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MEMORANDUM

To: Hon. Janet Napolitano
Secretary, Department of Homeland Security

From: Brent W. Renison
Pro Bono Counsel, Surviving Spouses Against Deportation

Date: February 16, 2009

Subject: Widows and Widowers of U.S. Citizens

This memorandum is intended to provide detailed information to the Secretary with respect to regulatory, legislative, and litigation options to immediately address the situation of widows and widowers of U.S. citizens who had petitioned for the spouse's immigration, but whose petitions were not adjudicated before the citizen spouse's death, resulting in agency termination of the petitions. This has been referred to in media accounts as the "widow penalty."

There are a number of simple administrative changes that the Secretary can make in order to carry out the intent of Congress and address the situation of these widows and widowers. In addition, such changes will serve to ease administrative burdens and streamline the process. Moreover, there are legislative changes that can be made to address the situation of those whose citizen spouse did not file a petition prior to death. I provide this information on behalf of the nearly 200 identified widows and widowers of U.S. citizens across our nation who look to the non-profit organization Surviving Spouses Against Deportation (SSAD) for assistance. As a founder of SSAD and pro bono counsel, I have litigated numerous cases involving these issues, and have performed exhaustive research into the history and faulty underpinnings of the widow penalty. Implementing these reforms will bring agency practice back into line with Congressional intent.

Summary of Recommendations:

- Rescind the Memorandum issued by Mike Aytes, Associate Director of Domestic Operations, USCIS, on November 8, 2007 – and issue a new Memorandum implementing the *Freeman* decision nationwide and abolishing the unnecessary and unlawful requirements of the Aytes Memorandum being challenged in a class action lawsuit. *See Hootkins v. Chertoff*, No. 07-05696 (CAS) (C.D. Cal., filed August 30, 2007) (challenging the substitute affidavit of support requirements and humanitarian reinstatement requirements as unlawful and *ultra vires*). Because no current

regulations are implicated in this type of case, the Secretary has the option of issuing a Memorandum that makes changes to the Adjudicator's Field Manual.

- Publish a precedent decision following *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), with the concurrence of the Attorney General, pursuant to 8 CFR § 1003.1(h)(2)(i), and file the decision for publication as a precedent in future proceedings. The decision could designate a case currently in removal proceedings, such as Mrs. Maria Paula Robledo (see *Robledo v. Chertoff*, No. AW-08-CV-2581 (D. Maryland, Oct. 2, 2008)). Additionally, because the fiancée adjustment procedure differs slightly from those who enter legally on other visas, the Secretary should also designate a case in which the applicant initially entered as a K-1 fiancée and married the petitioner, such as Mrs. Gwendolyn Hanford (see *Hanford v. Chertoff*, Civ. No. SA-08-CA-0795 (XR) (W.D. Texas, Sept. 25, 2008)). Both the *Hanford* case and the *Robledo* case have received final administrative denials, and both are in removal proceedings. The Secretary's published decision should adopt the reasoning of the Court in *Freeman* and reject the reasoning of the Court in *Robinson*. Further, the Secretary should clarify that the substitute affidavit of support requirements of the Aytes Memorandum may only be required where no I-864 was ever executed by the petitioner, and further that the humanitarian reinstatement requirements are not to be applied in any case.
- Promulgate new regulations under § 205 which provide guidance to adjudicators on the lawful reasons for exercise of the revocation authority for "good and sufficient cause" such as fraud, deceit or mistake.
- Eliminate automatic revocation of petitions due to death of the petitioner and along with it the unlawful "humanitarian reinstatement" exception. The regulation should provide that properly filed petitions that were approved shall remain valid despite the death of the petitioner after approval. This simple regulatory change will eliminate government waste and ease the suffering currently endured by families that have suffered the tragedy of a death. It will also bring the regulations into harmony with the *Pierno* decision and faithfully carry out legislative intent. Current procedures on humanitarian reinstatement make it difficult to determine which agency or office has jurisdiction over the request, and entail the needless and costly transfer of files between the State Department and the USCIS, resulting in delay and wasted resources.

Analysis

I. Implement the Holding in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) Nationwide and Abolish Automatic Termination

Today, USCIS is deporting the widows of American citizens, automatically and without exception, where the death of the American spouse occurred before lengthy administrative visa processing could be completed. This practice is illegal and unnecessary.

The USCIS claims it cannot approve an application for permanent residence (a green card) when a spouse is killed before the bureaucracy acts on the couple's residency application - no exceptions. According to the current Administration, it all depends on the timing of the bureaucracy, not the legitimacy of the marriage. Administrative delay and the happenstance of a death are the reasons USCIS treats these cases differently. Without an administrative policy change, or a technical amendment to the immigration law, USCIS will continue to compound the loss of these surviving spouses, making them face deportation, lose employment authorization, and cope with separation from family members and the home they made with their American spouses. This injustice is not required by current law, and should be halted immediately.

On November 23, 2008, CBS "60 Minutes" exposed the Widow Penalty to a national audience in a segment hosted by Bob Simon entitled "For Better or For Worse – A Loss of Love and Country." As Bob Simon reported in the "60 Minutes" segment, "Raquel, like all the other widows 60 Minutes met, had entered the U.S. legally. Still, immigration has been rejecting requests for permanent residence if the American spouse died before they had their immigration interview to prove their marriage was based on love. But the government can take months – sometimes more than a year – to schedule that interview. Raquel's mother-in-law, Linda, says Raquel shouldn't be penalized because the bureaucracy didn't move fast enough. 'They were doing things legally. They filed the right papers. They filed them in a timely manner. Things were not processed in a timely manner. And they're, and then my son died. This was not something that you can foresee,' Linda says." (Source: CBS News, "60 Minutes": <http://www.cbsnews.com/stories/2008/11/21/60minutes/main4625729.shtml>)

We urge the administration to recognize, as a number of Courts have recognized, that a spouse does not cease to be a spouse when the American spouse dies during routine bureaucratic processing of an immigration benefit. See *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006); *Taing v. Chertoff*, 2007 U.S. Dist. LEXIS 911411 (D. Mass 2007), *appeal docketed*, No. 08-1179 (1st Cir. Feb. 11, 2008); *Lockhart v. Chertoff*, 2008 U.S. Dist. LEXIS 889 (D. Ohio 2008), *appeal docketed*, No. 08-1179 (6th Cir. 2008). Additionally, other lawsuits have begun to be filed around the country, costing taxpayers money and wasting scarce government resources. *Hanford v. Chertoff*, Civ. No. SA-08-CA-0795 (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).

Government lawyers have appealed these rulings, and recently persuaded the Third Circuit that their reasoning had merit. On February 2, 2009, the Third Circuit decided

Robinson v. Napolitano, et al, --- F.3d ---, WL 223856, No. 07-2977 (3d Cir. Feb. 2, 2009), in which the majority in a 2 to 1 decision expressly disagreed with the holding in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006).

We respectfully submit that the *Robinson* decision was not well reasoned. The majority in *Robinson* evidenced a clear misinterpretation of the “two-year rule” and failed to consider key statutes that were carefully considered by the *Freeman* court. 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. The majority failed to recognize 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 allow an individualized determination – not automatic termination. Indeed, 8 USC § 1186a, the statute that was enacted in 1986 before the second sentence of 8 USC § 1151 was inserted in 1990, specifically addresses 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 makes it clear that termination of that status may not occur “through the death of a spouse.” See 8 USC §§1186a (b)(1)(A)(ii); (c)(1)(A); (c)(4)(B); (d)(1)(A)(i)(II); (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, Congress cannot have intended 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 insulated from having her permanent resident status terminated (as the government must concede 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 dissent also 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. In summary, 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*, results in the conclusion that Congress never intended a duly filed petition to be voided automatically upon the petitioner’s death. The *Robinson* majority also evidenced a misunderstanding of the wait times for administrative processing, assuming that it never acts fast enough to grant applications before two years of marriage. During oral argument in the *Robinson* case, 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 misinformation provided during oral argument by the government attorney, 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. Below are some statistics on the processing times available on the USCIS website:

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

The *Robinson* court, therefore, did not have accurate information before it, and misinterpreted the law, just as USCIS has for many years. A petition for rehearing *en banc* will be filed to request full court reconsideration of the flawed majority opinion.

Yet a simple administrative remedy is at hand. We urge the Secretary to rescind the Memorandum issued by Mike Aytes, Associate Director of Domestic Operations, USCIS, on November 8, 2007 – and issue a new Memorandum implementing the *Freeman* decision nationwide and abolishing the unnecessary and unlawful requirements of the Aytes Memorandum being challenged in a class action lawsuit. See *Hootkins v. Chertoff*, No. 07-05696 (CAS) (C.D. Cal., filed August 30, 2007) (challenging the substitute affidavit of support requirements and humanitarian reinstatement requirements as unlawful and *ultra vires*). Because no current regulations are implicated in this type of case, the Secretary has the option of issuing a Memorandum that makes changes to the Adjudicator's Field Manual.

A preferable option, however, would be for the Secretary to publish a precedent decision with the concurrence of the Attorney General, pursuant to 8 CFR § 1003.1(h)(2)(i), and file the decision for publication as a precedent in future proceedings. The decision could designate a case currently in removal proceedings, such as Mrs. Maria Paula Robledo (see *Robledo v. Chertoff*, No. AW-08-CV-2581 (D. Maryland, Oct. 2, 2008)). Additionally, because the fiancée adjustment procedure differs from those who enter legally on other visas, the Secretary should also designate a case in which the applicant initially entered as a K-1 fiancée and married the petitioner, such as Mrs. Gwendolyn Hanford (see *Hanford v. Chertoff*, Civ. No. SA-08-CA-0795 (XR) (W.D. Texas, Sept. 25, 2008)). Both the *Hanford* case and the *Robledo* case have received final administrative denials, and both are in removal proceedings. The Secretary's decision for publication should adopt the reasoning of the Court in *Freeman* and reject the reasoning of the Court in *Robinson*. Further, the Secretary should clarify that the substitute affidavit of support requirements of the Aytes Memorandum are only appropriate where no I-864 was ever executed by the petitioner, and further that the humanitarian reinstatement requirements are not to be applied in any case.

The Aytes Memorandum imposes 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 § 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). After reviewing 8 USC § 1154(a)(1)(A)(i) and 8 USC § 1151(b)(2)(A)(i), the Court in *Freeman* concluded that, “through our review of the language, structure, purpose and application of the statute, that Congress clearly intended an alien widow whose citizen spouse has filed the necessary forms to be and to remain an immediate relative (spouse) for purposes of § 1151(b)(2)(A)(i), even if the citizen spouse dies within two years of the marriage.” *Freeman v. Gonzales*, 444 F.3d 1031, 1039 (9th Cir. 2006). It is the I-130 petition, filed under 8 USC § 1154(a)(1)(A)(i), which establishes eligibility for immediate relative status. With respect to the application of the immediate relative to be granted the status of Lawful Permanent Resident (LPR), certain discretionary

grounds of inadmissibility may apply to bar the adjustment of status (Form I-485) or issuance of an immigrant visa and admission (Form DS-230). Those inadmissibility grounds are found at 8 USC § 1182(a). Such grounds of inadmissibility are wholly separate from the determination of eligibility for immediate relative status under 8 USC § 1154(a)(1)(A)(i) and 8 USC § 1151(b)(2)(A)(i), and the Aytes Memorandum attempt to apply inadmissibility standards to the validity of a petition for eligibility is prohibited as a matter of law. The Ninth Circuit has held that, “determinations that require application of law to factual determinations are nondiscretionary.” *Hernandez v. Ashcroft*, 345 F.3d 824, 833-34 (9th Cir. 2003). The determination of immediate relative status is non-discretionary. The Aytes Memorandum’s efforts to import discretionary criteria into the determination under 8 USC § 1154(a)(1)(A)(i) and 8 USC § 1151(b)(2)(A)(i) are illegal. Such efforts also contravene the mandatory language of 8 USC § 1154(b), “the Attorney General shall...”. *Id.*

It is unlawful to apply grounds of inadmissibility under 8 USC § 1182(a) to a determination of immediate relative status under 8 USC § 1154(a)(1)(A)(i) and 8 USC § 1151(b)(2)(A)(i). Otherwise, a spouse who would ordinarily be able to renew an application for adjustment of status in removal proceedings would be barred from that renewal avenue through the pre-emptive denial of her I-130 petition based only upon discretionary inadmissibility factors that have no place in a nondiscretionary eligibility determination. Such a denial results in the denial of due process of law implicit in the Fifth Amendment to the United States Constitution.

Specifically, the Aytes Memorandum purports to require *as a prerequisite of I-130 approval* the additional filing of a Form I-864, Affidavit of Support (hereinafter “Affidavit”) by a “substitute sponsor”, a requirement linked to the inadmissibility ground found at 8 USC § 1182(a)(4) (“Public Charge”). The substitute sponsor, according to the Aytes Memorandum, must be filed by a relative listed in 8 USC § 1183a(f)(5)(B), which under the title “Non-Petitioning Cases” limits the available sponsors to the “spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, or grandchild of a sponsored alien”. The Memorandum directs adjudicators to automatically revoke an I-130 petition unless an Affidavit is filed by one of these listed substitute sponsors. In cases where the citizen filed a petition, however, are not “Non-Petitioning Cases” and are instead cases in which the petitioning spouse filed the required Affidavit.

The Aytes Memorandum states that a new affidavit of support will be required for I-130 approval. Yet, 8 U.S.C. § 1182(a)(4)(C) does *not* specifically require a valid affidavit of support. Instead, that section requires that “the person petitioning for the alien’s admission (and any additional sponsor required under section 213A(f) or any alternative sponsor permitted under paragraph (5)(B) of such section) has *executed* an affidavit of support described in section 213A with respect to such alien.” 8 U.S.C. § 1182(a)(4)(C)(ii) (emphasis supplied). *Execution* of an affidavit by the petitioner is all that is required under the statute. The requirements, found at 8 U.S.C. § 1183a, defining the “enforceability” of executed

affidavits of support serve merely to instruct the form and process of the affidavit, and do not add additional requirements for admission as a lawful permanent resident other than those found at 8 U.S.C. § 1182(a)(4). For example, a petitioning sponsor may execute an affidavit of support as required under § 1182(a)(4), but during the pendency of the petition process the alien may work the last of the required 40 qualifying quarters of coverage and therefore make the affidavit of support unenforceable. See 8 U.S.C. § 1183a(a)(3)(A). The fact that the duly executed affidavit of support becomes unenforceable does not make the alien inadmissible under 8 U.S.C. § 1182(a)(4), because the petitioner and alien spouse have done all that is required under the statute. Enforceability is not required for the sponsored immigrant to be admissible - only *execution* of the affidavit by the petitioning sponsor. To maintain otherwise would lead to absurd results.

Further, even if enforceability were required at the time of admission, the Aytes Memorandum argument that the affidavit of support executed by the petitioner cannot be enforced following the death of the petitioner is not in accordance with the statute. The regulation does, in fact, state that the sponsor's obligation ends when the sponsor dies. 8 C.F.R. § 213a.2(e)(2)(ii). Yet this "enforcement ends at death" requirement is not in the statute, and runs contrary to the remedies provided for enforcement under 8 U.S.C. § 1183a(c), which include remedies to enforce obligations against a person's estate. It is true that "sponsor" is defined in the regulations as "an individual who is either required to execute or has executed a Form I-864 under this part." 8 C.F.R. § 213a.1. In cases where the petitioner filed a petition on behalf of his or her spouse, the petitioner has generally also executed a Form I-864. This is not the case of a "juridical person" attempting to execute an affidavit of support, because plaintiffs' spouses accomplished the execution of Form I-864, satisfying the requirements of the statute. Nothing further is required in such a case, and the Aytes Memorandum position that the I-130 petition should turn on a substitute affidavit of support under an unrelated provision is unfounded.

It is well established law that the determination of admissibility is not within the scope of visa petition procedure. *Matter of O*, 8 I&N Dec. 295 (BIA 1959) (<http://www.usdoj.gov/eoir/vll/intdec/vol08/Pg295.pdf>). Despite this basic tenet of immigration law, the Aytes Memorandum seeks to utilize grounds of inadmissibility in violation of law to deny surviving spouses' visa petitions, and impose unlawful humanitarian reinstatement requirements. In *Matter of O*, the Board of Immigration Appeals reviewed the denial of an immigrant petition filed by a U.S. citizen woman on behalf of her husband, a citizen of Italy. The Board noted that, "The parties were married on September 25, 1929, at Fulton, New York. The petition is supported by the birth certificate of the petitioner and by a marriage certificate. The beneficiary appears, upon the basis of the documents submitted, *prima facie* eligible for a nonquota status under section 101(a)(27)(A) of the Immigration and Nationality Act as the alien husband of a citizen of the United States." *Id.* at 295. The immigration service had denied the visa petition on the basis that the "beneficiary is ineligible to receive a visa and is inadmissible to the United States..." *Id.* at 296. The Board disagreed with the visa petition denial, and the court admonished the Service for using admissibility

criteria to deny eligibility. Such actions constitute a violation of the Due Process Clause of the Fifth Amendment of the U.S. Constitution.

In Summary, the Aytes Memorandum should be rescinded, and the Secretary should publish a precedent decision that demands adherence to the *Freeman* holding and clarifies that no substitute affidavit of support is required where the petitioner had executed an affidavit, and that no humanitarian reinstatement showing need be made in order to receive adjudication and approval of the petition and of lawful permanent resident status.

II. Implement the Holding in *Pierno v. INS*, 397 F.2d 949 (2d Cir. 1968) Nationwide and Abolish Automatic Revocation

In addition to terminating action on pending applications, the agency has also engaged in automatic revocation of petitions that were already approved at the time of the petitioner's death. The procedure for revoking the approval of visa petitions has been misused for many decades. Yet the regulations purporting to automatically revoke a visa petition upon the death of the petitioner have been rejected repeatedly by Circuit Court of Appeals in the context of the widow penalty. *See, e.g., Pierno v. INS*, 397 F.2d 949 (2d Cir. 1968); *Freeman*, 444 F.3d 1031. Nearly two decades after the automatic revocation provisions of 8 CFR § 205.2(a)(3)(C)(2) were promulgated, the Second Circuit opined that it could "hardly imagine" that Congress intended 8 U.S.C. § 1155 to result in automatic revocation of a visa petition upon the death of the citizen spouse. *Pierno*, 397 F.2d at 951. In *Pierno*, the Court reviewed the automatic revocation of a petition approved prior to the death of the petitioner, but where the adjustment of status application had not been adjudicated at the time of the death. The appellate court explained the automatic revocation regulations as such:

[T]he Service contends that the automatic revocation of approval pursuant to Regulation 206.1(b)(2) [now 205.1], when Mr. Pierno died, precludes the Service from granting Mrs. Pierno's application for an adjustment of status. We disagree.

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

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

The section is permissive; it grants the Attorney General discretion in determining what shall constitute good and sufficient cause and whether revocation of approval shall occur or be withheld in those cases where there is good and sufficient cause for revocation. It should not be interpreted to authorize the Attorney General's wooden application of rules for automatic revocation. In *Stellas v. Esperdy*, 388 U.S. 462, 87 S.Ct. 2121, 18 L.Ed. 2d 1322 (1967), *reversing* 366 F.2d 266

(2d Cir. 1966), the Supreme Court remanded the cause before it for further proceedings before the Service when the Service applied its rule that petition approval is automatically revoked when the petitioning citizen-spouse withdraws his petition. Regulation 206.1(b)(1). *See also, United States ex rel. Stellas v. Esperdy*, 366 F.2d at 272-274 (Moore, J., dissenting). *We can hardly imagine that Congress would have intended Mrs. Pierno to be deported as a result of her husband's death had he been, for instance, killed in action while the status adjustment proceedings were pending. Yet, such a result would follow from the Service's decision. The purpose of placing such discretion regarding immigration in the hands of the Attorney General, rather than having that field governed by a detailed statute, is to give some flexibility in treating a myriad of possible situations. Regulations issued by the Attorney General should not be so applied as to frustrate that Congressional intent.*

Id. at 950-51 (emphasis added) (alteration in original). The automatic revocation regulations found at 8 CFR § 205.2(a)(3)(C)(2) continue to frustrate the intent of Congress and are *ultra vires*. 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.

Following the Second Circuit's 1968 opinion in *Pierno*, a proposed regulation change was published. Specifically, the proposed regulation promised,

Proposed amendments to Part 205. In § 205.1, it is proposed to include a reference to part 203(e), as amended, respecting automatic revocation of approval of visa petitions. In § 205.1(a)(2), it is proposed to delete the words “petitioner or”, and add a new § 205.1(a)(3) which will provide that a relative visa petition will not be automatically revoked upon the death of the petitioner.

41 Fed. Reg. 220, 49996, Nov. 12, 1976 (emphasis supplied). Despite the legitimate proposal to provide that a relative visa petition will not be automatically revoked upon the death of petitioner, as would have been in keeping with the decision in *Pierno*, the agency instead issued a final regulation providing for automatic revocation upon the death of the petitioner, “unless the Attorney General in his discretion determines that for humanitarian reasons revocation would be inappropriate.” 41 Fed. Reg. 248, Dec. 23, 1976. The “humanitarian reinstatement” rule was thus born, and despite its intentions continues to haunt families and their surviving relatives. The humanitarian reinstatement rules are not lawful and should be abolished. New regulations that properly reflect the intent of Congress should be promulgated after notice and comment, and should do away entirely with automatic revocation where the death of the petitioner occurs during bureaucratic visa processing, as was proposed in 1976.

Promulgating new regulations which provide guidance on the lawful reasons for exercise of the revocation authority for “good and sufficient cause” such as fraud, deceit or mistake, will be in keeping with Congress’ intent in enacting INA 205. Eliminating automatic revocation and the humanitarian reinstatement exception, and simply leaving petitions in place that were duly filed and properly approved will eliminate government waste and ease the suffering currently endured by families that have suffered the tragedy of a death. Current procedures on humanitarian reinstatement make it difficult to determine which agency or office has jurisdiction over the request, and entail the needless transfer of files between the State Department and the USCIS, resulting in delay and wasted resources. Such transfers and additional adjudication add two to four years to what should be a seamless process for grieving families. The new regulations should leave in place an approval unless good and sufficient cause is found, such as fraud, to revoke the approval.

III. Support Legislation for Non-Petitioning Spouses

Despite the administrative changes outlined above, there are nevertheless cases that merit consideration in which the petition was never filed on behalf of the alien spouse or child. One example is Jacqueline Coats, a Kenyan citizen whose American husband Marlin died off of San Francisco Beach Park while trying to rescue two drowning teenage boys. He died on Mother’s Day 2006, and had signed all the paperwork to petition for Jacqueline to become a permanent resident days before, but due to his death he was not able to complete the filing. He has been hailed as a hero, and received the highest Coast Guard Medal of Honor, but now his surviving spouse faces deportation. There is also Dorota Lamoree, a Polish citizen whose husband was employed as a police officer with the Rio Vista police force in California. While driving home from work he was struck head-on by a vehicle occupied by teenagers who tried passing a semi-truck in a no-passing zone. He died without having filed the petition, but had hired a lawyer at the cost of \$5,000 to initiate the process before he died. Current statutes only allow a self-petition by the surviving spouse if the marriage had existed for at least two years at the time of the citizen spouse’s death. Because of the humanitarian nature of these cases, legislation has been introduced that would end the Widow Penalty for non-petitioning spouses. Bi-partisan legislation introduced in the 110th Congress, H.R. 6034 and S.3369, would have put the unfair practice of deporting widows of American citizens to rest once and for all. The bill sponsors have indicated a desire to reintroduce these bills in the 111th Congress, and I ask that the Administration consider future efforts to enact this important legislation.