TONY WEST
Assistant Attorney General
Civil Division
U.S. Department of Justice

VICTOR M. LAWRENCE
Principal Assistant Director
District Court Section

GISELA A. WESTWATER NSB 21801
Trial Attorney

AARON D. NELSON NJBN 040932007
Trial Attorney
District Court Section
Office of Immigration Litigation
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 305-0691
Facsimile: (202) 616-8962
E-mail: Aaron.Nelson@usdoj.gov

Attorneys for Defendants.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

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| **DE OSORIO v. SCHARFEN;** | **No. SACV 08-00840 JVS (SHx)** |
| DOWLATSHAHI v. MUKASEY; | No. SACV 08-05301 JVS (SHx) |
| TOROSSIAN v. DOUGLAS; | No. SACV 08-06919 JVS (Shx) |
| ZHANG V. CHERTOFF; | No. SACV 09-00093 JVS (Shx) |
| | Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment |

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Defendants sumbit this Reply to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment. ("Pls. Opp.")

**INTRODUCTION**

The facts in these cases are not in dispute and have been detailed in previous filings. Defendants likewise discuss at length the statutory framework and history of the Child Status Protection Act ("CSPA") in earlier filings, including in Defendants' Motion for Summary Judgment, and in Defendants' Opposition to (Plaintiffs') Motion for Summary Judgment.

**PLAINTIFFS' CHEVRON ANALYSIS IS MISGUIDED**

In their brief in opposition to Defendants' Motion for Summary Judgment, Plaintiffs reveal a fundamental failure to understand the principles of Chevron deference as applied to the present cases. Plaintiffs pronounce boldly that the conversion and priority date retention provisions of the CSPA (codified at 8 U.S.C. 1153(h)(3)) are "plain and unambiguous" and necessarily benefit their clients. Pls. Opp. at 2. To support this contention, however, Plaintiffs impermissibly cite an unpublished Board decision, disregarding a later, precedential, **published** decision. Defendants elsewhere offer a detailed analysis of how the CSPA is ambiguous and thus the agency interpretation of the Act is entitled to Chevron deference. See Defendants' Memorandum Of Points and Authorities In Opposition To Plaintiffs' Motion For Summary Judgment at 9-18. ("Defs. Opp.") Defendants refrain from repeating that argument here, except to highlight Plaintiffs' repeated misunderstanding of Chevron principles.

Plaintiffs charge that Defendants' Chevron analysis is askew because Defendants find "ambiguity in the statute by focusing on

the wrong familial relationship as well as the wrong point in time." Pls. Opp. at 3-4. Yet, Plaintiffs cite no "clear language" in the statute setting out the "familial relationship" that should be the focus of the analysis. Indeed, Defendants maintain that the proper relationship to focus on is that of the original petitioner and the derivative beneficiary (either the grandparent to grandchild relationship or the aunt/uncle to niece/nephew relationship). Whatever status the derivative beneficiary enjoys during the pendency of the original petition is anchored by that original petitioner and his actions. Without the original petitioner – the grandparent who files for his/her daughter, or the aunt who files for her sister – the derivative has no interest whatsoever. Plaintiffs, however, claim that this focus is simply "wrong." Id.

Plaintiffs likewise charge that where Defendants focus on the moment that the derivative beneficiary turns twenty-one (and thus ages-out), saying that this is the "wrong point in time." Id. at 4. Yet, Plaintiffs quote no statutory language clearly delineating that the "automatic conversion" should take place upon the happening of a later event – let alone the event they propose. To be sure, Defendants insist that when the derivative beneficiary ages-out and no visa number is then available, the "appropriate category" is termination. As discussed in their Motion for Summary Judgment, Defendants emphasize that Plaintiffs' current petitions for their children (for which they seek the earlier, now defunct petition priority dates) are F2B

petitions, and thus ineligible for CSPA consideration. Defendants' Motion for Summary Judgment at 11-12. These are new petitions based on a new relationship and backed by different statutory support. This position, Plaintiffs declare, is likewise wrong.

Plaintiffs insist that when "one focuses on the appropriate familial relationship, the operation of §203(h)(3) becomes clear." Id. For Plaintiffs, the arbiter of the "appropriate" familial relationship and point in time comes from the unpublished Board decision, Matter of Maria T. Garcia. 2006 WL 2183654 (BIA Jun. 16, 2006). In so doing, Plaintiffs dismiss a later, published decision, Matter of Wang, charging that the Board there "makes the same mistake. . ." as Defendants make in their CSPA analysis. Matter of Wang, 25 I&A Dec. 28 (BIA 2009). Herein lies Plaintiffs' failure to understand (or disregard for) Chevron deference.[1]

The Attorney General, while retaining ultimate authority, has vested the Board of Immigration Appeals with the power to provide, through precedent decisions, "clear and uniform guidance

[1] Plaintiffs' insistence that the proper focus should remain on the relationship between the principal beneficiary and the aged-out derivative beneficiary is not borne out by historical analysis or the explicit language of the statute. For example, the derivative of an F2A petition could not reclaim the priority date of a petition filed by his stepfather after his mother adjusted status because the prior petition was focused on the relationship between the petitioner and the beneficiary – not the derivative beneficiary and the primary beneficiary. See Bolvito v. Mukasey, 527 F.3d 428 (5th Cir. 2008).

to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations." 8 C.F.R. §1003.1(d)(1). The Supreme Court has accordingly recognized that the Board should be granted Chevron deference "as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication. . . ." INS v. Aquirre-Aquirre, 526 U.S. 421, 426 (1999) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 448-49 (1987)). The Supreme Court clarified the issue of agency interpretation and Chevron deference in United States v. Mead, 553 U.S. 218 (2001). In applying Mead, the Ninth Circuit Court of Appeals has treated "the precedential value of an agency action as the essential factor in determining whether Chevron deference is appropriate." Miranda-Alvarado v. Gonzales, 449 F.3d 915, 922 (9th Cir. 2006).

In Matter of Wang, the Board provided a precedential decision offering clear guidance on the "proper interpretation and administration" of the INA. Defendants' analysis in both their Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment aligns with the reasoning in Wang. Plaintiffs, on the other hand, continually cite Maria T. Garcia in support of their position. In so doing, Plaintiffs ask this Court to impermissibly adopt the logic of a 2006 unpublished Board decision (Garcia) in contravention of a 2009 published decision (Wang). To do so would disregard Ninth Circuit and Supreme Court directive on the deference owed to the statutory interpretations of the agency.

Plaintiffs' misunderstanding is exhibited in operation of the example of "Joe" that Plaintiffs offer in their Opposition. Joe is a derivative beneficiary of a family-based third preference visa petition filed on behalf of his mother. See Pls. Opp. a 6-8. According to Plaintiffs, when Joe ages-out, he benefits from § 203(h)(3) and "automatically converts to the appropriate category (as determined by his relationship to the direct beneficiary, his mother)." Id. at 8. Most important in this example is that Plaintiffs must add the parenthetical "(as determined by his relationship to the direct beneficiary, his mother)." If the language of the statute was clear here; if it spoke for itself on this point, the additional parenthetical qualifier that Plaintiffs add would be unnecessary. The fact that Plaintiffs themselves add it, however, makes the point that the statute is ambiguous.

Plaintiffs noticeably omit the Ninth Circuit's guidance in the 2006 Miranda-Alvarado v. Gonzales decision, which says that Chevron deference is to be accorded depending on the precedential value of an agency action. Miranda-Alvarado v. Gonzales, 449 F.3d at 922. Plaintiffs rather cite earlier Ninth Circuit cases that claim that "generous provisions" should be "generously interpreted." See case citations in Pls. Opp. at 9. Here again Plaintiffs miss a major point. Not only would accepting Plaintiffs' interpretation of the ambiguous provisions of the CSPA turn proper Chevron deference on its head, it would also fail to have the "generous" effect Plaintiffs claim. As

discussed in Defs. Opp. at 23-24, the number of visas for allocation is finite. What Plaintiffs attempt to describe as generous for them would directly deny visas to other individuals whose parents became Legal Permanent Residents years before the parents in the instant cases did. Plaintiffs would be displacing others in the line. This would be far from a generous effect on the lawful permanent residents who obtained their immigrant status years before the Plaintiffs did and who have been patiently waiting for their adult sons and daughters to join them in the United States.

**CONCLUSION**

For the reasons stated above and discussed in Defendants' Motion for Summary Judgment, Defendants respectfully request the Court grant summary judgment in favor of Defendants.

DATED: September 21, 2009

*/s/ Aaron D. Nelson*
AARON D. NELSON
Trial Attorney
District Court Section
Office Of Immigration Litigation
Civil Division
U.S. Department of Justice
P. O. Box 868
Washington, D.C. 20044
Telephone: (202) 305-0691
Facsimile: (202) 616-8962
Aaron.Nelson@usdoj.gov

*/s/ Gisela A. Westwater*
GISELA A. WESTWATER
Trial Attorney
District Court Section
Office of Immigration Litigation

**CERTIFICATE OF SERVICE**

Case No. CV 08-0840 JVS(SHx)

I hereby certify that on September 21, 2009, a copy of the foregoing "DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT" was filed electronically using the Court's electronic filing system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

*/s/ Aaron D. Nelson*
AARON D. NELSON
Trial Attorney
District Court Section
Office Of Immigration Litigation
Civil Division
U.S. Department of Justice
P. O. Box 868
Washington, D.C. 20044
Telephone: (202) 305-0691
Facsimile: (202) 616-8962
Aaron.Nelson@usdoj.gov

*/s/ Gisela A. Westwater*
GISELA A. WESTWATER
Trial Attorney
District Court Section
Office of Immigration Litigation