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8 UNITED STATES DISTRICT COURT  
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
10 WESTERN DIVISION  
11

12	CAROLYN ROBB HOOTKINS, et. al.,	)	Case No. CV07-5696 CAS (MANx)
13		)	
14	Plaintiffs-petitioners,	)	Date: April 20, 2009
15	vs.	)	Time: 10:00 a.m.
16		)	Courtroom: 5
17	JANET NAPOLITANO, U.S. Department	)	Honorable Christina A. Snyder
18	of Homeland Security, et. al.,	)	PLAINTIFFS' RESPONSE TO
19		)	DEFENDANTS' MOTION FOR
20	Defendants-respondents.	)	PARTIAL SUMMARY JUDGMENT AS
21		)	TO NINTH CIRCUIT CLASS
22		)	PLAINTIFFS
23		)	
24		)	CLASS ACTION
25		)	

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1           **I. ARGUMENT**

2           **A. Defendants’ Direct Attack on *Freeman* Fails**

3           Defendants make a direct attack on *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir.  
4 2006) by arguing that *Freeman* was at odds with two prior decisions of the Ninth Circuit  
5 – *Dodig v. INS*, 9 F.3d 1418 (9th Cir. 1993); and *Abboud v. INS*, 140 F.3d 843 (9th Cir.  
6 1998) – and therefore should “not be given any weight.” Def. Mot. Partial S.J. at 4-15  
7 (Dkt. # 124). This direct attack on *Freeman* must fail because the petitioner in *Dodig*  
8 only argued that the “humanitarian reinstatement” provisions of 8 CFR § 205.2(a)(3)  
9 should have been applied to a case where the petitioner died before the petition had been  
10 approved, and because the petitioner in *Abboud* only argued that equal protection  
11 required that he be treated the same as someone who was eligible for humanitarian  
12 reinstatement. *Id.*

13           The Ninth Circuit in *Freeman* clearly stated that the issue of first impression before  
14 the Court was “the proper definition of ‘spouse’”, and not whether the humanitarian  
15 reinstatement provision applied (*Dodig*), or whether failure to apply that standard was a  
16 denial of equal protection (*Abboud*). *Freeman, supra*, 444 F.3d at 1033. The Ninth  
17 Circuit was never called upon to decide the issue of the proper definition of spouse until  
18 *Freeman*, and therefore the holding in *Freeman* does not conflict with *Dodig* and  
19 *Abboud*. The Court is bound to apply *Freeman* to the cases within the jurisdiction of the  
20 Ninth Circuit.  
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**B. Defendants Unlawfully Require a Substitute Affidavit of Support**

Defendants cannot escape the fundamental rule governing immigrant petitions which states that admissibility concerns are not relevant to petition procedure. *Matter of O*, 8 I&N Dec. 295 (BIA 1959) (Dkt. # 9, Attachment A). Defendants admit that principle in their motion. Def. Mot. Partial S.J. at 20 (Dkt. # 124). Affidavits of support are tied to the section governing admissibility, and have no place in petition procedure. Defendants may not utilize admissibility concerns to withhold approval or revoke approval of petitions.

At issue in this case is the “Special rule for Ninth Circuit cases” outlined in the Aytes Memorandum (Dkt # 8, Def. Mot. Ex. 1, p. 6, AFM Ch. 21.2(a)(4)(B)(1), hereinafter “Memorandum”). The Memorandum imports an unlawful requirement that the beneficiary “present a request under 8 CFR § 205.2(a)(3)(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” or the petition will automatically be revoked. Memorandum, p. 7, AFM Ch. 21.2(a)(4)(B)(2). The Memorandum, therefore, makes it clear that defendants will *automatically* revoke a petition approved under the *Freeman* decision for reasons not allowed under the *Freeman* decision or the statute.

After reviewing 8 U.S.C. § 1154(a)(1)(A)(i) and 8 U.S.C. § 1151(b)(2)(A)(i), the Court in *Freeman* concluded that, “through our review of the language, structure, purpose

1 and application of the statute, that Congress clearly intended an alien widow whose  
2 citizen spouse has filed the necessary forms to be and to remain an immediate relative  
3 (spouse) for purposes of § 1151(b)(2)(A)(i), even if the citizen spouse dies within two  
4 years of the marriage.” *Freeman v. Gonzales*, 444 F.3d 1031, 1039 (9th Cir. 2006). It is  
5 the I-130 petition, filed under 8 U.S.C. § 1154(a)(1)(A)(i), which establishes eligibility  
6 for immediate relative status. With respect to the application of the immediate relative to  
7 be granted the status of Lawful Permanent Resident (LPR), certain grounds of  
8 inadmissibility may apply to bar the adjustment of status (Form I-485) or issuance of an  
9 immigrant visa and admission (Form DS-230). Those inadmissibility grounds are found  
10 at 8 U.S.C. § 1182(a). Such grounds of inadmissibility are wholly separate from the  
11 determination of eligibility for immediate relative status under 8 U.S.C. §  
12 1154(a)(1)(A)(i) and 8 U.S.C. § 1151(b)(2)(A)(i), and defendants’ attempt to apply  
13 inadmissibility standards to the validity of a petition for eligibility is prohibited as a  
14 matter of law. The Ninth Circuit has also held that, “determinations that require  
15 application of law to factual determinations are nondiscretionary.” *Hernandez v.*  
16 *Ashcroft*, 345 F.3d 824, 833-34 (9th Cir. 2003). The determination of immediate relative  
17 status is non-discretionary. Defendants efforts to import discretionary criteria into the  
18 determination under 8 U.S.C. § 1154(a)(1)(A)(i) and 8 U.S.C. § 1151(b)(2)(A)(i) are  
19 illegal, and subject to judicial review as a matter of law. Such efforts also contravene the  
20 mandatory language of 8 U.S.C. § 1154(b), “the Attorney General shall...”. *Id.*

1 By way of illustration, defendants approved the I-130 petition filed by Robert  
2 Freeman on behalf of his wife Carla Freeman, following the decision of the Ninth Circuit  
3 in her case. (Dkt. # 9, Exhibit 3). When adjudicating Mrs. Freeman's I-485 application,  
4 however, defendants applied a number of grounds of inadmissibility to her application,  
5 and denied the application in discretion. (Dkt. #9, Exhibit 4). Because her I-130 was  
6 approved, however, she was provided the opportunity to renew her I-485 adjustment of  
7 status application in removal proceedings. See *Freeman v. USDC*, 489 F.3d 966 (9th Cir.  
8 2007). Defendants are free to apply lawful grounds of inadmissibility to plaintiffs'  
9 applications for adjustment of status or immigrant visas, but it is unlawful to apply  
10 grounds of inadmissibility under 8 U.S.C. § 1182(a) to a determination of immediate  
11 relative status under 8 U.S.C. § 1154(a)(1)(A)(i) and 8 U.S.C. § 1151(b)(2)(A)(i).  
12 Otherwise, a spouse who would ordinarily be able to renew an application for adjustment  
13 of status in removal proceedings would be barred from that renewal avenue through the  
14 pre-emptive denial of her I-130 petition based only upon discretionary inadmissibility  
15 factors that have no place in a nondiscretionary eligibility determination. That is because  
16 the Immigration Judge has no authority over I-130 petitions. A pre-emptive I-130 denial  
17 results in the denial of due process of law implicit in the Fifth Amendment to the United  
18 States Constitution, because without an approved petition, no process exists to review the  
19 application for adjustment of status. A reading of the statute which invalidates  
20 Defendants' misuse of the affidavit of support requirements will avoid significant due  
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1 process concerns. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr.*  
2 *Trades Council*, 485 U.S. 568, 575 (1988). Defendants may only review whether the  
3 parties were married, and whether the alien remains a spouse for immediate relative  
4 purposes. If the answer is yes, the petition *shall* be granted. 8 U.S.C. § 1154(b), INA §  
5 204(b)  
6

7  
8 Defendants purport to require *as a prerequisite of I-130 approval* the additional  
9 filing of a Form I-864, Affidavit of Support (hereinafter “Affidavit”) by a “substitute  
10 sponsor”, a requirement linked to the inadmissibility ground found at 8 U.S.C. §  
11 1182(a)(4) (“Public Charge”). The substitute sponsor, according to the Memorandum,  
12 must be filed by a relative listed in 8 U.S.C. § 1183a(f)(5)(B), which under the title “Non-  
13 Petitioning Cases” limits the available sponsors to the “spouse, parent, mother-in-law,  
14 father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law,  
15 daughter-in-law, sister-in-law, brother-in-law, grandparent, or grandchild of a sponsored  
16 alien”. The Memorandum directs adjudicators to automatically revoke an I-130 petition  
17 unless an Affidavit is filed by one of these listed substitute sponsors. Plaintiffs cases,  
18 however, are not “Non-Petitioning Cases” and are instead cases in which the petitioning  
19 spouse filed the required Affidavit. Additionally, by its express terms the permissive  
20 substitute sponsor statute only applies to cases in which “the individual petitioning under  
21 section 204 for the classification of such alien died *after* the approval of such petition.” 8  
22 U.S.C. § 1183a(f)(5)(B)(i) (emphasis added). That section is inapplicable.  
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1 In earlier pleadings, Defendants stated that a new Affidavit will be required for I-  
2 130 approval, “even if the deceased spouse filed one.” Def.’s Opp’n Cross Mot. S.J. 8, n.  
3 5 (Dkt. # 8). In support of this requirement, Defendants stated in earlier briefing that  
4 “Section 1182(a)(4)(C) of 8 U.S. Code *specifically requires a valid affidavit of support*  
5 under section 1183a for all immediate relative and family preference cases...” Def.’s  
6 Opp’n. 8, n. 5 (Dkt. # 8) (emphasis supplied). Yet, 8 U.S.C. § 1182(a)(4)(C) does *not*  
7 specifically require a valid Affidavit. Instead, that section requires that “the person  
8 petitioning for the alien’s admission (and any additional sponsor required under section  
9 213A(f) or any alternative sponsor *permitted* under paragraph (5)(B) of such section) has  
10 *executed* an affidavit of support *described in section 213A* with respect to such alien.” 8  
11 U.S.C. § 1182(a)(4)(C)(ii) (emphasis supplied). *Execution* of an Affidavit by the  
12 petitioner in a form described in § 213A (8 U.S.C. § 1183a) is all that is required under  
13 the admissibility statute.  
14

15 With respect to enforceability of the affidavit, 8 U.S.C. § 1183a(a)(1) states simply  
16 that no affidavit may be “*accepted*” unless the affidavit is “*executed* by a sponsor of the  
17 alien *as a contract - ... (B) that is legally enforceable against the sponsor...*” 8 U.S.C.  
18 § 1183a(a)(1)(B) (emphasis added). There is no factual dispute that Plaintiffs’ spouses  
19 executed an Affidavit as described in that section, and that each Affidavit was accepted  
20 for filing. The Affidavit that is accepted must be a contract that is legally enforceable  
21 against the sponsor, and the government issued I-864 Form meets the requirements of  
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1 such contract described in 8 U.S.C. § 1183a. The death of the sponsor who executed the  
2 legally enforceable contract does not foreclose its enforceability. 30 Williston on  
3 Contracts 77:75 (4th Ed.) ( Unless a contractual obligation is personal in character, death  
4 of the obligor will not discharge the duty).  
5

6  
7 In fact, the statute specifically provides only one way that an Affidavit may  
8 become unenforceable. The provisions of 8 U.S.C. § 1183a(a)(3)(A) provide that the  
9 period of enforceability terminates upon completion of a certain period of employment.  
10 For example, a petitioning sponsor may execute an affidavit of support as required under  
11 § 1182(a)(4), but during the pendency of the petition process the alien may work the last  
12 of the required 40 qualifying quarters of coverage and therefore make the affidavit of  
13 support unenforceable. See 8 U.S.C. § 1183a(a)(3)(A). The fact that the duly executed  
14 affidavit of support becomes unenforceable does not make the alien inadmissible under 8  
15 U.S.C. § 1182(a)(4), because the petitioner and alien spouse have done all that is required  
16 under the statute. It is no surprise, therefore, that for purposes of determining the number  
17 of qualifying quarters of coverage to be credited for termination of the enforceability  
18 period, Congress chose to specifically include quarters worked by a spouse where “such  
19 spouse is deceased.” See 8 U.S.C. § 1183a(a)(3)(B)(ii). Apart from providing additional  
20 support to Plaintiffs’ position that a spouse remains a spouse when he or she predeceases  
21 the other spouse, the latter section is compelling evidence that Congress considered the  
22 effect of death of a spouse on qualifying quarters, yet consciously chose not to include  
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1 death of a spouse as one of the bases for termination of the enforceability period of the  
2 Affidavit.  
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4       Additionally, Congress' choice to include specific circumstances in which the  
5 Affidavit would not be enforceable, but not to include death of the petitioner as one of  
6 those circumstances strongly suggests that Congress did not intend death to terminate the  
7 Affidavit's enforceability as a contract under the statute. See *Keene Corp. v. United*  
8 *States*, 508 U.S. 200, 208, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993) (Where Congress  
9 includes particular language in one section of a statute but omits it in another, it is  
10 generally presumed that Congress acts intentionally and purposely in the disparate  
11 inclusion or exclusion). Therefore, the form of the Affidavit must be that of an  
12 enforceable contract, but death of the sponsor does not make the Affidavit unenforceable.  
13 To the extent that 8 CFR § 213a.2(e)(2)(ii) provides otherwise, Congress provided no  
14 authority for such a result and that regulation is unlawful. Additionally, the fact that  
15 Defendants' I-864 Form states that sponsor obligations end upon the sponsor's death does  
16 not alter the fact that Plaintiffs' citizen spouses complied with all the requirements of the  
17 statute – to execute an Affidavit as a contract that is legally enforceable. Even if the  
18 Affidavit were to become unenforceable after execution and acceptance by Defendants  
19 upon the death of the sponsor, however, the requirements of 8 U.S.C. § 1182(a)(4) and 8  
20 U.S.C. § 1183a are satisfied when the sponsor has executed the Affidavit as a contract as  
21 outlined in the statute. The statute is silent regarding death of the sponsor, and  
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1 Defendants may not inject termination provisions that are specifically absent from 8  
2 U.S.C. § 1183a(a)(3)(B). The substitute Affidavit required by Defendants is unlawful.  
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### 4 **C. Freeman Is Not Limited To Adjustment Filings**

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6 According to the Memorandum, the *Freeman* decision will not be applied to I-  
7 130 petitions unless an I-485 application was also filed before the death of the petitioner.  
8  
9 The Court in *Freeman* held that, “an alien widow whose citizen spouse filed the  
10 necessary immediate relative petition form but died within two years of the qualifying  
11 marriage nonetheless remains a spouse for purposes of 8 U.S.C. § 1151(b)(2)(A)(i), and  
12 is entitled to be treated as such when DHS adjudicates her adjustment of status  
13 application.” *Freeman*, supra, at 1034. The Court did not hold, for example, that an alien  
14 widow whose citizen spouse filed the necessary immediate relative petition form but died  
15 within two years of the qualifying marriage nonetheless remains a spouse for purposes of  
16 8 U.S.C. § 1151(b)(2)(A)(i), *if she has also filed an* adjustment of status application.  
17  
18 Such an interpretation is not only in direct conflict with *Freeman*, but also unsupported  
19 by the statute.  
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22  
23 Even if the *Freeman* ruling were limited to such narrow circumstances, the  
24 Court may find that an I-485 application is not required for alien spouses to escape the  
25 unlawful denial and termination procedures applied by Defendants. Petition procedure  
26 must be free from influence by admissibility concerns and discretionary criteria, as  
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1 established by Board precedent. *Matter of O*, 8 I&N Dec. 295 (BIA 1959). If the Court  
2 were to require, as Defendants suggest, the filing of an I-485 application which concerns  
3 only admissibility criteria and the discretion to grant or deny adjustment of status, then  
4 alien spouse beneficiaries of I-130 petitions filed by United States citizens would not be  
5 considered spouses because of unrelated admissibility or discretionary reasons. Such a  
6 result is prohibited by Board precedent, and by the holding in *Freeman*. It is true that the  
7 Freeman panel analyzed the entire statutory framework,

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11 “We conclude, through our review of the language, structure, purpose and  
12 application of the statute, that Congress clearly intended an alien widow  
13 whose citizen spouse has filed the necessary forms to be and to remain an  
14 immediate relative (spouse) for purposes of § 1151(b)(2)(A)(i), even if the  
15 citizen spouse dies within two years of the marriage.”

16 *Freeman*, 444 F.3d at 1039. In Mrs. Freeman’s case, the necessary forms were the I-130  
17 and I-485 applications. In the case of an application for an immigrant visa for an  
18 applicant abroad, the necessary forms would be the I-130, followed by the DS-230  
19 immigrant visa application when later requested by the State Department. There is also a  
20 procedure through which the I-130 and DS-230 may be filed directly with the State  
21 Department at an Embassy abroad, where no USCIS presence in the foreign country  
22 exists. There is nothing in the *Freeman* decision, or the statutory scheme, that supports  
23 the Defendants’ view that a spouse is treated differently depending on which particular  
24 forms are required for the various processes. If Defendants’ view were to be adopted,  
25 then *Freeman* might be limited to those who entered under the Visa Waiver Program  
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1 (VWP), because Mrs. Freeman happened to have entered without a visa, and those who  
2 entered lawfully with a visa would be excluded. No such result is required, and  
3  
4 Defendants improperly limit the application of *Freeman* to those who also filed an  
5 adjustment of status application (Form I-485) with the petition (I-130). It is undisputed  
6 that an I-130 must be filed in all cases in order for *Freeman* to be applicable, otherwise  
7 the self-petitioning I-360 procedure governed by the *second* sentence of 8 U.S.C. §  
8 1151(b)(2)(A)(i) and the *second* clause of 8 U.S.C. § 1154(a)(1)(A) requires the widow  
9 or widower on whose behalf no I-130 petition was ever filed to file the I-360 self-  
10 petition. Therefore, because the critical form for immediate relative classification (other  
11 than for self-petitioners) is the I-130 petition, *Freeman* applies to those alien spouses on  
12 whose behalf an I-130 was filed, and is not limited to those who also filed an I-485.  
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17 **D. The Automatic Revocation and Humanitarian Reinstatement Regulation Is**  
18 **Ultra Vires and Invalid as a Matter of Law**

19 Defendants' Memorandum requires the filing of a request for humanitarian  
20 reinstatement under 8 CFR § 205.2(a)(3)(C)(2). If a request is not filed, or if defendants  
21 deem the humanitarian reasons insufficient, the petition will be revoked. *See* Dkt. # 8,  
22 Def. Mot., Ex. 1, AFM Ch. 21.2(a)(4)(B)(2). By introducing this requirement,  
23 defendants raise a significant issue for the Court's review. This requirement imports  
24 discretionary factors into the I-130 immigrant petition process that are not supported by  
25 the statute, and more properly lie with the application for adjustment of status or  
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1 immigrant visa application. For the same reasons noted above, a denial on such grounds  
2 presents Constitutional due process concerns under the Fifth Amendment. The  
3 regulations found at 8 CFR § 205.1 dealing with automatic revocation of immediate  
4 relative petitions upon the death of the petitioning relative are *ultra vires* and invalid as a  
5 matter of law.  
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8 The statute governing revocation of approval of petitions states, “The Secretary  
9 of Homeland Security may, at any time, *for what he deems to be good and sufficient*  
10 *cause*, revoke the approval of any petition approved by him under section 204 [8 U.S.C. §  
11 1154]. Such revocation shall be effective as of the date of approval of any such petition.”  
12 8 U.S.C. § 1155 (emphasis supplied). The regulation, however, provides that a petition is  
13 *automatically* revoked upon the death of the petitioner, unless USCIS determines as a  
14 *matter of discretion* for humanitarian reasons that revocation would be inappropriate. 8  
15 CFR § 205.2(a)(3)(C)(2). Defendants have not attempted to justify the humanitarian  
16 reinstatement criteria, and such barriers are needless and unlawful. The death of a spouse  
17 does not, as a matter of law, constitute “good and sufficient cause” to automatically  
18 revoke the approval of a petition that has been properly filed by a United States citizen on  
19 behalf of his or her spouse. Such things as fraud, misrepresentation, or mistake may  
20 constitute good and sufficient cause, but not an Act of God over which petitioner and  
21 beneficiary have no power, nor defendants’ own delay. More importantly, the Board of  
22 Immigration Appeals has held that in determining what constitutes “good and sufficient  
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1 cause” to revoke the approval of a visa petition, the question is whether the evidence  
2 “would have warranted a denial based on the petitioner’s failure to meet his or her burden  
3 of proof.” *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Because *Freeman* holds  
4 that death of the petitioning spouse cannot form the basis of a denial of a visa petition,  
5 *Matter of Estime* commands that it cannot form the basis of a revocation of the approval  
6 of a visa petition. *Matter of Estime* involved the question of fraud, which could have  
7 formed the basis of a denial of the visa petition, and which was therefore a possible basis  
8 for revocation. *Id.*

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12 Defendants’ policy to automatically revoke a visa petition upon the death of the  
13 petitioner has also been rejected by Circuit Courts of Appeal. *See e.g., Leano v. INS*, 460  
14 F.2d 1260 (9th Cir. 1972); *Pierno v. INS*, 397 F.2d 949 (2d Cir. 1968). The Second  
15 Circuit opined that it could “hardly imagine” that Congress intended 8 U.S.C. § 1155 to  
16 result in automatic revocation of a visa petition upon the death of the citizen spouse.  
17 *Pierno*, 397 F.2d at 951. In *Pierno* the Court reviewed the automatic revocation of a  
18 petition approved prior to the death of the petitioner, but where the adjustment of status  
19 application had not been adjudicated at the time of the death. The Court explained the  
20 automatic revocation regulations thus,  
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24  
25 [T]he Service contends that the automatic revocation of approval pursuant to  
26 Regulation 206.1(b)(2), when Mr. Pierno died, precludes the Service from  
27 granting Mrs. Pierno’s application for an adjustment of status. We disagree.  
28

1 Section 206, under which the automatic revocation regulations are  
2 promulgated, provides:

3 The Attorney General may, at any time, for what he deems to  
4 be good and sufficient cause, revoke the approval of any petition [for  
5 nonquota status] approved by him. . .

6 The section is permissive; it grants the Attorney General discretion in  
7 determining what shall constitute good and sufficient cause and whether  
8 revocation of approval shall occur or be withheld in those cases where there  
9 is good and sufficient cause for revocation. It should not be interpreted to  
10 authorize the Attorney General's wooden application of rules for automatic  
11 revocation. In Stellas v. Esperdy, 388 U.S. 462, 87 S.Ct. 2121, 18 L.Ed. 2d  
12 1322 (1967), reversing 366 F.2d 266 (2d Cir. 1966), the Supreme Court  
13 remanded the cause before it for further proceedings before the Service  
14 when the Service applied its rule that petition approval is automatically  
15 revoked when the petitioning citizen-spouse withdraws his petition.  
16 Regulation 206.1(b)(1). See also, United States ex rel. Stellas v. Esperdy,  
17 366 F.2d at 272-274 (Moore, J., dissenting). *We can hardly imagine that*  
18 *Congress would have intended Mrs. Pierno to be deported as a result of her*  
19 *husband's death had he been, for instance, killed in action while the status*  
20 *adjustment proceedings were pending. Yet, such a result would follow from*  
21 *the Service's decision. The purpose of placing such discretion regarding*  
22 *immigration in the hands of the Attorney General, rather than having that*  
23 *field governed by a detailed statute, is to give some flexibility in treating a*  
24 *myriad of possible situations. Regulations issued by the Attorney General*  
25 *should not be so applied as to frustrate that Congressional intent.*

26 *Id.* at 950-51 (emphasis added) (alteration in original). The automatic revocation  
27 regulations continue to frustrate the intent of Congress, and are *ultra vires*.

28 Consequently, the automatic revocation regulations do not constitute a "permissible  
construction of the statute" found at 8 U.S.C. § 1155, and are "arbitrary, capricious, or  
manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44. Defendants'  
interpretation of 8 U.S.C. § 1155 is directly contrary to 8 U.S.C. § 1154 and, therefore, is

1 entitled to no deference. Furthermore, because *Freeman* holds that death of the  
2 petitioning spouse cannot form the basis of a denial of a visa petition, and because *Matter*  
3 *of Esteime* commands that facts which could not support a denial cannot form the basis of  
4 a revocation of the approval of a visa petition, Defendants' recourse to the revocation  
5 statute is unlawful.  
6  
7

8 **E. Plaintiff Nguyen's Claim and the Claims of the K-1 Subclass**  
9 **are Governed by *Choin* and *Freeman***

10 The Ninth Circuit's precedential decision in *Choin v. Mukasey*, 537 F.3d 1116 (9th  
11 Cir. 2008), which followed *Freeman*, entitles Plaintiff Nguyen and the class members  
12 that she represents to judgment in their favor. The analysis of the Court in *Choin* on the  
13 effect of divorce of a K-1 entrant following marriage to the U.S. citizen petitioner is fully  
14 applicable to death of the U.S. citizen petitioner. The Court in *Choin* analyzed the waiver  
15 available under 8 U.S.C. § 1186a(c)(4)(B), and noted that, "This waiver teaches that a  
16 non-citizen spouse is not automatically returned to his or her native country upon divorce.  
17 Instead, the statute focuses on the good faith of the marriage, not the marriage's success  
18 or failure." *Choin*, supra, 537 F.3d at 1121. In the case of "death of the spouse"  
19 provided in 8 U.S.C. § 1186a(c)(4)(B), a waiver application is not even needed, because  
20 8 USC § 1186a provides in no less than five separate places that termination of  
21 conditional resident status (that is, status based on a marriage which was entered into less  
22 than 24 months before the alien obtains status) may not occur "through the death of the  
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1 spouse.” See 8 U.S.C. §1186a(b)(1)(A)(ii); 8 U.S.C. §1186a(c)(1)(A); 8 U.S.C.  
2 §1186a(c)(4)(B); 8 U.S.C. §1186a(d)(1)(A)(i)(II); 8 U.S.C. §1186a(g). Congress  
3 intended the K-1 entrant to marry, in good faith, the U.S. citizen who petitioned for the  
4 K-1 status, and also provided for conditional permanent resident status for those spouses  
5 married less than 24 months. Such conditional resident status may be terminated only on  
6 bases “other than through the death of a spouse.” 8 U.S.C. § 1186a(b)(1)(A)(ii).  
7 Congress never intended bureaucracy and delay to interfere with this statutory scheme  
8 and foreclose all avenues of relief when death cannot be a basis of termination of status  
9 where the marriage is less than 24 months. Plaintiff Nguyen and the K-1 class fall  
10 squarely within the holding and reasoning of *Choin* and *Freeman*, and are entitled to  
11 judgment in their favor.  
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#### 16 **F. Plaintiff Lockett Did Not Abandon His Adjustment of Status**

17 Plaintiff Lockett has not abandoned his I-485 Adjustment of Status Application.  
18 Plaintiff Lockett obtained an advance parole travel document prior to his departure, but  
19 due to personal circumstances did not return before the expiration date of the document.  
20 Defendants refuse to issue a renewal document, arguing that he has now abandoned the  
21 application. These actions derive from Defendants’ unlawful interpretation of the  
22 definition of spouse, and are precisely those unlawful factors flowing from the erroneous  
23 interpretation of which Plaintiffs complain and seek relief. First Amended Complaint, p.  
24 41, para. 10 (Dkt. # 37).  
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1 The regulation at 8 CFR § 245.2(a)(4)(B) is *ultra vires*, because nothing in the  
2 adjustment of status statute, 8 U.S.C. § 1255, or anywhere else in the Immigration and  
3 Nationality Act for that matter, provides statutory authority for Defendants to deem an  
4 application automatically abandoned where Defendants by their own unlawful actions  
5 may withhold an advance parole travel document. This alleged abandonment finding is  
6 an unlawful direct consequence of Defendants illegal actions, and should not be  
7 sanctioned.  
8

## 9 II. CONCLUSION

10 Defendants are correct on one vital point when they state that,

11 “a Form I-130 can still be approved, even if the underlying marriage has  
12 ended by the petitioner’s death. All the alien needs to do to obtain approval  
13 of the Form I-130 is to prove that the alien was the spouse of the petitioner  
14 when the petitioner died, and that the marriage was not an immigration  
15 sham. A.F.M. chapter 21.2(a)(4)(B)(1). On this point, Defendants’ policy is  
16 fully consistent with *Freeman*.”  
17

18 Def. Mot. Partial S.J. at 22 (Dkt. # 124). On this point, Defendants’ policy is fully  
19 consistent with *Freeman*, but Defendants’ policy is not fully consistent with  
20 *Freeman* where Defendants 1) require a substitute I-864 Affidavit of Support  
21 where the petitioner executed the necessary Affidavit form; 2) automatically  
22 revoke the I-130 Petition on grounds that could not form a basis for denial and  
23 thereafter require the showing of discretionary factors (“humanitarian  
24 reinstatement”) that have no place in petitioning procedure; and 3) limit the  
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28

1 applicability of *Freeman* to cases in which an I-485 Application for Adjustment of  
2 Status is filed.  
3

4 For the foregoing reasons, Plaintiffs respectfully request that summary judgment  
5 be entered in Plaintiffs' favor.  
6

7 DATED March 27, 2009.

8 By /s/ Brent W. Renison  
9 BRENT W. RENISON, Oregon SBN. 96475  
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15 *Admitted pro hac vice*  
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1 PROOF OF SERVICE

2  
3 I, the undersigned, say: On March 27, 2009, true and correct copies of the  
4 plaintiffs': PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL  
5 SUMMARY JUDGMENT AS TO NINTH CIRCUIT CLASS PLAINTIFFS, were served  
6 pursuant to the district court's ECF system as to ECF filers to the following ECF filers:

6 Elizabeth Stevens  
7 Office of Immigration Litigation  
8 USDOJ Civil Division  
9 P.O. Box 878  
10 Ben Franklin Station  
11 Washington, DC 20044

11 Patricia E. Bruckner  
12 Office of Immigration Litigation  
13 USDOJ Civil Division  
14 P.O. Box 878  
15 Ben Franklin Station  
16 Washington, DC 20044

16 I declare under penalty of perjury under the laws of the United States of America  
17 that the foregoing is true and correct.

18 EXECUTED on March 27, 2009, at Lake Oswego, Oregon.

20 /s/ Brent W. Renison  
21 Brent W. Renison, Declarant