

TO: Zhou Min WANG (Petitioner)

File number: WAC-06-269-52406

C/o
Scott Bratton, Esq. of Margaret Wong & Assoc. Co., LPA
3150 Chester Ave.
Cleveland, OH 44114
(216) 566-9908

Date: March 25, 2008

IN THE MATTER OF:

Petition For Alien Relative, Form I-130

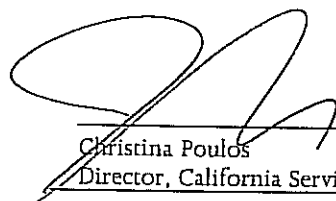
Zhou Min WANG - Petitioner

Xiuyi WANG - Beneficiary

The following action has been taken in this case:

1. This case has been certified for review to the Board of Immigration Appeals (Board). Within 10 days after receipt of this notice, you may submit to this office a brief or written statement for the Board to consider. If you desire oral argument before the Board, you must send a prompt request by letter to the Board at 5107 Leesburg Pike, Suite 2000, Falls Church, Virginia 22041. (703) 605-1007.
2. In accordance with 8 CFR 245.13(m)(2) or 8CFR 245.15(r)(3), this case has been certified for review to the Immigration Court located at _____ so that an immigration judge may conduct a hearing to determine whether this decision should be made final. Within 10 days after receipt of this notice, you may submit to this office a brief or written statement for the Court to consider. Regardless of whether you submit a brief, you will be notified by the Immigration Court of the date, time and location of the hearing.
3. This case has been certified for review to:
 - A. The Administrative Appeals Office (AAO), U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, N.W., Rm. 3000, Washington, DC 20529.
 - B. The following Service official:
Located at:

Within 30 days of this notice, you may submit to the office where your case was sent, a brief or written statement. Any request for oral argument before the AAO must be made within the 30-day period. If you want, you may waive the 30-day period by writing to the office where your case was sent.



Christina Poulos
Director, California Service Center

SERVICE CENTER COUNSEL (for)



Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Chief Counsel

24000 Avila Road, Room 2117
Laguna Niguel, CA 92677
March 17, 2008

Memorandum for Certification

Pursuant to Title 8, Code of Federal Regulations, Section 1003.1(c), the Director of the California Service Center, United States Citizenship and Immigration Services (CIS), hereby submits to the Board of Immigration Appeals, her decision dated March 25, 2008. Jurisdiction by certification is proper since this decision arises under Title 8, Code of Federal Regulations, Section 1003.1(b)(5) and the decision relates to a petition filed in accordance with section 204.

Executive Summary

CIS concludes that the Petition for Alien Relative filed by Petitioner on behalf of Beneficiary in 2006 should not be able to retain/capture the visa "priority date" of a Petition for Alien Relative previously filed on behalf of Petitioner in 1992. CIS reaches this conclusion because there is no provision of law supporting retention of the earlier priority date and that even under section 203(h) of the Child Status Protection Act, only 2nd preference derivative beneficiaries may retain earlier priority dates, not aged-out derivatives of 4th preference visa petitions. However, Petitioner cites to a single unpublished Board of Immigration Appeals (BIA) case supporting his position to the contrary. *See In re: Maria T. Garcia*, 2006 WL 2183654 (BIA 2006 unpublished).

Statement of Facts

1. On January 4, 1993, Yu Lian Wang, a United States citizen, filed a Petition for Alien Relative, Form I-130 ("Petition #1") on behalf of her brother, Zhuo Min Wang (the Primary Beneficiary of Petition #1 and subsequently, the Petitioner in Petition #2).
2. Included for relative visa consideration within Petition #1 were four "derivative beneficiaries," including the Primary Beneficiary's minor daughter (Xiuyi Wang, date of birth: November 6, 1982).
3. On February 24, 1993, the (former) Immigration and Naturalization Service approved Petition #1. Petition #1 was accorded a December 28, 1992 priority date.

4. In February of 2005, the State Department Visa Bulletin indicated that the visa priority date for 4th preference relative visa petitions from China was January 8, 1993. February of 2005 appears to be the first month that the 4th preference visa (from China) became available for the Primary Beneficiary of Petition #1.
5. In October of 2005, the State Department Visa Bulletin indicated that the visa priority date for 4th preference relative visa petitions (from China) was February 1, 1994.
6. On October 3, 2005, Zhuo Min Wang, the Primary Beneficiary of Petition #1 was admitted to the United States as a Lawful Permanent Resident under Family 4th Preference ("F4")(from China).
7. Prior to the admission of Zhuo Min Wang, the Primary Beneficiary of Petition #1, the derivative beneficiary (Xiuyi Wang) turned 21 years of age. She turned 21 on November 6, 2003. Because she had aged-out, she no longer qualified to immigrate as a derivative beneficiary family member under Petition #1.
8. Petitioner has acknowledged his daughter's (Xiuyi Wang) ineligibility to immigrate with him in 2005.
9. On September 12, 2006, Zhuo Min Wang, the Primary Beneficiary of Petition #1 (now a lawful permanent resident) filed a Petition for Alien Relative (Form I-130) ("Petition #2) on behalf of his (over 21 years of age) daughter, Xiuyi Wang, formerly a derivative beneficiary of Petition #1.
10. The priority date given to Petition #2 was September 12, 2006.
11. As the unmarried daughter over 21 years of age, of a lawful permanent resident, Xiuyi Wang would be classified under the 2nd preference "B" visa priority category (from China).
12. The Visa Bulletin for March 2008 indicates that the visa priority date for 2nd preference-B (from China) is February 8, 1999 – almost seven years before the priority date for Petition #2.
13. Petition #2 seeks to classify Xiuyi Wang as the unmarried daughter, over 21, of a lawful permanent resident, yet Petitioner argues that Petition #2 should retain the priority date of Petition #1.

Legal Framework Governing the Immigrant Visa Petition Priority Date

Title 8 C.F.R. § 204.1(c) – Filing date. The filing date of a petition shall be the date it is properly filed under paragraph (d) of this section and shall constitute the priority date.

Title 8 C.F.R. § 204.2(g) – Petition for brother or sister. Only a United States citizen who is 21-years of age or older may file a petition for a brother or sister for classification under § 203(a)(4).

Title 8 C.F.R. § 204.2(g)(4) – Derivative beneficiaries. A spouse or child accompanying or following to join a principal alien beneficiary under this section may be accorded the same preference and priority date as the principal alien without the necessity of a separate petition.

Title 8 C.F.R. § 204.2(h) – Validity of approved petitions. Unless terminated... the approval of a petition to classify an alien as a preference immigrant... shall remain valid for the duration of the relationship to the petitioner and of the petitioner's status as established in the petition.

Title 8 C.F.R. § 204.2(a)(4) – Derivative beneficiaries. (Provides that)... in the case of a child accompanying or following to join a principal alien under § 203(a)(2) of the Act may be included in the principal alien's second preference visa petition... the child will be accorded 2nd preference classification and the same priority date as the principal alien. However, if the child reaches the age of 21 prior to the issuance of the visa to the primary alien parent, a separate petition will be required. In such case, the original priority date will be retained if the subsequent petition is filed by the same petitioner. ***Such retention of priority date will be accorded only to a son or daughter previously eligible as a derivative beneficiary under a 2nd preference spousal petition.***

Analysis

Petitioner seeks for his 23 year old daughter to retain the 1992 priority date for the purpose of the 2nd preference Relative Visa Petition which he filed on her behalf in 2005 (Petition #2). However, Title 8 C.F.R. § 204.2(a)(4) contains language that “***such retention of priority date will be accorded only to a son or daughter previously eligible as a derivative beneficiary under a 2nd preference spousal petition.***” This supports the CIS position that priority date retention is only viable for 2nd preference and not 4th preference classifications.

In this case, Petitioner's 23 year old daughter was previously classified as a derivative beneficiary under the 4th preference Relative Visa Petition (Petition #1). Accordingly, she was not previously classified under the 2nd preference and there is no provision of law that provides for the retention of the earlier priority date.

Petitioner asserts that Petition #2 is entitled to favorable treatment under § 203(h) of the Child Status Protection Act. Discussing the retention of priority dates, § 203(h)(3) states, “if the age of the alien is determined... to be 21 years of age or older for the purposes of subsection (a)(2)(A) and (d), the alien's petition shall automatically convert to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.”

§ 203(a)(2)(A) discusses beneficiaries that are “the spouses or children ***of an alien lawfully admitted for permanent residence...***” In this case, CIS believes that such language requires that it is the Petitioner himself, as a lawful permanent resident, that is and always had been, petitioning for the spouse or child.

§ 203(d) discusses the treatment of family members and that, “a child defined in subparagraph (A), (B), (C), (D), or (E) of section 101(b)(1) shall... be entitled to the same status, and the same order of consideration... if accompanying or following to join, the spouse or parent.”

Under Petitioner’s construction and in accord with the language of the statute, when his daughter, the Beneficiary, turned 21 years old in 2003, she was automatically converted from being a derivative 4th preference category, to a 2nd preference category – even though Petition #1 had in fact, been filed the sister of her father – her aunt . It was not until 2006 that Plaintiff directly filed Petition #2 on behalf of his daughter.

Arguably, the dispute centers around the privity required by § 203(h)(3). Plaintiff asserts that upon his daughter’s “age-out” of the 4th preference derivative status, she automatically converted to the 2nd preference status – this is, what Petitioner thinks is the “appropriate category” discussed in § 203(h)(3). CIS disagrees citing the fact that no petitionable relationship exists between the daughter and her aunt following her age-out and that accordingly, the “appropriate category” is actually a non-existing visa category, or no preference category.

CIS emphasizes that only § 203(a)(2)(A) and Title 8 C.F.R. § 204.2(a)(4) – which relate to derivative beneficiary children whose parent has been petitioned by a spouse – are the only provisions allowing for retention of the earlier priority date. CIS believes that these sections reach appropriate conclusions because the 2nd preference category contains 2 sub-sections – one for spouses and children under 21 and the other for children over 21. Conversely, there is no such conversion language within 203(g)(4) for derivatives. Accordingly, if CIS allows a 4th preference to convert to a 2nd preference when no petitionable relationship exists between the original petitioner and the aged-out derivative beneficiary, then CIS allows for the creation of a relative visa petition relationship and visa category not previously provided for by statute.

CIS is aware that the BIA appears to reach a different conclusion in the unpublished case of *In re Mario Garcia* (2006 WL 2183654). There, the BIA seems to conclude that the natural conversion (under section 203(h)(3) of an aged out child in a similar 4th preference relative visa petition would be to focus not upon the relationship of the original petitioner and the derivative beneficiary, but instead to focus upon the child’s familial relationship with the primary beneficiary. However, *In re Mario Garcia* is an unpublished case arising from removal proceedings as litigated by U.S. Immigration and Customs Enforcement (“ICE”), and in light of the foregoing discussion of both the priority classifications and the applicable sections of CSPA § 203, CIS disagrees with the decision.

Conclusion

On review by certification, CIS respectfully requests that the BIA uphold the decision of the Service Center Director, denying retention of the earlier priority date.

Sincerely,

3/27/2008

/s/

Jason R. Grimm
Service Center Counsel - Laguna Niguel
U.S. Citizenship and Immigration Services

4. In February of 2005, the State Department Visa Bulletin indicated that the visa priority date for 4th preference relative visa petitions from China was January 8, 1993. February of 2005 appears to be the first month that the 4th preference visa (from China) became available for the Primary Beneficiary of Petition #1.
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