

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

CIVIL ACTION NUMBER:

Neang Chea TAING, Petitioner/Plaintiff v. ALBERTO GONZALES, U.S. Attorney General; MICHAEL CHERTOFF, Secretary, Department of Homeland Security; EMILIO GONZALEZ, Director, U.S. Citizenship and Immigration Service; DENIS RIORDAN, District Director of Boston MA, U.S. Citizenship and Immigration Service, Respondents/Defendants
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AGENCY FILE #
A 99 233 120

**PETITION FOR WRIT OF MANDAMUS and
COMPLAINT FOR DECLARATORY and
INJUNCTIVE RELIEF on behalf of
THE SURVIVING SPOUSE OF A UNITED STATES CITIZEN**

Petitioner / Plaintiff, Neang C. Taing, challenges the Respondents’ determination that, as a matter of law, Petitioner / Plaintiff lost her status as the “immediate relative” spouse of a United States Citizen when her citizen spouse died while the Petitioner’s immigration applications were pending. Petitioner respectfully petitions this Court for injunctive, declaratory and mandamus relief to compel Respondents and their subordinates to:

- (a) find that, as a matter of statutory interpretation, Petitioner remains an “immediate relative” spouse under 8 U.S.C. § 1151 et seq. [INA, § 201(b)(2)(A)i];
- (b) reopen and adjudicate (or readjudicate) the I-130 Immigrant Petition that was filed on behalf of the Petitioner by her U.S. Citizen spouse; and
- (c) reopen and adjudicate (or readjudicate) the I-485 Application for Adjustment to the status of a Lawful Permanent Resident that the Petitioner filed as the immediate relative spouse of a U.S. Citizen Spouse. The Government’s actions were final and not review able within the Agency.

JURISDICTION

1. This action arises under 8 U.S.C. §§ 1151, 1255 [INA §§ 201(b)(2)(A)I, 245], Laws of the United States. The Court has jurisdiction under 28 U.S.C. § 1331, the Administrative Procedures Act, 5 U.S.C. § 701 et seq., the Mandamus Act, 28 U.S.C. § 1361 and the Immigration and Naturalization Act. Petitioner also seeks relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2201.

VENUE

2. Venue in the District of Massachusetts is proper under 28 U.S.C. §1391(e) as the Plaintiff/Petitioner resides in this district and no real property is involved in this action. Additionally, a substantial part of the events giving rise to the claim occurred in this, the Eastern District of Massachusetts.

The Boston Region / District office of the United States Citizenship and Immigration Services, a agency of the United States Department of Homeland Security, was the office that denied the applications at issue in this matter.

EXHAUSTION

3. There are no administrative remedies available.
4. There is no administrative appeal of the deceased spouse's visa petition [I-130] for a visa for his wife available, as the Board of Immigration Appeals has held that it lacks jurisdiction to review such a denial. *Matter of Sano*, 19 I & N Dec. 299 (BIA 1985).
5. There is no administrative appeal of the denial of the Petitioner's Application to Adjust Status [I-485]. 8 CFR § 245.2(a)(5)(ii).
6. While the Plaintiff / Petitioner may ordinarily renew her application in removal proceedings before the Executive Office of Immigration Review ("EOIR"), such action

would be futile without an underlying Immigrant Visa as the EOIR lacks jurisdiction over the Visa Petition, *id.*

PARTIES

7. The Petitioner/Plaintiff, Neang Chea TAING, is a Citizen of Cambodia and the surviving spouse of Mr. Techumsen Chip TAING, a Naturalized United States Citizen. Ms. Taing resides at 25 Marlborough Street, Lowell Middlesex County, Massachusetts.
8. The Respondent/Defendant
 - (a) Alberto Gonzales, is being sued in his official capacity as the Attorney General of the United States.
 - (b) Michael Chertoff, is being sued in his official capacity as the Secretary of the Department of Homeland Security.
 - (c) Emilio Gonzalez, is being sued in his official capacity as the Director of the United States Citizenship and Immigration Service which is an agency within the Department of Homeland Security.
 - (d) Denis Riordan, is being sued in his official capacity as District Director of the Boston Massachusetts District Office of the United States Citizenship and Immigration Service which has jurisdiction over the Plaintiff/Petitioner's applications and made the denial decisions in the applications.

FACTS

9. Ms. Neang Chea TAING (f/k/a Neang CHEA), a Cambodian Citizen born in Cambodia on 06/10/1961¹ who entered the United States as a tourist for pleasure, with inspection, on June 17, 2004. She subsequently 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.
10. 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.
11. The Government, based upon her applications, approved her application for work authorization and issued a work authorization card. The Government continued to process the couples applications.
12. 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.
13. Ms. Taing's husband died 6 months after the proper filing of applications based on an "Immediately Available" visa.
14. On 09/13/2005, the Government issued a notice for Ms. Taing and her now 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

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.

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.

15. At the time of filing that all applications were allowable.
16. On April 10, 2006, the Department of Homeland Security mailed Ms. Taing a Notice to Appear⁴ charging her with being a Visa Overstay. The Charging Document makes no mention of her applications for permanent status in the United States.
17. There is no provision of law, including within the Immigration and Naturalization Act, that provides for automatic termination of Immediate Relative of Spousal Status or the denial of a relative petition, upon the death of the petitioning spouse.
18. 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 flawed and it was denied.

CLAIMS FOR RELIEF

19. The Government's construction of INA, § 201(b)(2)(A)(I)⁵ is contrary to the express language of the statute, unreasonable, and leads to arbitrary and capricious results.
20. The Plaintiff/Petitioner as and remains an "Immediate Relative" for the purposes of INA, § 201(b)(2)(A)(I) and, as a matter of law, is eligible to adjustment of status under INA, § 245(a), 8 U.S.C. § 1255(a)

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

⁴ The formal document with which Removal or Deportation proceedings are commenced.

⁵ INA is used to refer to the Immigration and Nationality Act.

21. Petitioner was inspected and lawfully admitted to the United States as a non-immigrant visitor.
22. Petitioner submitted and filed a completed application with USCIS under INA 245(a), 8 U.S.C. § 1255(a). Together with the Application, Plaintiff/Petitioner paid various filing fees as required by law, which were duly collected by USCIS.
23. Plaintiff/Petitioner's United States Citizen spouse, Techumsen Chip TAING, submitted and filed a completed petition for an Immigrant Visa pursuant to INA § 204(a), 8 U.S.C. § 1154(a). Together with the Petition, Techumsen Chip TAING, paid the filing fee required by law, which was duly collected by USCIS.
24. An immigrant visa was immediately available to Plaintiff / Petitioner at the time the application as filed pursuant to INA § 245(a), 8 U.S.C. § 1255(a)
25. Plaintiff / Petitioner was not stripped of her status as an "Immediate Relative" spouse as a result of the untimely death of her husband.
26. Plaintiff / Petitioner remains eligible to receive an Immigrant Visa as the Immediate Relative surviving spouse of a United States citizen pursuant to INA § 201(b)(2)(A)(I), 8 U.S.C. § 1151(b)(2)(A)(I).
27. Petitioner is admissible to the United States as a Lawful Permanent Resident.
28. Petitioner has suffered, and will continue to suffer, significant and irreparable harm because of the Respondent's policies, procedures, acts and failures to act as described herein.

COUNT 1

29. The Plaintiff/Petitioner realleges and incorporates by reference paragraphs 1 through 28 with equal force as if they were repeated here.
30. The Defendants / Respondents violated the Plaintiff / Petitioner's statutory right to apply for relief which Congress has provided under the INA, thereby unlawfully depriving her of the opportunity to obtain adjustment to the status of a Lawful Permanent Resident and live lawfully in the United States under INA § 245.

COUNT 2

31. The Plaintiff/Petitioner realleges and incorporates by reference paragraphs 1 through 30 with equal force as if they were repeated here.
32. The Plaintiff / Petitioner has suffered a "Legal Wrong" or has been "Adversely Affected" or "Aggrieved" by the agency action. 5 U.S.C. § 702. Plaintiff / Petitioner is a person aggrieved by an agency action for which there is no other adequate remedy in a court. 5 U.S.C. § 704.
33. Respondents have unlawfully and erroneously interpreted the term "immediate relative" in INA 201(a)(b)(2)(a)I. Based on this erroneous interpretation, Respondents have erroneously denied both the Petition and Application in violation of Congressional intent. Petitioner is entitled to injunctive relief to "compel agency action unlawfully withheld or unreasonably delayed" and to hold unlawful and set aside agency action that, as here is not in accordance with law. 5 U.S.C. § 706 (1) and (2). See *Freeman v. Gonsales*, 444 F.3d 1031 (9th Cir. 2006).

COUNT 3

34. The Plaintiff/Petitioner realleges and incorporates by reference paragraphs 1 through 33 with equal force as if they were repeated here.
35. USCIS denied the Petition and Application solely on the basis that the Plaintiff / Petitioner was stripped of her status as an Immediate Relative Spouse of a United States Citizen and not for discretionary reasons. Respondents have failed to perform their duties by reason of their act of determining that Plaintiff / Petitioner was no longer an Immediate Relative Spouse of a United States Citizen , and therefore not entitled to adjustment of status, and by failing to exercise discretion.
36. Respondents owe the Plaintiff/Petitioner a clear and certain duty under the INA, as aforesaid, and the Mandamus Act, 28 U.S.C. § 1361, to adjudicate the Petition and Application on the basis that the Plaintiff / Petitioner remains an Immediate Relative Spouse of a United States Citizen and was not stripped of such status by the death of her husband. . See Freeman v. Gonsales, 444 F.3d 1031 (9th Cir. 2006).
37. The Plaintiff / Petitioner has no other adequate remedy at law.

WHEREFORE the Plaintiff respectfully prays that this honorable Court enter an order:

- (a) require the Defendants to revalidate the Plaintiff / Petitioner's Visa Petition;
- (b) require the Defendants to revalidate and adjudicate the Plaintiff / Petitioner's Adjustment of Status Application;
- (c) awarding the Plaintiff costs and reasonable attorney's fees associated with this action;

and

(c) granting such other and further relief as justice may require.

Respectfully submitted,
Neang Chea Taing,
by her attorney

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