10-2560

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEIMEI LI,
DUO CEN
Petitioners,

v.

DANIEL M. RENAUD, Director, Vermont Service Center, U.S. Citizenship and Immigration Services
ALEJANDRO MAYORKAS, Director, U.S. Citizenship and Immigration Services;
MICHAEL MUKASEY, Attorney General of the United States
JANET NAPOLITANO, Secretary, Department of Homeland Security;

Defendants.

Appeal of the Decision of the United States District Court for the Eastern District of New York in Case No. 1:08-cv-07770

APPELLANTS' BRIEF

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Petitioner makes the following disclosure:

1. Is said party or affiliate of a publicly-owned corporation? No.

2. Is there a publicly-owned corporation, not a party appeal, that has a financial interest in the outcome? No.

s/Scott Bratton
Scott E. Bratton

10/22/2010
Date

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PRELIMINARY STATEMENT

On April 27, 2010, the United States District Court for the Eastern District of New York (Judge Marrero) granted Defendants' Motion to Dismiss. The basis for its decision was that USCIS properly construed the provisions of the Child Status Protection Act as they applied to Appellants. A timely notice of appeal was filed with the District Court. Therefore, the case is properly before this Court.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. A timely notice of appeal was filed with the District Court.

STATEMENT OF THE ISSUE

I. Whether an aged-out derivative beneficiary of a second preference family-sponsored visa petition can utilize the automatic conversion and priority date retention provisions of the Child Status Protection Act set forth at 8 U.S.C. § 1153(h)(3)?

STATEMENT OF THE CASE AND FACTS

I. Introduction

The facts in the instant case are not disputed. The issue is the priority date to be accorded to the I-130 petition filed in 2008. Plaintiffs contend that the automatic conversion and priority date retention provisions set forth in the Child Status Protection Act ("CSPA") codified at 8 U.S.C. § 1153(h)(3) are applicable where Cen was previously a derivative beneficiary on an I-130 petition filed by his mother in family second preference-B category. Thus, the appropriate priority date under CSPA is the date the second preference-B I-130 was filed on behalf of his mother.

B. Background and I-130 Filings

Plaintiff Feimei Li is a citizen of the People's Republic of China. Feimei Li was born on August 15, 1952. (Apx. 11, *Compl.* at ¶ 6) She obtained her permanent resident card on March 18, 2005. (Apx. 18, *Permanent Resident Card*). Plaintiff Li received her green card through the approved I-130 filed on her behalf by her father on June 6, 1994. (Apx. 28, *I-130 approval notice filed by Yong Guang Li on behalf of Fa Mei Li*)

Plaintiff Duo Cen was born on September 11, 1979. (Apx. 8, *Compl. ¶ 8;* Apx. 20-24, *Duo Cen birth certificate)* He is the son of Plaintiff Feimei Li. (Apx. 20-24, *birth certificate Duo Cen*) He currently resides in Guangzhou, China. (*Apx. 8,* Compl. at ¶ 8). Plaintiff Duo Cen was a derivative beneficiary on the I-130 petition filed by Feimei Li's father on Li's behalf on June 6, 1994. (Apx. 8-9, *Compl.* at ¶ 8-9) However, she aged-out prior to the time that the priority date became current.

Plaintiff Feimei Li filed an I-130 Petition for Alien Relative on behalf of Duo Cen on April 25, 2008. (Apx. 17, *I-130 approval notice*) The petition was filed in the second preference-B category as Duo Cen was an unmarried child over 21 of a lawful permanent resident. Id. In the filing, Plaintiffs specifically requested that the petition be accorded the June 1994 priority date of the petition that was filed by Li's father on Li's behalf. (Apx. 25-26, *I-130 cover letter)* A priority date of June 1994 would enable Duo Cen to immediately be eligible for an immigrant visa so that he could come to the United States.

The I-130 was approved on August 7, 2008. (Apx. 17, *I-130 approval notice*) However, the priority date that USCIS assigned was April 25, 2008. The impact of USCIS' decision is that Plaintiff Cen will have to wait several years to join his family in the United States.

III. Complaint

On September 4, 2008, Plaintiffs filed a Complaint in the United States District Court for the Southern District of New York challenging USCIS' interpretation of CSPA and the assignment of the 2008 priority date rather than the requested 1994 priority date. (Apx. 6-16, *Complaint*) The case was assigned the Judge Marrero.

On February 11, 2010, Defendants filed a Motion to Dismiss with the District Court for failure to state a claim upon which relief can be granted. (Dkt. 14, 15) Plaintiffs filed a Memorandum in Opposition to the Motion to Dismiss. (Dkt. 16)

IV. District Court's Decision

On April 27, 2010, the District Court issued a decision granting Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Apx. 44-73, *District Court's Decision and Order*) The District Court first addressed the issue of whether the statute at issue was ambiguous. (Apx. 17-18) The Court concluded that the statute was ambiguous. The Court next examined whether the Board's decision in Matter of Wang, 25 I&N Dec. 28 (BIA 2009), which addressed the same issue as raised herein, was entitled to deference. (Apx. 60-71) The Court

found that USCIS' interpretation of the law was entitled to deference. Id. Therefore, the Motion to Dismiss was granted.

SUMMARY OF ARGUMENT

In the instant case, Plaintiff Cen was a derivative beneficiary on an I-130 petition filed by his mother in 1994. When he aged-out prior to a visa number becoming available, his mother filed an I-130 petition on his behalf under the family 2-B category. Plaintiff Cen should have been assigned a priority date of 1994 rather than 2008 under the Child Status Protection Act.

The provisions of the Child Status Protection Act codified at 8 U.S.C. § 1153(h)(3) are clear. When a derivative child ages-out, "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." Section § 1153(h)(3). This section applies to an alien who is determined to be over 21 in § 1153(h)(1) for purposes of petitions filed under § 1153(a)(2)(A) and (d). Those petitions include family-based derivative petitions. Under the plain terms of 8 U.S.C. § 1153(h)(3), Plaintiff Cen has automatically converted from the derivative beneficiary of a family-based second preference petition, to the beneficiary of a family-based second preference petition. He retains the 1994 priority date. This interpretation is consistent with the unambiguous language of the statute. The District Court erred in deferring to the Board's contrary interpretation in Matter of

Wang, 25 I&N Dec. 28 (BIA 2009).

ARGUMENT

I. An aged-out derivative beneficiary of a second preference family-based visa petition can utilize the automatic conversion and priority date retention provisions of the Child Status Protection Act set forth at 8 U.S.C. § 1153(h)(3)

Standard of review:

We review de novo a district court's grant of a motion to dismiss for failure to state a claim. Jaghory v. New York State Dep't of Educ., 131 F.3d 326, 329 (2d Cir.1997).

Law and Argument:

A. Family Preference Petitions under the Immigration and Nationality Act

In order the fully understand the issue raised, a discussion of family-based visas is appropriate.

There are a number of ways in which a person can come to the United States. The way that is relevant to the instant proceedings is the family-based, immigrant visa route.1 This requires that a Form I-130 be filed by the lawful permanent resident or United States citizen petitioner on behalf of the beneficiary.

1 An immigrant visa allows a person to come to the United States and enter as a lawful permanent resident.

The beneficiary is the person who is attempting to gain admission to the United States. The primary beneficiary is the person for whom the I-130 is filed. For purposes of the I-130 process, there can also be a derivative beneficiary. For example, a child of the primary beneficiary can be listed as a derivative beneficiary on the I-130. This is what occurred in the instant case where Duo Cen was a derivative beneficiary of an I-130 petition filed on behalf of Feimei Li.

Congress has set forth various preference categories for employment-based visas. The family-sponsored immigration categories are subject to a set number of visas each year. 8 U.S.C. § 1151(c). However, immediate relatives are not subject to this numerical cap. Immediate relatives include children of United States citizens, spouses of United States citizens, and parents of United States citizens who are at least 21 years old. 8 U.S.C. § 1151(b)(2)(A)(i).

Congress set forth four categories of family-sponsored preference petitions that apply when there is not an immediate relative petition. 8 U.S.C. § 1153(a)(1)-(4). These are referred to as first through fourth preference. As will be discussed, the second preference is divided into two subcategories. The categories are:

(1) First preference: Unmarried sons and daughters of citizens;

(2) Second preference:

(A) Spouses and children, and unmarried sons and daughters of

permanent residents;

(B) Unmarried sons and daughters (21 years of age and older)

(3) Third preference: Married Sons and daughters of citizens;

(4) Fourth preference: Brothers and sisters of adult citizens

Each of these respective categories is assigned a certain number of visa numbers per year. In order to obtain an immigrant visa, an immigrant visa number must be available. Since the demand for visas far outweighs the visas available, there is a wait for each of the preference categories. The length of the wait depends upon the category the person is assigned and the country where the person is from.

When a visa petition is filed, it is assigned a priority date. This is the date the petition is received by USCIS for processing. The priority date assigns the beneficiary a place in line. When the priority date is current, the person is then eligible to apply for an immigrant visa.

Each month, the United States Department of States issues a visa bulletin. *See e.g.* (Apx. 29-31, *Visa Bulletin for September 2008*) It summarizes the availability of visa numbers for that month. The bulletin lists a cut-off date for each of the preference categories. Certain countries (China, India, Mexico, and the Philippines) also have different cut-off dates than those individuals from the rest of

the world. If an I-130 petition was filed before the cut-off date listed in the visa bulletin, then the priority date is current and the beneficiary can apply for an immigrant visa.

In the instant case, the second I-130 petition was filed on April 25, 2008 in the family second-preference-B category. According to the visa bulletin for November 2010, the cut-off date for the family 2-B category is June 1, 2005. See http://travel.state.gov/visa/bulletin/bulletin_5172.html. Therefore, it is several years from becoming current under USCIS' erroneous interpretation of the law.

As can be seen by the visa bulletin, it can take a significant period of time for some visa numbers to become current. A problem may arise when derivative beneficiary is under 21 at the time of filing the I-130 petition. Due to the length of time it takes for a visa number to become available, the child may age-out. A beneficiary is no longer considered a child when he or she turns 21 years old. 8 U.S.C. § 1101(b)(1). At that point, the child is no longer considered a derivative beneficiary on the primary beneficiary's petition. Thus, the child may be faced with the possibility of being separated from his or her parents as in the instant case.

The way the visa system is set up has led to a large number of derivative beneficiaries losing their ability to come to the United States with their parents due

to either long processing times for the petitions or the lack of available visa numbers. In order to remedy this situation and allow for unification of families, Congress enacted the Child Status Protect Act ("CSPA") on August 6, 2002. As will be discussed, CSPA is applicable to Plaintiffs' situation.

B. The Child Status Protection Act

The Child Status Protection Act, Pub. L. 107-208 (Aug. 6, 2002) was enacted on August 6, 2002. The purpose of the Act is to protect children who aged-out during the long process of applying for lawful permanent residence. Section 1153(h)(1), 8 U.S.C. sets forth a formula for determining whether a person qualifies as a "child" under the Immigration and Nationality Act. If the individual is considered a child, he or she would be eligible to either adjust status or come to the United States as an immigrant under a petition filed on behalf of one of the parents. Under 8 U.S.C. § 1153(h)(1), the child's age is adjusted by subtracting the amount of time USCIS takes to adjudicate the visa petition from the age of the child on the date he or she becomes eligible to adjust status. If the adjusted age is under 21, that child has not aged-out and is eligible to immigrate with the parent.

The applicable section of the Child Status Protection Act states:

"(h) Rules for determining whether certain aliens are children

(1) In general
For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 1101 (b)(1) of this title shall be made using—

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

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

(2) Petitions described
The petition described in this paragraph is—
(A) with respect to a relationship described in subsection (a)(2)(A) of this section, a petition filed under section 1154 of this title for classification of an alien child under subsection (a)(2)(A) of this section; or

(B) with respect to an alien child who is a derivative beneficiary under subsection (d) of this section, a petition filed under section 1154 of this title for classification of the alien's parent under subsection (a), (b), or (c) of this section.
(3) Retention of priority date
If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) 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)(1)-(3).

The stature references 8 U.S.C. § 1153(a)(1)(A) and (d). Section

1153(a)(2)(A) applies to children of lawful permanent residents under the family 2-A category. Section 8 U.S.C. § 1153(d) states:

> **"(d) Treatment of family members**
> A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 1101 (b)(1) of this title shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent."

This section clearly applies to all derivative beneficiaries of family, employment or diversity petitions.

The issue in the instant case is whether an aged-out derivative beneficiary of an F-2B preference category may utilize the automatic conversion and priority date retention provisions of 8 U.S.C. § 1153(h). Plaintiffs contend that under the plain language of 1153(h)(3), once the alien is determined to be over 21 under (h)(1), the alien's petition shall "be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition."

C. The Board's decision in Matter of Wang.

On June 16, 2009, the Board issued a published decision addressing the provision of CSPA at issue under similar facts. Matter of Wang, 25 I&N Dec. 28 (BIA 2009). In the instant case, the District Court concluded that Wang was

entitled to Chevron deference.

In Wang, the Board first discusses whether INA § 203(h) is applicable where the beneficiary did not seek to acquire lawful permanent resident status within one year. Id. at 33. However, the Board did not address this question in light of its holding that the automatic conversion provision set forth in INA § 203(h)(3) is not applicable. Id.

With respect to the automatic conversion provision, the Board found that this would apply only where the petitioner remained the same on both petitions. The Board limited the provision to only a select group of derivative children, which are those of a second preference spouse beneficiary. Thus, under the Board's decision, Plaintiffs would not be entitled to the earlier priority date.

The Board's decision is consistent with the position that USCIS has taken in these cases. Plaintiffs believe that the Board's decision is not entitled to deference and will address the decision in detail herein. The decision contradicts the plain language of the statute. Furthermore, even if the statute could be said to be ambiguous, the Board's decision in Wang is arbitrary, capricious, and manifestly contrary to statute.

Plaintiffs would point out that a timely motion to reconsider has been filed in the Wang case. It is currently pending with the Board.

D. **The plain and unambiguous language of 8 U.S.C. 1153 makes clear that an aged-out derivative beneficiary of a second preference family-sponsored preference category can utilize the automatic conversion and priority date retention provisions set forth at 8 U.S.C. § 1153(h)(3). Additionally, even if the statute is ambiguous, the Board's interpretation is not entitled to deference because the decision is arbitrary, capricious, and manifestly contrary to statute.**

The United States Supreme Court has set forth a two-step framework to determine whether an Agency's interpretation of a statute is proper. Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The first step requires the Court to look at whether the statute is ambiguous. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 843-44.

If the statute is ambiguous, the Court must move to step two. Under step two, a Court must defer to the Agency's interpretation unless it is "arbitrary, capricious or manifestly contrary to the statute." Id. at 844.

In the instant case, Plaintiffs contend that the statute is not ambiguous. Furthermore, even if the statute can be said to be ambiguous, the Agency's interpretation is arbitrary, capricious and manifestly contrary to the statute.

1. The Agency's interpretation of CSPA ignores the plain meaning of the language in the statute.

The District Court incorrectly concludes that 8 U.S.C. § 1153(d) is ambiguous. The Court's analysis of this issue is less than two pages. (Apx. 16-17) As will be discussed, the Court's holding that the statute is ambiguous is contrary to the plain language of the statute.

The plain language of the statute at issue clearly supports Plaintiffs' position as to the assignment of the priority date. An Agency's interpretation of a statute is not entitled to deference where the traditional tools of statutory construction reveal Congress' intent. See Chevron, 467 U.S. at 843.

In the instant case, the Agency erroneously construed the provisions at issue, and in effect, interpreted the statute as if the phrase relating to 8 U.S.C. § 1153(d) was not even present in the subsection. The interpretation by the Agency ignores a portion of the subsection, divides the subsection so as to provide no weight to the group relating to 1153(d), and rewrites the subsection as if 1153(d) were not part of

the subsection. This interpretation was followed by the Board in Wang. The Agency's interpretation is contradicted by the plain language, structure, history, and purpose of the Section 3 of the Child Status Protection Act.

As set forth by the Ninth Circuit Court of Appeals, the provisions of CSPA should be read broadly. Padash v. INS, 358 F.3d 1161, 1168-74 (9th Cir. 2004). "The legislative objective reflects Congress' intent that the Act be construed so as to provide expansive relief to children of United States citizens and permanent residents." Id. CSPA "was intended to address the often harsh and arbitrary effects of the age out provisions under the previously existing statute." Id. at 1173. Congress stated that the purpose of the Child Status Protection Act was to "address [] the predicament of these aliens, who through no fault of their own, lose the opportunity to obtain [a] . . . visa." H.R. Rep. No. 107-45, *2, reprinted in 2002 U.S.C.C.A.N., at 641.

When interpreting a statute, the Agency must ascertain the intent of Congress by giving effect to its legislative will. Hernandez v. Ashcroft, 345 F.3d 824, 838 (9th Cir. 2003). In analyzing a statute, the first step is to look at the plain meaning of the statute. Additionally, the general canon of statutory construction is that "a rule intended to extend benefits should be interpreted and applied in an ameliorative fashion." Padasah, 358 F.3d at 1173 *quoting* Hernandez, 345 F.3d at

840.

The plain language of the statute at issue supports the position of Plaintiffs. Plaintiff Cen is no longer considered a "child" for purposes of CSPA. Cen had aged-out by the time his mother's immigrant visa was approved. The parties agree that for purposes of the age calculation in (h)(1) that Plaintiff Cen is over 21 years old.

Section § 11153(h)(2) describes two classes of visa petitions to which the formula set forth in paragraph (1) can be applied. 8 U.S.C. § 1153(h)(2). It applies both to visa petitions filed in the (a)(2)(A) category and those filed under § 1153(d). Therefore, Congress made clear in paragraph (2) that a child that is listed as a derivative beneficiary of any family, employment or diversity petition is eligible to have his age determined pursuant to the formula set forth in paragraph (h)(1).

The next step is to look at 8 U.S.C. § 1153(h)(3). This section specifically applies to all derivative beneficiaries who age out under paragraph (1) and not solely to beneficiaries of § 1153(a)(2)(A). The structure of the subsection, specifically to include both "(a)(2)(A) and (d)" clearly indicates Congress' intent to provide the mandatory conversion and automatic retention of priority date. The District Court overlooks the inclusion of INA § 1153(d), without an adequate

explanation as to why those who fall within INA § 1153(d) are somehow excluded in the interpretation for one subsection, while recognized for the other subsection, directly opposite of canons of statutory construction.2

The phrase "for purposes of subsection (a)(2)(A) and (d)," is used in both subsections (1) and (3). If a phrase is used in different subsections of a statute, it is a well-established canon of statutory construction that Congress intends to give a phrase the same meaning throughout the statute. United States v. Various Slot Machines on Guam, 658 F.2d 697, 703, n. 11 (9th Cir. 1981). In the instant case, the Agency violates this rule when it correctly applies subsection (1) to all derivative beneficiaries under INA § 203(d) but then limits the application of subsection (3) to only derivative beneficiaries of INA § 1153(a)(2)(A). The Agency improperly imposes a limitation on subsection (3) that does not exist. See Schneider v. Chertoff, 450 F.3d 944, 956 (9th Cir. 2006)(it is impermissible for an Agency to impose a new requirement that is not intended by Congress). Had Congress intended to limit subsection (3) to derivative beneficiaries of 8 U.S.C. 1153(a)(2)(A) only, it would have specified this restriction. In other circumstances, Congress has set forth clear limitations. See e.g. INA § 1151(b)(1)(A)(section limited to certain categories of special immigrants); 8

2 The Board's decision in Wang overlooks the inclusion of INA § 203(d).

U.S.C. § 1153(d) (section limited to certain definitions of the term "child"); INA § 1151(b)(2)(A)(ii)(section limited to individuals "described in the second sentence of § 1151(b)(2)(A)(i)."

The District Court finds that the statute is ambiguous because it does not explicitly state which petitions qualify for favorable treatment. However, 8 U.S.C. § 1153(h)(3) necessarily incorporates (h)(2) as (h)(2) explicitly addresses those petitions covered. The Court also concludes that the petitions defined by (h)(2) are not necessarily the ones included within (h)(3) because (h)(2) refers to petitions described in this "paragraph" rather that "in this subsection." This ignores the plain language and function of the statute. Section § 1153(h)(3) incorporates (h)(1) and (2). The statute could not operate if not by reference to the two prior paragraphs in (h)(1) and (2). Thus, the Court's ignores the language and operation of the statute.

The District Court fails to adequately explain how its interpretation of 8 U.S.C. § 1153(h)(3) would be consistent with the plain language of the remainder of the statute. The Board's decision in Wang also fails to analyze how its interpretation is consistent with the remainder of the statute. 8 U.S.C. § 1153(h)(2)(B) makes clear that "with respect to an alien child who is a derivative beneficiary under subsection (d)," all of 8 U.S.C. § 1153(h)("this paragraph")

applies to any "petition filed under section 1154 for classification of the alien's parent under subsection (a), (b), or (c)." All of § 1153(h) applies to any petition filed for an alien child of the primary beneficiary under family-based, employment-based, or diversity petitions. There is no distinction in § 1153(h)(2)(B) between derivative beneficiaries of family second preference petitions or any other preference. As set forth above, 8 U.S.C. § 203(h)(3) specifically references § 203(d).

Section 1153(h)(2) describes petitions in "this paragraph" and provides no differentiation between § 1153(h)(1) and (h)(3). In essence, the approach of the BIA and District Court to statutory construction would add the qualifying phrase "in the preceding paragraph" to § 1153(h)(2). Since Congress did not include any limiting language in § 1153(h)(2), this approach is without merit and manifestly contrary to the statute. Section 1153(h)(3) clearly applies to all petitions filed under § 1153(d).

When reviewing the statute, it is unambiguous. When a derivative child ages-out, "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." Section § 1153(h)(3). This section applies to an alien who is determined to be over 21 in § 1153(h)(1) for purposes of petitions filed under §

1153(a)(2)(A) and (d). Since the petitions subject to automatic conversion include any "petition filed under section 1154 for classification of the alien's parent under subsection (a), (b), or (c)," an aged-out child, who is a derivative beneficiary of the visa petition of his parent, can reunite with their family more quickly by utilizing their parent's earlier priority date. See 8 U.S.C. § 1153(h)(2). This interpretation is consistent with the unambiguous language of the statute.

2. Legislative history supports Plaintiffs' position

Under Chevron, legislative intent must be examined. Thus, looking at the legislative history of a statute may be useful in determining the intent of Congress. Plaintiffs contend that the legislative history supports their position. Although it is not necessary for the Court to reach this issue because the plain language of the statute supports Plaintiffs' position, Plaintiff will address it in the event this Court disagrees. Additionally, Plaintiffs would point out that the Board in Wang relied in part on irrelevant legislative history in reaching its incorrect decision.

As set forth herein, the intent of the Child Status Protection Act was to provide broad benefits to families and prevent their separation. Plaintiff's interpretation of CSPA is consistent with the clear intent of Congress.

Senator Diane Feinstein introduced the Child Status Protection Act in the Senate on April 2, 2001. See 147 Cong. Rec. S 3275 (April 2, 2001). This was

entitled "A bill to amend the Immigration and Nationality Act to provide for continued classification of certain alien as children for purposes of that Act in cases where the aliens age-out while awaiting immigration processing, and for some other purposes, to the Committee on the Judiciary." Id. In discussing the importance of the legislation, Senator Feinstein stated:

> "INS backlogs have carried a very 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 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 admission to the United States. This is what is [sic.] commonly known as aging-out."

Id. (emphasis added) Feinstein's remarks also state that the legislation she introduced applies to family-based, employment-based, and diversity petitions. Id.

The statement by Senator Feinstein supports the proposition that CSPA was meant to address more than administrative delays in the processing of visa petitions. It was also meant to address situations where the delay was caused by a

backlog in visa availability.

It was the Senate version of the bill that added § 1153(h) to the statute. Therefore, Senator Feinstein's statements are important is assessing the intent of Congress. Unfortunately the Board in Matter of Wang discussed legislative history but ignored Feinstein's remarks.

3. Automatic conversions operate in immigration law in cases where the petitioner does not remain the same.

As set forth herein, the District Court's decision, which upheld Wang is based on an impermissible construction of the statute. The District Court and the Board in Wang ignored the plain and unambiguous language of the statute. The Board in Wang also goes on to discuss other provisions dealing with conversion and retention of priority date to support its position. However, in Wang, the Board overlooks the many other sections of immigration law permitting conversion and retention of a priority date where the petitioner is not the same. The District Court upheld Wang's discussion regarding automatic conversions and retention of priority date.

One example is contained in 8 C.F.R. § 204.5(e). The regulation states:

> "A petition approved on behalf of an alien under sections 203(b) (1), (2), or (3) of the Act accords the alien the priority date of the approved petition for any subsequently filed petition for any classification under sections 203(b)

> (1), (2), or (3) of the Act for which the alien may qualify. In the event that the alien is the beneficiary of multiple petitions under sections 203(b) (1), (2), or (3) of the Act, the alien shall be entitled to the earliest priority date. A petition revoked under sections 204(e) or 205 of the Act will not confer a priority date, nor will any priority date be established as a result of a denied petition. A priority date is not transferable to another alien."

The regulation allows an employer to petition for a person in the EB-1, EB-2, or EB-3 categories. If the person changes employment after the I-140 is approved, another employer may sponsor the person in the same or a different category. Once the second I-140 is approved, the person can adjust by retaining the original priority date of the initial petition. For example, a person who receives an I-140 approval in the EB-3 category from employer/petitioner number 1 can change employment and receive an approved I-140 in the EB-2 category from employer/petitioner number 2, and still retain the original priority date from employer/petitioner number 1's petition. He or she can adjust status in the EB-2 category using the initial priority date of the EB-3 I-140 approval which was filed by a different petitioner but on behalf of the same beneficiary.

The Patriot Act provides another example where Congress provided for retention of a priority date for use in a subsequent petition by a different petitioner. Section 421(c) of the Patriot Act, P.L. 107-56, 115 Stat. 272 (2001) provides that where a family-sponsored visa petition was revoked or terminated due to specified terrorist activity, the beneficiary could file a new "self-petition" while retaining the

priority date of the family members earlier petition.

Additionally, a non-citizen physician working in a medically underserved area who changes jobs may retain the priority date of the prior employer's petition for use with the new employer's petition. 8 C.F.R. § 204.12(f)(1). Another regulation allows transfer of priority date of petition filed by an abusive spouse or parent to a new petition. See 8 C.F.R. § 204.2(h)(2).

USCIS regulations permit individuals to change jobs, preference categories, and petitioners while retaining the original priority date. The automatic conversion clause in CSPA is not the only law that allows a person to retain the priority date of a previous petition where the new petition is filed by a different petitioner. The Board's decision in Wang is significantly flawed as it fails to consider the other sections where retention of a priority date is permitted despite the fact that the second petition involves a new petitioner. The interpretation of the Board is inconsistent with the statutory and regulatory scheme, and incorrectly concludes Congress' intent for automatic conversion only applies for petitions filed by same petitioners. The above examples illustrate that retention of a priority date does occur even where the petitioner changes

4. It is incorrect to state that Plaintiff Cen would be jumping in line ahead of those waiting for a visa number to become available.

The District court also addresses the portion of the Wang decision that discusses how Wang's interpretation of the statute would result in line-jumping. The argument is that it would be unfair to allow a person in Mr. Cen's position to jump ahead of others who are waiting for visa numbers to become available. This misstates the effect of the proper interpretation of INA § 203(h)(3). This argument argument is incorrect and also conflicts with the plain language of the statute and Congressional intent.

Mr. Cen has already been waiting since 1994. He is not jumping in line in front of others who waited for a longer time. He is trying to save his place in line and avoid having to go to the back of another long line. See e.g. Baruelo v. Comfort, 2006 U.S.Dist. LEXIS 94309, pages 10-11 (N.D. Ill. Dec. 29, 2006)("This [203(h)(3)] means that when a child beneficiary of a visa application turns twenty-one even after factoring in the CSPA's ameliorative age calculation, she does not end up 'at the end of a long waiting list,' and does not have to file a new petition, but rather keeps the original filing date even after being moved to a lower preference category."). The Court in Baruelo recognized that § 1153(h)(3) helps families avoid having to go back to the end of another long line after the child has aged out. Unfortunately Mr. Cen aged-out while waiting for the

immigrant petition to be approved. Although he cannot take advantage of INA § 203(h)(1), he falls under INA§ 203(h)(3) and his petition is automatically converted and "shall" be given the 1994 priority date. Just as Congress includes INA § 203(d) in INA§ 203(h)(3) to refer specifically to derivative beneficiaries, Congress also uses the word "shall" intentionally to indicate that there is no discretion for losing the priority date already obtained for the family. The intent of Congress in passing CSPA was for family unification. Plaintiffs' interpretation is consistent with that intent.

5. The Board in Wang fails to explain why it believes Congress really only intended to create a statutory benefit for a group who previously had an automatic conversion

In examining the applicability of the statute, the Board addresses the regulations at 8 C.F.R. § 204.2(a)(4), which have been in effect since 1987. Wang 25 I&N Dec. at 34. The Board notes that the retention provision of 8 C.F.R. § 204.2(a)(4) is limited to a lawful permanent resident's son or daughter who was previously eligible as a beneficiary under a second preference spousal petition filed by that same lawful permanent resident. Id. Thus, the petitioner must remain the same. Id.

Relying on 8 C.F.R. § 204.2(a)(4), the Board found that the petitioner must

remain the same for the automatic conversion provision to apply. The regulation was in existence at the time that INA § 203(h) was enacted. The only benefit would be that a new I-130 petition would not need to be filed under § 1153(h)(3). However, under the old regulation, the person would still be protected. Thus, under the Board's reading of CSPA, there would be no expansion of those persons protected over what was already set forth by regulation. There is no reason why Congress would have addressed only this situation where a regulation was already in place that provided relief for those derivative children of a second preference spouse beneficiary.

6. USCIS' interpretation of CSPA as applied to Plaintiffs contradicts the plain language of the statute and is not entitled to deference.

For the reasons set forth herein, the Board should find that INA § 203(h)(3) is applicable and that the appropriate priority date is June 6, 1994. This is consistent with the plain language and intent of CSPA. The Agency's interpretation is contradicted by the plain language, structure, history, and purpose of the Section 3 of the Child Status Protection Act. The focus should be on the child's relationship with the original primary beneficiary not the original petitioner and derivative beneficiary.

The Agency's decision, which is consistent with the Board's decision in

Wang, is inconsistent with the plain language of the statute. When looking at the statutory scheme, it is clear that § 1153(h) protects all beneficiaries who have aged-out through no fault of their own. If the age-out occurs due to government delays in adjudicating the underlying visa petition (e.g. I-130, I-140), the beneficiary is protected by 8 U.S.C. § 1153(h)(1) and the person's age is treated as being under 21 so that he or she can still qualify as a derivative. If the age-out occurs because of visa backlogs, the beneficiary can no longer be classified as a derivative and must wait until the appropriate category exists for automatic conversion. Section 1153(h)(3) protects the aged-out child by allowing him or her to retain the original priority date upon a conversion to the new petition. Thus, in the instant case, the protection is that Plaintiff Cen can retain the 1994 priority date on the new I-130 petition. This makes sense as it credits Cen with the time he previously had to wait in line for a visa number to become available.

Additionally, for the reasons set forth herein, even if the statute can be said to be ambiguous, the Agency's interpretation is not entitled to Chevron deference as it is arbitrary, capricious, and unreasonable. In its precedent decision, the Board overlooked many important points as addressed herein and relied on irrelevant legislative history. As discussed the regulations cited by the Board in support of its decision actually undermine its holding.

Additionally, under the Board's interpretation, the reference in § 1153(h)(3) to derivative beneficiaries under § 1153(d) would have no legal significance. "A statute should be interpreted so as to give each provision significance." United States v. Marek, 198 F.3d 532, 36 (5th Cir. 1999). The Board's reading of the statute does not give any effect to a portion of § 1153(h)(3) and cannot be said to be reasonable.

In the instant case, the appropriate priority date is the date the original petition was filed. Under 8 U.S.C. § 1153(h)(3), USCIS' decision is incorrect. Under the plain terms of 8 U.S.C. § 1153(h)(3), Plaintiff Cen has automatically converted from the derivative beneficiary of a family-based second preference petition, to the beneficiary of a family-based second preference petition. He also retains the original priority date of June 6, 1994 associated with the second preference petition filed on her mother's behalf. The Defendants' refusal to accord the proper priority dates to Plaintiffs' pending immigrant visa petition is thus arbitrary and capricious, an abuse of discretion, and contrary to 8 U.S.C. § 1153(h)(3).

Plaintiffs are entitled to relief as a matter of law. The grant of the Motion to Dismiss was improper since Plaintiffs set forth a claim for which relief could be granted.

Conclusion

Based on the foregoing, Plaintiffs request that the Court find that they are entitled to benefits under 8 U.S.C. § 1153(h)(3) and reverse the decision of the District Court granting the Motion to Dismiss.

Respectfully Submitted,

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I certify that on the 22nd day of October, 2010, I sent two copies of the foregoing brief via regular United States Mail to:

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