10-2560

To Be Argued By:
DAVID BOBER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-2560

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

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* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Daniel M. Renaud, Alejandro Mayorkas, and Janet Napolitano are automatically substituted for their respective predecessors as defendants-appellees in this case.

Preliminary Statement

Plaintiffs-appellants Feimei Li ("Li") and Duo Cen ("Cen") (collectively, "Plaintiffs") appeal from a judgment entered by the United States District Court for the Southern District of New York (Marrero, J.) on May 11, 2010, granting the motion of defendants-appellees (the "Government") to dismiss the complaint for failure to state a claim. The opinion granting the motion to dismiss, dated April 27, 2010, is reported at 709 F. Supp. 2d 230 (S.D.N.Y. 2010).

This case presents an issue of first impression in the Courts of Appeals: the appropriate interpretation of 8 U.S.C. § 1153(h)(3), which was enacted in 2002 as part of the Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002) ("CSPA"). In April 2008, Li, a legal permanent resident of the United States, filed with United States Citizenship and Immigration Services ("CIS") a Form I-130 Petition for Alien Relative on behalf of her adult son, Cen. In the petition, Li requested that CIS classify Cen as her unmarried adult son for immigration purposes, and also requested that CIS backdate the petition and give it a "priority date" of June 1994, which was the date that Li's father (Cen's grandfather) had petitioned on Li's behalf. The priority date given to the petition is significant because, due to Congressionally-mandated annual limits, the waiting time for family-based immigrant visas is often years long, and the priority date establishes the alien's place in line. If CIS were to grant Li's request and backdate the petition to 1994, Cen would jump to the front of the line and immediately be eligible for an immigrant visa; however, if, as is the ordinary practice, the petition were given a priority date of 2008 (the year in which it

was filed), Cen would have to wait in line for a number of years.

On August 7, 2008, slightly more than three months after Li filed the petition, CIS approved it—*i.e.*, CIS granted Li's request to have Cen classified as her adult son—but, in accordance with CIS regulations (specifically, 8 C.F.R. § 204.2(a)(4)), the priority date was established as April 2008, the month in which the petition was filed. Cen, like his mother before him, and like tens of thousands of other Chinese citizens who seek to immigrate to the United States, therefore must wait, most likely a number of years, until he becomes eligible for an immigrant visa.

Plaintiffs filed this lawsuit to challenge CIS's determination as to Cen's priority date. Relying on the CSPA (specifically, 8 U.S.C. § 1153(h)(3)), they claimed that Cen is entitled to the June 1994 priority date of the petition that Li's father filed on behalf of Li. While this lawsuit was pending in district court, Plaintiffs' proposed interpretation of the CSPA was rejected by the Board of Immigration Appeals ("BIA") in a published, precedential decision, in a case involving essentially identical facts. *See Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009). In *Wang*, the BIA rejected the position that Plaintiffs (and *amicus curiae*) advocate here, and held that § 1153(h)(3) does not permit transfer of the priority date from one petition to another petition filed by a different person. Plaintiffs argued that *Wang* was wrongly decided, but the district court upheld the BIA's interpretation of the CSPA. The district court determined that § 1153(h)(3) is ambiguous and that, under *Chevron USA, Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984) ("*Chevron*"), it was

required to defer to the BIA's reasonable interpretation of the statute.

The district court's judgment should be affirmed. Section 1153(h)(3) is ambiguous, and under settled Supreme Court and Second Circuit law, the BIA's interpretation is entitled to deference. Indeed, although this is an issue of first impression in the Courts of Appeals, every district court to have considered the issue has rejected Plaintiffs' position and accorded *Chevron* deference to the BIA's construction of the CSPA set forth in *Wang*. This Court likewise should defer to the BIA's interpretation and affirm the district court's judgment dismissing Plaintiffs' complaint.

Counterstatement of Jurisdiction

This Court has jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. Judgment was entered dismissing the complaint on May 11, 2010, and Plaintiffs' notice of appeal was filed on June 25, 2010. (A-5, A-74, A-75).

The district court had subject matter jurisdiction over Li's claim pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. *See Sharkey v. Quarantillo*, 541 F.3d 75, 84 (2d Cir. 2008) ("Because [28 U.S.C. § 1331] confers jurisdiction on the district courts, a suit that arises under the APA is properly brought in district court."); *Ruiz v. Mukasey*, 552 F.3d 269, 276 (2d Cir. 2009) (district courts have jurisdiction to review denial by CIS of Form I-130 petition).

The district court lacked jurisdiction over Cen's claim, however, because Cen is not an "affected party"

within the meaning of the Immigration and Nationality Act ("INA"), and therefore lacks standing to seek judicial review. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B); *see also, e.g.*, *Blacher v. Ridge*, 436 F. Supp. 2d 602, 606 n.3 (S.D.N.Y. 2006) (only petitioner, and not beneficiary, has standing to seek judicial review of decision on petition for immigration benefits). The district court thus properly concluded that only Li "has standing to challenge the agency decision." (A-58). In their brief to this Court, Plaintiffs do not contest the district court's finding that Cen lacked standing.

Issue Presented for Review

Whether the district court correctly determined that the BIA's interpretation of 8 U.S.C. § 1153(h), set forth in its published, precedential decision in *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009), is entitled to *Chevron* deference.

Statement of the Case

On April 25, 2008, Li filed an I-130 petition on behalf of her son, Cen. (A-9, A-17, A-19). Li requested that CIS backdate the petition and assign it a priority date of June 1994, the priority date that had been assigned to an earlier petition filed on Li's behalf by her father. (A-25-27). CIS granted Li's 2008 petition in August 2008, but declined her request to backdate the petition and instead assigned a priority date of April 2008. (A-17). Li and Cen commenced this lawsuit in district court on September 5, 2008, seeking to compel CIS to establish an earlier priority date for Li's petition. (A-6). On June 16, 2009, the BIA issued a published, precedential decision in *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009), holding that 8 U.S.C. § 1153(h)(3), which

contains a provision that automatically converts the petitions of certain derivative beneficiaries who "age out" during the waiting period for a visa, does not apply to derivative beneficiaries such as Cen, who seek to backdate newly-filed petitions. 25 I. & N. Dec. at 34. On April 27, 2010, the district court issued a decision deferring to the BIA's interpretation of § 1153(h)(3) and dismissing the action. (A-44). Judgment was entered on May 11, 2010. (A-74). This timely appeal followed. (A-75).

Statement of Facts

A. Family Preference Petitions and Priority Dates Under the INA

To enter and remain in the United States lawfully, an alien must possess a valid visa conferring immigrant or non-immigrant status. 8 U.S.C. § 1182(a)(7)(A), (B). The Supreme Court long has recognized that

> [t]he conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, [and] the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of [federal courts] to control.

Fiallo v. Bell, 430 U.S. 787, 796 (1977) (citation omitted). In determining the conditions for entry, Congress considers a number of factors, including the interests of

United States citizens and lawful permanent residents in reuniting with members of their families, the nation's employment needs, and the nation's interest in encouraging immigration from various countries. *See, e.g.*, Congressional Research Service Report for Congress, "Immigration Fundamentals," dated Sept. 15, 1999, http://digital.library.unt.edu/ark:/67531/metacrs-997/m1/1/high_res_d/98-918epw_1999Sep15.pdf ("Immigration admissions are subject to a complex set of numerical limits and preference categories giving priority for admission on the basis of family relationships, needed skills, and geographic diversity."). The resulting balancing of Congress's immigration priorities is reflected in the INA, 8 U.S.C. § 1101 *et seq*.

The family-based immigrant visa category—at issue in this case—requires a United States citizen or lawful permanent resident "petitioner" to file a Form I-130 Petition for Alien Relative with CIS on behalf of a family member, who is referred to as the "beneficiary" of the petition. The petition asks CIS to classify the beneficiary as falling within one of the Congressionally-created immigrant relative categories under the INA. 8 U.S.C. §§ 1153(a), 1154(a)(1)(A)(i), (a)(1)(B)(i)(I); 8 C.F.R. §§ 204.1(a)(1); *see generally Drax v. Reno*, 338 F.3d 98, 113-14 (2d Cir. 2003).

When an alien files a petition, CIS determines if the factual allegations in the petition are true and whether the alien qualifies as a beneficiary based on a valid relationship to the petitioner. *See* 8 U.S.C. § 1154(b). If CIS finds that such a relationship exists between the petitioner and the beneficiary, it approves the petition. *Bolvito v. Mukasey*, 527 F.3d 428, 430 (5th Cir. 2008); *see also Drax*, 338 F.3d at 114. The approval of the

petition is not the grant of a visa or permanent residence; it merely results in the classification of the beneficiary as an individual eligible to receive a visa under a particular family preference category. *See Bolvito*, 527 F.3d at 432 n.4.

In many cases, due to numerical limitations imposed by Congress on the number of visas that the Government can issue in any given year, it can be years after a Form I-130 is granted before a visa becomes available. *See, e.g.*, *United States v. Revuelta*, 109 F. Supp. 2d 1170, 1171 (N.D. Cal. 2000) (explaining that beneficiary of family preference petition was required to wait "several years" before obtaining immigrant visa "because Congress has limited the annual number of immigrants who can change their status"). Currently, Congress has capped the total number of family-sponsored immigrant visas at 480,000 per year, *see* 8 U.S.C. § 1151(c)(1)(A)(i), and the number of immigrant visas issued to natives of any single foreign state may not exceed 7 percent of the number of such visas made available in any fiscal year, *see* 8 U.S.C. § 1152(a)(2).

Visas for certain categories of aliens are not subject to any numerical limitations. For example, "immediate relatives" of United States citizens—*e.g.*, children under 21 years old and spouses—are immediately eligible for a visa once a petition for them is approved. *See* 8 U.S.C. § 1151(b) (explaining that "immediate relatives" "are not subject to the worldwide levels or numerical limitations"); *Azizi v. Thornburgh*, 908 F.2d 1130, 1131-32 (2d Cir. 1990). Parents of United States citizens over the age of 21 are also classified as "immediate relatives" who are immediately eligible for a visa. 8 U.S.C. § 1151(b)(2)(A)(i).

But for aliens who do not qualify as "immediate relatives" of United States citizens, Congress has set numerical limitations, and as to them each approved petition is given a "preference category" and a "priority date." *See Drax*, 338 F.3d at 114. Congress has established four preference categories, each of which is based on the petitioner's relationship to the beneficiary, and subject to a statutory limitation on the number of visas that will be granted each fiscal year depending on the preference category and the beneficiary's country of origin. 8 U.S.C. §§ 1151(a)(1) & (c), 1153(a); *Bolvito*, 527 F.3d at 429-32 (explaining visa petition process).

The first preference category ("F1") consists of unmarried adult sons and daughters of United States citizens, with a yearly limit of 23,400. *See* 8 U.S.C. § 1153(a)(1). The second preference category is divided into two subsets. The first subset ("F2A") consists of spouses and "children"—*i.e.*, sons and daughters under 21 years old—of lawful permanent residents. 8 U.S.C. § 1153(a)(2)(A). The second subset of the second preference category ("F2B") (the one at issue in this case) consists of unmarried adult sons and daughters of lawful permanent residents. 8 U.S.C. § 1153(a)(2)(B). The combined limit for the second preference category is 114,200 per year, and at least 77 percent of second-preference visas must be issued to persons in the F2A category, *i.e.*, spouses and children under the age of 21 of lawful permanent residents. 8 U.S.C. § 1153(a)(2)(A), (B). The third preference category ("F3") is for married adult sons and daughters of United States citizens, with a limit of 23,400 per year. 8 U.S.C. § 1153(a)(3). The fourth and final preference category ("F4") is reserved for brothers and sisters of United States

citizens, with a yearly limit of 65,000. 8 U.S.C. § 1153(a)(4).

Certain types of relatives have been excluded from the above categories. In general, family-sponsored classifications are limited to members of the "immediate" family. Thus, United States citizens may not file petitions on behalf of nieces, nephews, or grandchildren. *See, e.g.*, *Bolvito*, 527 F.3d at 434. For legal permanent residents, there are even greater restrictions: they may not petition on behalf of married sons and daughters, parents, or siblings. *See* 8 U.S.C. § 1153(a) (listing relationships recognized under INA).

For aliens who are required to wait for visas because they are in categories that are subject to annual limitations, the "alien's place in the waiting line for an immigrant visa is determined by [his] . . . priority date." *Bolvito*, 527 F.3d at 430. The "priority date" is based on the date of the filing of the petition and establishes the beneficiary's spot in the waiting line. 8 C.F.R. § 204.1(c) ("The filing date of a petition shall be the date it is properly filed under paragraph (d) of this section and shall constitute the priority date."). The Bureau of Consular Affairs of the United States Department of State publishes a monthly "Visa Bulletin" that provides information on whether an immigrant visa is immediately available in the various preference categories. *See* 8 C.F.R. § 245.1(g)(1). If an alien beneficiary's priority date is earlier than the cut-off date indicated in the Visa Bulletin, a visa is immediately available to that alien. *See id.*

Because the INA places an annual cap on the number of family-preference visas and the number of visas that can be issued to immigrants from any one country, the beneficiary of an approved Form I-130

petition may have to wait several years before a visa becomes available, depending on his or her preference category and country of origin. *See, e.g.*, *Ogbolumani v. USCIS*, 523 F. Supp. 2d 864, 869-70 (N.D. Ill. 2007) ("[D]ue to oversubscriptions in that visa preference category, visa numbers might not be immediately available for the alien relative."); *see also Drax*, 338 F.3d at 115-16. For example, visas are currently available for Filipino F4 beneficiaries with priority dates before January 15, 1988—in other words, Filipino brothers and sisters of United States citizens who have been waiting for over twenty-two years. *See* U.S. Dep't of State, Bureau of Consular Affairs, Visa Bulletin for February 2011, *available at* http://www.travel.state.gov/visa/bulletin/bulletin_5228.html. But the Filipino spouse of a United States citizen may immigrate immediately. 8 U.S.C. § 1151(b).

If a beneficiary of a petition is the parent of a "child" —*i.e.*, an unmarried son or daughter under the age of 21*—the child may be eligible to immigrate as the "derivative beneficiary" of his or her parent (the "primary beneficiary") regardless of whether the child is listed as a derivative beneficiary on the Form I-130. To avoid separating parent from minor child, Congress gave the child derivative beneficiary "the same status" and "order" as the parent primary beneficiary, so long as the child derivative beneficiary maintains the required relationship with the parent primary beneficiary. 8 U.S.C. § 1153(d); *see* 9 U.S. Dep't of State,

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* 8 U.S.C. § 1101(b)(1) provides that a "child" is an "unmarried person under twenty-one years of age" who meets one of various criteria not relevant here.

Foreign Affairs Manual § 40.1 n.7.1, *available at* http://www.state.gov/documents/organization/86920.pdf (derivative interest in visa petition is valid only "as long as the alien following to join has the required relationship with the principal alien").*

Nonetheless, the interest of a derivative beneficiary is not an actual preference. For example, if the primary beneficiary of a visa petition dies, the derivative beneficiary loses any derivative eligibility he or she may have had. *Ward v. Holder*, 608 F.3d 1198, 1201-02 (11th Cir. 2010); *Matter of Khan*, 14 I. & N. Dec. 122, 123-24 (BIA 1972). And, as noted, there is no preference category for grandchildren; the interest of a grandchild

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* Congress did not give the same preference—*i.e.*, the "same status" and "order"—to adult children of primary beneficiaries. *See Alvidrez v. Ridge*, 311 F. Supp. 2d 1163, 1166 (D. Kan. 2004) ("An adult son or daughter can reasonably be expected to live apart from his or her parents while waiting for his or her 2B numbers to become available."). This makes the F2A category unique in that it is the only category in which a derivative beneficiary is also entitled to be a primary beneficiary. To illustrate, a legal permanent resident who has a wife and minor child in China could file two separate F2A petitions (one on behalf of his wife, and the other on behalf of his child), or, to save filing fees, could file one F2A petition on behalf of his wife, and his child would be entitled to follow as a derivative beneficiary (so long as the child retained all the characteristics of a derivative, including remaining under the age of 21).

in a petition filed on behalf of his or her parent is merely derivative of the parent's interest.

B. The Child Status Protection Act

While a primary beneficiary parent awaits the adjudication of a Form I-130 petition or application to adjust status, his or her child derivative beneficiary may "age out," *i.e.*, turn twenty-one years of age and no longer qualify as a "child" entitled to derivative benefits from a petition filed on behalf of his parent. *Bolvito*, 527 F.3d at 435-36 ("a qualifying familial relationship that is terminated due to . . . 'aging out' . . . no longer entitles the derivative noncitizen to accompanying or following" the primary beneficiary into the United States). Prior to enactment of the CSPA, Congress recognized that substantial numbers of derivative-beneficiary children were "aging out" due to administrative delays, because the former Immigration and Naturalization Service ("INS") was tasked with adjudicating a large number of visa petitions and applications for adjustment of status and lacked the resources to adjudicate them promptly. Indeed, the legislative history of the CSPA indicates that Congress was concerned that, in some cases, the INS was taking up to three years to process Form I-130 petitions. *See* H.R. Rep. No. 107-807, at 55 (2003) (explaining that "[w]ith the INS taking up to 3 years to process applications, aliens who were under 21 when their petitions were filed often found themselves over 21 by the time their applications were processed"); 147 Cong. Rec. S3275-01 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein) ("This legislation would protect children who are in danger of losing their eligibility for an immigration visa

because of the inability of the [INS] to process their petitions or applications in a timely fashion.").

Congress enacted the CSPA to protect derivative beneficiaries from "aging out" due to delays in the adjudication process. As one court has stated, Congress had "but one goal" in enacting the CSPA: "to override the arbitrariness of statutory age-out provisions that resulted in young immigrants losing opportunities to which they were entitled because of administrative delays," *i.e.*, "agency delays in processing their applications or petitions." *Padash v. INS*, 358 F.3d 1161, 1174 (9th Cir. 2004).

Section 3 of the CSPA, codified at 8 U.S.C. § 1153(h), contains three subsections. Section 1153(h)(1) provides that for purposes of visa eligibility, the age of the beneficiary of certain petitions is determined by excluding the time the petition is pending with CIS. Section 1153(h)(2) describes the specific types of petitions that are covered by Section 1153(h)(1). Section 1153(h)(3), the provision most directly at issue here, provides:

> (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 [8 U.S.C. §§ 1153(a)(2)(A) & (d)], the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

8 U.S.C. § 1153(h)(3).

C. The 1994 Form I-130 Petition for Alien Relative on Behalf of Li

In June 1994, Yong Guang Li ("Yong"), a lawful permanent resident of the United States, filed a Form I-130 Petition for Alien Relative (the "1994 Petition") with the INS. (A-28). In the 1994 Petition, Yong requested that the INS classify his daughter, plaintiff Feimei Li—a Chinese citizen who was the primary beneficiary of that petition—in the family second-preference category, as an unmarried adult daughter of a lawful permanent resident of the United States. (A-28, A-10); *see also* INA § 203(a)(2)(B), 8 U.S.C. § 1153(a)(2)(B). On April 4, 1995, the INS approved the 1994 Petition and gave it a priority date of June 6, 1994. (A-28). At the time the INS approved the 1994 Petition, plaintiff Cen—who was born on September 11, 1979, and is the son of plaintiff Li—was fifteen years old. (A-8). Because he was under the age of 21, he qualified for "derivative status" as the "child" of Li, the primary beneficiary of the 1994 Petition. *See* 8 U.S.C. §§ 1101(b)(1), 1153(d).

Although the 1994 Petition was granted in 1995, Li was not granted status as a legal permanent resident until March 2005, due to statutory limitations on the annual number of persons eligible for family-based visas. (A-18). By 2005, when Li became eligible for a visa, Cen was 26 years old and no longer qualified as a "child" who could derive beneficiary status from the petition filed by his grandfather on behalf of his mother. *See* 8 U.S.C. §§ 1101(b)(1), 1153(d). Thus, only Li was authorized to immigrate to the United States.

D. Li's 2008 Form I-130 Petition for Alien Relative on Behalf of Cen

Li became a permanent resident in March 2005. (A-18). Three years later, on April 25, 2008, she filed a Form I-130 Petition for Alien Relative (the "2008 Petition") with CIS, naming her adult son Cen as the beneficiary. (A-19). In the 2008 Petition, Li requested that CIS classify Cen in the family second preference category, as the unmarried adult son of an alien lawfully admitted for permanent residence. (A-19); *see also* INA § 203(a)(2)(B), 8 U.S.C. § 1153(a)(2)(B). Li requested that CIS backdate the 2008 Petition and give it a priority date of June 6, 1994, the same priority date given to the 1994 Petition that Yong had filed on Li's behalf. (A-11, A-25). CIS approved the 2008 Petition on August 7, 2008, but declined Li's request to backdate the petition, instead establishing the priority date as April 25, 2008, the date that CIS received the 2008 Petition. (A-17).

E. Initial Proceedings in District Court

Plaintiffs initiated this action by filing a complaint on September 5, 2008. (A-2, A-6). At the time, the question of the proper application of priority dates under § 1153(h)(3) was pending before the BIA. Accordingly, at the parties' joint request, the district court placed this case on its suspense docket pending a decision from the BIA. (A-2-3).

F. *Matter of Wang*

On June 16, 2009, the BIA issued a published, precedential decision construing § 1153(h)(3) in a case with facts similar to those presented here, *Matter of*

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Wang, 25 I. & N. Dec. 28 (BIA 2009). In *Wang*, a United States citizen filed an F4 visa petition in 1992 on behalf of her brother ("Wang") as the primary beneficiary, and Wang's wife and children as derivative beneficiaries. *Id.* at 29. Before a visa became available to Wang in 2005, one of his daughters turned twenty-one, thus losing her derivative status under the petition. *Id.* After Wang became a lawful permanent resident in October 2005, he filed a separate F2B petition on behalf of his daughter. *Id.* Like Plaintiffs in this case, Wang argued that, under § 1153(h)(3), the priority date from the F4 petition filed by his sister on his behalf in 1992 should be applied to the F2B petition that he filed on behalf of his daughter in 2006. 25 I. & N. Dec. at 29-32, 34. The Director of the CIS California Service Center approved the petition, but gave it a priority date of 2006 rather than 1992; however, in light of the important question raised regarding which priority date to assign to the petition, she certified the question to the BIA. *Id.* at 28-29.

The BIA rejected Wang's arguments and affirmed the decision of the Director. First, the BIA held that § 1153(h)(3) is ambiguous. The BIA concluded that whereas 8 U.S.C. §§ 1153(h)(1) and (h)(2) "clearly define the universe of petitions that qualify for the delayed processing formula," § 1153(h)(3) refers vaguely to both the "petition" and the "original petition," without "expressly stat[ing] which petitions qualify for automatic conversion and retention of priority dates." 25 I. & N. Dec. at 33. The BIA found that Congress's failure to specify the types of petitions to which § 1153(h)(3) applies creates ambiguity as to which types of petitions are covered.

To resolve the ambiguity, the BIA looked to the use of the terms "conversion" and "retention" in provisions of the CSPA other than § 1153(h)(3) and in immigration regulations that were in effect in 2002, when Congress enacted the CSPA. 25 I. & N. Dec. at 34-36. With respect to the term "conversion," the BIA looked to § 2 of the CSPA, INA § 201(f), now codified at 8 U.S.C. § 1151(f). 25 I. & N. Dec. at 35. Section 1151(f)(2) provides that if a legal permanent resident becomes naturalized after petitioning for his child to receive a family preference visa, the petition is "converted" to a petition for classification as an "immediate relative." *Id.* The BIA noted that under § 1151(f), the petition converts without the need for any action, such as the filing of a new petition. 25 I. & N. Dec. at 35. The BIA also found that the "automatic" nature of the "conversion" in § 1153(h)(3) was underscored by § 6 of the CSPA, INA § 204(k), now codified at 8 U.S.C. § 1154(k). 25 I. & N. Dec. at 35 n.9. Section 1154(k)(1) provides that a parent's petition for an alien unmarried son or daughter's classification as a family-sponsored immigrant is converted to a new classification if the parent becomes naturalized after filing the petition. The BIA noted that the conversion under § 1154(k) occurs without the need to take any action, including, *inter alia*, the filing of a new petition. 25 I. & N. Dec. at 35 n.9. The BIA explained that the "automatic" nature of the conversion in § 1153(h)(3) was also highlighted by § 1154(k)(2), which provides that aliens who do not wish to move into the new preference category must affirmatively opt out of the conversion (when, for example, the new category would provide a less advan-

tageous priority date).* In addition, the BIA looked to 8 C.F.R. § 204.2(i), enacted in 1987, which deals with conversion of preference classifications. The BIA noted that the term "conversion" is used in § 204.2(i) in connection with events—such as a change in the beneficiary's marital status—that do not involve the filing of a new petition. 25 I. & N. Dec. at 34.

With respect to the term "retention," the BIA looked to how that term is used in 8 C.F.R. § 204.2(a)(4), the regulation concerning the aging-out of primary and derivative beneficiaries of F2A petitions, *i.e.*, children (under 21 years of age) of lawful permanent residents. 25 I. & N. Dec. at 34. The BIA explained that § 204.2(a)(4) makes clear that "the original priority date

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* Section 6 of the CSPA, 8 U.S.C. § 1154(k), was intended to address a problem encountered by Philippine F2-B applicants whose parents naturalized. Automatic conversion from F2B to F1 at the time of the parent's naturalization actually would have disadvantaged these beneficiaries, because the cutoff date for Philippine F1s was earlier than the cutoff date for Philippine F2Bs. Thus, although the statute provided for automatic conversion of preference categories when a parent naturalized, it also permitted the son/daughter beneficiary to opt out of the automatic conversion by making a request to the Attorney General that such conversion not occur. *See* H.R. Rep. No. 107-807, at 55 (2003) (explaining that the CSPA was intended to fix "a troubling anomaly in the immigration law" and that, with automatic conversion, "[t]he line actually gets longer for the sons and daughters [of immigrants from the Philippines] when the parent naturalizes").

will be retained if the subsequent petition is filed by the same petitioner" who filed the first petition. 25 I. & N. Dec. at 34. The BIA noted that § 204.2(a)(4) limits priority-date retention "to a lawful permanent resident's son or daughter who was previously eligible as a derivative beneficiary under a second-preference spousal petition filed by the same lawful permanent resident." 25 I. & N. Dec. at 34.

After surveying these statutes and regulations, the BIA held that the term "conversion" in § 1153(h)(3) means a change in classification "without the need to file a new visa petition." 25 I. & N. Dec. at 35. The BIA further held that the term "retention" applies only with respect to "visa petitions filed by the same family member." *Id.* The BIA presumed that Congress enacted § 1153(h)(3) with an understanding of the usages of the terms "conversion" and "retention" in the other parts of the CSPA and the regulations, and held that these terms as they appear in § 1153(h)(3) should be construed in accordance with such usages. *Id.* at 35.

The BIA then held that the conversion and retention provisions of § 1153(h)(3) did not apply to the facts of *Wang*. There could be no automatic "conversion," the BIA held, because there was no appropriate category for Wang's daughter to convert to at the time she aged out, as she was the niece of the original petitioner and there is no preference category for the niece of a United States citizen. 25 I. & N. Dec. at 35. And there could be no "retention" of priority date, the BIA held, because the two petitions at issue were filed by different people —the first one by Wang's sister on behalf of Wang, and the second one by Wang himself on behalf of his daughter. *Id.* at 36.

The BIA thus concluded that § 1153(h)(3) is limited to petitions in which the primary or derivative beneficiary is the son or daughter of a lawful permanent resident. 25 I. & N. Dec. at 34. Prior to turning 21 years of age, these individuals are in category F2A—children of lawful permanent residents. If these individuals turn 21 years old while in the waiting line due to the annual cap on the F2A category, their petitions are "automatically . . . converted" to category F2B—unmarried adult sons and daughters of lawful permanent residents—without the need for the filing of another petition, and thus they "retain" the original priority date. This construction of § 1153(h)(3), the BIA concluded, gives effect to the statutory requirement that the conversion be "automatic[ ]," *i.e.*, not dependent on the filing of a second petition. Thus, as construed by the BIA, § 1153(h)(3) provides that once the F2A beneficiary turns 21 years old under the formula set forth in § 1153(h)(1), he or she is "automatically converted" to the "appropriate category," *i.e.*, F2B, and he or she "retains" the more favorable priority date given to the "original petition," *i.e.*, the F2A petition when it was originally filed.

The BIA noted that this interpretation of § 1153(h) is consistent with the legislative history of the CSPA, which, according to the BIA, does not support the broader reading of the terms "conversion" and "retention" that Wang urged. 25 I. & N. Dec. at 37-39. According to the BIA, the legislative history of the CSPA demonstrates that Congress intended to provide for the retention of child status "without displacing others who have been waiting patiently." *Id.* at 37 (quoting 148 Cong. Rec. H4989-01 (daily ed. July 22, 2002) (statement of Rep. Jackson-Lee); 147 Cong. Rec.

H2901-01 (daily ed. June 6, 2001) (statement of Rep. Sensenbrenner)). Further, the BIA found that the CSPA's legislative history demonstrates that Congress was concerned only with delay by the agency in the processing of visa petitions, and not "delays resulting from visa allocation issues, such as the long wait associated with priority dates," *i.e.*, numerical limitations established by Congress. *Id.* Most importantly, the BIA reasoned, if Wang were granted the earlier priority date, his daughter would " 'jump' to the front of the line . . . , thereby causing all the individuals behind her to fall further behind" in the line. *Id.* at 38.

G. The District Court's Decision

After the BIA issued *Wang*, the Government moved to dismiss the complaint, arguing that *Wang* had decided the issue on essentially identical facts, and that the district court owed *Chevron* deference to the BIA's interpretation of § 1153(h)(3). (A-4). On April 27, 2010, the district court issued a decision and order holding that § 1153(h)(3) is ambiguous and that the BIA's construction of the statute was "far from arbitrary and capricious," and "carefully reasoned in line with the related immigration regulations and the statute's text, legislative history, and purpose." (A-70-71). Accordingly, the district court deferred to the BIA's construction of the CSPA under *Chevron*, granted the Government's motion, and dismissed the complaint. (A-4, A-44).

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Summary of Argument

The Court should affirm the judgment of the district court and defer to the BIA's interpretation of 8 U.S.C. § 1153(h)(3). Published, precedential decisions of the BIA that interpret ambiguous provisions of the INA are entitled to *Chevron* deference, unless the BIA's interpretation is arbitrary, capricious, or manifestly contrary to the statute. *See infra* Point A. The BIA correctly held that § 1153(h)(3) is ambiguous. Whereas §§ 1153(h)(1) and (h)(2) "clearly define the universe of petitions that qualify for the delayed processing formula," § 1153(h)(3) refers vaguely to both the "petition" and the "original petition," without "expressly stat[ing] which petitions qualify for automatic conversion and retention of priority dates." *Wang*, 25 I. & N. Dec. at 33. Congress's failure to specify the types of petitions to which § 1153(h)(3) applies creates ambiguity as to which petitions are covered. Under settled *Chevron* principles, the Court therefore should defer to the BIA's resolution of the ambiguity unless it is arbitrary, capricious, or manifestly contrary to the statute. *See infra* Point B.

The BIA's decision in *Wang* is reasonable and entitled to *Chevron* deference. *See infra* Point C. The BIA's construction of § 1153(h)(3) interprets the terms "conversion" and "retention" consistently with other relevant provisions of the CSPA and immigration regulations. *See infra* Point C.1. The BIA's construction also gives effect to Congress's directive that petitions "shall *automatically* be converted," without the need to file subsequent petitions. *See infra* Point C.2. The BIA's interpretation is supported by the legislative history of the CSPA, which makes clear that Congress did not

intend for 8 U.S.C. § 1153(h)(3) to apply to cases (such as this one) involving "aging-out" due to delays caused by Congressionally-mandated numerical limitations, as opposed to administrative delays. *See infra* Point C.3.a. Nor did Congress intend to permit beneficiaries to jump ahead of others waiting in line for a visa, as Plaintiff Cen seeks to do here. *See infra* Point C.3.b.

For these reasons, every court to have considered the issue thus far has agreed with the BIA that § 1153(h)(3) is ambiguous, and deferred to the BIA's reasonable construction of the statute. *See infra* Point C.4. This Court likewise should defer to the BIA's interpretation and affirm the judgment of the district court.

ARGUMENT

THE DISTRICT COURT PROPERLY DEFERRED TO THE BIA'S CONSTRUCTION OF § 1153(h)(3)

A. Standard of Review and Principles of *Chevron* Deference

This appeal presents solely a question of law: the appropriate interpretation of 8 U.S.C. § 1153(h)(3). The Court reviews questions of statutory construction *de novo*. *United States v. Lucien*, 347 F.3d 45, 50 (2d Cir. 2003). However, the Court "must give appropriate deference under [*Chevron*] to the BIA's published, precedential interpretations of the Immigration and Nationality Act." *Baraket v. Holder*, __ F.3d __, 2011 WL 135760, at *2 (2d Cir. Jan. 18, 2011); *see also Michel v. INS*, 206 F.3d 253, 262 (2d Cir. 2000) ("[W]here the BIA is interpreting . . . the INA, *Chevron*

deference is warranted."); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (explaining that where a "Court of Appeals confront[s] questions implicating [the BIA's] construction of the statute which it administers, the court should [apply] the principles of deference described in *Chevron*").

Under *Chevron*, the Court first asks whether Congress " 'has directly spoken to the precise question at issue,' " and whether " 'the intent of Congress is clear.' " *Medina v. Gonzales*, 404 F.3d 628, 633 (2d Cir. 2005) (quoting *Chevron*, 467 U.S. at 842-43). If so, " '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.* If, however, the Court determines that the statute is silent or ambiguous with respect to the specific question at issue, then it must consider "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 634. In other words, the Court defers to the BIA unless the BIA's interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Mora v. Mukasey*, 550 F.3d 231, 234 (2d Cir. 2008) (citations omitted). Courts accord deference because they "presum[e] that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency and desired the agency (rather than the court) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996). If the statute is ambiguous, the Court should not substitute its judgment for that of the agency, even if the agency's interpretation "is not the reading the court would have

reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11.

B. Section 1153(h)(3) Is Ambiguous

To determine whether a statute is ambiguous, a reviewing court should look at the language of the statute itself, the specific context in which it is used, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also Serv. Employees Int'l, Inc. v. Director, Office of Workers Compensation Prog.*, 595 F.3d 447, 453 (2d Cir. 2010).

With respect to the text of the statute, the BIA correctly noted that §§ 1153(h)(1) and (h)(2) "clearly define the universe of petitions that qualify for the delayed processing formula." *Wang*, 25 I. & N. Dec. at 33. 8 U.S.C. § 1153(h)(1) states that it is "applicable" to "petition[s] described in paragraph (2)." 8 U.S.C. § 1153(h)(1). Paragraph (h)(2), in turn, states that the "petition described in this paragraph" is either "a petition filed under section 1154 of this title for classification of an alien child under subsection (a)(2)(A) of this section [*i.e.*, an F2A petition seeking to classify a child as the child of an alien lawfully admitted for permanent residence]," 8 U.S.C. § 1153(h)(2)(A), or "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 [*i.e.*, a family-based or employment-based petition in which a spouse or child of the beneficiary would have a derivative interest]," 8 U.S.C. § 1153(h)(2)(B).

By contrast, § 1153(h)(3) does not refer to paragraph (h)(2) or otherwise specify exactly which petitions it is

intended to cover. Rather, it refers only to the "alien's petition" that "shall automatically be converted," but "does not expressly state which petitions qualify for automatic conversion and retention of priority dates." *Wang*, 25 I. & N. Dec. at 33. The district court (and the BIA) thus properly concluded that there is ambiguity as to which types of petitions are covered by § 1153(h)(3), as has every other court to have considered the issue. *See Zhong v. Novak*, No. 08-4597, 2010 WL 3302962, at *7 (D.N.J. Aug. 18, 2010) ("Section [1153(h)(3)] is ambiguous at *Chevron* step one" because "it only vaguely refers to 'petitions' that qualify for conversion and priority date retention, without expressly specifying *which* petitions qualify for this favorable treatment.") (emphasis in original); *Co v. U.S. Citizenship & Immigration Servs.*, No. CV 09-776-MO, 2010 WL 1742538, at *3 (D. Or. Apr. 23, 2010) ("The BIA determined that § 1153(h)(3) is ambiguous because it does not state the types of petitions eligible for automatic conversion and priority date retention. I agree with the BIA's determination."); *Zhang v. Napolitano*, 663 F. Supp. 2d 913, 919 (C.D. Cal. 2009) ("The Court finds that [Section 1153(h)(3)] is ambiguous at *Chevron* step one, and endorses the explanation of this ambiguity articulated in *Wang* itself."); *Costelo v. Chertoff*, No. SA08-00688-JVS, 2009 WL 4030516, at *3 (C.D. Cal. Nov. 10, 2009) ("[T]he Court finds that Section 203(h)(3) [8 U.S.C. § 1153(h)(3)] is ambiguous."); *appeal docketed*, No. 09-56846 (9th Cir. Nov. 19, 2009).*

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* *Costelo*, which is currently on appeal to the Ninth Circuit, was filed as a class action, and on July 19, 2009, the district court certified a class consisting of

Plaintiffs and *amicus curiae* contend that § 1153(h)(3) is unambiguous because it purportedly is clear that Congress intended the conversion and retention provisions of § 1153(h)(3) to apply to the petitions specified in § 1153(h)(2). Plaintiffs' Br. at 19-20, *Amicus* Br. at 4-5.* As the district court correctly noted (A-60-61), however, Congress's use of "paragraph" rather than "subsection" in § 1153(h)(2) is significant. The district court declined to "conclude that the petitions described in § 1153(h)(2) clarify the vagueness of those described in § 1153(h)(3)," because "the former specifically describe[s] only the 'petition[s] described *in*

"[a]liens who became lawful permanent residents as primary beneficiaries of third- and fourth-preference visa petitions listing their children as derivative beneficiaries, and who subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters, for whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to § 203(h)(3)." *Costelo*, 2009 WL 4030516, at *1. Li is not a class member bound by *Costelo* because she was the beneficiary of a second (rather than third or fourth) preference visa petition. *Cf. Liao v. Holder*, 691 F. Supp. 2d 344, 353-54 (E.D.N.Y. 2010) (dismissing complaint on *res judicata* grounds without reaching merits because plaintiffs were members of *Costelo* class).

* Citations to "Plaintiffs' Br." and "*Amicus* Br." are, respectively, to the corrected brief filed by Plaintiffs on November 3, 2010 (docket no. 47), and the brief filed by *amicus curiae* American Immigration Council on October 29, 2010 (docket no. 42).

this paragraph,' and not 'petitions described in this [subsection]' or 'the petitions described in this paragraph [and the next paragraph].' " (A-61 (emphasis in original)).

To accept Plaintiffs' argument, this Court would have to construe "paragraph" in § 1153(h)(2) as synonymous with "subsection," which the district court appropriately declined to do. (A-61); *Phong Thanh Nguyen v. Chertoff*, 501 F.3d 107, 114 (2d Cir. 2007) (observing that courts presume that Congress "says in a statute what it means and means in a statute what it says"). Had Congress intended for the petitions described in subsection (h), paragraph (2), to apply to all of subsection (h), it would have so specified. For example, Congress easily could have said in § 1153(h)(3), as it did in § 1153(h)(1), that (h)(3) is "applicable" to the "petitions described in paragraph (h)(2)." Moreover, § 1153(h)(3) itself uses both "paragraph" and "subsection," making it highly unlikely that both words were intended to mean the same thing.

Accordingly, the Court should "refrain from concluding here that the differing language in [§§ 1153(h)(2) & (h)(3)] has the same meaning in each." *Russello v. United States*, 464 U.S. 16, 23 (1983); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) ("A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."); *United States v. Pettus*, 303 F.3d 480, 485 (2d Cir. 2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts

intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal quotation marks omitted).

Section 1153(h)(3) is also ambiguous with regard to how the "automatic[]" conversion would operate *vis-a-vis* different family-preference categories. In some instances—such as when an F2A petition (child of legal permanent resident) converts to F2B (adult son or daughter of legal permanent resident)—the operation of § 1153(h)(3) would be straightforward. The petition would convert automatically from F2A to F2B upon the child reaching the age of 21, but retain the original priority date. But where, as here, the beneficiary of the original petition is a derivative under § 1153(d), the operation of § 1153(h)(3) is unclear. When Cen aged out, there was no preference category to which his petition could have been "automatically" converted, because there was (and is) no preference category for grandchildren of legal permanent residents. Thus, if his petition did convert "automatically"—from F2B to the "appropriate category"—it would have converted to no category at all.* As explained *infra* in Point C.2,

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* This also explains why Plaintiffs' argument that § 1153(h)(3) must provide automatic conversion and priority-date retention to *all* derivative beneficiaries under § 1153(d), Plaintiffs' Br. at 19, is incorrect. Section 1153(d) is the section that creates derivative status, *i.e.*, it provides that a minor "child" is entitled to the "same status" and "same order" as a primary-beneficiary parent. 8 U.S.C. § 1153(d). Some derivative beneficiaries under Section 1153(d)—such as children of legal permanent residents—are eligible to be primary

Congress's direction in § 1153(h)(3) that petitions "shall be automatically converted" supports the BIA's interpretation that paragraph (h)(3) does not in fact apply in cases like this one. But, at the very least, § 1153(h)(3) is ambiguous as to whether a petition would convert "automatically" when there is no preference category into which the aged-out alien can be converted.

C. The BIA's Construction of § 1153(h)(3) Is Not Arbitrary, Capricious, or Manifestly Contrary to the Statute

At *Chevron* step two, the Court must determine "whether the agency's answer is based on a permissible construction of the statute," *Aguirre-Aguirre*, 526 U.S. at 424, and must defer "to any reasonable interpretation by the Board," *Wong v. Holder*, __ F.3d __, 2011 WL 293762, at *9 (2d Cir. Feb. 1, 2011).

Applying these standards, the district court correctly held that *Wang* is "far from arbitrary and capricious," and, in fact, is "carefully reasoned in line with the related immigration regulations and the

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beneficiaries in their own right. Thus, when they "age out," there is a category (F2B) into which they can convert automatically. Other derivative beneficiaries under Section 1153(d), such as grandchildren like Cen, are not eligible to be primary beneficiaries in their own right. It was reasonable for the BIA to conclude, as it did, that aliens who could have been primary beneficiaries are entitled to automatic conversion, but aliens who never were eligible to be primary beneficiaries do not gain that ability simply by virtue of having once been derivative beneficiaries.

statute's text, legislative history, and purpose." (A-70-71).

1. The BIA Construed the Terms "Conversion" and "Retention" Consistently with Other Family-Based Provisions of the CSPA and Immigration Regulations

In *Wang*, the BIA resolved the ambiguity as to which petitions qualify for "conversion" and "retention" of priority date in part by looking at how those terms are used in other provisions of the CSPA and immigration regulations related to family preferences.

For example, the BIA noted that "in immigration regulations, the phrase 'automatic conversion' has a recognized meaning." *Wang*, 25 I. & N. Dec. at 34. The BIA cited as an example 8 C.F.R. § 204.2(i), which has been in effect since 1987, and which provides for the "automatic conversion of preference classification" in certain circumstances, including "by change in the beneficiary's marital status," by "the beneficiary's attainment of the age of twenty-one years," and by "the petitioner's naturalization." 8 C.F.R. § 204.2(i)(1)-(i)(3). The BIA also pointed to INA § 201(f), 8 U.S.C. § 1151(f), which was enacted as part of the CSPA. *Wang*, 25 I. & N. Dec. at 34 & n.8. Section 1151(f) provides rules for determining whether certain aliens are immediate relatives, and refers to conversion of petitions based on certain events. 8 U.S.C. § 1151(f)(2) (noting petition may be converted "due to the naturalization of the parent"); 8 U.S.C. § 1151(f)(3) (noting petition may be converted "due to the legal termination of the alien's marriage"). These provisions support the BIA's interpretation of § 1153(h)(3), because they demonstrate

that the word "conversion" typically has been used elsewhere in the CSPA and in immigration regulations to refer to a situation in which a beneficiary converts from one preference category to another "without the need to file a new visa petition." *Wang*, 25 I. & N. Dec. at 35.

With respect to "retention," the BIA pointed to 8 C.F.R. § 204.2(a)(4), which provides that if a derivative beneficiary of an F2A petition reaches the age of twenty-one prior to the issuance of a visa to his or her alien parent, "a separate petition will be required," but "the original priority date will be retained if the subsequent petition is filed by the same petitioner." 8 C.F.R. § 204.2(a)(4). The BIA construed "retention" in § 1153(h)(3) similarly—*i.e.*, to apply only to situations where a subsequent petition is filed by the same petitioner. *Wang*, 25 I. & N. Dec. at 35.

Thus, the BIA construed "conversion" and "retention" in § 1153(h)(3) consistently with how those terms have been used in other immigration statutes and regulations related to family-based preferences. This was reasonable, as we "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts," *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988), including relevant regulations, *see United States v. Wilson*, 290 F.3d 347, 357 (D.C. Cir. 2002) (explaining that the "Executive Branch's interpretation of the law through its implementation colors the background against which Congress was legislating," and "Congress is presumed

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to be aware of established practices and authoritative interpretations of the coordinate branches").*

Plaintiffs and *amicus curiae* contend (Plaintiffs' Br. at 27; *Amicus* Br. at 12-13) that the BIA's interpretation of the terms "conversion" and "retention" in § 1153(h)(3) is unreasonable because, according to Plaintiffs, the BIA "overlook[ed] the many other sections of immigration law permitting conversion and retention of priority date where the petitioner is not the same." Plaintiffs' Br. at 25. In support of this argument, Plaintiffs and *amicus curiae* cite various immigration regulations and other provisions of the INA, including 8 C.F.R. §§ 204.5(e) and 204.12(f)(1), which address retention of priority dates for certain employment-based petitions; 8 C.F.R. § 204.2(h)(2), which allows for "transfer" of priority dates for certain spouses and children who are the victims of abuse; Section 421(c) of the Patriot Act, which allows a petitioner to "maintain" a priority date in certain circumstances when the

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* Plaintiffs argue that the BIA's interpretation of § 1153(h)(3) is too narrow because it restricts automatic conversion and retention to aliens who convert from F2A to F2B, which was already permitted under preexisting regulations, specifically 8 C.F.R. § 204.2(a)(4). Plaintiffs' Br. at 29-30. But Congress can codify a preexisting regulation, and it effectively did that in § 1153(h)(3), although it eliminated the need for the "same petitioner" to file a separate petition, thus making the process less expensive for the petitioner alien (who saves filing fees associated with filing multiple petitions) and more efficient for CIS (which has fewer petitions to adjudicate).

original petition has been revoked due to specified terrorist activity; and the Western Hemisphere Savings Clause, Pub. L. No. 94-571, 90 Stat. 2703, which "accords" previous priority dates to certain aliens. Plaintiffs' Br. at 25-26; *Amicus* Br. at 12-13, 21.

Plaintiffs' argument is unpersuasive for several reasons. First, whereas the BIA looked at how the words "conversion" and "retention" are used elsewhere in the CSPA and in immigration regulations, many of the provisions Plaintiffs cite do not even use those terms. For example, 8 C.F.R. § 204.2(h)(2) (cited in Plaintiffs' Br. at 26; *Amicus* Br. at 21) does not use any form of the words "conversion" or "retention"; rather, it provides for the "transfer" of a priority date under certain circumstances. *See* 8 C.F.R. § 204.2(h)(2) (providing that a "self petitioner who has been the beneficiary of a visa petition filed by the abuser . . . will be allowed to *transfer* the visa petition's priority date") (emphasis added). Similarly, Section 421(c) of the USA Patriot Act does not use the words "conversion" or "retention." *See* USA Patriot Act of 2001, Pub. L. No. 107-56, § 421(c), 115 Stat. 272 (providing that the "alien may *maintain* [the] priority date") (emphasis added); *see also* Western Hemisphere Savings Clause, Pub. L. No. 94-571, 90 Stat. 2703 (providing that an alien "shall be *accorded* the priority date previously established by him") (emphasis added).

Second, Plaintiffs' argument is unpersuasive because it relies on statutes and regulations that are unrelated to family-based preferences. Whereas the BIA relied on, for example, relevant family preference-related regulations that address conversion "by change in the beneficiary's marital status," 8 C.F.R.

§ 204.2(i)(1), by "the beneficiary's attainment of the age of twenty-one years," 8 C.F.R. § 204.2(i)(2), and by "the petitioner's naturalization," 8 C.F.R. § 204.2(i)(3), Plaintiffs rely on provisions relating to employment-based preferences, victims of abuse, and individuals who associate with terrorists. As the *Zhong* court explained in rejecting the same arguments, "the cited examples are entitled to less weight because they do not relate to family-preference visas, as the regulations cited in *Wang* do. The rationales behind these other regulations are significantly different than the intent underlying the family-based visa petition framework, and reflect different policy choices." *Zhong*, 2010 WL 3302962, at *8. For example, the "basis for employment visas is the United States' need for particular skills. Based on this national need, Congress has decided that an alien beneficiary may change employers, but retain the priority date from the visa petition filed by their previous employer." *Id.* (citing 8 C.F.R. § 204.5(e)). Likewise, Congress's decision to allow victims of abuse to retain their priority dates likely reflects Congress's concern that abuse victims might continue relationships with their abusers for visa purposes.

2. The BIA Gave Effect to the Term "Automatically"

In addition to construing the terms "conversion" and "retention" consistently with relevant CSPA provisions and immigration regulations, the BIA's construction of § 1153(h)(3) accords the word "automatically" its plain meaning. *See, e.g.*, *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999) ("It is axiomatic that the plain meaning of a statute controls its interpretation."). By construing the phrase "the alien's petition shall

automatically be converted" to mean that a visa petition will convert from one category to another "without the need to file a new visa petition," *Wang*, 25 I. & N. Dec. at 35, the BIA's interpretation gives meaning and effect to the word "automatically," which typically refers to an action that is "largely or wholly involuntary," or "done spontaneously or unconsciously." *See* http://www.-merriam-webster.com/dictionary/automatic.

By contrast, under Plaintiffs' and *amicus curiae*'s proposed construction of § 1153(h)(3), the conversion would not be "automatic" at all, but rather dependent on the filing of a second petition years later. As explained *supra* in Point B, there could not have been any "automatic" conversion when Cen aged out, because there was no category into which he could have been converted. His "conversion," under Plaintiffs' theory, would occur only after a multi-year gap in his eligibility, and only after another petition was filed for him by another petitioner. Plaintiffs essentially seek to excise the word "automatically" from the statute, which the Court is not permitted to do. *Triestman v. United States*, 124 F.3d 361, 376 (2d Cir. 1997) ("[W]e assume that Congress intended that language which it chose to employ actually was to have meaning; effect must be given, if possible, to every word, clause and sentence of a statute . . . so that no part will be inoperative or superfluous, void or insignificant.").

Amicus curiae attempts to avoid this problem by arguing, based on a Supreme Court case from 1865, that the word "and" in the phrase "the alien's petition shall automatically be converted to the appropriate category *and* the alien shall retain the original priority date" in fact means "or." *Amicus* Br. at 16-17. This

argument strains credulity and certainly does not provide a reason for the Court to substitute its judgment for that of the BIA.

To be sure, a court confronted with a "difficult issue[] of construction" should "consider how a disjunctive or conjunctive form fits into the statutory scheme as a whole." *Mizrahi v. Gonzales*, 492 F.3d 156, 164 (2d Cir. 2007). But Congress's use of the word "and" in § 1153(h)(3) does not present a difficult issue of construction. "The usual meaning of the word 'and' . . . is conjunctive, and unless the context dictates otherwise, the 'and' is presumed to be used in its ordinary sense." *Reese Bros. Inc. v. United States*, 447 F.3d 229, 235-36 (3d Cir. 2006).

Furthermore, this Court is not considering § 1153(h)(3) in a vacuum; rather, the question is whether "and" so clearly means "or" that the BIA's construction of "and" to mean "and" is not entitled to deference. In other words, it would not be enough for the Court to conclude that "or" is a plausible meaning of "and," or that "or" is one of several possible meanings of "and." The Court would have to conclude that "and" *unambiguously* means "or" in § 1153(h)(3). There is no basis for such a conclusion.

3. The BIA's Interpretation of § 1153(h)(3) Is Consistent with the Legislative History of the CSPA

The legislative history of the CSPA reveals that Congress intended to address delays caused by the INS's inability to adjudicate visas promptly, rather than delays resulting from statutorily-imposed numerical limitations. Congress also wanted to prevent line-

jumping, *i.e.*, allowing beneficiaries of the CSPA to jump ahead of others who have been waiting for years to obtain a visa. As explained below, the BIA's interpretation of § 1153(h)(3) furthers both goals.

a. Congress Intended to Address Administrative Delays

In the House Report accompanying H.R. 1209, 107th Congress (2001), the House Committee on the Judiciary identified the purpose of the bill as modifying

> provisions of the Immigration and Nationality Act determining whether an alien is considered a child and eligible for permanent resident status as an immediate relative of a U.S. citizen, principally by providing that the alien's status as a child is determined as of the date on which the petition to classify the alien as an immediate relative is filed.

H.R. Rep. No. 107-45, at 1-2 (2001), *reprinted in* 2002 U.S.C.C.A.N. 640, 640. The report emphasized that the motivation for the legislation was to correct unfairness resulting from administrative delays in the processing of visa petitions. It noted, for example, that the INS faced a "backlog of unprocessed applications exceed[ing] 986,000," and that, as a result, the INS was "taking up to 3 years to process applications." *Id.* It noted further that "the cause that necessitates H.R. 1209 is the unacceptably long backlog of adjustment of status (to permanent residence) cases before the INS." *Id.* at **3.

Other reports of the House Committee on the Judiciary and statements by members of the House of Representatives similarly express concern over delays in the adjudication process, rather than waiting times associated with numerical limitations. *See, e.g.*, H.R. Rep. No. 107-807, at 50 (2003) (noting that "with the INS taking up to three years to process applications, children who were under 21 when their petitions were filed may find themselves over 21 by the time their applications were processed"); 148 Cong. Rec. H4989-01 (daily ed. July 22, 2002) (statement of Rep. Jackson-Lee) ("INS processing delays have caused up to a 3-year delay for adjustment."); 147 Cong. Rec. E1095-03 (daily ed. June 13, 2001) (statement of Rep. Mink) (stating that CSPA "is but one way to ensure that children of citizens are not penalized because it takes the INS an unacceptable length of time to process their adjustment of status petitions"); 147 Cong. Rec. S3275-01 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein) (noting the "expected three to five year wait for the INS to adjudicate adjustment of status applications").*

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* Plaintiffs omit the majority of the legislative history from their brief and cite only one statement from Sen. Feinstein, in which she expressed concern that some aliens were aging out "because [of] growing immigration backlogs in the immigration visa category." Plaintiffs' Br. at 24. Even if this could be read to express support for Plaintiffs' position, the version of the CSPA to which Sen. Feinstein's statement related was not the version that ultimately was enacted and, in any event, only provided for retention of priority date "if the alien attained 21 years of age after the date on which

Courts have recognized that Congress, in enacting the CSPA, was motivated by a desire to correct unfairness caused by administrative delays. As the Ninth Circuit explained,

> Congress had but one goal in passing the Child Status Protection Act, an affirmative one—to override the arbitrariness of statutory age-out provisions that resulted in young immigrants losing opportunities, to which they were entitled, because of administrative delays . . . . Congress passed the Act to provide broad protection to young immigrants who were required to wait years for their approved visas to become available, only to have agency delays in processing their applications or petitions prevent them from obtaining permanent residence status.

Padash, 358 F.3d at 1174; *see also Henriquez v. Ashcroft*, No. 02 Civ. 7355, 2004 WL 3030116, at *5 (S.D.N.Y. Nov. 23, 2004) ("The principal purpose of the CSPA was to provide relief to children . . . [who] were denied relief because administrative delays in processing their applications caused them to 'age out' . . . *before action was taken on their applications*.") (emphasis added); *Chen v. Rice*, No. 07-4462, 2008 WL 2944878, at *7 (E.D. Pa. July 28, 2008) ("The CSPA was

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the petition was filed but while the petition is pending before the Attorney General," which obviously was not the case for Cen. 147 Cong. Rec. S3275-01 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein).

passed to expedite the unification of qualifying derivative family members . . . *which had been delayed by processing backlogs*.") (emphasis added).

As the BIA noted in *Wang*, its interpretation of § 1153(h)(3) gives effect to this legislative intent. Sections 1153(h)(1) and (h)(2), when read in tandem, permit an alien in certain circumstances to subtract from his age the amount of time that his application has been pending with CIS—*i.e.*, the time from the date he filed his petition to the date that CIS approved it. For example, if an F2A petition is filed by a legal permanent resident on behalf of a "child" who is 20 years old, and the application is pending with CIS for two years before it is approved (and the beneficiary reaches the age of 22 during that time), under §§ 1153(h)(1) & (h)(2) the beneficiary is permitted to subtract from his age the amount of time (two years) that the application was pending. Thus, although the beneficiary's age in reality is 22, for immigration purposes he would be considered only 20, and he would retain F2A eligibility if a visa were immediately available.

By contrast, 8 U.S.C. § 1153(h)(3) only applies if "an alien is determined under paragraph (1) to be 21 years of age or older." In other words, § 1153(h)(3) applies after an alien has already been given credit under (h)(1) and (h)(2) for the time that the application was pending with the agency, but was determined to be over the age of 21 even accounting for that time. In that situation, the alien has "aged out" not because of delay in processing at the agency level—he has already been given credit for that in the form of months or years that have been subtracted from his age. Rather, he has aged out because of the delay resulting from the annual caps

that Congress has placed on family-preference visas. As the courts cited above have recognized, and as the legislative history makes clear, Congress intended to adjust the "age out" provisions to correct for administrative processing delays, not for the waiting times resulting from annual limitations.

Plaintiffs contend that their more expansive interpretation of the CSPA is appropriate because Congress, in enacting the CSPA, intended to keep families together. According to Plaintiffs, under the BIA's construction of § 1153(h)(3), "[a] child may be faced with the possibility of being separated from his or her parents[,] as in the instant case." Plaintiffs' Br. at 11. By providing that children who are under the age of 21 may accompany their parents as derivative beneficiaries, however, Congress evidently was concerned with the separation of parents not from their children, but from their *minor* children. This is a reasonable distinction, as "[a]n adult son or daughter can reasonably be expected to live apart from his or her parents while waiting for his or her [F2B visa] numbers to become available." *Alvidrez*, 311 F. Supp. 2d at 1166.

b. Congress Did Not Intend to Permit Line Jumping

As the BIA noted in *Wang*, there was discussion in the House of Representatives of the legislative intent to allow for retention of child status "without displacing others who have been waiting patiently in other visa categories." *Wang*, 25 I. & N. Dec. at 37 (citing 148 Cong. Rec. H4989-01 (daily ed. July 22, 2002) (statement of Rep. Jackson-Lee)). Courts also have recognized that this was the intent of Congress when it

enacted the CSPA. *See Zhong*, 2010 WL 3302962, at *9 (finding that Plaintiffs' proposed interpretation "would be inconsistent with Congress's . . . concern with not displacing others who have been patiently waiting in other visa categories"); *Zhang*, 663 F. Supp. 2d at 920 (Congress "concerned with not displacing others").

Plaintiffs' proposed interpretation of the CSPA would, in effect, allow Cen to circumvent the waiting period associated with the annual limitations and jump to the front of the line. Although they argue that this result would further Congress's goal of family reunification, the immediate reunification of Plaintiffs' family necessarily would prolong the separation of other families who have been waiting for years.* Tens of thousands of Chinese legal permanent residents and citizens file petitions on behalf of their relatives every year, and due to the annual cap put in place by Congress, the vast majority of the intended bene-

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* A concrete example illustrates this point. As Plaintiffs' complaint demonstrates, in September 2008, visas were available for beneficiaries of F2B petitions with priority dates earlier than December 15, 1999. (A-31). Had CIS granted Li's request to backdate her petition to 1994, Cen would have been immediately eligible for a visa, and Li and Cen, who as of September 2008 had only been separated for three years (because Li arrived in the United States in 2005), would have been able to reunite immediately. But Cen would have jumped ahead of Chinese F2B beneficiaries and petitioners who had, as of September 2008, been separated for at least *nine* years, since at least December 1999.

ficiaries of those petitions will have to wait for years before they become eligible for a visa. Rather than wait their turn in line, Plaintiffs seek to benefit from the happenstance that Cen was once a derivative beneficiary of a petition filed by his grandfather on his mother's behalf. Li did not even file a petition on Cen's behalf until three years after she arrived in the United States (A-8-9, A-17; Plaintiffs' Br. at 4), and as the BIA observed, under Plaintiffs' proposed interpretation, "a derivative beneficiary would never age out or lose a previous priority date," *Wang*, 25 I. & N. Dec. at 36, but would retain a priority date in perpetuity, even if an unrelated petition were filed on his behalf decades in the future.

By contrast, interpreting § 1153(h)(3) to permit only F2A to F2B conversion, as the BIA did in *Wang*, avoids the line jumping that Congress intended to prevent. Under this type of conversion, the beneficiary moves from a category with a relatively short waiting line (F2A) to a category with a much longer waiting line (F2B). An example taken from the Visa Bulletin that was annexed to Plaintiffs' complaint in district court (A-31) illustrates this. As of September 2008, with respect to all countries except Mexico and the Philippines, F2A visas were available for beneficiaries with priority dates earlier than December 1, 2003, while F2B visas were available only for beneficiaries with priority dates earlier than December 15, 1999.* (A-31). In other

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* The difference in the waiting times is a result of the fact that, under § 1153(a)(2), at least 77 percent of second preference category visas must be allocated to F2A.

words, the waiting time for F2A visas was four years shorter than the waiting time for F2B visas for all countries except Mexico and the Philippines.* Thus, by allowing conversion from F2A to F2B, § 1153(h)(3) actually requires the converted beneficiaries to wait on a longer line, but they are permitted to "retain" the priority date of the "original petition," and therefore they are not required to start at the end of the longer line.

The BIA's interpretation of § 1153(h)(3) in *Wang* effectuates Congress's intent by giving an alien credit for the time spent waiting in the pre-conversion category, but, unlike Plaintiffs' proposed interpretation, does not allow the alien to jump all the way to the front of the line.

4. Every Court to Have Considered the Issue Has Deferred to the BIA's Interpretation of § 1153(h)(3)

Although no Court of Appeals has yet addressed the appropriate interpretation of 8 U.S.C. § 1153(h)(3), every district court to have considered the question has rejected Plaintiffs' arguments and deferred to the BIA's construction of the CSPA. *See Zhong*, 2010 WL 3302962, at *9 ("[T]he Court finds that the BIA's interpretation of [8 U.S.C. § 1153(h)(3)] embodied in *Wang* is reasonable and entitled to *Chevron*

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* For Mexico and the Philippines, the difference between the F2A and F2B waiting lines was even longer—for Mexico F2B visas were not even available; for the Philippines the difference was more than six years. (A-31).

deference."); *Co*, 2010 WL 1742538, at *7 ("The BIA's interpretation of § 1153 is entitled to deference."); *Zhang*, 663 F. Supp. 2d at 921 ("*Wang* is entitled to *Chevron* deference, and Defendants did not act arbitrarily or capriciously in refusing to apply [§ 1153(h)(3)] to the adult sons and daughters in these cases."); *Amershi v. Napolitano*, No. 6:09-cv-106, 2009 WL 5173492 (M.D. Fl. Dec. 9, 2009) ("The law squarely sides with [the Government], [stating] that a child who 'ages out' of derivative status cannot transfer his previous priority date to a new petition filed by a different relative."); *Costelo*, 2009 WL 4030516, at *3 ("[T]he Court finds that Section [1153(h)(3)] is ambiguous and that the BIA's interpretation is reasonable.").

As these courts and the district court below recognized, the BIA's interpretation is consistent with the language of § 1153(h)(3), other relevant provisions of the CSPA and immigration regulations, and the legislative history. The BIA's construction accordingly is reasonable and entitled to deference under *Chevron*.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

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February 22, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 12,198 words in this brief.

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ADDENDUM

8 U.S.C. § 1153(h)

(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.