

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

Docket Number
Civil Action 07-10499 WGY

Neang Chea TAING,
Petitioner/Plaintiff

v.

ALBERTO GONZALES, U.S. Attorney General et al.,
Respondents/Defendants

AGENCY FILE#
A 99 233 120

OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

TABLE OF CONTENTS

STATEMENT OF JURISDICTION, FACTS AND RELIEF REQUESTED. iii

ISSUES PRESENTED. iv

SUMMARY OF ARGUMENT. v

LEGAL ARGUMENT. 1

I. RESPONDENTS UNLAWFULLY TERMINATED ACTION ON THE SUBJECT IMMIGRANT PETITION BECAUSE MRS. TAING REMAINS AN IMMEDIATE RELATIVE FOR PURPOSES OF ADJUSTMENT OF STATUS. 1

A. Mr. Taing’s death did not divest respondents of authority to adjudicate the petition. 1

1. Immigrant Petition Statute and Regulations. 1

a. Mrs. Taing’s eligibility for immediate relative classification was established at the time of filing. 1

b. The regulations governing immigrant petitions support the Freeman Court’s construction of § 1151(b)(2)(A)(i). 3

c. Techumsen Taing’s death does not prevent the Respondents from carrying out the investigation required by INA § 204(b). .4

2. Adjustment of Status Statute and Regulations. 5

B. Respondents Lack Authority to Terminate Action On, Or Revoke, a Petition That Has Never Been Adjudicated. 7

II. THE AGENCY’S INTERPRETATION OF SECTION 201(B) OF THE ACT IS NOT ENTITLED TO DEFERENCE. 9

A. Respondents’ Construction of the Statute Is Not Based on Viable Precedent. .9

B. Congress Intended for Surviving Spouses Married less than Two Years at the Time of the Death to Remain Eligible for Immigration Benefits. 11

1.	The intent of Congress may be clearly ascertained from the Language, Structure, Purpose and Application of the Statute...	11
2.	Case Law Cited by Respondents Underscores the Weakness of Their Position..	14
3.	Even if the Court Finds INA 201(b) Ambiguous, Respondents’ Construction of the Statute is not Permissible..	15
	a. The governments reading requires the abandonment of bedrock principals of statutory interpretation and disregards the plain language and structure of the text..	15
	b. Respondents’ fail to show that the order of sentences in a subsection (clause) make them related..	16
	c. Respondents’ construction of the statute defies the traditional understanding of the term spouse, which includes surviving spouses..	17
	i. Spouse is a common term of ordinary usage and includes a spouse who outlives the other spouse..	17
	ii The definition of the spouse in the Defense of Marriage Act supports the traditional understanding of the term spouse..	18
	<u>CONCLUSION.</u>	20

STATEMENT OF JURISDICTION, FACTS AND RELIEF REQUESTED

This Court has jurisdiction pursuant to the Federal statutes cited in ¶ 1 of the Complaint.

The Respondents' have not challenged the jurisdiction of the Court.

No material facts are in dispute. The Respondents characterize this matter as “question of statutory construction.”

The Petitioner seeks, at this time, an Order denying the Respondents' motion to dismiss

ISSUES PRESENTED

- I. Whether the Respondents acted contrary to law by terminating, rather than adjudicating, a properly filed petition for immediate relative classification under INA § 201(b) and by concluding that, as a matter of law, an alien-spouse is stripped of her spousal status and eligibility for immigration benefits upon the death of her citizen-spouse if married less than two years at the time of death.

- II. Whether an agency's interpretation of a statute it administers should be accorded deference where such interpretation is contrary to the law's language, structure, purpose and application and is grounded in a precedent specifically discredited by the same administrative tribunal.

SUMMARY OF ARGUMENT

This case concerns an issue of first impression in the First Circuit. Immigration officials terminated action in a residency petition filed on the Petitioner's late husband, Mr. Techumsen Chip TAING, a Naturalized United States Citizen. The petition for Mrs. Taing, and her corresponding adjustment of status application had been pending for about 6 months at the time of her husband's death, but their adjudication remained incomplete.¹ Following the death of Techumsen Taing, rather than adjudicating the petition in accordance with the law, government officials did not act on the petition and subsequently denied – apparently without adjudication – both the visa petition and adjustment of status application.

Respondents argue that Mrs. Taing was stripped of her status as an immediate relative “spouse” under section 201(b)(2)(A)(I) of the Immigration and Nationality Act (“INA”) by virtue of her husband's death and that, accordingly, she was no longer eligible for resident status. Respondent's further contend that they were divested of authority to adjudicate Mrs. Tang's immigrant petition as a result of her husband's death. The Government's argument's are unsupported by the statutory scheme governing immigrant petitions and adjustment of status applications, they run contrary to the express intent of Congress and are grounded in deference to a 1970 decision by the Board of Immigration Appeals (“BIA”) that the BIA itself deemed inappropriate and extrajurisdictional.

Mrs. Taing urges this court to adopt the reasoning set forth by the Ninth Circuit Court of Appeals in Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006) and hold that the termination of the petition was unlawful. The Court should determine that the Respondents are duty-bound to

¹ The USCIS had begun processing the application and had, based on her filings, authorized Mrs. Taing to work and issued her a work authorization card.

adjudicate the petition because , under the express terms of the statute, Mrs. Taing qualified as the “spouse” of a U.S. Citizen at the time of filing and, absent clear statutory provision voiding her spousal status upon her husband’s death, she remains a *surviving* spouse for the purposes of eligibility for adjustment of status. Neither the definition of immediate relative nor the text and structure of the statutory scheme provided support for the respondents’ position that Mrs. Taing was stripped of her spousal status.

LEGAL ARGUMENT

I. RESPONDENTS UNLAWFULLY TERMINATED ACTION ON THE SUBJECT IMMIGRANT PETITION BECAUSE MRS. TAING REMAINS AN IMMEDIATE RELATIVE FOR PURPOSES OF ADJUSTMENT OF STATUS.

A. Mr. Taing's death did not divest respondents of authority to adjudicate the petition.

Respondents claim that Mrs. Taing was stripped of her status as an immediate relative spouse because her husband died before immigration officials completed action on her duly filed petition. This argument does not comport with the relevant provisions of the INA. As the U.S. Court of Appeals for the Ninth Circuit confirmed on materially identical facts in Freemen v. Gonzales, 444 F.3d 1031, 1044-45 (9th Cir. 2006) – Mrs. Taing's status as an immediate relative was established at the time of the filing the petition and corresponding application for adjustment of status. For the reasons set forth below, Respondents' arguments to the contrary do not withstand close scrutiny.

1. Immigrant Petition Statute and Regulations.

a. Mrs. Taing's eligibility for immediate relative classification was established at the time of filing.

Under INA § 201 [8 U.S.C. § 1151] a United States citizen may petition to have the status of an alien who is an immediate relative adjusted to that of a Lawful Permanent Resident ("LPR"). "Immediate relative is a defined term that, pursuant to the first sentence of § 1151(b)(2)(A)(i) includes the "spouse" of a United States Citizen. Spouse, in turn, is defined at INA § 101(a)(35) as follows:

The term "spouse", "wife", or "husband" does not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.

INA § 101(a)(35) [8 U.S.C. § 1101(a)(35)].

Notably, this definition has not changed since its original enactment in 1952 and is a negative definition which does not preclude common understandings of the term.

The second sentence of § 1151(b)(2)(A)(i) goes on to provide a *separate right* for alien-widows to *self-petition* for immediate relative classification. The statute provides:

In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 204(a)(1)(A)(ii) within 2 years after such date and only until the date the spouse remarries.

INA § 201(b)(2)(A)(i), second sentence [8 U.S.C. § 1151(b)(2)(A)(i)].

As the Ninth Circuit held in Freeman, the logical construction of § INA § 201(b)(2)(A)(i) [8 U.S.C. § 1151(b)(2)(A)(i)] is that, under the first sentence, **eligibility for immediate relative classification vests at the time of filing**. See Freeman at 1039-40. The beneficiary is not stripped of their status as an immediate relative “spouse” by virtue of the citizen-spouse’s untimely death. In the Freeman case, the Court found that the alien spouse “remains a surviving spouse” for purposes of status. Id. at 1040.

In fact, contrary to the Respondent’s argument that INA §§ 201(b)(2)(A)(i) and 204(b) [8 U.S.C. § 1154(b)] of the INA “clearly provide” that an I-130 petition may not be approved following the death of a citizen-spouse, neither statutory provision contains such language. INA §§ 201(b)(2)(A)(i) and 204(b) [8 U.S.C. §§ 1151(b)(2)(A)(i) & 1154(b)].

Under the express terms of the statute, Mrs. Freeman [Taing] qualified as the *spouse* of a U.S. citizen when she and her husband petitioned for adjustment of status, and absent a clear statutory provision voiding her spousal status upon her husband's untimely death, she remains a *surviving* spouse. Neither the definition

of immediate relative nor the text and structure of the adjustment of status regime provides support for the government's position that Mrs. Freeman [Taing] should be stripped of her spousal status.

Freeman, 444 F.3d 1039-40.

Mrs. Taing thus qualifies as a spouse under the first sentence of section 1151(b)(2)(A)(i). She need not avail herself to the right to self-petition under the second sentence of section 1151(b)(2)(A)(i) because she is already the beneficiary of a duly filed and valid petition filed by her husband prior to his death.

b. The regulations governing immigrant petitions support the Freeman Court's construction of § 1151(b)(2)(A)(i) .

Respondents point to 8 C.F.R. § 204(a) and § 204.2(a) to justify their construction of § 1151(b)(2)(A)(i) (Resp. brief at 3) . These regulations govern the processing of immigrant petitions and provide:

(a) Types of petitions. . . . (1) A citizen or lawful permanent resident of the United States petitioning under section 204(a)(1)(A)(i) or 204(a)(1)(B)(i) of the Act for a qualifying relative's classification as an immediate relative under section 201(b) of the Act or as a preference immigrant under section 203(a) of the Act must *file* a Form I-130, Petition for Alien Relative. These petitions are described in Sec. 204.2 [emphasis added]

(a) Petition for a spouse — (1) Eligibility. A United States citizen or alien admitted for lawful permanent residence may *file* a petition on behalf of a spouse. [emphasis added]

8 C.F.R. 204.2(a)(1).

The regulation provide no basis for concluding that Mrs. Taing was stripped of her spousal status after filing. To the contrary, **the regulations support Mrs. Taing's position that eligibility for the requested benefit was established *at the time of filing***. See id.

These provisions, moreover are consistent with the construction of § 1151(b)(2)(A)(i)

adopted in Freeman. While the above-cited regulations address petitions by United States citizens on behalf of their spouses, 8 C.F.R. §§ 204.1(a)(2) and 203.2(b) address self-petitions by alien widows and widowers who are not the beneficiaries of petitions filed by their U.S. Citizen-spouses prior to their deaths. As the Ninth Circuit noted in Freeman, the regulations are “consistent with the congressional intent to create two different processes, such that one or the other applies – either the citizen spouse petitions or, if he dies without doing so, the alien may do so” [provided that the alien and the citizen were married at least two years]. Freeman at 1041-42.

c. Techumsen Taing’s death does not prevent the Respondents from carrying out the investigation required by INA § 204(b).

INA § 204(b) [8 U.S.C. § 1154(b)], for the proposition that officials must investigate and determine the truth of the facts alleged in the petition. USCIS may not approve Form I-130 on behalf of a claimed immediate relative unless USCIS finds, as a result of an investigation that the facts stated in the petition are true and that the alien on behalf of whom the petition is made is an immediate relative.

The purpose of the investigation required by INA § 204(b) is to determine the *bona fides* of the underlying marriage and whether the marriage was “entered into for the purpose of evading the immigration laws.” 8 C.F.R. §§ 204.2(a)(1)(i)(A)-(C), (ii) and (iii)(A)-(B). A petition may not be approved on the basis of a marriage which, although legally valid, was entered into solely to obtain an immigration benefit.

Immigration officials routinely approve I-130 petitions, and issue immigrant visas, without interviewing the petitioning spouse in the context of petitions filed at Service Centers for the purposes of immigrant visa (consular) processing, including those filed on behalf of

immediate relative spouses.² These petitions are *always* adjudicated by the Service Center without an interview and based solely on the documentation submitted. Once approved, the petition is forwarded overseas to the appropriate U.S. Embassy or consular office for scheduling the alien spouse for a immigrant visa interview. It is extremely rare for a citizen-spouse to fly overseas to attend a visa interview. Clearly, the Respondents can determine the *bona fides* of the relationship underlying a visa petition without interviewing the petitioning spouse in the context of a properly filed adjustment of status application when they routinely do just that in the context of immigrant visa applications. Immigration officials not only have the *authority* to conduct this investigation, but, whether the citizen-spouse is alive or deceased, the law *mandates* and investigation on the basis of testimonial evidence from the alien-spouse, affidavits and / or testimonial evidence from third-parties with personal knowledge of the relationship, and standard forms of documentary evidence. See 8 U.S.C. § 1154(b) [Supporting Documentation]; 8 C.F.R. §§ 204.2(a)(1)(i)(B)(1)-(6) [Documentation] and (a)(2) [Evidence for a petition of a spouse]. Moreover, *nothing* in the INA or Regulations authorizes immigration officials to terminate action on a petition upon the death of a petitioning-spouse.

2. Adjustment of Status Statute and Regulations.

To be eligible for adjustment of status, an immigrant visa must be immediately available to the applicant at the time of the petition is filed. INA § 245(a)(3) [8 U.S.C. § 1255(a)(3)]. The

² Alien spouses physically present in the United States at the time of filing, who are otherwise eligible, may simultaneously file visas applications and for adjustment of status to that of a lawful permanent resident under INA § 245. Alien spouses outside the United States must apply for an immigrant visa at a U.S. Consular post or Embassy after the approval of their visa petition. As a matter of practice, the U.S. Citizen spouse is not interviewed before the adjustment of status and the issuance of a “green” card. Mr. and Mrs. Taing exercised their right to apply under the adjustment of status regime, as both were present in the United States.

law provides:

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

- (1) the alien makes an application for such adjustment,
- (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (3) an immigrant visa is immediately available to him *at the time his application is filed.* [emphasis added]

INA § 245(a) [8 U.S.C. § 1255(a)].

That same language appears in the regulations concerning adjustment of status, it provides:

- (g) Availability of immigrant visas under section 245 and priority dates.
- (1) Availability of immigrant visas under section 245. An alien is ineligible for the benefits of section 245 of the Act unless an immigrant visa is immediately available to him or her *at the time the application is filed.* [emphasis added]

8 C.F.R. § 245.1(g)(1).

(2) Proper filing of application

(i) Under section 245.

(A) An immigrant visa must be immediately available in order for an alien to properly file an adjustment application under section 245 of the Act. *See* §245.1(g)(1) to determine whether an immigrant visa is immediately available.

(B) If, *at the time of filing*, approval of a visa petition filed for classification under section 201(b)(2)(A)(i), section 203(a) or section 203(b)(1), (2) or (3) of the Act would make a visa immediately available to the alien beneficiary, the alien beneficiary's adjustment application *will be considered properly filed* whether submitted concurrently with or subsequent to the visa petition, provided that it meets the filing requirements contained in parts 103 [having to do with fees] and 245. For any other classification, the alien beneficiary may file the adjustment application only after the Service has approved the visa petition.

8 C.F.R. 245.2(a)(2) *et seq.*

The foregoing regulations thus support Mrs. Taing's position that she remains eligible for adjustment of status because an immigrant visa was immediately available to her at the time of filing. In addition, the general regulation governing adjustment of status applications, further supports Mrs. Taing's position:

(a) General. Any alien who is physically present in the United States, except for an alien who is ineligible to apply for adjustment of status under paragraph (b) or (c) of this section, may apply for adjustment of status to that of a lawful permanent resident of the United States if the applicant is eligible to receive an immigrant visa and an immigrant visa is *immediately available at the time of filing of the application*. [emphasis added]

8 C.F. R. § 245.1(a).

Accordingly, any claim by the Respondents that Techumsen Chip Taing's death divested them of authority to consider Mrs. Taing's petition and corresponding adjustment of status application has no support in either statutory law or the applicable regulations.

B. Respondents Lack Authority to Terminate Action On, Or Revoke, a Petition That Has Never Been Adjudicated.

Respondents stopped processing Mr. and Mrs. Taing's petitions and deemed them denied.

Section 205 of the INA and part 205 of 8 C.F.R. govern Respondents' authority to revoke approved petitions. While, INA § 205 [8 U.S.C. 1155] authorizes the Secretary of Homeland Security to revoke approval of a petition for "good and sufficient cause," the regulations go well beyond the authority of the statute and provide for *automatic* revocation of an approved petition upon the death of the petitioner. 8 C.F.R. § 205.1(a)(3)(i)(C).³ Strangely, the regulations

³ A strong argument can be made that the automatic revocation and so-called humanitarian reinstatement provisions of 8 C.F.R. § 205.1 are *ultra vires*. Automatic revocation of a properly filed and approved petition upon the death of the petitioner is not "good and sufficient cause" as contemplated by the statute. The mere notion that the death of one's spouse

authorize the Secretary to “reinstate” approval of a revoked petition for “humanitarian reasons.”

Id.

As a preliminary matter, the government’s revocation authority concerns “approved” (as opposed to unadjudicated) petitions and, accordingly, does not apply to Mrs. Taing. 8 U.S.C. 1155; Dodig v. INS, 9 F.3d 1418 (9th Cir. 1993). Moreover, it is impossible to reconcile the automatic revocation and reinstatement regulation with the respondents’ claim that a surviving spouse is no longer a “spouse” for the purposes of adjustment of status. According to the government’s theory, the law allows Respondents to pick and choose which class of surviving spouses may be approved for lawful resident status. By its express terms, the regulation sanctions the grant of lawful resident status to the surviving spouse of a U.S. Citizen where, at the time of death, there is an approved immigrant petition, but not yet approved adjustment application, in a process whereby the approved petition is automatically revoked and then “reinstated” at the government’s discretion for humanitarian reasons. See 8 C.F.R. § 205.1(a)(3)(i)(C). By recognizing this path to legal resident status, Respondents treat certain surviving spouses of U.S. citizens as qualifying immediate relatives – precisely what officials claim they lack authority to do in the case at bar – while arguing that other surviving spouses lose their spousal status upon the untimely death of their spouses. This is arbitrary and illustrates how Respondents’ interpretation of § 1151(b)(2)(A)(i) has yielded, and will continue to yield, results in direct contravention of congressional intent.

could be considered “good and sufficient cause” to *automatically* revoke an approved petition, or terminate action on an unadjudicated petition, runs contrary to fundamental justice and due process of law, particularly in light of the government’s routine approval of I-130 petitions without examination of the citizen-spouse.

In refusing to perform its congressionally mandated duty to adjudicate the petition filed on behalf of Mrs. Taing, Respondents determined that upon the death of her husband the I-130 Petition was automatically terminated. Contrary to the government's position, the citizen-spouse's death does not preclude consideration of the *bona fides* of a marriage. Indeed, the issue may be – and is routinely – given due consideration without the petitioner's testimony.⁴

II. THE AGENCY'S INTERPRETATION OF SECTION 201(B) OF THE ACT IS NOT ENTITLED TO DEFERENCE

A. Respondents' Construction of the Statute Is Not Based on Viable Precedent.

The notion that a *bona fide* spouse of a U.S. citizen may be stripped of her right to an adjudication of an I-130 petition filed on her behalf, including the corresponding notion that an approved petition shall be automatically revoked upon the death of the petitioning-spouse, flows not from the "good and sufficient cause" language of the statute, but from a discredited decision of the Board of Immigration Appeals. In the Matter of Varella, 13 I&N Dec. 453 (BIA 1970), the Board "summarily ruled that by the time the non-citizen wife's adjustment of status petition was being determined, she was no longer [the] spouse of a United States citizen under § 1151 because her husband's 'death had stripped her of that status.'" Freeman, 444 F.3d at 1038 (citing Varela

⁴ There is no rational basis for awarding benefits to a surviving spouse who was fortunate enough to have her petition adjudicated prior to her husband's death, while simultaneously (and automatically) punishing a spouse who was less fortunate. For example, a surviving spouse who enjoyed a *bona fide* relationship with her husband may be denied benefits, through no fault of her own, where her immigrant petition and adjustment application had been pending for several months, even years, at the time of her husband's death, while another surviving spouse, including one who has been married (or whose petition has been pending for) less time, may be granted resident status if immigration officials happened to perform the ministerial act of approving the petition. Surely, this is not what Congress intended when it enacted the adjustment of status regime. Rather Congress intended that all duly filed petitions be given just and adequate consideration.

at 454). **Varela, however, is not good law.**

The Board modified the decision in Varela in a critical respect in the Matter of Sano, 19 I&N dec. 299 (BIA 1985). Sano stands for the proposition that the “alien beneficiary of a visa petition does not have *standing* to seek the petition’s approval after the petitioner’s death, Sano was decided on the basis that the BIA its self, due to regulatory constraints, ***lacked jurisdiction*** to hear and appeal from an individual other than the petitioner. The Board determined as follows:

As we recently stated in Matter of Zaidan, 19 I&N Dec. 297 (BIA 1985), the Board's appellate jurisdiction is defined by the regulations set forth in 8 C.F.R. § 3.1(b) (1985). Unless the regulations affirmatively grant us power to act in a particular matter, we have no appellate jurisdiction over it. . . . We therefore conclude that we lack jurisdiction to address an appeal by the beneficiary from the denial of a visa petition. Cf. Matter of Zaidan, *supra*. To the extent that our decision in Matter of Varela, *supra*, conflicts with this conclusion, it is hereby modified.

Matter of Sano, 19 I&N Dec. 299, 300-301 (BIA 1985).

While the BIA could not overrule its previously issued extra-jurisdictional decision, it explicitly stated that its review in Varela was “inappropriate.” *Id.* at 300. **Varela is not good law.**

The Ninth Circuit Court of Appeals discussed the level of deference owed to Varela.⁵ See Freeman, 444 F.3d at 1038. The Court explained that Varela is an “extra-jurisdictional” decision, suffers from a “lack of statutory analysis” and is “not a permissible construction of the statute.” *Id.* While an agency’s reasonable interpretation⁶ of a statute which it administers is ordinarily accorded deference, here there is no proper interpretation by the agency. Hence, the

⁵ An agency decision.

⁶ For the purposes of the INA, an agency interpretation is one voiced by the Board of Immigration Appeals.

Respondents' reliance on Varela for the proposition that death of the citizen-spouse automatically terminates the petition is misplaced.

B. Congress Intended for Surviving Spouses Married less than Two Years at the Time of the Death to Remain Eligible for Immigration Benefits.

1. The intent of Congress may be clearly ascertained from the Language, Structure, Purpose and Application of the Statute.

Where an agency's construction of a statute it administers is at issue, courts are:

. . . confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron v. NRDC, 467 U.S. 837, 842-43 (1984).

Courts "should not defer to an agency's interpretation of a statute if Congress' intent can be clearly ascertained through analysis of the language, purpose and structure of the statute."

Freeman 444 F.3d at 1038 (citations omitted). Congressional intent is clear with regard to INA § 201(b).

The Petitioner urges that Court to adopt the reasoned, logical and cogent analysis of INA § 201(b)(2)(A)(i) set forth by the United States Court of Appeals in Freeman. See Freeman at 1039-43. The Court determined that:

The language of the first sentence of § 1151(b)(2)(A)(i), which sets out the general definition of immediate relative, is straightforward and succinct, and expressly includes “spouses.” Only alien “parents” are subject to any limitation, with the grant of immediate relative status being restricted to those whose citizen child is at least 21 years of age. There is no comparable qualifier to be a “spouse” — that is, a requirement that the marriage must have existed for at least two years. “This fact only underscores our duty to refrain from reading a phrase into a statute when Congress has left it out. Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” [cites omitted] . . . Under the express terms of the statute, Mrs. Freeman [Taing] qualified as the *spouse* of a U.S. citizen when she and her husband petitioned for [an immigrant visa and] adjustment of status, and absent a clear statutory provision voiding her spousal status upon her husband's untimely death, she remains a surviving spouse. Neither the definition of immediate relative nor the text and structure of the adjustment of status regime provides support for the government's position that Mrs. Freeman [Taing] should be stripped of her spousal status. [emphasis preserved]

Freeman at 1030-40.

The Freeman court recognized that the first sentence of § 1151(b)(2)(A)(i) – under which this case falls – governs I-130 petitions filed by citizen-spouses and that there is no language in the INA voiding such petitions in the event of the death of a petitioner. The Court further recognized that the second sentence of § 1151(b)(2)(A)(i) “**grants a separate right** to an alien widow to self-petition, within two years of the citizen-spouse’s death, by filing a [different] form **I-360 where the citizen-spouse has not filed an immediate relative petition prior to his death.**” Id. at 1039 [emphasis added]. Congress provided separate protection for widows whose deceased spouses did not file petitions on their behalf. The Court must therefore reject the Respondents’ misguided and unlawful “attempt to read the second sentence of § 1151(b)(2)(A)(i)

as implicitly importing a two year requirement into the definition of spouse.” Id. at 1040.

In rejecting the Respondents’ position that immigration officials act lawfully by refusing to adjudicate duly filed I-130 petitions, the Ninth Circuit reasoned as follows:

The government, relying primarily on the statute's *second* sentence (“In the case of an alien who was the spouse of a citizen. . . .”), reads § 1151(b)(2)(A)(i) as “requir[ing] that in order to be an ‘immediate relative’ under immigration law the alien ‘spouse’ (wife) must have been married to the United States citizen ‘spouse’ (husband) ‘for at least 2 years at the time of the citizen's death.’” Under the government's proffered reading, if the citizen spouse dies before the second anniversary of the qualifying marriage, the alien spouse is no longer considered a “spouse” and is no longer entitled to an adjustment of status. Mrs. Freeman disputes the government's reading. Relying on the *first* sentence of the statute (“For purposes of this section, the term ‘immediate relative’ means the children, spouses, and parents. . . .”), she argues that she qualified for adjustment of status as an immediate relative — *i.e.*, a spouse — because of her marriage to a U.S. citizen at the time her husband (and she) filed the forms required to initiate the adjustment of status process. She further argues that the statute does not impose a two-year marriage requirement to be considered an immediate-relative spouse, nor does it void that spousal status upon her husband's death. To the extent the second sentence the government invokes is relevant, it simply grants an alien spouse whose deceased citizen spouse had *not* filed an I-130 the right to self-petition so long as the parties were married for two years prior to the citizen's death.

Freeman at 1037-38.

The Court in Freeman thus recognized that, where a citizen-petitioner properly files for his or her spouse, the petition is filed under the definition of the first sentence of the immediate relative definition. Only where the United States citizen-spouse never filed a petition is the alien-spouse required to *self-petition* under the second sentence of the the immediate relative definition. See 8 U.S.C. § 1151(b)(2)(A)(i). Mrs. Taing thus qualifies as a ‘first sentence’ spouse, not a ‘second sentence’ widow and self-petitioning spouse. Because her husband had already filed a petition on her behalf, Mrs. Taing is not required to self-petition as a widow.

2. Case Law Cited by Respondents Underscores the Weakness of Their Position.

Respondents argue that there is no authority to approve a Form I-130 after the petitioner has died as Mrs. Taing is no longer an immediate relative (Resp. Brief 4.) and cite an unreported decision, Burger v. McElroy, 1999 WL 203353 (S.D.N.Y. 1999) in support of their position. Apart from the fact that Burger is an unpublished opinion from the trial court of a foreign jurisdiction, the court merely deferred to the BIA's interpretation in Varela. The Burger court did not discuss or even refer to the BIA's decision in Sano, calling into question whether the court was even aware of the Board's ruling on its lack of jurisdiction, and did not address or analyze the issues presented in the case at bar.

The Respondents also cite to Turek v. Department of Homeland Security, 450 F.Supp. 2d 736 (E.D. Mich. 2006) which was issued after the Ninth Circuit's decision in Freeman. Turek, however is distinguishable and off the mark in numerous material respects. As a threshold matter, the "analysis" in Turek is not only brief, but troublingly weak. See 450 F.Supp.2d at 740. Without even attempting a meaningful analysis of the statute, the Turek court relied on the Board's decision in Varela and summarily concluded that "Plaintiff was disqualified from consideration for immediate relative status by Diane Turek's death prior to the approval of the relative petition." Id. Notably, counsel in Turek only advised the court of the Freeman decision during a hearing in open court on 08/28/2006, which preceded the Turek courts decision by little more than a week. See id. at 736, 738. Like the Burger court, the Turek court failed to recognize or discuss the extra-jurisdictional nature of Varela and that the BIA – the issuing tribunal, itself, deemed the decision "Inappropriate" and modified it accordingly in Sano. Sano, 19 I&N Dec. 299, 300 (BIA 1985). Indeed, the critical issues analyzed in the Freeman case were likely not

even raised, much less fully briefed and considered.

Furthermore, the Turek court distinguished Freeman by noting that **Mr. Turek entered into the marriage during removal proceedings**, which raises a “presumption that the marriage was not done in good faith.” Turek, 450 F.Supp.2d at 740; see 8 U.S.C. § 1154(g); 8 U.S.C. 1255(e)(3). The court found that because Mr. Turek provided no additional evidence to rebut the presumption, **the “immediate relative petition could not be granted at the time Diane Turek passed away.”** 450 F.Supp.2d at 740.

Finally, and perhaps most significantly, the Turek court made the fatal error of conflating the two immediate relative definitions within 8 U.S.C. § 1151(b)(2)(A)(i) – a distinction that the Court of Appeals in Freeman went to great lengths to highlight. Respondents’ unlawful “attempt to read the second sentence of § 1151(b)(2)(A)(i) as implicitly importing a two-year requirement into the definition of spouse” violated a fundamental canon of statutory construction and must be rejected. Freeman, 444 F.3d at 1040.

3. Even if the Court Finds INA 201(b) Ambiguous, Respondents’ Construction of the Statute is not Permissible.

a. The governments reading requires the abandonment of bedrock principals of statutory interpretation and disregards the plain language and structure of the text.

“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . Succar v. Ashcroft, 394 F.3d 8, 22 (1st Cir. 2005) quoting from INS v. Cardoza-Fonseca, 480 U.S. 421,447-8 (1987) quoting Chevron v. NRDC, 467 U.S. 837, 842-43 (1984). Whenever Congress has left a gap for the agency to fill, then we reach the second question, for the agency's regulation is “given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the

statute.” Chevron, 467 U.S. 843-44. Had Congress intended to divest immigration officials of their authority to adjudicate I-130 petitions for a particular class of individuals, or prevent surviving spouses with pending applications from obtaining benefits, it would have done so explicitly. The law neither condones Respondents’ attempt to insert a two year requirement into the first sentence of the immediate relative definition, nor their attempt to extend the definition of “spouse” under INA § 101(a)(35) to preclude surviving spouses from obtaining benefits. See 8 U.S.C. §§ 1101(a)(35), 1151(b)(2)(A)(i).

Furthermore, as previously set forth, the government’s interpretation of the statute is irrational and contrary to the text and structure of the adjustment of status regime, which plainly provides that eligibility vests upon filing. The Court should therefore hold that Mrs. Taing remains eligible for immigration benefits because nothing in the language, structure, purpose and application of the INA suggests that Congress intended for the death of a citizen-spouse to divest officials of authority to adjudicate a duly filed petition. See Freeman, 444 F.3d at 1039-43.

b. Respondents’ fail to show that the order of sentences in a subsection (clause) make them related.

Respondents’ call the Courts attention to the House and Senate drafting manuals to try and show that the first sentence of INA § 201(b)(2)(A)(i) [8 U.S.C. § 1151(b)(2)(A)(i)] is modified by the second sentence. (Resp. Brief. at 6-7) While, the Congress could have used the suggestions of the drafting manuals to make their intent crystal clear, they did not.

The subsection – or clause in the parlance of the drafting manuals – begins “Immediate Relatives” Then describes – in the same “clause” several types of immediate relatives. The first sentence contains words of limitation – “21 years of age” ; the second sentence creates a widow class of immediate relatives; the last sentence adds VAWA beneficiaries under INA §204. **It is**

hard to see how the drafting manual helps demonstrate that the second sentence of clause (i) modifies the first rather than setting out a separate right.

- c. Respondents' construction of the statute defies the traditional understanding of the term spouse, which includes surviving spouses.**
 - i. Spouse is a common term of ordinary usage and includes a spouse who outlives the other spouse.**

As previously discussed, Respondents' interpretation of who qualifies as a "spouse" in the context of § 1151(b)(2)(A)(i) is grounded in the BIA's discredited decision in Matter of Varela, supra. Apart from the fact that the holding in Varela was "inappropriate," as determined by the very administrative body that issued it, no deference should be given to the agency's interpretation of the ordinary term spouse.

Respondents admit that spouse is a common term and cite to Black's Law Dictionary for definition. (Resp. Brief 4.) Although Respondents did not include the full definition of spouse in their brief, the English Edition of Black's published in 2004 defines spouse as follows:

Spouse. One's husband or wife by lawful marriage; a married person. . . .
Surviving spouse. A spouse who outlives the other spouse.

Black's Law Dictionary (8th Edition 2004)

Spouse is thus defined to include the term surviving spouse, which refers to a "spouse" who has outlived the other spouse.

Black's Law Dictionary, Sixth Edition, published in 1990 and available at the time of the 1990 INA amendments, defines spouse as "one's husband or wife and 'surviving spouse' is one

of a married pair who outlives the other .” Black’s Law Dictionary (6th Ed. 1990) The term “surviving spouse is expressly incorporated into the definition of “spouse.”

The Forth Edition of Black’s Law Dictionary, which was published in 1951 and was the most up-to-date edition available to the drafers of the INA of 1952 (the source of the current immediate relative definition), broadly defines spouse as “one’s husband or wife,” a phrase specifically derives from Rosell v. State Indus. Accident Comm’n, 164 Or. 173, 179, 95 P.2d 726, 729 (Or. 1939) Black’s Law Dictionary (4th Ed. 1951). Rosell, in turn defines a widow as “a married woman whose husband is dead” and a spouse as “one’s wife or husband.” It then defines a surviving spouse as “the one, of a married pair, who outlives the other.” 164 Or. At 173.

Whether one turns to the most recent 2004 edition of Black’s Law Dictionary, the 1990 Edition available at the time of the 1990 amendments, or the 1951 Edition that was the most current when Congress drafted the INA of 1952, “surviving spouse” falls within the definition of “spouse.” **Mrs. Taing has outlived her spouse, although a spouse she remains.**

ii The definition of the spouse in the Defense of Marriage Act supports the traditional understanding of the term spouse.

Respondents’ recourse to 1 U.S.C. § 7 (Resp. Brief 5) does not altar the analysis advanced by Petitioner. That statute merely defines a spouse as a “person of the opposite sex who is a husband or wife.” Because a surviving spouse is the on, of a married pair, who outlives the other, a surviving spouse is also a spouse within 1 U.S.C. § 7. See Black’s Law Dictionary (8th ed. 2004); see also Rosell, supra.

The definition of the spouse found in 1 U.S.C. § 7 originated in the “Defense of Marriage Act” (“DOMA”), Pub. L. 104-199, September 21, 1996. It is clear from a review of the legislative history that DOMA was intended to preserve the institution of marriage as a legal

union between one man and one woman. It was not intended to alter our traditional understanding of the term spouse. For example, Senator Byrd, a co-sponsor of the Senate Bill made the following statement:

In very simple and easy to read language, this bill says that a marriage is a legal union between one man and one woman as husband and wife, and that a spouse is a husband or wife of the opposite sex. There is nor, of course, anything earth-shaking in that declaration. We are not breaking any new ground here. We are not setting any new precedent. We are not overturning the status quo in any way, shape or form. On the contrary, all this bill does is reaffirm for purposes of Federal law what is already understood by everyone. . . . a relationship worthy of legal recognition and judicial protection. The purpose of this kind of union between human beings of opposite gender is primarily for the establishment of a home. . . As I say , in debating the issue, I am not here to bash anyone . . . But if the State of Hawaii, or any other State, for that matter, redefines those terms, then what will happen at the Federal Level? Who knows, for example, what the Social Security Administration is supposed to do when a so-called '*spouse*' of a same-sex marriage walks in and attempts to collect *survivors* benefits under the Social Security program? [emphasis added]

Defense of Marriage Act: Hearings on S. 1740, 104th Cong. 10, 109-11 (1996).

Likewise, the House Judiciary Committee report on DOMA provides as follows:

Government currently provides an array of material and other benefits to married couples in an effort to promote, protect, and prefer the institution of marriage. While the Committee has not undertaken an exhaustive examination of those benefits, it is clear that they do impose certain fiscal obligations on the federal government. For example, survivorship benefits paid to the *surviving spouse* of a veteran of the of the Armed Services plainly costs the federal government money. If Hawaii (or some other State) were to permit homosexuals to "Marry," these marital benefits would, absent some legislative response, presumably have to be made available to homosexual couples and *surviving spouses* of homosexual "marriages" on the same terms as they are now available to opposite-sex married couples and spouses. [emphasis added]

H.Rep.No. 664, 104th Cong., 2d Sess. 18 (1996).

The legislative history thus demonstrates that DOMA was intended to prevent Federal

recognition of same-sex marriage, not modify or change the common and long-held understanding of the term spouse. Indeed, throughout its discussion of surviving spouse benefits, the House Judiciary Committee recognized that the word “spouse” would commonly be applied in the surviving spouse context. The intent and effect of DOMA was to deny recognition of spousal status to parties of the same-sex, not opposite-sex, marriages.

CONCLUSION

Based upon the above, Mrs. Taing respectfully requests that this Honorable court deny the Respondents’ motion to dismiss.

Respectfully submitted,
Neang Chea Taing,
by her attorney

/s/ Thomas Stylianos, Jr.
Thomas Stylianos, Jr. (MA BBO # 565941)
287 Appleton Street
Lowell MA 01852

Telephone: 978-459-5000
Facsimile: 978-459-5000
Email: Tom@StylianosLaw.com

Dated: August 27, 2007

Certificate of Service

Review of the docket reflects that this motion will be served on counsel electronically.

/s/ Thomas Stylianos, Jr.
Thomas Stylianos, Jr.
Attorney for the Plaintiff