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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

ROSALINA CUELLAR DE  
OSORIO, ET AL

Plaintiffs,

v.

JONATHAN SCHARFEN, ET AL

Defendants.

)  
) Case No. SACV 08-840-JVS(SHx)

)  
) **PLAINTIFFS' MEMORANDUM**  
) **OF POINTS AND AUTHORITIES**  
) **IN OPPOSITION TO**  
) **DEFENDANTS' MOTION FOR**  
) **SUMMARY JUDGMENT**

)  
) Date: September 28, 2009

) Time: 3:00 p.m.

) Courtroom: 10C

)  
) Hon. James V. Selna

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

1 Plaintiffs hereby submit their Memorandum of Points and Authorities in  
2  
3 Opposition Defendants' Motion to for Summary Judgment.

4 **I. INA § 203(H)(3) IS UNAMBIGUOUS**

5  
6 The issue presented in this case is whether aged-out derivative beneficiaries  
7 of third and fourth family-sponsored preference categories may utilize the  
8 automatic conversion and priority date retention provisions of INA § 203(h)(3).<sup>1</sup>  
9  
10 Under the plain and unambiguous language of the act, the answer must be yes.

11 The first step in any statutory interpretation is whether "Congress has  
12 directly spoken to the precise question at issue." *Chevron USA, Inc. v. Natural Res.*  
13 *Def. Council, Inc.*, 467 U.S. 837, 842, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984);  
14 *See also, Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S.  
15 102, 108 (1980) ("The starting point for interpreting a statute is the language of the  
16 statute itself. Absent a clearly expressed legislative intention to the contrary, that  
17 language must ordinarily be regarded as conclusive"). If the statute is clear, courts  
18 as well as the agency "must give effect to the unambiguously expressed intent of  
19 Congress." *Chevron*, 467 U.S. at at 842 – 843.  
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23 Section 203(h)(3) of the INA explicitly includes derivative beneficiaries  
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25 <sup>1</sup> The facts in this matter are not disputed, and a full discussion of the relevant  
26 statutory framework was set forth in Plaintiffs' Memorandum of Points and  
27 Authorities in Support of Motion for Summary Judgment, p. 1 – 10. Docket No.  
53-2 (August 31, 2009).

1 under INA § 203(d) – the section covering derivatives in **all** family and  
2 employment-based visa categories, as well as the diversity visa category. Indeed,  
3 the phrase, “for purposes of subsections (a)(2)(A) and (d)” is repeated in both §  
4 203(h)(1) and § 203(h)(3). By the consistent and repeated reference to sections  
5 (a)(2)(A) **and** (d), it is plain that each provision of section 203(h) applies to  
6 derivative beneficiaries in the family, employment and diversity preference  
7 categories. Had Congress meant to limit § 203(h)(3) to derivatives of the second-  
8 preference category only, it would have eliminated § 203(h)(3)’s reference to  
9 derivatives under § 203(d).  
10  
11

12       The Defendants recognize that “[t]he language in each subsection of [§  
13 203(h)] is identical, implying that... all derivative beneficiaries of petitions filed  
14 under section [203] may be eligible to benefit from the provision.” Def.’s  
15 Memorandum of Points and Authorities in Support of Motion for Summary  
16 Judgment (hereinafter “Def.’s Memo. of Points and Auth.”), p. 9 - 10 (Aug. 31,  
17 2009). Nevertheless, Defendants contend that “the operative language of  
18 [§203(h)(3)] only makes sense in reference to petitions originally filed to classify  
19 an alien as the primary or derivative beneficiary of an F2A petition.” Def.’s  
20 Memo. of Points and Auth., p. 11.  
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23

24       The Defendants find an ambiguity in the statute by focusing on the wrong  
25 familial relationship as well as the wrong point in time. First, the Defendants  
26 erroneously focus on the relationship between the original petitioner and the now  
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1 aged-out derivative beneficiary. The original petitioners could not have filed visa  
2 petitions directly on behalf of the derivative beneficiaries. Def’s Memo. of Points  
3 and Auth. p. 11 – 12. Thus, Defendants contend, when the derivatives reached the  
4 age of twenty-one, there is no preference category to which they may convert. Id.

5  
6 It is clear that a derivative’s interest in a visa petition comes from his or her  
7 relationship with the **principal beneficiary**. Under § 203(h)(3), the focus should  
8 **remain** on the relationship between the principal beneficiary and the aged-out  
9 derivative. As stated in *Matter of Garcia*, “where an alien was classified as a  
10 *derivative* beneficiary of the original petition, the ‘appropriate category’ for  
11 purposes of section 203(h)(3) is that which applies to the ‘aged-out’ derivative vis-  
12 à-vis the *principal* beneficiary of the original petition.” *Matter of Maria T. Garcia*,  
13 2006 WL 2183654 at p. 4 (BIA June 16, 2006) (emphasis in original). When one  
14 focuses on the appropriate familial relationship, the operation of § 203(h)(3)  
15 becomes clear. The Plaintiffs’ aged-out children are unmarried sons and daughters  
16 of lawful permanent residents. Thus the appropriate category is the second family  
17 preference category.  
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22 The Defendants also find an ambiguity in § 203(h)(3) by focusing their  
23 analysis on the wrong point in time – specifically the date a derivative beneficiary  
24 turns twenty-one. Defendants contend that, when the Plaintiffs’ children turned  
25 twenty-one there was no appropriate category to convert to. They state that, “when  
26 Plaintiffs’ children aged-out, their petitions ‘automatically converted’ to the only  
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‘appropriate category:’ termination.” Def’s Memo. of Points and Auth. p. 12.

1 Thus they conclude that § 203(h)(3) cannot possibly apply to the case at hand.<sup>2</sup>

2  
3 Contrary to this analysis, the determination of benefits under the CSPA is  
4 not made upon the derivative turning twenty-one. Section 203(h)(1) establishes a  
5 formula to determine whether a derivative beneficiary may still be considered a  
6 “child” notwithstanding the fact that he has reached the age of twenty-one. This  
7 formula starts with “the age of the alien on **the date on which an immigrant visa**  
8 **number becomes available for such alien** (or, in the case of subsection (d), the  
9 date on which an immigrant visa number became available for the alien's parent).”  
10 The alien may reduce his age on this date by “the number of days in the period  
11 during which the applicable petition was pending,” “**only if the alien has sought**  
12 **to acquire the status of an alien lawfully admitted for permanent residence**  
13 **within one year of such availability.**” INA § 203(h)(1) (emphasis added).

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15  
16 The language of the statute plainly demonstrates that the required CSPA  
17 calculation cannot be completed upon a derivative beneficiary turning twenty-one.

18  
19 At that point in time a visa number may not be available, and it may also be  
20 unclear whether the beneficiary will seek permanent residence within one year.

21  
22 Thus a final determination of whether a derivative remains a “child” under §

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25 \_\_\_\_\_  
26 <sup>2</sup> In *Wang*, the BIA makes the same mistake by focusing on the moment the  
27 derivative aged out. They conclude that there was no preference category for an  
28 adult niece of a United States citizen, and thus there was no category for the  
beneficiary to convert to. *Matter of Wang*, 25 I&N Dec. 28, 35 (BIA 2009).

203(h)(1) may very well take place well after he or she turns twenty-one.

1 For example, Joe is the derivative beneficiary of a family-based third  
2 preference visa petition filed on behalf of his mother on May 8, 2000. Joe was  
3 born on April 30, 1986, and thus at the time the petition is filed he is fourteen (14)  
4 years old. The visa petition is pending for 425 days before it is approved by the  
5 USCIS. However, visa numbers are not immediately available. In fact, it is over  
6 seven (7) years before the 2000 priority date becomes current on January 1, 2008.  
7

8  
9 Joe turned twenty-one on April 30, 2007. Nevertheless, Joe's interest in the  
10 petition filed on behalf of his mother clearly did **not** terminate on this date. His  
11 interest in the petition continued because in order to determine what benefit Joe  
12 derives under § 203(h)(1), one must start with Joe's age on **January 1, 2008** – the  
13 date a visa number becomes available to his mother. The CSPA states that Joe  
14 may subtract the number of days the petition was pending (425) from his age of  
15 January 1, 2008. This subtraction would bring Joe back under the age of twenty-  
16 one for immigration purposes.  
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20 But even at the date a visa becomes available, the CSPA's calculation may  
21 not necessarily be complete. There is one final requirement under § 203(h)(1). Joe  
22 must "seek to acquire" permanent residence within one year of visa availability.  
23 Thus, he must take steps to acquire permanent residence prior to January 1, 2009 in  
24 order to satisfy § 203(h)(1). Provided that he meets this final requirement, Joe will  
25 still be considered a "child" and may be granted permanent residence as his  
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mother's derivative.

1 Just like the calculation under § 203(h)(1), a determination of benefits under  
2  
3 § 203(h)(3) does not take place immediately when the derivative turns twenty-one.

4 Section 203(h)(3) section provides:

5  
6 (3) Retention of priority date.-- If the age of an alien is determined **under**  
7 **paragraph (1)** to be 21 years of age or older for the purposes of subsections  
8 (a)(2)(A) and (d), the alien's petition shall automatically be converted to the  
9 appropriate category and the alien shall retain the original priority date  
10 issued upon receipt of the original petition."

11 INA § 203(h)(3) (emphasis added).

12 One must first perform the calculation under § 203(h)(1) before one may  
13 turn to an analysis of benefits under 203(h)(3). Again using the example of Joe,  
14 when he turns twenty-one in 2007 a visa number is not yet available. It thus  
15 remains to be seen whether he may be considered a "child" under § 203(h)(1).

16 Assume that a visa number did not become available until January 1, **2009** (rather  
17 than 2008 as stated above). On that date, Joe's age was twenty-two years, eight  
18 months, and one day. Although he can subtract the 425 days the visa petition was  
19 pending with USCIS, this subtraction is not enough to bring him under the age of  
20 twenty-one.  
21

22  
23 Nevertheless, Joe benefits from the § 203(h)(3)'s automatic conversion and  
24 priority date retention provisions. Although his age is determined to be over  
25 twenty-one, he automatically converts to the appropriate category (as determined  
26 by his relationship to the direct beneficiary, his mother), and he retains a priority  
27

1 date of May 1, 1999. If that priority date is current, Joe is eligible to apply for  
2 lawful permanent residence.

3 The same analysis applies to the Plaintiffs in the instant case. For example,  
4 Plaintiff Ruth Uy was the derivative beneficiary of a fourth-preference petition  
5 filed on behalf of her mother on February 4, 1981 (when Ruth was two (2) years  
6 old). The petition was approved on February 8, 1981.

8 Ruth Uy turned twenty-one on April 25, 2000. As discussed above, her  
9 interest in the visa petition did not immediately terminate on that date. Because the  
10 priority date was not yet current, it was still unclear whether she could benefit from  
11 the CSPA calculations in § 203(h)(1). Unfortunately, an immigrant visa did not  
12 become available to the Uy family until July 2002. Subtracting days the visa  
13 petition was pending, Ms. Uy was still over twenty-one. However, she benefits  
14 from § 203(h)(3), and thus she attempted to apply for lawful permanent residence  
15 in July 2007.<sup>3</sup> She was and is eligible for such status as the unmarried daughter of  
16 a lawful permanent resident with a current priority date under § 203(h)(3). The  
17 USCIS' rejection of her application was in error.

22 **II. THE AGENCY'S INTERPRETATION IS UNREASONABLE AND**  
23 **IS ENTITLED TO NO DEFERENCE**

24 The Ninth Circuit has recognized that, "when the legislature enacts an

26 \_\_\_\_\_  
27 <sup>3</sup> Her mother, Norma Uy, also filed an I-130 petition on her behalf and included her  
28 arguments for priority date retention under the CSPA.



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3 ameliorative rule designed to forestall harsh results, the rule will be interpreted and  
4 applied in an ameliorative fashion. This rule applies with additional force in the  
5 immigration context, where doubts are to be resolved in favor of the alien.” *Akhtar*  
6 *v. Burzynski*, 384 F.3d 1193, 1200 (9th Cir. 2004); *see also Padash v. INS*, 358  
7 F.3d 1161, 1173 (9th Cir. 2004); *Matter of Vizcaino*, 19 I&N Dec. 644, 648 (BIA  
8 1988) (noting that the expansion of relief “clearly was intended as a generous  
9 provisions, and it should therefore be generously interpreted”). In contrast to these  
10 recognized principles of statutory interpretation, the BIA’s decision in *Matter of*  
11 *Wang* is restrictive and contrary to the plain language of the law.

12 A detailed discussion of the many errors made in *Matter of Wang* is  
13 presented in Plaintiffs’ Memorandum of Points and Authorities in Support of  
14 Motion for Summary Judgment, p. 14 – 20, and will not be repeated here. (Docket  
15 No. 53 – 2 (August 31, 2009)). The BIA erroneously concludes that the statute is  
16 ambiguous; it uses a selective and incomplete analysis of the terms automatic  
17 conversion and priority date retention; and it relies on legislative history that is  
18 irrelevant to the particular section at hand. Most importantly, the agency’s  
19 interpretation set forth in *Matter of Wang* essentially deletes § 203(h)(3)’s  
20 inclusion of derivatives as defined in § 203(d), and re-writes the statute as follows:  
21 “If the age of an alien is determined under paragraph (1) to be 21 years of age or  
22 older for the purposes of subsections (a)(2)(A) ~~and (d)~~, the alien's petition shall  
23 automatically be converted to the appropriate category and the alien shall retain the  
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original priority date issued upon receipt of the original petition.” The agency cannot interpret the CSPA to eliminate benefits for a category of aliens when Congress did not exclude them from eligibility. *See e.g., Succar v. Ashcroft*, 394 F.3d 8, 24 – 25 (1st Cir. 2005) (The agency cannot promulgate a regulation that categorically excludes from application for adjustment of status a category of otherwise eligible aliens).

**III. CONCLUSION**

The Plaintiffs request this Court deny the Defendants’ motion and enter judgment for the Plaintiffs.

Dated: September 8, 2009

Respectfully submitted,  
Carl Shusterman

s/ Amy Prokop  
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**CERTIFICATE OF SERVICE**

I hereby certify that on September 8, 2009, a copy of the foregoing “Plaintiffs’ Memorandum of Points and Authorities in 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. Parties may access this filing through the Court’s system.

Dated: September 8, 2009

Respectfully submitted,

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