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Florida War Widow Wins Residency, Others Left Behind

CASSELBERRY, FL – A Central Florida war widow who was facing deportation after her American husband was killed in Iraq was granted permanent residency despite a United States Citizenship and Immigration Services (USCIS) earlier ruling.

Immigration officials notified Dahianna Heard and her attorney today that her legal resident status, denied previously due to her husband's death, has now been approved. Mrs. Heard had entered the country legally from Venezuela and married her American husband, Jeffrey Heard, a military veteran in July 2004. The couple filed a residency application in October 2004 and waited for immigration authorities to act on the application. Meanwhile, Jeffrey worked for a private security contractor, and was sent to Iraq to help provide supplies to U.S. troops there. While in Iraq, Dahianna gave birth to the couple's son, Bryan.

On March 20, 2006, Heard was killed in an ambush outside Falluja. In a letter dated September 27, 2006, Linda Swacina, District Director for USCIS in Orlando, Florida, wrote to Heard's grieving widow:

“Reference is made to the visa petition filed on your behalf by Jeffrey Heard on October 27, 2004. The record reflects that your spouse died on March 20, 2006. In accordance with the death of the petitioner, the petition is hereby terminated as well as the application for permanent residence. U.S. Citizenship and Immigration Services (CIS) considers the matter closed. No further action will be taken on the petition or application. CIS is sorry for your loss...Because your marriage to Mr. Heard was less than two years old at the time of his death, you do not qualify as an immediate relative under the law”

The couple was married for one year, eight months, and eleven days when Heard was killed. Mrs. Heard soon learned she was another victim of the “widow penalty” in U.S. immigration law. She was told that, had her application been reviewed before her husband's death, it would have been approved. Also, if she had been married for two years at the time of his death, she could file her own “self-petition” for widow status. Because neither of those two things occurred, she faced automatic denial.

But Heard was not alone. Members of the American Immigration Lawyers Association have long been urging the USCIS to recognize that its own delay, coupled by an unfortunate death, should not strip legal status from an applicant who followed all the rules for residency. A non-

profit advocacy organization, Surviving Spouses Against Deportation (www.ssad.org) was founded last year to fight what has been coined the “widow penalty.” SSAD has discovered 130 cases of the widow penalty nationwide, in over 30 states representing over 50 nationalities.

A U.S. Ninth Circuit Court of Appeals decision issued in 2006, *Freeman v. Gonzales*, ruled that the government was wrong to strip spousal status from a couple who had filed all the necessary paperwork prior to the death, and where the pair was only awaiting USCIS action. After a federal Court in New Jersey – in *Robinson v. Chertoff* – followed the *Freeman* ruling, a national class action lawsuit was filed in August 2007 in Los Angeles federal court by Oregon attorney Brent Renison and Los Angeles attorney Alan Diamante. Mrs. Heard joined the class action as a plaintiff.

Carla Freeman’s husband, Bob Freeman, was killed in Merrillville, Indiana when a Pepsi truck crossed the center lane and collided head-on with his vehicle. Osserritta Robinson is the widow of a citizen killed in the Staten Island Ferry accident. The couples were simply waiting for USCIS to get to the applications when the tragedies occurred. The New Jersey federal court ordered that Robinson be treated as a spouse, but USCIS has appealed that decision to the U.S. Third Circuit Court of Appeals. The lead plaintiff in the class action, filed in Los Angeles federal court is Carolyn Hootkins, widow of actor Bill Hootkins of Star Wars fame. Others in the lawsuit include another widow of American contractor killed in Iraq, Diana Engstrom of Bloomington, Illinois, the widow of a border patrol agent, Ana Maria Moncayo-Gigax of California, and the widow of a man killed by a drunk driver, Khin Win of Las Vegas, Nevada. The Office of Immigration Litigation, within the Department of Justice, has opposed the lawsuit, and filed a motion to dismiss the proceedings on behalf of USCIS. A hearing is set March 3, 2008 to determine the status of the case.

Previously, on November 8, 2007, Mike Aytes, Associate Director of Domestic Operations for USCIS, issued a memorandum directing field leadership to follow the *Freeman* ruling only in the states covered by the Ninth Circuit, and to continue automatic denials for the rest of the country.

Legislative efforts to end the widow penalty have been underway for several years, but the stalled debate over immigration reform has so far hampered progress. Legislation to end the widow penalty passed the Senate in 2006 as part of comprehensive immigration reform, but the House failed to pass it. In 2007, Senator Bill Nelson of Florida introduced an amendment to the reform bill that would end the widow penalty, but Senators failed to agree on a reform package. SSAD advocates were shocked this week to hear that on January 28, 2008, the National Defense Authorization Act, signed into law by President Bush that day, included surviving spouse benefits to Iraqi translators and other Iraqis who helped the U.S. military effort in Iraq. The new provision does not include the surviving spouses of American citizens – only those of Iraqi citizens.

Heard’s application was finally approved under provisions passed in the 2003 National Defense Authorization Act, which provides for the surviving spouses of active duty military members killed in combat. Because Heard was killed while working as a contractor, the provision was initially overlooked. Following Heard’s participation in the class action lawsuit, immigration

officials at USCIS took a closer look, and decided that the two requirements – military service and death in combat – did not have to occur at the same time.

The approval in Heard's case does not apply to the other widows' cases, however, and still leaves out Diana Engstrom, whose husband Todd Engstrom was killed in Iraq on September 14, 2004, in a rocket-propelled grenade attack on his convoy by insurgents. Todd had previously served as a Commander in the United Nations Special Operations Group, and met his wife in Kosovo where she served as a United Nations translator. After their marriage in December 2003, Diana filed for legal residency the following month with the Chicago USCIS office. Because Todd did not previously serve in the U.S. military, and because he is not an Iraqi citizen, his wife Diana is left to deal with the cruel effects of the widow penalty. While she is a plaintiff in the class action lawsuit, her future remains uncertain. Senators Durbin and Obama introduced private legislation in 2005 to give her permanent resident status, but those efforts have not yielded results. In fact, passage of private legislation is exceedingly rare.

The last private bill passed into law for a widow of an American citizen was for Anisha Foti, whose husband Seth Foti died in the crash of Gulf Air 072 on August 23, 2000. Seth was a State Department diplomatic courier at the time of his death, and had filed for residency for his wife. Because of support from the State Department Diplomatic Security office, Foti's private bill was passed and signed into law by President Bush in 2003. But a private bill only benefits the one person who is the subject of the bill, so the widow penalty continues to punish all other grieving widows whose only crime is the death of their spouse.

"It is time to stop this cruel and unjust practice, and recognize that we have a serious flaw in the law," SSAD pro bono counsel Brent Renison said.

"We should not be deporting widows of Americans when they have complied with the legal requirements for residency. No one can prepare for the death of a spouse, especially when government processing times vary widely and are not within the control of applicants. We should not punish those who follow the rules. This is America, and we can do better than that."

SSAD hopes that election year politics do not impede the efforts to pass a law to address the widow penalty this year, and await a champion to spearhead a bill. Survivors who have been impacted by the widow penalty continue to huddle in the shadows, stripped of work authorization and legal status, relying on the kindness of strangers for assistance.

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For more information, visit the SSAD website: <http://www.ssad.org>