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10 **THE UNITED STATES DISTRICT COURT FOR THE**
11 **CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

12 TERESITA G. COSTELO, and)
13 LORENZO P. ONG, Individually And) Case No. SACV08-688 JVS (SHx)
14 On Behalf Of All Others Similarly)
15 Situated,)

16 Plaintiffs,)

17 v.)

18 JANET NAPOLITANO, Secretary Of)
19 The Department Of Homeland)
20 Security; UNITED STATES)
21 CITIZENSHIP AND IMMIGRATION)
22 SERVICES; ALEJANDRO)
23 MAYORKA, Director, United States)
24 Citizenship And Immigration)
25 Services; LYNNE SKEIRIK, Director,)
26 National Visa Center; CHRISTINA)
27 POULOS, Acting Director, California)
28 Service Center, United States)
Citizenship and Immigration Services;)
And HILLARY CLINTON, Secretary)
of State,)

Defendants.)

MEMORANDUM

OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

Hearing Date: November 9, 2009
Time: 1:30 p.m.
Courtroom: 10C
Judge: James V. Selna

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1 Plaintiffs Teresita G. Costelo and Lorenzo P. Ong, individually and on
2 behalf of all others similarly situated, hereby submit the following Memorandum
3 of Points and Authorities in support of their Motion for Summary Judgment:
4

5 **I. INTRODUCTION**

6 On June 20, 2008 Plaintiffs, by and through their undersigned attorneys,
7 filed a civil action against Defendants Michael Chertoff, *et. al.* (collectively,
8 “Defendants”) seeking declaratory, mandamus, and injunctive relief on behalf of
9 themselves and all others similarly situated. On July 16, 2009 this Court granted
10 Plaintiffs’ motion to certify class pursuant to Federal Rule of Civil Procedure
11 23(b)(2) on July 16, 2009. The issue before this Court is the proper interpretation
12 of a provision of the Child Status Protection Act (“CSPA”) codified at 8 U.S.C. §
13 1153(h)(3), § 203(h)(3) of the Immigration and Nationality Act (“INA”).
14 (hereinafter “§203(h)(3)”). Because the language of §203(h)(3) is unambiguous
15 and provides for the automatic conversion and retention of an original priority date
16 for all petitions filed pursuant to § 203(d), Plaintiffs are entitled to judgment as a
17 matter of law. In the alternative, Plaintiffs argue that Defendants’ interpretation of
18 §203(h)(3) is owed no deference because it is arbitrary, capricious and contrary to
19 law.
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26 **II. STATEMENT OF RELEVANT FACTS**

1 On July 22, 2004, Plaintiff Teresita G. Costelo obtained lawful permanent
2 resident status through an approved Petition for Alien Relative filed by her United
3 States citizen mother on January 5, 1990. Plaintiff Costelo's two daughters,
4 Angelyn G. Costelo and Anne Theresa G. Costelo, were named in this petition as
5 derivative beneficiaries. When Plaintiff Costelo's mother filed the petition in
6 1990, Angelyn was 10 years old and Anne Theresa was 13 years old. Later, when
7 Plaintiff Costelo's priority date became current in 2004, Angelyn and Anne
8 Theresa were over 21 years old, and, therefore, had "aged out" of their derivative
9 status. Accordingly, Plaintiff Costelo filed new immigrant visa petitions for her
10 daughters on September 23, 2004. On or about August 2, 2007, Plaintiff Costelo
11 requested these petitions retain her original January 5, 1990, priority date.
12 Subsequently, on February 12, 2008, Defendants approved retention of the original
13 priority date for Angelyn, but denied retention of the original priority date for
14 Anne Theresa.

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20 Meanwhile, on June 16, 2004, Plaintiff Lorenzo P. Ong obtained lawful
21 permanent resident status through an approved immigrant visa petition filed by his
22 United States citizen sister on May 7, 1981. Similar to Plaintiff Costello, Plaintiff
23 Ong's two daughters, Vernilee M. Ong and Lucheevette M. Ong, were named
24 derivative beneficiaries of their father's petition. When Plaintiff Ong's sister filed
25 the petition in 1981, Vernilee was 4 years old and Lucheevette was 2 years old.
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1 Subsequently, when Plaintiff Ong's priority date became current in July 2002, both
2 Vernilee and Lucheevette had aged-out. Plaintiff Ong filed new immigrant visa
3 petitions for his daughters on March 8, 2005. On October 20, 2005, he also
4 requested retention of his original May 7, 1981, priority date for his daughter's
5 petitions. Defendants have yet to respond to Plaintiff Ong's request.
6

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8 On June 20, 2008, Plaintiffs Costelo and Ong filed a class action complaint
9 against Defendants seeking declaratory, mandamus, and injunctive relief for
10 themselves and all others similarly situated. Plaintiffs were certified as a class
11 pursuant to Federal Rule of Civil Procedure 23(b)(2) on July 16, 2009. Plaintiffs
12 seek an order from the Court declaring that Defendants' denial of original priority
13 date retention for aged-out derivative beneficiaries of approved petitions violates
14 the CSPA. Plaintiffs also ask the Court to order Defendants, their agents,
15 employees, and successors in office to timely adjudicate visa petitions for all class
16 members pursuant to the correct interpretation of the CSPA.
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22 **III. STATEMENT OF RELEVANT LAW**

23 24 **A. FAMILY BASED VISA PETITIONS**

25 Family based immigration is one of the primary avenues for foreign
26 nationals to immigrate to the United States. In order for an individual to immigrate
27 to the United States through family based immigration, he or she must first become
28

1 the beneficiary of an approved visa petition filed by a qualified U.S. citizen or
2 permanent resident family member. Section 204 of the Act defines who may file a
3 petition to classify a family member as a family-sponsored immigrant. See INA §
4 204, 8 U.S.C. § 1154. Under this section, any U.S. citizen or permanent resident
5 who claims an alien is entitled to a classification by reason of a relationship
6 described in INA § 203(a)(2) may file a petition with the Attorney General for
7 such classification. See INA § 204(a)(1)(B)(i).
8

9
10 In turn, INA § 204(b) governs approval of petitions for classification as a
11 family-sponsored immigrant. See INA § 204(b), 8 U.S.C. § 1154(b). If, after an
12 investigation of the facts of the case, the Attorney General determines that the facts
13 stated in the petition are true and that the alien bears an appropriate relationship to
14 his or her petitioner, the petition should be approved and forwarded the
15 Department of State. At that point, the Secretary of State authorizes the proper
16 consular office to grant the alien the appropriate preference status. See § 204,
17 *supra*; see also *infra* at 6–7.
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22 Once an alien is the beneficiary of an approved visa petition, he or she is
23 eligible to immigrate to the United States. Yet, pursuant to the INA, family-
24 sponsored immigration is limited to a maximum of 480,000 visas every year. See
25 INA §201(c)(1), 8 U.S.C. § 1151(c)(1). This limitation, coupled with the high
26 demand for immigrant visas, creates a large backlog of approved visa petitions.
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1 Those immigrants who are the children of U.S. citizens,¹ spouses of U.S. citizens,
2 or parents of U.S. citizens over twenty-one years old are considered “immediate
3 relatives” and are not subject to the numerical quota. See INA § 201(b)(2)(A)(i).
4
5 This allows them to immigrate quickly. However, those immigrants who do not
6 qualify as “immediate relatives” are subject to the numerical quotas and the four
7 family-sponsored immigrant visa preference categories. See INA § 203(a), 8
9 U.S.C. § 1153(a).

10
11 INA § 203 sets forth the four preference categories for family-sponsored
12 aliens. These categories are set forth as follows:

- 13 1) First Preference – Unmarried adult sons and daughters of U.S.
14 citizens. INA § 203(a)(1).
- 15 2) Second Preference – Spouses and children, and unmarried sons
16 and daughters of lawful permanent residents.
17 INA § 203(a)(2)(A) & (B).
- 18 3) Third Preference – Married sons and daughters of U.S. citizens.
19 INA § 203(a)(3).
- 20 4) Fourth Preference – Brothers and sisters of adult U.S. citizens.
21 INA § 203(a)(4).

22 In addition, pursuant to INA § 203(d), the spouse or child of a beneficiary of a
23 family sponsored visa petition is entitled to the same classification and priority
24 date as the primary beneficiary. This spouse or child is considered a “derivative

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26 ¹ The statutory provisions defining a child, for purposes of petitions for classification under INA
27 § 204 are located at INA § 101(b)(1). Under that section, “[t]he term ‘child’ means an unmarried
28 person under twenty-one years of age.”

1 beneficiary” of the approved visa petition and is eligible to immigrate with the
2 primary beneficiary.

3 The allocation of immigrant visas for family-sponsored immigrants is
4 governed by INA § 203(e)(1), 8 U.S.C. § 1153(e)(1). See also 22 C.F.R. §§
5 42.53(a) and 42.54(a)(1). Under this section, visas for family based immigrants
6 are made available in the order in which a petition in behalf of each such
7 immigrant is filed with the Attorney General. As such, each family based
8 immigrant is provided a “priority date” identical to the filing date of the approved
9 petition that accorded him or her preference status. See 22 C.F.R. § 42.53(a)
10 (stating that “[t]he priority date of a preference visa applicant under INA 203(a) or
11 (b) shall be the filing date of the approved petition that accorded preference
12 status.”); see also 22 C.F.R. § 42.54(a)(1) (applying the same formula to consular
13 officers.)
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19 Because federal regulations demand that approved visa petitions be
20 considered in chronological order, an immigrant’s priority date becomes an
21 indicator of his or her place in the queue of individuals waiting to make their way
22 through the backlog of approved visa petitions. See 22 C.F.R., *supra*. Therefore,
23 beneficiaries of approved visa petitions and their derivatives must monitor the
24 progression of priority dates through the U.S. State Department’s Visa Bulletin.
25 Each month, the Visa Bulletin provides a cut-off date for each preference category.
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1 Beneficiaries who have a priority date earlier than the cut-off date are allotted a
2 visa number, and only once the beneficiary has a “current” priority date can he or
3 she apply for adjustment of status or an immigrant visa.
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5
6 **B. THE CHILD STATUS PROTECTION ACT**

7 As noted above, the child of a beneficiary of an approved family sponsored
8 visa petition is properly considered a “derivative beneficiary” and is therefore
9 entitled to the same classification and priority date as the primary beneficiary
10 himself. INA § 203(d). However, derivative beneficiaries can maintain their
11 status only as long as they remain “children” as defined by the INA.
12 Consequently, once a derivative child turns 21 years old, he or she loses derivative
13 beneficiary status. This is commonly known as “aging-out.”
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16 Seeing that large numbers of derivative children were aging-out because of
17 administrative delays and the large backlog of approved visa petitions, Congress
18 enacted the CSPA. A portion of this law, codified at INA § 203(h)(1), sought to
19 provide relief to derivative beneficiaries who aged-out. Pursuant to this provision,
20 a child’s age is adjusted by subtracting the amount of time the United States
21 Citizenship and Immigration Service (“USCIS”) took to adjudicate the visa
22 petition from the child’s age on the date he or she becomes eligible to immigrate to
23 the United States. If the adjusted age is under 21, that child is not considered to
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1 have “aged-out” and may immigrate with his or her parent.² On the other hand, if
2 the adjusted age after performing the aforementioned calculation is 21 years or
3 older, INA § 203(h)(3) applies.³ Under INA § 203(h)(3), when an individual’s age
4 is determined to be 21 or older after subtracting the USCIS adjudication time, his
5 or her petition shall “automatically be converted to the appropriate category and
6 [he or she] shall retain the original priority date issued upon receipt of the original
7 petition.” INA § 203(h)(3).
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10 The application of this provisions includes “subsections (a)(2)(A) and (d).”
11
12 INA § 203(h). Section 203(a)(2)(A) of the Act refers to spouses and children of
13 permanent residents while INA § 203(d) states that the spouses and children of
14 principal beneficiaries of family, employment, and diversity lottery visas are
15 entitled to permanent residence in the same category as the primary beneficiary.
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19 ² Specifically, INA § 203(h)(1) provides:

20 [f]or purposes of subsections (a)(2)(A) and (d) [of § 203 of the INA], a
21 determination of whether the alien satisfies the age requirement in the matter
22 preceding subparagraph (A) of § 101(b)(1) [of the INA] shall be made using --
23 (A) the age of the alien on the date on which an immigrant visa number becomes
24 available for such alien...but only if the alien has sought to acquire the status of an
25 alien lawfully admitted for permanent residence within one year of such
26 availability; reduced by (B) the number of days in the period during which the
27 applicable petition described in paragraph (2) was pending.

28 ³ INA § 203(h)(3) reads as follows:

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 issued upon receipt of
the original petition.

1 The issue in the present case is if § 203(h)(3) applies to an aged-out
2 derivative beneficiary of a third or fourth family preference visa petition, thereby
3 allowing the derivative beneficiary to automatically convert the existing petition to
4 the correct preference category and retain the original priority date from the
5 primary beneficiary's visa petition.
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7 **IV. ARGUMENT**

9 Summary judgment is appropriate when the “pleadings, depositions, answers
10 to interrogatories, and admissions on file, together with the affidavits, if any, show
11 that there is no genuine issue as to any material fact and that the moving party is
12 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).
13

14 Because § 203(h)(3), the statute at issue in this case, is unambiguous and
15 provides for the automatic conversion and retention of an original priority date for
16 all petitions filed under INA § 203(d), Plaintiffs are entitled to judgment as a
17 matter of law. Moreover, even if the Court determines § 203(h)(3) is ambiguous,
18 Defendants' interpretation of the statute is arbitrary, capricious and manifestly
19 contrary to the law and as such owed no deference.
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22
23 **A. BECAUSE THE STATUTE IS UNAMBIGUOUS AND PROVIDES**
24 **FOR THE AUTOMATIC CONVERSION AND RETENTION OF AN**
25 **ORIGINAL PRIORITY DATE FOR ALL PETITIONS FILED**
26 **UNDER INA § 203(D), PLAINTIFFS ARE ENTITLED TO**
27 **JUDGMENT AS A MATTER OF LAW.**
28

1 Statutory construction and interpretation begins with the ordinary and
2 natural meaning of a statute’s words. Bailey v. United States, 516 U.S. 137, 144–
3 45 (1995); INS v. Cardoza-Fonesca, 480 U.S. 421, 431 (1987). In addition, courts
4 should give effect to every word of a statute. Bowsher v. Merck & Co., 460 U.S.
5 824, 833 (1983) (stating that the “settled principle of statutory construction that we
6 must give effect, if possible, to every word of the statute.”); see also United States
7 v. Wenner, 351 F.3d 969, 975 (9th Cir. 2003) (noting the fundamental principal of
8 statutory construction that a statute should not be construed to render certain words
9 or phrases mere surplusage.).
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13 When applying these principles to § 203(h)(3), the statute appears
14 unambiguous — when a derivative child ages-out, “the alien’s petition shall
15 automatically be converted to the appropriate category and the alien shall retain the
16 original priority date issued upon receipt of the original petition.” INA §
17 203(h)(3). Because the petitions subject to automatic conversion include any
18 “petition filed under section 204 for classification of the alien’s parent under
19 subsection (a), (b), or (c),” an aged-out child, who is a derivative beneficiary of the
20 visa petition of his parent, can reunite with their family more quickly by utilizing
21 their parent’s earlier priority date. See INA § 203(h)(2). This interpretation is
22 consistent with the unambiguous language of the statute and, therefore, Plaintiffs
23 are entitled to judgment as a matter of law.
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1 More specifically, INA § 203(h)(2)(B) defines the petitions described by §
2 203(h) “with respect to an alien child who is a derivative beneficiary under
3 subsection (d), a petition filed under section 204 for classification of the alien’s
4 parent under subsection (a) [family based petitions], (b) [employment based
5 petitions], or (c) [diversity lottery based petitions].” As such, all of § 203(h)
6 applies to any petition filed for the alien child (derivative beneficiary) of the
7 primary beneficiary (parent) under family based, employment based or diversity
8 petitions. There is neither a distinction in § 203(h)(2)(B) between derivative
9 beneficiaries of petitions filed under family-based second preference or any other
10 preference nor any such distinction in § 203(h)(3) itself, which specifically
11 references § 203(d).

12 Undoubtedly, § 203(h)(2) of the Act describes petitions in “this paragraph”
13 and provides no differentiation between § 203(h)(1) and § 203(h)(3). See INA §
14 203(h)(2). In essence, Defendants’ limited approach to statutory construction
15 would add the qualifying phrase “in the preceding paragraph” to § 203(h)(2).
16 Because Congress did not include this (or any other) qualifying phrase in §
17 203(h)(2), Defendant’s limiting approach is without merit. As such, this Court
18 should find that § 203(h)(3) applies to all petitions filed under § 203(d) as
19 indicated by § 203(h)(2) and as already applied by Defendants under § 203(h)(1).
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1 An additional issue in the present case is the language of § 203(h)(3) that
2 limits the automatic conversion and retention of priority dates to petitions arising
3 under “subsections (a)(2)(A) and (d).” INA § 203(h)(3). It is undisputed that §
4 203(d) of the Act refers to derivatives in all the family-based preference categories.
5
6 As such, from the plain language of the statute, it appears that Congress intended
7
8 to include other derivatives, such as family based derivatives under the third and
9
10 fourth preference categories, in § 203(h)(3). Whenever possible, Courts must
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12 avoid interpreting statutes in such a way as to render any portion of the statute
13
14 redundant or unnecessary. See United States v. Wenner, 351 F.3d at 975.
15
16 Moreover, the same phrase “(a)(2)(A) and (d)” is used to describe petitions in both
17
18 § 203(h)(1) and § 203(h)(3). Because Congress used the same phrase in both §
19
20 203(h)(1) and § 203(h)(3), it is clear that Congress meant for the phrase to have the
21
22 same meaning in both sections. If the same phrase (“(a)(2)(A) and (d)”) used in
23
24 the same statute (INA § 203(h)) enacted by Congress at the same time (August 6,
25
26 2002) has the same meaning, then Plaintiffs are entitled to judgment as a matter of
27
28 law.

24 In addition, Congress enacted the Child Status Protection Act not only to
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26 address administrative delays, but to provide relief to immigrant families and
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28 secure family unity. Indeed, the history and purpose of CSPA supports a reading
of § 203(h) that is as ameliorative as it is inclusive because Congress expressly

1 enacted the statute to “address[] the predicament of those aliens, who through no
2 fault of their own, lose the opportunity to obtain [a] . . . visa.” Padash v. INS, 358
3 F.3d 1161, 1173 (9th Cir. 2004) (*quoting* H.R. Rep. No. 107–45, at 2.). The
4 United States Court of Appeals for the Ninth Circuit has found that the Child
5 Status Protection Act “was intended to address the often harsh and arbitrary effects
6 of the age out provisions under the previously existing statute.” Padash, 358 F.3d
7 at 1173. This Court should adhere to the general canon of construction that “a rule
8 intended to extend benefits should be ‘interpreted and applied in an ameliorative
9 fashion.’” Id. (*quoting* Hernandez v. Ashcroft, 345 F.3d 824, 840 (9th Cir. 2003)).

13 As applied, Plaintiff’s reading of the plain language of the statute performs
14 smoothly without the need to ignore certain statutory words or phrases. For
15 example, where an alien is classified as a derivative beneficiary of an original
16 petition, the appropriate category for purposes of § 203(h)(3) is that which applies
17 to the aged out derivative vis-à-vis the principal beneficiary of the original petition.
18 Furthermore, the derivative beneficiary would be entitled to retain the original
19 priority date that applied to the original preference petition. Any other reading
20 requires the Court to ignore “and (d)” or render it mere surplusage. As noted
21 above, established jurisprudence cautions against this approach. See, e.g., Bailey
22 v. United States, 516 U.S. at 144–45; INS v. Cardoza-Fonesca, 480 U.S. at 431;
23 Bowsher v. Merck & Co., 460 U.S. at 833; United States v. Wenner, 351 F.3d at
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1 975. Because § 203(h)(3) provides for the automatic conversion and retention of
2 the original priority date for all petitions filed under § 203(d), Plaintiffs are entitled
3 to judgment as a matter of law.
4

5 Furthermore, it is important to note that Congress was not attempting to
6 remedy a problem that was previously cured through regulation. It was not trying
7 to help children “cut in line.” In fact, Congress aimed toward correcting a problem
8 that unfairly separated families for decades. As such, the CSPA’s purpose is to
9 allow aged-out children to keep their place in line — a place they held with their
10 parents as a family. The plain language of the statute makes this clear, and,
11 therefore Plaintiffs are entitled to judgment as a matter of law.
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15 **B. BECAUSE THE AGENCY’S POSITION IS ARBITRARY,**
16 **CAPRICIOUS, AND MANIFESTLY CONTRARY TO THE LAW,**
17 **DEFENDANT’S POSITION DESERVES NO DEFERENCE AND,**
18 **AS SUCH, PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A**
MATTER OF LAW.

19 In this case, the Defendant’s interpretation of INA § 203(h)(3) is found in
20 the Board of Immigration Appeals’ (“BIA”) decision in Matter of Wang, 25 I&N
21 Dec. 28 (BIA 2009). Under the interpretation found in Wang, automatic
22 conversion under § 203(h)(3) applies only to derivative children of a second
23 preference primary beneficiaries. See Wang at 34–39. This interpretation fails to
24 take into account the plain language of § 203(h)(3). Moreover, the conflict
25 addressed by Wang did not require remediation because it had been addressed by 8
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1 CFR § 204.2(a)(4) prior to the enactment of the CSPA. Because 8 CFR §
2 204.2(a)(4) was enacted and revised well before the CSPA was passed,⁴ Congress
3 did not need to pass a law in 2002 to provide the exact same relief already
4 provided through federal regulation.

6 Matter of Wang also fails to explain how an interpretation of § 203(h)(3)
7 that covers derivative beneficiaries only in the situation described in 8 CFR §
8 204.2(a)(4) would be consistent with the plain language of the entire statute.

10 Moreover, Matter of Wang completely misstates the effect of a correct
11 interpretation of § 203(h)(3). Wang states that an aged-out child who is permitted
12 to use the primary beneficiary’s original priority date would, in effect, “cut the
13 line” and, consequently, displace other immigrants who have been waiting for
14 years. The implication of this argument is that Congress would not intend such an
15 “unjust” result. However, an examination of Wang’s facts clearly reveals the flaws
16 in the BIA’s assessment. Xiuyi Wang, the aged-out derivative beneficiary in
17 Wang, was waiting in the immigrant visa line since 1992 when she was 10 years
18 old. See Matter of Wang, supra at 29. In seeking to retain his original priority date
19 for his daughter, Xiuyi’s father hoped to save her place in the line she had been
20 waiting in for nearly seventeen years before being kicked out by the “harsh and
21 arbitrary effects of the age out provisions.” Padash, supra at 1173. In doing so, he

28 ⁴ The most recent revision to 8 CFR § 204.2(a)(4) occurred in 1997.

1 would also prevent her from falling to the back of another line where she must wait
2 another decade. Accordingly, Xiuyi would not be cutting in line, but, rather,
3 saving her place in line. This is the just result Congress hoped to achieve by
4 passing the CSPA.
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8 1. BECAUSE DEFENDANT’S POSITION IGNORES THE
9 LAW, IT IS ARBITRARY AND CAPRICIOUS.

10 Defendants position ignores § 203(h)(3)’s inclusion of derivatives in all the
11 family-based preference categories. To determine who is included in § 203(h)(3),
12 one must start at the beginning of that subsection. The initial clause includes all
13 aliens mentioned in § 203(h)(1) (“[i]f the age of the alien is determined under
14 paragraph (1)”). Section 203(h)(3) then narrows the included aliens to those who
15 have “aged out” despite § 203(h)(1)’s protection against agency delay (“to be 21
16 years of age or older for the purposes are look to the age of the alien,”). Then
17 Congress stopped narrowing the inclusion of aliens under § 203(h)(3) (noted by the
18 comma) and, subsequently, spelled out what relief these aliens were entitled to
19 (“the alien’s petition shall be automatically converted to the appropriate category
20 and the alien shall retain the original priority date issued upon the original
21 petition.”)
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27 Defendants’ position completely ignores the initial words of § 203(h)(3) by
28 prematurely leaping to the relief portion. Defendants attempt to determine how

1 relief under § 203(h)(3) operates under existing statutes and ignore Congress’
2 “attempt to address the often harsh and arbitrary effects of the age out provisions
3 under the previously existing statute.” Padash supra 1173. To be sure, the CSPA
4 was enacted by Congress not only to address agency delays, but also to protect
5 derivatives in all the family-based preference categories. However, Defendants’
6 approach ignores portions of the statute by relying on outdated statutory
7 references. Thus, both Defendants’ interpretation of § 203(h)(3) and their
8 argument in its support are without merit.

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12 Furthermore, as discussed above, Defendants’ position ignores the language
13 “and (d).” Under Defendants’ position, this Court must either ignore “and (d)” or
14 count it as surplusage. However, the Courts must avoid interpreting statutes in
15 such a way as to render any portion of the statute redundant or unnecessary.
16 United States v. Wenner, 351 F.3d 969, 975 (9th Cir. 2003). Because Defendants’
17 position does exactly that, it is arbitrary and capricious and, therefore, Plaintiffs are
18 entitled to judgment as a matter of law.
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22 2. BECAUSE DEFENDANTS’ POSITION IS FATALLY
23 FLAWED, WITHOUT MERIT, AND MANIFESTLY
24 CONTRARY TO THE LAW, PLAINTIFFS ARE ENTITLED
25 TO JUDGMENT AS A MATTER OF LAW.

26 Defendant’s argue that “[Matter of Wang] makes clear that 8 U.S.C. §
27 1153(h)(3) applies only when a LPR files an F2A petition designating a child as a
28 primary or derivative beneficiary.” Defs. MSJ at 17 (*emphasis added*). However,

1 this position is not only without merit, but manifestly contrary to the statute. See
2 Ramos-Lopez v. Holder, 563 F. 3d 855 (9th Cir. 2009) (stating that a court may
3 overturn an agency decision under the second step of Chevron if it is arbitrary,
4 capricious, or manifestly contrary to the statute.”) Specifically, § 203(h)(4)
5 establishes that § 203(h)(3) applies to self-petitioners and derivatives of self-
6 petitioners. See INA § 203(h)(4). As such, Defendants’ assertion that § 203(h)(3)
7 applies “only” to F2A petitions is without merit, manifestly contrary to the statute,
8 and, therefore, Plaintiffs are entitled to judgment as a matter of law.
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12 Moreover, if the Court were to apply the approach set forth by Defendants to
13 self-petitioners and derivatives of self-petitioners as proscribed under § 203(h)(3),
14 the arbitrary nature of their position becomes apparent. Consider the following: a
15 derivative beneficiary of a self-petitioner ages-out while the self-petitioner himself
16 waits to obtain lawful permanent resident status. Defendants would argue that
17 because the automatic conversion set forth in § 203(h)(3) occurs at the time the
18 derivative child ages out, the derivative beneficiary’s petition cannot convert to an
19 appropriate category because there is no category for unmarried sons and daughters
20 of self-petitioners. See Wang at 35, 38; see also Defs. MSJ at 16, 18–19.
21 According to Defendants, “Congress never provided for ‘delayed’ conversions
22 where an alien was ‘temporarily’ ineligible for classification under INA.” See
23 Matter of Wang, *supra* at 35–38; Defs. MSJ at 18. Simply put, this is not true.
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1 Indeed, it appears that an aged-out derivative of a self-petitioner has no appropriate
2 category to convert to, yet, § 203(h)(4) makes clear that § 203(h)(3) properly
3 applies in that situation. See also INA § 204(a)(1)(D)(I).⁵ As such, Defendants’
4 approach is fatally flawed. See also Defs. MSJ at 19 (Because “[Self-petitioners]
5 were not U.S. Citizens or LPRs at the time that [the self-petitions] were filed, and
6 their daughters did not age-out due to administrative delays” § 203(h)(3) would not
7 apply.) Because Defendants’ position is fatally flawed and without merit,
8 Plaintiffs are entitled to judgment as a matter of law.

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12 Furthermore, Defendants rely heavily on the premise that in order for a
13 beneficiary to retain the original priority date, the subsequent petitioner must be the
14 same petitioner in the original petition. See Matter of Wang, supra at 35 (“[T]he
15 concept of ‘retention’ of priority dates has always been limited to visa petitions
16 filed by the same family member.”); see also Defs. MSJ at 18. However, applying
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21 ⁵ INA § 204(a)(1)(D)(I) reads, in relevant part, as follows:

22 Any child who attains 21 years of age who has filed a petition under clause (iv) of
23 section 204(a)(1)(A) [governing immigrant children who have suffered domestic
24 abuse from their U.S. citizen parents] or section 204(a)(1)(B)(iii) [governing
25 immigrant children who have suffered domestic abuse from their lawful
26 permanent resident parents] . . . that was filed or approved before the date on
27 which the child attained 21 years of age shall be considered (if the child has not
28 been admitted or approved for lawful permanent residence by the date the child
attained 21 years of age) a petitioner for preference status under paragraph (1),
(2), or (3) of section 203(a) [setting forth family preference categories] . . .
whichever paragraph is applicable, with the same priority date assigned to the
self-petition filed under clause (iv) of section 204(a)(1)(A) or section
204(a)(1)(B)(iii) No new petition shall be required to be filed. (emphasis
added).

1 § 203(h)(3) to self-petitioners and derivatives of self-petitioners again
2 demonstrates the legal error in Defendants’ interpretation. Under §203(h)(3), the
3 automatic conversion and retention of original priority dates would create a new
4 and separate petitioner for a derivate of a self-petition. Specifically, the derivative
5 beneficiary of a self-petitioner becomes her own self-petitioner. See INA §
6 204(a)(1)(D)(III).⁶ Undoubtedly, this situation involves the creation a new
7 petitioner who is not “the same family member.” This is just one example of the
8 creation of a new petitioner that demonstrates Defendants’ interpretation is
9 arbitrary and capricious.⁷

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13 Finally, Defendants’ contend that derivative children waiting with their
14 parents were never “in line” and as such § 203(h)(3) does not apply because
15 Congress was concerned with displacing others who have been waiting patiently in
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19 ⁶ INA § 204(a)(1)(D)(III) reads, in relevant part, as follows:

20 Any derivative child who attains 21 years of age who is included in a petition
21 [filed by an alien under subparagraph (A)(iii) [good faith marriage to U.S.
22 citizen], (A)(iv) [children who have suffered abuse from a U.S. citizen parent],
23 (B)(ii) [good faith marriage to LPR] or (B)(iii) [children who have suffered abuse
24 from an LPR parent] in which the child is included as a derivative beneficiary]
25 that was filed or approved before the date on which the child attained 21 years of
26 age shall be considered . . . a VAWA self-petitioner with the same priority date as
27 that assigned to the petitioner in [the original petition]. No new petition shall be
28 required to be filed. (emphasis added).

⁷ Other examples include Section 421(c) of the U.S. Patriot Act, P.L. 107-56, 115 Stat. 272
(2001); different employment based petitioners pursuant to 8 C.F.R. § 204.5(e); physicians with
approved national interest waivers under INA § 203(b)(2) pursuant to 8 C.F.R. § 204.12(f)(1).
The Court may also consider the Western Hemisphere savings clause as set forth in the
Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703,
27077; 9 FAM 42.53 Note 4.1.

1 line. See Matter of Wang *supra* at 38; Defs. MSJ at 16, 21. Under their approach,
2 Defendants argue that derivatives were never in line and, as such, § 203(h)(3) does
3 not allow an aged out derivative to convert to a preference category. Not only is
4 this argument manifestly contrary to the law, it requires an unreasonable
5 interpretation of what it means to wait 15 years or more for the opportunity to
6 immigrate to the United States as a family. Defendants would have Xiuyi Wang,
7 who undoubtedly waited in the immigrant visa queue with her father for nearly
8 seventeen years, wait another decade or more in order to legally immigrate to the
9 United States simply because she is now too old for the line she was waiting in.
10 See Matter of Wang, *supra* at 38–39. This unjust result severely punishes those
11 who attempt to legally immigrate to the United States in accordance with our
12 immigration laws, but, through no fault of their own, fall out of their original visa
13 preference category. This result is unreasonable, capricious, and stands in stark
14 contrast to Congress’ intent in passing the CSPA.

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20 Moreover, Defendants’ argument stands completely against logic.
21 Derivative children are obviously “in line” because they are statutorily eligible for
22 permanent resident status pursuant to INA § 203(d) and are often listed on the
23 original visa petition. See discussion *supra* at 5–6. This fact is unquestionably
24 evinced by every derivative beneficiary who has gained lawful permanent resident
25 status through family based immigration. If, as Defendants suggest, derivative
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1 beneficiaries are not waiting in the visa line with their parents, it would be
2 impossible for them to gain permanent resident status. However, this is patently
3 untrue, and, as such, any argument contending that derivative beneficiaries are not
4 “in line” is completely specious and illogical. Thus, Defendant’s interpretation of
5 INA § 203(h)(3), which relies upon this argument, is not entitled to deference, and
6 Plaintiffs are entitled to judgment as a matter of law.
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10 C. PLAINTIFFS ARE OTHERWISE ENTITLED TO JUDGMENT AS
11 A MATTER OF LAW.
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13 Defendants’ refusal to issue the visa petition with the original priority date is
14 at odds with the language, structure, history and purpose of the Child Status
15 Protection Act. Because Defendants have failed to abide by statutory procedures,
16 their actions are arbitrary, capricious and an abuse of discretion. Accordingly, this
17 Court should enter judgment consistent with the clear language of the Child Status
18 Protection Act and Congressional intent, declaring class members’ visa petitions
19 automatically convert and retain the original priority date pursuant to § 203(h)(3).
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22 Furthermore, this Court should enter judgment compelling Defendants to
23 perform their non-discretionary duty to issue the correct original priority date
24 pursuant to § 203(h)(3).
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27 Class members have significant, fundamental interests that have been
28 prejudiced by the errors and inaction in their cases. Class members have a

1 fundamental interest protected by the Fifth Amendment in family unity and in
2 maintaining their familial ties. See Kaur v. Ashcroft, 388 F.3d 734, 737 (9th Cir.
3 2004) (*quoting Zadvydas v. Davis*, 533 U.S. 678, 693 (2001))(the Fifth
4 Amendment’s Due Process Clause “applies to all ‘persons’ within the United
5 States, including aliens.”) Class members’ fundamental interest in the unity and
6 integrity of their families is protected by the Due Process Clause. See Stanley v.
7 Illinois, 405 U.S. 645, 651 (1972) (recognizing that "the integrity of the family unit
8 has found protection in the Due Process Clause of the Fourteenth Amendment").
9 As such, this Court should enter judgment compelling the immediate issuance of
10 the visa petitions with the correct original priority date pursuant to § 203(h)(3).
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15 **V. CONCLUSION**

16 For the foregoing reasons, Plaintiffs request the Court grant their Motion for
17 Summary Judgment.
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19 Dated: October 9, 2009

Respectfully Submitted,

/s/Nancy E. Miller

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