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### **Staten Island Ferry Crash Claims One More Victim Under the Widow Penalty**

MAHWAH, NJ – American citizen Louis Robinson was killed on October 15, 2003 in the Staten Island Ferry crash, and now his widow's plea for resident status has been derailed by a divided federal Court of Appeals decision issued today.

Louis Robinson filed a petition for his wife Osserritta of Jamaica to receive permanent resident status in March 2003, shortly after their marriage. Such petitions were taking on average more than twenty-one months to review in 2003. The immigration bureaucracy, United States Citizenship and Immigration Services (USCIS) had not reached the couple's application when Mr. Robinson was tragically killed. Instead of allowing Mr. Robinson's petition to proceed on behalf of his surviving spouse, USCIS denied it automatically without appeal due to the death. This type of termination, without even reviewing evidence of the good faith marriage, has become known as the "widow penalty." Had bureaucratic action occurred before the death, her application would have been routinely approved, because she entered the country legally and the marriage was bona fide.

Today a three Judge panel of the Third Circuit Court of Appeals sitting in Philadelphia, Pennsylvania, in a 2 to 1 decision, upheld the government's automatic termination and overturned a lower New Jersey federal court ruling in Mrs. Robinson's favor from 2007. The two Judges in the majority ruled in an opinion authored by Judge Sloviter that Mrs. Robinson was no longer the spouse of Louis Robinson, and that the immigration law requires a couple to be married two years for lawful permanent resident (LPR) status to be granted. The majority Judges, unfortunately, misread the law to require a marriage of two years before residency may be granted,

"We agree with the agency that Robinson's claim must be rejected, not because of any government bureaucracy but because she does not meet one of the Congress' requirements for immediate relative status, i.e., that she had been married to her citizen spouse for at least two years...Congress could reasonably determine that an alien with a pending I-130 petition

who had been married to a U.S. citizen for less than two years at the time of the citizen spouse's death is not entitled to LPR status”

The problem with Judge Sloviter's majority opinion is that USCIS grants LPR status on a routine basis to those who are married for less than two years, and in fact may not take away that status due to death of the spouse. The Conditional Resident Status statute, explicitly states that resident status may be terminated for a number of reasons “other than through the death of a spouse.” 8 USC Sec. 1186a. A foreign spouse who was married for three months, for example, at the time USCIS reached the application, would be given resident status, and if the death occurred after that USCIS could not terminate it because of the death of the spouse. The majority's failure to consider these statutes was a failure to properly decide the case. As the dissenting Judge Nygaard stated in his disagreement with the majority opinion,

“As a result of the government's fatally flawed interpretation of [the immediate relative definition], Osserritta Robinson will be removed from the United States, in spite of her full compliance with the INA, simply because the petition filed on her behalf by her deceased husband is stuck in the government's bureaucracy... Finally, it is inconceivable to me that Congress intended the alien's status to be contingent upon the amount of time that the executive department takes to process a timely and proper petition - a factor completely outside of the control of the alien. This interpretation creates an arbitrary, irrational and inequitable outcome in which approvable petitions will be treated differently depending solely upon when the government grants the approval. Nor do I believe that Congress intended to sanction the disregard that the department has shown towards persons like Osserritta Robinson. She has committed no crime. She is innocent of any misbehavior. She is a grieving widow and the lone parent of the Robinsons' U.S. citizen child. This same department whose delay or inaction forecloses Osserritta Robinson's chance of becoming an American, now so diligently pursues the avenues of her expulsion. It contends that the statute is ambiguous and then urges upon us the least reasonable and least humane alternative. My view, wholly in the margin, is that it is untoward of this nation of immigrants, we who have passed through the portals of citizenship, to coldly and impassively slam the door behind us on innocent aspirants who dream to follow.”

Judge Nygaard, who was appointed by President Reagan, correctly noted that Congress could not have intended Mrs. Robinson's status to be contingent upon the amount of time that the bureaucracy takes to act on a properly filed petition and application. Mrs. Robinson's attorney, Jeffrey Feinbloom of New York City, advises that a petition for rehearing *en banc* will be filed, requesting a hearing before the entire Third Circuit Court (composed of 21 judges, 14 of whom may hear a case *en banc*). The full Court has the option to deny rehearing or grant it, and either uphold the decision or overturn it. Following this process, either party could seek review before the U.S. Supreme Court because there is now a “Circuit split.” The split in Circuits is due to the fact that the Ninth Circuit Court of Appeals in 2006 ruled in favor of a surviving spouse in *Freeman v. Gonzales*, whose husband had been killed by a Pepsi truck driver. The *Robinson v. Napolitano* decision affects all surviving spouses with cases like Mrs. Robinson's in Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands, the area covered by the Third Circuit.

In addition to the *Freeman* and *Robinson* cases, two other Circuit Courts have “widow penalty” cases pending before them – the *Taing* case in the First Circuit (Massachusetts, Maine, New Hampshire, and Rhode Island) and the *Lockhart* case in the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee). In addition, lawsuits have been filed in federal court in Maryland, Missouri, New York and Texas to challenge the widow penalty, and a class action has been certified in the Ninth Circuit by the federal court in Los Angeles (covering Alaska, Arizona, California, Idaho, Guam, Hawaii, Northern Marianas, Nevada, Montana, Oregon, and Washington). Secretary of Homeland Security Janet Napolitano issued a Directive on Friday, January 30, 2009 requiring the immigration agencies to report to her by February 20, 2009 on “the regulatory, legislative, and litigation options that could be considered to immediately address the situation of these widows and widowers”. The Directive is a welcome response to the widow penalty, and widows, widowers and their American children and families anxiously await the Secretary’s decision as to whether the current policy will continue, or whether a change will be put in place.

Media accounts, including those in the Washington Post, New York Times, and CBS 60 Minutes have drawn attention to the nearly two hundred widows and widowers of U.S. citizens facing the widow penalty. We urge all survivors and their families to keep up hope, because we will not stop fighting in Court or Congress until the widow penalty is abolished.

Further information on the widow penalty, including the recent lawsuits, legislation and advocacy tools can be found at the non-profit website for Surviving Spouses Against Deportation: [www.ssad.org](http://www.ssad.org)