Robert L. Reeves, SBN 92878
Nancy Miller, SBN 120031
Jeremiah Johnson, SBN 227275
REEVES & ASSOCIATES, A PLC
2 North Lake Avenue, Ninth Floor
Pasadena, CA 91101
Telephone: (626) 795-6777
Facsimile: (626) 795-6999
immigration@rreeves.com

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE OF IMMIGRATION REVIEW

BOARD OF IMMIGRATION APPEALS

In the Matter of: PATEL, JYOTI R. Petitioner, In Visa Certification Proceedings.	File No. A 089726558

BRIEF OF AMICUS CURIAE

I. INTRODUCTION

On December 9, 2008 this Board of Immigration Appeals granted Reeves & Associates' request to appear as Amicus Curiae pursuant to 8 C.F.R. § 1292.1(d). At issue before this Board is the scope and applicability of the automatic conversion and retention provision of the Child Status Protection Act. Amicus urges this Board to follow its decision of Matter of Garcia, A 079 001 587 (BIA July 16, 2006) (unpublished) and hold that denial of the original priority date retention for derivative beneficiaries of approved petitions for alien relatives who have reached the age of 21 or over, violates the Child Status Protection Act.

Congress provided clear language to assist in the speedy reunification of families and the refusal of the United States Citizenship and Immigration Services to automatically convert and retain the alien child's original priority date is contrary to law. Nothing can be more fundamental to our values than the right to family; nothing can be clearer in our jurisprudence than the plain language of Congress, and nothing can be more egregious than the refusal to abide by the rule of law.

II. ARGUMENT

Congress enacted the Child Status Protection Act of 2002 ("CSPA"), codified at § 203(h) of the Immigration and Nationality Act ("INA"), to provide immigration relief to children of immigrant parents. Prior to CSPA children who reached the age of 21 were no longer eligible to obtain an immigrant visa with the rest of their family. These children became known as "age-outs." One provision of CSPA specifically INA §

203(h)(1), provides relief from government adjudication delays by allowing the amount of time the United States Citizenship and Immigration Service ("USCIS" or "Service") takes to adjudicate the visa petition to be subtracted from the child's age on the date he or she becomes eligible to immigrate to the United States. This provision alone would still leave some children behind when families immigrate to the United States. However, Congress also enacted Section 3 of CSPA, codified as INA § 203(h)(3), to keep children together with their parents.

Section 203(h)(3) of the Act 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 upon receipt of the original petition." INA § 203(h)(3) (*emphasis original*). As such, an aged-out child, who is a derivative beneficiary of the visa petition of his parent, can now reunite with their family more quickly by utilizing their parent's earlier priority date. A child abroad who aged-out is eligible under CSPA for an immigrant visa, and if the child is in the United States, he or she will be able to adjust to legal resident status.

When a child who is a derivative beneficiary under the visa petition filed for their parent turns twenty one, he or she is considered to have aged-out. As an age-out, the child is ineligible to immigrate as a derivative beneficiary under the petition filed for their parent. Some parents have to wait up to 20 years for their visa number to become available and during this time their children age-out. Under INA § 203(a)(2)(B), a permanent resident parent has the right to petition his unmarried adult children. The

child's priority date would then be the date the immigrant visa petition was filed. Because of the limited number of visas and the backlog, the child would have to wait several more years to be reunited with his family[1]. Under CSPA, however, the child can retain the priority date under which the parent immigrated. This preserves the child's place in line, eliminates the lengthy wait and makes the child's immigrant visa immediately available in most cases.

Although the Service has in some cases granted some visa petitions and permitted retention of the earlier priority dates pursuant to INA § 203(h)(3), and this Board has issued several unpublished cases addressing INA § 203(h)(3); there appears to be no uniform policy from USCIS as a whole. The lack of any regulations regarding INA § 203(h)(3) or policy memorandum has lead to arbitrary and inconsistent decision-making affecting thousands on a global level. As such, and for all the foregoing reasons, Amicus urges this Board to affirm the decision of Matter of Garcia, A 079 001 587 (BIA July 16, 2006) (unpublished) and hold the denial of the original priority date retention for derivative beneficiaries of approved petitions for alien relatives who have reached the age of 21 or over violates the Child Status Protection Act.

A. Section 203(h) Of The Act Does Not Limit The Automatic Conversion And Retention Of The Priority Date To Those Seeking Conversion Of Family Based Preference Petitions.

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[1] According to the US State Department Visa Bulletin for the Philippines for January 2009, the current priority date for F4 is May 1, 1986 and the current priority date for F2B is September 1, 1997. Meaning that children who aged-out during the 22 years they have been waiting as derivatives to come to the United States would now have to wait 11 more years to get a green card.

The Service readily concedes, and Amicus agrees, that INA § 203(h)(1) covers family based and employment based petitions filed under INA § 204 pursuant to INA § 203(h)(2). See USCS Supp. Brief Patel at 6. However, the Service contends that INA § 203(h)(3) does not cover these same petitions, thereby limiting INA § 203(h)(3)'s applicability to only family based petitions (and only those family based petitions seeking conversion of (a)(2)(A) and (a)(2)(A) derivatives.) See USCIS Supp. Brief Patel at 6-7. This limited reading of the statute ignores the plain language of INA § 203(h)(2).

Indeed, INA § 203(h)(2) describes petitions in "this paragraph" with no differentiating between INA § 203(h)(1) and INA § 203(h)(3). See INA § 203(h)(2). Specifically, INA § 203(h)(2) describes (and defines) the terms "(a)(2)(A)" and "(d)" for the entire paragraph, here INA § 203. In essence, the Service with their limited approach to statutory construction would now seek to add the qualifying phrase "in the preceding sub-paragraph" to INA § 203(h)(2). Because Congress did not include this (or any other) qualifying phrase, the Service's position is without merit. As such, this Board should find that INA § 203(h)(3) applies to both family based and employment based visa petitions as indicated by INA § 203(h)(2) and as applied by the Service under INA § 203(h)(1).

Here, the reference to (a)(2)(A) refers to INA § 203(a)(2)(A) which provides the statutory authority to issue visas to unmarried sons and daughters of permanent resident aliens. Section (d) refers to INA § 203 which provides the statutory authority to issue visas to derivative beneficiaries i.e. spouses and children to immigrate with the principal

beneficiary such as the immigrating parent. As such, the plain language of the Child Status Protection Act setting forth automatic conversion and retention of priority date makes reference to applications under both INA § 203(a)(2)(A) and INA § 203(d). Moreover, and perhaps more importantly here, INA § 203(d) of the Act refers to derivatives in all the family-based preference categories. As such, it appears, from the plain language of the statute that Congress intended to include other derivatives, such as family based derivatives under the 4th preference category, in INA § 203(h)(3). Whenever possible, the Courts must avoid interpreting statutes in such a way as to render any portion of the statute redundant or unnecessary.

In its brief before this Board, the Service narrowly focuses on the word "and" and fails to recognize the entire statutory phrase "for the purposes of subsection (a)(2)(A) and (d)." See USCIS Supp. Brief at 7. As indicated above, the Service not only concedes that this statutory phrase includes both family based and employment based visa petitions when used at INA § 203(h)(1); but by extension would necessarily cover not only (a)(2)(A) categories but all family based preference categories. Indeed, it is well settled that derivative beneficiaries of 4th category preference can avail themselves of INA § 203(h)(1). The Service's position to limit this statutory phrase under INA § 203(h)(3) must be viewed as inconsistent when the Service interprets the exact same phase under INA § 203(h)(1) to include all family based and employment based visa petitions. Such an inconsistent position cannot persuade and Amicus urges this Board to read INA § 203(h) as a whole, and find that INA § 203(h)(3) applies to all family based and employment based visa petitions.

B. An Ameliorative And Inclusive Interpretation Of INA § 203(h)(3) Is Consistent With The Plain Text And Congressional Intent.

Not only is the Service's position internally inconsistent, but is also at odds with the language, structure, history and purpose of the Child Status Protection Act. Specifically, the history and purpose of the Child Status Protection Act supports a reading of Section 3 that is as ameliorative as it is inclusive. Indeed, Congress enacted the Child Status Protection Act "to address the 'enormous backlog of adjustment of status (to permanent residence) applications' which had developed at the [former] INS." Padash v. INS, 358 F.3d 1161, 1172 (9th Cir. 2004) (*quoting* Child Status Protection Act of 2001, H.R. Rep. No. 107-45, 107th Cong., 1st Sess., at 2 (2001), *reprinted* in 2002 U.S.C.C.A.N. 640). The House Judiciary Committee noted that at the time of enactment "the backlog of unprocessed visa[] applications was close to one million," and that "approximately one thousand of the applications reviewed each year by the agency were for individuals who had aged-out of the relevant visa category since the time they had filed their petitions," due to delays in processing. Padash, *supra* at 1172-73 (*citing* H.R. Rep. No. 107-45).

For example, under INA § 203(a)(2)(B), a permanent resident parent has the right to petition his unmarried adult children. The child's priority date would then be the date the immigrant visa petition was filed. Because of the limited number of visas and the backlog, the child would have to wait several more years to be reunited with his family. Under CSPA, however, the priority date under which the parent immigrated becomes the

priority date of the aged-out child. This eliminates the lengthy wait and makes the child's immigrant visa immediately available in most cases. Such a reading is consistent with Congressional intent.

Indeed, Congress expressly enacted the Child Status Protection Act to "'address[] the predicament of those aliens, who through no fault of their own, lose the opportunity to obtain [a]...visa.'" Padash, *supra* at 1173 (quoting H.R. Rep. No. 107-45, at 2). The United States Court of Appeals for the Ninth Circuit has found that the Child Status Protection Act "was intended to address the often harsh and arbitrary effects of the age out provisions under the previously existing statute." Padash, *supra* at 1173.

This Board should adhere to the general canon of construction that "a rule intended to extend benefits should be 'interpreted and applied in an ameliorative fashion." Padash, *supra* at 1173 (*quoting* Hernandez v. Ashcroft, 345 F.3d 824, 840 (9th Cir. 2003).) An ameliorative reading of CSPA would suggest that all family based and employment based visa petitions automatically convert to the appropriate category and would retain the original priority date. The Service notes that at the time of automatic conversion, the aged out child would not be the son or daughter of a lawful permanent resident and therefore would not be eligible for F2B preference. See USCIS Supp. Brief at 10-11. However, such a reading would leave thousands of aged out children with a right with out a remedy. Specifically, at the time a child is determined to have "aged out" of derivative status during the consular process the original beneficiary would never be a lawful permanent resident. Congress would not have created such an ameliorative statute that could not be used in the consular processing scenario. Such a result would be

absurd, and this Board should not read statutes in a way that would produce absurd results. Rather, Amicus urges the Service to adopt appropriate procedures (such as filing a new visa petition or Form I-864) that would effectuate Congressional intent rather than deny families' requests under INA § 203(h)(3). Nevertheless, the issue before this Board is the statutory interpretation of the Child Status Protection Act and whether Congress intended to protect children waiting in line with their parents. Amicus urges this Board to find that Congress did indeed intend to protect these children.

Finally, the Service's interpretation and application of INA § 203(h)(3), is anything but ameliorative and is not supported by Congressional intent. The Service relies on speculation based on the limited Congressional record. See USCIS Supp. Br. At 12. For example, while it is true that Congress was concerned about displacing others in line, it is equally true that Congress considered these aged out children as having already been standing in line with their parents. Indeed, Representative Jackson-Lee indicated that CSPA included "Children of family and employer-sponsored immigrants and diversity lottery winners" Congressional Record – House, July 22, 2002 at H4992. Moreover, Representative Jackson-Lee was well aware that these children "have been standing in line for maybe 2, 2, 4 years." Congressional Record, *supra* at H4991. In some cases, these children have been standing in line much longer. As noted above, Congress made no distinction in the plain statutory language between INA § 203(h)(1) and INA § 203(h)(3). The plain meaning is controlling except in the rare case in which the application of the statute would produce a result "demonstrably at odds with the intentions of the drafters." Almero v. INS, 18 F. 3d 757, 760 (9th Cir. 1994). See also

US v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989); US v. Turkette, 452 U.S. 576, 580 (1981) ("If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'")(*quoting* Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). Here, there is no clear expressed legislative intent to the contrary and the Service's position would require these children to now leave their place in line and go to the back. Such a reading is not ameliorative and is not supported by the Congressional intent.

III. CONCLUSION

For all the foregoing reasons, Amicus urges this Board to follow its decision of Matter of Garcia, A 079 001 587 (BIA July 16, 2006) (unpublished) and hold the denial of the original priority date retention for derivative beneficiaries of approved petitions for alien relatives who have reached the age of 21 or over, violates the Child Status Protection Act.

Dated: January 5, 2009

Respectfully submitted,
Reeves & Associates, APLC

Robert L. Reeves
Nancy Miller
Jeremiah Johnson
Attorneys for Amicus Curiae

PROOF OF SERVICE

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2 North Lake Avenue, Suite 950, Pasadena, California 91101.

On January 5, 2009, I served the foregoing document BRIEF OF AMICUS CURIAE on the interested parties in the action described as

☐ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

☒ by placing ☐ the original and ☒ a true copy thereof enclosed in sealed envelopes addressed as follows:

Jason R. Grimm, Service Center Counsel
U.S. Citizenship and Immigration Services
24000 Avila Road., Suite 2117
Laguna Niguel, CA 92677

☒ By Mail

☒ By placing a true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Pasadena, California.

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Executed on January 5, 2009 at Pasadena, California.

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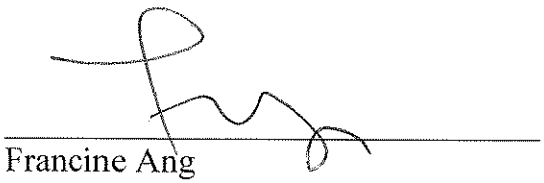
☒(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

☒(Federal) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Francine Ang