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	)	A088 484 947
Zhou Min WANG – Petitioner	)	
Xiuyi WANG –Beneficiary	)	
	)	
In Visa Certification Proceedings	)	

MOTION TO RECONSIDER AND REQUEST FOR EN BANC CONSIDERATION

SUMMARY:

Xiuyi Wang and Zhou Min Wang respectfully request reconsideration of the Board's decision dated June 16, 2009. As will be set forth herein, the decision contains errors of law. The Board incorrectly affirmed the decision of the Director of the California Service Center assigning a priority date of September 5, 2006. The Board's decision ignores the plain language of the statute and is contrary to the intent of the Child Status Protection Act ("CSPA").

FACTS:

This case comes before the Board on certification by the Director of the California Service Center, United States Citizenship and Immigration Services ("USCIS").

Zhou Min Wang is a citizen of the People's Republic of China. His daughter, Xiuyi Wang, was born on November 6, 1982.

On December 28, 1992, Zhou Min Wang's sister filed a visa petition (Form I-130) on his behalf. The petition was filed in the fourth preference (F-4) category. Xiuyi Wang was a derivative beneficiary on the 1992 I-130 petition that was filed on behalf of her father. This petition was approved by the Legacy Immigration and Naturalization Service on February 24, 1993.

An immigrant visa number became available for the first time in February 2005. Thus, this was the first opportunity that the Wangs had to file their applications for lawful permanent residence. On October 3, 2005, Zhuo Min Wang, the primary beneficiary on

the I-130 petition, was admitted to the United States as a lawful permanent resident under the F-4 classification. However, Xiuyi Wang was unable to come to the United States at that time because she was over 21. Her age for purposes of the Child Status Protection Act was over 21 at that time.

On September 5, 2006, Zhou Min Wang filed an I-130 petition on behalf of Xiuyi Wang as the unmarried child (over 21 years of age) of a lawful permanent resident. Thus, Xiuyi Wang's current I-130 petition is under the second preference-B category. The priority date for this category is not current. However, when filing the I-130, counsel requested that the petition be given the priority date of December 28, 1992 pursuant to the Child Status Protection Act. If the petition is given the December 28, 1992 priority date, then Xiuyi Wang would be immediately eligible for an immigrant visa that would allow her to join her family in the United States.

The I-130 petition has been approved. However, USCIS denied the request for the December 28, 1992 priority date. USCIS concluded that the appropriate priority date was September 5, 2006.

The case was then certified to the Board of Immigration Appeals. On June 16, 2009, the Board issued a published decision affirming the decision of the Director with respect to the priority date of September 5, 2006. Matter of Wang, 25 I&N Dec. 28 (BIA 2009). In its decision, the Board first discusses whether INA § 203(h) is applicable where the beneficiary did not seek to acquire lawful permanent resident status within one year. Id. at 33. However, the Board did not address this question in light of its holding that the automatic conversion provision set forth in INA § 203(h)(3) is not applicable. Id.

With respect to the automatic conversion provision, the Board found that this would apply only where the petitioner remained the same on both petitions. The Board limited the provision to only a select group of derivative children, which are those of a second preference spouse beneficiary.

In addition to the instant Motion, Xiuyi Wang and Zhou Min Wang are simultaneously filing an action in the United States District Court for the Northern District of Ohio challenging the Board's decision.

ARGUMENT:

Xiuyi Wang and Zhou Min Wang respectfully request that the Board reconsider and vacate its prior decision and issue a decision according them a priority date of December 28, 1992. The errors in the Board's decision will be set forth herein. Xiuyi Wang and Zhou Min Wang also request en banc consideration in their case due to the importance of the issue to thousands of individuals in similar situations who have been deprived of the ability to join their families in the United States due to the erroneous interpretation of INA § 203(h).

The instant visa petition should be given the priority date of the first I-130 petition where Xiuyi Wang was a derivative beneficiary. The automatic conversion provisions of CSPA dictate that the earlier priority date is warranted.

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 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). It is undisputed that the beneficiary in the instant case is over 21 for purposes of CSPA. 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. 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."

I. The Board's interpretation ignores the plain meaning of the language, and in effect, rewrites the subsection as if 203(d) were not present in the subsection.

In the instant case, the Board erroneously construed the provisions at issue, and in effect, interpreted the statute as if the phrase relating to 203(d) was not even present in the subsection. The interpretation by the Board effectively ignores a portion of the subsection, divides the subsection so as to provide no weight to the group relating to 203(d), and rewrites the subsection as if 203(d) were not part of the subsection. The Board's interpretation is contradicted by the plain language, structure, history, and purpose of the Section 3 of the Child Status Protection Act.

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

When interpreting a statute, the 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.

II. Statutory Construction is to provide the same phrase within a statute consistent meaning throughout the statute.

The plain language of the statute at issue supports the position of Mr. and Ms. Wang. Xiuyi Wang is no longer considered a "child" for purposes of CSPA. She had aged-out by the time her father's immigrant visa was approved. The next step is to look at INA § 203(h)(3). This section specifically applies to all derivative beneficiaries who age out under paragraph (1) and not, as the Board concluded, solely to beneficiaries of INA § 203(a)(2)(A). The structure of the subsection, specifically to include both "(a)(2)(A) and (d)" clearly indicates Congress' intent to provide the mandatory conversion and automatic retention of priority date. The Board overlooks the inclusion of INA § 203(d), without explanation as to why those who fall within INA § 203(d) are somehow excluded in the BIA interpretation for one subsection, while recognized for the other subsection, directly opposite of canons of statutory construction.

The phrase "for purposes of subsection (a)(2)(A) and (d)," is used in both subsections (1) and (3). If a phrase is used in different subsections of a statute, it is a well-established canon of statutory construction that Congress intends to have the phrase to have the same meaning throughout the statute. United States v. Various Slot Machines on Guam, 658 F.2d 697, 703, n. 11 (9th Cir. 1981). In the instant case, the Board violates this rule when it correctly applies subsection (1) to all derivative beneficiaries under INA § 203(d) but then limits the application of subsection (3) to only derivative beneficiaries of INA § 203(a)(2)(A). The Board improperly imposes a limitation on subsection (3) that

does not exist. See Schneider v. Chertoff, 450 F.3d 944, 956 (9th Cir. 2006)(it is impermissible for an Agency to impose a new requirement that is not intended by Congress). Had Congress intended to limit subsection (3) to derivative beneficiaries of INA § 203(a)(2)(A) only, it would have specified this restriction. In other circumstances, Congress has set forth clear limitations. See e.g. INA § 201(b)(1)(A)(section limited to certain categories of special immigrants); INA § 203(d) (section limited to certain definitions of the term "child"); INA § 201(b)(2)(A)(ii)(section limited to individuals "described in the second sentence of § 201(b)(2)(A)(i)."

The Board fails to explain how its interpretation of INA § 203(h)(3) would be consistent with the plain language of the remainder of the statute. INA § 203(h)(2)(B) makes clear that "with respect to an alien child who is a derivative beneficiary under subsection (d)," all of INA § 203(h)("this paragraph") applies to any "petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c)." All of INA § 203(h) applies to any petition filed for an alien child of the primary beneficiary under family-based, employment-based, or diversity petitions. There is no distinction in INA § 203(h)(2)(B) between derivative beneficiaries of family second preference petitions or any other preference. As set forth above, INA § 203(h)(3) specifically references INA § 203(d).

III. The Board fails to explain why they believe Congress really only meant to create a statutory benefit for a group who previously had an automatic conversion

In examining the applicability of the statute, the Board addresses the regulations at 8 C.F.R. § 204.2(a)(4), which have been in effect since 1987. Wang 25 I&N Dec. at

34. The Board notes that the retention provision of 8 C.F.R. § 204.2(a)(4) is limited to a lawful permanent resident's son or daughter who was previously eligible as a beneficiary under a second preference spousal petition filed by that same lawful permanent resident. Id. Thus, the petitioner must remain the same. Id.

Relying on 8 C.F.R. § 204.2(a)(4), the Board found that the petitioner must remain the same for the automatic conversion provision to apply. The regulation was in existence at the time that INA § 203(h) was enacted. There is no reason why Congress would have addressed only this situation where a regulation was already in place that provided relief for those derivative children of a second preference spouse beneficiary.

IV. The Board erroneously concluded that Congress relied on the fact that automatic conversions only operate when the petitioner remains the same, when this is incorrect.

In its decision, the Board references various automatic conversion regulations and concludes that when Congress enacted CSPA, they were aware that conversions only operate where the petitioner remains the same. Wang, 25 I&N Dec. at 35. However, this is incorrect. The Board failed to consider many other sections of immigration law permitting conversion and retention of a priority date where the petitioner is not the same.

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

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

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

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

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

USCIS regulations permit individuals to change jobs, preference categories, and petitioners while retaining the original priority date. The automatic conversion clause in

CSPA is not the only law that allows a person to retain the priority date of a previous petition where the new petition is filed by a different petitioner. The Board's decision is flawed as it fails to consider the other sections where retention of a priority date is permitted despite the fact that the second petition involves a new petitioner. The interpretation of the Board is inconsistent with the statutory and regulatory scheme, and incorrectly concludes Congress' intent for automatic conversion to only apply for petitions filed by same petitioners.

V. The Board rejects Matter of Garcia without explanation or analysis, despite its applicability to the instant case.

In examining the plain language of the statute at issue, it is clear that it does not require the same petitioner. In its decision, the Board briefly addresses its prior unpublished decision in Garcia, which supports the position of Xiuyi Wang and Zhou Min Wang regarding the applicability of INA § 203(h)(3). Matter of Garcia, 2006 WL 2183654 (BIA June 16, 2006). The Board rejects the decision but fails to explain why the analysis in Garcia was in error.

In Matter of Garcia, the Board addresses 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). Garcia 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. Garcia

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 addresses 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. Specifically, the Board held that a derivative beneficiary of the F4 immigrant petition retained the priority date of the initial 1983 petition under INA§ 203(h)(3), without concern to the fact that the petitioner (her mother) was different than the initial immigrant petitioner (her aunt). The same holds true in the instant case.

The Board's prior unpublished decision in Garcia is consistent with the plain language and intent of the statute. INA § 203(h)(3) applies to the petition at issue in the instant case. The automatic conversion provision requires that the petition be given a priority date of December 28, 1992, without concern to whether the petitioner remains the same.

VI. The Board misstates that the beneficiary herein would jump ahead if the interpretation allows for automatic conversion

In its decision in the instant case, the Board misstates the effect of the proper interpretation of INA § 203(h)(3). The Board believes that it would be unfair for Xiuyi Wang or someone in her 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. Ms. Wang has already been waiting since 1992. She is not jumping in line in front of others who waited for a longer time. She is trying to save her place in line and avoid having to go to the back of another long line. Unfortunately Xiuyi Wang aged-out while waiting for the immigrant petition to be approved. Although she cannot take advantage of INA § 203(h)(1), she falls under INA§ 203(h)(3) and her petition is automatically converted and "shall" be given the 1992

priority date. Just as Congress includes INA 203(d) in INA§ 203(h)(3) to refer specifically to derivative beneficiaries, Congress also uses the word "shall" intentionally to indicate that there is no discretion for losing the priority date already obtained for the family.

VII. Legislative History does not speak to automatic conversion.

In its decision, the Board also improperly relies on irrelevant legislative history. There is no legislative history of the automatic conversion clause. The discussion of legislative history is taken from the 2001 House Report and from individual members of the House of Representatives. However, the automatic conversion clause was added in 2002. There is no further legislative history cited by the Board to evidence any intent concerning the automatic conversion clause. It is therefore even more appropriate to rest with the clear meaning of the language, as there is no ambiguity to the inclusion of 203(d) in INA§ 203(h)(3), and there is no legislative history pertaining to the automatic conversion clause upon which to oppose or contradict the plain language written directly in the statute.

For the reasons set forth herein, the Board should find that INA § 203(h)(3) is applicable and that the appropriate priority date is December 28, 1992.[1] This is

[1] The Board did not explicitly rule on USCIS' one-year bar claim. Xiuyi Wang and Zhou Min Wang contend that this bar is inapplicable to the current case. §203(h)(1)(A). 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. INA §203(h)(1)(A) also has the requirement that

consistent with the plain language and intent of CSPA. The Board's interpretation is contradicted by the plain language, structure, history, and purpose of the Section 3 of the Child Status Protection Act. The focus should be on the child's relationship with the original primary beneficiary not the original petitioner and derivative beneficiary. In the instant case, the appropriate priority date is the date the original petition was filed. Under INA § 203(h)(3), the Board's decision is incorrect. The appropriate category for conversion is the F-2B category and Mr. and Ms. Wang retain the 1992 priority date, which is now current.

EN BANC CONSIDERATION

Due to the importance of the legal issue involved in the instant case, en banc consideration is warranted. The instant decision directly conflicts with a prior unpublished decision of a three-member panel of the Board. Matter of Garcia, 2006 WL 2183654 (BIA June 16, 2006). The case also directly impacts thousands of similarly situated individuals who are separated from their families as a result of USCIS' erroneous interpretation of INA § 203(h)(3). There are currently several lawsuits pending in federal court regarding the issue raised herein, including a case filed as a class action in California. Costelo v. Chertoff, SACV 08-688-JVS-SH (C.D. Cal). Accordingly, en banc consideration is warranted.

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the section is applicable only to those aliens who have sought permanent residence status within one year. Ms. Wang does not claim an immigrant visa under section INA §203(h)(1)(A). In contrast, Ms. Wang claims the right to an automatic retention of the priority date as she was a derivative beneficiary of her father's initial immigrant petition where he was the direct beneficiary of his U.S. citizen sister's petition.

CONCLUSION

The Motion to Reconsider should be granted. The Board erroneously concluded that the visa petition should not be accorded the December 28, 1992 priority date of the original F-4 petition. Under INA § 203(h)(3), Zhuo Min Wang and Xiuyi Wang are entitled to the priority date of the original petition.

Respectfully submitted this _____ day of July, 2009.

Scott Bratton
Margaret W. Wong & Associates, Co., L.P.A.,
3150 Chester Ave.
Cleveland, Ohio 44114
(216) 566-9908

CERTIFICATE OF SERVICE

I certify that I sent a copy of the foregoing Supplemental Brief 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 _____, 2009.

Respectfully submitted,

Scott Bratton
Margaret W. Wong & Associates, Co., L.P.A.
3150 Chester Ave.
Cleveland, Ohio 44114
(216) 566-9908

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