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 DISTRICT OF CALIFORNIA
EDCV 08-840 JVS (SHX)

OPENING BRIEF FOR PLAINTFFS-APPELLANTS

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I. JURISDICTION

This is an appeal from the District Court's denial of Plaintiffs-Appellants' motion for summary judgment. The District Court denied Plaintiffs – Appellants' motion for summary judgment on October 9, 2009. Plaintiffs' Excerpts of Record, hereinafter "E.R.," Tab 2, p. 2, Order re: Cross Motions for Summary Judgment. An appeal was timely filed on November 3, 2009. *See* Federal Rule of Appellate Procedure 4(a)(1)(B). E.R. Tab 1, p. 1, Notice of Appeal. This Court has jurisdiction over final orders of the District Court for the Central District of California under 28 U.S.C. § 1291.

The District Court's jurisdiction over this action was based on 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 2201 (Declaratory Judgment Act), and 5 U.S.C. § 701 et seq. (Administrative Procedure Act or APA).

II. STATEMENT OF THE ISSUE

Whether the District Court erred in determining that aged-out derivative beneficiaries of third and fourth family-sponsored preference categories may not utilize the automatic conversion and priority date retention provisions of the Child Status Protection Act (CSPA) codified at 8 U.S.C. § 1153(h)(3).

III. STATEMENT OF THE CASE

On June 23, 2008, Plaintiffs filed a complaint for declaratory and mandamus relief with the District Court for the Central District of California. E.R. Tab 8, p.

65, Civil Docket #1. The complaint alleged that Defendants wrongfully, arbitrarily, and capriciously refused to accord the appropriate priority dates to the immigrant visa petitions Plaintiffs have filed on behalf of their adult children contrary to the plain meaning of the Child Status Protection Act, Pub. L. No. 107-20, 116 Stat. 927 (2002), codified at 8 U.S.C. § 1153(h), INA § 203(h)(3) (hereafter INA § 203(h)(3)).

Plaintiffs' case was transferred to Judge James Selna along with several related cases. E.R. Tab 8, p. 67, Docket #10. The District Court then granted Defendants' motion to hold the case in abeyance pending an anticipated precedent decision from the Board of Immigration Appeals (BIA). E.R. Tab 8, pp. 67, 68, Docket #12, 17. On June 16, 2009, the BIA issued its decision in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009) in which it held that the automatic conversion and priority date retention provisions of the CSPA do not apply to an alien who ages out of eligibility for an immigrant visa as the derivative beneficiary of a fourth-preference visa petition.

On August 31, 2009, Plaintiffs and Defendants filed cross motions for summary judgment. E.R. Tab 8, pp. 71-72, Docket # 53, 55. The District Court denied Plaintiffs – Appellants' motion for summary judgment on October 9, 2009. E.R. Tab 8, p. 73, Docket # 63. Defendants' motion for summary judgment was denied as moot.

IV. STATEMENT OF FACTS

A. Statutory Framework - Family Based Immigration

Immigration on the basis of a family relationship with a citizen or lawful permanent resident of the United States is one of the primary ways for foreign nationals to immigrate to the United States. Other means include immigration through an employer's petition, asylum, and the diversity visa lottery. *See* 8 U.S.C. §§ 1153(b), 1159 and 1153(c), respectively. The family-sponsored immigration categories are subject to a maximum allotment of 480,000 visas each year, less the number of immigrant visas issued to immediate relatives, and plus the number of unused employment-sponsored immigrant visas, if any. *See* 8 U.S.C. § 1151(c).

Under the Immigration and Nationality Act, certain family members of U.S. citizens are deemed "immediate relatives," and are not subject to the numerical limitations. Immediate relatives include the children of U.S. citizens, spouses of U.S. citizens, and parents of U.S. citizens who are at least twenty-one years of age. *See* 8 U.S.C. § 1151(b)(2)(A)(i). There is no similar provision for the "immediate relatives" of lawful permanent residents.

For those individuals who are not "immediate relatives," the Immigration and Nationality Act establishes four family-sponsored immigrant visa preference

categories which are subject to numerical limitations. *See* 8 U.S.C. § 1153(a). These categories are:

> a) *First family-sponsored preference category*: Unmarried adult sons and daughters of United States citizens ("F1 category"). 8 U.S.C. § 1153(a)(1).
>
> b) *Second family-sponsored preference category*: Spouses and children ("F2A category"), and unmarried sons and daughters ("F2B category") of lawful permanent residents. 8 U.S.C. §§ 1153(a)(2)(A) & (B).
>
> c) *Third family-sponsored preference category*: Married sons and daughters of U.S. citizens ("F3 category"). 8 U.S.C. § 1153(a)(3).
>
> d) *Fourth family-sponsored preference category*: Brothers and sisters of adult U.S. citizens ("F4 category"). 8 U.S.C. § 1153(a)(4).

A spouse or child of the alien beneficiary of a family-sponsored immigrant visa petition is entitled to the same status and priority date as the principal alien beneficiary. *See* 8 U.S.C. § 1153 (d). Such spouse or child is considered a "derivative beneficiary" of the visa petition.

Immigrant visas are made available in the order in which a visa petition is received by the United States Citizenship and Immigration Services (USCIS). Because the demand for immigrant visas in each family sponsored preference category surpasses the statutory allotment each year, beneficiaries and their immediate family members often experience long waiting times before they are eligible to receive an immigrant visa.

Filing an immigrant visa petition (Form I-130, Petition for Alien Relative) with the USCIS is the first step in the family-sponsored immigration process. The

receipt date of the I-130 petition is commonly referred to as the "priority date" because it indicates the beneficiary's "place in the line" to receive an immigrant visa. *See* 8 C.F.R. § 204.1(c).

Beneficiaries of visa petitions must monitor the progression of their priority dates on the U.S. State Department's Visa Bulletin.[1] The Visa Bulletin shows when a visa number is available for beneficiaries of approved visa petitions. Only beneficiaries who have a priority date earlier than the cut-off date on the current Visa Bulletin may be allotted a visa number. This is commonly referred to as having a "current priority date." Once a beneficiary has a current priority date, she may take the second step of applying for adjustment of status (aka "green card") if she resides in the United States, or for an immigrant visa at the appropriate U.S. Consulate if she resides abroad.

B. Statutory Framework - The Child Status Protection Act

The CSPA was enacted in order to address the predicament of certain individuals who were classified as children under the INA when an immigrant visa petition was filed, but who turned twenty-one and subsequently lost their eligibility

[1] Current and archived visa bulletins are available on the State Department website: http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html (Accessed March 17, 2010).

for immigration benefits. In order to meet the definition of a "child" for immigration purposes, a beneficiary must be unmarried and under the age of twenty-one. *See* 8 U.S.C. §1101(b). Once an individual reaches the age of twenty-one or marries, he or she is generally no longer considered a "child" for immigration purposes.

In enacting the CSPA, Congress was motivated by "the enormous backlog of adjustment of status (to permanent residence) applications" which were then pending with the INS.[2] H.R. Rep. No. 107-42, *2. It sought to "address[] the predicament of these aliens, who through no fault of their own, lose the opportunity to obtain a visa." Id. *See also*, *Padash v. INS*, 358 F.3d 1161, 1172 – 73 (9th Cir. 2004). The legislation thus "facilitates and hastens the reuniting of legal immigrants' families. It is family-friendly legislation that is in keeping with our proud traditions." *See*, 148 Cong. Rec. H4991 (Statement of Rep. Sensenbrenner).

In its original form, H.R. 1209, the CSPA only applied to visa petitions filed for immediate relatives. The Senate then expanded the bill to include protections

[2] The INS was abolished on March 1, 2003 pursuant to the Homeland Security Act of 2002. Pub. L. No. 107-296 § 471, 116 Stat. 2135 (2002). The processing of applications for immigration benefits was assumed by the United States Citizenship and Immigration Services (USCIS), a component of the Department of Homeland Security (DHS). This brief will refer to the agency by its current name, USCIS.

for prospective immigrants in other immigration categories. 148 Cong. Rec. S5560 (2002).

At issue in the case at hand is the provision regarding automatic conversion and priority date retention found at Section 3 of the CSPA. Section 3 of the CSPA is entitled "Treatment of Certain Unmarried Sons and Daughters Seeking Status as Family-Sponsored, Employment-Based and Diversity Immigrants." 107 P.L. 208, 116 Stat. 927 (2002). This provision reads as follows:

> Section 203 of the Immigration and Nationality Act (8 U.S.C. 1153) is amended by adding at the end the following:

(h) Rules for Determining Whether Certain Aliens Are Children.—

(1) In general.-- For purposes of subsections (a)(2)(A) and (d), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using—

(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by

(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

(2) Petitions described.-- The petition described in this paragraph is—

(A) with respect to a relationship described in subsection (a)(2)(A), a petition filed under section 204 for classification of an alien child under subsection (a)(2)(A); or

(B) with respect to an alien child who is a derivative beneficiary under

> subsection (d), a petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c).
>
> (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 issued upon receipt of the original petition.

107 P.L. 208, 116 Stat. 927 (2002) § 3; INA § 203(h).

The first subsection establishes a formula for determining when a derivative beneficiary may be able to retain status as a "child" despite reaching twenty-one years of age. If the resulting calculation brings the beneficiary under the age of twenty-one, she will still be considered a "child" provided she seeks to acquire permanent residence within one year of visa availability. *See* INA. § 203(h)(1). This provision directly addresses Congress' concerns regarding administrative delays by allowing the beneficiary to subtract the time a petition is pending from her age when the priority date becomes current.

The second subsection defines which petitions are covered by Section 3 of the CSPA. This subsection references petitions filed under all family-based preference categories, as well as the employment- based and diversity visa categories. *See* INA § 203(h)(2).

The final subsection provides for the retention of the original priority date for derivative beneficiaries who cannot preserve their status as "children" under the CSPA's formula. *See* INA § 203(h)(3).

Because each subsection of INA § 203(h) references "*subsections (a)(2)(A) and (d)*" of INA § 203, it is necessary to read and understand both of these provisions as well.

INA § 203(a)(2)(A) provides as follows:

> (a) Preference Allocation for Family-Sponsored Immigrants. - Aliens subject to the worldwide level specified in section 201(c) for family-sponsored immigrants shall be allotted visas as follows:
>
> > (2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens. - Qualified immigrants –
> >
> > > (A) who are the spouses or children of an alien lawfully admitted for permanent residence.

INA § 203(a)(2)(A) thus refers to spouses and children (those under twenty-one and unmarried) of permanent residents who are petitioned under the family-based 2A category.

The second section referenced is INA § 203(d), which provides as follows:

> Treatment of family members –
>
> > A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 101(b)(1) shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

INA § 203(d) thus states that the spouses and children of principal beneficiaries of family, employment, and diversity lottery visas are entitled to permanent residence in the same category as the principal.

The issue presented in the instant case is whether the aged-out derivative beneficiaries of a third and fourth family-sponsored preference categories may utilize the automatic conversion and priority date retention provisions of INA § 203(h)(3).

C. Matter of Wang

When Plaintiffs initially filed their complaint with the District Court, this issue had not been addressed in any precedent decision at either the administrative or federal court level.[3] The Board of Immigration Appeals (BIA) addressed this issue in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009). *Matter of Wang* involved an I-130 petition filed by a lawful permanent resident on behalf of his adult daughter in 2006. The petitioner himself obtained permanent residence through an earlier petition filed by his U.S. citizen sister in 1992. His daughter was included as a derivative beneficiary of that earlier fourth preference (F4) petition, but aged out before a visa was available.[4] The petitioner in *Wang* filed a I-130 on behalf of

[3] The BIA had issued two non-precedent decisions that applied the terms of § 203(h)(3) to aged-out beneficiaries of fourth –preference visa petitions. *See*, *Matter of Maria T. Garcia*, 2006 WL 2183654 (BIA June 16, 2006); *Matter of Elizabeth F. Garcia*, 2007 WL 2463913 (BIA July 24, 2007).

[4] The F4 petition was filed on December 28, 1992 when Wang's derivative daughter was ten (10) years old. The petition was approved on February 24, 1993. However given the backlogs in the fourth preference category, visas did not become available until February of 2005 when Wang's daughter was twenty-two (22) years old.

his adult daughter and sought to retain the 1992 date associated his sister's petition under INA § 203(h)(3). *Wang* at 28.

The BIA held that "the automatic conversion and priority date retention provisions of the CSPA do not apply to an alien who ages out of eligibility for an immigrant visa as the derivative beneficiary of a fourth-preference visa petition, and on whose behalf a second-preference petition is later filed by a different petitioner." *Id.*

In analyzing the issue, the BIA first found that the statute was ambiguous and did not "expressly state which petitions qualify for automatic conversion and retention of priority dates." *Id.* at 33. The BIA then considered certain family-based statutory and regulatory provisions dealing with automatic conversion and priority date retention. *Id.* at 34. Based on these provisions the BIA concluded that:

> [T]he term "conversion" has consistently been used to mean that a visa petition converts from one visa category to another, and the beneficiary of that petition then falls within a new classification without the need to file a new visa petition. Similarly, the concept of "retention" of priority dates has always been limited to visa petitions filed by the same family member. *Id*. at 35.

The BIA went on to examine the legislative history, and found that Congress was focused on the "issue of children aging out of visa availability as a result of administrative delays, without cutting in line ahead of others awaiting visas in other preference categories." *Id.* at 38. The BIA found no "evidence that it was

intended to address delays resulting from visa allocation issues, such as the long wait associated with priority dates." *Id.* For these reasons, the BIA declined to apply INA § 203(h)(3) to the petition in *Wang.* *Id.*

D. Plaintiffs' Immigration History

The facts in this matter are not in dispute. Plaintiffs Rosalina Cuellar de Osorio, Elizabeth Magpantay, Evelyn Santos, Eloisa Liwag, and Norma Uy are all lawful permanent residents of the United States who immigrated based on the visa petitions of United States citizen family members. Each Plaintiff named above is the parent of a child or children who were initially included as derivative beneficiaries of the visa petitions filed on her behalf. However, their children turned twenty-one before visa numbers were available and they consequently lost their classification as derivative beneficiaries. Ruth Uy, the final Plaintiff in this action, is the daughter of Norma Uy and is one such aged-out derivative beneficiary.

Plaintiff Rosalina Cuellar de Osorio was the beneficiary of an immigrant visa petition filed by her U.S. citizen mother on May 5, 1998. E.R. Tab 4, p. 25. At the time, Ms. Cuellar de Osorio's son Melvin Alexander Osorio Cuellar was thirteen years old and classified as a derivative beneficiary of this petition. E.R. Tab 4, p. 26.

The immigrant visa petition was approved on June 30, 1998. E.R. Tab 4, p. 25. However, visa numbers were not available to Ms. Cuellar de Osorio until over seven years later, on November 1, 2005. Melvin turned twenty-one a few months before, in July of 2005, and was not permitted to immigrate together with the rest of his family.

Ms. Rosalina Cuellar de Osorio entered the United States in August 2006 as a lawful permanent resident. E.R. Tab 4, p. 27. On July 20, 2007, she filed an immigrant visa petition on behalf of her son Melvin pursuant to the terms of 8 U.S.C. § 1153(a)(2)(B) (providing classification for unmarried sons and daughters of lawful permanent residents). Included with the petition was a request to retain the May 5, 1998 priority date pursuant INA § 203(h)(3). E.R. Tab 4, pp. 28-31.

Plaintiffs Elizabeth Magpantay, Evelyn Y. Santos, and Maria Eloisa Liwag are sisters. On January 29, 1991, their U.S. citizen father filed immigrant visa petitions on behalf of each daughter. E.R. Tab 5, p. 36. Their petitions were approved on March 14, 1991, however visa numbers were not available to the sisters and their families until nearly fifteen years later, on December 1, 2005. By that time, their children Ricardo, Melizza and Christine Magpantay, Dan Santos

and Conalu Liwag were all twenty-one years of age or older, and were not permitted to immigrate together with their parents and younger siblings.[5]

Subsequently, Ms. Magpantay, Ms. Santos and Ms. Liwag each entered the United States with their husbands and younger children as lawful permanent residents. They have been residents since May 2006, February of 2007, and June 2006 respectively. E.R. Tab 3, p. 22; Tab 5, p. 35; Tab 6, p. 53. Each mother filed immigrant visa petitions for their children living in the Philippines, and each has submitted a request to retain the January 29, 1991 priority date under INA § 203(h)(3). E.R. Tab 5, p. 40; Tab 6, p. 50.

The remaining plaintiffs, Norma Uy and Ruth Uy, are mother and daughter. Norma Uy was the beneficiary of an immigrant visa petition filed by her U.S. citizen sister on February 4, 1981. E.R. Tab 7, pp. 59, 61. At the time, her daughter Ruth was not yet two years old, and was included as a derivative beneficiary. E.R. Tab 7, p. 54. The petition was approved on February 8, 1981. However, visa numbers were not available to the Uy family until over twenty-one (21) years later, in July 2002. Ruth Uy turned twenty-one in April of 2000.

Norma Uy entered the United States in April 2005 as a lawful permanent resident. E.R. Tab 7, p. 61. Ruth Uy is currently present in the United States in valid F-1 student status. On July 12, 2007 Norma Uy submitted an immigrant

[5] Birth Certificates for all children are found at E.R. Tab 3, p. 21; Tab 5, pp. 32, 37, 44; Tab 6, p. 47.

petition (Form I-130) on behalf her daughter and Ruth applied for adjustment of status to permanent resident (Form I-485). Included was a request to retain the "original priority date" of February 4, 1981 pursuant to INA § 203(h)(3). The USCIS rejected the I-130 Petition and I-485 application stating that a visa number was not available. E.R. Tab 7, p. 57. Subsequently, Norma Uy re-submitted her immigrant visa petition on behalf of her daughter to the USCIS California Service Center, again requesting the February 4, 1981 priority date. E.R. Tab 7, pp. 55, 58-60.

On June 23, 2008, Plaintiffs filed their complaint for declaratory and mandamus relief seeking an order which would compel the Defendants to apply the requested priority dates to their pending visa petitions under INA § 203(h)(3). On June 16, 2009, the BIA issued *Matter of Wang,* 25 I&N Dec. 28 (BIA 2009), holding that the INA § 203(h)(3) applies only to individuals who were aged out of petitions initially filed in the second family preference category (i.e. only to derivatives initially petitioned by their lawful permanent resident parents). The District Court found that the BIA's decision in *Matter of Wang* was entitled to deference, and denied Plaintiffs' motion for summary judgment.

Since the District Court's decision the USCIS has approved the I-130 petitions filed by the Plaintiffs. In accordance with *Wang,* these petitions were *not* accorded the earlier priority dates requested by Plaintiffs under INA § 203(h)(3).

Consequently, and given the current waiting periods for the second family-sponsored preference category, it will be many years before the Plaintiffs' adult children will be able to join their families in the United States. At present, beneficiaries in the F2B category with priority dates of March 1, 2002 or earlier are eligible for immigrant visas. For individuals from the Philippines, the F2B category is backlogged to September 15, 1998. *See* April 2010 Visa Bulletin, available at: http://www.travel.state.gov/visa/frvi/bulletin/bulletin_4747.html (accessed April 13, 2010). An examination of archived visa bulletins shows that, since the Plaintiffs filed their complaint in June of 2008, the worldwide F2B category has progressed 31 months. The Philippines F2B category advanced at a much slower rate – only 18 months since June of 2008. *See* Archived Visa Bulletins available at: http://www.travel.state.gov/visa/frvi/bulletin/bulletin_1770.html (accessed April 13, 2010).

Given this pace, Plaintiffs' children will likely be approaching forty years of age before their priority dates become current. Should any of the Plaintiff / Petitioners pass away before this time, their petitions for their children will be revoked as a matter of law. *See* 8 C.F.R. § 205.1(a)(3)(i)(C). Should any of the beneficiaries marry while their petitioning parent is a lawful permanent resident, their petitions will likewise be revoked. *See* 8 C.F.R. § 205.1(a)(3)(i)(I).

Therefore, it is likely that many of the Plaintiffs will never be reunited with their sons and daughters in the United States.

V. SUMMARY OF ARGUMENT

The provisions of the CSPA codified at § 203(h)(3) of the Immigration and Nationality Act (INA) are clear. This section provides that the petitions of "Certain Unmarried Sons and Daughters Seeking Status as Family-Sponsored, Employment-Based, and Diversity Immigrants" who have reached their twenty-first birthdays will automatically convert to the appropriate category and that they will retain the priority date associated with their original petitions. The plain language of the statute applies to aged-out derivative beneficiaries of petitions under INA § 203(a)(2)(A) and § 203(d). Plaintiffs' children are the aged-out derivative beneficiaries of third and fourth family-sponsored preference categories as defined in § 203(d). Thus they benefit from the automatic conversion and priority date retention provisions of INA § 203(h)(3).

The District Court erred in deferring to the BIA's contrary interpretation of § 203(h)(3) set forth in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009). The BIA's restrictive interpretation conflicts with the plain language of the statute. Moreover, its interpretation relies on an incomplete analysis of key terms used in § 203(h)(3), a flawed analysis of legislative intent, and a misapprehension of the impact of a broader application of § 203(h)(3). Finally, the BIA's interpretation stands in

direct contravention to a fundamental principle and purpose of immigration law – reuniting families. The practical implication of adopting the BIA's holding in *Matter of Wang* will be more delay in reuniting families, and in some cases the permanent separation of families. The BIA's interpretation is arbitrary, capricious and is owed no deference.

VI. STANDARD OF REVIEW

This court reviews an entry of summary judgment de novo. *See Family Inc. v. U.S. Citizenship & Immigration Servs.*, 469 F.3d 1313, 1315 (9th Cir. 2006); *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). An agency's interpretation of a statute is a question of law reviewed de novo. *See Halaim v. INS*, 358 F.3d 1128, 1131 (9th Cir. 2004).

"In reviewing an agency's statutory construction, we must reject those constructions that are contrary to clear congressional intent or that frustrate the policy that Congress sought to implement." *See Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006) citing C*hevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

The court interpreting a statute must look first to the language of the statute for evidence of its meaning. *Estate of Cowart v. Nicholas Drilling Co.*, 205 U.S. 469, 474 (1992); *Robinson v. Shell Oil*, 519 U.S. 337, 340 (1997). If the language is clear, the Court must give effect to the plain meaning of the statute. *Consumer*

Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive").

If the statute is silent or ambiguous, then the reviewing court will defer to the agency only if the agency's interpretation is based on a permissible construction of the statute. C*hevron*, 467 U.S. at 843.

VII. ARGUMENTS

I. The District Court erred in deferring to the BIA's interpretation in *Matter of Wang* as it conflicts with the plain language of INA § 203(h)(3)

Deference to the agency's interpretation of the immigration laws is only appropriate if Congressional intent is unclear. *See Socop-Gonzalez v. INS*, 272 F.3d 1176, 1187 (9th Cir. 2001) (en banc) (citing *Chevron* 467 U.S. at 842); *see also, INS v. St. Cyr*, 533 U.S. 289, 320 n. 45 (2001) (we only defer…to agency interpretations that, applying the normal tools of statutory construction, are ambiguous). Courts must reject those constructions that are contrary to clear Congressional intent or that frustrate the policy that Congress sought to implement. *Chevron*, 467 U.S. at 843 n.9.

In the present case, the District Court held that INA § 203(h)(3) was ambiguous, and it "endorse[d] the explanation of this ambiguity articulated in *Wang* itself." E.R. Tab 2, p. 13. However, the BIA's decision in *Matter of Wang* contains no meaningful analysis of this alleged ambiguity. Its decision summarily concludes, "Unlike sections 203(h)(1) and (2), which when read in tandem clearly define the universe of petitions that qualify for the 'delayed processing formula,' the language of section 203(h)(3) does not expressly state which petitions qualify for automatic conversion and retention of priority dates. Given this ambiguity, we must look to the legislative intent behind section 203(h)(3)." *Matter of Wang*, 25 I&N Dec. at 33.

Contrary to the BIA's conclusion in *Wang*, there is no ambiguity in who benefits from the terms of § 203(h)(3). The title of CSPA Section 3, which created § 203(h), is the first statement evidencing who benefits from the provisions of the Act. CSPA Section 3 is "TREATMENT OF CERTAIN UNMARRIED SONS AND DAUGHTERS SEEKING STATUS AS FAMILY-SPONSORED, EMPLOYMENT-BASED AND DIVERSITY IMMIGRANTS." 107 P.L. 208, 116 Stat. 927 (2002). INA § 203(h) then clearly defines who benefits from its provisions, namely all derivative beneficiaries covered by INA § 203(a)(2)(A) and (d).

This structure is clear when one examines each of the paragraphs in turn. Paragraph one establishes a mathematical formula which permits the length of time that the visa petition was pending to be subtracted from the age of the derivative beneficiary on the date a visa becomes available. Such beneficiaries must also "seek to acquire" lawful permanent residence within one year of visa availability. In order to determine *who* may utilize this mathematical formula, paragraph 1 references "the applicable petition described in paragraph (2)." *See* INA § 203(h)(1).

Paragraph two in turn encompasses petitions filed under § 203(a)(2)(A), and petitions filed under § 203(d), meaning that beneficiaries under the F2A category, as well as all other derivatives in family, employment and diversity categories may utilize the formula in paragraph one to determine whether they may still be considered "children." *See* INA § 203(h)(2).

Finally, paragraph three states that if a beneficiary is over twenty-one notwithstanding the formula provided in paragraph one, the petition will automatically convert and she may retain her priority date. This section reads:

> "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 [203](a)(2)(A) and [203](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." (Emphasis added).

It is plain that INA § 203(h)(3) contains an *unrestricted* reference to paragraph one (§ 203(h)(1)). As stated above, paragraph one plainly covers beneficiaries in the F2A category (INA § 203(a)(2)(A)), as well as derivatives in other family-based, employment-based, and diversity visa categories (INA § 203(d)). Thus any and all beneficiaries who age out under the calculations of paragraph one may utilize the automatic conversion and priority date retention provisions of paragraph three.

From the plain language of § 203(h) it is unambiguous that the automatic conversion and priority date retention provisions apply to:

1) an alien,

2) who is over 21 notwithstanding the formula of § 203(h)(1),

3) for purposes of INA § 203(a)(2)(A) and (d).

The BIA erred in concluding that it was unclear who benefits from § 203(h)(3).

Moreover, the BIA's interpretation of § 203(h)(3) conflicts with a fundamental principle of statutory construction. It is well-established that when Congress uses the same phrase in different subsections of a statute, it intends that phrase to have the same meaning throughout the statute. *See, United States v. Various Slot Machines*, 658 F.2d 697, 703 n. 11 (9th Cir. 1981). When Congress used the phrase "*for purposes of subsections (a)(2)(A) and (d)*" in INA § 203(h)(*1*), this provision applies equally to derivatives in all family, employment and

diversity categories. The derivative son of an employment-based applicant, the derivative daughter of a third family preference beneficiary, or the derivative son of a diversity lottery winner may all utilize the formula at § 203(h)(1) to determine whether he or she is still considered a "child" for immigration purposes.

In *Matter of Wang*, the BIA essentially ignores the inclusion of the identical phrase "*for purposes of subsections (a)(2)(A) and (d)*" when it is repeated in INA § 203(h)(3). The practical effect of *Matter of Wang* is the limit the applicability of § 203(h)(3) to include only the aged-out derivatives of second preference family petitions (§ 203(a)(2)(A)).[6] Since the statutory language is clear that § 203(h)(3) and § 203(h)(1) apply to the same persons, this interpretation impermissibly conflicts with the statute.

The District Court glosses over this glaring conflict by stating that, "beneficiaries of petitions filed under subsection (d) include derivative beneficiaries of F2A petitions. Given the BIA's reliance on a perceived intent of Congress not to expand the protection of the act, the Court cannot say that an

[6] It must be noted that these beneficiaries were *already* protected by the regulatory scheme in place when Congress enacted the CSPA. 8 C.F.R. § 204.2(a)(4) provides that when the derivative beneficiary of a second preference spousal petition (F2A) ages out, he may retain the original priority date associated with the F2A petition upon the filing of a F2B petition by his permanent resident parent. Thus, aged-out derivatives in the F2A category were already guaranteed they would keep their place in line, and Congressional action would be unnecessary to benefit such derivatives. Neither the plain language of CSPA Section 3, nor the legislative history of the CSPA as a whole supports an inference that Congress intended to codify this regulatory provision.

interpretation of the reference to subsection (d) which restricts subsection (d) to beneficiaries of derivative F2A petitions is unreasonable."[7] E.R. Tab 2, p. 16.

The problem with the District Court's reasoning is that the BIA fails to address this conflict in *Matter of Wang*. The BIA makes no attempt to explain what the unrestricted reference to INA § 203(d) is supposed to mean if it does not include all family, employment and diversity-based beneficiaries. The BIA certainly never held that the inclusion of INA § 203(d) refers only a distinct sub-set of the individuals otherwise plainly covered by its terms – i.e. derivatives of F2A petitions. The District Court erred in attributing reasoning to the BIA which was never articulated in *Matter of Wang*. *See, Motor Vehicle Manufacture Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (the judiciary may not supply a reasoned basis for the agency's action that the agency itself has not given).

Each of the three subsections of § 203(h) reference petitions filed under INA §§ 203(a)(2)(A) *and* (d). By the consistent and repeated reference to sections (a)(2)(A) *and* (d), it is plain that each provision of section 203(h) applies to derivative beneficiaries in the family, employment and diversity preference categories. By restricting the application of INA § 203(h)(3) to a narrow subset of

[7] As more fully explained in Section II B below, the BIA's determination of Congressional intent is also flawed. There is indeed evidence of Congressional intent to go beyond merely addressing administrative delays – among such evidence is § 203(h)(3) itself.

beneficiaries, the BIA's reasoning in *Matter of Wang* impermissibly conflicts with the plain language of the statute and is owed no deference. *See*, *Padash*, 358 F.3d at 1168 ("Because…we can ascertain congressional intent by employing traditional tools of statutory construction, deference is not required").

II. The District Court erred in deferring to the BIA's unreasonable interpretation of the statute and legislative history set forth in *Matter of Wang*

A. The BIA's statutory and regulatory analysis of the terms "retention" and "automatic conversion" is incomplete.

The BIA's holding in *Matter of Wang* is based on an impermissible construction of the statute, and thus must fail. After ignoring the plain and unambiguous language of the statute, the BIA in *Matter of Wang* moves on to a discussion of other statutory provisions dealing with automatic conversion and priority date retention. *Matter of Wang*, 25 I&N Dec. at 34. The BIA determined that the terms "automatic conversion" and "retention" have a recognized meaning under the INA after examining several statutory and regulatory provisions dealing with family-based petitions.

The BIA first cites to the regulation at 8 C.F.R. § 204.2(i) as an example of "automatic conversion." This regulation has several provisions which allow for conversion from one preference category to another upon events such as a change

in the beneficiary's marital status, the beneficiary's turning twenty-one, and naturalization of the petitioner. The regulations provide that the beneficiary's priority date will remain the same.

The BIA then looks to 8 C.F.R. § 204.2(a)(4) as an example of priority date retention. *Matter of Wang*, at 34. This regulation allows the aged-out derivative of a second preference (F2A) petition to retain his original priority date in connection with a subsequent petition filed by the same lawful permanent resident parent (F2B). A stated in note 5, supra, this regulatory provision pre-dates the CSPA and accomplishes the same result as the BIA's holding in *Wang*. The only difference is that under the BIA's interpretation of INA § 203(h)(3), aged-out derivatives of F2A petitions no longer require a separate petition by their lawful permanent resident parent.

Finally, the BIA looks to INA § 201(f) as an instance of Congress' use of "the terms 'automatic conversion' and 'retention' consistent with the existing regulatory schema." *Matter of Wang* at 35. INA § 201(f) was added by the CSPA and established new rules to determine when aliens qualify as "immediate relatives." It allows for conversion from the F2A category to immediate relative status upon the naturalization of the petitioner (§ 201(f)(2)), and it allows for conversion from the F3 category to immediate relative status upon termination of a beneficiary's marriage (§ 201(f)(3)).

Based on these provisions the BIA concludes that, "the term 'conversion' has consistently been used to mean that a visa petition converts from one visa category to another, and the beneficiary of that petition then falls within a new classification without the need to file a new visa petition. Similarly, the concept of 'retention' of priority dates has *always* been limited to visa petitions filed by the same family member." *Wang*, 25 I&N Dec. at 35 (emphasis added).

The District Court found that the BIA's analysis of the statute was reasonable. However, the BIA's reasoning is flawed for several reasons. First, their recitation of examples overlooks instances where the statute and regulations allow for retention of priority dates with a change in petitioner. There are several such provisions in the INA and the federal regulations.

For instance, under 8 C.F.R. § 204.2(h)(2), the beneficiary of a petition filed by an abusive spouse may retain his or her priority date in connection with a new self-petition. Additionally, Section 421(c) of the U.S. Patriot Act, P.L. 107 – 56, 115 Stat. 272 (2001) allows beneficiaries to file self-petitions and retain their priority dates if their petitions were revoked or terminated as a result of a specified terrorist activity. This provision applies to all family-based and employment-based petitions. In fact, this provision also allows the beneficiary of a fiancée visa petition under INA § 101(a)(15)(K), or an application for labor certification under

INA § 212(a)(5)(A) to file a self-petition with the USCIS while retaining an older priority date.

In the employment-based context, retention of priority dates can and often does involve different petitioners. 8 C.F.R. § 204.5(e) allows beneficiaries in the first, second or third employment based categories to retain the priority date of an approved petition for any subsequently filed petition for classification under INA § 203(b)(1), (2), or (3). Under this section the beneficiary may have not only a new petitioner, but may also have a petition in a completely different employment-based preference category, and still retain his original priority date.

Also, under 8 C.F.R. § 204.12(f)(1) physicians with approved national interest waivers under INA § 203(b)(2) may change employers and retain the priority date associated with their initial visa petition.

Such broad application of priority date retention is hardly a new concept under the immigration laws. Until 1976, immigrants who were born in the Western Hemisphere or Canal Zone were termed "Western Hemisphere immigrants" and were not subject to the established preference system for family and employment-based immigrants. This changed with the Immigration and Nationality Act Amendments of 1976. Pub. L. No. 94 – 571, 90 Stat. 2703, 2707 (October 20, 1976). With the 1976 Amendments, Western Hemisphere immigrants

were placed in the establish preference system thereby losing a significant advantage in terms of waiting times.

However, a savings clause in the 1976 law allowed Western Hemisphere immigrants to retain their priority dates as long as they were established prior to January 1, 1977. Id. at § 9(b). Under this savings clause, as long as the noncitizen established a priority date prior to January 1, 1977, he or she could use that priority date for the purpose of *any* preference petition subsequently approved on his or her behalf. See 9 FAM 42.53 Note 4.1.

Moreover, the spouse or child of the Western Hemisphere immigrant could use the same priority date in connection with a future preference petition. For instance, an adult child covered by the Western Hemisphere priority date provisions could use his father's 1976 priority date in connection with a new petition filed by an employer today. Or the priority date could be used in connection with a family-based petition filed by a U.S. citizen sibling.

This longstanding provision, together with the numerous other provisions cited above, demonstrates that the BIA erred in concluding that priority date retention "has always been limited to visa petitions filed by the same family member." The concept of priority date retention is not as limited as the BIA contends in *Wang*.

Nor is the concept of conversion limited to only the same petitioner, as evidenced by the "automatic conversion" provision cited by the BIA itself in *Wang*. 8 C.F.R. § 204.2(i) contains a provision under which a beneficiary's petition will "automatically convert" from a spousal petition to a self-petition upon the death of the U.S. citizen petitioner. 8 C.F.R. 204.2(i)(1)(iv) provides:

> A currently valid visa petition previously approved to classify the beneficiary as an immediate relative as a the spouse of a United States citizen must be regarded, upon the death of the petitioner, as having been approved as a Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant for classification under paragraph (b) of this section [relating to petitions by widows or widowers], if, on the date of the petitioner's death, the beneficiary satisfies the requirements of paragraph (b)(1) of this section. If the petitioner dies before the petition is approved, but on the date of the petitioner's death, the beneficiary satisfies the requirements of paragraph (b)(1) of this section, then the petition shall be adjudicated as if it had been filed as a Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant under paragraph (b) of this section.

Under this regulation, the "petitioner" changes from a U.S. citizen spouse to the alien beneficiary. This conversion can even occur before the petition is approved provided that the beneficiary meets certain criteria set forth in the regulation.

The District Court summarily dismissed all of the provisions cited by the Plaintiffs stating merely that, "none of Plaintiffs' cited examples weigh heavily because none use the terms 'conversion' and 'retention' in conjunction." E.R Tab 2, p. 16. However the examples cited by the BIA *itself* in *Matter of Wang* likewise do not all use the terms "conversion" and "retention" in conjunction. The BIA's first example, 8 CFR § 204.2(i), is entitled "automatic conversion." It also

provides that the beneficiary's priority date "is the same" after such conversion. It does not use the word "retain," although clearly that is what occurs under this provision.

The second example, 8 CFR 204.2(a)(4), discusses priority date retention alone and does not involve conversion. The final example, INA § 201(f), has two subsections which reference "conversion" (§§ 201(f)(2), and (3)) but makes no mention of priority date "retention."

Because the BIA's examples do not always use the exact terms "retention" and "automatic conversion" in conjunction, the District Court erred in disregarding Plaintiffs examples for that reason. There are many provisions in the statute which clearly show the concepts are broader that what was stated in *Wang*. Because the BIA based its decision on an incomplete analysis of the statute and regulations, it is owed no deference.

B. The BIA's analysis of legislative intent is flawed

The District Court additionally deferred to the BIA's findings regarding Congressional intent as set forth in *Matter of Wang*. In *Matter of Wang*, the BIA finds that Congress sought to address administrative processing delays while not displacing individuals waiting in other visa categories. *Wang*, 25 I&N Dec. at 36 – 38. The BIA specifically quoted comments by Representatives Sheila Jackson-Lee, Sensenbrenner and Smith made *prior to* the Senate revisions that added

Section 203(h)(3) to the CSPA. *Id.* at 37, n. 10, citing 147 Cong. Rec. H2901 (statement of Rep. Jackson-Lee), 2001 WL 617985, at H2902. They conclude that there is no evidence in the legislative history that Congress sought to alleviate the impact of the "length of the visa line." *Id*. at 38. In the decision denying Plaintiffs' motion for summary judgment, the District Court deferred to the BIA's conclusion. E.R. Tab 2, p. 16.

First, it must be noted that the legislative history does not contain any explicit or specific statements regarding the purpose and impact of § 203(h)(3). The House version of the bill focused exclusively on children of United States citizens. The Senate then expanded the CSPA significantly. When the bill was returned to House for further consideration and agreement, several Representatives noted that the Senate version made important and appropriate additions to the prior House version of the CSPA. 148 Cong. Rec. H4990 (July 22, 2002). For instance, Representative Sensenbrenner stated that the Senate bill addresses three additional age-out situations, including:

> Case number two: Children of family and employer-sponsored immigrants and diversity lottery winners. Under current law, when an alien receives permanent residence as a preference visa recipient or a winner of the diversity lottery, a minor child receives permanent residence at the same time. After the child turns 21, the parent would have to apply for the child to be put on the second preference B waiting list.

Mr. Sensenbrenner continued that, "[b]ringing families together is a prime goal of our immigration system. H.R. 1209 facilitates and hastens the reuniting of

legal immigrants' families. It is family-friendly legislation that is in keeping with our proud traditions." *See*, 148 Cong. Rec. H4991 (Statement of Rep. Sensenbrenner).

Second, and contrary to the BIA's determination in *Matter of Wang*, there is indeed clear evidence that the CSPA was meant to address visa allocation issues – the clearest evidence being INA § 203(h)(3) itself.

It is undisputed that if the beneficiary of an F2A petition utilizes the calculation in 203(h)(1) and is still over the age of twenty-one, she can benefit from the conversion and retention provision of 203(h)(3). This is what the BIA held in *Matter of Wang*, and that is what the Defendants argued in the proceedings below. Undoubtedly, the problem facing such an aged-out child has nothing to do with administrative delays and everything to do with visa allocation and backlog issues. She is already allowed to subtract USCIS processing times from her age under § 203(h)(1), but she is still over the age of twenty-one. The problem she faces is one of *backlogs* caused by limits on visa numbers. And Congress put in place a provision that would keep this individual from having to move to the back of the line after aging out. The very inclusion of INA § 203(h)(3) is irrefutable evidence that Congress meant to address delays resulting from visa allocation issues.

Another example is the opt-out provision of INA § 204(k). For some countries like the Philippines, the waiting time for a first preference petition is actually longer than an F2B petition. Thus, when the petitioning parent becomes a naturalized citizen and the adult child's petition moves to the first preference category, the waiting time will increase. However, Congress drafted § 204(k) to allow the beneficiary to "opt-out" of conversion to the first preference category notwithstanding the naturalization of her petitioner. This again has nothing to do with administrative delays, and everything avoiding delays attributable to visa allocation issues.

In addition to the CSPA's provisions addressing administrative delays, Congress implemented generous provisions consistent with the fundamental focus of the immigration laws- uniting families.

Finally, the BIA's decision highlights supposed equitable concerns with enabling the beneficiary *Wang* and similarly situated non- citizens to retain the original priority date under the CSPA. The BIA speaks in terms of such non-citizens "cutting in line," "displacing other aliens," and "jump[ing] to the front of the line." *Wang*, 25 I&N Dec. at 38. This reasoning clearly misstates the impact of § 203(h)(3).

A better reasoned view of this provision's effects is that it allows aged-out derivatives to avoid *another* lengthy wait for visa availability. *See*, e.g. *Baruelo v. Comfort*, 2006 U.S. Dist. LEXIS 94309, pages 10 – 11 (N.D. Ill Dec. 26, 2009) ("[Section 203(h)(3)] means that when a child beneficiary of a visa application turns twenty-one even after factoring in the CSPA's ameliorative age calculation, she does not end up 'at the end of a long waiting list,' and does not have to file a new petition, but rather keeps her original filing date even after being moved to a lower preference category").

The District Court dismissed the reasoning of the *Baruelo* case as "inapposite" since that case involves an aged-out derivative of an F2A petition, and the Plaintiffs' children aged out of F3 and F4 petitions. E.R. Tab 2, p. 17. However, there is simply no reason to conclude that the aged out child of an F2A petition would *not* be "cutting in line" when he converts to an F2B petition, while the aged out child of an F3 or F4 petition *would*. The Court in *Baruelo* recognized the fact that § 203(h)(3) helps families avoid having to go to the back of another long waiting line after a child ages out. This reasoning applies equally to aged-out derivatives in *all* preference categories.

The BIA's reasoning in *Matter of Wang* ignores the fact that Plaintiffs' children waited in line for many years as derivatives of their parent's petitions. For Plaintiffs Rosalina Cuellar de Osorio and her son Melvin, this process began on

May 5, 1998 when the third preference petition was initially filed by Rosalina's U.S. citizen father. For Plaintiffs Norma Uy and Ruth Uy, the process began over twenty-nine years ago, on February 4, 1981, when Norma Uy's U.S. citizen sister filed a visa petition on her behalf. For Plaintiffs Elizabeth Magpantay, Evelyn Santos, and Maria Eloisa Liwag and their children, the process began on January 29, 1991 with the filing of the third preference petition by their U.S. citizen father. In *Matter of Wang*, the BIA subverts the clear language of the statute, and forces these aged-out sons and daughters of permanent residents, who have played by the rules and waited patiently in line, to go to the end of another long line before they can be reunited with their parents.

The Ninth Circuit has recognized that, "when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion. This rule applies with additional force in the immigration context, where doubts are to be resolved in favor of the alien." *Akhtar v. Burzynski*, 384 F.3d 1193, 1200 (9th Cir. 2004); *see also Padash v. INS*, 358 F.3d 1161, 1173 (9th Cir. 2004). Rather than following this rule, the BIA sought to interpret the provisions of INA § 203(h)(3) in the most restrictive way possible. The decision in *Matter of Wang* is unreasonable and owed no deference.

VIII. CONCLUSION

Based on the foregoing, Plaintiffs request that this Court find they are entitled to the benefits of INA §203(h)(3) and reverse the decision of the District Court denying their motion for summary judgment.

Dated: April 19, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App. 32(a)(7)(C) and Circuit Rule 32-1

I certify that pursuant to Fed. R. App. R. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionally spaced, has a typeface of 14 points and contains 8,110 words.

Dated: April 19, 2010

/s AmyProkop

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Attorneys for Appellants

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28 – 2.6, the undersigned is aware of the following related case pending before the Court:

Costelo et. al., v. Napolitano, et. al., Case No. 09-56846

Dated: April 19, 2010

/s AmyProkop

Amy Prokop
Carl Shusterman
The Law Offices of Carl Shusterman
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 19, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

Dated: April 19, 2010

/s AmyProkop_____

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