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U.S. Citizenship and Immigration Services

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AFM Update AD08-04

Interoffice Memorandum

To: FIELD LEADERSHIP

From: Mike Aytes /s/
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U.S. Citizenship and Immigration Services

Date: November 8, 2007

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

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

1. Purpose

This memorandum reaffirms, for cases outside the 9th Circuit, USCIS policy concerning the effect of a visa petitioner's death, while the petition is still pending, on the authority to approve the petition. For cases within the 9th Circuit, the memorandum directs USCIS adjudicators to follow *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), in cases involving the same essential facts.

2. Background

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

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

"spouse" once the other spouse has died. Moreover, even if the statute may be considered ambiguous, the Ninth Circuit failed to give the deference to the Board's interpretation of the statute that, under decisions of the Supreme Court, a court is legally bound to give. *See National Cable & Telecomm. Assn v. Brand X Internet Services,* 545 U.S. 967 (2005); *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984).

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

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

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

3. <u>Field Guidance and Adjudicator's Field Manual (AFM) Update</u>

The adjudicator is directed to comply with the following guidance.

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

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

The revisions read as follows:

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

(a) <u>Filing and Receipting of Relative Petitions</u>.

* * * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A)(3) Effect of other judicial decisions. If a *district court* outside the Ninth Circuit follows *Freeman* in an individual case, and the Government does not appeal the decision, USCIS will comply with the district court's judgment *with respect to that specific case*. USCIS will not, however, consider the district court judgment to be a binding precedent for any subsequent case, since the Board has held that district court judgments do not have binding effect for other cases. *Matter of K- S-,* 20 I&N Dec. 715 (BIA 1993).

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

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

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

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

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

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(g) Revocation of Approval. * * *

(1) Automatic Revocation.

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(C) Discretionary Authority to Not Automatically Revoke Approval.

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

4. Use

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

5. Contact Information

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

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