10-2560-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEIMEI LI, DUO CEN,

Plaintiffs - Appellants,

v.

PAUL NOVAK, Director, Vermont Service Center, USCIS,
JONATHAN SCHARFEN, Acting Director, USCIS,
ERIC H. HOLDER, Jr., U.S. Attorney General,
MICHAEL CHERTOFF,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PLAINTIFFS - APPELLANTS

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CORPORATE DISCLOSURE STATEMENT UNDER RULE 26.1

Li v. Novak, No. 10-2560-cv

I, Mary Kenney, attorney for the *Amicus Curiae*, American Immigration Council, certify that this organization is a non-profit organization which does not have any parent corporation or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

Dated: October 28, 2010

s/ Mary Kenney

Mary Kenney
American Immigration Council

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I. INTRODUCTION

This case raises a pure question of statutory interpretation involving the Child Status Protection Act (CSPA), Pub. L. No. 107-20, 116 Stat. 927 (2002). At issue is what classes of aged-out children Congress intended to benefit in 8 U.S.C. §1153(h)(3). Section 3 of the CSPA (8 U.S.C. § 1153(h)) provides three alternate remedies for child beneficiaries of immigrant visas who are facing the detrimental impact of "aging out;" that is, turning 21 while a visa petition is pending and losing the status of "child." Through these remedies, Congress intended to ameliorate the harsh consequences of severe delays in visa processing and availability that these visa beneficiaries faced through no fault of their own, most particularly, the prolonged separation from family members.

Congress's first remedy in §1153(h), applicable to family-based, preference visa petitions, employment-based visa petitions and diversity visa petitions, is a formula that adjusts the age of a child beneficiary to offset delays in visa petition processing. 8 U.S.C. §1153(h)(1). Under this formula, the age of many child beneficiaries is adjusted to under 21 and in this way these beneficiaries retain the status of "child" even if their biological age is over 21. *Id.*

Congress also specifically recognized, however, that the age of some beneficiaries would not be adjusted to under age 21 under the CSPA formula of §1153(h)(1), and that these beneficiaries would "age out" of child status. Essentially, for this group, visa processing delays (the focus of the remedy in §1153(h)(1)) are not the cause of the problem. Instead, the visa backlog itself has caused the delay that in turn caused them to age-out. To compensate these aged-out beneficiaries, Congress provided two additional benefits for this group of aged-out beneficiaries: 1) the opportunity to have the original visa petition on which the child was listed as a beneficiary "automatically convert" to the appropriate visa category for the now-adult beneficiary; and 2) the ability to retain the priority date from the original visa petition, which ensures that the beneficiary will not lose his or her place in line.[1] 8 U.S.C. §1153(h)(3). It is this provision that it at issue here.

In its precedent decision *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), the BIA narrowly and erroneously interpreted the benefits of §1153(h)(3), holding that these benefits are only applicable to a limited group of beneficiaries. The district court below adopted the reasoning of the

[1] Generally, a beneficiary's place in line is established by the filing date of the visa petition. Often, these beneficiaries already had been in line for many years at the time that they turned 21. For example, in the present case, plaintiff Duo Cen has been "in line" since he was first named as a derivative beneficiary on his grandfather's visa petition on June 6, 1994, when he was approximately 13 years old.

BIA in full. The opening brief of plaintiffs/appellants in this appeal demonstrates how the BIA's interpretation ignores the plain language of the statute and violates Congress's intent.

Amici curiae, the American Immigration Council (Immigration Council) and the American Immigration Lawyers Association (AILA), do not simply repeat these arguments, although amici do adopt them in full. Instead, amici offer the Court two additional arguments. First, amici expand upon the plaintiffs/appellants' statutory construction argument to demonstrate how the structure of §1153(h)(3) compels the conclusion that all categories of derivative beneficiaries are covered by §1153(h)(3). Second, amici demonstrate that petitioner/appellant Duo Cen is eligible for retention of the earlier priority date, the benefit that he requested, and that this relief can be granted without the Court having to reach the meaning of the "automatic conversion" provision. Amici will demonstrate that the two provisions operate as independent benefits.

American Immigration Council (Immigration Council) is a non-profit organization established to increase public understanding of immigration law and policy and to advance fundamental fairness, due process, and constitutional and human rights in immigration law and administration. The Immigration Council has a direct interest in ensuring that the Child Status

Protection Act (CSPA) is applied in an ameliorative fashion, as Congress intended.

AILA is a national association with more than 10,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS") and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts, Courts of Appeal, and the United States Supreme Court.

II. ARGUMENT

A. IN PLAIN AND UNAMBIGUOUS LANGUAGE, CONGRESS MADE CLEAR THAT §1153(h)(3) APPLIES TO ALL AGED-OUT DERIVATIVE BENEFICIARIES OF FAMILY-BASED, EMPLOYMENT-BASED AND DIVERSITY VISAS.

In *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), the BIA erroneously concluded that 8 U.S.C. §1153(h)(3) is ambiguous. In reaching this

conclusion, the BIA failed to consider the particular language chosen by Congress or the structure of §1153(h) as a whole and its interrelated paragraphs.[2] The starting point of all statutory interpretation is the intent of Congress, and where the statutory language makes this intent clear, "'that is the end of the matter.'" *Firstland International, Inc. v. INS*, 377 F.3d 127, 132 (2d Cir. 2004) (*quoting Chevron USA, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). Moreover, where

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[2] 8 U.S.C. §1153(h) reads in full:

(h) Rules for Determining Whether Certain Aliens Are Children.—

(1) In general.-- For purposes of subsections (a)(2)(A) and (d), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using—

(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by

(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

(2) Petitions described.-- The petition described in this paragraph is—

(A) with respect to a relationship described in subsection (a)(2)(A), a petition filed under section 204 for classification of an alien child under subsection (a)(2)(A); or

(B) 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), (b), or (c).

(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 subsections (a)(2)(A) 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 intent is clear, no deference is due to the agency's interpretation of the statute. *Id.*

1. *Matter of Wang* impermissibly denies the benefits of §1153(h)(3) to members of the class of beneficiaries that Congress specifically covered under this provision.

In *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), the BIA held that 8 U.S.C. §1153(h)(3) was ambiguous with respect to which petitions qualify for automatic conversion and retention of priority date. In fact, however, when read in context with the remainder of section (h), paragraph (3) specifies not only the petitions but also – and equally importantly – the noncitizens to which it pertains.

The universe of petitions to which paragraph (3) of §1153(h) applies is coextensive with the petitions to which paragraph (1) of the same provision applies. In *Matter of Wang*, the BIA first correctly applies paragraph (1) to *all* derivative beneficiaries under §1153(d), but then incorrectly limits the application of paragraph (3) to *only* derivative beneficiaries of §1153(a)(2)(A). 25 I&N Dec. at 33, 39 (emphasis added). The BIA did not engage in a thorough analysis of the language of the statute prior to reaching this conclusion. As a result, its decision impermissibly imposes a limitation in paragraph (3) that does not correspond with the statutory language or structure. *See Cervantes-Ascencio v. INS*, 326 F.3d 83,

86 (2d Cir. 2003) ("[Courts] are without authority [] to add terms or provisions where Congress has omitted them") (citation omitted); *see also Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001) ("[I]n the absence of an explicit statement in the text," the court has "no warrant to avoid a clear Congressional mandate").

It is well-settled that, under *Chevron*, a "'reviewing court should not confine itself to examining a particular statutory provision in isolation. . . . A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme.'" *Shi Liang Lin v. U.S. DOJ*, 494 F.3d 296, 307 (2d Cir. 2007) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000)). Here, the three paragraphs of §1153(h) are interrelated.

i. First, paragraph (1) sets forth a formula for determining the age of a visa petition beneficiary "for purposes of subsections (a)(2)(A) and (d) [of §1153]." 8 U.S.C. §1153(h)(1). Application of this age-determining formula allows some beneficiaries to retain the status of a "child" – notwithstanding that the beneficiary may be over the biological age of 21 – for purposes of classification as the child of a lawful permanent resident (LPR) (§1153(a)(2)(A)) or as a derivative child of a family-based, employment based or diversity visa petition (§1153(d)). Paragraph (1) also

specifies that the formula for determining a beneficiary's age applies to petitions "described in paragraph (2)." 8 U.S.C. §1153(h)(1).

ii. In turn, paragraph (2) describes two sets of visa petitions to which the formula in paragraph (1) can be applied. 8 U.S.C. §1153(h)(2). First, with respect to a child of an LPR, paragraph (2) describes a visa petition filed under 8 U.S.C. §1154 for classification of the child under §1153(a)(2)(A). *Id.* Second, and relevant here, with respect to a derivative child under §1153(d), paragraph (2) describes a visa petition filed under §1154 for classification of the parent (the principal beneficiary) under §§1153(a), (b), or (c) (family-based, employment-based or diversity visa petitions respectively). *Id.* Thus, Congress made clear that a child named as a derivative beneficiary of any family, employment or diversity visa petition was eligible to have his or her age determined under the formula of paragraph (1).

iii. Finally, the purpose of paragraph (3) of §1153(h) is to provide alternate benefits to those beneficiaries who are determined under the formula found in paragraph (1) to be over 21 years of age. 8 U.S.C. §1153(h)(3). Paragraph (3) applies to "an alien [who] is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)." 8 U.S.C. §1153(h)(3). The BIA found that this

paragraph was not clear as to the petitions to which it applied because, unlike paragraph (1), it does not reference the petitions described in paragraph (2). *Matter of Wang,* 25 I&N Dec. at 33. However, the BIA failed to address the actual language of the provision and thus overlooked the interrelation of the three paragraphs and the fact that paragraph (3) references and is wholly dependant on paragraph (1) for its meaning.

Significantly, the only limit that Congress placed on the term "an alien" as used in paragraph (3) is that the individual have been found to be over 21 when the age-determining formula of paragraph (1) is applied. Application of paragraph (3) thus is dependent on the application of the formula in paragraph (1). The formula found in paragraph (1) will be applied only to beneficiaries of petitions described in paragraph (2). Of necessity, then, paragraph (3) also will be applied only to the petitions identified in paragraph (2), since it is only those petitions that trigger the age-determination of paragraph (1). Moreover, Congress's use of the otherwise unlimited term "an alien" demonstrates its intent that all aliens found to have aged out under paragraph (1) be covered by paragraph (3). Thus, taking into account the entire interrelated structure of §1153(h), *all* derivatives of all family, employment and diversity visas – as specified in paragraph (2) – are covered under paragraph (3).

This result is reinforced by the fact that both paragraphs (1) and (3) use the identical phrase "for purposes of subsections (a)(2)(A) and (d)." Section 1153(d) provides that a child who otherwise is not a principal beneficiary of a visa petition can be named as a derivative beneficiary on a family-based, employment-based, or diversity visa filed on behalf of the parent. When this occurs, the derivative child beneficiary is entitled to the same status and same priority date as the parent. 8 U.S.C. §1153(d). Congress clearly intended that its reference to §1153(d) in paragraph (1) encompass all derivatives of family, employment and diversity visas, consistent with its description of the covered petitions in paragraph (2). As such, the reference to §1153(d) in paragraph (3) also must be read as covering derivatives of all three visa categories. Congress's use of the identical phrase in two paragraphs within the same section creates a presumption that Congress intended that they have the same meaning. *See Chao Qun Jiang v. Bureau of Citizenship and Immigration Servs.*, 520 F.3d 132, 135 n.5 (2d Cir. 2008) (citing *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 460 (1993)).

2. Had Congress intended to limit the class of beneficiaries eligible for the benefits of § 1153(h)(3), it would have done so explicitly.

Matter of Wang erroneously held that the *only* derivative beneficiaries to whom §1153(h)(3) applied were derivative beneficiaries of §1153(a)(2)(A). As discussed above, there is no textual support for this conclusion. Moreover, had Congress intended to limit the scope of paragraph (3) to derivative beneficiaries of §1153(a)(2)(A) only, it would have specified this restriction, as it repeatedly has done elsewhere.

For example, in *Akhtar v. INS*, the Ninth Circuit Court of Appeals noted that, with respect to the V visa category, Congress made clear that "only those individuals within preference category 2A are eligible to receive a V Visa." 384 F.3d 1193, 1198 (9th Cir. 2004) (citing 8 U.S.C. §1101(a)(15)(V)). The V visa provision reads "an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section [1153](d)) of a petition to accord status under section 203(a)(2)(A)." Notably, Congress was able to limit without ambiguity its reference to §1153(d) derivatives to only those named in a family-based 2A visa petition. Had this been the result that Congress sought with respect to §1153(h)(3), as the BIA held in *Matter of Wang*, it easily could have done the same here. Instead, the specificity of the V visa provision is in marked contrast to the general and unrestricted reference to derivative beneficiaries in §1153(h)(3). *See also* 8 U.S.C. §§1151(b)(1)(A) (section limited to

certain categories of special immigrants); §1153(d) (section limited to certain definitions of term "child"); §1154(a)(1)(A)(ii) (section limited to individuals "described in the second sentence of §[1151](b)(2)(A)(i)").

Where Congress includes language in one section of a statute but fails to include it in another, it is presumed to that Congress has acted intentionally in the disparate exclusion. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). The clear limits that Congress set out with respect to V visas and in similar provisions demonstrates that Congress knew how to impose such restrictions when it intended to do so; their absence here supports a conclusion that Congress intended no restriction on derivative beneficiaries in §1153(h)(3). *Accord Langhorne v. Ashcroft*, 377 F.3d 175, 179 (2d Cir. 2004) ("If Congress intended *Section 321(a)(4)* to construe the word 'naturalization' as narrowly as Langhorne argues on appeal, it could have easily done so simply by using the phrase '*the* naturalization' instead of '*such* naturalization' in *Section 321(a)(4)*") (emphasis in original).

3. Contrary to the Board's conclusion, an interpretation of §1153(h)(3) as applying to all derivative beneficiaries is not inconsistent with past practice.

The BIA bolsters its holding that §1153(h)(3) does not apply to all derivative beneficiaries by attempting to demonstrate that any other conclusion would upset longstanding precedent on the use of automatic

conversion and retention of priority dates. In their opening brief, plaintiffs/appellants repute this claim, pointing to multiple examples in the statute and regulations which provide for these benefits in situations comparable to that found in §1153(h)(3). *See* Brief of Plaintiffs/Appellants at 25-27.[3]

As plaintiffs/appellants' brief demonstrates, there is precedent for automatic conversions across visa categories (including situations in which a new visa petition is required). *Id.* There also is precedent for a beneficiary retaining a priority date from an earlier petition for use in a subsequent petition by a different petitioner. *Id.* Thus, contrary to the BIA's conclusion, application of §1153(h)(3) to all derivative beneficiaries – as Congress clearly intended – does not contravene longstanding practice with respect to either automatic conversion or retention of priority dates. Instead, this interpretation gives meaning to all parts of §1153(h), reading them as consistent and interrelated parts of a whole.

B. BECAUSE §1153(h)(3) APPLIES TO PLAINTIFF/APPELLANT, HE IS ELGIBLE FOR RETENTION OF THE PRIORITY DATE FROM THE ORIGINAL VISA PETITION FILED ON HIS BEHALF.

[3] Amici adopt and incorporate plaintiffs/appellants' arguments in full without restating them here.

As demonstrated in section A, above, §1153(h)(3) applies to plaintiff/appellant. As shown below, he is eligible to retain the priority date of the earlier visa petition, as he requested. Moreover, because retention of the priority date is available independent of the automatic conversion benefit, this Court need not reach the issue of what "automatic conversion" means as used in §1153(h)(3).

1. Automatic conversion and retention of priority dates are distinct and independent benefits under §1153(h)(3); a beneficiary can be eligible for one without having to be eligible for the other.

Section 1153(h)(3) affords two distinct potential benefits for eligible, aged-out beneficiaries: 1) the automatic conversion of a petition to an appropriate category; and 2) the beneficiary's retention of the earlier priority date. The BIA mistakenly read §1153(h)(3) as if these benefits were wholly dependant upon one another; that is, as if an aged-out beneficiary must be able to benefit from *both* or otherwise would be unable to benefit from either.

However, to resolve *Matter of Wang*, the BIA was not required to address whether automatic conversion was applicable to Wang's case. Wang's father, after securing his own lawful permanent resident status, filed a visa petition to classify her as his adult daughter under 8 U.S.C. §1153(a)(2)(B) (2B family preference category). *Matter of Wang,* 25 I&N

Dec. at 29. Because Wang and her father had this independent avenue for a visa for Wang after she had aged out, they did not need to request an automatic conversion of the earlier family 4th preference visa petition to the family 2B visa category. Instead, what they requested under §1153(h)(3) was retention of the priority date from the earlier 4th preference visa petition – on which Wang was named as a derivative – for use with the newly filed 2B visa petition. *See Matter of Wang,* 25 I&N Dec. at 29 (noting the petitioner's written request that Wang be assigned the earlier priority date).[4]

Despite this, the BIA framed the issue as one of automatic conversion, defining it as "whether a derivative beneficiary who has aged out of a fourth-preference visa petition may automatically convert her status to that of a beneficiary of a second-preference category" under §1153(h)(3). *Matter of Wang,* 25 I&N Dec. at 30. The Board further stated that to resolve the automatic conversion question, it had to determine if the CSPA "intended for the beneficiary of a second-preference visa petition filed by her father to retain the priority date previously accorded to her as the derivative beneficiary of a fourth-preference visa petition filed by her aunt." *Id.*

In this way, and without further analysis of the language regarding these two statutory benefits, the BIA inextricably coupled its determination

[4] The same is true of plaintiff/appellant in the present case.

of whether Wang qualified for retention of the priority date, as she and her father requested, with the question of whether she qualified for automatic conversion of the original visa petition. The BIA's subsequent analysis of the entire provision was marred by this mistaken coupling of the two statutory benefits.

The relevant portion of §1153(h)(3) states that "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." (Emphasis added). Congress intended for the word "and" as used here to operate simply as a means to connect two independent phrases – the automatic conversion phrase and the retention of priority date phrase. Consistent with this reading, one of several definitions for the word "and" is that it is "[]used to connect alternatives[]: *He felt that he was being forced to choose between his career and his family*." *Dictionary.com Unabridged*, Random House, Inc., (accessed Apr. 26, 2010). http://dictionary.reference.com/browse/and.

This certainly is not an uncommon construction of the word "and." For example, "[a]s often noted, the [Fourth] Amendment consists of two independent clauses joined by the conjunction 'and.'" *Ybarra v. Illinois*, 444

U.S. 85, 100 (1979) (Burger, J., dissenting) (referencing the "search and seizure" clause and the "warrant" clause).[5]

Similarly, Congress often uses the word "and" to connect two independent terms. In fact, the word "and" in the phrase "for the purposes of subsections (a)(2)(A) and (d)" in §1153(h)(3) serves just this purpose. Because a person cannot be a beneficiary under both of these subsections at the same time, Congress instead used the term to reference beneficiaries of either category. As the Supreme Court has explained, "to ascertain the clear intention of the legislature . . . courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or.'" *United States v. Fisk*, 70 U.S. 445, 447, 18 L. Ed. 243 (1865); *see also Slodov v. U.S.*, 436 U.S. 238, 245, 247 (1978) (construing the word "and" in a statute as disjunctive where it was the only reading consistent with the purpose of the statute).

Similarly, this Court has noted that "courts resolving difficult issues of construction will consider how a disjunctive or conjunctive form fits into the statutory scheme as a whole." *Mizrahi v. Gonzales*, 492 F.3d 156, 164 (2d Cir. 2007) (citing *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 270 n.1 (7th Cir. 1986) (observing that courts must not "rely too heavily on

[5] The Fourth Amendment phrase "unreasonable searches and seizures" provides still another example. While both types of government action – "searches" and "seizures" – are prohibited, both need not occur in the same incident to trigger the amendment's protection.

characterizations such as 'disjunctive' form versus 'conjunctive' form to resolve difficult issues of statutory construction," but instead must "look at all parts of the statute")); *see also Reese Brothers, Inc. v. USA,* 447 F.3d 229, 235 (3d Cir. 2006) ("The Government contends – and we agree – that the word 'and' can be either conjunctive or disjunctive); *National Railroad Passenger Corp. v. USA,* 431 F.3d 374, 376 (D.C. Cir. 2005) ("To be sure, Congress does sometimes use the word 'and' disjunctively"); *Thomas v. Money Mart Financial Services,* 428 F.3d 735, 737 n.3 (8th Cir. 2005) (finding no merit to a construction of the statute at issue that would read the word "and" conjunctively); *USA v. Pereira-Salmeron,* 337 F.3d 1148, 1151 (9th Cir. 2003) ("Despite the … use of the conjunctive 'and,'" the court read the two subparts of the statute as presenting alternate definitions); *Bruce v. First Federal Savings and Loan Assoc*., 837 F2d 712, 715 n2 (5th Cir. 1988) (finding that a strict grammatical construction of the word "and" would frustrate Congress's intent).

Here, Congress granted an "aged-out" beneficiary two distinct types of benefits, one of which attaches to the visa petition (automatic conversion) and one of which attaches to the beneficiary (retention of priority date). 8 U.S.C. §1153(h)(3). At the time the CSPA was enacted, there were numerous precedents allowing a visa petition beneficiary to retain an earlier

priority date independent of whether there is an automatic conversion of the earlier petition to another category following a change in circumstances.

For example, in precisely one of the situations covered by §1153(h)(3), a regulation existing at the time the CSPA was enacted (and still existing today) provided for retention of a priority date for a child who is named as a derivative beneficiary on a 2A visa petition and who ages out before a visa becomes available. 8 C.F.R. §204.2(a)(4).[6] This regulation would apply to an LPR who filed a visa petition for his or her spouse and included the couple's child as a derivative beneficiary. If the child ages out before a visa becomes available, the regulation permits the child to retain the priority date of the 2A visa petition for use with any family 2B visa petition

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[6] The relevant portion of this regulation reads:

> A child accompanying or following to join a principal alien under [8 U.S.C. §1153](a)(2) [ ] 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 twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required. In such a 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.

8 C.F.R. §204.2(a)(4).

subsequently filed by the same petitioning parent.[7] The retention of the priority date is allowed even though the regulation did not provide for automatic conversion of the visa petition.

There are additional examples of the independent authority for retention of a priority date in the employment-based visa context. Beneficiaries of visa petitions in three major employment-related categories retain the priority date of an approved petition for "any subsequently filed petition for any classification" of a new job within the same three employment categories. 8 C.F.R. §204.5(e). Similarly, an immigrant 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. In both of these situations, there is no automatic

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[7] This regulation specifically requires that the 2B petition for the aged out adult child be filed by the same parent who filed the original 2A petition. In *Matter of Wang*, the BIA emphasized this requirement as a reason for limiting the reach of §1153(h)(3) to family 2A petitions. In no other visa category covered by §1153(h)(3) will the same petitioner file the subsequent visa petition for the aged out derivative child. *Matter of Wang* exemplifies this. There, Wang's aunt filed the original family fourth preference visa petition for Wang's father, the principal beneficiary, with Wang named as a derivative beneficiary. Once Wang aged out, however, it was her father – who had become an LPR – who filed the subsequent family 2B petition for her. Contrary to the BIA's conclusion, however, the fact that the regulation specifically requires filing by the same petitioner says nothing about the meaning of §1153(h)(3), where this requirement is notably absent. In fact, by specifically broadening the class of beneficiaries covered by §1153(h)(3) to derivatives of all family, employment and diversity visa categories, Congress signaled its intent that the same petitioner was not required.

conversion of the visa petition filed by the first employer to the second employer, but instead a new petition by a new petitioning employer is required. 8 C.F.R. §204.12(f)(1).

There also are examples of this in special legislation adopted to address a discrete problem, just as was the CSPA. In §421(c) of the U.S. Patriot Act, P.L. 107-56, 115 Stat. 272 (2001), Congress provided that certain victims of the September 11, 2001 attack could file petitions for special immigrant status. The statute also provided for the retention of earlier priority dates from unrelated family-based, employment-based and diversity visa petitions for use with the subsequent self-petition. *Id.* Similarly, the 1976 amendments to the INA reorganized the family and employment visa categories and, for the first time, subjected immigrants from the Western Hemisphere to these preference categories. Pub. L. No. 94 – 571, 90 Stat. 2703, 2707. Congress specifically provided that Western Hemisphere immigrants could retain priority dates from earlier, unrelated family, employment or diversity visa petitions for use in the new visa categories. *Id.* at §(9)(b). Still a third example is found in the regulation implementing legislation for immigrant victims of domestic violence. Under 8 C.F.R. §204.2(h)(2), the child of an abusive parent can transfer the priority date of the petition filed on his or her behalf by the parent to an independent

self-petition that is separately filed. While retention of priority dates is allowed in all three situations, none involve the automatic conversion of the initial visa petition.

Finally, the CSPA itself contains another example of Congress authorizing a beneficiary to retain an earlier priority date independent of whether an automatic conversion of the petition takes place. Section 6 of the CSPA specifically allows an adult son or daughter of an LPR, named as a beneficiary on a family 2B preference petition, to retain the earlier priority date upon the parent's naturalization regardless of whether the beneficiary opts out of an automatic conversion of the petition to family 1st preference. 8 U.S.C. §1154(k).

These examples illustrate the precedent for reading §1153(h)(3) as providing an aged-out beneficiary the opportunity to retain an earlier priority date regardless of whether the earlier petition is automatically converted to a new visa category. Thus, these examples both support and are consistent with an interpretation of §1153(h)(3) which allows a beneficiary to retain a priority date irrespective of whether the original petition automatically converts to a petition in a different category.

2. There is no ambiguity in the phrase "the alien shall retain the original priority date."

There is nothing ambiguous in the phrase "the alien shall retain the earlier priority date issued upon receipt of the original petition." 8 U.S.C. §1153(h)(3). In the context of this provision, the "original petition" clearly applies to the petition under which the beneficiary was found to have aged-out under paragraph (1). As demonstrated in section A, above, covered petitions will include those filed under family preference 2A as well as other family preference, employment-based and diversity visas, consistent with both the reference to §1153(d) and the entire structure of the provision. Moreover, as plaintiffs/appellants explain in their opening brief, there is considerable precedent for the retention of a priority date from one unrelated petition to another, including situations involving a subsequent petition filed by a different petitioner.

In narrowly interpreting §1153(h)(3), the BIA also takes issue with the fact that a broader reading would result in a beneficiary retaining "favorable priority date status, even with regard to a new visa petition that … may be filed without any time limitation in the future." *Matter of Wang,* 25 I&N Dec. at 36.[8] In suggesting that such a gap in coverage is

[8] The BIA erroneously states that this would allow a beneficiary to "never age out." *Matter of Wang, id.*, at 36. This is simply wrong. The beneficiary would not be seeking the benefits of §1153(h)(3) in the first place, unless he or she had been found to have aged out under the formula of §1153(h)(1).

impermissible, the BIA fails to recognize the instances in which this already occurs. For example, under 8 C.F.R. §204.5(e), a beneficiary of a visa petition filed within the first, second or third employment-based visa categories is eligible to retain the priority date from this initial visa petition for use in a subsequently filed visa petition within any of the same three visa categories. There is no restriction on when the second visa petition must be filed in order for the beneficiary to retain the earlier priority date. There can be – and often is – a gap in eligibility, during which the beneficiary is no longer eligible to immigrate based upon the first job and either has not yet secured the second job or the second employer has not yet filed the visa petition.[9]

A gap in eligibility can also occur under 8 C.F.R. §204.2(a)(4), as this provision requires that the petitioner file a new 2B visa petition for the aged out derivative beneficiary named on an earlier 2A visa petition. Between the time that the beneficiary ages out and the filing of the new 2B visa petition, the aged out beneficiary has no basis to immigrate. However, the

[9] For example, a beneficiary of an employment-based visa may lose his eligibility if the employer goes bankrupt and dissolves, and thus cannot employ him. The beneficiary would retain the priority date from this initial petition and could use it with respect to a second petition filed by a new employer, even if there was a gap in eligibility between these two petitions.

regulations contain no time limit for filing the new petition and thus months or longer could pass before the second petition is filed.[10]

Because there is no ambiguity in Congress's directive that a beneficiary – including all derivative beneficiaries of family, employment and diversity visas – "shall retain the original priority date issued upon receipt of the original petition," this Court must give effect to it. The Court should find that plaintiff/appellant is entitled to retain the priority date from the initial petition.

III. CONCLUSION

For all the reasons stated above, amici urge the Court to overturn the decision of the district court and to read §1153(h)(3) in accord with its plain and Congress's intent.

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[10] The structure of the CSPA will often exacerbate such a gap. The formula for determining if a child has aged out is not complete until one year following the availability of a visa. At that time, the beneficiary's age will be determined by whether the beneficiary "sought to acquire" the status of an LPR during the year. 8 U.S.C. §1153(h)(1)(A). Until this year has passed and the "sought to acquire" determination is made, there will be no final determination of whether the beneficiary remains a child. By then, however, the beneficiary may be well over 21 years old. As such, for those ultimately found to have aged out, there will have been a gap in eligibility.

Respectfully submitted,

s/ Mary Kenney

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Dated: October 28, 2010

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Li v. Novak, No. 10-2560

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s/ Mary Kenney

Mary Kenney
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