UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

IN THE MATTER OF:	)	
Petition for Alien Relative, Form I-130	)	
JYOTI R. PATEL, Petitioner	)	
VISHALKUMAR R. PATEL, Beneficiary,	)	A89 726 558

SUPPLEMENTAL BRIEF OF JYOTI PATEL AND VISHALKUMAR PATEL REGARDING THE APPLICATION OF SECTION 203(h)(3) OF THE IMMIGRATION AND NATIONALITY ACT

SUMMARY:

This case comes before the Board on certification by the Director of the California Service Center, United States Citizenship and Immigration Services ("USCIS"). In its June 4, 2008 decision, USCIS concluded that the petition for alien relative (I-130) filed by Jyoti Patel (Petitioner) on behalf of Vishalkumar Patel (Beneficiary) should not be able to retain/recapture the priority date of a previously filed petition on behalf of Jyoti Patel in 1998. Vishalkumar Patel (Beneficiary) was a derivative beneficiary on the 1998 visa petition filed on behalf of his mother Jyoti Patel. Mr. and Ms. Patel contend that under the Child Status Protection Act ("CSPA"), they are entitled to retention of the 1998 priority date. After Vishalkumar turned 21, the original visa petition that was filed under the employment 3rd preference category automatically converted to the family-based second preference category as the unmarried child of a lawful permanent resident. Pursuant to INA § 203(h)(3), Mr. and Ms. Patel are entitled to the priority date of 1998 petition.

Both parties have filed briefs in this matter. In August 2008, USCIS submitted a Supplemental Brief regarding the application of INA § 203(h)(3) to the instant I-130 petition.

FACTS:

Jyoti Patel is a citizen of India. She was born on June 1, 1964. Ms. Patel became a lawful permanent resident on January 12, 2006.

Vishalkumar Patel is the son of Jyoti Patel. Mr. Patel is a citizen of India and is currently residing in India. He was born on November 10, 1984.

On January 16, 1998, Vimco Corporation filed a labor certification on behalf of Jyoti Patel. The case was certified on August 14, 2000.

On June 2, 2003, Vimco filed an I-140 petition on behalf of Ms. Patel. The I-140 was given a priority date of January 16, 1998 as this was the date the labor certification was filed. Mr. Patel was a derivative beneficiary on the I-140 petition.

On June 2, 2003, Ms. Patel filed her application for adjustment of status with USCIS. On or about January 19, 2006, Ms. Patel's adjustment of status application was approved. Subsequently, an I-824 (application for action on approved application or petition) was filed on behalf of Vishalkumar Patel. However, Mr. Patel was no longer eligible for an immigrant visa because he was over 21.

On February 24, 2006, Ms. Patel filed an I-130 petition on behalf of Mr. Patel as the unmarried son of a lawful permanent resident. Mr. and Ms. Patel argued that under the Child Status Protection Act, they were entitled to the priority date of January 16, 1998.

On June 4, 2008, USCIS approved the I-130 petition at issue. However, USCIS accorded a priority date of February 24, 2006 rather than the 1998 priority date.

Based on current processing times, it will take approximately ten years for Mr. Patel to come to the United States.

ISSUE:

Whether Jyoti Patel and Vishalkumar Patel are entitled to the priority date of January 16, 1998 on their visa petition under INA § 203(h)(3)?

ARGUMENT:

The instant visa petition should be given the priority date of the first I-130 petition where Vishalkumar Patel was a derivative beneficiary. The automatic conversion provisions of CSPA dictate that the earlier priority date is warranted. This argument is supported by two unpublished Board cases. See Matter of Garcia, A79 001 587, 2006 WL 2183654 (BIA June 16, 2006); Matter of Elizabeth Garcia, 2007 WL 2463913 (BIA July 24, 2007)[1]. A copy of these decisions has previously been provided to the Board in this case. USCIS acknowledges that these decisions are inconsistent with its decision in the instant case.

The Child Status Protection Act, Pub. L. 107-208 (Aug. 6, 2002) was enacted on August 6, 2002. The purpose of the Act was to protect children who aged-out during the long process of applying for lawful permanent residence. INA § 203(h)(1) sets forth a

[1] Counsel will refer to Matter of Garcia as Garcia and Matter of Elizabeth Garcia as Elizabeth Garcia in order to distinguish between the two cases.

formula for determining whether a person qualifies as a "child" under the Immigration and Nationality Act. If the individual is considered a "child," he or she would be eligible to either adjust status or come to the United States as an immigrant under a petition filed on behalf of one of the parents. Under INA § 203(h)(1), the child's age is adjusted by subtracting the amount of time USCIS takes to adjudicate the visa petition from the age of the child on the date he or she becomes eligible to adjust status. If the adjusted age is under 21, that child has not aged-out and is eligible to immigrate with the parent.

INA § 203(h)(3) addresses the retention of a priority date for a person that is considered over the age of 21 after performing the calculation set forth in INA § 203(h)(1). That section states:

> "(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), 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."

Subsection (a)(2)(A) refers to INA § 203(a)(2)(A) which provides the statutory authority to issue visas to sons and daughters of lawful permanent residents. Subsection (d) refers to INA § 203(d) which provides the statutory authority to issue visas to derivative beneficiaries (spouses and children) to immigrate with the principal beneficiary. Thus, under the plain language of INA § 203(h)(3), once the alien is determined to be over 21 under (h)(1), the alien's petition shall "be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition."

In the instant case, USCIS narrowly construed the provisions at issue. USCIS' interpretation is contradicted by the plain language, structure, history, and purpose of the Section 3 of the Child Status Protection Act.

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

When interpreting a statute, the Board must ascertain the intent of Congress by giving effect to its legislative will. Hernandez v. Ashcroft, 345 F.3d 824, 838 (9th Cir. 2003). In analyzing a statute, the first step is to look at the plain meaning of the statute. Additionally, the general canon of statutory construction is that "a rule intended to extend benefits should be interpreted and applied in an ameliorative fashion." Padasah, 358 F.3d at 1173 *quoting* Hernandez, 345 F.3d at 840.

The plain language of the statute at issue supports the position of Mr. and Ms. Patel. Vishalkumar is no longer considered a "child" for purposes of CSPA. He had aged-out by the time his mother's adjustment of status application was approved. The next step is to look at INA § 203(h)(3). Under the plain language of this statute, Vishalkumar is entitled to automatic conversion to the appropriate category, which is F-

2B. The provision setting forth automatic conversion and retention of priority date makes reference to provisions under both INA § 203(a)(2)(A) and INA § 203(d). The language of the statute shows that Congress intended it to apply to all other derivatives, not just those that originally filed in the F-2 category. Based on the automatic conversion provision, Mr. and Ms. Patel are entitled to the 1998 priority date of the original petition filed on behalf of Ms. Patel.

In response to USCIS' claim that the scope and application of INA §203(h)(3)'s calculations and the benefits that flow to derivative beneficiaries would not include Mr. Patel's situation, we respectfully disagree.

In their first argument presented in the Supplemental Brief, USCIS states that Vishalkumar Patel does not meet the requirements of INA §203(h)(3) due to a mischaracterization of INA §203(h)(3) as if it were written as one combined section contained in INA §203(h)(1). The argument presented by USCIS blends the two sections, without notice directly to the individual requirements of each section that provide for intentionally different scenarios. INA §203(h)(1)(A) does indeed have a calculation that takes into account the length and duration of the processing for the underlying immigrant petition, whether it is family or employer based. §203(h)(1)(A) also has the requirement that the section is applicable only to those aliens who have sought permanent residence status within one year. Mr. Patel does not claim an immigrant visa under section INA §203(h)(1)(A). In contrast, Mr. Patel claims the right to an automatic retention of the priority date as he was a derivative beneficiary of his mother's initial immigrant petition where she was the direct beneficiary of an I-140 petition.

The benefits provided in INA §203(h)(3) differ from the benefits provided in INA §203(h)(1). INA §203(h)(3) talks solely about the retention of a priority date, and only mentions paragraph (1) in relation to the calculation of physical age versus CSPA calculated age for the purposes of INA §203(a)(2)(A) and (d). INA §203(h)(3) does not include a time-limiting phrase, such as whether an alien has sought an immigration benefit within a one year time frame. INA §203(h)(3) only states that if the CSPA calculated age under paragraph one, which is the true physical age reduced by the amount of time the immigrant petition was pending, is found to be over 21 or older, then the alien's priority date "**shall**" automatically be converted to the appropriate category and the alien "**shall**" retain the original priority date entered upon receipt of the original petition. Accordingly, the priority date of the mother's alien petition (I-140), now that he is a lawful permanent resident, is accorded to his son, as the adult child of a lawful permanent resident.

USCIS also argues that the inclusion of all derivatives is a misreading of the statute. INA §203(h)(3) does in fact state, "for the purposes of subsection (a)(2)(A) and (d)." There is no confusion with this language. The "(d)" refers to derivative beneficiaries of family, employment and diversity visa petitions. The wording is not limited in any manner, by words such as in relation only to (a)(2)(A) or only if the subsequent petition is filed by the same petitioner. Congress knows how to differentiate words and use limiting language when they choose to limit the statute. Even USCIS' comparison to the "strikingly similar" 8 C.F.R. §204.2(a)(4), evidences the ability and intention of Congress to limit when a retention of priority date will be retained and by whom when it states "if the subsequent petition is filed by the same petitioner." Congress

used no such limiting language in INA §203(h)(3). It is a well established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning of those words. Blending the one-year limiting language of INA §203(h)(1) into the broader language of INA §203(h)(3) does not give effect to the plain meaning of the language.

In Matter of Garcia, the Board addressed a very similar situation as in the instant case. Garcia was in removal proceedings and applying for adjustment of status before the immigration court. In that case, respondent was a derivative beneficiary of a visa petition filed by his aunt on behalf of his mother in 1983 (F-4 petition). Respondent was 9 years old at the time. However, a visa number did not become available until respondent was 22 years old. Subsequently, respondent's mother filed a 2B petition on her behalf. Respondent argued that she retained her mother's original 1983 priority date for purposes of establishing her eligibility in the second-preference category.

In Garcia, the Board addressed whether respondent was eligible to adjust status under INA § 203(h). Garcia first argued that she should be found to be a "child" for purposes of CSPA. The IJ had concluded that Garcia was no longer her mother's "child" for purposes of INA § 203(h)(1) because she did not file the application for adjustment of status within one year after the visa number became available in connection with her mother's visa petition. The Board did not reach the issue of whether Ms. Garcia sought to acquire permanent resident status within one year of a visa number being available. This is because the Board determined that Ms. Garcia would have failed to maintain the status of her mother's child, even if she had applied for adjustment of status within one year after the visa number became available to her mother. The visa number became

available when Ms. Garcia was 22 years old and the visa petition was approved on the day it was filed. Thus, she was 22 for CSPA purposes and no longer could be considered a "child."

In light of the determination that Ms. Garcia was not presently entitled to a visa number as a derivative beneficiary on her mother's F-4 petition, the Board next turned to the question of whether a visa was immediately available to Garcia by operation of the automatic conversion provision at INA § 203(h)(3). The Board held that "where classified as a derivative beneficiary of the original petition, the 'appropriate category' for purposes of section 203(h)(3) is that which applies to the 'aged-out' derivative vis-à-vis the principal beneficiary of the original petition." Thus, the "appropriate category" to which Garcia's petition was converted was the 2B category and respondent retained the 1983 priority date that applied to the original petition. The same holds true in the instant case.

In its brief, USCIS also argues it would be unfair to allow Vishalkumar or someone in his position to jump ahead of thousands of aliens of others patiently awaiting consideration. This argument is incorrect and also conflicts with the plain language of the statute and Congressional intent. Mr. Patel has already been waiting since 1998. He is not jumping in line in front of others who waited for a longer time. Unfortunately he aged-out while waiting for the petition on his mother's behalf to be approved. By the time the I-824 was filed, Mr. Patel was no longer considered a "child." Although he cannot take advantage of INA § 203(h)(1), he falls under INA§ 203(h)(3) and his petition is automatically converted and shall be given the 1998 priority date.

The Board should follow the holding in Garcia. This is consistent with the plain language and intent of CSPA. USCIS' interpretation is contradicted by the plain language, structure, history, and purpose of the Section 3 of the Child Status Protection Act. The focus should be on the child's relationship with the original primary beneficiary not the original petitioner and derivative beneficiary. In the instant case, the appropriate priority date is the date the original petition was filed. Under INA § 203(h)(3), USCIS' decision is incorrect. The appropriate category for conversion is the F-2B category and Mr. and Ms. Patel retain the 1998 priority date, which is now current.

CONCLUSION

USCIS erroneously concluded that the visa petition should not be accorded the January 16, 1998 priority date of the original F-4 petition. Under INA § 203(h)(3), Jyoti Patel and Vishalkumar Patel are entitled to the priority date of the original petition.

Respectfully submitted this _____ day of October, 2008.

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CERTIFICATE OF SERVICE

I certify that I sent a copy of the foregoing by regular first-class mail to Jason R. Grimm, Service Center Counsel-Laguna Niguel, United States Citizenship and Immigration Services, 24000 Avila Rd, Suite 2117, Laguna Niguel, CA 92677.

on the ___ day of _____, 2008.

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