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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

11 CAROLYN ROBB HOOTKINS, et al.) Case No. CV07-05696 (CAS)
12 Plaintiffs,)
13) Date: December 10, 2007
14 v.) Time: 10:00 a.m.
15) Courtroom: 5
MICHAEL CHERTOFF, Secretary, U.S.) Honorable Christina A. Snyder
16 Department of Homeland Security,) DEFENDANTS' NOTICE OF MOTION
et al.) AND MOTION TO DISMISS; AND
17 Defendants.) MEMORANDUM OF POINTS AND
AUTHORITIES

1 PLEASE TAKE NOTICE that on December 10, 2007, at 10:00 a..m.
2 or as soon thereafter as the parties may be heard,
3 Defendants/Respondents Michael Chertoff, Emilio Gonzalez,
4 Condoleezza Rice, and Maura Harty (collectively "Defendants" or
5 "Government") will bring for hearing a motion to dismiss this
6 action pursuant to Federal Rules of Civil Procedure 12(b)(1) and
7 (6). The hearing will take place before the Honorable Christina
8 A. Snyder, Courtroom 5, 312 North Spring Street, Los Angeles,
9 California 90012.

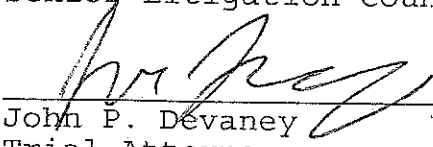
10 This Motion is based on the Memorandum of Points and
11 Authorities attached hereto, all pleadings, papers and files in
12 this action, and such oral argument as may be presented at the
13 hearing on the motion.

14 This Motion is made following the conference of counsel
15 pursuant to L.R. 7-3 which took place on November 9, 2007.
16 Plaintiffs' counsel specifically requested the date noticed.
17

18 Respectfully submitted,

19 PETER D. KEISLER
20 United States Department of Justice
21 Assistant Attorney General
22 Civil Division

23 ELIZABETH J. STEVENS
24 Senior Litigation Counsel

25 Dated: November 12, 2007 By: 

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MEMORANDUM OF POINTS AND AUTHORITIES

1
2 Defendants Michael Chertoff, Emilio Gonzalez, Condoleezza
3 Rice, and Maura Harty (collectively "Defendants" or "Government"),
4 by and through their undersigned counsel, respectfully move this
5 Court for an Order dismissing Plaintiffs' Petition for Writ of
6 Mandamus and Complaint for Declaratory and Injunctive Relief
7 ("Complaint") because the Court lacks subject matter jurisdiction
8 over Plaintiffs' claims in part, and the Complaint fails to state
9 a claim upon which relief may be granted in part. See Fed. R. Civ.
10 P. 12(b)(1), (6).
11

12 Plaintiffs seek lawful permanent resident status through their
13 prior status as legally married spouses of United States citizens.
14 Complaint, page 1. Plaintiffs seek relief through the
15 Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*
16 (2007). Defendants assert that this Court lacks jurisdiction for
17 failure of the Plaintiffs to exhaust available administrative
18 remedies, the lack of final agency action, or *res judicata*. In
19 the alternative, should the Court not dismiss the Plaintiffs
20 residing outside of the Ninth Circuit for lack of jurisdiction,
21 the applicable law requires dismissal of those Plaintiffs' claims
22 for failure to state a claim, as those claims are not governed by
23 Ninth Circuit precedent.
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1 I. BACKGROUND

2 A. Legal Authority

3 Section 204 of the Immigration and Nationality Act ("INA"), 8
4 U.S.C. § 1154 (2007), provides United States citizens and alien
5 spouses, under certain conditions, the right to petition the
6 Attorney General for classification of an alien as an "immediate
7 relative." The INA allows a United States citizen to file a
8 petition (form I-130) on behalf of a spouse claiming the spouse is
9 entitled to classification as an "immediate relative." 8 U.S.C. §
10 1154(a)(1)(A)(i). "Immediate relative" is a defined term, as set
11 forth in 8 U.S.C. § 1151(b)(2)(A)(i):
12

13 For purposes of this subsection, the term "immediate
14 relatives" means the children, spouses, and parents of a
15 citizen of the United States, except that, in the case of
16 parents, such citizens shall be at least 21 years of age.
17 In the case of an alien who was the spouse of a citizen
18 of the United States for at least 2 years at the time of
19 the citizen's death and was not legally separated from
20 the citizen at the time of the citizen's death, the alien
21 (and each child of the alien) shall be considered, for
22 purposes of this subsection, to remain an immediate
23 relative after the date of the citizen's death but only
24 if the spouse files a petition under section
25 204(a)(1)(A)(ii) of this title within 2 years after such
26 date and only until the date the spouse remarries.
27

28 *Id.*

29 As a result, those married less than two years at the time of
30 the death of the petitioning spouse no longer qualify for
31 "immediate relative" status as legally married spouses of United
32 States citizens. See *Matter of Varela*, 13 I. & N. Dec. 453 (BIA
33 1970). In *Varela*, the Board of Immigration Appeals ("BIA" or
34

1 Board"),¹ addressed the question of whether the death of a United
2 States citizen deprived his alien spouse of her legal status as a
3 spouse, and therefore an "immediate relative." According to the
4 Board's interpretation of the statutory language, the death of the
5 citizen spouse ends the legal marriage, and thus also ends
6 "immediate relative" status as well. *Id.* The Board reaffirmed
7 the result in *Varela* in a later decision, although the Board
8 stressed the lack of the alien's standing even to pursue the
9 matter after the citizen spouse had died. *Matter of Sano*, 19 I. &
10 N. Dec. 299 (BIA 1985). These precedent decisions remain valid,
11 although they are subject to the later-enacted exception contained
12 in the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i) (widows
13 married at least 2 years when the citizen spouse died), and in two
14 specific exceptions created by Congress for spouses of those who
15 died in the 9/11 terrorist attacks in the United States, Pub. L.
16 107-56, 115 Stat. 272, §§ 421(a), (b)(1)(B)(i) (2001), and for
17 spouses of those who were active-duty military and died as a
18 result of injury or disease incurred in or aggravated by combat,
19 Pub. L. 108-36, Div. A, Title XVII, § 1703(a)-(e) (2003).

20
21
22 The decisions in *Sano* and *Varela* reflect the general rule in
23 the United States that marriage legally ends when one spouse dies.
24 See 52 Am. Jur. 2d, Marriage, § 8. Nevertheless, on April 21,
25 2006, the Ninth Circuit issued a precedent decision with a
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27
28 ¹ Determinations by the Board are binding on the government in
the immigration context and apply nation-wide. See 8 C.F.R. §
1003.1(g) (2006).

1 different interpretation of the relevant statutory language.
2 *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006). The *Freeman*
3 Court concluded that the death of the United States citizen spouse
4 did not necessarily strip the alien spouse of her immediate
5 relative status. *Id.* at 1040-43. The Court also concluded it was
6 not required to follow the rule of deference to an authoritative
7 administration interpretation, see *National Cable & Telecomm. Assn*
8 *v. Brand X Internet Services*, 545 U.S. 967, 125 S. Ct. 2688, 162
9 L. Ed. 2d 820 (2005); *Chevron, U.S.A., Inc., v. Natural Res. Def.*
10 *Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694
11 (1984), because, according to the panel, the Board decision in
12 *Sano* undermined the validity of *Varela*. *Freeman*, 444 F.3rd at
13 1038, n.10. Without acknowledging the general rule that marriage
14 ends at death, moreover, the Court held that *Varela* did not
15 reflect a permissible interpretation of the statute. *Id.* at 1038.
16 According to the Court, once the citizen spouse has filed the Form
17 I-130 and the alien spouse has filed the related adjustment of
18 status application (Form I-485), "immediate relative" status vests
19 with the alien spouse, and the death of the United States citizen
20 spouse does not strip the alien of "immediate relative" status.
21 *Id.* at 1042-43. In the Ninth Circuit, therefore, an alien may
22 immigrate as the spouse of a citizen, despite the fact that he or
23 she is not, legally, married to a citizen.
24
25
26

27 For those individuals whose spouses die after an I-130 relative
28 petition has been approved, revocation of that petition is

1 automatic. 8 C.F.R. § 205.1(a)(3)(i)(C) (2006). The United
2 States Citizenship and Immigration Service ("USCIS") may reinstate
3 the approval of I-130 petition, as a matter of discretion, where
4 the beneficiary of the petition requests reinstatement for
5 humanitarian reasons and another relative (as described in 8
6 U.S.C. § 1183a(f)(5)(B)) is willing and able to file an affidavit
7 of support as a substitute sponsor. 8 C.F.R. §
8 205.1(a)(3)(i)(C)(3).² The Ninth Circuit has held that this
9 discretion is not available if the citizen dies before approval of
10 the I-130. See *Abboud v. INS*, 140 F.3d 843, 849 (9th Cir. 1998);
11 *Dodig v. INS*, 9 F.3d 1418 (9th Cir. 1993).

12
13 On November 8, 2007, USCIS provided guidance to its field
14 adjudicators concerning the application of the *Freeman* decision.
15 See *Effect of Form I-130 Petitioner's Death on Authority to*
16 *Approve the Form I-130*, attached as Exhibit 1. The Defendants'
17 guidance specifies that, for cases arising outside the Ninth
18 Circuit, USCIS adjudicators will continue to follow *Matter of Sano*
19 and *Matter of Varela* and the general rule that marriage ends when
20 one spouse dies. Ex. 1 at 3. For cases arising in the Ninth
21 Circuit, USCIS adjudicators may, under *Freeman*, approve a Form I-
22 130 after the petitioner has died, if the case involves the same
23 essential facts, including the fact that alien filed the
24 adjustment application before the petitioner died, and if the
25
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28 ² The *Freeman* panel took no notice of the *Abboud* and *Dodig*
decisions, nor of the automatic revocation provision in 8 C.F.R. §
205.1(a)(3)(i)(C).

1 alien proves that the now-terminated marriage was legally valid,
2 and that the spouses did not marry to confer an immigration
3 benefit on the alien. Ex. 1 at 6-7. If the Form I-130 is
4 approved, USCIS will not deem the approval automatically revoked
5 on the petitioner's death under 8 C.F.R. § 205.1(a)(3)(i)(C), if
6 there is a person who is willing and able to file an affidavit of
7 support (USCIS Form I-864) on the alien's behalf, in place of the
8 Form I-864 that the citizen spouse would have been required to
9 submit. Ex. 1 at 7.

11 **B. Relevant Facts**

12 Except for plaintiff Nguyen, the United States Citizen spouses
13 of the alien Plaintiffs filed I-130 petitions on their behalf,
14 pursuant to 8 U.S.C. § 1154(a)(1)(A)(i). Complaint at ¶¶ 17-153.
15 Plaintiff Nguyen was the beneficiary of an approved I-129F fiancée
16 petition, and applied for adjustment of status within three months
17 of her arrival in the United States, after marrying the United
18 States citizen petitioner. Complaint at ¶¶ 123-28. In all but
19 two cases, the United States citizen spouse died after the filing
20 of the I-130 petition, but prior to its adjudication. Complaint
21 at ¶¶ 17-153. Two I-130 petitions filed by the United States
22 citizen spouses were approved, but were later revoked upon the
23 death of the citizen spouse. Complaint at ¶¶ 96-104.

26 All but one of the named plaintiffs residing within the
27 jurisdiction of the Ninth Circuit filed their applications prior
28 to the April 21, 2006, decision in *Freeman*, and had their

1 applications initially adjudicated prior to April 21, 2006.
2 Complaint at ¶¶ 17-59, 73-79, 92-103. Of those plaintiffs,
3 plaintiffs Hootkins, Moncayo-Gigax, Brenteson, Win, Poindexter,³
4 Rudl, and Nguyen have filed motions to reopen with the Board.
5 Complaint at ¶¶ 22, 28, 53, 79, 116, 122, 128. The motions to
6 reopen for plaintiffs Hootkins, Moncayo-Gigax, Brenteson, Win and
7 Rudl are still pending. Complaint at ¶¶ 22, 28, 53, 79, 122. The
8 motion to reopen for plaintiff Nguyen (whose application for
9 adjustment of status was based upon an approved I-129F fiancée
10 petition) was denied on March 3, 2006 - before the decision in
11 *Freeman*. Complaint at ¶ 128. Plaintiffs DeMaily and Gobeil,
12 whose petition and I-485 adjustment of status applications were
13 denied in 2003 and 2004 respectively, did not appeal the
14 decisions, nor have they filed motions to reopen. See Complaint
15 at ¶¶ 29-34, 50-59. Plaintiffs Vargas de Fisher and Lockett have
16 applications that remain pending with USCIS. Complaint at ¶¶ 41,
17 47.

20 The remaining plaintiffs reside outside of the jurisdiction of
21 the Ninth Circuit. Complaint at ¶¶ 61, 68, 81, 87, 93, 100, 106,
22 130, 136, 142, 148. Plaintiffs Walsh and Lu (the two plaintiffs
23 who sought immigrant visas from a United States Embassy or
24 consular section abroad) had their I-130 petitions approved prior
25 to the death of their spouses, but those petitions were revoked
26

27
28 ³ Plaintiff Poindexter's application was denied because he failed to appear at a scheduled interview. Complaint at ¶ 116.

1 after the death of their citizen spouses. Complaint at ¶¶ 96-98,
2 102-04. Plaintiffs Heard, Fishman-Corman, Arias-Argulo,
3 Bernstein, and Bayor have not filed motions to reopen after the
4 denial of their applications. See Complaint at ¶¶ 66, 72, 110,
5 134, 140. Plaintiff Diaz-Ruiz filed a motion to reopen, which was
6 denied in 2006. Complaint at ¶ 91. Plaintiffs Sandifer and
7 Batool⁴ have filed motions to reopen with USCIS, which are still
8 pending. Complaint at ¶¶ 146, 152.

10 II. ARGUMENT

11 This Court should dismiss Plaintiffs' Complaint, in part,
12 because this Court lacks subject matter jurisdiction over
13 Plaintiffs' claims. Fed. R. Civ. P. 12(b)(1). Plaintiffs have
14 the burden of establishing the jurisdiction of this Court. See
15 *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th
16 Cir. 1989) (noting that a federal court is presumed to lack
17 subject matter jurisdiction until the contrary affirmatively
18 appears). Even where a Plaintiff's pleadings are technically
19 sufficient to establish some basis of jurisdiction, a Rule
20 12(b)(1) motion may also allege that there is an actual lack of
21 jurisdiction. See, e.g., *Thornhill Publ'g Co. v. Gen. Tel. &*
22 *Elects. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *Roberts v.*
23 *Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Because
24
25
26

27
28 ⁴ Plaintiff Batool's application was denied because she failed
to appear at a scheduled interview. Complaint at ¶ 152.

1 Defendants challenge the jurisdiction of the Court, a motion to
2 dismiss under Rule 12(b)(1) is appropriate.

3 In addition, dismissal for failure to state a claim under Rule
4 12(b)(6) is appropriate where Plaintiffs' claims fail on the law
5 of their jurisdiction. See Fed. R. Civ. P. 12(b)(6).

6
7 **A. Plaintiffs' APA Claims Fail Due to Failure to Exhaust
8 Administrative Remedies Or Due To The Lack Of A Final
9 Decision.**

10
11 **1. Plaintiffs Have Failed to Exhaust Available
12 Administrative Remedies.**

13 The APA, by its terms, provides a right to judicial review of
14 all "final agency actions for which there is no other adequate
15 remedy in a court."⁵ 5 U.S.C. § 704. In *Darby v. Cisneros*, 509
16 U.S. 137, 113 S. Ct. 2539, 125 L. Ed. 2d 113 (1993), the Supreme
17 Court held generally that when a party challenges a final agency
18 decision under the APA an appeal to "superior agency authority" is
19 a prerequisite to judicial review only when expressly required by
20 statute or when an agency rule requires appeal before review and
21 the administrative action is made inoperative pending that review.
22 *Darby*, 509 U.S. at 153. Where exhaustion of administrative
23 remedies is not mandatory, the courts generally require such
24 exhaustion: "Under the doctrine of exhaustion, 'no one is
25 entitled to judicial relief for a supposed or threatened injury

26
27 ⁵ As a preliminary matter, a separate mandamus analysis is not
28 required. See, e.g., *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061,
1065 (9th Cir. 1997) (analyzing claim under the APA rather than
mandamus where mandamus and APA relief are the same).

1 until the prescribed . . . remedy has been exhausted.'" *Laing v.*
2 *Ashcroft*, 370 F.3d 994, 997 (9th Cir. 2004) (quoting *McKart v.*
3 *United States*, 395 U.S. 185, 193, 89 S. Ct. 1657, 23 L. Ed. 2d 194
4 (1969)). "Although courts have discretion to waive the exhaustion
5 requirement when it is prudentially required, this discretion is
6 not unfettered." *Laing*, 370 F.3d at 998 (citing *Castro-Cortez v.*
7 *INS*, 239 F.3d 1037, 1047 (9th Cir. 2001)). "Lower courts are,
8 thus, not free to address the underlying merits without first
9 determining [that] the exhaustion requirement has been satisfied
10 or properly waived." *Laing*, 370 F.3d at 998 (citing *Montgomery v.*
11 *Rumsfeld*, 572 F.2d 250, 254 n.4 (9th Cir. 1978)).

13 Plaintiffs erroneously assert that exhaustion of remedies
14 would be futile. For those Plaintiffs residing in the
15 jurisdiction of the Ninth Circuit, USCIS has announced that it
16 will follow the *Freeman* decision in the Ninth Circuit. See
17 Exhibit 1. As such, the claims of all Plaintiffs residing within
18 the Ninth Circuit -- plaintiffs Hootkins, Moncayo-Gigax, DeMailly,
19 Vargas de Fisher, Lockett, Brenteson, Gobeil, Win, Poindexter,
20 Rudl, and Nguyen should be dismissed for failure to exhaust non-
21 futile, available administrative remedies.

23 In addition, aliens who have yet to enter removal proceedings
24 may be determined to have failed to exhaust their administrative
25 remedies. See *Rivera-Durmaz v. Chertoff*, 456 F. Supp. 2d 943,
26 951-52 (N.D. Ill. 2006) (declining to review plaintiffs
27 eligibility for adjustment of status until they exhausted their
28

1 administrative remedies - specifically, consideration of the
2 matter by an Immigration Judge and review by the Board); *Soliz v.*
3 *U.S. Citizenship and Immigration Services*, 2007 WL 1753543 (S.D.
4 W. Va. June 18, 2007) (concluding that Petitioner had failed to
5 exhaust his administrative remedies in regard to his application
6 for adjustment of status until he entered removal proceedings).
7

8 In *Rivera-Durmaz*, the court considered the language of the
9 Immigration and Nationality Act ("INA") and the relevant agency
10 regulations, as required by *Darby*. *Rivera-Durmaz*, 456 F. Supp. 2d
11 at 952. While finding no explicit exhaustion requirement in the
12 INA, the court concluded that language contained in the
13 regulations did contain such a requirement. *Id.* Specifically,
14 the court concluded that the language in 8 C.F.R. § 245.2(a)(5)(2)
15 (2006), which governs decisions on I-485 applications, imposes a
16 mandatory exhaustion requirement.⁶ *Id.* The court found it
17 relevant that many of the courts of appeal had come to the same
18 conclusion under factually similar circumstances. *Id.* at 953
19 (citing *Cardoso v. Reno*, 216 F.3d 512, 518 (5th Cir. 2000) (the
20 option of a rehearing on the agency's refusal to adjust
21 petitioner's status imposes an exhaustion requirement); *Howell v.*
22
23

24 ⁶ 8 C.F.R. § 245.2(a)(5)(2) reads, in pertinent part:

25 . . . No appeal lies from the denial of an application by
26 the director, but the applicant, if not an arriving alien,
27 retains the right to renew his or her application in
proceedings under [8 C.F.R. § 240].

28 *Id.*

1 INS, 72 F.3d 288, 294 (2nd Cir. 1995) (finding petitioner seeking
2 review of the denial of his application for adjustment of his
3 status must exhaust administrative remedies through deportation
4 proceedings)).

5 Here, several Plaintiffs are in the same situation as the
6 Plaintiffs in *Rivera-Durmaz*: Their I-485 applications have been
7 denied but they have yet to be put into removal proceedings. This
8 Court should follow the example of *Rivera-Durmaz*, and decline to
9 rule on plaintiffs' APA claim until they have exhausted their
10 administrative remedies through the renewal of their applications
11 for adjustment of status in removal proceedings. As a result,
12 this Court should dismiss the claims of plaintiffs Nguyen, Heard,
13 Fishman-Corman, Arias-Argulo, Bernstein, and Baylor.
14

15 The claims of plaintiffs Walsh and Lu should also be dismissed
16 for failure to exhaust available administrative remedies, as
17 neither requested humanitarian reinstatement of their I-130
18 petitions pursuant to 8 C.F.R. § 205.1(a)(3)(i)(C)(3).
19

20 2. *Certain Claims Must Be Dismissed For Lack of Final*
21 *Agency Action.*

22 In order for an action to be final, and thus reviewable
23 pursuant to the APA, the action must (1) "mark the 'consummation'
24 of the agency's decision-making process," and (2) the action "must
25 be one by which 'rights or obligations have been determined,' or
26 from which 'legal consequences will flow.'" *Bennett v. Spear*, 520
27 U.S. 154, 178, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997).
28

1 With regard to the first prong, the question courts ask is
2 whether the agency "has rendered its last word on the matter."
3 *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 465 F.3d 977,
4 984 (9th Cir. 2006) (citing *Whitman v. Am. Trucking Ass'n*, 531
5 U.S. 457, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001)). The last word
6 has yet to be given in the cases of plaintiffs Hootkins, Moncayo-
7 Gigax, Vargas de Fisher, Lockett, Brenteson, Win, Engstrom,
8 Poindexter, Rudl, Sandifer, and Batool, as all have either
9 applications or motions to reopen pending before USCIS. Given the
10 USCIS policy guidance, it is reasonable assume that the motions
11 will lead to approval of the visa petitions, at least for those
12 plaintiffs who can show that their marriages were bona fide and
13 that they have substitute affidavit of support sponsors. See Ex.
14 1. Therefore it is clear that the "final word" has yet to be given
15 for these Plaintiffs, rendering relief under the APA
16 inappropriate.
17
18

19 B. Several Claims Are Barred By The Doctrine Of *Res*
20 *Judicata*.

21 *Res judicata*, or claim preclusion, "treats a judgment, once
22 rendered, as the full measure of relief to be accorded between the
23 same parties on the same claim or cause of action." *McClain v.*
24 *Apodaca*, 793 F.2d 1031, 1033 (9th Cir. 1986) (citations omitted).
25 *Res judicata* applies when there is (1) a valid, final judgment,
26 (2) rendered on the merits, (3) a subsequent action involving the
27 same parties or those in privity with them, (4) that is based on
28

1 the same cause of action or claim." *Hooker v. Klein*, 573 F.2d
2 1360, 1367 (9th Cir. 1978). *Res judicata* applies to immigration
3 proceedings. *Ramon-Sepulveda v. INS*, 824 F.2d 749 (9th Cir.
4 1987).

5 It is well established that the *res judicata* "consequences of
6 a final, unappealed judgment on the merits [are not] altered by
7 the fact that the judgment may have been wrong or rested on a
8 legal principle subsequently overruled in another case."

9
10 *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.
11 Ct. 2424, 2428, 69 L. Ed. 2d 103 (1981) (emphasis added).

12 Therefore, any Plaintiff whose I-485 application for
13 adjustment of status was adjudicated prior to the decision of the
14 *Freeman* case by the Ninth Circuit, and who had not appealed the
15 denial of that application (or filed a motion to reopen after the
16 *Freeman* decision) is barred by *res judicata* from having his or her
17 denial reviewed under the post-*Freeman* interpretation of the
18 relevant statutory language. Of the Plaintiffs residing in the
19 Ninth Circuit, none filed his or her application for adjustment of
20 status after the April 21, 2006, *Freeman* decision, and all but one
21 application was initially denied prior to April 21, 2006.
22 Plaintiffs DeMaily, Gobeil and Nguyen failed to file timely
23 appeals of their final, pre-April 2006, agency decisions.
24

25 Of the plaintiffs residing outside of the Ninth Circuit with
26 final agency decisions, *res judicata* would bar them from re-
27 litigating their case at this time. Those barred include
28

1 plaintiffs Heard, Fishman-Corman, Arias-Argulo, Bernstein and
2 Bayor. Accordingly, the claims of these plaintiffs should be
3 dismissed.

4 C. The Complaint Fails To State A Claim Upon Which Relief
5 May Be Granted For Those Plaintiffs Residing Outside of
6 the Jurisdiction Of The Ninth Circuit.

7 In the immigration context, determinations by the Board of
8 Immigration Appeals are binding on the government and apply
9 nation-wide. See 8 C.F.R. § 1003.1(g) (2006). If, however, a
10 court of appeals comes to a position contrary to the Board in a
11 precedent decision, the government follows that position only
12 within the jurisdiction of that particular Court of Appeals.
13 *Matter of Anselmo*, 20 I. & N. Dec. 25 (BIA 1989). In addition, if
14 a federal district court issues a final decision contrary to the
15 Board, the government complies with the judgment only with respect
16 to the individual case. See *Matter of K-S-*, 20 I. & N. Dec. 715
17 (BIA 1993). As no other court of appeals has issued a published
18 decision following the Ninth Circuit's *Freeman* analysis, the
19 applicable Board determination is the law this Court must apply to
20 the claims of those residing outside of the jurisdiction of the
21 Ninth Circuit.

22
23 The governing Board precedents specify that a Form I-130 is to
24 be denied if the citizen petitioner has died. *Matter of Sano*, 19
25 I. & N. Dec. 299 (BIA 1985); *Matter of Varela*, 13 I. & N. Dec. 453
26 (BIA 1970). The precedents, of course, are subject to the
27 exceptions that Congress has enacted more recently, which permit
28

1 only a narrow subset of widowed aliens, who were married less than
2 two years, to retain their "immediate relative" status after the
3 death of their spouses. These later exceptions indicate that
4 Congress clearly intended that aliens married less than two years
5 at the time their U.S. citizen spouse dies are no longer entitled
6 to "immediate relative" status.

7
8 Moreover, the fact that Congress has passed two specific,
9 narrowly-tailored exceptions to the general rule supports the
10 government's position that *Freeman* was wrongly decided, and
11 buttresses its determination not to follow *Freeman* outside of the
12 Ninth Circuit. See Pub. L. 107-56, 115 Stat. 272, §§ 421(a),
13 (b)(1)(B)(i) (2002) (creating a specific exception for "surviving
14 spouses" of those who died in the 9/11 terrorist attacks in the
15 United States); Pub. L. 108-36, 117 Stat. 1693, Div. A, Title
16 XVII, § 1703(a)-(e) (2003) (creating a specific exception for
17 spouses of those who were active-duty military and died as a
18 result of injury or disease incurred in or aggravated by combat).
19 Section 421 of Pub. L. 107-56 is particularly telling on this
20 point. For family-sponsored and immediate relative cases,
21 Congress intended § 421 to benefit an alien relative whose
22 relative's visa petition "was revoked or terminated (or otherwise
23 rendered null)" by the petitioner's death. Pub. L. 107-576,
24 § 421(b)(1)(B)(i), 115 Stat. at 356. There would be no need for
25 the enactment of § 421 if, as the *Freeman* panel found, the
26 petitioner's death does not render the visa petition null.
27
28

1 In addition, the final affidavit of support rule, 71 Fed. Reg.
2 35732 (June 21, 2006), also supports the Government's
3 interpretation. The Government received several comments on the
4 prior interim rule, dealing with the validity of a visa petition
5 once the petitioner has died. 71 Fed. Reg. at 35735. In response
6 to the comments, the Attorney General and the Secretary of
7 Homeland Security specifically endorsed the Board's holding in
8 *Matter of Varela* that the visa petitioner's death requires denial
9 of the Form I-130. *Id.* The Government has also crafted a special
10 humanitarian exception for those with previously-approved I-130
11 petitions for cases with special humanitarian circumstances, by
12 providing for the conversion of a spousal I-130 petition into a
13 widow's I-360 petition, if the requirements of the second sentence
14 in § 1151(b)(2)(A)(i) are met when the citizen spouse dies. 8
15 C.F.R. §§ 204.2(b)(1)(i)-(iv) (2006); 8 C.F.R. §
16 205.1(a)(3)(i)(C)(2).
17
18

19 Hence, the law as it exists outside of the Ninth Circuit is
20 that an alien married less than two years at the time of his or her
21 United States citizens spouse's death automatically loses
22 "immediate relative" status if the I-130 petition has not been
23 approved. Accordingly, the Court should dismiss the claims of
24 those residing outside of the Ninth Circuit for failure to state a
25 claim upon which relief may be granted.
26
27
28

1 D. The Court Should Sever The Claims Of Those Not Residing
2 Within The Jurisdiction Of The Ninth Circuit.

3 Should the Court not dismiss the Complaint for lack of
4 jurisdiction or for failure to state a claim, the Court should
5 sever the claims of all individuals not currently within the
6 jurisdiction of the Ninth Circuit under Fed. R. Civ. P. 21. See
7 *Coughlin v. Rogers*, 130 F.3d 1348, 1350-51 (9th Cir. 1997)
8 (finding joinder inappropriate due to unique nature of each
9 application). In determining whether severance is appropriate, a
10 court considers: (1) whether the claims arise out of the same
11 transaction or occurrence; (2) whether the claims present common
12 questions of law or fact; and (3) whether prejudice to a
13 substantial right would be avoided if severance was granted. *Id.*
14 (finding that there was no common question of law or fact where it
15 would be necessary to apply "different legal standards.").

17 As in *Coughlin*, severance is appropriate in this case on the
18 basis that the Ninth Circuit's recent decision in *Freeman v.*
19 *Gonzales*, 444 F.3d 1031 (9th Cir. 2006), has created a situation
20 that requires the application of "different legal standards" to
21 different plaintiffs' claims, depending on the residence of the
22 individual. Therefore, since "different legal standards" would be
23 applied to different plaintiffs' claims this case does not present
24 common questions of law and fact and the claims of plaintiffs
25 residing outside of the Ninth Circuit must be severed under Fed.
26 R. Civ. P. 21.
27
28

1 CONCLUSION

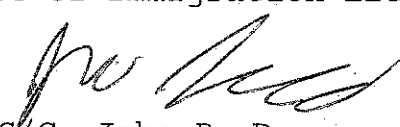
2 Plaintiffs' Complaint should be dismissed for lack of
3 jurisdiction in part, and for failure to state a claim in part.
4 In the alternative, the Court should sever the claims of
5 plaintiffs residing outside of the Ninth Circuit.
6

7
8 Respectfully Submitted,

9
10 PETER D. KEISLER
11 United States Department of Justice
12 Assistant Attorney General
13 Civil Division

14 ELIZABETH J. STEVENS
15 Senior Litigation Counsel
16 Office of Immigration Litigation

17 Dated: 12 November 2007

18 By:  S/C. John P. Devaney
19 John P. Devaney
20 Trial Attorney
21 Office of Immigration Litigation
22
23
24
25
26
27
28


CERTIFICATE OF SERVICE

Case No. C-07-5696-CAS

I hereby certify that on this 12th day of November 2007, true and correct copies of the Defendants' NOTICE OF MOTION AND MOTION TO DISMISS, AND MEMORANDUM OF POINTS AND AUTHORITIES were served by Federal Express next-day delivery on the counsel for Plaintiffs:

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Exhibit 1



U.S. Citizenship
and Immigration
Services

HQDOMO 130/1.3
AFM Update AD08-04

Interoffice Memorandum

To: FIELD LEADERSHIP

From: Mike Aytes /s/
Associate Director of Domestic Operations
U.S. Citizenship and Immigration Services

Date: November 8, 2007

Re: Effect of Form I-130 Petitioner's Death on Authority to Approve the Form I-130

Revisions to *Adjudicator's Field Manual (AFM)* Chapter 21.2
(AFM Update AD08-04)

1. Purpose

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.

2. Background

The traditional view has been that if a Form I-130 visa petitioner dies before USCIS acts on the Form I-130, USCIS must deny the Form I-130. Cf. *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985); *Matter of Varela*, 13 I&N Dec. 453 (BIA 1970). The U.S. Court of Appeals for the Ninth Circuit has rejected this interpretation of the statute. *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006). USCIS is legally obligated to follow the precedent decisions of the Board of Immigration Appeals, in the absence of a supervening precedent decision of a court of appeals. 8 CFR 1003.1(g). Thus, USCIS adjudicators must follow *Sano* and *Varela*, and not *Freeman*, in any case arising outside the Ninth Circuit.

In addition to noting that *Freeman* does not apply outside the Ninth Circuit, the USCIS position is that *Freeman* was wrongly decided. A person who had been married is no longer, legally, a

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"spouse" once the other spouse has died. Moreover, even if the statute may be considered ambiguous, 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. See *National Cable & Telecomm. Assn v. Brand X Internet Services*, 545 U.S. 967 (2005); *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Nevertheless, the *Freeman* decision is a controlling precedent for cases in the Ninth Circuit, unless the Ninth Circuit were to overrule *Freeman* or the Supreme Court were to decide a case involving the same issue in a manner contrary to *Freeman*.

USCIS adjudicators are reminded that, under the circumstances specified in 8 CFR 204.2(i)(1)(iv) and 205.1(a)(3)(i)(C)(1), *as amended*, 71 FR 35732, 35749 (2006), a spousal Form I-130 is converted to a widow(er)'s Form I-360 if, on the date of the Form I-130 petitioner's death, the couple were married for at least 2 years and the widow(er) would be otherwise eligible to file a widow(er)'s Form I-360.

USCIS adjudicators are also reminded that, if the visa petitioner dies *after* approval of a Form I-130 – in both immediate relative and family-preference cases – then USCIS has discretion to reinstate the pre-death approval. 8 CFR 205.1(a)(3)(i)(C)(2), *as amended*, 71 FR 35732, 35749 (2006). This discretion will be exercised favorably only if there is a substitute sponsor who has submitted a Form I-864 in place of any Form I-864 that was filed, or would have been filed, by the deceased petitioner. *Id.*

3. Field Guidance and Adjudicator's Field Manual (AFM) Update

The adjudicator is directed to comply with the following guidance.

1. Chapter 21.2 of the AFM entitled "Factors Common to the Adjudication of All Relative Visa Petitions" is amended by:

- a. Adding a new chapter 21.2(a)(4); and
- b. Revising the **Note** at the end of chapter 21.2(g)(1)(C).

The revisions read as follows:

21.2 Factors Common to the Adjudication of All Relative Visa Petitions.

(a) Filing and Receipting of Relative Petitions.

* * * * *

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(4) Effect of the petitioner's death before approval. (A)(1) Except as provided in paragraph (a)(4)(B) of this chapter for cases governed by the precedent decisions of the Ninth Circuit, a Form I-130 must be denied if the visa petitioner dies after the visa petitioner filed the Form I-130 and before USCIS has adjudicated the Form I-130. *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985) and *Matter of Varela*, 13 I&N Dec. 453 (BIA 1970). A USCIS adjudicator will actually deny a Form I-130 in this situation, and not just "terminate action" on it. The denial will give as reasons for the denial the reasoning stated in paragraph (a)(4)(A)(2) of this chapter.

(A)(2) Effect of *Freeman v. Gonzales* outside the Ninth Circuit. USCIS adjudicators shall *not* follow the decision in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) in any case arising outside the Ninth Circuit. The USCIS position is that *Freeman* was wrongly decided, for the reasons set forth in this chapter 21.2(a)(4)(A)(2). USCIS adjudicators, moreover, are legally obligated to follow *Sano* and *Varela*, since the Board designated them as precedents. 8 CFR 1003.1(g).

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. See *BedRoc Ltd, LLC v. United States*, 541 U.S. 176, 184 (2004); *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975). Like the term "material," the term "spouse" "is not a *hapax legomenon*." Cf. *Kungys v. United States*, 485 U.S. 759, 769 (1988). The common, ordinary meaning of the term "spouse" is a married person. See definition of "spouse," Black's Law Dictionary (8th Ed. 2004). Federal law has adopted this same basic definition of "spouse" for purposes of the administration of every Federal statute and regulation. 1 U.S.C. § 7. A person is a "spouse" only if he or she is either the husband or the wife of a legal marriage. *Id.*

The general rule in the United States, moreover, is that marriage ends upon the death of one spouse. See 52 Am. Jur. 2d, Marriage, § 8.

The *Freeman* panel considered it significant that neither § 201(b)(2)(A)(i), nor any other provision of the Act, clearly provides that a person's status as a "spouse" ends when the marriage ends. 444 F.3d at 1039-40. But if the term "spouse" is given its ordinary meaning, there is no need for such a specific provision. Citing the Supreme Court's decision in *BedRoc Ltd, LLC, supra*, the *Freeman* panel did acknowledge that statutory terms are to be given their common, ordinary meaning. Despite this, the *Freeman* panel simply took no notice of the legal effect of death upon a marriage. As a matter of law, a marriage ends upon the death of one spouse. The other person, then, is no longer a married person and, by definition, no longer a spouse.

Moreover, although the *Freeman* panel said it was reading § 201(b)(2)(A)(i) in light of the statute as a whole, the *Freeman* panel did not consider § 204(b) of the Act, 8

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U.S.C. § 1154(b). Under § 204(b), USCIS may approve a Form I-130 only if, after investigation, USCIS finds that the "facts stated in the petition are true" (*emphasis added*). It is not enough, as the court thought in *Freeman*, 444 F.3d at 1039-40, that the facts were true when the petition was filed. At the time of adjudication, USCIS must find that the facts are true otherwise USCIS may not approve the Form I-130. See INA § 204(b), 8 U.S.C. § 1154(b). See *id.* Once the petitioner dies, the claim that the petitioner is related to the beneficiary in the legally relevant way is *no longer* true. The general rule in immigration cases, moreover, is that cases are decided based on the facts as they exist on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

This conclusion that a Form I-130 cannot be approved after the petitioner dies does not, as the *Freeman* panel thought, 444 F.3d at 1039, "import" into the first sentence of § 201(b)(2)(A)(i) any requirement concerning how long the Form I-130 petitioner and the alien beneficiary must be married in order for USCIS to approve the Form I-130. What the first sentence of § 201(b)(2)(A)(i) and § 204(b), when read together, require is that the petitioner and beneficiary must still be legally married, in order for USCIS to approve the Form I-130. This factor readily distinguishes the case of a deceased petitioner from *Dabaghian v. Civiletti*, 607 F.2d 868 (9th Cir. 1979), upon which the *Freeman* panel relied in concluding that it was "untenable" to say that a visa petitioner's death ends the beneficiary's claim to be an immediate relative. 444 F.3d at 1041. The petitioner and the beneficiary in *Dabaghian* were still legally married when the alien in that case had obtained permanent residence. 607 F.2d at 869. If the petitioner has died, by contrast, the beneficiary is no longer married to the petitioner. Their marriage dissolved upon the petitioner's death. Thus, the beneficiary is not the spouse of a citizen, and so, is not an immediate relative. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

The *Freeman* panel also failed to consider INA § 205, 8 U.S.C. § 1155, and the related regulations. Under § 205, for example, USCIS may revoke approval of a Form I-130 in any case in which USCIS finds good cause for doing so. Had USCIS approved Form I-130 in a case before a petitioner's death, the approval would have been revoked, automatically, upon his death. See 8 C.F.R. § 205.1(a)(3)(i)(C)(2), as amended 71 Fed. Reg. 35,732, 35,749 (2006). There is discretion to leave an approval in place. As the Ninth Circuit has held in earlier cases, however, this discretion is not available if the petitioner dies while the Form I-130 was still pending. See *Abboud v. INS*, 140 F.3d 843, 849 (9th Cir. 1998); and *Dodig v. INS*, 9 F.3d 1418 (9th Cir. 1993). Under DHS regulations, moreover, USCIS may reinstate approval of a Form I-130 only if some qualified person is willing and able to submit a Form I-864, affidavit of support, as a substitute for the petitioner. 8 C.F.R. § 205.1(a)(3)(C)(2), as amended, 71 Fed. Reg. at 35,749. The statute, in turn, permits a substitute sponsor only if the petitioner dies *after* approval of the Form I-130. INA § 213A(f)(5)(B), 8 U.S.C. § 1183a(f)(5)(B).

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The most reasonable inference from the provision for a substitute sponsor only if the Form I-130 was approved before the petitioner's death is that the petitioner's death ends the beneficiary's ability to immigrate.

This inference is all the stronger, since Congress has provided several statutes under which a person may obtain permanent residence based on a relationship that has been dissolved by death. The *Freeman* panel did consider one of these provisions, the second sentence of § 201(b)(2)(A)(i). Under this provision, the widow(er) of a citizen can still qualify as an immediate relative, if the widow(er) and the citizen were married at least 2 years at the time of the citizen's death. Similar provisions are found in the FY2004 National Defense Authorization Act, Pub. L. 108-136, Division A, § 1703, 117 Stat. 1392, 1693-96 (2003) and the USA Patriot Act, Pub. L. 107-57, §§ 421 and 423, 115 Stat. 272, 356-363. USCIS acknowledges, as the *Freeman* panel did, 444 F.3d at 1039, that the second sentence of § 201(b)(2)(A)(i) permits a widow(er) to file his or her own petition. The salient point to be drawn from these provisions, however, is that, when Congress has wanted to permit an alien to obtain permanent residence based on a relationship that no longer exists, Congress has done so explicitly.

Section 421 of the Patriot Act is particularly relevant on this point. Under § 421, Congress provided a special benefit for the beneficiary of a Form I-130 if the Form I-130 was "revoked or terminated (or otherwise rendered null), either before or after its approval" because the petitioner died as a result of the September 11, 2001, terrorist attacks on the United States. Pub. L. 107-57, § 421(a) and (b)(1)(B)(i), and § 428(b), 115 Stat. at 356-7. In particular, the beneficiaries of § 421 immigrate as "special immigrants," and *not* as "immediate relatives." *Id.* There would have been no need for Congress to enact § 421(a), if, as the *Freeman* panel and the district court in this case concluded, a visa petitioner's death does not "terminate (or otherwise render null)," *id.* § 421(b)(1)(B), 115 Stat. at 356, the Form I-130.

The *Freeman* panel, moreover, misconstrued the Board's precedents in *Matter of Sano* and *Matter of Varela*. The actual result in each case was the same: the Board affirmed the INS decisions denying the respective Forms I-130 due to the petitioner's death. The only difference between these two decisions was the reason given. In *Matter of Varela*, the Board assumed it had jurisdiction and decided the case on the merits, holding that the visa petitioner's death required denial of the Form I-130 because the beneficiary was no longer the spouse of a citizen. 13 I&N Dec. at 454. The Board did not, in *Sano*, question its conclusion in *Varela* that a person is no longer a "spouse" after the other spouse had died. Rather, in *Sano*, the Board held that the beneficiary's lack of standing would have been the more proper basis for the decision in *Varela*. 19 I&N Dec. at 300-01. The Secretary and the Attorney General, moreover, have specifically endorsed the conclusion from *Varela* that "[t]here is no authority to approve a visa petition after the petitioner dies." 71 *Fed. Reg.* at 35,735.

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The *Freeman* panel was also mistaken in saying that the Board in *Sano* acted "summarily," 444 F.3d at 1038, and without statutory analysis. The Board concluded that the beneficiary in *Sano* was no longer a "spouse" of a citizen because the citizen had died. 13 I&N Dec. at 454. The Board's conclusion was fully consistent with the general rule in the United States that marriage ends with the death of one spouse. See 52 Am. Jur. 2d, Marriage, § 8. That the Board's opinion may have been brief does not change the fact that the Board gave a legally sound and sufficient basis for its conclusion.

(A)(3) Effect of other judicial decisions. If a *district court* outside the Ninth Circuit follows *Freeman* in an individual case, and the Government does not appeal the decision, USCIS will comply with the district court's judgment *with respect to that specific case*. USCIS will not, however, 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. *Matter of K- S-*, 20 I&N Dec. 715 (BIA 1993).

If a court of appeals other than the Ninth Circuit follows *Freeman*, and *designates its own decision as a precedent*, then the guidance in chapter 21.2(a)(4)(B) of the AFM will apply in that Circuit, as well as in the Ninth Circuit. If a different Circuit follows *Freeman* in a decision that is *not* designated a precedent, USCIS adjudicators should consult with their regional counsel to determine whether, under the law of that Circuit, the decision is nevertheless binding in subsequent cases.

(B)(1) Special rule for Ninth Circuit cases involving *spousal immediate relative* petitions. Chapter 21.2(a)(4)(A) of the AFM does not apply to a case that is governed by the precedent decisions of the Ninth Circuit. In the Ninth Circuit, if the visa petitioner dies after filing the *spousal immediate relative* Form I-130 and after the beneficiary has filed the related Form I-485, but before there is a final decision on the Form I-130, the *spousal immediate relative* Form I-130 may still be approved, based on the Ninth Circuit decision in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006). The beneficiary still bears the burden of proving that the beneficiary would qualify as an immediate relative if the petitioner were still alive. Establishing that the beneficiary would qualify as an immediate relative if the petitioner were still alive requires the beneficiary to prove that, before the petitioner's death, the petitioner and beneficiary were related in a way that would have made the beneficiary eligible for classification as an immediate relative under section 201(b)(2)(A)(i). A Form I-130, *Petition for Alien Relative*, which is based on a spousal (immediate relative) relationship may still be denied if the beneficiary fails to establish that the marriage that forms the basis for the classification was bona fide, and not entered into to acquire an immigration benefit.

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Note AFM chapter 21.2(a)(4)(B) applies only to cases involving the same essential facts as the *Freeman* case. One fact that played a critical role in the panel's decision is that the beneficiary in *Freeman* had filed her Form I-485 before the petitioner had died. 444 F.3rd at 1042-43. In cases where the petitioner dies before the beneficiary filed a Form I-485, the case results in a significant factual distinction from that presented in *Freeman*. In such cases, the Form I-130 should be denied, based on this distinction, as specified in chapter 21.2(a)(4)(A)(2). AFM chapter 21.4(a)(4)(B) does not apply to family based petitions under section 203(a) of the Act or immediate relative petitions filed for the *parents* or *children* of citizens, rather than for *spouses*.

(B)(2) The beneficiary of a spousal immediate relative Form I-130 petition that is approved under AFM chapter 21.2(a)(4) must still submit a Form I-864 in order to overcome inadmissibility on public charge grounds. Except as provided in paragraph 21.2(a)(4)(C) of this chapter, therefore, the post-death approval of any Form I-130 that is approved under the *Freeman* decision and this paragraph 21.2(a)(4) will be revoked automatically under 8 CFR 205.1(a)(3)(i)(C), unless the beneficiary presents a request under 8 CFR 205.1(a)(3)(i)(C)(2) for humanitarian reinstatement, supported by a properly completed Form I-864 from an individual who qualifies under section 213A(f)(5)(B) of the Act as a qualifying substitute sponsor. USCIS may, as a matter of discretion, reinstate the approval pursuant to section 213A(f)(5)(B) of the Act and 8 CFR 205.1(a)(3)(i)(C)(2) if a qualifying substitute sponsor submits a Form I-864 in place of any Form I-864 that was submitted, or would have been submitted, by the deceased petitioner. If the beneficiary requests reinstatement under 8 CFR 205.1(a)(3)(i)(C)(2) before USCIS has actually adjudicated the Form I-130, and reinstatement is appropriate under 8 CFR 205.1(a)(3)(i)(C)(2), the decisions to approve the Form I-130 and to leave approval unrevoked will be made in a single written notice.

(C) Paragraph 21.2(a)(4)(B) of this AFM does not apply to any Form I-130 that is converted upon the petitioner's death to a widow(er)'s Form I-360, as provided for in 8 CFR 204.2(i)(1)(iv) and 205.1(a)(3)(i)(C)(1).

(g) Revocation of Approval. ***

(1) Automatic Revocation.

(C) Discretionary Authority to Not Automatically Revoke Approval.

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Note: See chapter 21.2(a)(4) of this AFM for guidance concerning the effect of a petitioner's death *before* approval of a Form I-130.

4. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law of by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

5. Contact Information

Operational questions regarding this memorandum may be directed to Andrew Perry, Regulation and Product Management Division, Domestic Operations Directorate. Inquiries should be vetted through appropriate supervisory channels.

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