* as the precedential administrative decision embodying its policy.441 It is forced to rely upon this case despite its troublesome aspects, because no other BIA decision addresses the relevant issue.442 However, the argument made by the plaintiffs that *Sano* severely undercuts any precedential authority *Varela* may have is both persuasive and meritorious.443 Whether a reviewing court would follow an ad hoc multifactor approach to *Chevron*'s Step Zero inquiry,444 or adhere to some established bright-line rules,445 it is unlikely that *Chevron* provides the appropriate governing framework.

As an initial matter, the Step Zero analysis would be uncomplicated if one were to disregard *Sano*. It is undisputable that BIA decisions are formal adjudications that normally warrant *Chevron* deference.446 After all, an agency will be assumed to have the power to act with the force of law if it is authorized to engage in formal procedures.447 There is little doubt that Congress delegated to USCIS the responsibility to administer the relevant statutory program and that the BIA considers pertinent terms through its case-by-case adjudication.448

439. *See supra* Part II.A.
440. *See supra* notes 97–102 and accompanying text.
441. *See supra* note 126 and accompanying text.
442. *See supra* note 127 and accompanying text.
443. *See supra* notes 192–94 and accompanying text.
444. For a discussion of *Barnhart*, *see supra* notes 118–21 and accompanying text.
446. *See supra* note 115 and accompanying text.
448. *See supra* notes 63–64 and accompanying text.
Discounting Sano, the only argument made by the plaintiffs that has some validity is the lack of analysis in the Varela decision. A relevant consideration in a Step Zero inquiry, according to Justice Stephen Breyer's approach in Barnhart, is the careful consideration the agency has given the question over a long period of time. A lack of analysis in the BIA's opinion could conceivably raise an issue as to whether careful deliberation was given. However, this argument is considerably weak. Although the Varela opinion is fairly short in length and does not provide an in-depth analysis of the relevant considerations, this does not necessarily preclude thorough contemplation of the issue. Even if this point could possibly be validated, it is only one factor out of many to resolve the Step Zero inquiry and thus would not be dispositive.

The plaintiffs' strongest and most compelling argument against the validity of Varela as a viable precedent is the decision in Sano. The BIA modified Varela in such a critical respect in Sano that the former can hardly be considered "good law." The significant and complicating impact the Sano decision had upon the simple bright-line rule regarding BIA adjudicatory decisions was the essential elimination of Chevron applicability. Under Mead, agency decisions will receive Chevron deference if they are a product of delegated authority to act with the force of law. As Professor Sunstein explains, the most plausible interpretation of this phrase "force of law" is when an agency decision is binding on private parties or even if the agency is legally bound by it. Although the decision in Varela was binding on the private parties in that case, Sano later made clear that the decision should not have been handed down in the first place. Sano declared that the BIA itself, due to regulatory constraints, did not have the jurisdiction to hear an appeal from the beneficiary of an I-130 petition; the BIA only had jurisdiction to decide a case brought directly by an I-130 petitioner.

The fact that Congress did not explicitly provide the BIA with jurisdiction to decide these cases is imperative. If the whole premise of Chevron rests upon a legal fiction of congressional intent, then it would be illogical to say that Congress intended to delegate authority to an agency to decide the meaning of a statutory term in the context of a situation that it had no jurisdiction to adjudicate. Although there may have been congressional authorization generally "to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed," there was no specific congressional authorization for the BIA to adjudicate in the case of a rejected I-130 petition brought by

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449. See supra note 195 and accompanying text.
450. See supra note 121 and accompanying text.
451. See supra note 192.
452. See supra note 116 and accompanying text.
453. Sunstein, supra note 87, at 222.
454. See supra notes 134–38 and accompanying text.
a beneficiary. The defendants have argued that *Varela* did not change earlier Agency practice,\(^{456}\) but that assertion is irrelevant. Even if one were to decide *Chevron* Step Zero based upon *Barnhart*'s multifactor case-by-case approach,\(^{457}\) the important question is still Congress’s implied instructions in the particular statutory scheme.

The subsequent regulation emphasized by the government, entitled Affidavits of Support on Behalf of Immigrants,\(^{458}\) although published after notice-and-comment, has little to no bearing on the question of *Chevron* applicability. This final rule is not dispositive because the Agency’s policy regarding the denial of I-130 petitions once the citizen petitioner has died was decided through adjudicatory means, long before the enactment of the this rule.\(^{459}\) USCIS relied on *Varela* and acted pursuant to this interpretation of 8 U.S.C. § 1151(b)(2)(a)(i) for thirty-five years before the regulation was even promulgated.\(^{460}\) Furthermore, USCIS denied most of the beneficiaries’ applications discussed in this Note before the adoption of the regulation.\(^{461}\) Thus, USCIS cannot claim that its position was based upon this regulation nor can it claim that it has been acting pursuant to it.

Throughout the cases discussed in this Note, the government has relied almost exclusively upon *Varela* as establishing the Agency’s position. The regulation is only discussed in the government’s briefs for a single case and even there it is barely mentioned.\(^{462}\) This is a clear indication that USCIS’s interpretation is based upon the BIA decision and not the later ratifying regulation.

Even if USCIS claims that it is currently acting pursuant to this regulation for the relevant class of future visa petitions, that argument should be deemed disingenuous. The purpose of the regulation was not to amend the procedure under which Form I-130 beneficiaries are processed when their citizen spouse dies within two years of the marriage. Rather, the regulation discusses affidavits of support when approval of a Form I-130 is revoked or when the petitioner dies after two years of marriage and the Form I-130 is converted to a Form I-360.\(^{463}\) Thus, future I-130 petitions would not be processed under the authority of this regulation. The two line statement in the regulation discussing the authority to approve a visa

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\(^{456}\) See supra notes 196–99 and accompanying text.

\(^{457}\) See supra notes 118–21 and accompanying text.

\(^{458}\) See supra notes 200–04 and accompanying text.

\(^{459}\) See supra note 126.

\(^{460}\) See supra note 126.


\(^{462}\) See supra note 204.

\(^{463}\) See supra notes 202–03 and accompanying text.
petition after the petitioner dies\textsuperscript{464} seems to be made merely in passing, and is neither the focus nor the purpose of the regulation.

Overall, \textit{Chevron} is not the appropriate governing framework and therefore deference to USCIS's interpretation of the statute is not warranted.

2. The Failure of Step One: Congressional Intent is Clear

Even if one were to accept that \textit{Varela} is a viable precedent embodying USCIS's policy, the language and structure of the statute unequivocally demonstrate that Congress intended a Form I-130 beneficiary to be, and to remain, an immediate relative, regardless of their spouse's death within two years of the marriage. Thus, even if the Agency's interpretation could pass muster under Step Zero and necessitate application of the \textit{Chevron} test, it will ultimately fail under Step One.

It is clear that the language of \S\ 1151 creates two separate petitioning rights: one for aliens whose citizen spouse filed the I-130 petition prior to his/her death, and one for aliens whose citizen spouse failed to file the I-130 petition prior to his/her death.\textsuperscript{465} The structure of the statute seemingly creates such a dichotomy. The first sentence is clear and succinct in defining who qualifies as an immediate relative, and only contains one obvious qualifier for parents.\textsuperscript{466} If Congress intended another qualifier to exist to attain spousal status, such as a requirement that the marriage have lasted two years, it would have done so explicitly.\textsuperscript{467} The widow(er)s in the cases discussed in Part I all fall under the immediate relative definition in the first sentence of \S\ 1151(b)(2)(A)(i).\textsuperscript{468}

The second sentence on the other hand, requiring a two-year minimum marriage duration for self-petitioning widow(er)s,\textsuperscript{469} cannot be found to qualify the definition of spouse in the first sentence. To do so would be misguided and illogical, for it would mean that a spouse can only achieve the status of an immediate relative after two years of marriage. However, USCIS can and does approve I-130 petitions prior to this durational trigger. Rather, the second sentence provides a different right for widow(er)s to self-petition if their spouse died without filing the necessary forms; this is a completely separate immigration process from that described in the first sentence.\textsuperscript{470} Only in the case of a self-petitioner, discussed in the second sentence of the statute, is a two-year marriage duration required.\textsuperscript{471}

The logic behind a durational requirement for self-petitioners is rational and understandable. In that situation, the petitioning spouse did not make

\begin{footnotes}
\item[464] See supra note 203 and accompanying text.
\item[465] See supra notes 225-32 and accompanying text.
\item[466] See supra notes 228, 243-45 and accompanying text.
\item[467] See supra note 245 and accompanying text.
\item[468] See supra note 233 and accompanying text.
\item[469] See supra notes 229 and accompanying text.
\item[470] See supra notes 230-33 and accompanying text.
\item[471] See supra notes 230-33 and accompanying text.
\end{footnotes}
the conscious decision to actively file the appropriate paperwork prior to his/her death, and therefore it is fair for the INA to impose heightened application requirements. But, that rationale is nonexistent when the petitioner has promptly filed the necessary petition. It makes no sense in that case to require the marriage to have lasted two years simply because of the petitioner’s unfortunate and untimely death.

None of the arguments proffered by the government are persuasive enough to support their position that the two-year marriage requirement applies to the entirety of the statutory section and not to the second sentence independently. The government does make a viable point in asserting that the sentences of the statute should be read together as an unfragmented whole; however, it is doubtful that the phrase “for purposes of this subsection” would mandate this. A simpler and more convenient reading of the statute does not necessarily make it the correct and intended reading.

Additionally, the fact that Congress may have followed a hierarchical scheme in drafting the statute and thereby subdividing it into statutory sections is irrelevant. The plaintiffs were correct in pointing out the government’s failure to show how the order of sentences would cause them to be related. As for the claim that if the plaintiffs’ interpretation was correct then the material in the second sentence would fit more logically into a different portion of the INA, that assertion is similarly immaterial. Statutes cross-reference each other throughout the INA, and related information is often put into separate statutory sections for differing reasons. In this case, although it might have been logical to place the two-year requirement for a self-petitioning spouse in § where the procedure is described, it was also logical for this information to be included in §, the section that discusses aliens that are not subject to direct numerical limitations. Both immediate relative petitions and self-petitions fall under this limited category.

The plaintiffs’ position is further supported by the adjustment of status regime and related regulations; both shed light on clear congressional intent. The government makes much of the present tense in the statute to justify their position that the facts stated in the deceased petitioners’ petitions “are not true.” However, based upon a number of various immigration statutes and regulations, the plaintiffs are exceedingly more justified in reasoning that eligibility for immediate relative classification is established at the time of filing, regardless of the present tense in the statute. The language “at the time of filing” or “at the time the application is filed” is woven throughout the visa-petition-related federal regulations

472. See supra notes 246–57, 260–63 and accompanying text.
473. See supra note 252 and accompanying text.
474. See supra notes 252–53 and accompanying text.
475. See supra notes 255–57 and accompanying text.
476. See supra note 259 and accompanying text.
477. See supra notes 260–61 and accompanying text.
478. See supra Part II.B.2.a.
479. See supra notes 295–98 and accompanying text.
and statutes.\textsuperscript{480} Although the government’s position that Congress did not provide for a “once an immediate relative, always an immediate relative” approach\textsuperscript{481} is appealing, that is not an accurate description of the situation. The plaintiffs make a more delineated and specified claim: when one has properly filed the appropriate petition and application, and at the time of filing has established the necessary perquisites to become an immediate relative, that status should not be stripped away because of the petitioner’s death.

The fact that USCIS can no longer perform a complete investigation once the petitioner dies is, at first glance, also a clever and compelling argument;\textsuperscript{482} identifying and discouraging marriage fraud is a legitimate goal clearly contemplated by Congress.\textsuperscript{483} However, once one learns that USCIS routinely conducts such investigations and determines the bona fides of a marriage without interviewing the petitioning party within the context of beneficiaries that are abroad,\textsuperscript{484} this argument becomes rather futile. It makes little sense to require less of an investigation when the beneficiary is not even physically located in the United States. USCIS cannot even defend this by claiming that such approval is a rare occurrence. In fact, immigration officials always approve these particular I-130 petitions based upon documentary evidence without interviewing the petitioning spouse.\textsuperscript{485}

The government also has made much of the regulations in the adjustment of status regime that provide the authority to revoke the approval of an immigrant visa petition if the petitioner has died.\textsuperscript{486} Although § 1151 does not expressly authorize the denial of an unapproved visa petition, the government refuses to recognize a distinction between predeath and postdeath approval.\textsuperscript{487} If an approved petition can be revoked for the petitioner’s death, then why can’t it be denied for the same reason? This is a valid inquiry, one that the plaintiffs have had a difficult time answering. However, the following three points can be made which minimize the persuasiveness of the government’s assertion.

First, § 1155 is irrelevant to these particular cases because the concepts of revocation and potential humanitarian discretion apply only to approved petitions.\textsuperscript{488} None of the Form I-130 visa petitions discussed in Part I of this Note were approved. Thus, there is justification for simply ignoring this statute as having no relevance to the issue at hand. Additionally, even if the revocation statute has some significance, it never contemplates that

\textsuperscript{480} See supra notes 300–02 and accompanying text.
\textsuperscript{481} See supra note 290 and accompanying text.
\textsuperscript{482} See supra Part II.B.2.a.
\textsuperscript{483} See supra note 293 and accompanying text.
\textsuperscript{484} See supra note 310 and accompanying text.
\textsuperscript{485} See supra notes 311–14 and accompanying text.
\textsuperscript{486} See supra Part II.B.2.b.
\textsuperscript{487} See supra Part II.B.2.b.
\textsuperscript{488} See supra note 329 and accompanying text.
the death of the petitioner automatically revokes an approved petition.\textsuperscript{489} The language only says that the Secretary of Homeland Security may, for good and sufficient cause, revoke the approval.\textsuperscript{490} Lastly, even in the case of automatic revocation, there is still a chance for humanitarian discretion that would reinstate immediate relative status.\textsuperscript{491} No analogous discretion exists when death occurs preapproval. At a minimum, USCIS could at least award some discretion when rejecting these I-130 petitions.

Another way to ascertain congressional intent is to look at legislative action that has been taken in separate, but related, contexts. While the government has pointed to the USA PATRIOT Act and the National Defense Authorization Act to demonstrate that Congress can, and has, provided clear immigration benefits to surviving spouses,\textsuperscript{492} this argument is unsatisfactory. Just because Congress has granted additional rights to surviving spouses within the context of military and terrorist activity, this does not imply a congressional intent to strip immediate relative status from all other applicants who have filed the necessary petitions and applications. Instead, it makes logical sense that these statutes are explicitly adding a separate right for specific classes of surviving spouses to self-petition under the second sentence of §1151. Thus, these acts would have no bearing upon the first sentence of §1151.

The last potential source of congressional intent is the bills that progressed through the 110th Congress.\textsuperscript{493} Although discussed under Step Two in Part II, recent legislative initiatives could be indicative of Congress's past objectives in enacting §1151. This legislation gained substantial support in both the House of Representatives and the Senate and passed through several legislative hurdles.\textsuperscript{494} Thus, the possibility of congressional amendment could easily indicate that the Agency is getting congressional intent wrong and that the policy underlying \textit{Freeman} is supported throughout Congress, the rulemaking authority that issued the statute in the first place.

However, two other possibilities cannot be ignored and thus negate any clear finding of congressional intent. First, the possible bills could also be an acknowledgement by Congress that the statute it wrote means what the Agency thinks it means, and thus requires amendment. Alternatively, it is feasible that Congress has simply changed its mind regarding the appropriate public policy. If either of these two options is plausible, then the recent bill initiatives cannot be utilized as a definitive measure of congressional sentiment.

\textsuperscript{489} See supra notes 331-33 and accompanying text.
\textsuperscript{490} See supra notes 331-33 and accompanying text.
\textsuperscript{491} See supra note 60 and accompanying text.
\textsuperscript{492} See supra Part II.B.3.
\textsuperscript{493} See supra Part II.D.3.b.
\textsuperscript{494} See supra Part II.D.3.b.
Additionally, Congress's use of private bills to ameliorate the harsh outcome on certain sufferers of the widow penalty could be an indicator of Congress's view of § 1151(b)(2)(A)(i). However, as with public legislation, this proposition is unconvincing. The entire purpose of private legislation is to mitigate the application of the law to a particular individual, without changing the law as generally applicable. Therefore, private bills could also be considered a recognition by Congress that the statute as written does not provide relief for the rejected I-130 beneficiaries discussed in this Note.

Nevertheless, based upon the statute itself, it is difficult to find that "immediate relative" is an ambiguous term that was left undefined by Congress. Congress provided an explicit and succinct definition in the first sentence of § 1151. Thus, the statutory text is clear and unambiguous. The statute directly addresses the issue, and the Agency would fail under the first prong of Chevron.

3. The Failure of Step Two: An Unreasonable Interpretation

Assuming arguendo that Chevron provides the appropriate governing framework, and that the statute and accompanying regulations are ambiguous or silent as to the appropriate definition of spouse to attain immediate relative status, the government's construction of the statute should still not be awarded any deference. It is not merely that the Agency's interpretation is inferior to that of the plaintiffs; rather it is so illogical and unreasonable that a court should be able to substitute its own judgment for that of the Agency.

To begin with, the terminological discussion in Part II regarding the common meaning of the word "spouse" in various contexts is unconvincing on either side of the debate. On one hand, there is merit to the idea that the term includes a spouse who outlives the other. However, one cannot easily dismiss that the terms marriage and spouse are "inextricably intertwined," thus requiring a spouse to be a married person. When one turns to "spouse" in Black's Law Dictionary and sees that the term "surviving spouse" is listed underneath the definition, it is reasonable to argue either that it expressly incorporates it or expressly excludes it.

Furthermore, while the state laws cited by the government that define marriage in a way that supports their interpretation of the word "spouse" are

495. See supra Part II.D.3.a.
496. See Miller v. AT&T Corp., 250 F.3d 820, 834 (4th Cir. 2001) (finding that the meaning of the word "treatment" in the Act was ambiguous because no definition had been provided).
498. See supra Part II.C.1.
499. See supra note 361 and accompanying text.
500. See supra notes 365, 377 and accompanying text.
mildly persuasive, they have no bearing on the INA or the particular statute at issue. Overall, neither side’s arguments regarding the common definition of spouse are compelling enough to make the government’s interpretation so unreasonable as to fail the second prong of *Chevron*. This is true despite the government’s ineffective argument that if the plaintiffs’ position was accepted, there would be no need for the concept of “widow” or “widower.” Rather, there are two matters worth discussing that illustrate the unreasonableness of USCIS’s construction of the ambiguous statute.

The first concern is that the interpretation taken by USCIS is not in accordance with the purpose of the statute. Because the Agency’s position is in conflict and unaligned with the policy judgments underlying INA’s statutory scheme, it seems wholly unsupported and therefore unreasonable. Congress enacted the 1990 amendments to the INA for the purpose of deterring fraud by aliens who wed U.S. citizens in sham marriages for the purpose of acquiring LPR status. Thus, although there may be some justification for USCIS to require generally for marriages to last two years as proof of their legitimacy, punishing the beneficiary whose spouse died before this durational mark in no way serves this goal.

The petitioners in these cases filed all the necessary paperwork and an investigation into the merits of their marriage is still possible, even after the death of their respective spouses. Allowing the beneficiaries to continue to qualify as immediate relatives in no way undermines USCIS’s purpose of deterring sham marriages. Rather, in the process of attempting to deter marriage fraud, USCIS has forsaken the underlying goal of the entire INA, which is family reunification. Since the widow penalty in no way satisfies the objective of marriage fraud deterrence, it cannot be viewed as a reasonable approach. Rather, its effect of punishing widows of legitimate marriages contravenes the meaning of the statute.

The second matter exemplifying USCIS’s failure to pass Step Two is that it is simply unreasonable to grant immediate relative status to some Form I-130 beneficiaries but not to all, when the only difference between the two groups is the unintended and unfortunate death of the petitioners. It is irrational to award the benefits of immediate relative status to someone who was lucky enough to have their petition adjudicated before their husband’s death and/or before the two year durational mark because USCIS happened to “perform the ministerial act of approving the petition,” but to refuse the award to someone who was not as fortunate.

Additionally, it is completely illogical that an alien whose citizen spouse filed the necessary paperwork in a prompt manner, but died twenty-three

501. See supra Part II.C.1.c.
502. See supra note 380 and accompanying text.
503. See supra notes 83–84 and accompanying text.
504. See supra note 36.
506. See supra note 328 and accompanying text.
months into the marriage, would be denied the ability to become an LPR of the United States; but an alien whose citizen spouse made no effort to comply with USCIS procedures in a timely manner but died twenty-four months into the marriage would still attain the ability to become an LPR. Clearly a temporal line must be drawn somewhere for these purposes, and this Note does not seek to claim that there should be no qualifications for immediate relative status. However, if a line is to be drawn it should be done in a way with some underlying logic, such as corresponding with the act of marriage.

The court in Freeman could find no "talismanic significance" of drawing the line at two years, and it seems odd that that wives and husbands would be required to reach this durational trigger in order to qualify as immediate relatives. It seems impermissible to allow aliens to suffer on the basis of two things that are completely out of their control: the pace of adjudication and their spouse’s death.

It makes no logical sense to argue that the passage of time and the promptness of adjudication would determine someone’s spousal status for immigration purposes. Instead, it is exceedingly more logical for Congress to have intended for the petitioner’s conscious and purposeful decision to promptly file an I-130 petition to be the proper basis for the determination.

Overall, even if the statute is ambiguous, and assuming that the common meaning of the term “spouse” is similarly unclear, the result urged by the government is manifestly unjust and unreasonable. The government itself has admitted that extending the ability to remain in the United States to some surviving spouses is legitimate because it “recogniz[es] ties between an alien and the country of the alien’s deceased spouse.” That rationale does not fade away within the context of the widow(er)s discussed in this Note. Moreover, a connection between an alien and their loved one’s home country is not the only bond that may be present; there may also be the existence of citizen children and other family ties.

The immigration policy of our country should not be to separate these vital familial links through deportation. Although deportation is not the subject of this Note, it is the logical end for those individuals faced with the widow penalty. The surviving spouses whose applications have been denied, but are physically present in the United States, live in constant fear of deportation; a system that Professor Daniel Kanstroom has called “an

507. See supra note 274 and accompanying text.
509. See Harden, supra note 1 ("Many of these widows have infants—U.S. citizens—who will be de facto deportees when their mothers exhaust their appeals and are ordered out of the country.").
510. Robinson v. Napolitano, No. 07-2977, 2009 U.S. App. LEXIS 1946, at *35 (3d Cir. Feb. 2, 2009) (Nygaard, J., dissenting) (stating how Mrs. Robinson will be removed from the country, because no other relief is available to her other than the extraordinary action of a private bill).
511. See Harden, supra note 1 ("Legal experts say that...[these] foreign-born surviving spouses...are on the brink of deportation.").
anachronistic embarrassment.”

International human rights law has recognized the importance of family unity and a USCIS policy that contravenes this objective should not be permitted to exist.

B. The Fix: USCIS Should Reform Its Policy

Since it is apparent that USCIS’s interpretation of the statute is not correct, and this in turn has led to an unreasonable immigration policy, it is necessary to consider how best to remedy the situation. Even the new Secretary of DHS, Janet Napolitano, has recognized the need to address the widow penalty. She posed the question, “What are the regulatory, legislative, and litigation options that could be considered to immediately address the situation of these widows and widowers?”

It seems clear that one possibility is case-by-case adjudication in the federal courts. If the cases that were decided in the district courts are appealed up to the federal appellate courts and affirmed there, then USCIS would be bound to follow those decisions within those circuits. This course of events is especially likely considering that USCIS has not accepted past verdicts, but rather has appealed virtually every losing case in the federal courts—what Michael Chertoff, former Secretary of Homeland Security, has referred to as “a normal part of responsible lawyering.” Furthermore, if enough courts of appeals rule on this issue, it is plausible for the Solicitor General to request certiorari from the Supreme Court. There is a sufficient likelihood of this, considering the recent decision in Robinson and the subsequent conflict between the Third and Ninth Circuit Courts of Appeals. However, the Supreme Court itself has observed that “it may be impossible to challenge an immigration pattern or practice in the context of an individual hearing.”

Another available form of action that litigants have used to challenge government administration of immigration laws is the class action. There is

515. Id. at 223.
516. See supra note 180 and accompanying text.
currently a pending class action suit regarding this issue in the preliminary stages;\textsuperscript{519} however this may not be a sensible resolution. Although it carries the promise of "broad systematic reform," there are threats to the future of the immigration class action that may imperil this form of lawsuit.\textsuperscript{520} Such threats include "(1) a general congressional willingness to restrict immigration judicial review; (2) the application of waivers of judicial review to immigration law; and (3) legislative jurisdiction-stripping attacks more specific to the immigration class action."\textsuperscript{521} Considering these hazards, one should not rely upon the class action as a method to bring about relief for victims of the widow penalty.

Legislation such as the bills discussed in Part II\textsuperscript{522} would also ameliorate the harsh effects of the widow penalty, however it is an unnecessary resolution. Since the statute itself is unambiguously written in favor of the rejected Form I-130 beneficiaries, the easiest and most efficient solution is a simple administrative policy change: for USCIS to retract its memorandum and alter its policy to conform to the decision in \textit{Freeman}. At this point, the holding in \textit{Freeman} applies only to I-130 petitions filed under similar circumstances inside of the Ninth Circuit. Thus, USCIS should issue a new memorandum in which it would mandate that the holding of \textit{Freeman} applies in every federal court circuit, thereby eliminating the widow penalty. There is no need to change the statute itself, for it clearly and unambiguously supports the beneficiary’s right to be and to remain an immediate relative. The problem is not \textsection{1151(b)(2)(A)(i)}; the problem is the Agency’s mistaken interpretation of it.

\textbf{CONCLUSION}

This Note discussed the policy of USCIS to automatically deny a properly filed immediate relative petition for a beneficiary if their petitioning American spouse died prior to its adjudication and before the couple’s two-year wedding anniversary. After analyzing all relevant arguments on both sides of the debate, the ultimate conclusion of this Note is that the Ninth Circuit’s interpretation of immediate relative to include a surviving alien spouse for immigration purposes is both the superior and only reasonable understanding of the relevant statute.

Once a U.S. citizen chooses to legitimately marry a noncitizen, the alien should have every fair and reasonable opportunity to enter and/or remain in this country, despite the citizen’s untimely and unfortunate death. Duly filed petitions, regardless of a death through no fault of the beneficiary, should be given just and adequate consideration. The current procedure established by USCIS has created a “regulatory crevice” into which these

\textsuperscript{519} Hootkins v. Chertoff, No. 07-5696 (C.D. Cal. filed Aug. 30, 2007).
\textsuperscript{520} Family, \textit{supra} note 518, at 74.
\textsuperscript{521} \textit{Id}.
\textsuperscript{522} \textit{See supra} Part II.D.3.b.
widow and widowers are dropped. However, they should not be punished merely because their petition is "stuck in the government's bureaucracy." The only exception to this should be aliens who do enter into sham marriages for immigration purposes.

The harsh result of the widow penalty is undeniable, and even Carla Freeman's story does not have a happy ending. As a result of winning her legal challenge in court, Mrs. Freeman's immigration case was remanded to the district director of USCIS with the authority to adjudicate her immediate relative preference petition. But, the power to act does not necessitate an action, and immigration officials continued to deny Mrs. Freeman's adjustment of status application. In the end, a three judge panel of the Ninth Circuit Court of Appeals refused to issue a writ of mandamus, in effect making her legal challenge fruitless. Today, Mrs. Freeman cannot return to the United States, even to see her own husband's grave in Clarkston, Washington.

As for Mrs. Robinson, her lawyer Jeffrey Feinbloom plans to petition for a rehearing en banc, requesting a hearing in front of the entire full circuit of twenty-one judges (although only fourteen may hear a case en banc). The entire Third Circuit Court of Appeals would then have the option to grant or deny that request. If that fails, he says he will turn to the U.S. Supreme Court. However, she too will ultimately face deportation if her lawyer is unsuccessful.

Surviving Spouses Against Deportation, a nonprofit organization formed to end the widow penalty, has summarized the senselessness of USCIS's policy in the following way: "USCIS nevertheless routinely approves applications where the marriage is less than two years old, and routinely approves waivers for those whose applications happened to be adjudicated prior to the death. Administrative delay and the happenstance of a death are the reasons USCIS treats these cases differently." Deportation is an unforgiving and unjust consequence for those aliens that followed necessary procedures to satisfy a statute, but were confronted by a government agency's irrational and illogical interpretation of it.
If, as a nation, we wish to promote legal migration into our country, then our laws and regulations must reflect a sensible and rationale approach to immigration. An irrational policy tarnishes our international image and, as a nation built upon a patchwork of immigrants, betrays our past. This sentiment was best expressed by Judge Richard L. Nygaard, who dissented in *Robinson*. He wrote that "it is untoward of this nation of immigrants, we who have passed through the portals of citizenship, to coldly and impassively slam the door behind us on innocent aspirants who dream to follow." 533
