UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEIMEI LI and DUO CEN,

Plaintiffs,

v. 08 Civ. 7770 (VM)

DANIEL M. RENAUD,[1] Director, Vermont Service Center, U.S. Citizenship and Immigration Services, *et al.*,

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Administrative Decisions

Statutes

Regulations & Rules

Other Materials

PRELIMINARY STATEMENT

Defendants respectfully submit this memorandum in support of their motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

The plaintiffs in this action are a mother, Feimei Li ("Li"), a lawful permanent resident of the United States, and her thirty-year-old son, Duo Cen ("Cen"), who resides in China and seeks to immigrate to the United States. In May 2008, Li filed on behalf of her son a Form I-130 Petition for Alien Relative, which was approved by and United States Citizenship and Immigration Services ("CIS"). However, like many beneficiaries of family visa petitions, Cen will have to wait for a visa before he can immigrate to the United States, because the demand for visas for individuals residing in China far exceeds numerical limitations set by Congress. But because the petition falls into a favorable category, the waiting line is short, at least as compared with the waiting line for Chinese nationals for other categories of family visas. USCIS has assigned Cen a priority date -- in effect, a place on the comparatively short waiting line -- of April 2008, the month in which the petition was filed.

The plaintiffs are not fully satisfied with CIS's decision. They do not dispute that Cen has been properly assigned to the category with the comparatively short waiting line. However, they want to "jump" that line by obtaining an earlier priority date, under which Cen would be able to obtain a visa immediately. The plaintiffs contend that Cen is entitled to the June 1994 priority date of an earlier petition, which Li's father (Cen's grandfather) filed on Li's behalf, and which resulted in her being able to immigrate to the United States in 2005. Cen could not

immigrate to the United States as a result of that earlier petition, because he had reached his 21st birthday by the time a visa became available to Li under that petition, and immigration law permits a son to immigrate under his mother's visa only if he is under 21 years of age.

In effect, the plaintiffs want to "cherry pick" by taking a priority date from an older petition and applying that priority date to a recently filed petition so as to avoid the waiting line. Significantly, if plaintiffs were to prevail, they would obtain a visa for Cen at the expense of another alien who has been waiting for a much longer time. In other words, due to the numerical limitations that Congress has set on visas, if Cen gets his visa now, another alien who has been waiting for years and who would otherwise be entitled to a visa will not get one now. The plaintiffs base their argument on Section 3(3) of the Child Status Protection Act ("CSPA"), Pub. L. No. 107-208, 116 Stat. 927 (2002), § 203(h)(3) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1153(h)(3).

The plaintiffs' argument has been rejected by the Board of Immigration Appeals ("BIA") in a case involving similar facts. *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009). In *Wang*, the BIA held that § 1153(h)(3) does not permit a transfer of the priority date from one petition to another petition, especially where, as here, the petitions were filed by different individuals. The BIA decision is entitled to deference under Supreme Court and Second Circuit case law; indeed, in two recent district court decisions the courts have deferred to the BIA's interpretation of § 1153(h)(3) and rejected claims similar to the claims that the plaintiffs make here.

See Zhang v. Napolitano, __ F. Supp. __, 2009 WL 3347345 (C. D. Cal. Oct. 9, 2009); *Costelo v. Chertoff*, No. SA08-688, 2009 WL 4030516 (C.D. Cal. Nov. 10, 2009). This Court should do the same and dismiss this action.

STATEMENT OF FACTS

A. 1994 Petition

In June 1994, Yong Guang Li, a lawful permanent resident of the United States, filed a Form I-130 Petition for Alien Relative (the "1994 Petition") with the former Immigration & Naturalization Service ("INS"). Complaint ¶ 17 & Exh. F. In the 1994 Petition, Yong Guang Li requested that the INS issue a visa for his daughter, plaintiff Feimei Li -- a Chinese citizen who was the primary beneficiary of that petition -- in the family second-preference category ("F2B"), as the child of a lawful permanent resident of the United States. Complaint ¶ 17. On April 4, 1995, the INS approved the 1994 Petition, with a priority date of June 6, 1994. Complaint ¶ F. At the time that the INS approved the1994 Petition, plaintiff Duo Cen -- who was born in September 1979, and is the son of plaintiff Feimei Li -- was fifteen years old and qualified for "derivative status" as the "child" of Li, the primary beneficiary. Complaint ¶ 8; *see* 8 U.S.C. §§ 1101(b)(1), 1153(d). In other words, had a visa been immediately available to Li, Cen could have immigrated with her to the United States, because he was under 21 years old and therefore was a derivative beneficiary of her visa.

But due to numerical limitations on the number of persons eligible for family-based visas, no visa was immediately available to Li, and a visa did not become

available until March 2005. See Complaint Exhibit B. By this time, however, Cen was 26 years old and, because he was over the age of 21, he no longer qualified as a "child" who could derive beneficiary status from the petition filed by his grandfather on behalf of his mother. Thus, only Li was authorized to immigrate to the United States. Cen remained in China and is waiting until a visa becomes available for him. Complaint ¶ 16.

B. 2008 Petition

Li became a lawful permanent resident of the United States in March 2005. Complaint Exhibit B. On May 1, 2008, she filed a Form I-130 Petition for Alien Relative (the "2008 Petition") with CIS, naming her adult son Cen as the beneficiary, just as her father had done for her. Complaint Exhibit C.[2] In the 2008 Petition, Li requested that CIS issue a visa for Cen, in the family second-preference category, as the unmarried adult son of an alien lawfully admitted for permanent residence. Complaint Exhibit C; *see also* INA § 203(a)(2)(B). In a cover letter that accompanied the 2008 Petition, Li requested a priority date of June 6, 1994, the same priority date given by the INS when it approved her father's 1994 Petition. Complaint ¶ 18 & Exhibit E. CIS approved the 2008 Petition on August 7, 2008, but established the priority date as April 25, 2008. Complaint Exhibit A. This means that Cen must wait several years before a visa becomes available for him.

The number of visas available each year for family preference visas is limited

[2] CIS has succeeded INS as the agency responsible for processing immigration petitions.

by Congress. Complaint Exhibit G at 1. According to the United States Department of State, China in particular has been oversubscribed; that is, the number of applications far exceeds the number of visas allocated per year. *Id.* As a result, there is a waiting period of many years for receipt of visas based on petitions filed for mainland Chinese beneficiaries in the F2B category. For example, as of February 2010, visas are available for petitions filed on or before January 1, 2002, for mainland Chinese beneficiaries of F2B family preferences. *See* U.S. Department of State Visa Bulletin for February 2010, *available at* http://travel.state.gov/visa/frvi/ bulletin/bulletin_1360.html.

STATUTORY BACKGROUND

A. Family Preference Petitions 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 has long 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, 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). In determining the conditions for entry, Congress balances the interests of United States citizens and lawful permanent residents ("LPRs") to reunite with members of their immediate and extended families, as well as the nation's employment needs and interests in encouraging

immigration from many different countries. *See* Congressional Research Service Report for Congress, "Immigration Fundamentals," dated Sept. 15, 1999, http://digital.library.unt.edu/ govdocs/crs/permalink/meta-crs-997:1 ("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*.

There are several different types of "immigrant visas." The family-based immigrant visa category -- the type at issue in this case -- requires a United States citizen or lawful permanent resident "petitioner" to file a Form I-130 with CIS to classify the intended alien "beneficiary" under 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).[3] *See generally Drax v. Reno*, 338 F.3d 98, 113-14 (2d Cir. 2003). There are various categories for spouses, parents, offspring, and siblings.

When an alien files a petition, CIS determines if the factual allegations in the petition are true and whether the alien qualifies as an immigrant beneficiary based upon a valid relationship to the petitioner. 8 U.S.C. § 1154(b). If CIS finds that a classifiable relationship exists between the petitioner and the beneficiary, it

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[3] Although 8 U.S.C. § 1154(a)(1)(A)(i) provides for filing with the "Attorney General," the Homeland Security Act of 2002, Pub. L. No. 107-296 § 451(b), 116 Stat. 2135, 2196 (2002), transferred the authority over these matters to CIS.

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 tantamount to the grant of a visa or permanent residence; rather, 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 ("the approval of Form I-130 results in the beneficiary of the petition being classified . . . for purposes of issuing a visa for admission to the United States; it does not grant a visa or permanent resident status"). 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 take years after a Form I-130 is granted before a visa is available.

Certain aliens are not subject to any numerical limitations; for example, once a petition for them is approved, "immediate relatives" of United States citizens -- *e.g.*, children under 21 years old or spouses -- are immediately eligible for a visa without regard to any numerical limitation. 8 U.S.C. § 1151; *Azizi v. Thornburgh*, 908 F.2d 1130, 1131-32 (2d Cir. 1990). But there are numerical limitations for relatives who do not qualify as "immediate relatives" of a United States citizen, and as to them each approved petition is given a "preference category" and a "priority date." *Drax*, 338 F.3d at 114. The "preference category" is based on the petitioner's relationship with the beneficiary. *Id.* Congress has established four preference categories, each of which is 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 petitioning process, statutory categories, and numerical limits).[4]

Congress has given first preference ("F1") to unmarried adult sons and daughters of United States citizens, with a yearly limit of 23,400. 8 U.S.C. § 1153(a)(1). The second preference 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 ("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 is 114,200 per year, and at least 77% of second preference visas issued must be issued to persons in the first subset, *i.e.*, spouses and children under the age of 21 of lawful permanent residents. 8 U.S.C. § 1153(a)(2)(A), (B). Married adult sons and daughters of United States citizens receive the third preference, with a limit of 23,400 per year. 8 U.S.C. § 1153(a)(3). The fourth preference is reserved for brothers and sisters of United States citizens, with a yearly limit of 65,000. 8 U.S.C. § 1153(a)(4). Significantly, there is no preference category for nieces, nephews, or grandchildren of United States citizens or lawful permanent residents.

Because § 1153(a) limits the number of family visas the Government may

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[4] If a large number of visas are sought for "immediate relatives" of United States citizens in a given fiscal year, the number of visas available under the four preference categories will be reduced in that year. *Bolvito*, 527 F.3d at 430 n.2.

issue for an alien who is not an "immediate relative" of a United States citizen, the alien may have to wait several years before a visa number will become available to him. *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. 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).

If a beneficiary (like Li in 1994) is a parent of a "child" (like Cen in 1994) -- *i.e.*, a son or daughter less than 21 years of age -- who is listed on the I-130, the parent (Li) is referred to as a "primary beneficiary" and the child (Cen) as a "derivative beneficiary." To avoid separating child from parent, 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, Foreign Affairs Manual § 40.1 n.7.1 (derivative interest in visa petition is valid only "as long as the alien following to join has the required relationship with the principal alien") (*quoted in Ward v. Holder*, No. 07-cv-443, 2009 WL 453390, at *3 (M.D. Fla. 2009)). Nonetheless, the interest of a derivative beneficiary in a petition is not the equivalent of an actual preference. For example, if the primary beneficiary of a visa petition dies, then the children who previously

had derivative eligibility lose it. *Ward*, 2009 WL 453390, at *3; *Matter of Khan*, 14 I. & N. Dec. 122 (BIA 1972); *see also Yuk-Ling Wu Jew v. Attorney General*, 524 F. Supp. 1258, 1260-62 (D.D.C. 1981) (death of primary beneficiary resulted in loss of derivative eligibility for his wife and sister). And, as noted, there is no preference category for grandchildren, and thus Yong Guang Li could not have petitioned directly on behalf of Cen, his grandson. Cen's preference was merely derivative of his mother's.

B. The CSPA

While a primary beneficiary parent awaits the adjudication of an immigrant petition or even the administrative issuance of a travel visa, 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 benefit 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). Congress recognized that substantial numbers of beneficiaries were "aging out" due to administrative delays, because the INS was tasked with adjudicating a large number of visa petitions and lacked the resources to adjudicate them promptly. H.R. Rep. 107-807, 2003 WL 131168 at *54 (Leg. Hist.) (House Judiciary Committee Report for second session of 97th Congress); 147 Cong. Rec. S3275-01, 2001 WL 314380, at *1 (Cong. Rec.) (statement of Sen. Feinstein). To protect these beneficiaries from "aging out" due to the delays in adjudication, Congress enacted

the CSPA. 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 are 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, 8 U.S.C. § 1153(h), contains three subsections. Section 1153(h)(1) provides, in effect, 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 USCIS:

> (1) *In general*
>
> For the purposes of subsections (a)(2)(A)[spouses/children of LPRs] and (d)[derivative beneficiaries] of this section, a determination of whether an alien satisfies the age requirement [as a child] 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), . . . ; reduced by
>
> (B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

Section 1153(h)(2) describes certain types of petitions:

> (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 subsection (d) of this title for classification of the alien's parent . . .

Section 1153(h)(3), the provision most directly at issue here, provides as follows:

> (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)(3).

ARGUMENT

THE COURT SHOULD DEFER TO THE BIA'S INTERPRETATION OF 8 U.S.C. § 1153(h)(3) AND HOLD THAT CIS PROPERLY DETERMINED THE PRIORITY DATE IN ACCORDANCE WITH THE CSPA

The claims in the Complaint are wrong on the merits and should be dismissed. The Court should construe § 1153(h)(3) in accordance with a recent BIA published decision, which establishes that plaintiffs are not entitled to the priority date that they seek.[5]

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[5] As a threshold matter, only plaintiff Li has standing to challenge CIS's decision regarding the priority date assigned to the 2008 Petition. A district court action for judicial review of an administrative decision concerning a petition for an immigrant visa may be brought only by the petitioner (Li), not by the beneficiary of the petition (Cen). *Blacher v. Ridge*, 436 F. Supp. 2d 602, 606 n.3 (S.D.N.Y. 2006) (citing 8 C.F.R. § 103.3(a)(1)(iii)(B)); a*ccord*, *Ibraimi v. Chertoff*, No. 07-cv-3644, 2008 WL 3821678 at *3 (D.N.J. 2008); *Morris v. Gonzales*, No. 06-4383, 2007 WL 2740438, at *6 (E.D. Pa. 2007). Because only the petitioner has standing to

A. *Matter of Wang*

The BIA recently issued a published, precedential decision construing § 1153(h)(3) in a case with facts similar to the those presented here. *See Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009). In *Wang*, a United States citizen filed an F4 visa petition in 1992 for her brother ("Wang") as the primary beneficiary, and Wang's wife and children as derivative beneficiaries. Before a visa number became available to Wang in 2005, one of his daughters turned twenty-one, thus losing her derivative status under the petition. After Wang became a lawful permanent resident in October 2005, he filed a separate F2B petition on behalf of his daughter. Like the 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. *Wang*, 25 I. & N. Dec. at 29-32, 34. The BIA rejected Wang's argument.

First, the BIA held that § 1153(h)(3) is ambiguous, as the statute does not expressly state which petitions qualify for "conversion" of category and "retention" of priority date. *Id.* at 33. To resolve the ambiguity, the BIA looked to the use of the terms "conversion" and "retention" in portions of the CSPA other than § 1153(h)(3) and in immigration regulations that were in effect in 2002, when Congress enacted the CSPA. *Wang*, 25 I. & N. Dec. at 34-36.

With respect to the term "conversion," the BIA looked to § 2 of the CSPA, INA

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challenge a decision by USCIS concerning a petition, the only proper plaintiff here is Li. *Blacher*, 436 F. Supp. 2d 606, n.3.

§ 201(f), now codified at 8 U.S.C. § 1151(f). 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." The BIA noted that under § 1151(f), the petition automatically converts without the need for any action, such as the filing of a new petition. *Wang*, 25 I. & N. Dec, at 34-35. The BIA also looked to the use of the term "conversion" in § 6 of the CSPA, INA § 204(k), 8 U.S.C. § 1154(k). *Wang*, 25 I. & N. at 35 n.9. Section 1154(k) provides that a parent's petition for an alien unmarried son or daughter's classification as a family-sponsored immigrant can be 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 petition. *Wang*, 25 I. & N. Dec. at 35 n. 9 (citing 8 U.S.C. § 1154(k)). 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. *Wang*, 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.[6] The BIA found that § 204.2(a)(4) made it clear that "the original priority date will be retained if the subsequent petition *is filed by the same petitioner*" who filed the first petition. *Wang*, 25 I. & N. Dec. at 34 (emphasis added). The BIA noted that § 204.2(a)(4) limited 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." *Wang*, 25 I. & N. Dec. at 34.

After surveying these statutes and regulations, the BIA held that the term "conversion" means a change in classification "without the need to file a new visa petition." *Wang*, 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 these terms 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 these usages. *Id.* at 35.

The BIA then held that § 1153(h)(3) did not apply to the facts of *Wang*. There could be no "conversion," the BIA held, because there was no appropriate category for the beneficiary to convert to at the time she aged out, as there is no category for the niece of a U.S. citizen. *Wang*, 25 I.& N. Dec. at 35. And there could be no

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[6] Derivative beneficiaries of an F2A petition would include the children of a lawful permanent resident who, to reduce the costs associated with the filing of petitions, filed only one petition listing his or her spouse as the primary beneficiary and their children as derivative beneficiaries.

"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, and the second one by Wang himself. *Id.* at 36.

The BIA also held that the legislative history of the CSPA does not support the broader reading of the terms "conversion" and "retention" that was urged by Wang. *Id.* 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 at *H4992, 2002 WL 1610632 at *6-7 (statement of Rep. Jackson-Lee); 147 Cong. Rec. H2901 at *H2902, 2001 WL 617985, at *2-3 (statement of Rep. Sensenbrenner)). Further, the BIA found that the legislative history shows that Congress was concerned with only one type of delay, *i.e.*, 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. *Wang*, 25 I. & N. Dec. at 38. Most importantly, the BIA reasoned, if the plaintiffs were granted the earlier priority date, the beneficiary 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.

B. The Effect of *Wang*

The BIA's decision in *Wang* limits the scope of § 1153(h)(3) to petitions in which the primary or derivative beneficiary is the son or daughter of a lawful permanent resident. Prior to turning 21 years of age, these individuals are in category F2A – children of lawful permanent residents. When these individuals turn 21 years old, they are then converted to category F2B – unmarried adult sons and daughters of lawful permanent residents – without the need for the filing of another petition. By construing § 1153(h)(3) in this manner, the BIA gave effect to the statutory requirement that the conversion be "automatic[]," *i.e.*, not dependent on the filing of a second petition. The BIA dealt with the statute's confusing use of the terms "petition" and "original petition" by, in effect, construing the term "original petition" to mean "the petition as originally filed." 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 original priority date given to the "original petition," *i.e.*, the F2A petition when it was originally filed.

The F2A to F2B conversion permitted by the BIA does not create the "line jumping" that Congress sought to prevent. Under this type of conversion, the beneficiary moves from a category with a relatively short waiting line to a category with a much longer waiting line. As shown in plaintiffs' complaint, for example, in September 2008, with respect to all countries except for 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. Complaint Exhibit G at 3. Thus, the waiting line for F2A visas was four years shorter than the waiting line for F2B visas for all countries except Mexico and the Philippines. For those two countries, the difference between the F2A and F2B waiting lines is even longer -- for Mexico F2A visas were not even available; for the Philippines the difference was more than six years. *Id.* 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. Thus, by allowing conversion only from F2A to F2B, the BIA in *Wang* required the converted beneficiaries to wait on a longer line and thereby effectuated Congress's desire to prevent "line jumping."

Under *Wang*, CIS properly found that plaintiff Cen is not entitled to the June 1994 priority date that plaintiffs seek, as he cannot be "converted" to a new category and he cannot "retain" that priority date. When he reached the age of 21, Cen could not have been "converted" to a new category, as there is no preference category for grandchildren of lawful permanent residents. *Wang*, 25 I. & N. Dec. at 35. Nor can Cen "retain" the June 1994 priority date of the 1994 Petition, because the 1994 Petition was filed by his grandfather, while the 2008 Petition was filed by his mother. *Id.* at 36. In addition, the delay in the issuance of a visa to his mother, Li, is not the type of delay that Congress sought to address in enacting the CSPA, *i.e.*, delay due to CIS's failure to promptly adjudicate a visa application. Instead, as in *Wang*, the delay in the issuance of a visa to Li was due to the fact that the demand

for the visas exceeds the numerical limitations set by Congress, which the CSPA did not alter. *Id.* at 38.

Moreover, as in *Wang*, the plaintiffs' attempt to transfer Li's priority date would result in "line jumping." As the plaintiffs' own complaint demonstrates, if Cen were granted the priority date that he has requested (June 2004), he would immediately jump to the front of the line, because as of February 2010, visas are available for F2B mainland Chinese beneficiaries with priority dates before January 2002, while if he is assigned the priority date that CIS has assigned to him (April 2008), he will have to wait several more years before a visa is available. *Cf.* *Wang*, 25 I. & N. Dec. at 38 (noting that if plaintiffs' argument were accepted "the beneficiary, as a new entrant in the second-preference visa category line, would displace other aliens who have already been in that line for years before her"); *id.* ("[T]he beneficiary would jump to the front of the line by retaining a 1992 priority date, thereby causing all the individuals behind her to fall further behind in the queue.").

The plaintiffs' interpretation of § 1153(h)(3) would result in "line jumping" for another reason. When Cen turned 21 years old, he lost his eligibility under category F2B (because he was no longer a "child"), and thus was not eligible to wait on any "line" (because there is no preference category for grandchildren). The plaintiffs are seeking to transfer him from "no line" status onto the F2B "line," with the earlier priority date, which would put him ahead of others who have been waiting on that "line" for years.

C. The Court Should Defer to the BIA's Interpretation of § 1153(h)(3)

The Second Circuit has repeatedly held that a published, precedential decision of the BIA that interprets an ambiguous provision of the INA is entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). *See, e.g.*, *Mora v. Mukasey*, 550 F.3d 231, 234, 238 (2d Cir. 2008); *Yuen Jin v. Mukasey*, 538 F.3d 143, 150 (2d Cir. 2008); *Maiwand v. Gonzales*, 501 F.3d 101,104 (2d Cir. 2007). Under *Chevron*, courts defer to a BIA interpretation of an ambiguous INA statute unless the interpretation is "arbitrary, capricious or manifestly contrary to the statute." *Mora*, 550 F.3d at 234 (quoting *Chevron*, 467 U.S. at 844); *Yuen Jin*, 538 F.3d at 150. 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).

The BIA correctly determined that § 1153(h)(3) is ambiguous. As the BIA noted, sections 1153(h)(1) and (h)(2) "clearly define the universe of petitions that qualify for the delayed processing formula," *Wang*, 28 I. & N. Dec. at 33 (paragraph (h)(1) refers to "applicable petition described in paragraph (2)," and paragraph (2), in turn, describes exactly the types of petitions to which it applies). Section 1153(h)(3), on the other hand, refers only to "petitions," but "does not expressly

state which petitions qualify for automatic conversion and retention of priority dates." *Id.* There is thus ambiguity as to which types of petitions are covered by § 1153(h)(3),[7] as the only court to have considered the issue has found. *See Zhang*, 2009 WL 3347345, at **5-6 ("The Court finds that § 203(h)(3) is ambiguous at *Chevron* step one"); *id.* at *6 (noting that the plaintiff's extended attempts to explain the meaning of § 1153(h)(3) "underscores the ambiguity surrounding the interpretation" of that paragraph).

Wang's resolution of the ambiguity in § 1153(h)(3) is not arbitrary, capricious, or manifestly contrary to § 1153(h)(3). *See Zhang*, 2009 WL 3347345 at **6-7 (deferring to *Wang*'s construction of § 1153(h)(3)). By looking to other provisions of the CSPA and to immigration regulations to interpret the terms "conversion" and "retention," the BIA employed methods of statutory construction that are consistent with Supreme Court and Second Circuit precedent. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (the "normal rule of statutory construction" is that "identical words in different parts of the same act are intended to have the same meaning"); *Phong Thanh Nguyen v. Chertoff*, 501 F.3d 107, 115 (2d Cir. 2007) (courts may assume that Congress, in enacting a statute, is aware of relevant administrative rules). As demonstrated above, the BIA also gave effect to the

[7] It does not appear that the petitions described in paragraph (h)(2) apply to paragraph (h)(3), as (h)(2) defines petitions for purposes of that "paragraph," thereby limiting the definition to (h)(2). If Congress had intended the definition in (h)(2) to apply to (h)(3), presumably it would have employed the term "subsection," rather than "paragraph."

statutory requirement that the conversion be accomplished "automatically" -- that is, without the need to file a second petition.

The BIA's conclusion that Congress did not intend for the CSPA to apply to cases involving "aging-out" due to delays caused by the numerical limitations is supported by the CSPA's legislative history. *Zhang*, 2009 WL 3347345 at *6 ("the BIA's interpretation in *Wang* . . . . is buttressed by the Congressional Record"). The legislative history is replete with references to delays caused by CIS's failure to promptly adjudicate visas. *See, e.g.*, H.R. Rep. 107-807 at *55-56, 2003 WL 131168 at *50 (Leg. Hist.)(House Judiciary Committee Report for second session of 97th Congress); 148 Cong. Rec. H4989-01 at *H4992, 2002 WL 1610632 at *6-7 (Cong. Rec.) (statement of Rep. Jackson-Lee); 147 Cong. Rec. H2901-01 at *H2902, 2001 WL 617985 at *2-3 (Cong. Rec.) (statement of Rep. Sensenbrenner); H.R. Rep. 107-45, 2002 U.S.C.C.A.N. 640, 641-42, 2001 WL 406244 at *1-2 (Leg. Hist.) (House Report); 147 Cong. Rec. E1095-03, 2001 WL 660831 (Cong. Rec.) (statement of Rep. Mink); 147 Cong. Rec. S3275-01, 2001 WL 314380 at *1 (Cong. Rec.) (statement of Sen. Feinstein). After reviewing this legislative history, the Ninth Circuit held that Congress enacted the CSPA for the sole purpose of preventing "aging out" due to delays in administrative adjudication of petitions and applications. *Padash*, 358 F.3d at 1174. The legislative history contains no indication that Congress sought to remedy delays resulting from numerical limitations.

The BIA also correctly noted that Congress made clear that the CSPA's relief for beneficiaries who would otherwise "age out" was not intended to cause increased

waiting times for other beneficiaries. *See* 148 Cong. Rec. H4989 at *H4992, 2002 WL 1610632 at **6-7 (statement of Rep. Jackson-Lee); 147 Cong. Rec. H2901 at *H2902, 2001 WL 617985, at *2-3 (statement of Rep. Sensenbrenner). Finally, the BIA correctly noted that the plaintiffs' proposed interpretation of § 1153(h)(3) would lead to absurd results. For example, under plaintiffs' proposed reading of the statute, all children who were derivative beneficiaries would gain favorable priority date status, even with regard to a new visa petition that is wholly independent of the original petition. In other words, "a derivative beneficiary would *never* age out or lose a previous priority date." *Wang*, 25 I. & N. Dec. at 36. Thus, under the plaintiffs' interpretation, Cen would retain a priority date of June 1994 even if a family member petitioned on his behalf twenty or more years in the future.

In sum, *Wang*'s resolution of § 1153(h)(3) is far from arbitrary and capricious, and in fact harmonizes the operational terms of the statute with longstanding agency practice and congressional intent as evidenced by legislative history. The Court should therefore defer to the BIA's interpretation of § 1153(h)(3) and reject the plaintiffs' construction of the statute. *Zhang*, 2009 WL 3347345, at **6-7; *see also Amershi v. Napolitano*, No. 6:09-cv-106, 2009 WL 5173492, at *2 (M.D. Fl. Dec. 9, 2009) (explaining that the law "squarely sides with [the Government]," and that a "child who ages out of derivative status cannot transfer his previous priority date to a new petition filed by a different relative") (citing *Wang*).

CONCLUSION

For the foregoing reasons, the complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

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