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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14 SOUTHERN DIVISION

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16 TERESITA COSTELO, *et al.*,) No. SA CV08-00688-JVS (SHx)
17 Plaintiffs,)
18 v.) DEFENDANTS' SUPPLEMENTAL
BRIEF IN OPPOSITION TO
19 JANET NAPOLITANO, Secretary,) PLAINTIFFS' SECOND AMENDED
Department of Homeland) MOTION FOR CLASS
20 Security, *et al.*,) CERTIFICATION
21 Defendants.)

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1 Defendants (collectively referenced hereinafter as
2 "Defendants" or "Government") through representation by Gisela A.
3 Westwater, Trial Attorney, United States Department of Justice,
4 submit this Supplemental Memorandum in Opposition to Plaintiffs'
5 Second Amended Motion For Class Certification.

6 **BACKGROUND**

7 On June 15, 2009, this Court heard oral argument regarding
8 Plaintiffs' Second Amended Motion for Certification of Class
9 Action. (Docket # 63) The Court took the matter under
10 submission. (Docket #63) Thereafter, on June 16, 2009, the
11 Board of Immigration Appeals (BIA) issued its decision in Matter
12 of Wang, 25 I. & N. Dec. 28 (BIA 2009), wherein the BIA found the
13 statutory provision at issue in the present case ambiguous and
14 then gave its reasoned interpretation of that provision. On June
15 17, 2009, this Court invited the parties to submit briefs,
16 discussing the impact of Matter of Wang on Plaintiffs' motion to
17 certify class. (Docket # 61)

18 **INTRODUCTION**

19 Plaintiffs' Complaint seeks certification of several
20 (sub)classes of individuals claiming that they are entitled to
21 relief under specific language in the Child Status Protection Act
22 (CSPA) that is codified at 8 U.S.C. § 1153(h) (3). In this
23 section, Congress provided for "automatic conversion" of certain
24 immigrant visa petitions to the "appropriate" category and
25 retention of "original" priority dates for such "converted"
26 petitions. See 8 U.S.C. § 1153(h) (3).

27 At the time Plaintiffs filed their Complaint, there were no
28 federal court or precedential BIA decisions applying 8 U.S.C.

1 § 1153(h) (3) in the manner requested by Plaintiffs.¹ Due to the
2 lack of precedential guidance in this area, Defendants previously
3 sought a stay of these proceedings to allow the U.S. Citizenship
4 and Immigration Services, acting through the BIA, to interpret
5 the statute. (Docket # 30.) The Court granted a stay, noting
6 that "the BIA expertise in this area might help this Court reach
7 a proper conclusion." (Docket # 32.)

8 The BIA has now published a decision analyzing 8 U.S.C.
9 § 1153(h) (3) in the context of claims identical to those of
10 Plaintiffs. See Matter of Wang, 25 I. & N. Dec. 28. The BIA
11 rejected Plaintiffs' position and specifically declined to follow
12 Maria T. Garcia, an unpublished, nonprecedential decision often
13 cited by Plaintiffs. See id. at 33, fn. 7; 8 C.F.R. § 1003.1(g)
14 (precedent decisions must be designated by a majority of
15 permanent BIA members). If this Court (like the BIA) finds the
16 language of 8 U.S.C. § 1153(h) (3) ambiguous, the BIA's
17 interpretation is entitled to Chevron deference so long as it is
18 "reasonable." Duran-Gonzales v. DHS, 508 F.3d 1227, 1235 (citing
19 Chevron USA, Inc. V. Natural Resources Defense Council, 467 U.S.
20 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).²

21 ARGUMENT

22 The Board's decision in Matter of Wang impacts class
23 certification in a number of ways. First, now that a decision
24

25 ¹ Although this Court cited several cases interpreting 8
26 U.S.C. § 1153(h) in its tentative order, those cases dealt with
other applications of the CSPA which are not at issue here.

27 ² Defendants assert that the statute is ambiguous but, as the
28 Court previously recognized, merits arguments are not appropriate
at this stage of litigation and are thus reserved.

1 has been published, the Government is ready for the Court to
2 proceed to adjudication of the issues raised in this and related
3 cases. If a class is certified, however, plaintiffs in the
4 related cases pending before this Court (and potentially other
5 courts nationwide depending on the scope of any certified class)
6 would be forced into the class and foreclosed from proceeding to
7 judgment in their own cases while the class action trudges along.
8 See Ticor Title Ins. Co. v. Brown, 511 U.S. 117 121, 114 S. Ct.
9 1359, 128 L. Ed. 2d 33 (1994) (per curiam) (finding that members
10 of a Rule 23(b) (2) class do not have the right to opt-out); Dukes
11 v. Wal-Mart, 509 F.3d 1168, 1188-1189 (9th Cir. 2007) (limiting
12 opt-outs under Rule 23(b) (2) to damage claims). Class
13 certification would result in a delay of at least six months in
14 the related cases before this Court. Compare Exhibit A (oral
15 arguments set for September 28, 2009 on cross-motions for summary
16 judgment) with Docket # 64 (trial set for March 16, 2010).

17 Additionally, with only one precedential decision on-point,
18 this Court should decline to certify a class, which would promote
19 the analysis of this issue by other courts and enable plaintiffs
20 across the country to control the prosecution of their own cases.
21 Califano v. Yamasaki, 442 U.S. 682, 702, 99 S. Ct. 2545, 61 L.
22 Ed. 2d 176 (1979) ("nationwide class actions may have a
23 detrimental effect by foreclosing adjudication by a number of
24 different courts and judges"); see also General Telephone Co. of
25 the Southwest v. Falcon, 457 U.S. 147, 160-161, 102 S. Ct. 2364,
26 72 L. Ed. 2d 740 (1982) 160-161 (warning not to assume that "all
27 will be well for surely the plaintiff will win and manna will
28 fall on all members of the class") (citation omitted). Where, as

1 here, basic statutory interpretations are involved, circuit
2 courts often split on the appropriate result. Thus, this Court
3 should decline to certify a nation-wide class in recognition of
4 the interests of other judicial circuits to consider this
5 question of first impression. See United States v. AMC Entm't,
6 Inc., 549 F.3d 760, 771 (9th Cir. 2008) ("principles of comity
7 should constrain the district court from" applying its own
8 interpretation of regulation through nationwide injunction when
9 it conflicts with narrower holding of other circuit court). See
10 also Hootkins v. Chertoff, 2009 U.S. Dist. LEXIS 3243 (C.D. Cal.
11 Jan. 6, 2009) (respecting right of circuit courts to control
12 statutory interpretation within their own jurisdictions by
13 extending class certification to only those plaintiffs in
14 circuits where courts had already considered the issue and
15 embraced Ninth Circuit's position).

16 Finally, Matter of Wang makes clear that the different
17 immigrant pathways (family v. employment) may control the result
18 in each respective case. In Matter of Wang, the BIA confined its
19 discussion of "conversion" practices to petitions in the family-
20 sponsored categories. 25 I. & N. Dec. at 35 ("[T]he concept of
21 'retention' of priority dates has always been limited to visa
22 petitions filed by the same family member."). The BIA did not
23 discuss the history of conversions between different employment-
24 based preference categories and between employment- and family-
25 based preference classifications.³ A family-based analysis such
26 as the BIA employed in Matter of Wang may not hold for

27
28 ³ The BIA apparently left this analysis for its anticipated
decision in a companion case, Matter of Patel.

1 employment-based cases. Thus, individuals who immigrated as the
2 primary beneficiaries of Form I-140 petitions who are now seeking
3 to apply the priority date of those I-140 petitions to separate
4 I-130 petitions form a distinct (sub)class of potential
5 plaintiffs. Plaintiffs seek to "convert" the priority date from
6 F3 and F4 petitions and from all employment-based preference
7 visas to F2 visa petitions. See Table attached as Exhibit B.
8 Neither named Plaintiff was the primary beneficiary of an
9 employment-based preference visa. Thus, neither Plaintiff meets
10 the requirement of Federal Rule of Civil Procedure 23(a) that the
11 class representatives actually be members of the certified
12 (sub)class. Fed. R. Civ. P. 23(a); Blum v. Yaretsky, 457 U.S.
13 991, 999, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982) ("The
14 complaining party must also show that he is within the class of
15 persons who will be concretely affected."). This Court,
16 accordingly, may not certify a class consisting of parents who
17 immigrated based on employment-based visas.

18 CONCLUSION

19 Based on the foregoing, the Government respectfully submits
20 that the Court should deny Plaintiffs' second amended notice and
21 motion for class certification, both as a matter of discretion
22 and because Plaintiffs have failed to satisfy all of the
23 requirements for class certification under Fed. R. Civ. P. 23.

24 Respectfully submitted,

25 DATED: July 1, 2009

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CERTIFICATE OF SERVICE

Case No. CV 08-00688 JVS (SHx)

I hereby certify that on July 1, 2009, a copy of the foregoing "SUPPLEMENTAL OPPOSITION TO SECOND CLASS CERTIFICATION" was filed electronically using the Court's electronic filing system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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