

No. 07-2977

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Osserritta Robinson,
Plaintiff-Appellee,

v.

Janet Napolitano, Secretary,
U.S. Department of Homeland Security, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
For the District of New Jersey
(D.C. No. 06-cv-05702)
District Judge: Honorable Stanley R. Chesler

**BRIEF OF AMICUS CURIAE SSAD IN SUPPORT OF
PLAINTIFF-APPELLEE'S PETITION FOR REHEARING EN BANC**

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STATEMENT OF COUNSEL UNDER FRAP 35(b)(1) AND LAR 35.1

I express a belief, based on a reasoned and professional judgment that the proceeding involves questions of exceptional importance to surviving spouses and their American citizen children and families, resulting in the automatic termination of duly filed petitions that remained mired in bureaucratic processing, due to the death of the petitioning spouse, a factor entirely beyond the control of the spouse, a result not intended by Congress, and that the divided panel decision conflicts with the unanimous authoritative decision in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), the only other United States Court of Appeals to have ruled on the issues raised herein.

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CORPORATE DISCLOSURE STATEMENT

Surviving Spouses Against Deportation (SSAD) is a 501(c)(4) non-profit association with headquarters in Lake Oswego, Oregon. No person or corporation owns any percentage of SSAD, nor is the organization publicly held.

STATEMENT OF INTEREST BY AMICUS CURIAE

Surviving Spouses Against Deportation

Surviving Spouses Against Deportation (SSAD) is a non-profit organization composed of surviving spouses of American citizens, their immediate family members, and legal counsel. SSAD was established in February 2007 to provide a resource to surviving spouses, their children and families, and attorneys seeking to assist clients whose petitions are subject to the government's automatic termination practices. SSAD maintains a website (www.ssad.org) that contains current information about developments relating to surviving spouses of American citizens, including ongoing litigation efforts.

SSAD has a compelling interest in this case, because the issues decided directly affect SSAD members and their American children and families in the jurisdiction of the Third Circuit, and indirectly affect SSAD members across the nation. Specifically, a number of known surviving spouses whose petitions and applications were denied in Delaware, Pennsylvania, New Jersey, and an unknown number in the U.S. Virgin Islands will now have no relief from summary denial, deportation and separation from their families, despite having entered legally and complied with all statutory requirements for legal resident status. One of the named plaintiffs in the *Hootkins v. Chertoff* class action litigation, Mrs. Stella Standifer, will be directly impacted by the decision in this case because she resides

in Philadelphia, Pennsylvania. *See Hootkins v. Chertoff*, No. 07-05696 (CAS) (C.D. Cal., filed August 30, 2007), first amended complaint, p. 30. Following the decision in this case, Defendants-Appellants have filed notices of the decision in other cases around the country, seeking to influence other courts. The decision in this case, therefore, impacts the interests of all SSAD members.

SSAD pro bono counsel Brent W. Renison is a founding member of SSAD, and has extensive knowledge and experience with the statutes and cases involved in this case. Mr. Renison was lead counsel on the *Freeman v. Gonzales* case, has assisted in the briefing in all the cases currently pending in federal courts around the country, and has been appointed class counsel in the *Hootkins v. Chertoff* class action. *See Hootkins v. Chertoff*, 2009 U.S. Dist. LEXIS 3243 (C.D. Cal. 2009), Order granting motion for class certification, *7.

ARGUMENT

A divided panel of this Circuit has reversed the judgment of the District Court granting summary judgment to Plaintiff-Appellee, Mrs. Osserritta Robinson. For the reasons stated in Mrs. Robinson's submission and herein, rehearing should be allowed.

I. THE PANEL WAS MISLEAD ON AGENCY PRACTICE AND PROCEDURE DURING ORAL ARGUMENT, AND THEREFORE FAILED TO CONSIDER THE IMPACT OF KEY STATUTES THAT OTHER COURTS HAVE ANALYZED AND CONSIDERED

A misleading exchange during oral argument contributed to a failure of proper analysis by the majority. The majority opinion also evidenced a misinterpretation of the "two-year rule" and failed to consider key statutes that were carefully considered by the Ninth Circuit in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), the only other court of appeals to have ruled on the issues raised herein. Specifically, the *Robinson* majority held that,

"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."

Opinion, p. 15. This holding is "fatally flawed." Dissent, p. 16 The majority was prevented from recognizing that Congress did not impose a requirement that an immediate relative have been married to a citizen spouse for at least two years as a

prerequisite to obtaining permanent resident status. Instead, the two year rule was only intended to guard against marriage fraud, and to therefore allow an individualized determination – not automatic termination. There are two separate “two-year rule” sections that were conflated by the majority – 1) 8 USC § 1186a providing for conditions on permanent resident status granted to alien spouses who entered into the marriage less than two years prior to approval, were beneficiaries of petitions filed by a U.S. citizen spouse under the *first clause* of 8 USC §1154(a)(1)(A)(i)(I), and subject to the definition found under the *first sentence* of 8 USC § 1151(b)(2)(A)(i), and 2) the *second clause* of 8 USC §1154(a)(1)(A)(i)(II) providing a self-petitioning right of alien spouses under the *second sentence* of 8 USC § 1151(b)(2)(A)(i). These sections consistently refer to a spouse and a surviving spouse as an “alien spouse” or “the spouse”. These interconnected sections refer to a surviving spouse as an “alien spouse” or “the spouse”, and the two year requirement of the self-petitioning spouse under the *second clause* of 8 USC §1154(a)(1)(A)(i) does not explicitly or implicitly limit the alien spouse whose U.S. citizen spouse filed a petition under the first clause of USC §1154(a)(1)(A)(i). The latter is merely subject to the conditions of 8 USC § 1186a which only allow for termination of status on a basis “other than through the death of a spouse.” 8 USC § 1186a(b)(1)(A)(ii).

A. Misleading Exchange Contributed to Lack of Analysis

The majority opinion evidenced a fundamental misunderstanding of the routine processing times for administrative adjudication, assuming that the USCIS rarely if ever acts fast enough to grant applications before two years of marriage. During oral argument, Circuit Judge Sloviter, who authored the majority opinion, had this exchange with the government lawyer:

SLOVITER, J.

What happens in the rare case where the agency acts so fast that it grants all the petitions, somebody is walking around with what is called a conditional green card and the...

GOV'T

They're fine, it's not going to be taken away.

SLOVITER, J.

Really, the, it doesn't get automatically revoked?

GOV'T

No, no, I was trying to explain that before when I talked about the three stages of the process, and how the statute, the structure of the statute and the regulations reflect an attempt to protect the interests of, or expectations, shall we say, of the alien, more as the person goes through the process. When they get to the end of the process and they become a lawful permanent resident, they're fine. That's going to be permanent regardless of whether the United States citizen dies.

SLOVITER, J.

Even if the marriage hasn't lasted for two years?

GOV'T

That's right, that's the way the statute is written...

SLOVITER, J.

And does that happen, ever? I guess the agency doesn't act that fast.

GOV'T

I can't say that it never happens, but as you're well aware the agency is understaffed, underfunded, and has a lot of applications before it constantly.

Contrary to the misleading exchange during oral argument, it is not the *rare* case that an application is approved where the marriage has not lasted two years, but the norm. It is commonplace for USCIS to grant adjustment of status to applicants who have been married for several months, because the statutory scheme clearly contemplates that the agency is to do so on a routine basis. USCIS processing times have always been under 24 months during the relevant period of time, and now average about six months nationwide as a result of earnest backlog reduction efforts initiated in 2003.¹

It is regrettable that the Court did not have accurate information before it, but that should not work to the disadvantage and extreme prejudice of Plaintiff-Appellee and other similarly situated surviving spouses. Amicus Curiae believe

¹ 10/2003 average times: **21.2** months; 8/2004 average times **21.7** months

http://www.uscis.gov/files/article/BEPQ3v2_1.pdf

2004 Q3 average times: **22.4** months

<http://www.uscis.gov/files/article/BEPQ4v7.pdf>

2004 Q4 average times: **19.8** months

<http://www.uscis.gov/files/article/BEPQ4v7.pdf>

2005 Q1 average times: **18.6** months

<http://www.uscis.gov/files/article/BEPQ1FY2005.pdf>

2005 Q3 average times: **15.2** months

<http://www.uscis.gov/files/article/BEPQ3FY2005.pdf>

2005 Q4 average times: **13.9** months

<http://www.uscis.gov/files/article/BEPQ4FY2005.pdf>

2006 Q1 average times: **13.4** months

<http://www.uscis.gov/files/article/BEPQ1FY2006.pdf>

2006 Q2 average times: **12.5** months

<http://www.uscis.gov/files/article/BEPQ2FY06.pdf>

2006 Q3 average times: **8.3** months

http://www.uscis.gov/files/article/backlog_FY06Q3.pdf

that had the panel known the realities of USCIS practice and procedure, and therefore had been prompted to analyze more closely the interconnected provisions of § 1154 and §1186a the importance of which are set out below, the majority would have sided with the dissent and upheld the sound judgment of the District Court. The dissent, after all, was entirely correct that,

As a result of the government's fatally flawed interpretation of § 1151(b), 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.

Nygaard, dissenting, p. 16. Yet the majority in this case overlooked the importance of § 1154 and §1186a.

B. The Two-Year Rule Found in § 1186a Conflicts Directly With The Majority Opinion and Was Not Discussed

The majority found the so-called "two year rule" to require a marriage of two years as a prerequisite to lawful permanent resident status, but did not analyze or refer to a key statute that directly undermines that holding. The Conditional Residence statute, 8 USC § 1186a, was enacted in 1986 before the second sentence of 8 USC § 1151 was even inserted in 1990. The provisions of 8 USC § 1186a specifically address those immediate relative spouses who obtain permanent resident status "by virtue of a marriage which was entered into less than 24 months before the date the alien obtains such status by virtue of such marriage" and further state in five specific sections that termination of that status may not occur "*through*

the death of a spouse.” See 8 USC §1186a (b)(1)(A)(ii); 8 USC §1186a (c)(1)(A); 8 USC §1186a (c)(4)(B); 8 USC §1186a (d)(1)(A)(i)(II); 8 USC §1186a (g). The Ninth Circuit in *Freeman* stated it thus,

“[T]he government concedes that it had the power to grant the Freemans’ application prior to Mr. Freeman’s death (and the Freemans’ second anniversary). Had it done so, Mrs. Freeman’s LPR could not then have been voided by her husband’s death, as the statute expressly states. See § 1186a(a), (b)(1) (providing that an alien spouse who receives permanent resident status as an immediate relative before the second anniversary of her qualifying marriage does so on a conditional basis, and if the Attorney General determines that prior to the second anniversary of the alien’s obtaining status the alien’s marriage ‘has been judicially annulled or terminated, *other than through the death of a spouse,*’ the Attorney General ‘shall terminate the permanent resident status of the alien.’ (emphasis added)). This is compelling evidence that Congress did not intend its provision for a widow’s self-petition for adjustment of status to have an implicit collateral consequence of terminating a spouse’s already pending petition – particularly when the effect would be to foreclose a grieving widow from any adjustment at all ‘through the death of [her] spouse.’”

Freeman v. Gonzales, 444 F.3d 1031, 1042 (9th Cir. 2006). Simply stated, compelling evidence exists that Congress did not intend a spouse who experienced a quick adjudication of (for example) three months resulting in permanent resident status, followed by the death of her spouse at four months, to be completely insulated from having her permanent resident status terminated (as the government conceded at oral argument would be the case under 8 USC § 1186a), and at the same time have intended a spouse who experienced a long bureaucratic delay to

have her petition terminated, where the death of her spouse occurred at eight months. The dissent correctly stated,

“[I]t is inconceivable to me that Congress intended an 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.”

Nygaard, J., dissenting opinion, p. 23. The panel did not analyze § 1186a.

C. The Use of “Spouse” Within Key Statutes Referring To Surviving Spouses Supports The Dissent’s Analysis

The dissent properly analyzed the importance of Congress’ usage of the phrase “the spouse” in the second sentence of 8 USC § 1151(b)(2)(A)(i), and noted the deliberate use of the word “spouse” in 8 USC §1154(a)(1)(A)(i)(II), which refers to a surviving spouse. *Id.* at p. 19. The majority in *Robinson* failed to consider relevant statutes 8 USC § 1154 and 8 USC § 1186a, and viewed 8 USC § 1151 in a vacuum. A review of the entire statutory scheme including the conflict that the government position creates with respect to § 1154 and §1186a, as was undertaken in *Freeman*, yields the conclusion that Congress never intended a duly filed petition to be voided automatically upon the petitioner’s death.

II. EN BANC REVIEW IS NECESSARY TO INSTRUCT OTHER CIRCUIT COURTS ON THE PROPER ANALYSIS OF THE STATUTES THAT THE FREEMAN COURT UNDERTOOK

Because other circuit courts will look to the *Robinson and Freeman* decisions when deciding this important issue, the full *en banc* court should review and specifically discuss the impact of *all* the relevant statutes, including § 1154 and §1186a. Given that the Third Circuit and Ninth Circuit decisions reached dramatically different conclusions on cases involving the same material facts, it is only appropriate that the later issued decision touch upon the relevant statutes discussed by the first court to have ruled on the issue, or at least discuss why those statutes are not necessary to the disposition of the case. In fact, no analysis was given by the majority to what the Ninth Circuit deemed “compelling evidence that Congress did not intend its provision for a *widow’s self-petition* for adjustment of status to have an implicit collateral consequence of terminating a *spouse’s already pending petition*”. *Freeman*, 444. F.3d at 1042 (emphasis added).

Two other sister circuits have had cases identical to *Freeman* and *Robinson* argued and submitted. *See Taing v. Chertoff*, 526 F. Supp. 2d 177 (D. Mass. 2007), *appeal docketed*, No. 08-1179 (1st Cir. 2008)², and *Lockhart v. Chertoff*, 2008 WL 80225 (N.D. Ohio 2008), *appeal docketed*, No. 08-3321 (6th Cir. 2008).³ Additionally, more lawsuits have been filed by surviving spouses and minor children and are pending in district courts located in the jurisdiction of the Second, Fourth, Fifth, and Eighth Circuits. *Hanford v. Chertoff*, Civ. No. SA-08-CA-0795

² Oral Argument in *Taing* took place October 10, 2008.

³ Oral Argument in *Lockhart* took place January 20, 2009.

(XR) (W.D. Texas, Sept. 25, 2008); *Kells v. Chertoff*, No. 08-CV-1582-CAS (E.D. Missouri, Oct. 14, 2008); *Robledo v. Chertoff*, No. AW-08-CV-2581 (D. Maryland, Oct. 2, 2008); *Gorovets v. Chertoff*, No. 08-10094 (LAP) (S.D.N.Y., Nov. 20, 2008); *McKoy v. Chertoff*, No. 08-3274 (DKC) (D. Md., Dec. 4, 2008); *Valero v. Chertoff*, No. 08-10793 (S.D.N.Y. Dec. 12, 2008). Amicus Curiae is aware of lawsuits being prepared in Florida and Georgia, within the Eleventh Circuit's jurisdiction. Because the decision in this case has far reaching implications on these pending and future cases, full analysis of the relevant statutes is of critical importance. This Court should grant the Plaintiff-Appellee's petition and rehear this case of exceptional importance to provide full analysis of the asserted claims.

CONCLUSION

For the foregoing reasons, the Amicus Curiae respectfully request that this Court grant the Plaintiff-Appellee's petition for rehearing *en banc*.

Respectfully Submitted,

/s/ Brent W. Renison
Brent W. Renison
Attorney for Amicus Curiae

Date: February 20, 2009

CERTIFICATIONS

1. **Certification of Bar Membership**

I hereby certify that I, Brent W. Renison, am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. **Certification of Word Count**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,155 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman Font.

3. **Certification of Service**

I hereby certify that electronic copies of the foregoing *Brief of Amicus Curiae SSAD in Support of Plaintiff-Appellee's Petition for Rehearing En Banc*, was sent to all CM/ECF Filing Users through the CM/ECF system, and that no parties are Non-Filing Users.

4. **Certification of Virus Check**

I hereby certify that a virus check of the electronic .PDF version of the foregoing Brief was performed using AVG Antivirus Network Edition, and the .PDF file was found to be virus free.

/s/ Brent W. Renison
Brent W. Renison
Attorney for Amicus Curiae

Date: February 20, 2009