No. 09-56786

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSALINA CUELLAR DE OSORIO; et al.,

Plaintiffs – Appellants,

v.

ALEJANDRO MAYORKAS,
Director of the United States Citizenship
and Immigration Services; et. al.,

Defendants – Appellees

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRIC OF CALIFRONIA
EDCV 08-840 JVS (SHX)

BRIEF OF ACTIVE DREAMS LLC ("DREAMACTIVIST") AS AMICUS CURIAE IN SUPPORT OF THE PLAINTIFFS - APPELLANTS

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CORPORATE DISCLOSURE STATEMENT UNDER RULE
Fed. R. App. P. 26.1

I, Thomas K. Ragland, attorney for the Amicus, certify that ACTIVE DREAMS LLC ("DreamActivist"), is a business organization incorporated in the State of California since July 13, 2009 and does not have any parent corporation or any publicly held corporation that owns 10% or more of its stock.

Dated: May 11, 2012

/s/ Thomas K. Ragland
Thomas K. Ragland

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I. INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE ACTIVE DREAMS LLC

This brief of amicus curiae Active Dreams LLC ("DreamActivist") is submitted pursuant to Fed. R. App. P. 29(a) and 9th Circuit Rule 29-2 with the consent of all parties. Pursuant to Fed. R. App. P. 29(c)(5), DreamActivist states that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money intended to fund the preparation or submission of this brief; and (3) no person other than DreamActivist, its members, or its counsel contributed money intended to fund preparation or submission of this brief.

Founded in November 2007 to build a movement for the passage of legislation that would grant legal status to certain eligible undocumented youth, DreamActivist is the largest immigrant youth social media hub in the United States and is organized as a business association, Active Dreams LLC, in the State of California since July 13, 2009. It has a membership of 140,000, growing by approximately 5000 per month. For the past five years, DreamActivist has worked tirelessly in communities across the country, regularly lobbying local, state, and federal officials to gain support for the passage of the federal DREAM Act.[1] The

[1] The DREAM Act is a bipartisan legislation that would give certain undocumented students who were brought here as minors a pathway to citizenship if they graduate high school or obtain a GED, and either finish two years of college or complete two years of military service.

organization was instrumental in persuading the U.S. House of Representatives to pass the legislation in 2010 and worked successfully to bring it to a vote in the U.S. Senate twice within the 2009-2010 session.

Among the membership ranks of DreamActivist are young adults who have aged-out of family and employment visa petitions due to the narrow interpretation of 8 U.S.C. §1153(h)(3) advanced by the Board of Immigration Appeals ("BIA" or "Board") in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009). This section of the Child Status Protection Act ("CSPA") plainly states that all family, employment, and asylum derivatives who have aged out of petitions because they turned 21 should be allowed to retain their priority dates and apply it to a subsequent petition filed on their behalf. However, because *Matter of Wang* restricts application of the CSPA to a small percentage of its intended beneficiaries, thousands of young adults are aging out and left without a way to adjust status along with their families. The current erroneous interpretation of the CSPA results in separation of families, the disruption of family life, the deportation of long-term residents of the U.S. who entered the country as children years before. The BIA's decision undermines the stated intent of family unity sought by Congress in passing the CSPA. If this Court overturns *Matter of Wang*, several members of DreamActivist would become immediately eligible for adjustment of status to

lawful permanent residence and would no longer be subject to imminent family separation, deportation, and a life spent in immigration limbo.

II. ARGUMENT

A. The BIA's erroneous decision in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), threatens to separate families and is manifestly contrary to the intent of the statute, because it subjects young adults who have spent most of their lives in the United States to deportation from the only place they consider home.

Immigration law in the U.S. has long placed a premium on family unity. Children are able to derive permanent resident status from petitions filed on behalf of their parents in a number of situations. The INA generally defines a child as "an unmarried person under 21 years of age" under several different scenarios of parentage. 8 U.S.C. §1101(b)(1). A child is said to "age-out" of benefits when she turns 21 before the parent's permanent residence is finalized. Frustrated that lengthy visa backlogs and government delays have contributed to children aging out, Congress passed the CSPA to facilitate the contemporaneous or prompt permanent residence of aged-out children and to avoid the family separation that can occur when a child loses eligibility for benefits that the rest of her family obtains. *See* 148 Cong. Rec. H4991 (Statement of Rep. Sensenbrenner).

Very often, when parents obtain residence and a child has aged-out, those parents, now permanent residents, petition for their aged-out child, even though the child was already a derivative beneficiary of a previous petition prior to ageing out.

The sons and daughters who are beneficiaries of these new petitions by a parent are classified as visa preference category F2B, as the sons and daughters of permanent residents under 8 U.S.C. §1153(a)(2)(B). At the time the petition is filed, the U.S. Citizenship and Immigration Service ("USCIS") issues a "priority date," which determines the beneficiary's place in the queue for issuance of an immigrant visa. *See* 8 C.F.R § 204.1(d); *see* also, 8 U.S.C. § 1255(a) (requiring that an immigrant visa be "immediately available" to an applicant for adjustment of status to permanent residence). The beneficiary of such a petition can become eligible for residence when her priority date is reached in the Visa Bulletin published by the Department of State.[2] There are often lengthy backlogs in the F2B category. For example, for nationals of most countries, an F2B petitioner would have had to file on behalf of a son or daughter (the beneficiary) prior to February 22, 2004 in order for the beneficiary to be able to receive residence today. *See* Department of State Visa Bulletin, May 2012. The backlog is worse for beneficiaries born in Mexico or the Philippines, for which the government is currently processing visas for beneficiaries who filed before December 1, 1992 and December 8, 2001, respectively. *Id*.

The CSPA attempted to ameliorate these delays. Under 8 U.S.C. §1153(h)(3), such an aged-out child may retain the priority date associated with the

[2] The Visa Bulletin is published monthly by the Department of State and can be found at: http://travel.state.gov/visa/bulletin/bulletin_5692.html. (Accessed 5/10/12).

petition filed on behalf of the parent and may automatically convert to the appropriate immigration category. However, this ameliorative provision has been severely restricted by *Matter of Wang*, thereby depriving a large class of immigrants of the benefit that the CSPA was designed to impart. The sons and daughters of lawful permanent residents in this brief, who represent a cross-section of DreamActivist's membership, come from many parts of the world and different segments of society, yet they are united by the fact that the Board's decision in *Matter of Wang* has rendered them unable to adjust status with their families and forced them to keep their lives on hold.[3] All of them are young adults who were brought to the United States when they were children and grew up in this country. They have attended our schools, graduated from our colleges and universities, and become active members of our community, and yet they are stuck in immigration limbo, unable to resolve their status due to the Board's decision in *Matter of Wang*.

As these accounts will demonstrate, *Matter of Wang* is manifestly contrary to Congress' intent in passing the CSPA because it separates families and subjects young adults who have done nothing wrong to a life in limbo with the ever-present threat of deportation.[4] As such, this Court should not defer to the Board's

[3] The following information is based upon individual case files. Their names are abbreviated to protect their privacy. All information is available from DreamActivist files.

[4] Please note that some names have been redacted or changed to maintain the anonymity of our members.

interpretation, but should find that the plain language of the statute requires a more expansive benefit than the restricted one defined by the Board.

1. **Ritesh: "I don't know when I will get the chance to attend dental school, become a dentist and provide a better life for my parents who brought me here."**

Ritesh was born in Mumbai, India in 1985. In 1990, when he was just five years old, his parents, yearning for better lives in the United States, brought him to California. His father was able to obtain a work permit and worked in a warehouse moving boxes, while his mother cooked Indian food at home to sell to her friends and neighbors. In April 1999, Ritesh's grandfather naturalized to become a U.S. citizen and filed a petition on behalf of Ritesh's father, with Ritesh's mother and Ritesh included as derivative beneficiaries.

Ritesh's parents worked hard to give him the opportunities they never had back in India. They lived well below their means in order to save for his education. Ritesh's ultimate goal was to become a dentist and eventually own his own practice to afford him the means to help a large number of people while also supporting his parents.

Despite having grown up undocumented, Ritesh graduated high school seventh in his class with a 4.75 GPA and, in 2007, earned his bachelor's degree in biology from the University of California, Los Angeles. Scoring in the 94th

percentile on his Dental Aptitude Test (DAT), Ritesh gained acceptance to the Dental Medicine (DMD) Program at Western University of Health Sciences.

That same year, his parents obtained permanent residency through his grandfather's petition. Ritesh was 22 at the time and had aged out of the process a few months earlier. His parents filed a new F2B petition for him, which was assigned a 2007 priority date rather than the priority date from his grandfather's petition.

Inability to obtain his permanent residency prevented Ritesh from actually attending dental school. He was not eligible for financial aid, nor did the school allow him to attend until he had some form of legal status. Ritesh convinced the school to defer his acceptance for two more years, buying him time for his new priority date to become current. However, due to the incredibly long wait times in the F2B category, he is still awaiting the ability to seek residence.[5] The school eventually dropped his acceptance and informed him that he would have to re-take all of his pre-requisite courses and the DAT exam and re-apply when his status changed. Disheartened, frustrated, and upset that he was stuck in immigration limbo, Ritesh retook all of his courses at a community college, where he earned a 4.00 GPA; he also took his DAT exam for the second time and scored even higher, this time in the 98th percentile.

[5] The current Visa Bulletin lists February 22, 2004 as the date for F2B beneficiaries born in India.

Ritesh is now 27 years old and ready to reapply to dental school. However, he is still waiting for his new priority date to become current. Because Ritesh is the college-educated son who cannot put his degree to good use, his parents continue to struggle to make ends meet. The family's dream of a better life in America remains deferred.

2. Elah: "I thought it was really unfair that the time I waited as a derivative beneficiary did not count towards the new petition, especially since it was an 11 year wait! It wasn't as if I could prevent myself from getting older."

Born in Israel, Elah was brought to the United States when she was just five years old. In 2000, when Elah was sixteen, her U.S. citizen aunt submitted an I-130 petition for Elah's father[6] and included her mother, brother, and Elah as derivative beneficiaries.

Elah graduated from high school and attended a four-year university, where she earned a B.S. in Biochemistry and Molecular Biology. In May 2012, she graduated with a Masters in Food Science and is eager to use her degree.

Graduation was bittersweet for Elah, because a year earlier, the priority date for the F-4 petition filed by her aunt finally had become current. Notwithstanding, Elah was unable to adjust her status with her parents because she was now 27 years old. Her brother had also aged out, effectively leaving both children ineligible to

[6] A U.S. citizen may petition for her siblings. 8 U.S.C. §1153(a)(4). Such petitions are in the family based fourth preference and are commonly referred to as F4. The longest backlogs in visa availability are in this category.

qualify for residence with their parents. Frantic over the possibility of being separated from their children, Elah's parents filed F2B petitions for Elah and her brother. Under current wait times, it will take anywhere from 6 to 10 years more for Elah and her brother qualify to adjust their status, because USCIS did not allow them to retain their priority dates.

Because her departure from the U.S. would subject her to a ten-year bar to re-entry, Elah does not feel she can return to Israel, as this would mean a prolonged and painful separation from her family. *See* 8 U.S.C. §1182(a)(9)(B)(i)(II). She also does not have any ties to Israel. She does have aunts, uncles, cousins, and a younger sibling who are U.S. citizens. A favorable outcome for the petitioners in the instant matter will mean that Elah can seek adjustment of status to permanent resident and not be separated from her family or have to leave her home in the near future.

3. **Grace: "If I leave, I will not be able to return. This is my home; this is the only place I know as home. The place I was born is as foreign to me as it is to you."**

Grace was brought to live in the United States in 1982 from Taiwan. Her experience as an undocumented immigrant has shaped her life, limiting where she can work and travel, what she can learn within these borders, and even what she feels she can talk about in daily conversations. Since 1982, she has watched her classmates learn to drive, gain acceptance to college, graduate, excel at different

firms, buy homes, and travel abroad, all while she remains stuck in the same place, unable to move forward.

Grace's aunt, who is a naturalized U.S. citizen, filed an F4 petition for her father in 1998, and Grace's mother, Grace, and her two siblings were listed as derivative beneficiaries. At the time, Grace and her two siblings were under 21. As the case progressed, all three children aged out. Her parents gained residence in December 2008, but because his three daughters aged out, Grace's father filed an F2B petition on their behalf. Grace has now rejoined the long queue waiting for a visa number to become available. Under the BIA's interpretation of the CSPA in *Matter of Wang*, Grace has lost the ten years between the first petition and the second, and she must wait another decade before she can adjust her status under her father's petition.

Grace graduated from Otis College of Art and Design, a private art institute, with a B.A. in Fashion Design. She has worked as an independent contractor and has paid corporate taxes on her business every year for the last ten years. However, being undocumented means that many unscrupulous employers take advantage of her, paying her substantially less than the industry average.

Grace was only 5 years old when her parents brought her to the United States, with dreams of a better future. She is now 33 and still waiting for her life to begin.

4. Prerna: "My American dream is to make sure that I give my mom the future she always dreamed for herself and me. And right now, that dream is facing deportation due to *Matter of Wang*."

In 1999, when Prerna was a 14 years old and living in Fiji, her father told her to pack her bags because the family was leaving for the United States, for reasons known only to him. Prerna left everything she knew behind to make the long journey to the United States, far away from her home. After bringing her to the U.S., her father neglected, abused, and abandoned her because she came out as gay.

Fortunately, her maternal grandmother and aunt are naturalized U.S. citizens. Her aunt enrolled her in a high school in Hayward, California. However, being undocumented presented Prerna with innumerable challenges. She could not drive. She could not obtain employment authorization. She could not secure financial aid to attend college and could not even own a cellphone or open a bank account for years because she did not have a social security number. A flight back to Fiji was unaffordable and potentially dangerous: she no longer had family members in Fiji because her mother had fled the country following a violent military takeover of the government. In 2000, when her grandmother filed a petition for Prerna's mother and listed Prerna as a derivative beneficiary, there was a tiny beacon of hope for her.[7]

[7] A U.S. citizen may file a petition on behalf of a married son or daughter. 8 U.S.C. §1153(a)(3).

Despite many challenges, Prerna scored in the top one percent for the State of California STAR 9 exams every year. She graduated at the top of her class and enrolled at the local community college, as it was the only way she could afford higher education. Within three years, Prerna transferred to a four-year university and earned an undergraduate degree in Political Science. She enrolled in a graduate program at the San Francisco State University, graduating with a Masters in International Relations at the age of 22. Unfortunately, by the time the priority date of the F3 petition became current in 2009 and her mother obtained legal residency, Prerna was 24 years old and had aged out of the process.

Unable to work, she went to many law offices, asking what she could do about her status. These visits failed to produce any viable options. Undeterred by the disheartening news and seeking an honest resolution, Prerna gained admission to the George Washington University Law School, where she hopes to become an immigration lawyer and figure out a way to resolve her status and help undocumented youth in a similar situation.

In the meantime, Prerna applied for adjustment of status even though the priority date on her mother's F2B petition was still several years from being current. In her application, Prerna cited 8 U.S.C. § 1153(h)(3) and the CSPA and asked for use of the original priority date of January 31, 2001 from the F-3 petition. USCIS denied the request and issued Prerna a Notice to Appear in Immigration

Court for removal proceedings just as she was finishing her first year of law school. Those proceedings remain pending at the Immigration Court in San Francisco, California.

If *Matter of Wang* is reversed, Prerna, now 27, will be eligible to seek permanent residence in the course of her removal proceedings, thus effectively halting her deportation and separation from her family, her U.S. citizen partner, her adopted home, and her law career.

5. Nathan: "My life has become stagnant because of a misinterpreted immigration clause."

Nathan's father came to the United States in February 1995 from Trinidad and Tobago on a business visa, and Nathan followed to join him in December of 1995, when he was just 12 years old. Nathan's aunt filed an F4 petition for his father in January 1998, when Nathan was 16 years old. The petition was quickly approved but did not become current until December 2008, when Nathan was 26 years old.

Nathan's father became a lawful permanent resident on May 5, 2009, and he promptly filed an F2B petition for Nathan in October 2009, which was approved in January 2010. Again, this new petition was assigned an October 2009 priority date, voiding the 11 years that Nathan had waited under his aunt's petition. Nathan must now wait another 6 to 8 years for the new priority date to become current.

Despite his immigration limbo, Nathan graduated from high school with a 3.49 GPA and earned a degree in business management and marketing from a four-year university in 2006. Six years later, Nathan is still waiting for his life to begin. He has watched friends get married and have kids, but he is unable to marry because it would render him ineligible to adjust, because his visa category is for *unmarried* sons and daughters. He has seen friends attain their dream jobs while he is stuck performing odd jobs that do not utilize his full potential.

6. Antonio: "I feel as if I stopped developing at age 16, when I could not get my driver's license."

Antonio was born in Mexico in 1987. His family moved to Chicago, Illinois in 1993 when he was just five years old. His uncle petitioned for the family in 1995, under the F4 category.

Antonio attended a community college while waiting for his priority date to become current. Prior to aging out, he lived with the fervent hope that he would obtain his residence and no longer live in fear. Alas, in September 2008, Antonio aged out of his eligibility for permanent residency through his uncle's petition.

Antonio was determined to earn his bachelor's degree, so he enrolled in the University of Illinois, Chicago to study business and information technology. He graduated on May 5, 2012. Instead of celebrating that he had achieved a personal

milestone, Antonio was dispirited to learn that he would graduate without authorization or the ability to obtain employment.

Antonio's parents and younger sibling received their permanent residence status in early 2010. Antonio's parents filed a new petition on his behalf, requesting use of his old priority date, but USCIS denied the request and assigned the F2B petition a 2010 priority date. Because Antonio is from Mexico, under current visa wait times, it is not likely that he will ever receive a visa under this category in light of the tremendous backlogs.[8]

Antonio deeply wishes to contribute to American society. He plans to continue his education and obtain a master's degree in Business Administration as well as establish an IT training program for underprivileged communities.

[8] See Department of State's Annual Immigrant Visa Waiting List Report (November 1, 2011), available on the agency's website at http://www.travel.state.gov/pdf/WaitingListItem.pdf. (Accessed 5/10/12). Based on the most current report, there is a pending backlog of 212,621 visas for Mexicans in the F-2B category, and that country is limited to a maximum of 1,841 visas per year.

III. CONCLUSION

For all of the individuals discussed within, and many more not named, amicus curiae supports appellants and respectfully urges the Court to reverse the decision of the District Court.

Respectfully submitted,

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Dated: May 11, 2012

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, I hereby certify that the attached amicus brief is proportionately spaces, has a type of 14 points or more and, according to computerized count, contains 3,765 words.

Dated: May 11, 2012

/s/ Thomas K. Ragland
Thomas K. Ragland

CERTIFICATE OF SERVICE

I certify that on May 11, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy of the foregoing document by mail.

/s/ Thomas K. Ragland
Thomas K. Ragland
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Dated: May 11, 2012