No. SACV 08-688 JVS (SHx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TERESITA G. COSTELO, et al.,

Plaintiffs,

v.

JANET NAPOLITANO, et al.

Defendants.

BRIEF OF THE AMERICAN IMMIGRATION LAW FOUNDATION AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PLAINTIFFS

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I. THIS COURT SHOULD NOT DEFER TO *MATTER OF WANG* BECAUSE INA §203(h)(3) IS PLAIN

In *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), the BIA finds that INA §§203(h)(1) and (2), in tandem, "clearly define the universe of petitions" to which these subsections apply. 25 I&N Dec. 28, 33 (BIA 2009). Without analyzing the precise statutory language, the BIA next concludes that §203(h)(3) is "ambiguous" as to the petitions to which it applies. *Id.* This latter conclusion is wrong. The plain language of paragraph (3) and its relation to (1) and (2), reveal Congress' intent that *all* beneficiaries under INA §§203(a)(2) and (d)[1] who have "aged-out" under paragraph (1) are eligible for the benefits of (3).

The starting point of all statutory interpretation is the intent of Congress, and "'[d]eference to the [agency's] interpretation … is only appropriate if Congress' intent is unclear.'" *Padash v. INS*, 358 F.3d 1161, 1168 (9th Cir. 2004) (quotations omitted). Where traditional tools of statutory construction reveal Congress' intent, "deference is not required at all." *Id.* (citations omitted). Where a statute is ambiguous, however, an agency's "permissible construction" of it is subject to deference." *Bona v. Gonzales*, 425 F.3d 663, 668 (9th Cir. 2006) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

[1] INA §203(a)(2)(A) allocates visas to the spouses and children of legal permanent residents (LPR). INA §203(d) allocates visas to derivative beneficiaries of family-sponsored, employment-based and diversity visas.

Paragraph (3) of § 203(h) specifically applies to "aliens determined under paragraph (1) to be 21 [ ] or older for the purposes of [INA §§] (a)(2)(A) and (d)." This language applies without restriction to *all* derivative beneficiaries under §203(d) who age-out under paragraph (1), and not, as the BIA would limit it, solely to derivative beneficiaries of §203(a)(2)(A).[2] The unrestricted reference to §203(d) demonstrates Congress' intent to provide these "aged-out" beneficiaries the alternative benefits of automatic conversion and retention of an earlier priority date.

Additionally, the phrase "for purposes of subsections (a)(2)(A) and (d)," repeated in both (1) and (3), must be given the same meaning. "It is a well-established canon of statutory interpretation that where Congress uses the same [ ] phrase throughout a statute, Congress generally intends the [ ] phrase to have the same meaning each time." *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1142 (9th Cir. 2002) (citations omitted). The BIA violates this basic rule when it first (correctly) applies (1) to all derivative beneficiaries under § 203(d), but then (incorrectly) limits the application of (3) to derivative beneficiaries of §203(a)(2)(A). Thus, *Matter of Wang* impermissibly imposes a limitation in paragraph (3) that does not exist. *See Schneider v. Chertoff*, 450 F.3d 944, 956

[2] For a full discussion of the decision, *see* David A. Isaacson, "BIA Rejects *Matter of Maria Garcia* in Precedent Decision Interpreting the Child Status Protection Act," http://www.cyrusmehta.com/News.aspx?SubIdx=ocyrus20096221176 (June 22, 2009).

(9th Cir. 2006) (an agency cannot "impose[] a new requirement that is not contemplated by Congress").

Had Congress intended to limit the scope of (3) to derivative beneficiaries of §203(a)(2)(A) only, it would have specified this restriction, as it repeatedly has done elsewhere. *See, e.g.*, INA §201(b)(1)(A) (section limited to certain categories of special immigrants); §203(d) (section limited to certain definitions of term "child"); §204(a)(1)(A)(ii) (section limited to individuals "described in the second sentence of §201(b)(2)(A)(i)").

INA §203(h)(3) must be interpreted in accord with its plain language. *Matter of Wang* is entitled to no deference.

II. THE BIA'S INTERPRETATION IS UNREASONABLE AND NOT ENTITLED TO DEFERENCE

Even were the statute ambiguous – which it is not – the BIA's interpretation is not entitled to deference because it is unreasonable. *See Akhtar v. Burzynski*, 384 F.3d 1193, 1202 (9th Cir. 2004). The BIA's conclusion that §203(h)(3) codified an existing regulation is without support. Moreover, the BIA relies upon select regulatory and statutory provisions to support its position, and ignores equally compelling contrary provisions. Thus, its conclusion about the "recognized" meaning of "automatic conversion" and "retention of priority dates" is inaccurate.

Central to the BIA's claim that §203(d) as used in (3) is limited, is its mistaken belief that *all* "retention of priority date" provisions involve the same petitioner. In fact, however, both Congress and the immigration agencies have authorized retention of a priority date for use in a subsequent petition by a *different petitioner*. For example, Congress specified in § 421(c) of the U.S. Patriot Act, P.L. 107-56, 115 Stat. 272 (2001), that where a family-sponsored visa petition was revoked or terminated due to certain terrorist activity, the beneficiary could file a new "self-petition" while retaining the priority date of the family member's earlier petition.[3]

Similarly, in the employment-based context, a non-citizen physician working in a medically underserved area who changes jobs may retain the priority date of the former employer's petition for use with the new employer's petition. 8 C.F.R. § 204.12(f)(1).[4]

The BIA's interpretation of the automatic conversion provision of § 203(h)(3) also is not rational or consistent with the statute. It premises its interpretation on the unsupported assumption that the "appropriate category" for

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[3] *See also* 8 C.F.R. § 204.2(h)(2) (beneficiary of petition by abusive spouse or parent may "transfer" priority date to own self-petition); § 9(b), Data Supplied by the U.S. Dept. of Justice, P.L. 94-571, 90 Stat. 2703 (1976) (priority date obtained under prior law may be retained for use in different priority classification); Richard D. Steel, *Steel on Immigration Law 2d*, § 4-17 (2009) (same).

[4] *See also* 8 C.F.R. § 204.5(e) (allowing beneficiaries of certain employment-based petitions to retain an earlier priority date for use with a new employer's petition); *Longwood Village Restaurant v. Ashcroft*, 157 F.Supp.2d 61, 69 (D.C. D.C. 2001) (discussing regulation); Richard D. Steel, *Steel on Immigration Law 2d*, §§ 4-17, 6.34 (2009) (same).

the new visa petition must be related to the original petitioner. The statute does not require this, however. In fact, in *Matter of Garcia*, 2006 WL 2183654 (BIA June 16, 2006)(unpublished), the BIA held that the "appropriate category" related to the principal beneficiary of the earlier petition, not the prior petitioner. *Matter of Wang* does not explain why this analysis in *Matter of Garcia* is in error. Moreover, precedent exists for the automatic conversion of a petition to a new classification involving a different petitioner. Where the petitioner of a pending I-130 petition to classify a spouse as an immediate relative dies, the petition may automatically convert to an I-360 self-petition by the surviving spouse for "special immigrant" classification. 8 C.F.R. § 204.2(i)(1)(iv). There is no reason why INA § 203(h)(3) was not intended to operate the same way.

The BIA also relies on legislative history that is irrelevant to §203(h)(3). This section was included in an amendment to the statute postdating the legislative history referenced by the BIA. As the BIA acknowledges, there is no legislative history explaining the purpose of this amendment. *See* 25 I&N Dec. at 37. Moreover, because Congress intended that this statute be ameliorative, it should be "interpreted and applied" in that fashion. *Padash*, 358 F.3d at 1173.

Dated: July 1, 2009

Respectfully submitted,

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