

No.08-1179

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NEANG CHEA TAING,
Plaintiff - Petitioner - **Appellee**

v.

MICHAEL CHERTOFF,
Secretary, Department of Homeland Security, et al,
Defendants - Respondents - Appellants

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS
No. 1:07-CV-10499-WGY

BRIEF FOR THE PLAINTIFF - PETITIONER - APPELLEE

Thomas Stylianos, Jr., Esq.
1st Cir. 78011, MA 565941
278 Appleton Street
Lowell MA 01852
Tel: 978-459-5000
FAX: 978-459-3079
Attorney for the Petitioner, Appellee

THE APPELLEE DESIRES ORAL ARGUMENT

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STATEMENT IN SUPPORT OF REQUEST FOR ORAL ARGUMENT

Petitioner-Appellee believes that oral arguments would be beneficial to the panel since this is a case of first impression in the First Circuit. Therefore, Plaintiff/Appellee respectfully requests the opportunity to appear before the panel for argument at a time convenient to the Court.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly held that a surviving alien spouse whose U.S. citizen-spouse dies after properly filing an I-130 petition on behalf of that alien-spouse is a “spouse” and an “immediate relative” as defined under 8 U.S.C. § 1151 (b)(2)(A)(i).

2. Whether the District Court correctly applied Chevron deference when it declined to apply an extra-jurisdictional and discredited agency opinion purporting to strip the status of “spouse” from Mrs. Taing automatically upon the death of her husband.

STATEMENTS OF THE CASE and FACTS

The Respondent, Ms. Neang Chea TAING (f/k/a Neang CHEA), is a Cambodian Citizen who was born in Cambodia on 06/10/1961.¹ She entered the United States as a tourist for pleasure, with inspection, on June 17, 2004. Subsequently she fell in love and on October 4, 2004, married Mr. Tecumsen Chip TAING, a Naturalized US Citizen of Cambodian heritage, who was born on 02/07/1972.

In December 2004, Mr. Taing filed a Visa Petition for his wife, Ms. Taing filed an adjustment application and a request for a work authorization. The Government, based upon her applications and immediately available visa, acted and approved her application for work authorization and issued a work authorization card. The Government continued to process the couples applications.

The couple resided together in Lowell Massachusetts from their marriage until Mr. Taing's death. On July 2, 2005, Mr. Taing suddenly died² of a stroke. Ms. Taing's husband died 6 months after the proper filing of applications based on an "Immediately Available" visa.

On 09/13/2005, the Government issued a notice for Ms. Taing and her now

¹ There is a scrivener's error in the Marriage Certificate setting out date of birth as 01/10/1961 which has been propagated into other documents by the Notario who prepared the original petition [I-130] and application [I-485].

² The Death Certificate lists the cause of death as "Interracial Hemorrhage" with onset about 1 day earlier. The Cause of Death is classified as natural.

deceased husband for an interview on their applications and scheduled that interview for October 13, 2005. Ms. Taing appeared for the interview, without her husband. According to the Government's Electronic Records,³ the Petition for a visa [I-130] and application for adjustment to status of a Lawful Permanent Resident [I-485] were denied on October 26, 2005, about 2 weeks after the date of the interview. No denial notice was ever received by the Plaintiff. At the time of filing that all applications were allowable.

On April 10, 2006, the Department of Homeland Security mailed Ms. Taing a Notice to Appear charging her with being a Visa Overstay. The Charging Document makes no mention of her applications for permanent status in the United States.

In an attempt to secure legal status for Ms. Taing, prior counsel filed a petition to have her classified as a widow of a Citizen who had been married for 2 years at the Citizens death. The premise of the petition was flawed⁴ and it was denied.

³ I do not have and on questioning, neither the Plaintiff nor prior counsel have any written notice of denial.

⁴ Six months is less than the required two years.

SUMMARY OF ARGUMENT

Appellants claim that Mrs. Taing was stripped of her status as an “immediate relative” spouse because her U.S. citizen husband died before immigration officials adjudicated the I-130 petition he had filed on behalf of his wife. This argument, however, does not comport with the plain language and structure of the statute. Neither the definition of “immediate relative” nor the text and structure of the statutory scheme support appellants’ position that Mrs. Taing was stripped of her classification as an “immediate relative” or “spouse” of a U.S. citizen upon the death of her husband after he had filed an I-130 petition on his wife’s behalf but before the I-130 petition was adjudicated. Appellants’ reading of 8 U.S.C. § 1151(b)(2)(A)(i) runs counter to the statutory scheme, requires the abandonment of fundamental canons of statutory construction and yields arbitrary and absurd results that Congress could not have intended.

Further, appellants arguments that Mrs. Taing is no longer an “immediate relative” or “spouse” also are contrary to other recent court decisions all on point with this case and all of which found that a “surviving spouse” of a U.S. citizen spouse who has filed an I-130 petition on behalf of the foreign national spouse is an “immediate relative” for immigration purposes and processing. See Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006), Robinson v. Chertoff, 2007 WL 1412284 (D.N.J. 2007).

Appellants’ argue that if the Court were to find the statute ambiguous, it should

defer to the Secretary's statutory interpretation of "spouse" which purports to rely on the Board of Immigration Appeals ("BIA") decision in In Matter of Varela, 13 I. & N. Dec. 453 (BIA 1970), which found that an alien spouse is no longer a "spouse" under 8 U.S.C. § 1151(b)(2)(A)(i) when the U.S. citizen spouse dies prior to the adjudication of an adjustment of status (I-485) application. Appellants' argument is flawed and should not be accorded deference for several reasons. First, in In re Varela the BIA never did a statutory analysis to determine the intent of Congress. In addition, In re Varela's weight is further undercut by a later decision of the BIA that found that it was an extra-jurisdictional decision and therefore inappropriate. See Matter of Sano, 19 I. & N. Dec. 299 (BIA 1985). In addition, *Chevron* deference should not be accorded to In re Varela since the intent of Congress with respect "to the issue at bar is clear based on the plain language of the statute, and that the BIA's interpretation is not a "permissible construction of the statute." See Freeman.

The Court should decline to stretch the statutory language to the point where agency inaction may disqualify an applicant automatically when an act of God intervenes during bureaucratic processing. The appellants' position that Congress intended for a citizen spouse's volitional act in filing an I-130 petition to be trumped by circumstances as random as the pace of adjudication and the citizen's untimely death defies logic and should be rejected.

STANDARD OF REVIEW

This Court has de novo review of issues of law, which includes issues or statutory interpretation. INS v. Aguirre-Aguirre, 526 US 415, 424 (1999). When Congress' intent is clear, the Court and the agency must give effect to that intent. If the Court finds that the statute is ambiguous regarding a specific issue, deference to the agency's interpretation is granted only when the agency's interpretation is based on a permissible construction of the statute. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 843 (1984).

ARGUMENT

I. THE STATUTE IS CLEAR AND UNAMBIGUOUS IN THAT MRS. TAING REMAINS A “SPOUSE” FOR PURPOSES OF “IMMEDIATE RELATIVE” CLASSIFICATION AND ADJUSTMENT OF STATUS

A. Statutory Scheme, Definitions of “Immediate Relative” and “Spouse”

Under the Immigration and Naturalization Act (“INA”) certain relatives of U.S. Citizens and Lawful Permanent Residents are allowed to obtain Lawful Permanent Resident status based on their family relationship and relatives sponsorship. This is a two-step process which requires the U.S. citizen (or LPR) sponsor to file an I-130 petition with the USCIS on behalf of his alien relative, and following the approval of the I-130 petition or simultaneously with the filing of the I-130 petition (which is allowed for “immediate relatives”), the foreign national relative applies for an immigrant visa by either filing an I-485 application (or if the relative is outside the U.S. by doing Consular Processing). INA § 204(a)(1)(A)(i); 8 U.S.C. § 1154(a)(1)(A)(i); 8 C.F.R. §§ 204.1(a)(1), 204.2(a).

Upon approval of the I-485 application (or Consular interview) the foreign national relative is granted Permanent Resident status. However, the INA has a quota system in place that limits the number of immigrant visas available for each fiscal year and a foreign national relative cannot file an I-485 application (or be scheduled for a Consular interview) until an Immigrant Visa is available. See 8 U.S.C. § 1151(a). However, Congress exempts “immediate relatives” of a U.S. Citizen from the

numerical limits imposed on other relatives so that immigrant visas are immediately available to them. Further, “immediate relatives” who are in the U.S., such as Mrs. Taing, are allowed to simultaneously file their I-485 application with the I-130 petition filed on their behalf by their U.S. Citizen spouse. The USCIS will typically adjudicate the I-130 petition and I-485 application of an “immediate relative” simultaneously. The statute provides,

any citizen of the United States claiming that an alien is entitled to classification by reason of a relationship described in paragraph (1), (3), or (4) of section 203(a) [preference immigrants subject to quotas] or to an immediate relative status under section 201(b)(2)(A)(i) may file a petition with the Attorney General for such classification.

8 U.S.C § 1151(b)(2)(A)(i); 8 U.S.C. §1154 (a)(1)(A)(i).

Thus, an “immediate relative” is not subject to the numerical limitations in the INA.

An “immediate relative is defined in 8 U.S.C. § 1151(b)(2)(A)(i), which states:

(2)(A)(i) 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....

The *first sentence* of 8 U.S.C. § 1151(b)(2)(A)(i), defines an “immediate relative” as “children, spouses, and parents” of U.S. citizens. Id.

This definition of the “immediate relative” is straightforward and expressly includes “spouses.” Therefore, under a plain reading of the statute, Mrs. Taing is an “immediate relative” as she is the spouse of a U.S. citizen.

Appellants argue that Mrs. Taing was stripped of her classification as an “immediate relative” upon the death of her husband (which occurred after he filed the I-130 petition but prior to the I-130 being fully⁵ adjudicated). However, within the statutory definition of 8 U.S.C. § 1151(b)(2)(A)(i), it is only alien parents that are subject to a qualifier limitation as to when they are defined as an “immediate relative” (i.e., “immediate relative” status being restricted to parents of 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.” Freeman, 444 F.3d at 1039.

The Court in Keene Corp. v. U.S., 508 U.S. 200, 2008 (1993) held that where a statute has a qualifier in one area, but is silent or has no qualifier in regard to another word or section that “This fact only underscores our duty to refrain from reading a phrase into a statute when Congress has left it out.”

⁵ Mrs. Taing was given work authorization by USCIS, based upon the papers filed by her husband and her.

The principle rule of statutory interpretation requires that one presumes that Congress says in the statute what it means and means in a statute what it says there. See Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992). Therefore, under the plain language and express terms of the statute, Mrs. Taing met the qualifications of a “spouse” of a U.S. citizen when her husband filed an I-130 petition on her behalf.

The *second sentence* of 8 U.S.C. §1151(b)(2)(A)(i), includes a definition of an “immediate relative” as an alien who was the spouse of a citizen for two years at the time of the citizen spouse’s death.

(2)(A)(i) Immediate relatives.-- ...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 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).

In the event that a U.S. citizen spouse dies without filing an I-130 petition, the *second sentence* of the statute provides a separate right for the alien spouse to self-petition for “immediate relative” classification under the second clause of 8 U.S.C. §1154(a)(1)(A)(ii).

Appellants argue that this section of the statute requires a foreign national, who is the surviving spouse of a U.S. citizen, to have been married for two years before the

U.S. citizen spouse's death in order to be an "immediate relative" for immigration processing purposes. 8 U.S.C. § 1154(a)(1)(A)(i).

This interpretation of the statute flies in the face of logic and is in opposition to USCIS procedural interpretations and requirements. The second sentence of the statute applies to those foreign national spouses whose U.S. citizen spouse dies *without filing* an I-130 petition on behalf of his foreign national wife. This second sentence of the statute provides a separate right for "widows and widowers" of U.S. citizens to self-petition for immediate relative classification by filing a Form I-360 Petition for Amerasian, Widow(er) or Special Immigrant ("I-360 petition") if the widow/widower meets the requirement of having been married for two years to the US citizen spouse before the death of the U.S. citizen spouse. 8 CFR §§ 204.1(a)(2), 204.2(b) and 8 U.S.C. §1151(b)(2)(A)(i).

Alien spouses who qualify under the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i) process under a different procedural processing than the spouse of a U.S. citizen as defined in the first sentence of the statute. The alien spouse/widow defined in the second sentence self-petitions by filing an I-360 petition whereas spouses of U.S. citizens under the first sentence have an I-130 petition filed for them by their U.S. citizen spouse. See 8 C.F.R. §§ 204.1(a)(1) & 204.2(b) for the self petition I-360 petition process and cf. 8 C.F.R. §§ 204.1(a)(1) & 204.2(a) for the

citizen spouse/I-130 petition process. Congress intentionally created “two different processes, such that one or the other applies—either the citizen spouse petitions (I-130 petition) or, if he dies without doing so, the alien widow may do so” (I-360 self petition) under the conditions set forth in the statute. Freeman, 444 F.3d at 1042. As the District Court explained, citing Freeman, the second class of immediate relatives does not modify the first class of immediate relatives.

Appellants argument that the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i) modifies the first, requiring a two year marriage requirement where the citizen spouse dies before the USCIS adjudicates a properly filed I-130 petition and for a surviving spouse to be considered an “immediate relative”, is also not supported and has been found unpersuasive by a number of Courts, as explained by the District Court of New Jersey:

The Court finds that the statute differentiates between an alien who waits to file a petition until after the citizen spouse is deceased and one who files an I-130 shortly after marriage. In the first case, the alien spouse could have petitioned for an immediate relative visa when the marriage first occurred but did not. In the second case, however, the alien has done everything she could do to ensure the issuance of an immediate relative visa. . . . The fortuity of the citizen spouse’s untimely death is too arbitrary and random a circumstance to serve as a basis for denying the petition.

Robinson v. Chertoff, No. Civ.A.06-5702 (SRC), 2007 WL 1412284 (D.N.J. May 14, 2007), p. 7 *appeal docketed*, No. 07-2977 (3rd Cir. July 5, 2007). See the following cases which are factually and procedurally analogous to the Robinson case and the instant case: Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006).

Mrs. Taing falls within the definition of “immediate relative” provided by the first sentence of 8 U.S.C. § 1151(b)(2)(A)(i) because Tecumsen Taing’s I-130 petition for his wife was properly filed under the provisions of the statute. Nothing in the statute authorizes the automatic stripping of Mrs. Taing’s eligibility for “immediate relative” classification due to her husband’s death during bureaucratic processing. 8 U.S.C. § 1154(a)(1)(A)(i); 8 C.F.R. § 103.2(b)(12).

Appellants argue that because 8 U.S.C. § 1154(b), INA § 204(b), is worded in the present tense, that “the facts attested to in the citizen’s petition must be true at the time of the adjudication of the petition and that the alien must be an immediate relative at the time of that determination.” Respondent-Appellant’s Brief, p. 18. The Court in Robinson addressed appellants’ argument this way:

Defendants cite two district court cases from other jurisdictions, *Burger v. McElroy*, 97 Civ. 8775 (RPP), 1999 U.S. Dist. LEXIS 4854 (S.D.N.Y. Apr. 12, 1999) and *Turek v. Dep’t of Homeland Security*, 450 F.Supp. 2d 736 (E.D. Mich. 2006). In *Burger* the government argued, as they do here, that they could not approve an I-130 petition because 8 U.S.C. § 1554(b) provides that a petition shall be approved only if the Attorney General “determines that the facts stated in the petition are true.” Because the statute is phrased in the present tense, the court in *Burger* determined that the government permissibly construed the statute when it determined that, because the citizen spouse had died while the application was pending, it was no longer true that the surviving widow was a spouse. Therefore, the court determined that the Government’s interpretation of the statute was entitled to deference under *Chevron*. *Burger*, 1999 U.S. Dist. LEXIS 4854 at * 17 (citing *Chevron*, 476 U.S. at 842-43).[fn. 2 omitted] The Court finds this reasoning unpersuasive. It is true that § 1554(b) requires immigration officials to verify the

accuracy of the information contained in the petition. That the statute is written in the present tense is not particularly significant. The court declines to stretch the language of § 1554(b) to the point where agency inaction may disqualify an applicant simply because the passage of time renders obsolete information that was true and accurate at the time the I-130 petition was filed.

Robinson v. Chertoff, No. Civ.A.06-5702 (SRC), 2007 WL 1412284 (D.N.J. May 14, 2007) *appeal docketed*, No. 07-2977 (3rd Cir. July 5, 2007).

Appellants' argument that the statutory terminology of present tense of the word "is" to determine that a person whose U.S. citizen husband who has died cannot be a "spouse" or "immediate relative" is absurd and yields results unintended by Congress.

The Court in *Robinson* persuasively noted that:

[the interpretation proffered by the government yields strange results. A prompt adjudication of the I-130 petition (before the citizen dies) will result in approval. A delay in adjudication (until after the citizen dies) will result in a denial. But a severe delay of two years, followed by the citizen's death, will also result in approval. The Court cannot imagine that Congress intended the time of death combined with the pace of administration, rather than the petitioner's conscious decision to promptly file an I-130 petition, to be the proper basis for determining whether the alien qualifies as an immediate relative.

Robinson, 2007 WL 1412284 at *5.

B. The Ordinary Meaning of the Term "Spouse" Includes a Surviving Spouse

The word "marriage" does not appear in 8 USC § 1151(b)(2)(A)(i). Appellants

argue, however, that Mrs. Taing “is no longer the spouse of a citizen because, as a matter of law, her marriage to the late Mr. Taing ended when he died.” Appellant’s Brief, p. 11. A close review of 8 USC § 1151(b)(2)(A)(i) reveals that the word “marriage” is not in the first sentence. Instead, the word “spouse” is found.

Over the past 50 years the term “spouse” has been used in the law and in ordinary usage to include and encompass a “surviving spouse”. “Spouse” is defined by the Eighth Edition of Black’s Law Dictionary, published in 2004, 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 ed. 2004). The definition of spouse includes a surviving spouse, who is a “spouse” who has outlived the other spouse. The Sixth Edition of Black’s Law Dictionary was published in 1990 and available when the INA was amended that year to include the second sentence of 8 USC § 1151(b)(2)(A)(i). The Sixth Edition defines spouse as “[o]ne’s husband or wife, and ‘surviving spouse’ is one of a married pair who outlives the other.” Black’s Law Dictionary (6th ed. 1990). This definition of spouse not only includes ‘surviving spouse’ but it also implies that the status as spouse persists despite the death of one member; a surviving spouse “*is* one of a married pair.” Black’s Law Dictionary (6th ed. 1990).

The current definition of *immediate relative* as provided in the INA, has not

changed since it was originally included in the Act in 1952. When the 1952 Act was drafted, its authors would have consulted the Fourth Edition of Black's Law Dictionary, which was published in 1951. The Fourth Edition of Black's Law Dictionary defined spouse broadly as "[o]ne's husband or wife," a phrase it 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 defines spouse as "one's wife or husband" and it defines surviving spouse as "the one, of a married pair, who outlives the other." 164 Or. At 173.

The Massachusetts District Court has held that "spouse" includes "surviving spouse":

[T]he term "spouse" as defined in the eight edition of Black's Law Dictionary is, as the government has stated, "one's husband or wife." The government, however, omits the last part of the definition, which states that a "surviving spouse is a spouse who outlives the other." Therefore, a surviving spouse still remains a spouse and Mrs. Taing's status as a "spouse" is not obliterated by her husband's death.

Taing v. Chertoff, 526 F. Supp.2d 177, 184 (D.Mass. 2007) – this matter, below.

Accordingly, whether one uses the most recent Edition of Black's Law Dictionary, the 1990 Edition available at the time of the 1990 amendments, or the 1951 Edition current when Congress drafted the INA in 1952, the word "spouse" has been defined to include a "surviving spouse." Mrs. Taing status as a spouse is not "obliterated" by her husband's death, she remains a "spouse".

Appellants also mischaracterize the requirements of the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i) when they state, “section 201(b)(2)(A)(i) provides that an alien widow or widower of a citizen may be considered to remain an ‘immediate relative,’ if certain conditions are met: (1) the alien ‘had been married for at least two years’ to a citizen of the United States...”

Appellant’s Brief, p. 8-9. The source of the quoted phrase is unknown, but it is not from the statute. Perhaps the error was inadvertent, but not insignificant. The second sentence of 201(b)(2)(A)(i) [and 8 U.S.C. § 1151(b)(2)(A)(i)] actually allows a self petition under the second clause of 8 U.S.C. § 1154(a)(1)(A) in the case of an alien spouse “who was the spouse of a citizen of the United States for at least two years at the time of the citizen’s death...” The statute, in providing the right to an “alien spouse” to self-petition where the alien spouse “was the spouse of a citizen of the United States for at least two years” does not also mean that upon the death of the spouse, the alien spouse ceases to be a spouse. The section merely notes that, in order to self-petition on one’s own (and on behalf of one’s children), the alien must have been a spouse for two years. The statute sets up a temporal limitation on the right to self-petition – the alien spouse must have been a spouse *for two years* at the time of the death – which does not lead to the conclusion, suggested by appellants, that the alien spouse is no longer a spouse.

Appellants seek to draw an inference between the phrase “was a spouse” found in the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i), and their position that Mrs. Taing is “an alien who was the spouse of a citizen.” Appellant’s Brief, p. 16 (emphasis in original). Appellants omit, however, the rest of the phrase that includes the relevant temporal limitation. By analogy, a statutory provision that (for example) allows certain benefits for “a person who was a resident of the State for at least two years at the time of the passage of the law” would apply to those who were residents for two years, without the incorrect inference that they are no longer residents now.

II. CHEVRON DEFERENCE IS NOT APPROPRIATE IN THE INSTANT CASE AS IT DOES NOT MEET THE TEST FOR CHEVRON DEFERENCE AND THE AGENCY’S INTERPRETATION IS IMPERMISSIBLE BECAUSE IT IS BASED ON A DISCREDITED AGENCY OPINION.

Appellants argue that the District Court erred by failing to give deference to the Agency’s statutory interpretation of 8 U.S.C. § 1151(b)(2)(A)(i) (for the terms “spouse” and “immediate relative”) as set forth in the Board of Immigration Appeals decision Matter of Varela, 13 I & N Dec. 453 (BIA 1970) as is due under the Chevron deference. In Chevron v. NRDC, 467 U.S. 837, 842 (1984) the Court ruled that deference is due to an administrative agency’s interpretation of a statute if (1) the intent of Congress is not clear based on the plain reading of the statute and, (2) when the statute is ambiguous, if the agency’s interpretation “is based on a permissible construction of the statute.” Id. (citing Chevron).

Chevron deference should not be accorded to Matter of Varela since, as the Court in Freeman held, the intent of Congress with respect to the issue at bar is clear based on the plain language of the statute, and that the BIA's interpretation is not a "permissible construction of the statute." Freeman, 1038-39 interpreting 8 U.S.C. § 1151(b)(2)(A)(i). The Court below also stated that "The court owes no deference to Matter of Varela..." Taing, p 7. Thus In re Varela does not meet either prong of the test for Chevron deference.

Further, the Court in Gonzales v. Oregon, 126 S. Ct. 904, 916 (2005) stated that "Chevron deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved." If Congress' intent can be clearly determined by an analysis of the language, purpose and structure of a statute then deference to an agency's interpretation is not appropriate. See NRDC v. Nat'l Marine Fisheries Serv., 421 F 3d 872, 877 (9th Cir. 2005).

In Matter of Varela, Mrs. Varela, a citizen of the Philippines, married a U.S. citizen, who filed an I-130 petition weeks after their marriage. The citizen spouse died before the agency could act on the I-130 petition, the District Director denied Mrs. Varela's visa petition and she appealed to the Board of Immigration Appeals ("BIA"), which upheld the I-130 denial in a brief opinion. The Board concluded that "[s]imply stated, at the time of his decision the beneficiary was not the spouse of a United States citizen. His death had stripped her of that status." Id. at 454.

The appellants argue that the District Court erred in failing to accord deference to the Secretary's statutory interpretation of 8 U.S.C. § 1151(b)(2)(A)(i), which is "grounded" in the BIA decision in Varela. However, the appellant is relying on an extra-jurisdictional and discredited agency opinion. The decision in Matter of Varela was later found to be an extra-jurisdictional decision and therefore inappropriate. See Matter of Sano, 19 I. & N. Dec. 299 (BIA 1985).

In Matter of Sano, 19 I. & N. Dec. 299 (B.I.A. 1985), a similarly-situated alien spouse appealed her denial to the BIA. After acknowledging that it had taken up this issue in Matter of Varela, the Board decided that it lacked jurisdiction under the regulations in regards to I-130 petitions. 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.

As a general matter, BIA decisions are entitled to Chevron deference only to the extent that they "give[] ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999). Non-precedential decisions of the BIA are likely not entitled to full Chevron deference. Lagandaon v. Ashcroft, 383 F.3d 983, 987 (9th Cir. 2004); Hernandez v. Ashcroft, 345 F.3d 824, 839 (9th Cir. 2003). Moreover, an informal agency interpretation of a statute is not entitled to deference, but instead deserves respect only

to the extent that it has the "power to persuade." Padash v. I.N.S., 358 F.3d 1161, 1168 n.6 (9th Cir. 2004), quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); see also United States v. Mead Corp., 533 U.S. 218 (2001).

Even assuming *arguendo* that Varela is viable, deference is inappropriate because Varela fails to provide a "full-blown reasoned interpretation" of the statute. Singh v. Ashcroft, 383 F.3d 144, 152 (3d Cir. 2004).

While an agency's interpretation of a statute which it administers is ordinarily accorded deference, summary application of the statute without "a full-blown reasoned interpretation [] is not entitled to deference." Id. The Ninth Circuit Court of Appeals explained that Varela is an "extra-jurisdictional" decision, suffers from a "lack of statutory analysis" and does not offer "a permissible construction of the statute." Freeman, 444 F.3d at 1038. Accordingly, this Court should reject appellants' reliance on Varela for the proposition that Tecumsen Taing's untimely death stripped Mrs. Taing of her status as a spouse.

Recent legislation ameliorating the effects of the death of a family member for 9/11 victims and military members do not support appellants' claims that it is Congress' intent to strip immediate relative status from an applicant who has complied with all the statutory prerequisites for lawful permanent residence. Appellants cite to the USA Patriot Act of 2001, Pub. L. 107-56, 115 Stat. 272, §§ 421(a), (b)(1)(B)(i)

(2001) and the National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, 117 Stat. 1693, § 1703(a) – (e) (2003) to evidence Congress’ intent. Appellant’s Brief, p. 28. Yet those specific exceptions were independent Acts which did not amend the Immigration and Nationality Act, and do not appear anywhere within the INA. Moreover, each of the foregoing Acts merely created a separate right for immediate relatives to self petition under the second sentence of the immediate relative definition. Neither law referenced in any way the first sentence of the immediate relative definition, nor the effect of a properly filed immediate relative petition.

Appellants state incorrectly that,

Section 421 of the Patriot Act is particularly relevant on this point. Under that section, Congress provided a special benefit for the alien beneficiary of a Form I-130 if the petition 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. Pub. L. 107-56, § 421(a) and (b)(1)(B)(I), and 428(b), 115 Stat. 356-57... There would be no need for the enactment of section 421 if, as the district court and the panel in Freeman concluded, a citizen petitioner’s death while a Form I-130 is pending does not ‘terminate (or otherwise render null)’ the Form I-130.

Respondent/Appellant Brief, p. 28.

No “immediate relative” cases are covered in the cited provision. In fact, the section referenced deals only with family preference aliens under 203(a) of the INA,

employment based immigrants under 203(b) of the INA, and K-1 nonimmigrants. Rather, immediate relatives under the 9/11 legislation were dealt with in Section 423(a)(1) of the USA Patriot Act, Pub. L. 107-56 which provided surviving spouses of immediate relatives the separate right to self-petition, conditioned on filing a self-petition within two years of the death. This legislation has everything to do with the *second sentence* of the immediate relative definition, and *not the first*.

The language governing immediate relatives found in the National Defense Authorization Act is identical to that of the 9/11 legislation. See. Pub. L. 108-136, § 1703(a), 117 Stat 1693. Because both the USA Patriot Act and the National Defense Authorization Act provided special language allowing aliens, *other than immediate relatives*, with the ability to have adjustment of status applications “adjudicated as if such death had not occurred”, but chose to provide *immediate relatives* with the distinct right to self-petition under the second sentence of the immediate relative definition, and under the second clause of 8 USC § 1154(a)(1)(A), the conclusion that appellants seek to draw cannot be made. Whether or not one can gain any insight into the intent of Congress from two Acts passed outside of the INA, the wording of those Acts lends no support to Appellants’ futile arguments that Congress intended that immediate relatives be automatically stripped of the status upon the death of the petitioning relative. Congress did not intend such absurd results.

Regardless of these other Acts, recourse to legislative history to determine the intent of Congress is unnecessary. The language of the statute is clear, and Mrs. Taing is entitled to be considered an immediate relative under the first sentence of the “immediate relative” definition, because her U.S. citizen husband properly filed an I-130 immediate relative petition under the first clause of the statute providing for petitions for immediate relatives.

III. VISA REVOCATION OF AN APPROVED PETITION IS APPROPRIATE ONLY WHEN A PETITION HAS PREVIOUSLY BEEN APPROVED AND WHEN THE ATTORNEY GENERAL MAKES CASE SPECIFIC FINDINGS OF GOOD AND SUFFICIENT CAUSE, NEITHER OF WHICH APPLIES IN THE INSTANT CASE

A. This Issue Cannot be Raised for the First Time On Appeal.

Appellants raise for the first time on appeal, the argument that a statute authorizing the revocation of approved visa petitions applies. This issue was not presented to the District Court. Appellate courts in general decline to address issues raised for the first time on appeal. See United States v. Reyes-Alvarado, 963 F.2d 1184, 1189 (9th Cir.), *cert. denied* 113 S.Ct. 258 (1992). Therefore, this issue should not be addressed on appeal. There are narrow exceptions to this, none of which apply to the present case. United States v. Flores-Payton, 942 F. 2d 556, 558 (9th Cir. 1991).

B. Visa Revocation by Death of the Petitioner Does Not Apply In the Instant Case

Despite appellants' recourse to this newly minted argument, automatic revocation is still not available to USCIS as a means of denying Mrs. Taing as a matter of law. First and foremost, 8 U.S.C. § 1155, INA §205, only applies to revocation of approved petitions. In the instant case the I-130 petition was never approved and therefore it cannot be revoked. In the instant case the only decision issued by the USCIS relative to the I-130 petition was to deny it.

Assuming *arguendo* that the I-130 petition for Mrs. Taing had been approved prior to her husband's death, the USCIS still could not have revoked the approval. "Once a visa petition is approved, it can be revoked only on a basis that would have warranted denial of the petition" and not because the US citizen spouse died before the parties had been married for two years. See Matter of Estime, 19 I&N Dec. 450, 451 (BIA 1987)." Appellant Brief, p. 19.

Further, even if automatic revocation were deemed to fall within the ambit of the "good and sufficient cause" language of 8 USC § 1155, the automatic revocation regulations are not a "permissible construction of the statute" and are "arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

In Pierno v. INS, 397 F.2d 949 (2d. Cir. 1968), the Court explained that the automatic revocation regulation was permissive and should not *be interpreted to authorize the Attorney General's wooden application of rules for automatic revocation*. See also Stellas v. Esperdy, 388 U.S. 462, 87 S.Ct. 2121, 18 L.Ed. 2d 1322 (1967), reversing 366 F.2d 266 (2 Cir. 1966). See also United States ex rel. Stellas v. Esperdy, 366 F.2d at 272-274 (Moore, J., dissenting) where the Court held that the wooden application of rules mandating automatic revocation was not a permissible interpretation of the statute, and expressed disbelief that automatic revocation could have been intended by Congress in enacting the "good and sufficient cause" statute.

CONCLUSION

The appellee, Mrs. Taing, requests that this Court affirm the District Court's denial of the Government's *Motion to Dismiss* and affirm the grant of *Summary Judgment* for appellee.

Respectfully submitted,
Neang Chea Taing,
by her Attorney,

Thomas Stylianos, Jr., Esq. (Bar # 1st Cir. 78011, MA 565941)
287 Appleton Street
Lowell MA 01852
Tel: 978-459-5000
Fax: 978-459-3079

Dated: July 30, 2008

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed.R.App.P. 32(a)(7)(B). The foregoing brief contains 26 pages and 6,360 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was WordPerfect X3.

Thomas Stylianos, Jr.

CERTIFICATE OF SERVICE

On this date I via first-class U.S. mail provided a 2 copies of the foregoing Brief for Petitioner-Appellee and a CD containing the brief to:

Gjon Juncaj
Senior Litigation Counsel
District Court Section
Office of Immigration Litigation
U.S. Department of Justice
Civil Division
Ben Franklin Station P.O. Box 868
Washington, D.C. 20044-0868

On this day, I filed this brief, along with required copies with the United States Court of Appeals for the First Circuit by overnight mail

I declare that the statements above are true to the best of my information, knowledge and belief and are made under the pains and penalties of perjury

Thomas Stylianos, Jr.

ADDENDUM

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