

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

|                                       |   |                               |
|---------------------------------------|---|-------------------------------|
| NEANG CHEA TAING,                     | ) |                               |
|                                       | ) |                               |
| Plaintiff,                            | ) | Civil Action No. 07-10499 WGY |
|                                       | ) |                               |
| v.                                    | ) |                               |
|                                       | ) |                               |
| ALBERTO GONZALES, Attorney General    | ) |                               |
| of the United States, <u>et al.</u> , | ) |                               |
|                                       | ) |                               |
| Defendants.                           | ) |                               |
|                                       | ) |                               |

**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANTS’ MOTION TO DISMISS**

This motion presents a single question of statutory construction: Does the plaintiff, Neang Chea Taing, qualify as an “immediate relative” within the meaning of 8 U.S.C. §1151(b)(2)(A)(i), even though she was widowed after less than two years of marriage to a United States citizen? The courts are divided on this question. Two district courts, the Eastern District of Michigan and the Southern District of New York, have held that an alien who is widowed after less than two years of marriage to a United States citizen does not qualify as an “immediate relative” within the meaning of §1151(b)(2)(A)(i), giving deference to the agency construction of the statute in In re Varela, 13 I.&N. 453 (BIA 1970). See Turek v. Dept. of Homeland Security, 450 F. Supp. 736 (E.D. Mich. 2006); Burger v. McElroy, 1999 WL 203353 (S.D.N.Y. April 12, 1999). Two other courts, the Ninth Circuit and the District of New Jersey, have reached the opposite conclusion, holding that an alien who is widowed after less than two years of marriage to a United States citizen remains an “immediate relative” within the meaning of §1151(b)(2)(A)(i). See Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006); Robinson v. Chertoff, 2007 WL 1412284 (D.N.J. May 14, 2007).

As we now, the plain meaning of §1151(b)(2)(A)(i) compels the conclusion that Ms. Taing does not qualify as an “immediate relative” within the meaning of that provision. And, even if this Court were to conclude that the terms of §1151(b)(2)(A)(i) are ambiguous, the Board of Immigration Appeals’ (“BIA”) construction of that provision in In re Varela is reasonable and is owed deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Ms. Taing, consequently, has failed to state a claim upon which relief can be granted.

### **BACKGROUND**

Plaintiff, Neang Chea Taing, a citizen of Cambodia, is the widow of Techumsen Chip Taing, a naturalized United States citizen. See Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief on Behalf of Surviving Spouse of a United States Citizen (“Complaint”) ¶ 7. Ms. Taing, who was born on June 10, 1961, alleges that she entered the United States as a tourist on June 17, 2004, and subsequently fell in love with Mr. Taing, who was born on February 7, 1972, and who also was of Cambodian heritage. Id. ¶ 9. They were married on October 4, 2004, less than five months after Ms. Taing’s entry into the United States. Id.

In December 2004, Mr. Taing filed an I-130 Immigrant Petition on behalf of Ms. Taing, and she filed an I-485 Application to Adjust Status. Id. ¶ 10. On July 2, 2005, Mr. Taing died of a stroke. Id. ¶ 12. Thereafter, on September 13, 2005, Ms. Taing received notice that she and her husband, who was now deceased, were scheduled to be interviewed on October 13, 2005, regarding their pending applications. Id. ¶ 14. Ms. Taing appeared at the interview alone. Id. On October 26, 2005, the applications were denied. Id.

On April 10, 2006, the Department of Homeland Security issued a Notice to Appear charging Ms. Taing with overstaying her visa. Id. ¶ 16. Thereafter, Ms. Taing’s prior counsel filed a petition

to have her classified as the widow of a citizen of the United States who had been married for two years at the time of her spouse's death. Id. That petition, the premise of which Ms. Taing now concedes was false, was denied. Id.

On March 14, 2007, Ms. Taing brought this action seeking declaratory, injunctive, and mandamus to compel the government to: (a) find, as a matter of statutory construction, that she remains an "immediate relative" spouse within the meaning of 8 U.S.C. § 1151(b)(2)(A); (b) reopen and adjudicate her I-130 Immigrant Petition that was filed on her behalf by Mr. Taing; and (c) reopen and adjudicate her I-485 Application to Adjust Status. See Complaint at 1.

### **STATUTORY BACKGROUND**

This case arises under the Immigration and Nationality Act ("INA"), 8 U.S.C. §1101, *et seq.* The INA imposes limits on the number of aliens who may immigrate to the United States as permanent residents each fiscal year. See 8 U.S.C. §§1151(a), (c), (d). Those numerical limits do not apply, however, to aliens who qualify as the "immediate relatives" of a United States citizen. See 8 U.S.C. §1151(b)(2)(A)(I). An alien qualifies as an immediate relative if the alien is the child, spouse, or parent of a United States citizen. Id.

A United States citizen begins the immigration process for his or her spouse by filing with the U.S. Citizenship and Immigration Services ("USCIS") an alien relative visa petition, or an I-130 Immigrant Petition. See 8 U.S.C. §1154(a)(1)(A)(I); 8 C.F.R. §204.1(a)(1); 204.2(a).<sup>1</sup> USCIS is to conduct an investigation into the petition and may not approve an I-130 Immigrant Petition unless

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<sup>1</sup> The statute provides that the petition is filed with the Attorney General. See 8 U.S.C. §1154(a)(1)(A)(I). This authority was transferred to USCIS, a bureau within the Department of Homeland Security, pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, §451(b), 116 Stat. 2135, 2196 (2002).

the agency finds “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.” 8 U.S.C. §1154(b) (emphasis added).

## ARGUMENT

### I. MS. TAING IS NOT AN “IMMEDIATE RELATIVE” WITHIN THE MEANING OF §1151(b)(2)(A)(i)

This case poses the question whether Ms. Taing qualifies as an “immediate relative” of a United States citizen within the meaning of §1151(b)(2)(A)(i). That provision states:

**Immediate relatives.**--For purposes of this subsection, the term “immediate relatives” means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age. 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 1154(a)(1)(A)(ii) of this title within 2 years after such date and only until the date the spouse remarries. For purposes of this clause, an alien who has filed a petition under clause (iii) or (iv) of section 1154(a)(1)(A) of this title remains an immediate relative in the event that the United States citizen spouse or parent loses United States citizenship on account of the abuse.

8 U.S.C. §1151(b)(2)(A)(i).

Ms. Taing plainly qualified as an “immediate relative” at the time her husband filed the I-130 Immigrant Petition on her behalf, as she was the spouse of a United States citizen while he was still alive. A spouse, as commonly understood, is defined as “[o]ne’s husband or wife by lawful marriage; a married person.” Black’s Law Dictionary, at 1438 (8<sup>th</sup> ed. 2004). A “wife,” in turn, as commonly understood, is defined as “[a] married woman; a woman who has a lawful husband living.” *Id.* at 1628 (emphasis added).

After the death of her husband, however, Ms. Taing no longer qualified as a “spouse” of a United States citizen. Because her husband no longer was living, Ms. Taing no longer was a “wife,” as commonly understood, but a “widow,” or “[a] woman whose husband has died and who has not remarried.” Black’s Law Dictionary, at 1628 (8<sup>th</sup> ed. 2004). Indeed, Congress has provided that: “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States \* \* \* the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.” 1 U.S.C. §7 (emphasis added). Both the common meaning of the term “spouse” and the definition of that term in 1 U.S.C. §7 refers to an individual who is a “husband” or a “wife,” not an individual who is a “widow” or a “widower.”

This conclusion is confirmed by the second sentence of §1151(b)(2)(A)(i), which 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 1154(a)(1)(A)(ii) of this title within 2 years after such date and only until the date the spouse remarries.

8 U.S.C. §1151(b)(2)(A)(i) (emphasis added). This language makes clear, because Ms. Taing was not married for at least two years at the time of her husband’s unfortunate death, she no longer “remain[s] an immediate relative” eligible for adjustment of status.

In reaching a contrary conclusion, the Ninth Circuit held that the first and second sentences of §1151(b)(2)(A)(i) should not be read together, and that “Congress clearly intended an alien widow (spouse) for purposes of §1151(b)(2)(A)(i), even if the citizen spouse dies within two years of the marriage.” 444 F.3d at 1039. The Ninth Circuit explained that, “[t]he two-year durational language

in 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 form I-360 where the citizen spouse had not filed an immediate relative petition prior to his death.” Id. The Ninth Circuit reached this conclusion by reasoning that, “[t]he more logical and statutorily substantiated interpretation of the second sentence is that it applies to those aliens whose citizen spouses did not initiate an adjustment of status proceeding before they died, granting such surviving spouses a beneficial right to file an immediate relative petition even without a living citizen spouse to vouch for the fact of the marriage.” Id. at 1041.

The Ninth Circuit's analysis, respectfully, lacks force. The second sentence of §1151(b)(2)(A)(i) provides that “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 \* \* \* shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death,” and the emphasized language is critical. “Congress ordinarily adheres to a hierarchical scheme in subdividing statutory sections,” Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60 (2004), and this hierarchical scheme is set forth in drafting manuals prepared by the legislative counsels' offices in the House and Senate, which are virtually identical. Id. The House Manual provides:

To the maximum extent practicable, a section should be broken into--

- (A) subsections (starting with (a));
- (B) paragraphs (starting with (1));
- (C) subparagraphs (starting with (A));
- (D) clauses (starting with (i)) \* \* \*

House Legislative Counsel's Manual on Drafting Style, HLC No. 104-1, p. 24 (1995) (quoted in Koons Buick, 543 U.S. at 60). The Senate manual similarly provides:

A section is subdivided and indented as follows:

- (a) SUBSECTION. --
- (1) PARAGRAPH. --
- (A) SUBPARAGRAPH. --
- (i) CLAUSE. --

Senate Office of the Legislative Counsel, Legislative Drafting Manual 10 (1997) (quoted in Koons Buick, 543 U.S. at 61).

Hence, when Congress provided that “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 \* \* \* shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen’s death,” that language applies to the entirety of §1151(b), including most particularly to all of §1151(b)(2)(A)(i), not cannot be cabined as a stand-alone sentence within that provision as was done by the Ninth Circuit.

Finally, to the extent that this Court finds the statutory language ambiguous, it should defer to the agency’s construction in In re Varela, in which the BIA held that, where an alien’s citizen husband died after only a few weeks of marriage, and before the agency had ruled on the immediate relative petition, “the beneficiary [i.e., the alien] was not the spouse of a United States citizen. His death stripped her of that status.” 13 I.&N. 453; see Turek, 450 F. Supp.2d at 740 (“The Court finds persuasive that the BIA had previously determined that the beneficiary of a spousal immediate relative petition would be ineligible for that status if the petitioning spouse dies before the statutory two-year time period.”).

**CONCLUSION**

For the foregoing reasons, the motion to dismiss should be granted.

Respectfully submitted,

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