
10-2560-cv

*In The United States Court of Appeals
For The Second Circuit*

FEIMEI LI, DUO CEN,

Plaintiffs / Appellants,

v.

Daniel M. RENAUD, Director, Vermont Service Center, United States
Citizenship & Immigration Services; Alejandro MAYORKAS, Director,
United States Citizenship & Immigration Services; Eric H. HOLDER,
Jr., United States Attorney General; Janet NAPOLITANO,
DEFENDANTS - APPELLEES,

Defendants - Appellees.

**On Appeal From the United States District Court
For the Southern District of New York**

**BRIEF AMICUS CURIAE IN SUPPORT OF
PETITION FOR REHEARING OR REHEARING EN BANC**

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The National Immigrant Justice Center (NIJC) has moved to appear as *amicus curiae* in this case. NIJC is a Program of the Heartland Alliance for Human Needs and Human Rights, a 501(c)(3) non-profit corporation located in Chicago, Illinois. Neither NIJC nor the Heartland Alliance is publicly held, and no person or corporation owns any percentage of NIJC or the Heartland Alliance. No other publicly held corporation or entity has a direct financial interest in the outcome of this litigation. The case does not arise out of a bankruptcy proceeding.

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INTRODUCTION

The Panel's decision – which went beyond anything previously held by the Agency or found by a court – upends the scheme which Congress enacted under the Child Status Protection Act (“CSPA”). Under the CSPA, some individuals continue to be treated as “children” despite turning 21; others are treated as adults. Under the Panel's rule, except for one visa category in which the same petitioning parent may file for the “aged-out” son or daughter, the aged-out individual moves “to the back of the line,” and is forced to start over from scratch. Respectfully, Congress meant to permit such individuals to maintain their “spot in line,” with a new petition (usually through their parent). Because of the importance of this issue to tens of thousands of affected individuals and their families, the Court should rehear this matter.

INTEREST OF *AMICUS CURIAE*

Heartland Alliance's National Immigrant Justice Center (“NIJC”) is a non-profit organization accredited by the Board of Immigration Appeals to provide immigration assistance since 1980. NIJC provides legal education and representation to low-income immigrants and asylum seekers, including in the context of visa petitions. In 2010, NIJC provided legal services to more than 10,000 non-citizens.

SUMMARY OF ARGUMENT

*Amicus curiae*¹ urges the Court to reexamine its decision in this matter (a matter of first impression among the courts of appeals) for three reasons.

First, the Panel found – *contra* the Agency’s view and the views of all other courts to consider this legal question – that the statute has a plain meaning using the tools of statutory construction. The Panel’s plain-meaning analysis used some tools of statutory construction, but other interpretative tools would have led to the contrary conclusion. Specifically, the Panel overlooked (a) the title of 8 U.S.C. § 1153(h); (b) the legislative history; (c) the absence in the statute of any similar language in the regulation which the Board basically interpreted the statute to codify; and most importantly, (d) the fact that the Panel’s interpretation would leave (h)(3) with no plausible application to the vast majority of individuals covered by (h)(1) and (h)(2), though (h)(3) applies on its face to those individuals “determined under paragraph (1)

¹ No party’s counsel authored this brief in whole or in part; no party or party’s counsel, nor any person besides *Amicus* and counsel, made a monetary contribution intended to fund preparing or submitting this brief. Fed.R.App.Pro. 29(c)(5).

to be 21 years of age or older for purposes of subsections (a)(2)(A) and (d) of this section.”

Second, to the extent that the statute has a plain meaning, its clarity flows from its scope. The essential fact is that § 1153(h)(3) applies to all beneficiaries who cease to be a “child” under the CSPA. Congress made § 1153(h)(3) applicable to all aged-out derivative beneficiaries to various family- and employment-based petitions; it would make no sense for Congress simultaneously to make the provision inapplicable to those same individuals. The plain meaning of these portions of § 1153(h)(3) is to permit the use of the priority date from an earlier petition, commonly when the now-permanent resident parent files a new petition for their son or daughter. The legislative history of the CSPA confirms this plain meaning.

Finally, if this Court finds ambiguity in the statute, it should reject the BIA’s interpretation of the statute in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), as arbitrary and capricious and contrary to law. The BIA justified its “same petitioner” limitation by reference to prior regulatory practice, but it offered only *one* prior regulation that limited retention of priority dates to petitions filed by the same petitioner,

however, ignoring *five* others that provided just the opposite. This Court need not defer to such faulty analysis.

ARGUMENT

I. The Panel's Plain Meaning Interpretation Goes Beyond the Claims of the Agency and Should Be Reconsidered.

No court has ever found § 1153(h)(3) to have the plain meaning ascribed it by the Panel, nor did the Government's brief in this matter argue for that conclusion. The Panel's holding on this point was deeply flawed. It overlooked arguments which would have supported the contrary result, and misapplied the tools which it chose to employ.

A. Most interpretative tools would have led to the contrary result.

The Panel's plain-meaning analysis overlooked a bevy of canons and interpretative tools which would have led to the contrary result.

First, the title of Section 3 of the CSPA—which became § 1153(h)(1)-(3)—itself states the scope of petitions subject to priority-date retention: “Treatment of Certain Unmarried Sons and Daughters Seeking Status as Family-Sponsored, Employment-Based and Diversity Immigrants.” 107 P.L. 208, 116 Stat. 927 (2002). Congress made an explicit choice to include employment-based and diversity petitions in

the title of the legislation; the Panel's analysis would appear to exclude such petitions from the reach of (h)(3).

Second, the opening clause of (h)(3) expressly defines the scope of petitions subject to priority-date retention. Subsection (h)(3) provides:

Retention of priority date. If the age of an alien *is determined under paragraph (1)* to be 21 years of age or older *for purposes of subsections (a)(2)(A) and (d) of this section*, 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.

8 U.S.C. § 1153(h)(3). It is plain that (h)(3) contains an *unrestricted* reference to the first paragraph, (h)(1). It is also plain (and not disputed) that (h)(1) itself applies to *all* family-based, employment-based, and diversity petitions on which a child was a derivative beneficiary as described in (h)(2). Thus, the statutory framework could not be more clear: If a child is in danger of "aging out" as a derivative beneficiary on any family-based, employment-based, or diversity petition, then the agency should first apply the special formula for determining the person's "age" under (h)(1). With regard to *all* such persons that are still determined to be over 21 for purposes of the

statute, they are instead entitled to the alternative remedy of priority-date retention under (h)(3).

Third, if there was any lingering doubt about the scope of original petitions covered by (h)(3), Congress removed it by also including a specific reference to both “subsections (a)(2)(A) *and* (d) of this section” in the opening clause of (h)(3). *See* 8 U.S.C. § 1153(h)(3). The first subsection referenced, subsection (a)(2)(A), includes only second-preference family petitions in which a lawful resident files a petition on behalf of her alien child or spouse. *See* 8 U.S.C. § 1153(a)(2)(A). However, subsection (d) is much broader and encompasses *all* family-based, employment-based, or diversity petitions filed on behalf of a child’s parent. *See* 8 U.S.C. § 1153(d) (explaining that children are entitled to the same status and consideration as their parents as a result of family-based, employment-based, and diversity petitions described in subsections (a)-(c)).

According to the BIA, the priority-date transfer in (h)(3) only applies where the prior petition may “convert,” which is possible only where the former derivative child is sponsored by the same petitioner. In practical effect, this limits (h)(3) to cases where a legal resident files

a petition on behalf of a noncitizen spouse, such that the petition can convert to category 2B when the child when he or she ages out and becomes an “adult son or daughter.”² That is, under the BIA’s approach, (h)(3) only applies to an original petition filed pursuant to *subsection (a)(2)(A)*, which covers petitions by a lawful resident on behalf of a her child or spouse. But (h)(3) expressly references petitions under *both* subsection (a)(2)(A) and (d). The effect of the Board’s reading is to leave Congress’s reference to subsection (d) with no effect.

Fourth, the one administrative regulation that the BIA cited in *Matter of Wang*, 8 C.F.R. § 204.2(a)(4), helps to illustrate the flaws in this analysis. At the time Congress enacted the CSPA, the regulation at 8 C.F.R. § 204.2(a)(4) permitted a child beneficiary on a spousal petition who “ages out” to retain the original priority date on a new petition filed by the same petitioner; but that limitation was based squarely in the *text* of the regulation:

² For any other type of petition under Section 203 of the INA, the “same petitioner” would not be able to file the subsequent petition. For example, in *Matter of Wang*, the original petition was filed by a U.S. citizen on behalf of her alien brother (naming his child as a derivative beneficiary), but the subsequent petition was filed by the lawfully adjusted brother on behalf of the aged-out child. Subsection (h)(3) cannot apply to such situations under the BIA’s non-textual “same petitioner” limitation.

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 CFR § 204.2(a)(4). In § 1153(h)(3), Congress decided *not* to include similar limiting language. If Congress wanted to limit § 1153(h)(3) to petitions filed by the same petitioner, it would more naturally have simply included limiting language in the statute, as the agency had in the regulation. Because Congress chose not to do so, the regulation cited by the BIA does not support its position but undermines it. *See Kucana v. Holder*, 130 S.Ct. 827, 837-38 (2010) (where Congress partially codified regulatory language, failure to include other language demonstrated intent to exclude that language).

B. Section 1154(k) Is Not to the Contrary.

The Government compares § 1153(h)(3) with 8 U.S.C. § 1154(k), arguing that Congress discussed priority date retention and conversion separately. The Court found the comparison persuasive.

Section 1154(k)(2) is not comparable with § 1153(h)(3). Section 1154(k) permits some individuals whose petitions convert through naturalization of a parent to continue to be treated as if their parent remained a permanent resident. That statute, as noted by the

Government in its brief, was designed to advance the cause of family reunification among certain Filipinos. Brief for Respondent at 19, n.*. The question under § 1154(k) is which category these aged-out individuals will occupy; the purpose is to allow those sons and daughters to become lawful permanent residents at the earliest possible point, to *reduce* family separation. It is true that § 1154(k) discusses visa conversion specifically; but that is because the *only issue* in § 1154(k) was which visa category would apply. That has nothing to say about whether the sons and daughters of families from other countries ought to have to start over from scratch.

Moreover, § 1154(k) applies on its face *only* to cases where the petition was “initially filed for an alien’s unmarried son or daughter ... under [8 U.S.C. §] 1153(a)(2)(B).” 8 U.S.C. § 1154(k)(1). That is, § 1154(k) applies only where a permanent resident parent applied for a son or daughter who was already 21 years old at the time of filing; i.e., it does not apply to the “age out” context. In that context, it would make no sense in that context to discuss any shift from one petitioner to another. The great variety of situations encompassed by § 1153(h)(3),

which applies to derivative visa beneficiaries in all visa categories, simply do not arise.

Because of the vastly distinct purposes and circumstances of the provisions, the comparison simply cannot bear the weight placed upon it by the government.

II. The Legislative History of the CSPA Supports Amicus' View of the Plain Meaning of Section 1153(h)(3).

The effect of the *Matter of Wang* rule, upheld by the Panel, is to withdraw precisely those benefits for which aged-out individuals remain eligible, benefits which Congress discussed in the course of legislating.

Where an individual no longer qualifies as a "child," the individual may no longer be a derivative beneficiary on the residency application for their parent. Thus, what has always happened in those situations is that the mother or father may file a new visa petition on behalf of their child. Congress was quite aware of this process, and the only brief discussions of the relevant CSPA amendments made reference to it. For instance, Rep. Sensenbrenner explained that "[u]nder current law, when an alien receives permanent residence as a preference visa recipient..., a minor child receives permanent residence at the same time. After the child turns 21, the parent would have to apply for the

child to be put on the second preference B waiting list.” 148 Cong. Rec. H4990-1 (daily ed. July 22, 2002) (Statement of Rep. Sensenbrenner) (emphasis added). This understanding was repeated by Rep. Jackson-Lee:

CHILDREN OF FAMILY AND EMPLOYER-SPONSORED IMMIGRANTS AND DIVERSITY LOTTERY WINNERS. Under current law, when an alien receives permanent residence as a preference-visa recipient or a winner of the diversity lottery, a minor child receives permanent residence at the same time. After the child turns 21, **the parent would have to apply for him or her** to be put on the second preference ‘B’ waiting list.

Id. at H4992 (Rep. Jackson-Lee) (emphasis added).

Yet under the *Wang* rule, which the panel upheld, precisely the process which Congress discussed – i.e., the parent obtaining residency status and applying for a child – is where § 1153(h)(3) cannot help.

The legislative history is rife with statements explaining the overriding purpose of the legislation was to “unite families” and protect the family unit in the immigration process:

Bringing families together is a prime goal of our immigration system. [The CSPA] facilitates and hastens ***the reuniting of legal immigrants’ families***. It is family-friendly legislation that is in keeping with our proud traditions.

148 Cong. Rec., H4991 (daily ed. July 22, 2002)(Statement of Rep. Sensenbrenner); *see also id.* (Statement of Rep. Jackson-Lee) (“I believe

this is an important bill that helps those who are aging out and *brings families together.*”).

By defining the priority-date protection in (h)(3) to apply to all petitions under (d), Congress protected all immigrant families, regardless of whether their original petitions were filed by a family member or an employer. By contrast, the BIA’s non-textual limitation on (h)(3) – which the Panel upheld – would thwart Congress’s express goal of protecting the family unit by precluding the majority of immigrant families from receiving (h)(3)’s protection. Except for a narrow class of family petitions, *all* aged-out child beneficiaries on family-based, employment-based, and diversity petitions would necessarily be placed at the “back of the line” and prevented from reuniting with their parents. In other words, of the eleven categories of original visa petitions on which a child can be named as a derivative beneficiary (set forth in Appendix A), the BIA asserts that only *one* category is entitled to the priority-date benefit under the CSPA (spousal petitions under (a)(2)(A)). Nowhere in the legislative history is there

any indication that Congress intended to protect such a narrow class of immigrant families.³

III. The Board's Non-Textual Limitation Requiring that New Petitions Be Filed by the "Same Petitioner" Is Arbitrary, Capricious, and Contrary to Law.

If the Court retracts its plain meaning interpretation of § 1153(h)(3), it would then confront the question briefed previously by the parties and *amici*, namely, whether the BIA's rule that a priority date may be transferred only along with conversion of the petition is reasonable. *See Matter of Wang*, 25 I&N Dec. at 33-38.⁴ Amicus will not repeat the arguments made previously or above, other than to point out one egregious flaw.

³ The purpose of including the automatic conversion rule was to avoid undermining the longstanding rule that petitions may automatically convert from one category to another. 8 C.F.R. § 204.2(i). If Congress had not included such a petition, the statute might have been read to require a new petition where one had not previously been required.

⁴ Notably, *Matter of Wang* constituted a complete reversal of the BIA's previous position in *Matter of Maria T. Garcia*, 2006WL 2183654 (BIA June 16, 2006). In *Garcia*, the BIA gave effect to the plain meaning of (h)(3) and held that it applied to all types of petitions naming children as derivative beneficiaries. *Id.* Nowhere did the BIA suggest that the original petition and the new petition had to be filed by the "same petitioner" for the statute to apply. In fact, the original petition in *Garcia* was filed by the alien's aunt, while the new petition was filed by the petitioner's mother. *Id.*

The BIA primarily cited one regulation in support of its cramped interpretation of § 1153(h)(3). As noted above, the regulation that the BIA cited—8 C.F.R. § 204.2(a)(4)—actually undercuts the BIA’s narrow interpretation of the CSPA. More basically, though, the Board’s claim that the “the concept of ‘retention’ of priority dates has *always* been limited to visa petitions filed by the same family member,” *Matter of Wang*, 25 I&N Dec. 28, 35 (BIA 2009), is simply false. The INA and accompanying regulations contain at least *five* instances in which a priority date carries forward from an initial petition to a petition filed by a different person or entity:

- Under 8 C.F.R. § 204.5(e), a noncitizen worker who has been the beneficiary of multiple petitions filed by *different employers* may carry forward the priority date from the earliest petition so long as it was never revoked or denied.
- Under 8 C.F.R. § 204.12(f)(1), a noncitizen physician working in a medically underserved area who is the beneficiary of a petition filed by one employer may carry forward that priority date to a subsequent petition filed by a *different employer*.
- Under 8 C.F.R. § 204.2(h)(2), a beneficiary of a petition filed by an abusive spouse or parent may carry forward that priority date to a *self-petition* filed pursuant to the Violence Against Women Act.
- Under P.L. 107-56, 115 Stat. 272, 356,357 (Oct. 26, 2001), § 421(c), a victim of the September 11, 2001, terrorist attacks who was previously the beneficiary of a family, employment, or diversity visa petition may carry forward that priority date to a *self-petition* under the USA PATRIOT Act.

- Finally, the 1976 Congressional reorganization of the visa system for Western Hemisphere immigrants demonstrates that carry-forward of an old priority date by a new petitioner is a long-standing concept in immigration law: Before 1976, Western Hemisphere immigrants were not subject to the established preference system for family and employment-based immigrants but were considered under a different scheme. *See* 22 C.F.R. § 42.53(b). The 1976 amendments to the INA incorporated these immigrants into the established preference system. INA Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703, 2707 (October 20, 1976). However, such an immigrant was allowed to retain any priority date established before 1977 and apply that date to future petitions—whether or not filed by a *different person*. 22 C.F.R. § 42.53(b).

In short, the “concept of ‘retention’ of priority dates” has plainly *not* “always been limited to visa petitions filed by the same family member.”

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges the Court to REHEAR this matter, before the panel or the en banc Court, and to reverse the BIA’s legal determination that Plaintiffs are ineligible for relief under the CSPA.

August 22, 2011

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Appendix A

INA Provision	Visa Petition Preference Category
8 U.S.C. § 1153(a)(1)	Unmarried Adult Sons and Daughters of U.S. Citizens
(a)(2)(A)	Spouses and Children of Permanent Residents
(a)(2)(B)	Unmarried Sons and Daughters of Permanent Residents
(a)(3)	Married Sons and Daughters of U.S. Citizens
(a)(4)	Brothers and Sisters of Adult U.S. Citizens
(b)(1)	Priority Workers
(b)(2)	Persons with Advanced Degrees or Exceptional Ability
(b)(3)	Skilled Workers and Other Professionals
(b)(4)	Certain Special Immigrants
(b)(5)	Immigrants Seeking to Create Employment Opportunities
(c)	Diversity Visa Lottery Winners

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2011 the foregoing Brief of Amicus Curiae in Support of Petition for Rehearing and Rehearing En Banc was filed electronically with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the e-mail addresses registered for service pursuant to 5th Cir. R. 25.2.5, including counsel for Respondent:

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), this is to certify that the foregoing Opening Brief for Appellants complies with the type-volume limitation of Rule 32(a)(7)(B), because this brief is no more than 15 pages in length, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). Appellants' brief has been prepared using the Microsoft Word word processing program in 14-point proportional font (Century Schoolbook).

/s/ Matthew L. Guadagno

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