U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

May 17, 2011

BY ECF FILING
Hon. Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

Re: *Li v. Renaud*,
10-2560

Dear Ms. Wolfe:

On behalf of the Government, we respectfully submit this letter in response to the "motion to file post argument letter as amicus" (Docket No. 77) filed on May 12, 2011, by Washington Square Legal Services ("WSLS"). WSLS directs the Court's attention to a decision, *Matter of Azam*, which was issued in February 2011 by an immigration judge in a case concerning the applicability of 8 U.S.C. § 1153(h)(3) to aged-out derivative beneficiaries of employment-based preference petitions. WSLS notes that an appeal of *Azam* is pending before the Board of Immigration Appeals ("BIA"), and urges the Court "to be clear that its opinion in the *Li* case is directed to the type of case presented" – that is, family-based preferences, at issue in *Li*, rather than employment-based preferences, at issue in *Azam*. WSLS Letter at 3.[1]

The applicability of 8 U.S.C. § 1153(h)(3) to aged-out derivative beneficiaries of employment-based preference petitions was not before the BIA in *Wang*, before the district court in this case, or addressed in the parties' briefs to this Court. In addition, as WSLS notes, the Department of Homeland Security has appealed the decision in *Azam*, and the matter is pending before the BIA. The Government therefore agrees with WSLS to the extent it urges the Court to "leave these questions to further agency resolution," WSLS Letter at 2, as the Court need not resolve the question whether 8 U.S.C. § 1153(h)(3) applies to aged-out derivative beneficiaries of employment-based preference petitions to decide this case.

Further, although WSLS states that the "BIA has not considered the proper reading of [8

[1] References to "WSLS Letter" are to the proposed amicus submission dated May 12, 2011, attached as Exhibit A to WSLS's motion for leave to file a post-argument amicus brief.

U.S.C. § 1153(h)(3)] in the context of employment based petitions," WSLS Letter at 2, the immigration judge's decision in *Azam* appears to conflict with an unpublished BIA decision, *Matter of Patel*, which was apparently certified to the BIA for a decision as a companion case to *Wang*. In *Patel*, a copy of which is enclosed, the BIA followed *Wang* and held that the aged-out derivative beneficiary of an employment-based preference petition could not benefit from the conversion and retention provisions of 8 U.S.C. § 1153 because there was no appropriate category for him to convert to when he aged out, and because the second petition was filed by his mother rather than his employer. Although *Patel* is unpublished and non-precedential, the existence of conflicting authority at the agency level makes it all the more appropriate for the Court to leave resolution of this issue – that is, how 8 U.S.C. § 1153(h)(3) operates in the context of employment-based petitions – to the BIA unless and until it is squarely presented to the Court in a future case, with an opportunity for full briefing by the parties.

We thank the Court for its consideration of this matter.

Respectfully submitted,

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cc: Scott Bratton, Esq.
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U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A089 726 558 - California Service Center Date: JAN 11 2011

In re: VISHALKUMAR RAJENDRA PATEL, Beneficiary of a visa petition filed by JYOTI R. PATEL, Petitioner

IN VISA PETITION PROCEEDINGS

MOTION

ON BEHALF OF PETITIONER: Pro se[1]

AMICUS CURIAE: Robert L. Reeves
Reeves & Associates

ON BEHALF OF DHS: Jason R. Grimm
Service Center Counsel

APPLICATION: Petition to classify status of alien relative for issuance of immigrant visa

In a June 5, 2008, decision the Director of the California Service Center approved a visa petition filed by the lawful permanent resident petitioner on behalf of the beneficiary as her unmarried son pursuant to section 203(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(a)(2). The petitioner had requested that the beneficiary be accorded a priority date of January 16, 1998, which was the date given an employment-based third preference visa petition previously filed on the petitioner's behalf, and of which the beneficiary had been a derivative beneficiary. However, the Director assigned the petition a priority date of February 24, 2006, the date the family-based visa petition was filed by the petitioner on the beneficiary's behalf. The California Service Center Director certified the decision to the Board to address the question of which priority date should be granted.

The petitioner contends that under the Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002) (hereinafter "CSPA"), the beneficiary is entitled to retain the 1998 priority date. Specifically, she avers that as the beneficiary is not considered a "child" under section 203(h)(1) of the Act, reference then must be made to section 203(h)(3), which provides that the petition shall "be converted to the appropriate category" with associated retention of the original priority date accorded the original visa petition. The petitioner argues that sections 203(h)((1) and (3) are distinct sections

[1] The Notice of Appeal was signed by Scott Bratton, Esquire, who submitted a Form EOIR-27 Notice of Entry of Appearance As Attorney on behalf of the beneficiary. The attorney did not provide a properly completed Form EOIR-27 in the petitioner's name, as required to indicate that he represents the petitioner. Thus, we decline to recognize counsel as the petitioner's attorney of record. However, as a courtesy, we are sending a copy of this opinion to Mr. Bratton.

with differing requirements, and avers that she is not seeking the benefit of section 203(h)(1), but claims the right to automatic retention of the earlier priority date as the beneficiary was the derivative beneficiary of the petitioner's employment-based visa petition, which she now contends has converted to that of a family-based petition. The petitioner contends that both the plain language of section 203(h) and Congressional intent support her interpretation of the statute, and her arguments as to its intent to allow retention of the earlier priority date. The petitioner also cites two unpublished Board decisions, most particularly *In Re Garcia*, 2006 WL 2183654 (BIA 2006), in support of her arguments.

The brief submitted by amici curiae similarly urges the Board to follow its decision in *In Re Garcia, supra* (Amicus Br. at 2-4, 10). This brief also argues that section 203(h)(3) should be read broadly in an ameliorative manner to allow all family and employment-based visa petitions to "automatically convert to the appropriate category" and retain the original priority date.[2]

In contrast, the Department of Homeland Security ("DHS") contends that prior Board decisions addressing the priority date issue are not controlling as they failed to fully analyze the statutory sections at issue. Further, DHS argues that the beneficiary must satisfy section 203(h)(1) of the Act before reference can be made to section 203(h)(3), contrary to her arguments otherwise. Section 203(h)(1) includes the requirement that the beneficiary must have "sought to acquire" lawful permanent resident status within one year of the availability of an immigrant visa number, which the beneficiary has indicated he did not do. DHS contends that section 203(h)(3) of the Act codifies regulations and agency practice relating to the automatic conversion of visa petitions. In addition, DHS argues that the beneficiary did not have a valid preference category pursuant to the employment-based visa petition before he aged out of eligibility for adjustment under that visa, and he did not fall within any preference category once he aged-out. DHS avers that Congress enacted the CSPA to provide redress to those harmed by administrative delays in the processing of visa petitions, and did not intend to allow for the expansive interpretation urged by the petitioner.

The Board addressed a similar issue in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009). Therein we specifically declined to follow the holding in *In Re Garcia, supra*, as we are not bound by nonprecedential unpublished Board decisions, and as that decision failed to fully evaluate all the requirements enumerated in section 203(h) of the Act regarding retention of "child" status. *Matter of Wang, supra* at 33. We find no basis to overturn that ruling.

As noted, the petitioner has essentially conceded that the beneficiary did not seek to acquire lawful permanent resident status within one year of visa availability pursuant to the employment-based petition filed on his behalf. While the petitioner suggests that section 203(h)(1) is inapplicable to her son's case and she only wishes to proceed under section 203(h)(3), the statute does not permit such a choice. Rather, section 203(h)(3) expressly limits use of its provisions to aliens who have been "determined under [section 203(h)(1)] to be 21 years of age or older." In turn, section 203(h)(1) expressly mandates that use of its age calculator is available "only if the alien has sought

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[2] We thank Mr. Reeves for his amicus brief and his helpful participation in this case.

to acquire the status of an alien lawfully admitted for permanent residence within one year" of visa availability. Given the petitioner's concession that the beneficiary made no such application, the petitioner is statutorily barred from utilizing the provisions of section 203(h)(3) of the Act.

Furthermore, we find that this beneficiary, as with the beneficiary in *Matter of Wang*, would not benefit by the provisions of section 203(h)(3) of the Act. There does not exist a visa category to which the visa petition seeking preference status for a petitioner's son as the derivative beneficiary of an employment-based visa petition could have converted once the son aged out. The visa preference system has never provided a preference category for an unmarried son or daughter (i.e., over the age of 21 years) of the primary beneficiary of a labor-based visa petition.

Similarly, the second visa petition filed on the beneficiary's behalf was filed by his mother, not by the employer who filed the first visa petition, of which he was a derivative beneficiary. As there existed no "appropriate category" into which the original visa petition could change, and since the second visa petition at issue was filed by a new petitioner, no "automatic conversion" could have, or did, occur. *Matter of Wang*, *supra* at 36, 39. Therefore, there could not be any associated retention of the priority date, as the petitioner argues. In sum, we find that the Director correctly found that the appropriate priority date of the second preference visa petition filed by the petitioner was the date that the Form I-130, Petition for Alien Relative, was properly filed, February 24, 2006.

ORDER: The decision of the Director is affirmed.

FOR THE BOARD