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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

13	TERESITA COSTELO, et al.)	No. SACV08-688 JVS (SHx)
14)	
15	Plaintiffs,)	Date: August 11, 2008
16)	Time: 1:30 p.m.
17	v.)	Courtroom: 10C
18)	Honorable James V. Selna
19	MICHAEL CHERTOFF, Secretary, U.S.)	DEFENDANTS' OPPOSITION
20	Department of Homeland Security,)	TO PLAINTIFFS' MOTION
21	et al.)	FOR CLASS CERTIFICATION
22)	
23	Defendants.)	
24)	
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1 Defendants (collectively referenced hereinafter as
2 "Defendants" or "Government") by Elizabeth J. Stevens, Assistant
3 Director, and Gisela A. Westwater, Trial Attorney, United States
4 Department of Justice, Office of Immigration Litigation, District
5 Court Section, submit the Defendant's Memorandum in Opposition to
6 Plaintiffs' First Amended Notice And Motion For Class
7 Certification.

8 Introduction and Background

9 Plaintiffs' First Amended Notice and Motion for
10 Certification of Class Action, filed July 18, 2008, seeks relief
11 based upon specific language in the Child Status Protection Act
12 (CSPA) that is codified at § 203(h)(3) of the Immigration and
13 Nationality Act (INA), 8 U.S.C. § 1503(h)(3). In this section,
14 Congress provided for automatic conversion of certain immigrant
15 visa petitions from one preference category to another and to
16 allow for retention of original priority dates for such converted
17 petitions. Plaintiffs assert that mandamus and injunctive relief
18 are appropriate due to the Government's alleged failure to
19 automatically convert the Plaintiffs' petitions.

20 In their initial Complaint and again in their First Amended
21 Notice and Motion for Class Certification, Plaintiffs move for
22 class certification for the proposed class of "[a]ll persons who
23 have filed an immigrant visa petition(s) for their child or
24 children with a request for the original priority date or are the
25 derivative beneficiary of an immigrant visa petition who face
26 future and/or ongoing separation from family members as a result
27 of the Defendants [sic] failure to automatically convert and
28 retain the original visa petition priority date." First Amended

1 Memorandum of Points and Authorities in Support of Motion for
2 Class Certification ("Class Memo") at 2.

3 Plaintiffs' motion for class certification should be denied
4 as a matter of discretion in order to allow administrative
5 resolution of this issue by the Board of Immigration Appeals
6 ("Board" or "BIA"). Such a course of action would allow a full
7 development of the issue, assessment by the nation's subject
8 matter experts in this field, and freeing of this court's docket.
9 Additionally, class certification should be denied as a matter of
10 discretion because the proposed class is so amorphous that the
11 individualized analysis required for identifying putative members
12 would undermine the efficiency goals at the core of class action
13 certification.

14 In addition, class certification is inappropriate in this
15 case because Plaintiffs fail to meet several of the legal
16 prerequisites for class certification that are stringently
17 demanded by Federal Rules of Civil Procedure 23(a) and 23(b) (2).
18

19 **ARGUMENT**

20 **I. CLASS CERTIFICATION IS NOT APPROPRIATE GIVEN THE IMMINENT**
21 **ANALYSIS AND RESOLUTION OF THIS ISSUE IN ADMINISTRATIVE FORA.**

22 The Supreme Court has recognized that "nationwide class
23 actions may have a detrimental effect by foreclosing adjudication
24 by a number of different courts and judges, and of increasing, in
25 certain cases, the pressures on this Court's docket." *Califano*
26 *v. Yamasaki*, 442 U.S. 682, 702, 99 S. Ct. 2545, 61 L. Ed. 2d 176
27 (1979). To address this disadvantage, the Supreme Court advised
28 that "[i]t often will be preferable to allow several courts to

1 pass on a given class claim in order to gain the benefit of
2 adjudication by different courts in different factual contexts."

3 *Id.* This preference for diverse fact inquiries counsels not only
4 against certification of nationwide classes, but also lends
5 support to the judicial practice of prudential exhaustion of
6 administrative remedies. This equitable concept may apply when:

- 7 (a) agency expertise makes agency consideration
8 necessary to generate a proper record and reach a
9 proper decision; (2) relaxation of the requirement
10 would encourage the deliberate bypass of the
11 administrative scheme; and (3) administrative review is
12 likely to allow the agency to correct its own mistakes
13 and to preclude the need for judicial review.

14 *Montes v. Thornburgh*, 919 F.2d 531, 537 (9th Cir. 1990) (quoting
15 *United States v. California Care Corp.*, 709 F.2d 1241, 1248 (9th
16 Cir. 1983)); *Gonzales, et al., v. Dept of Homeland Security, et*
17 *al.*, 508 F.3d 1227, 1234 (9th Cir. 2007). While recognizing
18 "there is no requirement of exhaustion where resort to the agency
19 would be futile," the Ninth Circuit has relied in the past upon
20 the Board to address immigration claims first where the Board
21 "might 'take action that would render unnecessary our
22 consideration of constitutional issues.'" *El Rescate Legal*
23 *Servs., Inc. v. Executive Office of Immigration Review*, 949 F.2d
24 742, 747 (9th Cir. 1991) (citing *SAIF Corp./Oregon Ship v.*
25 *Johnson*, 908 F.2d 1434, 1441 (9th Cir. 1990) and quoting *Dhangu*
26 *v. INS*, 812 F.2d 455, 460 (9th Cir. 1987)).

27 These discretionary actions are consistent with the
28 structure of the Administrative Procedure Act ("APA"), 5 U.S.C. §

1 701, et seq., which provides the standards for reviewing agency
2 action but does not provide an independent jurisdictional basis.
3 *Califano v. Sanders*, 430 U.S. 99, 107, 97 S. Ct. 980, 51 L Ed. 2d
4 192 (1977); *Staacke v. U.S. Department of Labor*, 841 F.2d 278,
5 282 (9th Cir. 1988). Likewise, the Declaratory Judgment Act, 28
6 U.S.C. § 2201, cited in Plaintiffs' Complaint as one of the
7 jurisdictional bases of the suit, does not provide an independent
8 basis for jurisdiction. Rather, it only expands the range of
9 remedies available in federal courts. *Skelly Oil Co. v. Phillips*
10 *Petroleum Co.*, 339 U.S. 667, 671-72, 70 S. Ct. 876, 94 L Ed. 2d
11 1194 (1950).

12 Plaintiffs' proposed class falls within the ambit of cases
13 where class certification would improperly interfere with the
14 review and potential resolution of this issue through internal
15 agency processes. Only one of the named plaintiffs, Plaintiff
16 Costelo, can claim to have been denied priority date retention
17 for one of her daughters. From Plaintiffs' pleadings, it appears
18 that Plaintiff Costelo did not appeal this action through
19 administrative avenues, namely the Board. Given that Plaintiff
20 Costelo's two daughters were treated differently by United States
21 Citizenship and Immigration Services ("USCIS") despite sharing
22 similar factual backgrounds, an administrative appeal of
23 Plaintiff Costelo's case would have given the Board the
24 opportunity to review and address USCIS's interpretation and
25 implementation of the statute head on. Without such
26 administrative challenges, the Board is unable to fulfill its
27 statutorily mandated function of "providing clear and uniform
28 guidance to [the Government], the immigration judges, and the

1 general public on the proper interpretation and administration of
2 the Act and its implementing regulations," 8 C.F.R. §
3 1003.1(d)(1). Class certification should, as a matter of
4 discretion, be denied at this time..

5 The Government is aware of several similar, though not
6 identical, cases that have been appealed through the Board. *In*
7 *re Maria T. Garcia*, 2006 WL 2183654 (BIA 2006 unpublished)
8 (concluding that the relationship to focus upon when converting a
9 fourth preference relative visa petition would be that of the
10 derivative child to the primary beneficiary); *In re: Elizabeth*
11 *Francisca Garcia*, 2007 WL 2463913 (BIA 2007 Unpublished)
12 (reconsidering matter in light of *In re: Maria T. Garcia*); *In*
13 *re: (A79 638 092, Name Redacted)* (BIA September 7, 2007)
14 (finding no retention of priority date when petitioner on
15 original and subsequent petitions is not same).

16 Based upon the specific facts of each of those cases, the
17 Board has begun to probe the language of the applicable statutes
18 and regulations, Congressional intent in passing the Child Status
19 Protection Act, and the world-wide effects of converting
20 immigration visa petitions from one category to another. These
21 cases highlight the factual differentiations that must be made
22 when considering whether 8 U.S.C. § 1153(h)(3) applies to all
23 derivative beneficiaries of visa petitions, or just those that
24 fall under both 8 U.S.C. 1153§ (a)(2)(A) and (d). As a result of
25 these unpublished decisions, the issues have been clearly framed
26 and are ready for definitive guidance from the Board.

27 Acknowledging the need for clearer Board guidance, the
28 Government has certified two cases for Board review (one

1 involving a family-based preference and the other involving an
2 employment-based petition), requesting a written opinion
3 interpreting the same provisions at issue in Plaintiffs'
4 Complaint. Depending on the outcome of the Board decisions, this
5 issue may be resolved for Plaintiffs and lead to the conservation
6 of judicial resources across the country. At the very least, a
7 clear record of the issues and agency positions will be
8 established.

9 Class certification should be denied, as a matter of
10 discretion, in order to allow the highest administrative tribunal
11 on immigration and nationality matters in the United States to
12 review and address this issue per its mandate.

13
14 **II. THE PROPOSED CLASS IS OVERLY BROAD AND AMORPHOUS.**

15 For a class to be certified, the moving party must show that
16 a class exists, and the class definition must be susceptible to a
17 precise definition. *O'Connor v. Boeing North Am., Inc.*, 184
18 F.R.D. 311, 319 (C.D. Cal. 1998) ("A class definition should be
19 'precise, objective, and presently ascertainable.'") Absent such
20 a definition, the class becomes the kind of "sprawling" class,
21 lacking in cohesion, that generated so much concern in *Amchem*
22 *Prods., Inc., v. Windsor*, 521 U.S. 591, 624, 117 S. Ct. 2231, 138
23 L Ed. 2d 689 (1997) (asbestos). In the instant case, the class
24 definition is not precise for several reasons.

25 First, the terminology used in the proposed class definition
26 is imprecise. The proposed class definition refers to parents
27 who have filed an immigrant visa petition for their "child or
28 children." Class Memo at 2. Under 8 U.S.C. § 1101(b)(1), the

1 term "child" is defined as "an unmarried person under twenty-one
2 years of age" Applying this statutory definition of
3 "child" to the proposed class definition, none of the named
4 plaintiffs would qualify as members of the proposed class.
5 Plaintiff Costelo's daughters were her "children" within the
6 meaning of the statute when Plaintiff Costelo's mother filed an
7 I-130 visa petition in 1990. At that time, Plaintiff Costelo was
8 the primary beneficiary (and her daughters the derivative
9 beneficiaries) of the application. When Plaintiff Costelo filed
10 I-130s in 2004 identifying each of her daughters as the primary
11 beneficiaries, neither of her daughters were "children" as
12 defined under 8 U.S.C. § 1101(b)(1). The same facts are true for
13 Plaintiff Ong who was the primary beneficiary of the visa
14 petition filed by his sister in 1981. When Plaintiff Ong filed
15 new immigrant visa petitions in 2005, both of his daughters had
16 aged out of their previous "child" classifications. (The Court
17 should also note that neither named plaintiff claims application
18 of 8 U.S.C. § 1153(h)(1), which provides criteria for retaining
19 "child" status for certain beneficiaries over the age of twenty-
20 one.) As such, neither named plaintiff has filed an "immigrant
21 visa petition(s) for their *child or children*." The inartful
22 proposed class definition serves only to create confusion.

23 Plaintiffs assert that the proposed class would consist of
24 "thousands of parents who have filed an immigrant visa petition
25 or are the adult children beneficiaries of an immigrant visa
26 petition" where the Defendants have allegedly refused "to
27 automatically convert and retain the original priority date of
28 the original visa petition pursuant to Section 3 of the Child

1 Status Protection Act." Class Memo at 4. Notably, however,
2 Plaintiffs fail to give any upper or lower numerical limits to
3 the proposed class of "thousands," to detail the number of those
4 "thousands" who have actually filed a request for retention of
5 priority date and the number of those who were subsequently
6 refused as compared to those whose requests are still pending, or
7 to precisely state into which of the various visa categories
8 potentially affected by 8 U.S.C § 1153(h) (3) the "thousands" of
9 individuals fall. Plaintiffs' declarations do little to better
10 define the class. In the two declarations attached to the Class
11 Memo, the declarants fail to describe the potential class members
12 in any detail, other than to aver that they believe the CSPA
13 applies to tens of thousands of individuals. Plaintiff's
14 Exhibits: Declaration of Jeremiah Johnson at 2; Declaration of
15 Nancy E. Miller at 4. Without such information, it is impossible
16 to adequately identify who these putative members are, where the
17 parents and the derivative beneficiaries are located, and when,
18 how, and by whom they were allegedly denied action.

19 Not knowing more details about these putative class members
20 is troubling further given that one of the named plaintiffs has
21 experienced two different outcomes from her requests for
22 retention of priority date. (One of Plaintiff Costelo's
23 daughters was able to take advantage of the original petition's
24 priority date and one was not. Complaint at 10.) The denial of
25 retention date may be an anomaly rather than the rule.

26 Plaintiffs' class definition is also over-inclusive in that it
27 may be construed to encompass individuals who, like Plaintiff
28

1 Ong, are awaiting action on their requests and have not been and
2 may never be denied the alleged appropriate agency action.

3 The proposed class definition is also imprecise due to
4 reliance on conflicting immigrant visa petitions. The proposed
5 "parent" class members are defined as persons who have "filed an
6 immigrant visa petition(s) for their child or children." Class
7 Memo at 2. Yet, the proposed "child" class members are defined
8 as "derivative beneficiar[ies]" of an earlier immigrant visa
9 petition. It is unclear if the "parent" must have been the
10 primary beneficiary of the original immigrant visa petition or if
11 a different relative, may file the new immigrant visa petition in
12 order to be a member of the class. For example, if Plaintiff
13 Costelo's husband had been named as an additional derivative
14 beneficiary on the original petition filed by Plaintiff Costelo's
15 mother, he could have accompanied her to the United States and
16 gained lawful permanent resident status. As such, he could file
17 I-130s for his daughters. Under the proposed class definition,
18 Mr. Costelo would be a class member even though he was not the
19 petitioner or even the primary beneficiary on the original
20 petition. His daughters would have had subsequent immigration
21 petitions filed on their behalf, but it is unclear if Mr.
22 Costelo's petition would be considered to be a succeeding
23 petition, or merely an entirely separate, unrelated one.
24 Precision on this point is critical since the regulations require
25 that the original and subsequent petitioners be the same person
26 or entity, or at least the primary beneficiary of the original
27 petition, in order for retention of priority date to apply. 8
28 C.F.R. § 204.2(a)(4). Since the relationship between allegedly

1 succeeding petitions may drive the outcome of this litigation,
2 class definitions on this aspect must be precise and devoid of
3 ambiguity.

4 Based upon the proposed class definition, the Court has no
5 way of readily ascertaining the identities of the putative class
6 members. Although parent class members might be traced by
7 culling through hundreds of thousands of I-130s and I-140s (and
8 perhaps other petitions) filed over an unidentified period, there
9 are no such recent filings required in order to be a "child"
10 member of the proposed class. A close reading of the proposed
11 definition for "children" class members indicates that "children"
12 are members based upon virtue of the original visa petition
13 filing, not any subsequent filing. The proposed class definition
14 does not allege that the Government has denied any subsequent
15 filings on the behalf of "children" class members, only that the
16 Government did not *sua sponte* automatically convert the original
17 petition. Absent the "recent" filing of an immigration form
18 (such as a new I-130, an I-485, or an I-824), it is difficult to
19 imagine a trigger for the Government's conversion of derivative
20 beneficiaries under twenty-year old immigrant visa petitions.

21 The proposed class definition further fails due to its lack
22 of precision of the term "immigrant visa petition(s)." Without
23 greater precision, it is uncertain which immigration documents
24 (e.g., I-130, I-485, or I-824) must have been filed by the
25 putative class members in order to be members of the class.
26 Board and court decisions often turn on the filing of the proper
27 forms, making specificity on this point critical. See Exhibit A,
28 Memorandum for Field Leadership, et al., *Subject: Revised*

1 *Guidance for the Child Status Protection Act (CSPA); AFM Update:*
2 *Chapter 21.2(3) The Child Status Protection Act of 2002 (CSPA)*
3 *(AD07-04) ("AFM Update"), at 4, available at*
4 http://www.uscis.gov/files/nativedocuments/CSPA_30Apr08.pdf).

5 If some relief were ordered for the class as currently
6 defined, the Government would easily comply with regards to the
7 named plaintiffs. To identify the other members of the class,
8 however, the Court would have to scour tens of thousands of visa
9 petitions. The original visa petitions filed for the named
10 plaintiffs, which provide the basis for their claims of automatic
11 conversion and date retention were filed over twenty years ago.
12 It is fair to guess that such old petitions would form the basis
13 for other class members' claims. In providing relief to class
14 members, then, the Court would be forced to review decades worth
15 of visa petitions, priority date availability for those
16 petitions, the immigration status of principal and derivative
17 beneficiaries, and whether the named derivative beneficiaries
18 might be entitled to relief under 8 U.S.C. § 1503(h)(3). Where
19 such efforts and expenditure of time and resources are needed
20 merely to resolve the issue of class membership *vel non*,
21 certification has been and should be denied. *Situ, et al., v.*
22 *Leavitt*, 240 F.R.D 551 (N.D. Cal. 2007) (finding class definition
23 inappropriate when membership cannot be identified without first
24 considering the merits of the claims) (citing *Hagen v. City of*
25 *Winnemucca*, 108 F.R.D. 61, 63-64 (D. Nev. 1985)).

26 Rule 23 is procedural in nature and embodies a judgment that
27 certain cases can and should be adjudicated collectively in order
28 to achieve efficiencies without compromising fundamental fairness

1 to the absent class members or the defendants. The imprecise
2 class definition proposed by Plaintiffs will confuse the class
3 claims, class identity, and proper class remedies, and thus
4 undermines any efficiency objectives of class certification.
5 This court should, as a matter of discretion, deny the
6 Plaintiffs' request for class certification.

7
8 **III. THE PREREQUISITES FOR CLASS CERTIFICATION ESTABLISHED UNDER**
9 **FEDERAL RULE OF CIVIL PROCEDURE 23 HAVE NOT BEEN MET.**

10 Class certification requires that all of the prerequisites
11 of Fed. R. Civ. P. 23(a) be met. Under Fed. R. Civ. P. 23(a), a
12 party may bring a class suit if: (1) the class is so numerous
13 that joinder is impracticable, (2) there are common questions of
14 law or fact, (3) the parties' claims are typical of the class
15 claims, and (4) the representative parties will fairly and
16 adequately protect the interest of the class." *Id.* In addition,
17 a party seeking certification under Fed. R. Civ. P. 23(b) (2) must
18 also be able to show that those opposing the class acted or
19 refused to act on "grounds generally applicable to the class,
20 thereby making appropriate final injunctive relief or
21 corresponding declaratory relief with respect to the class as a
22 whole." *Id.*

23 The party seeking class certification bears the burden of
24 proof on all factors. *Zinser v. Accufix Research Inst., Inc.*,
25 253 F.3d 1180, 1186 (9th Cir. 2001). In turn, the District Court
26 must conduct a rigorous analysis to determine that the
27 requirements of Rule 23 have been met. *Gen. Tel. Co. of the*
28 *Southwest v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L Ed.

1 2d 740 (1982). As the Court of Appeals for the Ninth Circuit
2 observed in *Doninger v. Pac. Northwest Bell Co.*, 564 F.2d 1304,
3 1308-1309 (9th Cir. 1977), "[m]ere repetition of the language of
4 the rule is inadequate." Thus, if the Court is not fully
5 satisfied, the class should not be certified. *Falcon*, 457 U.S.
6 at 14.

7
8 **A. The Proposed Class Fails To Satisfy The Commonality**
9 **Requirement.**

10 Plaintiffs' formulation of the proposed class lacks
11 commonality. See Fed. R. Civ. P. 23(a)(2). The commonality
12 requirement is construed permissively and may be established by
13 "the existence of shared legal issues with divergent factual
14 predicates" or "a common core of salient facts coupled with
15 disparate legal remedies within the class." *Hanlon v. Chrysler*
16 *Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

17 As touched upon above, the members of the proposed class are
18 so broad as to include individuals with "disparate legal issues"
19 and "divergent factual predicates." Based upon past precedent,
20 these technical differences from class member to class member may
21 be outcome determinative for each of their claims. The divergent
22 facts that defeat commonality are the fact that parents may have
23 filed one or more of numerous immigrant visa forms (e.g., I-130,
24 I-485, I-824), and that the original visa petitions may have been
25 either family or employment based.

26 Different outcomes are often reached in the immigration
27 arena as result of filing of an incorrect or alternative form.
28 For example, in order to remain a "child" for purposes of 8

1 U.S.C. § 1503(a)(2)(A), an alien must seek to acquire legal
2 permanent resident status within one year of an immigrant visa
3 number becoming available for the alien or, in the case of a
4 derivative beneficiary, the alien's parent. This may be
5 manifested by filing an I-485 (if the beneficiary is in the
6 United States) or an I-824 (for those outside the United States)
7 within the allotted period. Filing of a labor certification or a
8 visa petition, however, are not considered adequate proof. *AFM*
9 *Update* at page 5.

10 Different outcomes can also be reached based upon the type
11 of original petition filed. The focus of Congress in passing the
12 Child Status Protection Act was clearly sons and daughters of
13 lawful permanent residents and/or United States citizens. H.
14 Jud. Comm. Rep. No. 107-45, at 2 (2001). Yet, the proposed class
15 would consist of parents of aged-out derivative beneficiaries
16 where the parents have filed subsequent immigration petitions on
17 behalf of their aged-out sons or daughters and aged-out
18 derivative beneficiaries of employment- and diversity-based
19 petitions, in addition to family-based petitions. Each category
20 of immigrant visa has different application requirements and
21 availability windows and dates. Clearly, these differing
22 postures will need to be analyzed by the court and may affect
23 outcomes for each putative class member, thus defeating
24 commonality.

25 Clearly, the proposed class contains distinctions so
26 numerous that this Court must find a lack of the commonality
27 requirement established by Fed. R. Civ. P. 23(a)(2).
28

1 **B. Plaintiffs Have Failed To Demonstrate That Class**
2 **Representatives' Claims Are Typical Of Class Claims.**

3 Plaintiffs' claims are not typical of the class. See Fed.
4 R. Civ. P. 23(a)(3). The typicality element requires that "the
5 claims or defenses of the representative parties are typical of
6 the claims or defenses of the class." *Staton v. Boeing Co.*, 327
7 F.3d 938, 957 (9th Cir. 2003).

8 First, the class representatives cannot be said to have
9 claims that are typical of the rest of the class because neither
10 was a derivative beneficiary of an immigrant visa petition,
11 neither was the primary beneficiary of an employment-based visa
12 petition, and neither was the beneficiary of a diversity visa.
13 Both named plaintiffs were primary beneficiaries of fourth
14 preference family-based immigrant visa petitions. Son and
15 daughter petitions by lawful permanent residents and United
16 States citizens were the impetus to Congress in passing the CSPA.
17 *See generally* H. Rep. 107-45. It is therefore expected that the
18 named plaintiffs will not adequately represent the interests of
19 derivatives of employment-based visa petitions and diversity
20 visas and their parents, despite their membership in the class as
21 currently defined and proposed.

22 As a further example of how the claims of the named
23 plaintiffs lack sufficient typicality with those of the described
24 class members, neither Plaintiff Costelo nor Plaintiff Ong were
25 the original petitioners for their daughters. The class,
26 however, is made up in part of parents who filed immigration visa
27 petitions for their spouses, with their children qualifying as
28 derivatives under such petitions. When the parent files a

1 subsequent immigration visa application for the son or daughter,
2 the petitioner for the two visas would be the same and more
3 readily viewed as entitled to retention of priority date under
4 various Board decisions and possible interpretations of 8 U.S.C.
5 § 1153(h)(3). The facts of the named plaintiffs do not match
6 with those of the typical class member and, in fact, require
7 broader interpretation of the statute than is necessary for many
8 class members.

9 Additionally, parent class members may have filed one of
10 numerous forms to qualify as members. Yet, neither of the named
11 plaintiffs filed I-824s or I-485s to seek automatic conversion of
12 their original immigrant visa petitions. In Plaintiffs'
13 complaint, it is not directly stated, but may be inferred, that
14 both named individuals filed new I-130s for their children.
15 Complaint, at 10-11, 18-20 Again, the named plaintiffs' actions
16 are not representative or even typical of those of the class.

17
18 **C. Plaintiffs Have Failed To Show That The Class**
19 **Representatives Would Adequately Protect The Interests**
20 **Of The Class.**

21 For the same reasons that Plaintiffs cannot satisfy the
22 commonality and typicality requirements to have this suit
23 certified as a class action, Plaintiffs cannot show that they are
24 adequate representatives of the class they purport to represent.
25 See Fed. R. Civ. P. 23(a)(4). A showing of adequate
26 representation requires named Plaintiffs to demonstrate that
27 their claims and the class claims are so interrelated that the
28 interests of the class members will be fairly and adequately

1 protected in their absence. *Falcon*, 457 U.S. at 158 n.13. "To
2 serve as representatives, the named plaintiffs must have common
3 interests with class members and a lack of interests adverse to
4 class members. They must also vigorously prosecute the interests
5 of the class through qualified counsel." *Dukes v. Wal-Mart*
6 *Stores, Inc.*, 222 F.R.D. 137, 168 (N.D. Cal. 2004) (citing *East*
7 *Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403-
8 05, 97 S. Ct. 1891, 52 L Ed. 2d 453 (1977)).

9 There are various ways in which the named Plaintiffs fail to
10 represent the interests of the class as a whole, most notably
11 that they cannot be said to share interests with potential class
12 members who were originally principal or derivative beneficiaries
13 of employment-based visa petitions and diversity visa
14 applications. The named Plaintiffs are recipients of family
15 fourth-preference visas, which were not the focus of Congress'
16 attention in passing the CSPA. Still, Plaintiffs' own interests
17 do not require that they pursue such an expansive reading of the
18 CSPA as to encompass derivative beneficiaries of one-year
19 diversity visa eligibility. Such class members may well find
20 their cause dropped in favor of a middle ground position.

21 Additionally, Plaintiffs have failed to demonstrate that
22 they have common interests with all potential class members,
23 because none of them were ever derivative beneficiaries.

1 **D. Plaintiffs Have Not Demonstrated That Class**
2 **Certification Is Appropriate Under Federal Rule of**
3 **Civil Procedure 23(b) (2) .**

4 Plaintiffs have also failed to demonstrate that the proposed
5 class is maintainable under one of the subsections of Rule 23(b) .
6 Here, Plaintiffs assert that their class is maintainable under
7 subsection (b) (2), which applies if the "party opposing the class
8 has acted or refused to act on grounds generally applicable to
9 the class, thereby making appropriate final injunctive relief or
10 corresponding declaratory relief with respect to the class as a
11 whole." Fed. R. Civ. P. 23(b) (2) . To the contrary, though, the
12 Government has not acted on grounds generally applicable to
13 potential members of the class. In Plaintiff Costelo's own
14 situation, the Government denied retention of the original
15 priority date for one of her daughters but denied it for another
16 similarly-situated daughter. One daughter is a putative class
17 member while the other is not. The distinction of membership is
18 based only upon the lack of action applicable to all potential
19 members of the class.

20 In addition, the Government has not refused to take
21 appropriate agency action. To the contrary, the Government has
22 certified and submitted this exact issue to the Board, requesting
23 a published decision clarifying this area of law. An agency
24 seeking to resolve an issue internally is hardly evidence of a
25 refusal to protect and enforce the rights of class members.

26 Accordingly, as Plaintiffs have failed to demonstrate that
27 they have met the additional requirements of Rule 23(b), the
28 Court should deny class certification.

1 CONCLUSION

2 Based on the foregoing, the Government respectfully submits
3 that the Court should deny Plaintiffs' first amended notice and
4 motion for class certification, both as a matter of discretion
5 and because Plaintiffs have failed to satisfy all of the
6 requirements for class certification under Fed. R. Civ. P. 23.

7
8 Dated this 28th day of July, 2008.

9 Respectfully submitted,
10

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26
27 Attorneys for Defendants
28

1
2
3 CERTIFICATE OF SERVICE

4 Case No. SACV08-688 JVS (SHx)

5 I hereby certify that on July 28, 2008, a copy of the
6 foregoing "MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR
7 CLASS CERTIFICATION" was filed electronically using the Court's
8 electronic filing system. I understand that notice of this
9 filing will be sent to all parties by operation of the Court's
10 electronic filing system. Parties may access this filing through
11 the Court's system.

12
13
14 /s/ Elizabeth Stevens

15 ELIZABETH STEVENS
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19 U.S. Department of Justice
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28 Defendants' Opposition To Plaintiffs' Motion For Class Certification
SACV08-688 JVS (SHx)

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U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A79 638 092 - San Francisco, CA

Date:

SEP - 7 2007

In re: _____

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Love M. Macione, Esquire

ON BEHALF OF DHS: Lowell C. Powell
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Adjustment

This matter was last before the board on April 10, 2007, when we dismissed the respondent's appeal from the Immigration Judge's April 14, 2006, decision denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture, and his request for a continuance of proceedings. The respondent now has filed a motion to reopen (MTR) alleging ineffective assistance by his former counsel. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) opposes reopening. The motion will be denied.

The record reflects that the respondent's aunt filed an immediate relative petition for the respondent's father on July 1, 1982, which was approved on November 2, 1982 (MTR, Tab A). The visa became available on November 1, 2004, and the respondent's father received his legal permanent resident (LPR) status on June 26, 2005 (MTR, Tabs B, D). The respondent argues on appeal that he was a "child" as defined in the Child Status Protection Act (CSPA) at the time that his father's visa became available,¹ he is entitled to retain the priority date of the petition filed by his aunt on behalf of his father, and his former attorney rendered ineffective assistance in failing to file an application for permanent residence within one year of his father's receipt of LPR status.

The record reflects that the respondent has substantially complied with the evidentiary requirements for asserting a claim of ineffective assistance of counsel outlined in *Matter of Lozada*,

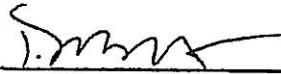
¹ The record reflects that the respondent was born on August 30, 1983, thereby turning 21 years of age on August 30, 2004 (Exh. 6 to I-130).

OK

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19 I&N Dec. 637, 639 (BIA 1988).² See *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 824-25 (9th Cir. 2003). Even assuming that the performance of his former attorney was deficient, we nevertheless find that the respondent has failed to establish that he was prejudiced by counsel's representation. See *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 859 (9th Cir. 2004) (an alien may prevail on a claim for ineffective assistance if he establishes that counsel's deficient performance "may have affected the proceedings"); *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999) (finding that prejudice must be shown for a due process challenge and that prejudice is found when the performance of counsel was so inadequate that it may have affected outcome); *Mohsseni Behbahani v. INS*, 796 F.2d 249, 251 (9th Cir. 1986). Regardless of whether the respondent was a child under the CSPA, section 203(h)(3) of the Immigration and Nationality Act does not permit the respondent to retain the priority date from his father's immediate relative petition. Pursuant to 8 C.F.R. § 204.2(a)(4), if a child reaches the age of 21 before a visa is issued to the principal alien parent, a separate petition must be filed and the original priority date is only retained *when the same petitioner* files the subsequent petition. In this case, the original petitioner was the respondent's aunt, and the subsequent petitioner is the respondent's father. Thus, even if former counsel's performance was deficient in failing to file a separate petition, the respondent has failed to establish that he is entitled to retain the original priority date, has a visa immediately available to him, and is eligible this time to adjust his status. Accordingly, the motion will be denied.

ORDER: The motion to reopen is denied.



FOR THE BOARD

² Under *Matter of Lozada, supra*, a motion based upon a claim of ineffective assistance of counsel should be supported by an affidavit, reflect whether a complaint had been filed with the appropriate disciplinary authorities, and include a response to the allegations by former counsel or report counsel's failure or refusal to respond. *Matter of Lozada, supra*, at 639.

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