LYNDEN MELMED
Chief Counsel
EVAN FRANKE
Chief, Litigation Coordination Division
JASON R. GRIMM
Associate Counsel, Service Center Counsel Division
U.S. CITIZENSHIP & IMMIGRATION SERVICES
24000 AVILA ROAD, SUITE 2117
LAGUNA NIGUEL, CA 92677
949-389-3226

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

BOARD OF IMMIGRATION APPEALS

In The Matter Of:	Case No. A89-726-558
Ms. Jyoti R. PATEL	REQUEST FOR PRECEDENT DECISION; REQUEST FOR ORAL ARGUMENT;
(Petitioner)	REQUEST FOR CONSIDERATION BY THREE MEMBER PANEL;
In Visa Certification Proceedings	MOTION TO ACCEPT SUPPLEMENTAL AND/OR REPLY BRIEF;

REQUEST FOR PRECEDENT DECISION

In accordance with the procedures described at 8 C.F.R. section 1003.1(g), United States Citizenship and Immigration Services ("USCIS") formally requests that the Board of Immigration Appeals ("Board") consider issuing a precedent decision concerning the interpretation and application of section 203(h)(3) of the Immigration and Nationality Act. Since enactment on August 6, 2002, section 203(h)(3) has been subject to conflicting interpretation, resulting in seemingly inconsistent treatment by the Board[1] and sporadic litigation in the federal

[1] Matter of Maria T. Garcia, A79 001587 (BIA July 16, 2006)(unpublished); Matter of Elizabeth Francisca Garcia, A77 806 733 (BIA July 24, 2007)(unpublished); Matter of Francisco Drilon Yang, A79 638 092 (BIA September 7, 2007)(unpublished); Matter of Stuti Chaitanya Patel, A88 124 902 (BIA April 18, 2008)(unpublished).

district courts. Moreover, the interpretation of section 203(h)(3) has risen to the level of national and public significance as USCIS stakeholders strive to administer the provisions of the section 203(h)(3) in accord with Congressional intent, but in the absence of consistent guidance. A precedent decision will provide a measure of closure to the interpretation of a provision which has gone largely unexplained since its enactment nearly six years ago. In light of the certification before the Board, USCIS believes that the matter is ripe for publication and hereby formally requests that the Board consider issuing a precedent decision.

REQUEST FOR ORAL ARGUMENT

USCIS requests that the Board grant oral argument in this matter as described within the Board of Immigration Appeals Practice Manual ("Practice Manual") at Chapter 4.2(g) and Chapter 8. USCIS is aware that Chapter 8.2 of the Practice Manual references 8 C.F.R. section 1003.1(e)(7) which provides, "[w]hen an appeal has been taken, a request for oral argument if desired shall be included in the Notice of Appeal." In this matter, Petitioner has requested oral argument, and USCIS joins in this request. Oral argument will provide USCIS an opportunity to fully develop the public policy rational behind its interpretation of section 203(h)(3) and further address the conflict and interplay between section 203(h)(3) and other provisions within both the Immigration and Nationality Act and its history of implementing regulations. USCIS believes that a full presentation including oral argument will alleviate the likelihood of a motion for oral argument as described in Chapter 8.2(b) of the Practice Manual and relating to motions to reopen or reconsider. Observing the criteria for oral argument discussed at Chapter 8.2(d) of the Practice Manual, USCIS believes that this matter concerns the resolution of a novel issue of law, requiring clarification of several conflicting and unpublished decisions issuing from the Board, and concerning an issue of significant public interest.

REQUEST FOR CONSIDERATION BY THREE MEMBER PANEL

In accord with the necessity for oral argument in this matter USCIS requests that this matter, if not previously before a three Board Member panel, be appropriately considered for

such treatment. Chapter 8.2 of the Practice Manual provides that "[o]ral argument is not allowed in a case assigned for disposition by a single Board Member." USCIS believes that this matter is not suitable for consideration by a single Board Member as it involves "[t]he need to establish a precedent construing the meaning of law and procedure" as described by 8 C.F.R. section 1003.1(e)(6)(ii) and Chapter 1.3(a)(i)(2) of the Practice Manual. Moreover, the novel issue of law at issue concerns a "controversy of major national import," as described by 8 C.F.R. section 1003.1(e)(6)(iv) and Chapter 1.3(a)(i)(4) of the Practice Manual. Accordingly, USCIS requests consideration by a three Board Member panel in conjunction with the request for oral argument.

MOTION TO SUBMIT SUPPLEMENTAL AND/OR REPLY BRIEF

USCIS requests leave to submit a supplemental brief to the memorandum accompanying the request for certification and in the alternative, an opportunity to file a reply to Respondent's brief dated June 25, 2008. For this purpose, USCIS requests a period of thirty days in which to file such brief with the Board.

Date: July 18, 2008

LYNDEN D. MELMED
Chief Counsel
EVAN FRANKE
Chief, Litigation Coordination Division

JASON R. GRIMM
Associate Counsel
Service Center Counsel Division

CERTIFICATE OF SERVICE

I, Jason R. Grimm, certify that a copy of this motion has been mailed to Petitioner, her counsel of record, and the Oral Argument Coordinator via first class mail on July 18, 2008 at the following addresses:

Ms. Jyoti Patel
730 Brookside Drive
Columbus, OH 43209

Mr. Scott Bratton, Esq.
C/o Margaret Wong & Associates
3150 Chester Avenue
Cleveland, OH 44114

Oral Argument Coordinator
Clerk's Office
Board of Immigration Appeals
P.O. Box 8530
Falls Church, VA 22041

Date: July 18, 2008

LYNDEN D. MELMED
Chief Counsel
EVAN FRANKE
Chief, Litigation Coordination Division

JASON R. GRIMM
Associate Counsel
Service Center Counsel Division

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Chief Counsel

24000 Avila Road, Room 2117
Laguna Niguel, CA 92677
June 12, 2008

Memorandum for Certification

Pursuant to Title 8, Code of Federal Regulations ("C.F.R.") § 1003.1(c), the Director of the California Service Center, United States Citizenship and Immigration Services (CIS), hereby submits to the Board of Immigration Appeals ("BIA"), her decision dated March 25, 2008. Jurisdiction by certification is proper since this decision arises under 8 C.F.R. § 1003.1(b)(5) and the decision relates to a petition filed in accordance with Immigration and Nationality Act § 204.

Executive Summary

CIS concludes that the Petition for Alien Relative (Form I-130) filed on behalf of Vishalkumar Patel in 2006 should not be able to retain/capture the visa "priority date" accorded to a Petition for Alien Worker previously filed in 2003 on behalf of his mother, Jyoti Patel. CIS reaches this conclusion because there is no provision of law supporting retention of the earlier priority date and that even when considering § 203(h) of the Child Status Protection Act ("CSPA"), only second preference (family-based) beneficiaries may retain earlier priority dates, not aged-out derivative beneficiaries of employment based visa petitions. In support of her argument, she cites to a single unpublished BIA case supporting her position to the contrary. *See In re: Maria T. Garcia*, 2006 WL 2183654 (BIA 2006 unpublished). Additionally, while not cited by Ms. Patel, CIS has become aware of three unpublished decision, each reaching a different conclusion. See *In re: (A88 124 902, Name Redacted)*,[1] April 18, 2008 (where dicta indicates that the BIA disagrees with CIS's assessment of the law, denying on other grounds), See *In re: Elizabeth Francisca Garcia*, 2007 WL 2463913 (BIA 2007 unpublished)(initially denying the retention of priority date, but reconsidering the matter on account of *In re: Maria T. Garcia*), but Cf. *In re: (A79 638 092, Name Redacted)*,[2] (BIA September 7, 2007) ("section 203(h)(3) of the Immigration and Nationality Act does not permit the respondent to retain the priority date from his father's immediate relative petition…").

As this brief sets forth, the CIS interpretation of CSPA § 203(h)(3) is both an accurate and reasonable interpretation of the statute. In effort to alleviate sporadic federal litigation on this nuanced immigration issue and to provide both briefing and an opportunity to the BIA to clarify its interpretation of the application of CSPA § 203(h)(3), CIS submits by way of certification, the decision of the Director of the California Service Center.

[1] Westlaw citation unavailable, redacted copy attached
[2] Westlaw citation unavailable, redacted copy attached

Statement of Facts

1. On January 16, 1998, Vimco Corporation ("Vimco"), doing business as Capital Motel ("Capital") filed an Application for Alien Employment Certification ("ETA-750") on behalf of Ms. Jyoti Patel ("Plaintiff"). A "Final Determination" (certification approval) of this application for employment certification was issued on August 14, 2000.

2. On June 2, 2003, Vimco filed an Immigrant Petition for Alien Worker ("I-140") on behalf of Plaintiff. This I-140 was accorded a priority date of January 16, 1998 based upon the filing date of the ETA-750. The I-140 was ultimately approved on November 19, 2003.

3. The Department of State Visa Bulletin for June of 2003 listed as current and immediately available, all employment visa categories, including Plaintiff's Third Preference employment based classification.

4. On June 2, 2003, Plaintiff filed an Application to Register Permanent Resident or Adjust Status ("I-485"). This I-485 listed Vishal Patel ("Vishalkumar") in "Part 3," section "B" and further indicated that Vishalkumar would apply for status with Plaintiff Jyoti.

5. On the date of filing, the Department of State Visa Bulletin ("Visa Bulletin") indicates that the employment based third preference visa immigrant was available.

6. On November 10, 2005, Vishalkumar turned 21 years of age.

7. Plaintiff's I-485 was approved on January 12, 2006.

8. Since Vishalkumar was over 21-years of age at the moment of approval, he was not able to benefit from derivative status to his mother's application, because he no longer satisfied the definition of "child" for the purposes of the Immigration and Nationality Act.

9. Plaintiffs have not challenged the determination that Vishalkumar cannot qualify for an immigrant visa as a derivative beneficiary.

10. On February 24, 2006, Plaintiff filed a Petition for Alien Relative ("I-130") on behalf of Vishalkumar as the unmarried son or daughter of a lawful permanent resident.

11. On June 4, 2008, CIS approved the I-130 filed by Plaintiff on behalf of Vishalkumar. CIS accorded the I-130 a priority date based upon the filing date of the petition, or February 24, 2006.

12. For the unmarried son or daughter (21 years of age or older) of a lawful permanent resident from India, the Department of State Visa Bulletin ("Visa Bulletin") for June 2008 indicates a visa priority date of August 1, 1999.

Legal Framework Governing the Immigrant Visa Petition Priority Date

INA § 203(b) – Preference Allocation for Employment Based Immigrants. Aliens subject to the worldwide level specified in section 201(d) for employment-based immigrants in a fiscal year shall be allotted visas as follows: (3) SKILLED WORKERS, PROFESSIONALS, AND OTHER WORKERS.— (A) IN GENERAL.—Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2): (i) SKILLED WORKERS.—Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

INA § 203(d) Treatment of Family Members – A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 101(b)(1) shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c), be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

INA § 203(h), CSPA § 203(h) – RULES FOR DETERMINING WHETHER CERTAIN ALIENS ARE CHILDREN- (3) [I]f the age of the alien is determined… to be 21 years of age or older for the purposes of subsection (a)(2)(A) and (d), the alien's petition shall automatically convert to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

Title 22 C.F.R. § 42.32(c)(2) Entitlement to Derivative Status. Pursuant to INA § 203(d), and whether or not named in the petition, the child or spouse of an employment-based third preference immigrant, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

Title 22 C.F.R. § 42.68(a) Preliminary determination of visa eligibility. If a principal applicant proposes to precede the family to the United States, the consular officer may arrange for an informal examination of the other members of the principal applicant's family in order to determine whether there exists at that time any mental, physical, or other ground of ineligibility on their part to receive a visa.

Title 22 C.F.R. § 42.68(b) When family member ineligible. In the event the consular officer finds that any member of such family would be ineligible to receive an immigrant visa, the principal applicant shall be informed and required to acknowledge receipt of this information in writing.

Title 8 C.F.R. § 204.1(c) – Filing date. The filing date of a petition shall be the date it is properly filed under paragraph (d) of this section and shall constitute the priority date.

Title 8 C.F.R. § 204.2(g)(4) – Derivative beneficiaries. A spouse or child accompanying or following to join a principal alien beneficiary under this section may be accorded the same preference and priority date as the principal alien without the necessity of a separate petition.

Title 8 C.F.R. § 204.2(h) – Validity of approved petitions. Unless terminated… the approval of a petition to classify an alien as a preference immigrant… shall remain valid for the duration of the relationship to the petitioner and of the petitioner's status as established in the petition.

Title 8 C.F.R. § 204.2(a)(4) – Derivative beneficiaries. (Provides that)… in the case of a child accompanying or following to join a principal alien under § 203(a)(2) of the Act may be included in the principal alien's second preference visa petition… the child will be accorded second preference classification and the same priority date as the principal alien. However, if the child reaches the age of 21 prior to the issuance of the visa to the primary alien parent, a separate petition will be required. In such case, the original priority date will be retained if the subsequent petition is filed by the same petitioner. *Such retention of priority date will be accorded only to a son or daughter previously eligible as a derivative beneficiary under a second preference spousal petition.* (emphasis supplied)

Analysis

On June 2, 2003, Vimco filed an I-140 on behalf of Plaintiff. Concurrently, Plaintiff filed her I-485 and supporting applications, which listed Vishalkumar as a derivative beneficiary. The I-140 was approved on November 19, 2003. Although Vishalkumar was still under twenty-one years of age when the I-140 was approved, Plaintiff failed to file an I-824 on his behalf within one-year of the approval of her I-140.[3] [4]

Seeking a second mechanism by which to assist her son, Plaintiff asserts that the I-130 she filed on behalf of Vishalkumar after her adjustment on January 12, 2006, is entitled to capture the January 16, 1998 priority date of her ETA-750 pursuant to CSPA § 203(h)(3). The section states:

> *[I]f the age of the alien is determined... to be 21 years of age or older for the purposes of subsection (a)(2)(A) and (d), the alien's petition shall automatically convert to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.*

The plain language of CSPA § 203(h)(3) requires several inquiries: First, the adjudicator must ascertain whether the alien beneficiary is over twenty-one years of age to determine if CSPA is even implicated. Second, the adjudicator must note what preference category applied to the alien beneficiary before aging out. Third, the adjudicator must determine what category exists at the

[3] INA § 203(d) – if at the time of Plaintiff's adjustment, Vishalkumar qualified as a child pursuant to INA § 101(b), he would, "be entitled to the same status… if accompanying or following to join."

[4] Department of State Guidance, Child Status Protection Act: ALDAC #2, Ref 02 State 163054, 123775 – in cases involving a derivative seeking to follow to join a principal who adjusted in the U.S., the derivative can benefit from the CSPA if the principal filed a Form I-824 for the beneficiary within one year of a visa becoming available (i.e., within one year of the case becoming current or petition approval, whichever is later).

moment the alien turns twenty-one years of age, which may give life to the language of "automatically convert to the appropriate category." Finally, after determining the "appropriate category" the adjudicator must observe and apply the original priority date which had been granted upon the initial receipt (filing) of the original petition.[5]

Addressing these inquiries in turn, first, Vishalkumar was determined to be over twenty-one years of age at the time he sought to immigrate on or about April 25, 2007.[6] Although he turned twenty-one on November 10, 2005, the I-140 through which he sought derivative status had been filed over two years earlier on June 2, 2003. Accordingly, the provisions of CSPA *may* apply.

Second, the Plaintiff's I-140 was approved on November 19, 2003, as a third-preference employment visa classification pursuant to INA § 203(b)(3)(A)(iii). Accordingly, so long as Vishalkumar remained a child a defined by the INA, he could enjoy derivative beneficiary status as provided by INA § 203(d). Here, Vishalkumar no longer satisfied the definition of child and could not remain a derivative beneficiary.

Since, Vishalkumar no longer satisfied the definition of child provided by INA § 101(b) an analysis of the "appropriate category" for "automatic conversion" is required. While CSPA § 203(h)(3) discusses an automatic conversion to an "appropriate category," a dispute between the parties exists as to the meaning of this phrase. It is in the third inquiry where Plaintiff's interpretation of CSPA §203(h)(3) falters.

The only petition in existence at the time Vishalkumar "aged-out" of his derivative beneficiary status was the I-140 filed by Vimco on behalf of Plaintiff. The "conversion" provided for by CSPA § 203(h)(3) is of the "original petition," which in this case is the I-140. The element being converted is the relationship between the petitioner and the beneficiary, a relationship reflected by the preference category assigned to the beneficiary. In this case, no preference category exists to reflect the privity between an employer, and the son or daughter of an employee – and only by operation of INA § 203(d) does an immigration benefit even extend to a qualifying derivative beneficiary.

On the other hand, Plaintiff argues an interpretation of the "automatic conversion" language in CSPA § 203(h)(3) which is inconsistent with both the "original petition" language of the statute and the very I-130 petition filed by Plaintiff on behalf of Vishalkumar. Plaintiff's interpretation of CSPA § 203(h)(3) calls for an automatic conversion upon age-out without more – it does not in any fashion call for the filing of the I-130; under Plaintiff's application of the statute, the I-130 filed for Vishalkumar is superfluous. Plaintiff's argument is both analytically incongruent with the language of the statute and her act of filing the I-130 on behalf of Vishalkumar.

The CSPA § 203(h)(3) states that the "alien's petition" shall automatically be converted. In this circumstance, there are two reasonable interpretations: (1) the language of the statute reflects the possessive relationship between the alien and the petition and accordingly, the I-140 at issue belongs to Plaintiff, and not Vishalkumar. In such an analysis the relationship between the petitioner (Vimco) and Plaintiff does not fall within INA § 203(a)(2) and accordingly, CSPA is

[5] Here, the I-140 has been assigned the January 16, 1998 priority date based upon the filing of the ETA-750.
[6] According to Plaintiff, Vishalkumar was refused his immigrant visa at his consulate interview in Mumbai, India.

not implicated; (2) under the theory that the petition may be treated as concurrently belonging to Vishalkumar by operation INA § 203(d), if an automatic conversion is to occur, it will relate to the relationship between Vimco and Vishalkumar.

Plaintiff argues that in the absence of a petition filed exclusively for Vishalkumar, his appropriate visa category for automatic conversion of the I-140 would be the second preference relative visa classification described by INA § 203(a)(2)(B). While such automatic action is the only mechanism to give meaning to the language of the statute which provides for "automatically convert[ing] to the appropriate category," Plaintiff's argument ignores her privity with Vimco as an employee, her subsequent act of filing the I-130 to classify Vishalkumar as a relative, and erroneously concludes that the employment classification is transformed into a relative classification based upon the relationship of Plaintiff and Vishalkumar.

As seen in Plaintiff's brief, she conflates the language of the CSPA calling for an "automatic conver[sion] to the appropriate category," with her subsequent action of filing an I-130 on behalf of Vishalkumar and arguing that such I-130 "should automatically retain the priority date of the original petition as an automatic conversion."[7] While the I-130 in this matter was filed only weeks after Plaintiff acquired lawful permanent resident status, such construction begs the following question: what if Plaintiff filed the I-130 years later, or never filed an I-130 whatsoever? The answer is simple. Because Vishalkumar had already been included as a potential derivative beneficiary on Plaintiff's applications, CIS would be required to review the documentation and determine the application of the CSPA. The CSPA analysis is required regardless of whether Plaintiff ever filed the I-130. The analysis is required because the language of the CSPA provides for the automatic conversion – not the *subsequent* conversion.

Reviewing the United States House proceedings of July 22, 2002, the record reflects that Representative Sensenbrenner specifically contemplated CSPA as addressing Plaintiff's situation:

> *The Senate passed H.R. 1209 with a few appropriate additions, and the motion today is to concur in those additions. The Senate bill addresses three other situations where alien children lose immigration benefits by "aging out" as a result of INS processing delays... Case number two: Children of family and employment-sponsored immigrants... Under current law, when an alien receives permanent residence as a preference visa recipient... a minor child receives permanent residence at the same time. After the child turns 21, the parent would have to apply for the child to be put on the second preference B waiting list.*

This record indicates some concern, as expressed by Representative Sensenbrenner, that, "when the child turns 21, the parent would have to apply for the child to be put on the second preference B waiting list." Representative Sensenbrenner appears to have been addressing the potential difficulty faced by the family members of an employment-sponsored immigrant. This concern, and the passage of CSPA, gave rise to guidance from the Department of State which provides:

---

[7] Plaintiff's brief at 2.

> *[I]n cases involving a derivative seeking to follow to join a principal who adjusted in the U.S., the derivative can benefit from the CSPA if the principal filed a Form I-824 for the beneficiary within one year of a visa becoming available (i.e., within one year of the case becoming current or petition approval, whichever is later). Department of State Guidance, Child Status Protection Act: ALDAC #2, Ref 02 State 163054, 123775.*

It is the position of CIS that the concern highlighted by Representative Sensenbrenner has been addressed by CSPA § 203(h)(1), which provides that the eligibility of an alien for an immigration benefit will be frozen, so long as, "the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability." This language directly relates to Plaintiff's belated efforts to file an I-824 on behalf of Vishalkumar, and Vishalkumar's subsequent immigrant visa refusal at the United States Consulate in Mumbai, India. It is only because of Plaintiff's unsuccessful attempts at the consulate abroad that she raises this creative application of CSPA § 203(h)(3).

Additional explanation of the Congressional intent behind CSPA can been seen in a technical amendment that Senator Feinstein offered to CSPA § 203(h)(3). In the proposed text, the provision read:

> *(3) Retention of Priority Date – If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsection (a)(4) and (d), the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.* Congressional Record – Senate, H4990-1, June 13, 2002.

Senator Feinstein offered an amendment clarifying that section "(a)(4)" should read as "(a)(2)(A)" which relates to spouses and children of an alien lawfully admitted for permanent residence. Her amendment was approved and survived to the enacted version of CSPA.

Still later in the Congressional record, Representative Jackson-Lee remarked:

> *The Senate expanded the bill to cover other situations where alien children lose immigration benefits by "aging out" as a result of INS processing delays. The Senate amendment expands age-out protection to cover: Children of Permanent Residents. Under current law, when a child of a permanent resident turns 21, he goes from the second preference "A" waiting list to the second preference "B" waiting list, which is much longer.* Congressional Record – House, H4990-1, July 22, 2002.

From this review of the Congressional Record, CIS observes a direct concern by Congress for the welfare of the children of permanent resident aliens as it relates to immigrant visa preference. See INA § 203(a)(2)(A). The Congressional record also speaks to a direct concern by Congress for the treatment of family members and their entitlement to the same status and consideration afforded a primary beneficiary. See INA § 203(d), INA 101(b)(1). The Congressional Record does not however, speak to the application of CSPA § 203(h) that plaintiff urges.

Plaintiff continues to urge that "Vishalkumar... should automatically retain the priority date of the original petition as an automatic conversion." Plaintiff's brief at 2. Plaintiff's argument continues to conflate automatic conversion and retention with subsequent transference. Furthermore, Plaintiff's argument allows for a mix and match of petitions and priority dates not provided for by law. CSPA § 203(h)(3) provides that:

> *RETENTION OF PRIORITY DATE - [I]f the age of the alien is determined... to be 21 years of age or older for the purposes of subsection (a)(2)(A) and (d), the alien's petition shall automatically convert to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.*

INA § 203(a)(2)(A) specifically addresses spouses and children. Since the INA § 101(b) provides no age limitation upon the definition of spouse, CSPA § 203(h)(3) can only logically relate to the age and status of children and the impact of aging-out upon such individuals. Furthermore, as defined by INA 101(b)(1), such child must be unmarried. Accordingly, CSPA § 203(h)(3) may only been properly viewed as addressing the circumstances of unmarried children of lawful permanent residents that are under twenty-one years of age.

CSPA § 203(h)(3) also restricts the quantity and nature of the petition eligible for consideration. The statute provides that, "if the age of the alien is determined... to be 21 years of age or older... the alien's petition shall automatically convert...." First, the section presupposes the requirement that the petitioner is already a lawful permanent resident - it amends INA § 203(a)(2)(A), not INA § 203(b) or (c). Second, it presupposes that the beneficiary of the petition filed by the lawful permanent resident is determined to have "aged-out." Finally, CSPA § 203(h)(3) provides that in such circumstance, where the child ages out when petitioned by a lawful permanent resident parent, that the child without further action or request, will be automatically converted to the appropriate visa category and retain the original priority date of the petition that was originally filed by the lawful permanent resident parent. These restrictions are key to CIS' interpretation of the statute and are reflected by the sole relevant regulation.

Title 8 C.F.R. § 204.2(a)(4) contains language that "such retention of priority date will be accorded only to a son or daughter previously eligible as a derivative beneficiary under a second preference spousal petition." This regulation reflects the CIS position that priority date retention is only viable for second preference beneficiaries and not the derivative beneficiary of an employment based classification. In this case, Vishalkumar was previously classified as a derivative beneficiary under Plaintiff's employment based adjustment. Accordingly, he was not previously classified under the second preference of family based visa petition, and there is no provision of law or regulation providing for the retention of the earlier priority date.

CIS is aware that the BIA appears to reach a different conclusion in the unpublished case of *In re Maria T. Garcia (2006 WL 2183654)*. There, the BIA seems to conclude that the natural conversion (under section 203(h)(3) of an aged out child in a similar fourth preference relative visa petition would be to focus not upon the relationship of the original petitioner and the derivative beneficiary, but instead to focus upon the child's familial relationship with the primary

beneficiary. However, *In re Maria T. Garcia* is an unpublished case arising from removal proceedings as litigated by U.S. Immigration and Customs Enforcement ("ICE"), and in light of the foregoing discussion of both the priority classifications, the Congressional Record, and the applicable sections of CSPA § 203, CIS disagrees with the decision.

Furthermore, as the BIA has not articulated in such case, the analytical framework through which it applies CSPA § 203(h)(3) as such a catch-all provision, that it appears to swallow whole, CSPA § 203(h)(1). More precisely, it appears that the BIA's application of CSPA § 203(h)(3), or at least Plaintiff's proposed application of CSPA § 203(h)(3) renders CSPA § 203(h)(1) superfluous. Seeking to give meaning to each word in a federal statute, CIS respectfully disagrees with the decision in *Maria T. Garcia* and Plaintiff's attempts to utilize this unpublished case for the proposition that the I-130 filed on behalf of Vishalkumar should retain the priority date accorded Plaintiff's I-140.

Under the plain meaning rules for statutory construction, had CSPA § 203(h)(3) been written to achieve exactly the action that Plaintiff urges, the statute might have been drafted with the language of :

> *[I]f the age of the alien is determined... to be 21 years of age or older for the purposes of subsection (a)(2)(A) and (d), the alien shall retain the original priority date issued to the original petition, upon receipt of any subsequent petition.*

Such drafting might remove the clouded privity that Plaintiff seeks in support of his analysis. At present however, the CSPA § 203(h)(3) bears no such language, and has not benefited from any such clarification or modification. Accordingly, it is the position of CIS that applying Plaintiff's remedy is not supported by the existing statutory language and would be tantamount to an ultra vires application of CSPA § 203(h)(3). CIS declines to proceed in such a manner, and urges the BIA to clarify the state of this provision by upholding the decision of the Service Center Director, California Service Center.

Conclusion

On review by certification, CIS respectfully requests that the BIA uphold the decision of the Director of the California Service Center, denying retention of the earlier priority date.

Dated this 12th day of June, 2008

Jason R. Grimm
Service Center Counsel – Laguna Niguel
U.S. Citizenship and Immigration Services

Certificate of Service

I Jason R. Grimm, certify that a copy of this memorandum of certification and accompanying decision of the Service Center Director has been mailed to Plaintiff and his counsel of record on June 12, 2008 at the following addresses:

Ms. Jyoti Patel
730 Brookside Drive
Columbus, OH 43209

Mr. Scott Bratton, Esq.
c/o Margaret W. Wong & Associates. Co., LPA
3150 Chester Avenue
Cleveland, OH 44114

Dated this 12th day of June, 2008

_____
Jason R. Grimm
Service Center Counsel – Laguna Niguel
U.S. Citizenship and Immigration Services