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THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

TERESITA G. COSTELO, and LORENZO P. ONG, Individually And On Behalf Of All Others Similarly Situated, Plaintiffs, v. MICHAEL CHERTOFF, Secretary Of The Department Of Homeland Security, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; EMILIO T. GONZALEZ, Director, United States Citizenship And Immigration Services; DAVID TYLER, Director, National Visa Center; CHRISTINA POULOS, Acting Director, California Service Center, United States Citizenship and Immigration Services; And CONDOLEEZA RICE, Secretary of State, Defendants.	Case No. SACV08-688 JVS (SHx) BRIEF REGARDING MATTER OF WANG Hearing Date: June 15, 2009 Time: 1:30pm Courtroom: 10C Judge: James V. Selna

On June 16, 2009 the Board of Immigration Appeals ("Board") issued a precedent decision, Matter of Wang, 25 I. & N. Dec. 28 (BIA 209), addressing § 203(h)(3) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1153(h)(3) (hereinafter "§ 203(h)(3)"). Because 1) the Board's decision is unreasonable and 2) Plaintiffs still meet the requirements under Federal Rule of Civil Procedure ("F.C.R.P.") 23, this Court should certify this case as a class action.

I. Because The Board's decision is unreasonable, this Court should certify the class.

The language of § 203(h)(3) is plain - when a derivative "aged-out", "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." Under the interpretation of Matter of Wang, automatic conversion under § 203(h)(3) applies only to a select few derivative children (those of a second preference spouse beneficiary.) Not only does this interpretation fail to take into account the plain language of § 203(h)(3), that situation did not require remediation because it had been addressed by 8 CFR § 204.2(a)(4) prior to the enactment of Child Status Protection Act ("CSPA"). Since that particular regulation had last been revised well before the enactment of CSPA[1], Congress did

[1] The most recent revision was in 1997

not need to pass a law in 2002 to provide relief for those derivative children of a second preference spouse beneficiary.

Matter of Wang also fails to explain how an interpretation of § 203(h)(3) that covers derivative beneficiaries only in the situation described in 8 CFR § 204.2(a)(4) would be consistent with the plain language of the entire statute. Specifically, § 203(h)(2)(B) defines the petitions described in § 203(h) "with respect to an alien child who is a derivative beneficiary under subsection (d), a petition filed under section 204 for classification of the alien's parent under subsection (a) [family based petitions], (b) [employment based petitions], or (c) [diversity]". As such, all of § 203(h) applies to any petition filed for the alien child (derivative beneficiary) of the primary beneficiary (parent) under family based, employment based or diversity petitions. There is no distinction in § 203(h)(2)(B) between derivative beneficiaries of petitions filed under family-based second preference or any other preference. Nor is there any such distinction in § 203(h)(3) itself, which specifically references § 203(d). Matter of Wang not only renders parts of the statute meaningless; it elevates the language of the regulation (8 CFR 204.2(a)(4)) above the language of the statute (CSPA).

Moreover, Matter of Wang completely misstates the effect of a correct interpretation of § 203(h)(3). Wang states that an aged out child permitted to use the original priority date would be cutting the line and displacing others who have

been waiting for years. The implication, of course, is that Congress could never have had that intent. However, a look at the actual facts of Wang shows how incorrect the Board is. Xiuyi Wang has been waiting in line to immigrate since 1992 (when she was 10 years old). In seeking to retain the original priority date, her father is trying to save her place in line and prevent her from having to go to the back of another line where she will have to wait another decade.

Congress was not trying to fix a problem that had previously been cured by regulation. It was not trying to help children "cut in line". It was trying to correct a problem whereby children are separated unfairly from their families for decades. CSPA's purpose is to allow aged-out children to keep their place in line. An examination of the plain language of the statute makes that abundantly clear.

II. Because Plaintiffs still meet the requirements under F.R.C.P. 23, this Court should certify the class.

The issue currently before this Court is whether the case should be certified as a class action. As this Court noted, there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974). Nothing in Matter of Wang has altered the fact that the plaintiffs meet all the requirements of Rule 23 for certification of a class. Therefore class certification should be granted.

Moreover, Plaintiffs contend the Board Matter of Wang is unreasonable and is entitled to no deference. The ultimate issue before this Court is whether the government can ignore the plain language of § 203(h)(3) and refuse to adjudicate applications for lawful permanent residence under the correct (original) priority date. While the Board's decision may give this Court insight as to why the government chooses to ignore the requirements of § 203(h)(3), the decision in itself does not end the case or controversy. Rather, the Board's decision is just one more act of Congressional defiance on the part of Defendants.

Prior to the Board's decision, this Court relied, in part, on the Board's failure to act. Now that the Board has "acted," the class may still be certified because "the party opposing the class has acted." F.R.C.P. 23(b)(2).

The issuance of Matter of Wang makes it even more appropriate to certify the class. Because Wang is fatally flawed and irrational, the decision will generate large numbers of lawsuits throughout the country. In the absence of a class action, numerous courts in every district will be called upon to address the same issue that Costelo has brought before this court. In addition to creating an unnecessary burden upon the court system, the decision will severely penalize family members who lack the financial wherewithal to seek relief in federal court. They will be forced to continue to endure unnecessary separation from their loved ones because they cannot afford to file a federal court action.

Moreover, Defendants have still failed or refused to promulgate regulations implementing CSPA benefits. The Board's decision does not excuse Defendants' failure to promulgate regulations and as such class certification is proper.

III. CONCLUSION

Nothing in Matter of Wang alters the fact that plaintiffs meet the requirements of numerosity, commonality, typicality and adequacy of representation and that the defendants have acted or refused to act on grounds that apply generally to the class. Therefore, this court should grant class certification.

Congress did not enact CSPA only to regurgitate rights previously codified by regulation 8 CFR 204.2(a)(4). CSPA was enacted as ameliorative legislation to keep families together. This is apparent from reading the statute.

Wang ignores the plain language of the statute. In fact, Wang conflicts with and is inconsistent with the plain language of 203(a)(3). Wang's interpretation of the statute is unreasonable. Therefore, the holding is not binding on this court and should not be given deference.

Dated: July 1, 2009

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Case No.: CV08-00688 JVS(SHx)

I hereby certify that on July 1, 2009, a copy of the foregoing "BRIEF REGARDING MATTER OF WANG" 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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