
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 09-56846

TERESITA G. COSTELO, and LORENZO P. ONG,
Individually and on Behalf of All Others Similarly Situated,

Plaintiffs – Appellants,

v.

JANET NAPOLITANO,
Secretary of the Department Of Homeland Security, et. al.,

Defendants – Appellees.

APPEAL OF DECISION OF THE U.S. DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AND THE
AMERICAN IMMIGRATION LAWYERS ASSOCIATION
AS AMICI CURIAE IN SUPPORT OF
THE PLAINTIFFS – APPELLANTS.

Mary Kenney
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7512
(202) 742-5619 (fax)

**CORPORATE DISCLOSURE STATEMENT UNDER RULE
Fed. R. App. P. 26.1**

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

DATED: May 25, 2010

s/ Mary Kenney

Mary Kenney

TABLE OF CONTENTS

I.	INTRODUCTION AND STATEMENT OF AMICI	1
II.	ARGUMENT.....	5
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.	5
	1. <i>Matter of Wang</i> impermissibly denies the benefits of § 1153(h)(3) to members of the class of visa petition beneficiaries that Congress specifically covered under this provision.	6
	2. Had Congress intended to limit the class of beneficiaries eligible for the benefits of § 1153(h)(3), it would have done so explicitly.....	12
	3. Contrary to the Board’s conclusion, an interpretation of § 1153(h)(3) as applying to all derivative beneficiaries is consistent with past practice.	13
B.	ALTERNATELY, THIS COURT CAN FIND PLAINTIFFS/APPELLANTS ELIGIBLE FOR RETENTION OF THE EARLIER PRIORITY DATES WITHOUT HAVING TO DECIDE THEIR ELIGIBILITY FOR AUTOMATIC CONVERSION.	18
	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.	18
	2. Because the retention of priority date and the automatic conversion clauses are independent, the Court can rule on the priority date clause even if it were to find some ambiguity in the automatic conversion clause.	26

3.	There is no ambiguity in the phrase “the alien shall retain the original priority date.”	28
III.	CONCLUSION	30

TABLE OF AUTHORITIES

Cases

<i>Akhtar v. Burzynski</i> , 384 F.3d 1193 (9th Cir. 2004).....	3, 12
<i>Bruce v. First Federal Savings and Loan Assoc.</i> , 837 F.2d 712 (5th Cir. 1988).....	22
<i>Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984)	6, 27
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000).....	8
<i>Gallarde v. INS</i> , 486 F.3d 1136 (9th Cir. 2007).....	8
<i>Matter of Wang</i> , 25 I&N Dec. 28 (BIA 2009).....	passim
<i>McCarthy v. Bronson</i> , 500 U.S. 136 (1991).....	6
<i>Montero-Martinez v. Ashcroft</i> , 277 F.3d 1137 (9th Cir. 2002)	11
<i>National Railroad Passenger Corp. v. USA</i> , 431 F.3d 374 (D.C. Cir. 2005)	22
<i>Padash v. INS</i> , 358 F.3d 1161 (9th Cir. 2004)	6
<i>Schneider v. Chertoff</i> , 450 F.3d 944 (9th Cir. 2006)	8
<i>Slodov v. U.S.</i> , 436 U.S. 338 (1978).....	22
<i>State of Washington v. Chu</i> , 558 F.3d 1036 (9th Cir. 2009)	6
<i>Thomas v. Money Mart Financial Services</i> , 428 F.3d 735 (8th Cir. 2005)..	22

<i>U.S. v. Ibarra-Galindo</i> , 206 F.3d 1337 (9th Cir. 2000), <i>cert. denied</i> , 121 S.Ct. 837 (2001)	13
<i>United Sav. Ass'n v. Timbers of Inwood Forest Assoc.</i> , 484 U.S. 365 (1988)	6
<i>United States v. Fisk</i> , 70 U.S. 445 (1865)	22
<i>USA v. Pereira-Salmeron</i> , 337 F.3d 1148 (9th Cir. 2003)	22
<i>Ybarra v. Illinois</i> , 444 U.S. 85 (1979)	21

Statutes

8 U.S.C. § 1101(a)(15)(K)	15
8 U.S.C. § 1101(a)(15)(V)	12
8 U.S.C. § 1151(b)(1)(A)	13
8 U.S.C. § 1151(b)(2)(A)(i)	13
8 U.S.C. § 1151(f)	14
8 U.S.C. § 1153(a)	9
8 U.S.C. § 1153(a)(2)	23
8 U.S.C. § 1153(a)(2)(A)	passim
8 U.S.C. § 1153(a)(2)(B)	19
8 U.S.C. § 1153(a)(3)	1
8 U.S.C. § 1153(a)(4)	1
8 U.S.C. § 1153(b)	9
8 U.S.C. § 1153(b)(1)	16

8 U.S.C. § 1153(b)(2)	16
8 U.S.C. § 1153(b)(3)	16
8 U.S.C. § 1153(c)	9
8 U.S.C. § 1153(h)	passim
8 U.S.C. § 1153(h)(1)	2, 8, 29
8 U.S.C. § 1153(h)(2)	8
8 U.S.C. § 1153(h)(3)	passim
8 U.S.C. § 1154.....	9
8 U.S.C. § 1154(a)(1)(A)(ii)	13
8 U.S.C. § 1154(k).....	26
8 U.S.C. § 1182(a)(5)(A).....	15
Child Status Protection Act (CSPA), Pub. L. No. 107-20, 116 Stat. 927	
(2002)	passim
Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94 –	
571, 90 Stat. 2703 (October 20, 1976)	16
U.S. Patriot Act, Pub. L. 107-56, 115 Stat. 272 (2001).....	15, 25

Regulations

8 C.F.R. § 204.12(f)(1)	16, 24
8 C.F.R. § 204.2(a)(4).....	14, 23, 29
8 C.F.R. § 204.2(h)(2).....	15, 25

8 C.F.R. § 204.2(i) 14

8 C.F.R. § 204.2(i)(1)(iv)..... 14

8 C.F.R. § 204.5(e) 15, 24, 28

Miscellaneous

Dictionary.com Unabridged, Random House, Inc., (accessed Apr. 27, 2010),
<http://dictionary.reference.com/browse/any>..... 10, 21

I. INTRODUCTION AND STATEMENT OF AMICI

This class action 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 categories of aged-out children Congress intended to benefit in 8 U.S.C. § 1153(h)(3).

The named plaintiffs obtained their legal permanent resident (LPR) status through a third or fourth preference family-based visa petition filed by a close relative.¹ Their children, named as derivative beneficiaries on the original visa petitions, had turned 21 by the time a visa became available for plaintiffs, and thus lost their eligibility for a visa as a derivative beneficiary. Consequently, upon gaining LPR status, both plaintiffs filed visa petitions on behalf of these children. They now seek to retain the priority dates from the original petitions, a benefit Congress specifically provided in the CSPA for “aged-out” children. 8 U.S.C. § 1153(h)(3). The plaintiffs represent a class consisting of:

Aliens who become lawful permanent residents as primary beneficiaries of third- and fourth-preference visa petitions listing their children as derivative beneficiaries, and who subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters, for whom

¹ A third preference family-based visa petition is filed by a U.S. citizen on behalf of an adult child. 8 U.S.C. § 1153(a)(3). A fourth preference family-based visa petition is filed by a U.S. citizen on behalf of a brother or sister. 8 U.S.C. § 1153(a)(4).

Defendants have not granted automatic conversion or the retention of priority dates pursuant to § [1153](h)(3).

In general, the CSPA protects child beneficiaries of immigrant visa petitions from the detrimental impact of “aging out;” that is, turning 21 while a visa petition is pending and losing the status of “child.” With respect to family-based preference visa petitions, employment-based visa petitions and diversity visa petitions, Congress established a formula for adjusting 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 who have turned 21 is adjusted to under 21 and in this way these beneficiaries retain the status of “child,” notwithstanding their biological age. *Id.*

Congress also specifically recognized, however, that the age of some beneficiaries would not be adjusted to under age 21 under the CSPA formula, and that these beneficiaries would age out of child status. To compensate, 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. 8 U.S.C. § 1153(h)(3).

Under the plain language of the statute, these alternate benefits are available to aged-out children of family, employment and diversity visas.²

In its precedent decision *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), the BIA narrowly interpreted § 1153(h)(3), holding that this provision is applicable to only a limited group of beneficiaries. The district court adopted the reasoning of the BIA. The opening brief of plaintiffs/appellants comprehensively demonstrates how the BIA's interpretation ignores the plain language of the statute, violates Congress's intent, and fails to adhere to the basic rule that ambiguities in ameliorative statutes should be interpreted in favor of the beneficiary of the statute. *See e.g. Akhtar v. Burzynski*, 384 F.3d 1193, 1200 (9th Cir. 2004).

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 three 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).

² While the class in this case is limited to family-based preference petitions, amici contend that § 1153(h)(3) applies equally to aged-out derivative beneficiaries of employment and diversity visas. Thus, this Court's decision will impact many beyond those who fall within the class.

Second, amici demonstrate the precedent for applying the automatic conversion and retention of priority date provisions broadly. Finally, amici provide the Court with an alternative means of resolving this case, by demonstrating that the two benefits provided in § 1153(h)(3) are independent of one another and that the Court can rule on the plaintiffs/appellants' right to retain the earlier priority date without having to reach the meaning of the automatic conversion provision.

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 CSPA is applied in an ameliorative fashion.

AILA is a national association with more than 10,000 members nationwide, 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.

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 considered the meaning of 8 U.S.C. § 1153(h)(3)³ and erroneously concluded that the entire provision was ambiguous. In reaching this conclusion, the BIA failed

³ 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.

to consider the particular language chosen by Congress, the structure of § 1153(h) as a whole, or the provision's interrelated paragraphs.

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) (citations omitted). Where the language of a statute is plain and unambiguous, that is the end of the matter, for the court must interpret the statute consistent with its plain language. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). “To determine what is ‘plain,’ a ‘court must look to the particular statutory language at issue, as well as the language and the design of the statute as a whole.’” *State of Washington v. Chu*, 558 F.3d 1036, 1043 (9th Cir. 2009) (quoting *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)). This is because a seemingly ambiguous phrase “may be clarified by statutory context.” *Id.* (quoting *United Sav. Ass'n v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988)).

1. *Matter of Wang* impermissibly denies the benefits of § 1153(h)(3) to members of the class of visa petition 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 visa 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 visa petition beneficiaries 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. With respect to derivative beneficiaries under 8 U.S.C. § 1153(d)⁴, the BIA in *Matter of Wang* first correctly applies paragraph (1) to *all* derivative beneficiaries but then incorrectly limits the application of paragraph (3) to *only* derivative beneficiaries of § 1153(a)(2)(A).⁵ 25 I&N Dec. at 33, 39 (emphasis added). The BIA did not engage in a thorough analysis of the statutory language prior to reaching this conclusion. As a result, its decision impermissibly imposes a limitation on paragraph (3)'s reference to § 1153(d) that simply does not exist. *See Schneider v. Chertoff*,

⁴ 8 U.S.C. § 1153(d) reads in full:

(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.

⁵ 8 U.S.C. § 1153(a)(2)(A) describes the family preference visa category for lawful permanent residents who petition for spouses or minor children.

450 F.3d 944, 956 (9th Cir. 2006) (an agency cannot “impose[] a new requirement that is not contemplated by Congress”).

“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Gallarde v. INS*, 486 F.3d 1136, 1141 (9th 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 and must be read as such. First, paragraph (1) sets forth a formula to determine 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 an 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).

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).

Finally, the purpose of paragraph (3) of § 1153(h) is to provide alternate benefits – automatic conversion of the visa petition and retention of the original priority date – 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 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) was 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 any⁶ alien 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).”

⁶ One definition of the word “any” is “an” and thus the two words can be used interchangeably. *Dictionary.com Unabridged*, Random House, Inc., (accessed Apr. 27, 2010), <http://dictionary.reference.com/browse/any>.

Section 1153(d) provides that a child who 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 unrestricted 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 unrestricted 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 is a strong indication that it intended that they 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). Here, through its unrestricted reference to § 1153(d), Congress meant all derivatives under this section and not a small subset of these derivatives as the BIA and the government contend.

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

Had Congress intended to limit the scope of paragraph (3) to derivative beneficiaries of § 1153(a)(2)(A) only, as the BIA held, it would have specified this restriction, as it repeatedly has done elsewhere. For example, in *Akhtar v. INS*, this Court noted that, with respect to the V visa category⁷, Congress made clear that “only those individuals within [family-based] 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 is granted to “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(h)(3) derivatives to only those named in a family-based 2A visa petition. Had this been the result that Congress sought with respect to § 1153(d), it easily could have done the same. 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).

⁷ The V visa is a nonimmigrant visa for spouses and children of LPRs who, because of immigrant quota backlogs, are forced to wait more than three years for a visa to become available.

Additionally, there are numerous other provisions in which Congress successfully limited a reference to a subset of a broader immigrant classification. *See* 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)”).

“It is well established that, when one interpretation of a statute or regulation obviously could have been conveyed more clearly with different phrasing, the fact that the authors eschewed that phrasing suggests, *ceteris paribus*, that they in fact intended a different interpretation.” *U.S. v. Ibarra-Galindo*, 206 F.3d 1337, 1339 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 837 (2001). The clear limits that Congress set forth for V visas and in similar provisions indicates that Congress intended no similar restriction on derivative beneficiaries in § 1153(h)(3).

3. Contrary to the Board’s conclusion, an interpretation of § 1153(h)(3) as applying to all derivative beneficiaries is consistent with past practice.

The BIA attempts to bolster its holding that § 1153(h)(3) does not apply to all derivative beneficiaries by claiming that any other conclusion would upset longstanding precedent on the use of automatic conversion and retention of priority dates. The BIA’s analysis is incomplete, however, in

that it ignores multiple statutory and regulatory provisions that allow for the automatic conversion of a petition or the retention of a priority date in situations comparable to that found in § 1153(h)(3).

The BIA restricts its analysis of the use of the concepts of automatic conversion of a petition and retention of a priority date to three provisions: 8 U.S.C. § 1151(f) and 8 C.F.R. §§ 204.2(a)(4) and (i). Based upon this incomplete survey of comparable provisions, the BIA concludes that “the term ‘conversion’ has consistently been used to mean that a visa petition converts from one visa category to another, and the beneficiary of that petition then falls within a new classification without the need to file a new visa petition. Similarly, the concept of ‘retention’ of priority dates has *always* been limited to visa petitions filed by the same family member.” *Wang*, 25 I&N Dec. at 35 (emphasis added).

There is precedent, however, for the automatic conversion of a visa petition from one category to another involving an entirely different petitioner. Where the petitioner of a pending family-based visa 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). The regulation specifically states that, where the beneficiary meets the necessary

requirements, “the [original visa] petition shall be adjudicated as if it had been filed as a Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant.” *Id.* Thus, the “petitioner” changes from a U.S. citizen spouse to the alien beneficiary. Because the BIA failed to address this similar provision, it suggested no reason why § 1153(h)(3) was not intended to operate the same way.

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. For example, under 8 C.F.R. § 204.2(h)(2), the beneficiary of a petition filed by an abusive spouse may retain his or her priority date in connection with a new self-petition. Additionally, Section 421(c) of the U.S. Patriot Act, Pub. L. 107 – 56, 115 Stat. 272 (2001), allows beneficiaries to file self-petitions and retain their priority dates if their original petitions were revoked or terminated as a result of a specified terrorist activity. This provision applies to all family-based and employment-based petitions. In fact, this provision also allows the beneficiary of a fiancée visa petition under 8 U.S.C. § 1101(a)(15)(K), or an application for labor certification under 8 U.S.C. § 1182(a)(5)(A) to file a self-petition with the USCIS while retaining an older priority date.

In the employment-based context, retention of priority dates can and often does involve different petitioners. For example, 8 C.F.R. § 204.5(e) allows beneficiaries in the first, second or third employment based categories to retain the priority date of an approved petition for any subsequently filed petition for classification under 8 U.S.C. §§ 1153(b)(1), (2), or (3). Under this section, the beneficiary not only may have a new petitioner, but also may retain the priority date for use with a petition in an entirely different employment-based preference category. Also, under 8 C.F.R. § 204.12(f)(1), physicians with approved national interest waivers under 8 U.S.C. § 1153(b)(2) may change employers – and thus have a new petitioner – but still retain the priority date from the petition that the former employer filed on their behalf.

Such broad application of priority date retention is hardly a new concept under the immigration laws. Until 1976, immigrants who were born in the Western Hemisphere or Canal Zone were termed “Western Hemisphere immigrants” and were not subject to the established preference system for family and employment-based immigrants. This changed with the Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94 – 571, 90 Stat. 2703, 2707 (October 20, 1976). With the 1976 Amendments,

Western Hemisphere immigrants were placed in the preference system, thereby losing a significant advantage in terms of waiting times.

However, a savings clause in the 1976 law allowed Western Hemisphere immigrants to retain their priority dates as long as these predated January 1, 1977. *Id.* at § 9(b). Under this savings clause, as long as the noncitizen established a priority date prior to January 1, 1977, he or she could use that priority date for the purpose of *any* preference petition subsequently approved on his or her behalf. *See* 9 FAM 42.53 Note 4.1.

Moreover, the spouse or child of the Western Hemisphere immigrant could use the same priority date in connection with a future preference petition. For instance, an adult child covered by the Western Hemisphere priority date provisions could use his father's 1976 priority date in connection with a new petition filed by an employer today. Or the priority date could be used in connection with a family-based petition filed by a U.S. citizen sibling.

This longstanding provision, together with the numerous other provisions cited above, demonstrates that the BIA erred in concluding that priority date retention “has always been limited to visa petitions filed by the same family member.” The concept of priority date retention is not as limited as the BIA contends in *Wang*.

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 is the only one that gives meaning to all parts of § 1153(h), reading them as consistent and interrelated parts of a whole.

B. ALTERNATELY, THIS COURT CAN FIND PLAINTIFFS/APPELLANTS ELIGIBLE FOR RETENTION OF THE EARLIER PRIORITY DATES WITHOUT HAVING TO DECIDE THEIR ELIGIBILITY FOR AUTOMATIC CONVERSION.

Amici contend that the statute is plain with respect to all of its parts. However, should this court find any ambiguity in the automatic conversion provision of § 1153(h)(3), it still could rule on the plaintiffs/appellants' eligibility to retain the earlier priority dates in accord with the plain meaning of the remainder of the provision. As shown below, automatic conversion and retention of priority dates are independent benefits available to eligible beneficiaries.

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 Wang 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 fourth preference visa petition – under which Wang was a derivative beneficiary – to the family 2B visa category.⁸ Instead, what they requested under § 1153(h)(3) was retention of the priority date from the earlier fourth preference visa petition – on which Wang was named as a derivative – for use with the newly filed 2B visa

⁸ All members of the certified class will be in this same situation. The class definition limits the class to those petitioners who have filed a second preference visa petition on behalf of their aged-out children.

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).

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, the BIA inextricably coupled its determination 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 “[u]sed 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). Another example within the Fourth Amendment is the phrase “unreasonable searches and seizures.” While both types of government action are prohibited, both need not occur in the same incident to trigger the amendment’s protection.

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. 338, 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); *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); *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"); *Bruce v. First Federal Savings and Loan Assoc.*, 837 F.2d 712, 715 n.2 (5th Cir. 1988) (finding that a strict grammatical construction of the word "and" would frustrate Congress's intent); *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).

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).⁹ 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 subsequently filed by the same petitioning parent.¹⁰ The retention of the

⁹ 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.” 8 C.F.R. § 204.2(a)(4).

¹⁰ This regulation specifically requires that the 2B petition for the aged-out child be filed by the same parent who filed the original 2A petition. In

priority date is allowed even though the regulation did not provide for automatic conversion of the visa petition, but to the contrary, required the filing of a new visa petition.

The employment-based visa context provides additional examples of a beneficiary being able to retain an earlier priority date without automatic conversion of the earlier visa petition. 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 conversion of the visa petition filed by the first employer, but instead a new petition by a new petitioning employer is required. 8 C.F.R. § 204.12(f)(1).

Matter of Wang, the BIA found that this requirement supported limiting the reach of § 1153(h)(3) to family 2A petitions, reasoning that in no other visa category will the same petitioner file the subsequent visa petition for the aged out derivative child. Contrary to the BIA’s conclusion, however, the regulation’s requirement says nothing about the meaning of §1153(h)(3), where this requirement is notably absent. In fact, by 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.

Certain special legislation, adopted to address a discrete problem (as was the CSPA) also allows the retention of an earlier priority date without an automatic conversion of the earlier visa petition. For example, in § 421(c) of the U.S. Patriot Act, Pub. L. 107-56, 115 Stat. 272 (2001), Congress provided that certain victims of the September 11, 2001 attack could file “self-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 these subsequently-filed new self-petitions. *Id.*

Similarly, another 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 by the child. While retention of priority dates is allowed in both 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 first 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. Because the retention of priority date and the automatic conversion clauses are independent, the Court can rule on the priority date clause even if it were to find some ambiguity in the automatic conversion clause.

As demonstrated in above in section A, Congress made clear its intent that the “automatic conversion” phrase of § 1153(d) applies to all derivative beneficiaries without limit. However, even if the Court was to find some ambiguity in this phrase or in how it is to be implemented, any such ambiguity should not impact the Court's interpretation of the retention of priority date provision.

In *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Supreme Court made clear that a court must strictly interpret those portions of a statute in which Congress made clear its intent, even where ambiguity existed with respect to other portions or certain applications. In *Cardoza*, the Court determined that, in accord with Congress’s plain language and at step one of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the statutory standards for asylum and withholding of deportation were different. At the same time, however, the Court recognized that the “narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts.” *Id.* at 448. Thus, the Court ruled on the first issue while leaving for the agency the task of more precisely defining the standard on a case-by-case basis.

In accord with this same principle, even should the Court find any ambiguity in the scope or applicability of the automatic conversion provision, it retains the ability to interpret the priority date clause in accord with its plain and unambiguous meaning. Moreover, such an interpretation would ensure that, consistent with Congress’s intent, *all* derivative

beneficiaries of family, employment and diversity visas benefit from § 1153(h)(3).

3. 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.

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. In suggesting that such a gap in coverage is 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.¹¹

A gap in eligibility also can occur under 8 C.F.R. § 204.2(a)(4). This section concerns, *inter alia*, derivative beneficiaries of family based 2A visa petitions. Where the derivative child ages-out before the issuance of a visa to the parent (the principal beneficiary), the regulation requires that the petitioner file a new 2B visa petition for the aged out derivative beneficiary. 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 regulation contains no time limit for filing the new petition and thus months or longer could pass before the second petition is filed.¹²

¹¹ 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.

¹² Of course, in cases involving an age-determination under § 1153(h)(3), there is no “age-out” until the determination in paragraph (1) is

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 plaintiffs/appellants are entitled to retain the priority dates from the initial petitions.

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 language and Congress’s intent.

Respectfully submitted,

s/ Mary Kenney

Mary Kenney
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7512
(202) 742-5619 (fax)
mkenney@immcouncil.org

Dated: May 25, 2010

Attorney for *Amici Curiae*

complete. Because this determination includes a one-year period within which the beneficiary is required to seek to acquire LPR status, the determination cannot be completed until the conclusion of the one year period. Thus, in all such cases, beneficiaries found to have aged-out will be over 21 when the age determination is made. Despite this, the “gap” in eligibility would not begin until the § 1153(h)(1) determination is made.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, I hereby certify that the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and, according to computerized count, contains 6,936 words.

DATED: May 25, 2010

s/ Mary Kenney

Mary Kenney

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered
for the Appellate CM/ECF System

U.S. Court of Appeals Docket No. 09-56846

I, Brian Yourish, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 25, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

Anthony J. Favero
REEVES & ASSOCIATES
Two North Lake Avenue
Suite 950
Pasadena, CA 91101-1871

Robert L. Reeves
REEVES & ASSOCIATES
Two North Lake Avenue
Suite 950
Pasadena, CA 91101-1871

s/ Brian Yourish

Brian Yourish
Legal Assistant
American Immigration Council

Date: May 25, 2010