No. 09-56846 & No. 09-56786

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.

ROSALINA CUELLAR DE OSORIO; *et al.*,
Plaintiffs - Appellants,
v.

ALEJANDRO MAYORKAS; *et al.*,
Defendants - Appellees.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Congress passed the Child Status Protection Act ("CSPA") to unite families that would otherwise be separated by administrative processing delays, oversubscription of immigrant visa categories, or other inequities in the immigration process. Congress drafted CSPA's third section, entitled "*Treatment of Certain Unmarried Sons and Daughters Seeking Status As Family-Sponsored, Employment-Based, and Diversity Immigrants*," to protect children, both derivative and otherwise, from "aging-out" of their immigrant visa category through no fault of their own. Congress formulated a clear statutory scheme to accomplish that purpose. Pursuant to INA § 203(h)(2), all children who "age out" of visa availability are protected by CSPA. INA § 203(h)(1) protects these children from aging-out as a result of the government's administrative delays. If the child remains over 21 years old after removing administrative delay, thereby ageing-out because of visa allocation backlogs, he or she is protected by INA § 203(h)(3).

Congress' scheme is clear, and there are no omissions. INA § 203(h) only becomes ambiguous in operation when one misconstrues the terms "retention" and "conversion" as terms-of-art. However, these words are not defined by the INA, and numerous provisions exist allowing for conversions and retentions without utilizing the language proscribed by the Board in

Matter of Wang, 25 I&N Dec. 28 (BIA 2009). As such, "retention" and "conversion" should be given their plain meaning, thereby allowing seamless application of INA § 203(h) to all aged-out children.

The cornerstone of *Wang* and the Defendants' argument in this case is the supposed absence of any Congressional intent to protect children against aging-out as a result of visa allocation backlogs. However, the Congressional Record reveals that the Senate made its intentions apparent. Senator Feinstein stated that CSPA was designed to address the problem of children aging out both because of administrative delays and because of visa allocation backlogs. When discussing the age-out problem, Senator Feinstein said,

> [A] family whose child's application for admission to the United States has been pending for years may be forced to leave that child behind either because the INS was unable to adjudicate the application before the child's 21st birthday, *or because growing immigration backlogs in the immigration visa category caused the visa to be unavailable* before the child reached his 21st birthday. *Id.* (emphasis added)

147 Cong. Rec. S 3275 (April 2, 2001). As such, Congress contemplated visa allocation backlogs in passing CSPA. This also unquestionably undermines the very foundation of the Board's decision in *Wang* which states "there is no clear evidence that [CSPA] was intended to address delays

resulting from visa allocation issues, such as the long wait associated with priority dates." *Wang*, 25 I&N Dec. at 38.

Defendants also cite non-binding District Court decisions in an attempt to bolster their position. However, these decisions either ignore Congressional intent or inappropriately defer to *Wang* because of faulty *Chevron* analysis. For these reasons, the Court should find these decisions unpersuasive and give them no weight.

Finally, Defendants make the policy argument that Plaintiff's interpretation of INA § 203(h) results in unfair "line jumping" that displaces other intending immigrants waiting in the visa queue. Accepting this argument requires turning a blind eye to the years a derivative child waits for an immigrant visa with his or her primary beneficiary parent. In addition, it requires the Defendants to turn a blind eye to numerous other instances where an intending immigrant is permitted to automatically move from one visa category to another while retaining his or her original priority date.

Congress passed § 3 of CSPA to protect children from the irreparable harm of aging-out of their immigrant visa category. It recognized the injustice in forcing children to wait an additional ten to fifteen years for an immigrant visa just because they turned 21 years old. Yet, the Board and Defendants have misconstrued the protections provided by Congress and

impermissibly limited them to a small subsection of aged-out children. This was not Congress' intent, and such limitations are not contained within the plain language of INA § 203(h). As such, the Court should sustain the present appeal and uphold CSPA's ameliorative intent.

II. AS PLAINTIFFS PREVIOUSLY DEMONSTRATED, AND DESPITE DEFENDANTS' ARGUMENTS, INA § 203(h) IS AN UNAMBIGUOUS STATUTE.

Defendants, relying largely upon the Board's holding in *Matter of Wang*, contend that INA § 203(h) is an ambiguous statute. Defendants' Answering Brief (D.A.B.) at 31. They take this position despite the fact that *Wang* contains no analysis of the plain language of INA § 203(h) and little more than a conclusory statement that 203(h) is ambiguous. The entirety of the Board's analysis on this issue is contained in two sentences. These read:

> Unlike §§ 203(h)(1) and (2), which when read in tandem clearly define the universe of petitions that qualify for the "delayed

[2] Throughout their brief, Defendants repeatedly argue that the decision in this case is governed by *Matter of Wang*, to which it claims the Court must defer. If such deference were due, however – which Plaintiffs and amici contest – the Court would be restricted to considering *only* the reasoning provided by the agency in its formal opinion. It is well-settled that no deference is owed to an agency's counsel's litigation position. *See e.g., Bowen v. Georgetown University Hospital,* 488 U.S. 204, 212-13 (1988); *Altamirano v. Gonzales,* 427 F.3d 586, 595 (9th Cir. 2005) (rejecting "appellate counsel's post-hoc rationalizations for agency action"). As such, none of the several alternate rationalizations for the meaning of § 203(h)(3) that have been offered by counsel are entitled to any *Chevron* deference, even if the statute was found to be ambiguous.

> processing formula," the language of § 203(h)(3) does not expressly state which petitions qualify for automatic conversion and retention of priority dates. Given this ambiguity, we must look to the legislative intent behind § 203(h)(3).
>
> *Matter of Wang,* 25 I & N Dec. at 33.

However, as Plaintiffs and amici comprehensively demonstrated in their opening briefs, INA § 203(h)(3), when read in connection with the other provisions of § 203(h), provides benefits to *all* beneficiaries who are found to have aged out under § 203(h)(1). This includes visa applicants like the Plaintiffs, *i.e*. derivative beneficiaries of the third and fourth family-based visa categories. The Defendants' premise their "ambiguity" argument upon two assertions.[2] First, that INA § 203(h)(3) is ambiguous because of omission. Second, that INA § 203(h)(3) is ambiguous in its operation. Each of these contentions is addressed in turn below.

Defendants first argue that INA § 203(h)(3) is ambiguous because of omission. D.A.B. 31–33. More specifically, Defendants contend that the range of petitions eligible for consideration under INA § 203(h)(3) is ambiguous because the statute "does not expressly state which petitions qualify for automatic conversion and retention of priority dates." D.A.B. at 32 (*quoting Wang*, 21 I&N Dec. at 23). Plaintiffs and amici have thoroughly rebutted this contention by demonstrating how the three subsections of § 203(h) are interrelated, and how § 203(h)(3) must be read to apply to the

same universe of petitions to which subsections (h)(1) and (h)(2) apply. Costelo Opening Brief (C.O.B.) 25-26; Osorio Opening Brief (O.O.B.) 21-22; Costelo Amici Brief (C.A.B.) 7-10; Osorio Amici Brief (O.A.B.) 6-8.

In short, in accord with its plain language, INA § 203(h)(3) only applies after performing INA § 203(h)(1)'s subtraction of administrative delay and finding that the F-2A beneficiary or derivative child (as identified in INA § 203(d)) is still over 21 years old. While Defendants find ambiguity in what petitions this subsection applies to, it is clear that INA § 203(h)(3)'s application is completely contingent upon first performing INA § 203(h)(1)'s calculation.[3] For this reason, it must operate upon the same petitions. INA § 203(h)(3) incorporates INA § 203(h)(2)'s "definition of petitions described" through both its contingent relationship with INA § 203(h)(1) and the use of the language "(a)(2)(A) and (d)" which directly reflects the language of INA § 203(h)(2).[4] Thus, if under the age-preserving

[3] The application of INA § 203(h)(3) is contingent upon performing INA § 203(h)(1)'s calculation because § 203(h)(3)'s initial phrase reads, "[i]f the age of an alien is determined under paragraph (1) to be 21 years of age or older . . . ." Therefore, a determination must be made under INA § 203(h)(1) before § 203(h)(3) applies.

[4] The phrase "(a)(2)(A)" refers to petitions filed for children of lawful permanent residents. These same petitions are referenced by INA § 203(h)(2)(A). Similarly, "(d)" refers to derivative children of family based, employment based, and diversity based visa petitions. These are the same

formula of § 203(h)(1), the age of an F-2A beneficiary ("(a)(2)(A)") or derivative child ("(d)") is over 21, his or her petition should automatically covert to the appropriate category and he or she should retain the priority date from the original petition.

Defendants' second argument is that INA § 203(h)(3) is ambiguous in operation. They set forth two examples of the so-called "seamless" operation of § 203(h)(1) and § 203(h)(3) when applied to F-2A petitions and derivatives before pointing to the allegedly "disjointed" operation of § 203(h)(3) when applied to F-3 and F-4 petitions. D.A.B. 33 - 36. However, the only reason cited by Defendants for such "disjointed" operation relies upon their erroneous contentions regarding Congress' use of the words "retention" and "conversion." Defendants argue that the words are essentially terms-of-art in immigration law with specific, historically accepted uses. As discussed in depth below, neither "conversion" nor "retention" is an immigration term-of-art with a "special meaning," and Defendants misrepresent Congress' use of both words throughout the INA. *See* Section IV *supra*. Because their premise is wrong, Defendants'

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petitions referenced – without any qualifications or limitations in either place - in INA § 203(h)(2)(B).

argument that INA § 203(h)(3) is ambiguous when applied to family-based third and fourth preference petitions must fail.

Overall, as a complete statutory scheme, INA § 203(h) protects all beneficiaries who age-out of visa availability through no fault of their own. If a child ages out because of government delays, he or she is protected by INA § 203(h)(1) and remains eligible to immigrate with his or her family as a derivative. On the other hand, if an individual ages out because of visa backlogs, he or she is no longer eligible to immigrate as a derivative and must wait until an appropriate category exists for the automatic conversion. However, INA § 203(h)(3)'s major protection is allowing the aged-out child to retain his or her original priority date upon conversion to the new visa category. This credits the beneficiary for the years he or she waited in the visa queue as an F-2A beneficiary or derivative child.

III. CONGRESSIONAL INTENT SUPPORTS THE PLAINTIFFS' POSITION

Defendants have further based their argument on the incorrect presumption that Congress did not speak of its intent with regard to section 203(h) in CSPA. However, the Senate made its intent clear.[5]

[5] Plaintiffs assert that resorting to legislative history is unnecessary because the statutory language makes Congress' intent clear. However, to the extent that this Court finds that the language "does not evince a specific congressional directive," then consideration of legislative intent is appropriate at *Chevron* step one, "alongside the plain statutory language."

On April 2, 2001, Senator Diane Feinstein introduced the Child Status Protection Act (S. 672) in the Senate. *See* 147 Cong. Rec. S 3275 (April 2, 2001). S. 672 was captioned "A bill to amend the immigration (*sic*) and Nationality Act to provide for the continued classification of certain aliens as children for purposes of that Act in cases where the aliens 'age-out' while awaiting immigration processing, and for other purposes, to the Committee on the Judiciary." *Id.*

Thus, Senator Feinstein stated that "[t]he legislation I have introduced today would provide a child, whose timely filed application for a family-based, employment-based, or diversity visa was submitted before the child reached his or her 21st birthday, the opportunity to remain eligible for that visa until the visa becomes available…" *Id.* In discussing the need for the legislation, Senator Feinstein explained:

> INS backlogs have carried a heavy price: children who are the beneficiaries of petitions and applications are "aging out" of eligibility for their visas, even though they were fully eligible at the time their applications were filed. This has occurred because some immigration benefits are only available to the "child" of a United States citizen or lawful permanent resident, and the Immigration and Nationality Act defines a "child" as an unmarried person under the age of 21.
>
> As a consequence, a family whose child's application for admission to the United States has been pending for years may be forced to leave

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Pacheco-Camacho v. Hood, 272 F. 3d 1266, 1269 (9th Cir. 2001) (quoting *Am. River v. Fed. Energy Reg. Comm'n*, 201 F.3d 1186, 1196 and n. 16 (9th Cir. 2000).

> that child behind either because the INS was unable to adjudicate the application before the child's 21st birthday, *or because growing immigration backlogs in the immigration visa category caused the visa to be unavailable before the child reached his 21st birthday.* As a result, the child loses the right to admission to the United States. This what is (*sic*) commonly known as "aging-out." *Id. (*emphasis added).

Senator Feinstein thus made it clear that the CSPA was intended to address more than administrative delays. Congress also intended § 203(h) of CSPA to address and correct the situation where children aged-out due to backlogs caused by oversubscription. Her statements reaffirm what is evident from the very existence of § 203(h)(3) – Congress' concern that all children who age-out through no fault of their own have some remedy that will, at a minimum, preserve the place in line where they have been waiting for years.

Significantly, it was this *Senate* version of the bill, not the House version, which added § 203(h) to the statute. Therefore, Senator Feinstein's remarks in the Congressional Record, made at the time of the bills' introduction, are important when determining the intent of Congress. Defendants cite to the Senator's remarks without quoting them in full in an attempt to support its contention that the only purpose of CSPA is to protect children of immigrants from the consequences of administrative delays. D.A.B. 15. Clearly, Senator Feinstein's remarks show otherwise.

In *Matter of Wang*, the Board discusses legislative history but makes no mention of Senator Feinstein's remarks. *Matter of Wang*, 25 I&N Dec. at 36 - 38. However, Senator Feinstein's statement clearly indicates that the intent of Congress is far more broad. Her remarks are also notable for defining the types of petitions to which the CSPA applies: family-based, employment-based and diversity visas.

The introduction of the bill also makes clear that Congress did not view this correction as the last word in immigration reform. At the end of the introduction of the bill, Senator Feinstein stated that:

> [t]he Child Status Protection Act of 2001 would correct these inequities and help protect a number of children who, through no fault of their own, face the consequence of being separated from their immediate family. It is a modest but urgently needed reform of our immigration laws, and I urge my colleagues to support the legislation.

There was no objection to Senator Feinstein's introduction. Therefore, contrary to Defendants' assertion, the Congressional record shows an intent to benefit family-based, employment-based and diversity visa categories alike, as well as an intent to provide remedies for children who age-out because of administrative delays *and* oversubscription. Both the Defendants' position and that of the Board in *Matter of Wang* are contrary to legislative intent as well as the plain language of the statute.

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[7] The LIFE was buried in the middle of a 350 page appropriations bill.

Defendants' resistance to implementing § 203(h)(3) stems in part from a basic misunderstanding of the core problem Congress sought to remedy by passing the Child Status Protection Act. Defendants claim that § 203(h)(3) was a minor provision, solely addressing administrative delays, and that Congress would not "sneak a watershed provision" into the statute without robust public debate. D.A.B. at 47. As such, Defendants contend that Congress' alleged silence indicates that it merely codified, with slight alternation, an existing benefit to primary and derivative beneficiaries of F-2A petitions. This contention is erroneous for a host of reasons.

First, and perhaps most significantly, is Defendants' refusal to acknowledge that CSPA is a watershed provision and, by passing it, Congress intended to change immigration law and not merely codify preexisting regulations. In passing CSPA, Congress provided a comprehensive remedy for the many thousand families torn apart because children "aged-out" during what is often a multiple year immigration process.

Second, the CSPA is not the only example of noteworthy immigration legislation passed without a significant Congressional record. For example, as this Court recognized, the Legal Immigration Family Equity ("LIFE") Act Amendments of 2000, which extended INA § 245(i) to thousands, was

passed outside of the normal committee process and without great debate.[7] This Court found "the LIFE Act and its amendments were developed outside the usual Senate committee process [and] they were not accompanied by committee reports explaining their background an purpose." *Akhtar v. Burzynski*, 384 F.3d 1193, 1200 (9th Cir. 2004).

Finally, and contrary to Defendants' contention, Congress did speak to the issues presented here. The Congressional record indicates that Congress contemplated more than just administrative delays. Specifically, Senator Feinstein gave the example of children who already aged out "[a]lthough the INS approved the petitions." 147 Cong. Rec. S 3275 (April 2, 2001). She states:

> The legislation I have introduced today would provide a child, whose timely filed application for a family-based, employment-based, or diversity visa was submitted before the child reached his or her 21st birthday, the opportunity to remain eligible for that visa *until the visa becomes available*.

Id. (emphasis added)

Congress enacted the Child Status Protection Act to provide relief to immigrant families and secure family unity. As Senator Feinstein indicated, CSPA relieves families from making the "difficult choice … to either come to the United States and leave their child behind, or remain in their country of origin and lose out on their American dream in the United States." *Id.*

While it is true that administrative delay contributed to the problem of families being separated, it was not the only problem Congress sought to remedy. Defendants have focused so narrowly on this one aspect of the Child Status Protection Act that they have failed to see the complete legislative intent of the statue.

Indeed, the history and purpose of CSPA supports a reading of § 203(h) that is both ameliorative and inclusive because Congress expressly enacted the statute to "'address the predicament of those aliens, who through no fault of their own, lose the opportunity to obtain [a] . . . visa.'" *Padash v. INS*, 358 F.3d 1161, 1173 (9th Cir. 2004) *quoting* H.R. Rep. No. 107–45, at 2. This Court has found that the Child Status Protection Act "was intended to address the often harsh and arbitrary effects of the age out provisions under the previously existing statute." *Padash*, 358 F.3d at 1173. This Court adheres to the general canon of construction that "a rule intended to extend benefits should be 'interpreted and applied in an ameliorative fashion.'" *Id. quoting Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003). The Board's restrictive interpretation of § 203(h)(3) stands in direct opposition to this principal and is owed no deference.

IV. THE TERMS "RETENTION" AND "CONVERSION" ARE NOT IMMIGRATION TERMS OF ART AS PORTRAYED BY THE DEFENDANTS

In an attempt to bolster the Board's faulty reasoning in *Matter of Wang* – and to create a reason for rejecting Plaintiffs' on-point examples that contradict the Board's analysis – Defendants seek to portray "retention" and "automatic conversion" as terms of art in immigration law. D.A.B. 48-60. This is not the case. Neither term appears in the definitional section of the Immigration and Nationality Act (INA § 101) and historically, both Congress and the USCIS have provided for conversions and retentions without the use of this specific terminology. In the absence of statutory definition, the terms "retention" and "automatic conversion" as used in the CSPA should be given their ordinary meaning. *See Cleveland v. City of L.A.,* 420 F.3d 981, 989 (9th Cir. 2005) (When construing a word, we generally construe the term in accordance with its "'ordinary, contemporary, common meaning.'")(quoting *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)). To that end, courts often consider a dictionary definition. *See id.*; *see also Mac's Shell Serv., Inc. v. Shell Oil Prods. Co.*, ___ U.S. ___, 2010 WL 693684, *5 (2010) (using dictionary definitions to inform statutory construction of words).

According to the Merriam-Webster Dictionary, to "retain" means to keep in possession or use. *See* http://www.merriam-webster.com/dictionary/retain (accessed September 20, 2010). The word "convert" means to change from one form or function to another; to transform. *See* http://www.merriam-webster.com/dictionary/converted (accessed September 20, 2010). Plaintiffs' interpretation of INA § 203(h)(3) is consistent with the plain meaning and historical use of the terms retention and conversion.[8] Because the terms are not restricted in their meaning as Defendants and the Board contend, neither term justifies limiting the otherwise plain meaning of INA § 203(h)(3).

In contrast to its plain meaning, the Board concluded in *Wang* 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 Board contends that "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). The Board's conclusion on both points is wrong.

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[8] This includes the alternative reasoning advanced by the Costelo Plaintiffs and amici that priority date retention and automatic conversion may be read as independent benefits under INA § 203(h)(3) C.O.B. 33-35; O.A.B. 13-21.

The flaw in the Board's reasoning is demonstrated by numerous provisions involving both retention and conversion which do not meet the Board's restrictive interpretation. *See* O.O.B. 25-31; C.A.B. 13-18. In their answering brief, Defendants maintain that the Board's failure to analyze these provisions is "reasonable … because none of those provisions use the terms 'conversion' and 'retention' in conjunction, most do not use the terms 'conversion' or 'retention' at all, and, even if considered relevant, these examples actually support the Board's analyses [sic]." D.A.B. 48.

However, if one applies Defendants' reasoning, the examples employed by the Board in *Matter of Wang* should also be disregarded. The Board cited only three provisions – two regulations and one statute – in its analysis of the meaning of the relevant terms in INA § 203(h)(3). *None* of the Board's cited provisions use the terms conversion and retention in conjunction.

The following chart illustrates the point:

Provision:	**Cited by Board:**	**Uses "retain"**	**Uses "convert"**
8 CFR § 204.2(a)(4)	As an example of retention. *Wang,* 25 I&N Dec. at 34.	**Yes** – provides for "retention" of priority date when a beneficiary ages out of a 2A petition, and states that a new petition is required.	**No** – does not use the word "convert" or any variation thereof.
8 C.F.R. § 204.2(i)	As an example of automatic conversion. *Wang,* 25 I&N Dec. at 34.	**No** - does not use the word "retain" or any variation thereof.	**Yes** – uses the word "convert" once with respect to impact of naturalization of the petitioner
INA § 201(f)	As a provision which uses conversion and retention consistently with existing regulatory scheme. *Wang,* 25 I&N Dec. at 34 – 35.	**No** – does not use the word "retain" or any variation thereof.	**Yes** – discusses petitions "converted" upon naturalization of petitioner or change in beneficiary's marital status.

Similarly, at least one of Defendants' own examples of the use of the word "conversion" suffers from the same alleged defect. D.A.B. 19. 8 C.F.R. § 205.1(a)(3)(i)(H), which Defendants cite in support of their

definition of "conversion," does not use the words "automatic," "conversion," or "retention." Rather, this regulation discusses automatic revocation of petitions. Although the regulation is missing each of the three words deemed essential by Defendants, it is a plain example of a conversion consistent with the dictionary definition of the term.

Each of the "retention" provisions cited by Plaintiffs and amici in their opening briefs demonstrate that priority date retention occurs when the beneficiaries of visa petitions are able to keep a priority date in their possession for later use. Notwithstanding the use of different terminology,[9] Plaintiffs' examples clearly demonstrate that retention of a priority date occurs even where the petitioner changes, contrary to the Board's and Defendants' contentions. Provisions such as 8 C.F.R. 204.5(e) (concerning retention of priority dates for certain employment-based petitions) and 8 C.F.R. 204.12(f)(1) (concerning retention of priority dates for second preference immigrant physicians) illustrate the fallacy of the Board's

[9] Defendants make much of the fact that some of Plaintiffs' examples use words such as "transfer" (8 C.F.R. § 204.2(h)(2)) and "maintain" (USA Patriot Act § 421(c)), however these provisions are consistent with the plain meaning of the terms "conversion" and "retention".

conclusion that the petitioner must remain the same in instances of priority date retention.[10]

Likewise, the Board erred in holding that conversion may never involve the filing of a new petition. *Matter of Wang* cites to 8 C.F.R. 204.2(i) as an example of automatic conversion. *Wang,* 25 I&N Dec. at 34. Plaintiffs' example, 8 C.F.R. 204.2(i)(1)(iv), allows an abused spouse to file a self petition and retain the earlier priority date. Under this regulation, the petitioner changes (from the abusive spouse to the self-petitioner) *and* the beneficiary must file a new petition. Thus, it contradicts both of the Board's supposed rules. Significantly, however, this regulation is a sub-provision of the very regulation cited by *Wang* entitled "AUTOMATIC CONVERSION OF PREFERENCE CLASSIFICATION." A provision falling within the very regulation cited by the Board is clearly relevant to the analysis, and yet

[10] The Defendants' cursory rejection of employment-based provisions misses the point. D.A.B. 50. First, as demonstrated in Plaintiffs' and amici's opening briefs, the plain language of § 203(h)(3) specifically references § 203(d) in its entirety and necessarily applies to derivatives of both family and employment-based petitions. Second, priority date retention in the employment context is no different than priority date retention in the family context. Both employment-based and family-based immigration schemes involve preference categories with numerical restrictions. Both involve the establishment of priority dates upon the filing of an immigrant visa petition. Both schemes afford the spouse and/or unmarried child(ren) under twenty-one status as derivative beneficiaries. In both employment and family-based categories, beneficiaries must wait until their priority date is current before they may become permanent residents. There is no reasonable basis to reject Plaintiffs' employment-based examples.

the Board's conclusions run counter to it. Because the Board based its decision on an incomplete analysis of the statute and regulations, *Matter of Wang* is owed no deference.

V. THE DISTRICT COURT OPINIONS CITED BY DEFENDANTS ARE EITHER INAPPOSITE OR UNPERSUASIVE, AND SHOULD NOT BE FOLLOWED BY THIS COURT.

Defendants cite to decisions from various U.S. District Courts in an effort to create a façade of judicial support for their position. These non-binding decisions are unpersuasive and should be given no weight by this Court. The District Courts cited by Defendants erred in deferring to *Wang*'s erroneous conclusion that Congress only intended to limit relief to those injured by administrative delay and did not intend to provide relief to those adversely affected by limited visa availability. *Co v. USCIS*, No 09-CV-00776, 2010 WL 1742538 (D. Or. 2010), appeal docketed No. 10-35547 (9th Cir. June 16, 2010). *Li v. Renaud*, -- F. Supp. 2d --, 2010 WL 1779922 (S.D.N.Y. Apr. 27, 2010), appeal docketed No 10-2560 (2nd Cir. June 25, 2010). To the contrary, the statements of members of the Senate, particularly those of Senator Feinstein discussed at section III, *supra*, demonstrate that Congress intended to provide remedies both for administrative delays and for visa allocation backlogs.

The court in *Li v. Renaud* stated that § 203(h)(3) is ambiguous because it does not "explicitly articulate which petitions qualify for favorable treatment," despite the fact that § 203(h)(3) necessarily incorporates § 203(h)(2), the subsection which "explicitly" defines the applicable petitions. *Li*, --- F. Supp. 2d ---, 2010 WL 1779922 at *7. The *Li* court reasoned that, because § 203(h)(2) refers to petitions described "in this paragraph" rather than "in this subsection," the petitions defined by § 203(h)(2) are not necessarily those referred to by § 203(h)(3). *Li* at *7. The court in *Zhong v. Novak*, 2010 WL 3302962 * 7 (D.N.J. Aug. 18, 2010) followed this faulty reasoning. However, this conclusion ignores the fact that § 203(h)(3) directly and implicitly incorporates the entirety of §§ 203(h)(1) and (h)(2). Indeed, § 203(h)(3) simply *could not operate* if not by reference to § (h)(1) and § (h)(2).

The reasoning in *Co v. USCIS* is even more lacking. In *Co*, the court completely failed to conduct an independent analysis of whether § 203(h)(3) was ambiguous and simply deferred to *Wang* in the first instance.[11] *Co*,

[11] The District Court gave lip service to *Chevron* analysis, but did not apply it correctly. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (U.S. 1984) ("*Chevron*"). The reviewing court should not consider the agency's opinion until the court has made a determination in the first instance that there is some ambiguity in the statute that would benefit from the agency's interpretation. *See Federiso v. Holder*, 605 F.3d 695, 697 (9th Cir. 2010) ("Only if we determine that a statute is ambiguous do we defer to the

2010 WL 1742538 at *3. The *Co* court failed to properly apply *Chevron* and determine that *Wang* was reasonable and *deserving* of deference before treating *Wang* with deference.

In sum, Defendants attempt to steer this Court to non-binding District Court opinions that are logically unsound, incomplete, and deferential to *Wang* without independent analysis. This Court should give no weight to the District Court opinions cited by Defendants and should instead make an independent determination that § 203(h)(3) is unambiguous, and that *Matter of Wang* does not provide a reasonable interpretation of the statute.

VI. THE PLAINTIFFS' INTERPRETATION OF CSPA § 203(H)(3) DOES NOT CONSTITUTE "LINE JUMPING"

Defendants also raise a policy objection to a literal interpretation of § 203(h)(3). If derivative beneficiaries of family-based and employment-based visa petitions were permitted to keep their original priority dates while they converted to the family 2B category, they would be "displacing" others in the 2B waiting line. D.A.B. 61.

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agency's interpretation. […] We may not accept an interpretation clearly contrary to the plain meaning of a statute's text. […]") (internal citations omitted). If the statute is not ambiguous, the reviewing court need not give any deference whatsoever to the agency's own, substantively more limited interpretation or desired application of the statute. *See Chevron*, 467 U.S. at 843 FN 9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

Apparently, Defendants see no contradiction in arguing that § 203(h)(3) allows derivative beneficiaries in the F-2A category to maintain their original priority date when they convert to the F-2B category. Under Defendants' logic, aren't these recently-converted F-2A beneficiaries displacing others in the F-2B waiting line?

Indeed, this is the same policy argument relied on by the Board in *Matter of Wang*. *Wang,* 25 I&N Dec. at 37-38. Interestingly, two of the regulations relied on by the Board in seeking to justify its restrictive interpretation - 8 C.F.R. 204.2(a)(4)[12] and 8 C.F.R. 204.2(i)[13] - allow beneficiaries to change categories while retaining their original priority dates. Does this constitute "jumping" to the head of line? The Board never discusses this apparent contradiction in *Matter of Wang*.

Defendants take *Wang* one step further when they state that because "the wait for an F2-B visa is always shorter than for an F-3 or F-4 visa", "Congress could have dispensed altogether with the complicated formula of § 1153(h)(1) and the conversion process of 8 U.S.C. § 1153(h)(3)." D.A.B. 68. In reality, the F-2B waiting line is not "always" shorter than the F-3 and F-4 waiting lines. One need look no further than the State Department's September 2010 Visa Bulletin to observe that the F-2B waiting line for

[12] Derivative beneficiaries
[13] Automatic conversion of preference classification

persons born in Mexico is backlogged well over one year longer than the F-4 waiting line.

See httphttp://www.travel.state.gov/visa/bulletin/bulletin_5113.html (Accessed September 30, 2010). In October, the difference has expanded to over three years.

See http://www.travel.state.gov/visa/bulletin/bulletin_5145.html (Accessed September 30, 2010). Because Defendants' "line-jumping" rationale is inaccurate and not supported by its own examples, it should be disregarded by this Court.

VII. CONCLUSION

Senator Feinstein's introduction of S.672 (§203(h)) unambiguously confirms that the CSPA's purpose is to protect children in all categories who aged out due to oversubscription. There is no room for doubt in her statement "the legislation I have introduced today would provide a child, whose timely filed application for a family-based, employment-based, or diversity visa was submitted before the child reached his or her 21st birthday, the opportunity to remain eligible for that visa until the visa becomes available." Nor is there any doubt that the relief applies, as she clearly stated, to families "whose child's application for admission to the United States has been pending for years … because growing immigration

backlogs in the immigration visa category caused the visa to be unavailable before the child reached his 21st birthday."

Defendants have repeatedly expressed a need to follow Congressional intent. They voiced concern that they could find no indication of what Congress intended. However, Senator Feinstein's introductory statement leaves no doubt as to Congressional intent. It was, and is, exactly what the Plaintiffs have said it is – to wit, to provide protection for children in family, employment, and diversity visa categories who have aged-out due to either administrative backlog ***or*** oversubscription of the visa category. INA § 203(h)(1) was created to prevent aging out due to administrative delay. Where aging-out is not a result of such delay, § 203(h)(3) provides relief by enabling the adult child to retain his or her original priority date. This allows the child to maintain his position in the line where he has stood with his family while waiting for a visa to become available.

Congress' intent that the CSPA should provide such wide-ranging relief is apparent from the unambiguous language of the statute. Defendants allege, in error, that INA § 203(h)(3) is ambiguous because it does not expressly state that it applies to the petitions that are set forth in INA § 203(h)(2), the subsection that immediately precedes it. As Plaintiffs have argued throughout this litigation, the Defendants position is illogical and

untenable because INA § 203(h)(3) expressly refers to INA § 203(h)(1), which in turn expressly refers to INA § 203(h)(2). Therefore, INA § 203(h)(3) expressly incorporates the universe of petitions set forth at INA § 203(h)(2).

Contrary to Defendants and the Board's assertion, "convert" and "retain" are not terms of art. As such, statutory construction demands they be given their plain meaning. "Convert" means to change from one form or function to another. "Retain" means to keep in possession or use. The terms are not restricted in their meanings and neither term justifies limiting the plain meaning of INA § 203(h)(3). Defendants would have this Court believe that, in practice, immigration law does not permit "retention" of a priority date or "automatic conversion" except under the limited, particular circumstances offered by the Defendants. Defendants have ignored examples set forth by Plaintiffs, and provided *no* example of a statute or regulation that uses "retention" and "automatic conversion" in conjunction in the manner suggested by Defendants. Defendants' proffered interpretation of INA § 203(h)(3) is contrary to Congress' ameliatory purpose as reflected by the statute's unambiguous, plain meaning and contrary to common sense.

INA § 203(h) is an unambiguous statute. When given its plain meaning, the language seamlessly flows into practical enactment. § 203(h) protects all beneficiaries who age-out of visa availability through no fault of their own. If government delay prevents the child from immigrating before he turns 21, he is permitted to retain his "child" status under INA § 203(h)(1). If oversubscription of the visa category prevents him from immigrating before he turns 21, his wait is lessened by allowing him to retain his original priority date. In this way, the child is credited for the years he waited in line as a derivative beneficiary.

As Senator Feinstein told Congress in her introduction, CSPA was intended to correct inequities caused by both oversubscription and administrative backlog and avoid the Draconian effect of additional years of family separation. Congress intended the Act to have that effect. Defendants and the Board have repeatedly refused to follow clear Congressional intent. This court should sustain Plaintiffs' appeal, reverse the Order of the District Court, thereby, allowing Congressional intent to have its day.

Dated: October 5, 2010

Respectfully Submitted,
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BRIEF FORMAT CERTIFICATION

Pursuant to Federal Rules of Appellate Procedure, Rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionally spaced, has a typeface of 14 points or more and contains 6,023 words .

Dated: October 5, 2010

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on **October 5, 2010**, I electronically filed the foregoing **APPELLANTS' REPLY BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: October 5, 2010

Signature: /s/Nancy E. Miller