O

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CAROLYN ROBB HOOTKINS, ET AL. Plaintiff(s), vs. MICHAEL CHERTOFF, U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL. Defendant(s).	Case No. CV 07-5696 CAS ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS COMPLAINT UNDER FED. R. CIV. P. 12(b)(1) and 12(b)(6)

I. INTRODUCTION

On August 30, 2007, plaintiffs, [1] on behalf of themselves and others similarly situated, filed the instant class action case. Plaintiffs seek injunctive, declaratory, and mandamus relief against defendants Michael Chertoff, Secretary of the Department of Homeland Security ("DHS"); Emilio Gonzalez, Director of United States Citizenship and

[1] Plaintiffs are Carolyn Robb Hootkins, Ana Maria Moncayo-Gigax, Suzanne Henriette De Mailly, Sara Cruz Vargas de Fisher, Raymond Lockett, Elsa Cecilia Brenteson, Pauline Marie Gobeil, Dahianna Heard, Rose Freeda Fishman-Corman, Khin Thidar Win, Diana Gejac Engstrom, Maria Del Carmen Diaz-Ruiz, Gladys Walsh, Li Ju Lu, Yelena Arias Angulo, Purita Manuel Poindexter, Tracy Lee Rudl, Dieu Ngoc Nguyen, Agnieszka Bernstein, Sarah Bayor, Stella Standifer, and Farah Batool.

Immigration Services ("USCIS"); Condoleezza Rice, United States Secretary of State; and Maura Harty, Assistant Secretary for the Bureau of Consular Affairs, in their official capacities (collectively, "defendants" or the "government"). The complaint alleges that defendants wrongfully determined that plaintiffs are not entitled to immediate relative status for purposes of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1151 et seq. Plaintiffs request that the Court compel defendants (1) to find, as a matter of statutory construction, that plaintiffs are "immediate relative" spouses for purposes of the INA; (2) to reopen and adjudicate their deceased citizen spouses' immigrant visa petitions; and (3) to reopen and adjudicate (a) plaintiffs' applications for adjustment of status or (b) plaintiffs' immigrant visa applications.

On November 13, 2007, defendants filed the instant motion to dismiss. On November 26, 2007, plaintiffs filed an opposition thereto, and a cross-motion for summary judgment. On January 16, 2008, defendants filed their reply. A hearing was held on January 28, 2008. The Court denied plaintiffs' motion for summary judgment without prejudice to its being renewed, continued defendants' motion to dismiss, and ordered the parties to file further briefing. Defendants filed their supplemental memorandum to their motion to dismiss on February 11, 2008. Plaintiffs filed their supplemental opposition thereto on February 15, 2008. A hearing was held on March 3, 2008. After carefully considering the parties' arguments, the Court finds and concludes as follows.

II. FACTUAL BACKGROUND

Plaintiffs are all aliens who were previously married to United States citizens. The United States citizen spouses, except for plaintiff Nguyen's spouse, filed a Form I-130, Petition for Alien Relative ("I-130 petition"), on behalf of plaintiffs pursuant to 8 U.S.C. § 1154(a)(1)(A)(i).[2] The same day that their citizen spouses filed the I-130 petitions, each

[2] Plaintiff Nguyen previously filed and received a Form I-129F, Petition for Alien Fiancé. Plaintiff Nguyen then married her United States citizen spouse within ninety days from entry into the United States under K-1 visa status, and applied for adjustment of (continued...)

of the alien plaintiffs, except for plaintiffs Walsh and Lu, filed a Form I-485, Application to Register Permanent Resident Status or to Adjust Status ("I-485 application").[3]

Except for plaintiffs Walsh and Lu, plaintiffs' United States citizen spouses each died after filing their respective I-130 petitions, but before adjudication of said petitions. USCIS then denied the I-130 petitions based on defendants' determination that plaintiffs were not "immediate relative[s]" for purposes of the INA because plaintiffs' citizen spouses died before the two-year marriage anniversary of the citizen spouse and the alien spouse. Plaintiffs Walsh and Lu's I-130 petitions were initially approved, but then automatically revoked by USCIS upon the death of their spouses. USCIS has not yet acted upon plaintiff Engstrom's petition and application.

III. STATUTORY AND LEGAL CONTEXT

The INA imposes a numerical quota on the number of immigrant visas that may be issued and/or the number of aliens who may otherwise be admitted into the United States for permanent residence. See 8 U.S.C. § 1151(a). However, aliens who are "immediate relative[s]" of United States citizens are exempt from these numerical limitations. 8 U.S.C. § 1151(b)(2)(A). To receive an immigrant visa by virtue of one's status as an "immediate relative" spouse, the alien's United States citizen spouse must first petition the Attorney General claiming that the alien is entitled to "immediate relative" status. 8 U.S.C. § 1154(a)(1)(A)(I). "Immediate relative" is a term defined in 8 U.S.C. § 1154(b)(2)(A)(I):

> For purposes of . . . subsection [1154(b)(2)(A)(I)], the term immediate relative 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

---

[2](...continued)
status.

[3] Because plaintiffs Walsh and Lu were not in the United States, the United States Department of State began processing their immigrant visas after the I-130 petitions of their citizen spouses were approved.

> age. In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 204(a)(1)(A)(ii) [8 U.S.C. § 1154(a)(1)(A)(ii)] within 2 years after such date and only until the date the spouse remarries. For purposes of this clause, an alien who has filed a petition under clause (iii) or (iv) of section 204(a)(1)(A) of this Act [8 U.S.C. § 1154(a)(1)(A)] remains an immediate relative in the event that the United States citizen spouse or parent loses United States citizenship on account of the abuse.

8 U.S.C. § 1154(b)(2)(A)(I) (internal quotations omitted). After the citizen spouse files the I-130 petition, the Attorney General conducts an investigation to determine whether "the facts stated in the petition are true and that the alien on behalf of whom the petition is made is an immediate relative." 8 U.S.C § 1154(b). If the Attorney General determines that the aforementioned is true, then "[t]he Secretary of State shall . . . authorize the consular officer concerned to grant [the alien beneficiary immediate relative] status." Id.

Once the I-130 petition is approved, the alien-beneficiary may then request an adjustment of immigrant status to that of legal permanent resident pursuant to 8 C.F.R. § 245.2(a)(2) by filing an I-485 application for adjustment of status.[4] See 8 U.S.C. § 1255(a). 8 U.S.C. 1255(a) provides

> The status of an alien who was inspected and admitted or paroled into the United States . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully

[4] The I-130 petition and I-485 application may also be filed simultaneously. See 8 U.S.C. §§ 1151(b)(2)(A)(i), 1255(a); 8 C.F.R. § 245.2.

> admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

Thus, to have one's status adjusted from alien to that of legal permanent resident, the alien must be eligible to receive an immigrant visa and the immigrant visa must be immediately available at the time that the alien's I-485 application is adjudicated. 8 C.F.R. § 245.2(a)(2)(I). Accordingly, the alien must have an approved I-130 petition to be eligible for adjustment of status.[5]

If the citizen spouse dies after the I-130 petition has been approved, but before final decision on the alien's I-485 application, the I-130 petition is automatically revoked. 8 C.F.R. § 205.1. 8 C.F.R. § 205.1(a)(3) affords an exception to this rule of automatic revocation allowing USCIS, at its discretion, to reinstate the I-130 petition for humanitarian reasons if another relative is "willing and able to file an affidavit of support as a substitute sponsor." Mot. to Dismiss at 5. Defendants argue that according to Abboud v. INS, 140 F.3d 843 (9th Cir. 1998) and Dodig v. INS, 9 F.3d 1418 (9th Cir. 1993), this humanitarian relief exception is not available if the citizen spouse dies before his or her I-130 petition has been approved. According to defendants, in order to be considered an "immediate relative" for purposes of 8 U.S.C. § 1115(b)(2)(A)(I), the alien spouse must have been married to his or her petitioning citizen spouse for at least two-years at the time of the citizen spouse's death. Defendants argue that when an alien's United States citizen spouse dies before the couple's two year marriage anniversary, the alien loses his or her spousal status. Defendants rely primarily

---

[5] The determination to ultimately grant the alien's I-485 application for adjustment of status is entirely within the discretion of the Attorney General. 8 U.S.C. § 1255(a); Matter of Tanahan, 18 I. & N. Dec. 339, 342 (B.I.A. 1981) ("An applicant who meets the objective prerequisites for adjustment of status is in no way entitled to that relief."); INS v. Chadha, 462 U.S. 919, 937 (1983) (same).

on the Board of Immigration Appeals' (sometimes referred to herein as the "Board") decision in Matter of Varela, 13 I. & N. Dec. 453 (B.I.A. 1973), to support their arguments. In Matter of Varela, the Board held that if the petitioning citizen spouse dies before the Attorney General has approved the citizen spouse's I-130 petition, the alien beneficiary may no longer be considered "the spouse of a United States citizen" for purposes of the INA. Matter of Varela, 13 I. & N. Dec. at 454. According to Matter of Varela, the death of the citizen spouse ends the legal marriage, and thereby strips the alien spouse of his or her "immediate relative" status. Id.

Defendants argue that the Board later affirmed this holding in Matter of Sano, 19 I. & N. Dec. 299 (B.I.A. 1985). In Matter of Sano, the Board held that an alien spouse lacks standing to appeal from the denial of the citizen spouse's I-130 petition. Matter of Sano, 19 I. & N. Dec. at 301. The Board concluded that it thereby "lacks jurisdiction to address an appeal by the beneficiary from the denial of a visa petition." Id. at 300-01. The Board further stated that its prior review of the beneficiary's appeal in Matter of Varela was thus "inappropriate" because it was "extra-jurisdictional." Id. at 300. Defendants contend that the Board's decisions in Matter of Varela and Matter of Sano are in accord with the general rule in the United States that marriage ends upon the death of a spouse. Defendants further contend that the Board's construction of the "immediate relative" statute is in accord with the ordinary meaning of "spouse."

In Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006), the Court of Appeals for the Ninth Circuit rejected the arguments now advanced by defendants. Carla Freeman, ("Mrs. Freeman"), an alien, married Robert Freeman ("Mr. Freeman"), a United States citizen. Id. at 1033. Mr. Freeman filed an I-130 petition on Mrs. Freeman's behalf. Id. That same day, Mrs. Freeman filed an I-485 application for adjustment of status to that of lawful permanent resident. Id. Just prior to the couple's first wedding anniversary, Mr. Freeman was killed in a car accident. Id. Mr. Freeman's I-130 petition and Mrs. Freeman's I-485 application were still pending. Id. USCIS then denied Mrs. Freeman's I-485 application. Id. USCIS found that Mrs. Freeman was not entitled to "immediate relative" status because

she was no longer the spouse of a United States citizen. Id. USCIS ordered Mrs. Freeman to leave the United States. Id. She petitioned for a writ of habeas corpus in federal district court challenging this decision. Id. The district court denied her petition, and she appealed to the Ninth Circuit. Id. The government advanced largely the same arguments before the Ninth Circuit as it does now before this Court:

> The government, relying primarily on the statute's second sentence ("In the case of an alien who was the spouse of a citizen . . ."), read[] § 1151(b)(2)(A)(I) as "requiring that in order to be an 'immediate relative' under immigration law the alien 'spouse' (wife) must have been married to the United States citizen 'spouse' (husband) 'for at least 2 years at the time of the citizen"s [sic] death.'" Under the government's proffered reading, if the citizen spouse dies before the second anniversary of the qualifying marriage, the alien spouse is no longer considered a 'spouse' and is no longer entitled to an adjustment of status.

Id. at 1038.

The Ninth Circuit rejected the government's interpretation:

> [C]onclud[ing], through [its] review of the language, structure, purpose and application of the statute, 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. As such, the widowed spouse remains entitled to the process that flows from a properly filed adjustment of status application. The two-year durational language in the second sentence of § 1151(b)(2)(A)(I) grants a separate right to an alien widow to self-petition, within two years of the citizen spouse's death, by filing a form I-360 where the citizen spouse had not filed an immediate relative petition prior to his death.

Id. at 1039. The court held that because Mrs. Freeman had filed all necessary forms, she

"must be considered a spouse for purposes of her adjustment of status application." Id.

Plaintiffs are now before this Court seeking to have Freeman applied to all of their cases, or alternatively, as to plaintiffs whose cases arose outside of the jurisdiction of the Ninth Circuit, requesting that the Court independently conclude that the death of their United States citizen spouses did not deprive them of their "immediate relative" statuses. Defendants, on the other hand, assert (1) that USCIS will apply Freeman only for cases arising within the jurisdiction of the Ninth Circuit and only if the alien spouse filed an I-485 application before the death of his or her citizen spouse and (2) that USCIS will apply Matter of Varela and Matter of Sano for cases arising outside of the jurisdiction of the Ninth Circuit.

IV. LEGAL STANDARD

A. MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1)

A motion to dismiss an action under Fed. R. Civ. P. 12(b)(1) raises the question of the federal court's subject matter jurisdiction over the action. The objection presented by this motion is that the court has no authority to hear and decide the case. This defect may exist despite the formal sufficiency of the allegations in the complaint. See T.B. Harms Co. v. Eliscu, 226 F. Supp. 337, 338 (S.D. N.Y. 1964), aff'd 339 F.2d 823 (2d Cir. 1964) (the formal allegations must yield to the substance of the claim when a motion is filed to dismiss the complaint for lack of subject matter jurisdiction). When considering a Fed. R. Civ. P. 12(b)(1) motion challenging the substance of jurisdictional allegations, the Court is not restricted to the face of the pleadings, but may review any evidence, such as declarations and testimony, to resolve any factual disputes concerning the existence of jurisdiction. See McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988).

The burden of proof in a Fed. R. Civ. P. 12(b)(1) motion is on the party asserting jurisdiction. See Sopcak v. Northern Mountain Helicopter Serv., 52 F.3d 817, 818 (9th Cir. 1995); Ass'n of Am. Med. Coll. v. United States, 217 F.3d 770, 778-79 (9th Cir. 2000). If jurisdiction is based on a federal question, the pleader must show that he has alleged a claim under federal law and that the claim is not frivolous. See 5B Charles A. Wright &

Arthur R. Miller, Federal Practice and Procedure § 1350, pp. 211, 231 (3d ed. 2004). On the other hand, if jurisdiction is based on diversity of citizenship, the pleader must show real and complete diversity, and also that his asserted claim exceeds the requisite jurisdictional amount of $75,000. See id.

B. MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

A Fed. R. Civ. P. 12(b)(6) motion tests the legal sufficiency of the claims asserted in a complaint. "While a complaint attacked by a [Fed. R. Civ. P.] 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007). "[F]actual allegations must be enough to raise a right to relief above the speculative level." Id. at 1965.

In considering a motion pursuant to Fed. R.Civ. P. 12(b)(6), a court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998). The complaint must be read in the light most favorable to the nonmoving party. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). However, a court need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. Sprewell, 266 F.3d at 988; W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

Dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is proper only where there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990).

Furthermore, unless a court converts a FedR. Civ. P. 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). In re American Cont'l Corp./Lincoln Sav. & Loan Sec. Litig., 102 F.3d 1524, 1537 (9th Cir. 1996), rev'd on other

grounds sub nom Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). A court may, however, consider exhibits submitted with or alleged in the complaint and matters that may be judicially noticed pursuant to Fed. R. Evid. 201. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999); Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

For all of these reasons, it is only under extraordinary circumstances that dismissal is proper under Fed. R. Civ. P. 12(b)(6). United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986); see Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000).

V. DISCUSSION

A. MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1)

1. SUBJECT MATTER JURISDICTION

Defendants contest subject matter jurisdiction, arguing that the Court lacks jurisdiction to hear plaintiffs' claims because of (1) plaintiffs' failure to exhaust available administrative remedies and (2) for lack of final agency action.

a. Federal Question Jurisdiction

The complaint alleges that this Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331. The complaint further alleges that the Court has jurisdiction under the INA, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq., and the Mandamus and Venue Act ("Mandamus Act"), 28 U.S.C. §§ 1361 et seq.[6]

[6] "[W]hile beyond dispute that the APA does not provide an independent basis for (continued...)

Federal question jurisdiction "refers to the subject matter jurisdiction of federal courts for claims 'arising under' the U.S. Constitution, treaties, federal statutes, administrative regulations, or common law." W. Schwarzer, A. Tashima & J. Wagstaffe, The Rutter Group Guide: Fed. Civ. Proc. Before Trial, § 2:54 (2006); 28 U.S.C. § 1331. Here, plaintiffs ask the Court to interpret the meaning of "spouse" under 8 U.S.C. § 1151(b)(2)(A)(I). This presents a "purely legal question[]." Freeman v. Gonzales, 444 F.3d 1031, 1037 (9th Cir. 2006). Similarly, the issue of "whether an alien is statutorily eligible for adjustment of status" is a "legal question." Ortega-Cervantes v. Gonzales, 501 F.3d 1111, 1113 (9th Cir. 2007); see also Pinho v. Gonzales, 432 F.3d 193, 204 (3d Cir. 2005) ("Determination of eligibility for adjustment of status - unlike the granting of adjustment itself - is a purely legal question and does not implicate agency discretion.").

The Real ID Act of 2005, enacted on May 11, 2005, limits judicial review of denials of discretionary relief. See 8 U.S.C. § 1252(a)(2)(B). Specifically, 8 U.S.C. § 1252(a)(2)(B) provides that

> no court shall jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this title [8 U.S.C. §§ 1151 et seq.] to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 208(a) [8 U.S.C. § 1158(a)].

However, in Freeman, the Ninth Circuit, in concluding that it had jurisdiction over the alien plaintiff's final order of deportation, found that this limitation does not apply to "purely legal claims." Freeman, 444 F.3d at 1037. Based on the foregoing, the Court concludes that it has subject matter jurisdiction over plaintiffs' instant claims which present only

---

[6](...continued)
subject matter jurisdiction, a federal court has jurisdiction pursuant to 28 U.S.C. § 1331 over challenges to federal agency action as claims arising under federal law, unless a statute expressly precludes review." Gallo Cattle Co. v. United States Dep't of Agric., 159 F.3d 1194, 1198 (9th Cir. 1998).

questions of interpretation of a federal statute.

b. Claims under the APA and/or the Mandamus Act

Defendants argue that the Court is deprived of jurisdiction to adjudicate plaintiffs' claims because plaintiffs did not exhaust their administrative remedies prior to seeking judicial review and for lack of final agency action. Defendants concede that exhaustion is not statutorily required. However, citing to Laing v. Ashcroft, 370 F.3d 994 (9th Cir. 2004), defendants nonetheless urge the Court to require exhaustion. Id. at 997 (requiring habeas petitioner to exhaust administrative remedies before seeking judicial review of the Board's decision of removal, although exhaustion is not required by statute).

The Court thus turns to whether it has jurisdiction to adjudicate plaintiffs' claims under the Mandamus Act and/or the APA.[7]

---

[7] During the hearing held on March 3, 2008, defendants' counsel asserted that R.T. Vanderbilt Co. v. Babbitt, 113 F.3d 1061 (9th Cir. 1997), instructs that a court is not required to conduct a separate APA and Mandamus Act analysis. Defendants' counsel further argued that the Court should look only to the APA, and not the Mandamus Act, to determine whether it has jurisdiction because the APA provides the "primary basis of jurisdiction." Tr. of March 3, 2008 hearing (rough draft) at 2.

Defendants' reliance on R.T. Vanderbilt Co. is misplaced. In R.T. Vanderbilt Co., the Ninth Circuit analyzed the merits of the plaintiff's claim to determine if it was entitled to relief. While in Independence Mining Co. v. Babbitt, 105 F.3d 502 (9th Cir. 1997), on which R.T. Vanderbilt Co. relied, the Ninth Circu it may have expressed a preference for first analyzing jurisdiction under the APA, this is because where the court has jurisdiction under the APA there is no need to analyze jurisdiction under the Mandamus Act if the relief sought under the APA and the Mandamus Act is essentially the same. See Jianhua Dong v. Chertoff, 513 F. Supp. 2d 1158, 1162 (N.D. Cal. 2007) ("[I]f the Court has jurisdiction pursuant to one, it need not analyze jurisdiction with respect to the other."); Abbasfar v. Chertoff, 2007 U.S. Dist. LEXIS 65050, at *11-12 (N.D. Cal. 2007) ("Because the same relief is sought and jurisdiction is present under the APA, this order need not address whether mandamus jurisdiction exists in the context of petitioner's claim."); Yufeng Liu v. Chertoff, 2007 U.S. Dist. LEXIS 65687, at *12-13 (D. Or. 2007) (analyzing its jurisdiction under the APA first because unlike the Mandamus Act, the APA does not require exhaustion of remedies, and reasoning that if there is jurisdiction under the APA the court need not address the question of jurisdiction under the Mandamus Act); (continued...)

i. The APA

The APA permits "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to bring suit against the agency. 5 U.S.C. § 702. As defined, "agency action" includes "failure to act." 5 U.S.C. §551(13). The district court is explicitly empowered to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C § 706(1). For relief pursuant to 28 U.S.C. § 1331 and the APA, plaintiff must show that defendant had a nondiscretionary duty to act, and unreasonably delayed in processing his application for naturalization. Singh v. Still, 470 F. Supp. 2d 1064, 1067 (N.D. Cal. 2007).

1. Exhaustion of Administrative Remedies

In Darby v. Cisneros, 509 U.S. 137 (1993), the United States Supreme Court held that federal courts may not require a plaintiff to exhaust administrative remedies before seeking review under the APA unless exhaustion is expressly required by statute, or by an agency rule. Id. at 143-44; see also W. Schwarzer, A. Tashima & J. Wagstaffe, The Rutter Group Guide: Fed. Civ. Proc. Before Trial, §§ 1:202.5, 1:205.1 (2006) ("Absent such statute or agency rules, federal courts may *not* require plaintiffs to seek reconsideration or exhaust appeals to higher administrative remedies before pursuing judicial review.") (emphasis in original). Here, it is undisputed that the INA does not require plaintiffs to exhaust their administrative remedies prior to seeking judicial review. Defendants contend

---

[7](...continued)
see also Sun v. Gonzales, 2007 U.S. Dist. LEXIS 84459, at *6-14 (D. Wash. 2007) (conducting separate jurisdictional analysis under the Mandamus Act and the APA); Deepakkumar Himatlal Soneji v. Dep't of Homeland Sec., 525 F. Supp. 2d 1151, 1154-57 (N.D. Cal. 2007) (same). In light of the fact that (1) the Court can require prudential exhaustion under the Mandamus Act, see Hironymous v. Bowen, 800 F.2d 888, 892 (9th Cir. 1986), (2) the Court cannot require prudential exhaustion under the APA, see Darby v. Cisneros, 509 U.S. 137, 143-44 (1993), and (3) the Court's ruling herein that the Court lacks jurisdiction under the APA over certain plaintiffs' claims for lack of final agency action, see discussion infra section V.A.1.b.i.2, a separate jurisdictional analysis under the Mandamus Act and the APA is necessary.

that the Court should require prudential exhaustion under the Ninth Circuit's decision in Laing. Thus, defendants appear to concede that exhaustion is not required by agency rule. See e.g., Bangura v. Hansen, 434 F.3d 487, 499 (6th Cir. 2006) ("This is because Plaintiffs do not appeal an order of removal but the denial of spousal immigration petition. In contrast to orders of removal, the INA does not require aliens to appeal denials of spousal immigration petitions to the BIA before seeking relief in federal court . . . . Therefore, this Court does not have the authority to require Plaintiffs to appeal to the BIA before bringing their claims under the APA in federal court."). However, this Court cannot judicially require exhaustion under the APA where the same is not mandated by statute or agency rule.

While on the one hand defendants argue that the Court should require exhaustion as a "prudential matter," thereby conceding that exhaustion is not required by statute or agency rule, on the other hand defendants urge this Court to follow Rivera-Durmaz v. Chertoff, 456 F. Supp. 2d 943 (D. Ill. 2006), and to conclude that "8 C.F.R. § 245.2(a)(5)(2) (2006) . . . imposes a mandatory exhaustion requirement." Mot. to Dismiss at 1. With respect to the latter contention, defendants argue that this Court does not have jurisdiction under the APA over plaintiffs who are not in removal proceedings, nor with respect to those plaintiffs who are in removal proceedings, because plaintiffs have not exhausted their remedies as required by 8 C.F.R. § 245.2(a)(5)(2), i.e., by agency rule.

For the reasons stated below, see discussion infra, V.A.1.b.ii.2, the Court concludes that Rivera-Durmaz is inapposite. To the extent that Rivera-Durmaz is applicable, the Court declines to follow the court's holding therein. 8 C.F.R. § 245.2(a)(5)(ii) does not expressly require that an alien renew a denied I-485 application in removal proceedings. Instead, 8 C.F.R. § 245.2(a)(5)(ii) states that an alien "may renew a denied application" in removal proceedings. This language is permissive. Courts are split on the question of whether an applicant for adjustment of status may seek judicial review before renewing the request during removal proceedings. See Davies v. Gonzalez, 2007 WL 2120312, at *3-4 (M.D. Fl. 2007) (recognizing split); Hillcrest Baptist Church v. United States, 2007 U.S.

Dist. LEXIS 12782, at *16 (D. Wash. 2007) (citing split of authority). However, according to Ninth Circuit precedent, which binds this Court, a court may exercise jurisdiction to review the denial of an alien's adjustment of status application where the alien has not renewed the denied application in the context of removal proceedings. Jaa v. INS, 779 F.2d 569, 579 (9th Cir. 1986) (citing 8 U.S.C. § 1329; Cheng Fan Kwok v. INS, 392 U.S. 206, 210 (1968); Galvez v. Howerton, 503 F. Supp. 35, 38 (C.D. Cal. 1980) (concluding that district court had jurisdiction to review plaintiff's challenge to denial of her application for adjustment of status); Chan v. Reno, 113 F.3d 1068, 1071 (9th Cir. 1997) (citing Yu Xian Tang and Jaa in concluding that district court had jurisdiction over plaintiffs' challenge to the denial of their applications for adjustment of status); Hillcrest Baptist Church v. United States, 2007 U.S. Dist. LEXIS 12782, at *16 (D. Wash. 2007); Mart v. Bebee, 2001 WL 13624, at *3-4 (D. Or. 2001); see also Young v. Reno, 114 F.3d 879, 881-82 (9th Cir. 1997) (concluding that 8 C.F.R. § 205.2, providing that United States citizen petitioner "*may* appeal" denial or revocation of a petition for preferential status, is not mandatory) (emphasis added); Chang v. United States, 327 F.3d 911, 922 (9th Cir. 2003) ("Absent language foreclosing immediate judicial review, a district court's subject matter jurisdiction is unaffected by the availability of non-mandatory administrative procedures."). Accordingly, the Court concludes that 8 C.F.R. § 245.2(a)(5)(ii) does not impose a mandatory exhaustion requirement.

Based on the foregoing, the Court concludes that plaintiffs are not required to exhaust administrative remedies to pursue their claims under the APA.

2. Lack of Final Agency Action

Defendants next contend that plaintiffs Hotkins, Moncayo-Gigax, Vargas de Fisher, Lockett, Brenteson, Win, Engstrom, Pointdexter, Rudl, Standifer, and Batool are not entitled to judicial review under the APA for lack of final agency action. Defendants assert

that these plaintiffs have "applications or motions to reopen pending before USCIS."[8] Mot. to Dismiss at 13. Defendants argue that accordingly, USCIS has not yet given the "last word" as to these plaintiffs. Id. Defendants assert that because USCIS allows its field adjudicators to follow Freeman as to applicants living within the jurisdiction of the Ninth Circuit, "it is reasonable [sic] assume that the motions will lead to approval of the visa petitions, at least for those plaintiffs who can show that their marriages were bona fide and that they have substitute affidavit of support sponsors." Id. Plaintiffs do not address defendants' argument regarding lack of final agency action. The APA permits "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to bring suit. 5 U.S.C. § 702. Under the APA, a court may review "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. To determine whether an agency action is final, a court must apply the following two-part test:

> First, the action must mark the "consummation" of the agency's decisionmaking process -- it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal citations omitted).

Here, the complaint alleges that plaintiffs Hootkins, Moncayo-Gigax, Vargas de Fisher, Lockett, Brenteson, Win, Engstrom, Pointdexter, Rudl, Standifer, and Batool all have applications or motions to reopen pending before USCIS.[9] Therefore, there is no final

---

[8] The Court notes that the failure to file a motion to reopen does not deprive the Court of jurisdiction under the APA. Castillo-Villagra v. INS, 972 F.2d 1017, 1024-25 (9th Cir. 1992).

[9] During the March 3, 2008 hearing, plaintiffs' counsel asserted that plaintiffs Brenteson's and Standifer's pending applications and/or motions to reopen have been (continued...)

agency action. Accordingly, judicial review under the APA is not available as to plaintiffs Hootkins, Moncayo-Gigax, Vargas de Fisher, Lockett, Brenteson, Winn, Engstrom, Pointdexter, Rudl, Standifer, and Batool. See e.g., M.A. v. Reno, 114 F.3d 128 (9th Cir. 1997) (dismissing case because agency decision was not final). However, this Court retains jurisdiction to adjudicate their claims under the Mandamus Act.

ii. Mandamus and Venue Act

Under the Mandamus Act, the district court is vested with "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." In order to obtain mandamus relief pursuant to 28 U.S.C. § 1361, a plaintiff must demonstrate that "(1) [his or her] claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available." Patel v. Reno, 134 F.3d 929, 931 (9th Cir. 1997).

1. Whether Exhaustion is Required?

The United States Supreme Court has made clear that a plaintiff must exhaust his or her administrative remedies before a writ of mandamus may issue. Heckler v. Ringer, 466 U.S. 602, 615 (1984) ("The common-law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty."). However, the Supreme Court did not state "whether the [exhaustion] requirement is jurisdictional or instead goes to the merits of the question whether the plaintiff is entitled to relief." Hironymous v. Bowen, 800 F.2d 888, 891 (9th Cir. 1986). In Hironymous, the Ninth Circuit Court of Appeal explained that "only when a plaintiff has failed to exhaust administrative remedies made exclusive by statute will a court generally be deprived of jurisdiction. In other cases, there is jurisdiction and a court has discretion in its application

---

[9](...continued)
denied. However, plaintiffs' counsel has not submitted any declaration or affidavit to that effect.

of the exhaustion doctrine." Id. at 892.

Here, it is not disputed that exhaustion is not required by statute. Thus, the Court is not deprived of subject matter jurisdiction by plaintiffs' alleged failure to exhaust administrative remedies.

Nonetheless, a court may require exhaustion in certain circumstances. Hironymous, 800 F.2d at 892; see also Leorna v. United States Dep't of State, 105 F.3d 548, 550 (9th Cir. 1997) ("Generally, a party must exhaust her administrative remedies before she can obtain judicial review of an agency decision."); Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1302 (9th Cir. 1992) ("When a statute does not provide for exhaustion of administrative remedies, a trial court may require exhaustion in the exercise of its discretion."). A court may require exhaustion if "(1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review. United States v. Cal. Care Corp., 709 F.2d 1241, 1248 (9th Cir. 1983).

The Court concludes that prudential exhaustion should not be required in this case. First, the government's position in this matter is clear. See Mot. to Dismiss, Ex. 1 (USCIS Interoffice Mem. from Mike Aytes, Assoc. Dir. of Domestic Operations, USCIS, to Field Leadership (Nov. 8, 2007) ("USCIS Memorandum") at 1 ("This memorandum reaffirms for cases outside the 9th Circuit USCIS policy concerning the effect of a visa petitioner's death, while the petition is still pending, on the authority to approve the petition. For cases within the 9th Circuit, the memorandum directs USCIS adjudicators to follow Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006), in cases involving the same essential facts."). Second, allowing plaintiffs to seek judicial review will not encourage the deliberate bypass of the administrative process. All plaintiffs have petitioned the government for approval of their I-130 applications. Defendants have not adduced any facts or otherwise suggested that plaintiffs are seeking judicial review in a bad faith attempt to avoid the administrative

process. Instead, plaintiffs seek judicial review here because there is a dispute regarding proper statutory interpretation, i.e., because the government does not consider plaintiffs to be "immediate relative" spouses for the purposes of the INA. Third, the USCIS Memorandum makes clear that it is USCIS' position that the death of a United States citizen spouse strips the surviving alien spouse of his or her "immediate relative" spousal status for purposes of the INA.

The Court finds that Laing, on which defendants rely, does not compel a contrary ruling. Laing involved a plaintiff's suit for habeas review under 28 U.S.C. § 2241. Laing v. Ashcroft, 370 F.3d 994, 997 (9th Cir. 2004). After Laing was convicted of a drug related felony, the INS initiated removal proceedings against him. Id. at 996. Laing filed a petition for cancellation of removal pursuant to 8 U.S.C. § 1229(b). Id. His petition was denied by an immigration judge, and the Board of Immigration Appeals affirmed this denial. Id. at 996-97. Laing petitioned the Ninth Circuit for review; the court denied his petition because it was untimely. Id. at 997. Then, Laing filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in district court. Id. The district court assumed jurisdiction and denied Laing's petition. Id. Laing appealed to the Ninth Circuit. Id. On appeal, the court determined that the district court erred in reviewing Laing's habeas petition because Laing had failed to exhaust administrative remedies, and his failure was not excusable. The Ninth Circuit held that while 28 U.S.C. § 2241 does not specifically require exhaustion, exhaustion is required as a "'prudential matter.'" Id. (citing Castro-Cortez v. INS, 239 F.3d 1037, 1047 (9th Cir. 2001)).

A habeas petitioner must exhaust administrative remedies before seeking judicial review because

> "The requirement of exhaustion of remedies will aid judicial review by allowing the appropriate development of a factual record in an expert forum; conserve the court's time because of the possibility that the relief applied for may be granted at the administrative level; and allow the administrative agency an opportunity to correct errors occurring in the course of

administrative proceedings."

Chua Han Mow v. United States, 730 F.2d 1308, 1313 (9th Cir. 1984) (quoting Ruiwat v. Smith, 701 F.2d 844, 845 (9th Cir. 1983) (per curiam)).

Thus, Laing employed essentially the same three-factor analysis set forth above in deciding that exhaustion should be judicially required. However, for the reasons discussed herein, the Court concludes that under the facts of this case, plaintiffs are not required to exhaust their administrative remedies.

2. Whether Nonexhaustion May be Excused?

Alternatively, the Court concludes that plaintiffs are excused from exhausting any administrative remedies.

Where the exhaustion requirement is not required by statute but judicially created, a plaintiff's failure to exhaust may be excused if "the remedies are inadequate, inefficacious, or futile, where pursuit of them would irreparably injure the plaintiff, or where the administrative proceedings themselves are void." United Farm Workers of Am. v. Ariz. Agric. Emp. Rel. Bd., 669 F.2d 1249, 1253 (9th Cir. 1982) (citation omitted); see also Ramona-Sepulveda v. I.N.S., 824 F.2d 749, 757 (9th Cir. 1987) (in case where petitioner sought a writ of mandamus terminating deportation proceedings, court found that it "was [] not precluded from issuing mandamus relief by petitioner's failure to exhaust administrative remedies" where it "[i]t would be futile and unreasonable to require petitioner to exhaust administrative remedies when" the government ignored the court's previous order) (internal citations omitted).

Defendants acknowledge that a court may excuse a judicially created exhaustion requirement. However, defendants argue that plaintiffs residing within the jurisdiction of the Ninth Circuit should not be excused from exhausting administrative remedies because USCIS has indicated that it will follow the Freeman decision in the Ninth Circuit. Specifically, defendants assert, relying on the USCIS Memorandum attached as Exhibit 1 to their instant motion, that USCIS adjudicators may approve an I-130 petition after the United States citizen spouse dies, provided that "the case involve[s] the same essential facts

[as Freeman], including the fact that alien filed the adjustment application before the petitioner died, and if alien proves that the now-terminated marriage was legally valid, and that the spouses did not marry to confer an immigration benefit on the alien." Mot. to Dismiss at 5-6 (citing Mot. to Dismiss, Ex. 1 (USCIS Memorandum)). Further, defendants contend that plaintiffs Walsh's and Lu's claims should be dismissed for nonexhaustion because they have not requested humanitarian reinstatement of their I-130 petitions pursuant to 8 C.F.R. § 205.1(a)(3)(i)(C)(3).[10]

Plaintiffs respond that USCIS has erroneously interpreted the Ninth Circuit's decision in Freeman, and consequently, 8 U.S.C. § 1151(b)(2)(A)(i). Plaintiffs assert that while the USCIS Memorandum instructs that Freeman is inapplicable unless an alien files an I-485 application before the death of the alien's citizen spouse, Freeman did not condition its ruling on the pre-death filing of an I-485 application for adjustment of status. Additionally, plaintiffs assert that USCIS improperly attempts to revoke the post-death approval of an I-130 petition "unless the [alien] beneficiary presents a request under 8 CFR 205.(a)(3)(i)(C)(2) for humanitarian reinstatement, supported by a properly completed Form I-864 from an individual who qualifies under section 213(A)(f)(5)(B) of the Act as a qualifying substitute sponsor." Mot. to Dismiss, Ex. 1 (USCIS Memorandum) at 7. According to plaintiffs, an I-130 petition must be granted so long as the alien beneficiary

---

[10] 8 C.F.R. § 205.1(a)(3)(i)(C)(3) provides that the approval of I-130 petition will be automatically revoked upon the death of the petitioning United States citizen spouse, unless:

> [USCIS] determines, as a matter of discretion exercised for humanitarian reasons in light of the facts of a particular case, that it is inappropriate to revoke the approval of the petition. USCIS may make this determination only if the principal beneficiary of the visa petition asks for reinstatement of the approval of the petition and establishes that a person related to the principal beneficiary in one of the ways described in section 213A(f)(5)(B) of the Act is willing and able to file an affidavit of support under 8 CFR part 213a as a substitute sponsor.

entered into a bona fide marriage with a United States citizen and the marriage was not entered into when the alien was subject to deportation or removal proceedings, i.e., when these conditions are met, the decision to grant an I-130 petition is mandatory, not discretionary. Plaintiffs argue that by allowing the Attorney General to exercise his discretion to automatically revoke a properly approved I-130 petition, the government is effectively making a nondiscretionary decision, discretionary.

Finally, plaintiffs challenge the propriety of 8 C.F.R. § 205.1(a)(3)(C)(2).[11] According to plaintiffs, 8 C.F.R. § 205.1(a)(3)(C)(2), which provides that an I-130 petition will be automatically revoked upon the death of the citizen spouse, is an impermissible interpretation of 8 U.S.C. § 1155, which allows the Attorney General to exercise his discretion to revoke an I-130 petition.[12] Plaintiffs argue that because the regulation lacks

---

[11] The complaint does not allege that 8 C.F.R. § 205.1(a)(3)(C)(3) is invalid as a matter of law. To the extent that plaintiffs now seek to amend the complaint to add such a claim, the Court hereby GRANTS plaintiffs' request.

[12] 8 C.F.R. § 205.1(a)(3)(C)(2) provides that a previously approved I-130 petition will be automatically revoked upon the death of the United States citizen petitioner unless the Attorney General makes a discretionary determination that revocation would be inappropriate for humanitarian reasons. This regulation is apparently based upon 8 U.S.C. § 1155, which provides that

> The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

While 8 U.S.C. § 1252(a)(2)(B)(ii) prohibits judicial review of any decision or action that is "specified . . . to be under the discretion of the Attorney General," the statute does not absolutely bar judicial review of 8 U.S.C. § 1155. "The 'may, at any time, for what he deems to be' portion of the key phrase plainly authorizes some measure of discretion." Ana Int'l v. Way, 393 F.3d 886, 893 (9th Cir. 2004). However, the "'good and sufficient cause'" language means that there must be some cause which has a logical relationship to the decision to revoke any petition. Id. at 893-94.

(continued...)

statutory basis, it is invalid.

Requiring plaintiffs whose cases arise outside of the jurisdiction of the Ninth Circuit to exhaust administrative remedies would be futile in light of the USCIS Memorandum instructing its field adjudicators to follow Matter of Varela and Matter of Sano, and not Freeman, outside of the Ninth Circuit.

The Court further concludes that plaintiffs whose cases arise within the jurisdiction of the Ninth Circuit and whose I-130 petitions are approved after the death of their citizen spouse under the Freeman decision need not exhaust administrative remedies because they are challenging (1) USCIS' interpretation of Freeman and (2) the legality of the USCIS rule that requires them to request humanitarian reinstatement under 8 C.F.R. 205.1(a)(3)(i)(C)(2) and to come forward with a substitute sponsor of support. While it is true that courts rarely excuse the exhaustion requirement, they have done so "where . . . the [plaintiff] challenge[s] . . . the adequacy of the agency procedure itself." W. Schwarzer, A. Tashima & J. Wagstaffe, The Rutter Group Guide: Fed. Civ. Proc. Before Trial, § 1:207 (2006); see also Espinoza-Gutierrez v. Smith, 94 F.3d 1270, 1273 (9th Cir. 1996); Legalization Assistance Project v. INS, 976 F.2d 1198, 1203-04 (7th Cir. 1992); Heinl v. Godici, 143 F. Supp. 2d 593, 601 (D. Va. 2001) (stating that court should excuse exhaustion requirements where an administrative agency "acts in 'brazen defiance' of its statutory authority") (quoting Philip Morris, Inc. v. Block, 755 F.2d 368 (4th Cir. 1985)); Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp., 489 U.S. 561 (1989); Heldman v. Sobol, 962 F.2d 148, 159 (2d Cir. 1992) ("The policies underlying the exhaustion requirement do not come into play, however, when pursuit of administrative remedies would be futile because the agency either was acting in violation of the law or was unable to remedy the alleged injury."); DCP Farms v. Yeutter, 957 F.2d 1183, 1189 (5th Cir. 1992) (stating that court may waive exhaustion requirement where a plaintiff

---

[12](...continued)

challenges the administrative system as unlawful or unconstitutional or where it "' would be futile to comply with the administrative procedures because it is clear that the claim will be rejected'") (quoting Patsy v. Fl. Int'l Univ., 634 F.2d 900, 904 (5th Cir.1981); Bavido v. Apfel, 215 F.3d 743, 748 (7th Cir. 2000) (stating that exhaustion is not required where the plaintiff challenges the agency procedure itself); cf. Boise Cascade Corp. v. FTC, 498 F. Supp. 772, 778 (D. Del. 1980) ("Claims of burdensome litigation expense, combined with merely colorable claims that an agency is acting ultra vires or unconstitutionally, do not establish irreparable injury, and are insufficient to trigger judicial intervention prior to exhaustion of administrative remedies."). Plaintiffs are challenging the legality of 8 C.F.R. § 205.2(a)(3)(C)(2) and it does not appear that there is an administrative forum in which plaintiffs can do so. Thus, exhaustion is unnecessary.

Defendants also urge the Court to follow Rivera-Durmaz, 456 F. Supp. 2d 943 (N.D. Ill. 2006), and to require plaintiffs to assert their instant grievances in the context of removal proceedings before the Executive Office for Immigration Review ("EOIR"). Defendants argue that those plaintiffs whose I-485 applications have been denied, but for whom removal proceedings have not yet be initiated or who are in removal proceedings, have failed to exhaust administrative remedies.

In Rivera-Durmaz, the defendants approved plaintff, Rossy Laura Rivera-Durmaz's I-130 petition for immediate relative status; however, defendants denied plaintiff Mahmut Erhan Durmaz's I-485 application for adjustment of status because the Durmazes had apparently misrepresented facts to an immigration officer. Rivera-Durmaz, 456 F. Supp. 2d at 946. The Durmazes filed suit challenging the denial of Mr. Durmaz's I-485 application, arguing that the defendants' actions were "arbitrary, capricious, and contrary to the law." Id. at 945. The defendants moved to dismiss the complaint due to the Durmazes' failure to exhaust administrative remedies. Id. at 951. The Durmazes argued that 8 C.F.R. § 245.2(a)(5)(ii) permitted them to renew Mr. Durmaz's I-485 application in removal proceedings before the EOIR, but that it did not require them to do so. Id at 952. The court rejected the Durmazes' interpretation, reasoning that "Seventh Circuit case law"

mandated a contrary interpretation. Id. The Rivera-Durmaz court concluded that while 8 C.F.R. § 245.2(a)(5)(ii) states that an alien "retains the right to renew his, or her application" in proceedings before the EOIR, the regulation imposed a mandatory requirement to do the same. Id. at 952.

Rivera-Durmaz is inapposite. Unlike Mr. Durmaz, whose I-130 petition had been approved, plaintiffs' I-130 petitions have either not been approved or their approval has been revoked. Plaintiffs are before this Court challenging defendants' determination that they are not "spouses" for purposes of 8 U.S.C. § 1154(b)(2)(A)(i), and there is no administrative proceeding in which plaintiffs can challenge this determination. According to Matter of Sano, the Board of Immigration Appeals lacks jurisdiction to address an appeal of the denial of an I-130 petition brought by an alien beneficiary. Matter of Sano, 19 I. & N. Dec. 299, 301 (B.I.A. 1985). Moreover, plaintiffs cannot appeal the denial of an I-485 application for adjustment of status. See 8 C.F.R. 245.2(a)(5)(ii)("No appeal lies from the denial of an [I-485] application by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 CFR part 240."). "Because [plaintiffs'] Form I-485 application[s] [are] entirely dependent on an approved Form I-130 petition[s], it would be futile for [them] to renew the application in . . . removal proceedings." Lockhart v. Chertoff, 2008 U.S. Dist. LEXIS 889, at *15-16 (D. Ohio 2008) (citing Freeman, 444 F.3d 1031, 1037 (9th Cir. 2006); Taing v. Chertoff, 2007 U.S. Dist. LEXIS 91411, at *7-8 (D. Mass. 2007); Robinson v. Chertoff, 2007 WL 1412284, at *1 (D. N.J. 2007)). Accordingly, the Court concludes that requiring plaintiffs to renew their I-485 applications in the context of removal proceedings would be futile.[13] Thus, if arguendo plaintiffs are required to exhaust administrative remedies, the Court hereby exercises its discretion to excuse any nonexhaustion (1) as futile, (2) as ineffective, and/or (3) because plaintiffs are challenging (a) USCIS' interpretation of Freeman and (b) the

[13] Moreover, district courts do not have jurisdiction to review a final order of removal. 8 U.S.C. § 1282(b)(2).

USCIS regulations that require them to request humanitarian reinstatement and to come forward with substitute sponsors of support before USCIS will approve their I-130 petitions.

2. THE DOCTRINE OF CLAIM PRECLUSION (RES JUDICATA)

Defendants alternatively argue that various plaintiffs are barred from prosecuting the instant action by the doctrine of res judicata for failure to file timely appeals of the denial of their respective I-485 applications. Relying on Federated Department Stores, Inc v. Moitie, 452 U.S. 394 (1981) and Avila-Sanchez v. Mukasey, 509 F.3d 1037 (9th Cir. 2007), defendants argue that any plaintiff whose I-485 application was adjudicated prior to the Freeman decision, and who failed to either appeal the denial of his or her I-485 application or to file a motion to reopen said denial after the Ninth Circuit issued its ruling in Freeman, is barred by the doctrine of res judicata from having his or her denial reviewed under the post-Freeman interpretation of the relevant statutory language. Defendants assert that of the plaintiffs residing in the Ninth Circuit, none filed his or her application for adjustment of status after April 21, 2006, the date of the Freeman decision, and all but one application was initially denied prior to April 21, 2006. Defendants claim that plaintiffs, De Mailly, Gobeil, and Nguyen failed to file timely appeals of their final, pre-April 2006, agency decisions. Defendants further argue that the doctrine of res judicata bars "plaintiffs residing outside of the Ninth Circuit with final agency decisions" – plaintiffs Heard, Fishman-Corman, Arias Angulo, Bernstein, and Bayor – from prosecuting the instant action.

Plaintiffs contest the applicability of the doctrine of claim preclusion.

Under the doctrine of claim preclusion (or res judicata), "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90, 93 (1980). "Claim preclusion is a broad doctrine that bars bringing claims that were previously litigated as well as some claims that were never before adjudicated." Clements v. Airport Auth. of Washoe County, 69 F.3d 321, 327 (9th Cir. 1995).

For a prior action to have preclusive effect, an adjudication must (1) involve the same "claim" as the later suit, (2) have reached a final judgment on the merits, and (3) involve the same parties or their privies. Blonder-Tongue Laboratories v. Univ. of Ill. Found., 402 U.S. 313, 323-24 (1971); Nordhorn v. Ladish Co., Inc., 9 F.3d 1402 (9th Cir. 1993). In conducting claim preclusion analysis, what matters is not whether the new claims were brought before, but whether they could have been brought. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1078 (9th Cir. 2003). The Ninth Circuit determines whether or not two claims are the same for purposes of res judicata with reference to the following criteria:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Costantini v. Trans World Airline, 681 F.2d 1199, 1201-02 (9th Cir. 1982) (quoting Harris v. Jacobs, 621 F.2d 341, 343 (9th Cir. 1980)).

Defendants cited cases are unpersuasive. In Federated Department Stores plaintiff retail customers brought seven, separate parallel lawsuits. Federated Dep't Stores, 452 U.S. at 395-96. The cases were all assigned to a single district court judge who eventually dismissed all the cases for failure to state a claim. Id. at 396. The plaintiffs Moitie and Brown did not appeal that adverse ruling. Id. Instead, they filed two separate suits in the state court. Id. However, the other five plaintiffs successfully appealed to the Ninth Circuit. Id. Moitie and Brown's state court actions were eventually removed to federal court. Id. The federal court then dismissed Moitie's and Brown's actions based on the doctrine of claim preclusion. Id. at 396-97. The Supreme Court held that Moitie and Brown were bound by their first unappealed judgments, and the fact that the legal principle on which their first case was dismissed had been overturned, did not change this result. Id. at 398, 402.

Similarly, in Avila-Sanchez, Avila was placed in removal proceedings and an immigration judge determined that he was ineligible for cancellation of removal. Avila-Sanchez, 509 F.3d at 1038. Avila filed a motion for reconsideration with the Board. Id. The Board denied his motion. Id. at 1039. Avila did not challenge that decision through a petition for review of habeas corpus or otherwise, and he was deported. Id. Later he illegally returned to the United States. Id. He was again placed in removal proceedings. Id. It is only at this point that Avila attempted to challenge his prior removal. Id.

Unlike both of those cases, plaintiffs havenever before sought review of the denial of their citizen spouses' I-130 petitions or their I-485 applications before a federal court, an immigration judge, or the Board of Immigration Appeals. The filing of an I-130 petition or an I-485 application, by itself, does not preclude a putative plaintiff from later seeking redress in federal court; a contrary holding would prevent a federal court from ever reviewing an administrative agency decision. Additionally, defendants do not cite to any prior final decision that is allegedly being collaterally attacked.[14]

Defendants, as the party asserting the defense of claim preclusion, bear the burden of showing that the doctrine applies. Clark v. Bear Stearns & Co., 966 F.2d 1318, 1321 (9th Cir. 1992). The Court concludes that they have failed to meet their burden, and that therefore, the doctrine of claim preclusion does not bar plaintiffs' instant suit.

B. MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

1. THE CLAIMS OF PLAINTIFFS WHOSE CASES ARISE OUTSIDE OF THE JURISDICTION OF THE NINTH CIRCUIT

Defendants argue that the complaint fails to state a claim upon which relief may be granted with respect to plaintiffs residing outside of the Ninth Circuit. According to

---

[14] Further, at the hearing held on January 28, 2008, the Court requested that defendants address whether plaintiffs were required to file a civil action within a specified period of time and whether plaintiffs had failed to do so. In their supplemental memorandum, defendants do not argue that plaintiffs' instant action is untimely. Thus, it appears that plaintiffs' instant lawsuit is timely.

defendants, the Board of Immigration Appeals' decisions are binding on the DHS. Defendants assert that where a United States Court of Appeals renders a decision that is contrary to the position of the Board's, that decision must be followed only as to cases arising within the circuit in which the case was decided. However, defendants adhere to the Board's position for cases arising outside the court's circuit. Defendants further claim that a federal district court's ruling is binding only as to the particular case before the court. Defendants argue that accordingly, they are not required to follow Freeman in cases arising outside of the jurisdiction of the Ninth Circuit. Defendants further assert that no other Court of Appeals has rendered a published decision in line with Freeman.[15] Based on the foregoing, defendants argue that the Board's decisions govern cases arising outside of the jurisdiction of the Ninth Circuit. According to defendants, in Matter of Sano, 19 I. & N. Dec. 299 (B.I.A. 1985) and Matter of Varela, 13 I. & N. Dec. 453 (B.I.A. 1970), the Board held that an I-130 petition is to be denied if the United States citizen spouse has died before his or her two-year marriage anniversary.

Plaintiffs respond that because the statutory language at issue here is ambiguous, plaintiffs residing outside of the jurisdiction of the Ninth Circuit have stated claims for relief. According to plaintiffs, federal courts outside of the Ninth Circuit have found that 8 U.S.C. § 1151(b)(2)(A)(i) is ambiguous and have held in accordance with Freeman.

The Court is mindful of the importance of allowing the government to litigate legal issues before different courts throughout the country. As Justice Rehnquist explained, preventing the government from doing so "would deprive [the] [Supreme] Court of the benefit it receives from permitting several court of appeals to explore a difficult question before [the] [Supreme] Court grants certiorari." United States v. Mendoza, 464 U.S. 154, 159 (1984) (holding that the United States may not be collaterally estopped from litigating an issue that was adjudicated against it in a prior lawsuit brought by a different party). The Court is also aware that "[i]t is standard practice for an agency to litigate the same issue in

[15] It is not clear whether defendants are aware of an unpublished court of appeals decision addressing this issue; the Court has found none.

more than one circuit and to seek to enforce the agency's interpretation selectively on persons subject to the agency's jurisdiction in those circuits where its interpretation has not been judicially repudiated." Ry. Labor Executives' Assoc. v. Interstate Commerce Comm'n, 784 F.2d 959, 964 (9th Cir. 1986); see also Nielsen Lithographing Co. v. NLRB, 854 F.2d 1063, 1066-67 (7th Cir. 1988) (holding that a circuit should do not make rulings interpreting administrative regulations, which rulings purport to affect other circuits, and that an agency therefore does not have to accept one circuit's ruling as binding throughout the country). It was with these concerns in mind that the Court asked the government to submit further briefing explaining, inter alia, why this Court should not exercise jurisdiction over plaintiffs residing outside of the jurisdiction of the Ninth Circuit and/or why this Court should not apply the Freeman decision, or its reasoning, to those plaintiffs. However, defendants have failed to sufficiently address these issues in their supplemental brief, and instead, have advanced largely the same arguments as before. Defendants have not offered an appropriate jurisdictional basis which would prevent the Court from adjudicating the claims of the plaintiffs residing outside of the jurisdiction of the Ninth Circuit. Nor have defendants argued that plaintiffs choice of venue is improper.[16] See e.g.,

---

[16] "A defendant must object to venue by motion or in his answer to the complaint or else his objection is waived." Costlow v. Weeks, 790 F.2d 1486, 1488 (9th Cir. 1986). A defendant waives his or her right to object to venue by making a motion pursuant to Fed. R. Civ. P. 12 and omitting the defense. Fed. R. Civ. P. 12(h)(1)(A). At the hearing held herein, defendants' counsel argued that defendants did not raise the issue of venue in their instant motion because this case is being prosecuted as a class action. This Court has not yet certified a class. Moreover, in a class action, a court looks only to the named plaintiffs to determine whether venue is proper. Shell v. Shell Oil Co., 165 F. Supp. 2d 1096, 1107 n.5 (C.D. Cal. 2001) ("Notwithstanding the relaxation of venue and personal jurisdiction requirements as to unnamed members of a plaintiff class, it is by now well settled that these requirements to suit must be satisfied for each and every named plaintiff for the suit to go forward."); Cook v. UBS Fin. Servs., Inc., 2006 U.S. Dist. LEXIS 12819, 2006 WL 760284, at *6 n.2 (S.D.N.Y. 2006) ("The law is clear that in determining whether venue for a putative class action is proper, courts are to look only at the allegations pertaining to the named representatives."); Dunn v. Sullivan, 758 F. Supp. 210, 216 (D. Del. 1991) (continued...)

Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679, 709, 765-68 (1989) (noting that while courts have been uneasy with forum shopping by both administrative agencies and by plaintiffs, they are often unable to transfer a case to a circuit with more substantial contacts absent some defect in venue).

Although Ninth Circuit law does not bind this Court with respect to these plaintiffs, the Court finds Freeman to be persuasive authority. District courts from other jurisdictions have agreed with Freeman in concluding that the death of an alien's citizen spouse before the couple's two-year marriage anniversary does not deprive the alien spouse of his or her "immediate relative" status. See e.g., Robinson v. Chertoff, 2007 U.S. Dist. LEXIS 34956, at *4 (D. N.J. 2007) ("[T]he Court is convinced that the Ninth Circuit's interpretation of the statute is correct."); Taing v. Chertoff, 2007 U.S. Dist. LEXIS 91411, at *28 (D. Mass. 2007) ("This Court agrees with the Ninth Circuit's interpretation of [8 U.S.C. § 1151(b)(2)(A)(i)]."); Lockhart v. Chertoff, 2008 U.S. Dist. LEXIS 889, at *30 (D. Ohio 2008) ("As the well-reasoned opinions of the Ninth Circuit (Freeman), Massachusetts District Court (Taing) and New Jersey District Court (Robinson) conclude, the plain language of the statute simply does not impose a two year requirement on 'immediate

---

(...continued)
("Venue in a class action suit is proper for the entire class if it is proper for the named plaintiffs."); 17 James Wm. Moore et al., Moore's Fed. Practice § 110.07 (2007) ("Venue in class actions is determined by the same statutes that would apply if the action were not a class action. Venue is proper if the statutory requirements are met with respect to the named parties."). Thus, as to the named plaintiffs, defendants could have objected to venue. Because defendants filed the instant motion pursuant to Fed. R. Civ. P. 12(b) and omitted any mention of venue, they have waived any such objection. When a defendant waives his or her objection to venue, the district court may not raise the issue of venue sua sponte. See Costlow v. Weeks, 790 F.2d 1486, 1488 (9th Cir. 1986) (holding that a district court may raise the issue of venue sua sponte as the long the defendant has not already waived objections to venue). Thus, the Court cannot raise the issue on its own motion.

relative' status for a surviving alien-spouse.").[17]

While other districts courts have adopted interpretations contrary to Freeman, see e.g., Turek v. Dep't of Homeland Sec., 450 F. Supp. 2d 736 (E.D. Mich. 2006); Burger v. McElroy, 1999 U.S. Dist. LEXIS 4854 (S.D.N.Y. 1999), these decisions have been criticized. For example, in Lockhart, the district court criticized both Turek and Burger:

> [I]n light of the plain language and grammatical structure of the statute, Turek and Burger improperly apply Chevron deference. Turek and Burger thus grossly over-emphasize the precedential value of In re Varela, the agency opinion interpreting § 1151(b)(2)(A)(i). In addition, Turek is factually distinguishable given that the marriage at issue in Turek was subject to an automatic presumption of invalidity because, unlike Ms. Lockhart's marriage, it was entered into while the alien-spouse was in removal proceedings.

Id., at *32; see also Taing, at *29 (criticizing Turek and Burger); Robinson, 2007 U.S. Dist. LEXIS 34956, at *10-13 (same). This Court finds Lockhart's reasoning to be persuasive. It is not clear that the statutory interpretation adopted by USCIS and advanced by defendants is entitled to Chevron deference. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Nor is it clear that USCIS's statutory interpretation is appropriate.

Defendants have cited no conflicting law from another circuit, and the Court has found none. In light of the fact that no other circuit has interpreted 8 U.S.C. § 1151(b)(2)(A)(1) differently from the court in Freeman, it does not appear that there is any conflict to be resolved at this point. Accordingly, the Court concludes that plaintiffs residing outside of the jurisdiction of the Ninth Circuit have sufficiently stated claims for relief based on the record before the Court.[18]

---

[17] While defendants argued at the March 3, 2008 hearing herein that many of these district court cases are on appeal, the fact remains that they are final judgments.

[18] When and if another circuit reaches a conclusion that is inconsistent with Freeman, (continued...)

2. THE DEPARTMENT OF STATE

Defendants assert for the first time in their supplemental memorandum, that the Department of State should be dismissed as a defendant because it does not grant or revoke any I-130 petitions. Defendants further argue that to the extent plaintiffs are challenging the "decision of consular officers in denying immigrant visas, such determinations are precluded from the subject matter jurisdiction of the Court." Suppl. Mem in Supp. of Mot. to Dismiss at 10.

In their supplemental opposition plaintiffs clarify that they are not challenging the Department of State's "admissibility decisions." Suppl. Mem. in Opp'n at 15. However, plaintiffs contend that the Department of State is a proper party because "[it] has been acting in concert with USCIS in the challenged conduct." Id.

Plaintiffs concede that the Department of State does not grant or revoke any I-130 petition. In fact, plaintiffs assert that the Department of State "returns I-130 petitions back to USCIS for automatic revocation." Id.; see also (U.S. Dep't of State Foreign Affairs Manual (Vol. 9), Procedural Notes, 9 FAM 42.42 n.2(a) (stating that a consular officer may prepare and forward a memorandum to DHS requesting that a petition revoked under 8 C.F.R. 205.1(a)(3) be reinstated for humanitarian reasons). Thus, it is clear that USCIS, not the Department of State, granted, denied, and/or revoked plaintiffs' citizen spouses' I-130 petitions. Because the Department of State has not engaged in any of the challenged conduct, i.e., because it has not denied or revoked any plaintiffs' I-130 petition, the Court concludes that it is not a proper party to the instant action. Accordingly, the Court grants defendants' motion to dismiss the Department of State as a defendant.

C. MOTION TO SEVER THE PLAINTIFFS PURSUANT TO FED. R. CIV. P. 20(a)

Alternatively, should the Court decline to dismiss plaintiffs' complaint for lack of jurisdiction or for failure to state a claim, defendants request that the Court sever the claims

---

[18](...continued)
defendants may bring such ruling to the attention of this Court.

of all plaintiffs not presently within the jurisdiction of the Ninth Circuit pursuant to Fed. R. Civ. P. 21.

The Court declines to sever the plaintiffs at this time. However, defendants may renew this argument at the time of the hearing regarding class certification.

VI. CONCLUSION

In accordance with the foregoing, the Court finds and concludes as follows:

(1) The Court DENIES defendants' motion to dismiss plaintiffs' claims under the Mandamus Act for failure to exhaust administrative remedies.

(2) The Court GRANTS defendants' motion to dismiss plaintiffs Hootkins', Moncayo-Gigax's, Vargas de Fisher's, Lockett's, Brenteson's, Win's, Engstrom's, Pointdexter's, Rudl's, Standifer's, and Batool's claims under the APA for lack of final agency action.

(3) The Court DENIES defendants' motion to dismiss the complaint based on the doctrine of claim preclusion.

(4) The Court DENIES defendants' motion to dismiss the claims of plaintiffs residing outside of the jurisdiction of the Ninth Circuit for failure to state a claim.

(5) The Court reserves judgement on defendants' motion to sever the claims of plaintiffs residing outside of the jurisdiction of the Ninth Circuit until the hearing regarding class certification.

(6) The Court GRANTS defendants' motion to dismiss the complaint as to the Department of State.

IT IS SO ORDERED.

Date: March 17, 2008

Christina A. Snyder

CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE