No. 09-56846 & No. 09-56786

United States Court of Appeals
For The Ninth Circuit

TERESITA G. COSTELO, AND LORENZO P. ONG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

JANET NAPOLITANO,
SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; ET AL,
Defendants-Appellees.

ROSALINA CUELLAR DE OSORIO; ET AL,
Plaintiffs-Appellants,

v.

ALEJANDRO MAYORKAS; ET AL.
Defendants-Appellees.

On Appeal From United States District Court for Central California Case No. 8:08-cv-00840-JVS-SH

MOTION OF THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE AMERICAN IMMIGRATION COUNCIL FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANTS

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May 11, 2012

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, the National Justice Immigration Center (NIJC) and the American Immigration Council (AIC) respectfully move this Court for leave to file the attached brief as *Amici Curiae* in support of the Plaintiff-Appellants.

In support of this Motion, the NIJC and AIC state the following:

1. The NIJC is a non-profit organization accredited by the Board of Immigration Appeals to provide immigration assistance since 1980. NIJC provides legal education and representation to low-income immigrants, including in the visa petition context. In 2010, NIJC provided legal services to more than 10,000 non-citizens. The NIJC has a direct interest in ensuring that the CSPA applies in an ameliorative fashion.

2. The AIC is a non-Profit organization established to increase public understanding of immigration law and policy and to advance fundamental fairness, due process, and constitutional human rights in immigration law and administration. The AIC has a direct interest in ensuring that the CSPA is applied in an ameliorative fashion.

3. As set forth more fully in the attached brief, the NIJC and AIC offer a distinct perspective from those of the parties to this matter, presenting separate and distinct arguments as to why the Agency's interpretation of Section 203(h)(3) of the Immigration and Nationality Act is incorrect and does not deserve deference.

4. *Amici* argue, *inter alia*, that no absurdity results from applying the statute's plain meaning; that the Court ought not reach Step-Two of Chevron, *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel*, 476 U.S. 837 (1984), insofar as the Agency perceived an aspect of the statute as ambiguous which is in fact clear; and that the Agency's interpretation would fail under Step-Two of Chevron because it is inconsistent with the structure and nature of the statute, as well as the legislative history of this provision. These are significant argument, and *Amici* believe that the Court's resolution of the appeal would benefit from a full consideration of the issues involved herein.

5. The *Amici* endeavored to obtain the consent of all parties to the filing of the brief before requesting this court's for permission to file the attached brief. The Defendants-Appellees have not consented to the filing of this brief.

For these reasons, the NIJC and AIC request that the Court grant them leave to file the attached brief as *amici curiae*.

Dated: May 11, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nickolas A. Kacprowski, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Curcuit by using the appellate CM/ECF system on May 11, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participant:

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No. 09-56846 & No. 09-56786

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BRIEF OF THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE AMERICAN IMMIGRATION COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS

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May 11, 2012

CORPORATE DISCLOSURE STATEMENT

The National Immigrant Justice Center and the American Immigration Council have moved to appear as *amici curiae* in this case.

Heartland Alliance's National Immigrant Justice Center is a Program of the Heartland Alliance for Human Needs and Human Rights, a 501(c)(3) non-profit corporation located in Chicago, Illinois. Neither the National Immigrant Justice Center nor the Heartland Alliance is publicly held, and no person or corporation owns any percentage of the National Immigrant Justice Center or the Heartland Alliance.

The American Immigration Council is a non-profit organization that does not have any parent corporation or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

No other publicly held corporation or entity has a direct financial interest in the outcome of this litigation. This case does not arise out of a bankruptcy proceeding.

DATED: May 11, 2012

/s Nickolas A. Kacprowski
Nickolas A. Kacprowski
Counsel for *Amici Curiae*

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INTRODUCTION

The outcome of these cases, one of which is a nationwide class action, will affect thousands of young adults who have spent years patiently waiting their turn to immigrate. Both cases present a question of interpretation of a statute, Section 203(h)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(h)(3), that is designed to apply in the case of children who have "aged out" while waiting along with their parents to be approved for permanent resident status. *Amici Curiae* submit this brief to highlight a number of important points.

First, Section 203(h)(3) unambiguously applies to multiple classes of visa petition derivative beneficiaries. As such, the Board of Immigration Appeals' ("BIA") decision examined in this case, *Matter of Wang*, 25 I&N Dec. 28 (2009), is not entitled to any deference under the two step analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837 (1984) ("*Chevron*"). *Wang* holds that Section 203(h)(3) only provides benefits to a ***single*** class of derivative beneficiaries, those individuals who are beneficiaries under visa petitions filed pursuant to Section 203(a)(2)(A) ("F2A Petitions"). *See* 25 I&N Dec. at 35. As the Panel and the Fifth Circuit recognize, however,

Section 203(h)(3) unambiguously provides benefits for ***multiple*** other classes of visa petition beneficiaries--i.e., derivatives of petitions under Section 203(a)(1), (a)(3), (a)(4), (b)(1)-(5), and (c) ("Non-F2A Petitions").[1]

The Government erroneously argues that even if the statute clearly and unambiguously provides benefits to Non-F2A beneficiaries, it is still ambiguous and *Chevron* Step-Two is triggered, because when considering other provisions of the statute, there would be "difficulties in applying" the benefits of Section 203(h)(3) to Non-F2A beneficiaries. (Government Br. in Opp. to Pet. for Rehearing at 10-11, ECF No. 51.) The Court should reject this misplaced argument. As the Fifth Circuit explained in *Khalid*, a "straightforward" interpretation of Section 203(h)(3) that would provide its benefits to those Non-F2A beneficiaries exists. *See Khalid*, 655 F.3d 363, 372 (5th Cir. 2011). The Court should follow Section 203(h)(3)'s plain language if that language can be reasonably harmonized with the statute's other provisions. *The Wilderness Society v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003)(refusing to defer to the agency interpretation because

[1] An explanation of these other Visa petition categories is provided at Appendix A.

"the language, purpose and structure of the Wilderness Act support the conclusion that Congress spoke clearly").

Amici believe that taken as a whole, the statute has a plain meaning which the Court can apply. If, however, the Court saw some ambiguity in the statute, the Agency's interpretation would still fail under Step-One of *Chevron*, because it cannot be squared with the clear breadth of the statute, which can hardly be contested.

Second, even were the Court to reach Step-Two of *Chevron*, the Court should reject *Wang* because it fails the Step-Two analysis. Section 203(h)(3) clearly applies to provides ***some*** benefit to Non-F2A derivative beneficiaries. Under the BIA's interpretation, however, Section 203(h)(3) provides ***no*** benefits to ***any*** Non-F2A beneficiaries. Reading the majority of beneficiaries out of the statute goes well beyond whatever implicit delegation is granted the Agency to interpret the statute. *Zheng v. Gonzales*, 422 F.3d 98, 119-20 (3rd Cir. 2005) (holding a regulation that totally denied paroled aliens benefits of adjustment of status invalid at *Chevron* Step-Two because the statute plainly provides that paroled aliens are eligible for adjustment of status).

Moreover, in the course of reading the statute's "retention of priority date" provision effectively out of the statute,[2] the BIA committed various factual errors and misstated the legislative history of the statute. Such an interpretation is arbitrary, capricious, and contrary to the law and therefore fails the Step-Two analysis.

The BIA's decision in *Wang* fails for independent reasons along with each step of the *Chevron* analysis. The Court has multiple grounds for rejecting *Wang*. It should do so, and reverse the District Court's order granting summary judgment for the Government based on *Wang*.

STATEMENT OF INTEREST OF AMICI CURIAE

Heartland Alliance's National Immigrant Justice Center ("NIJC") is a non-profit organization accredited by the BIA to provide immigration assistance since 1980. NIJC provides legal education and representation to low-income immigrants, including in the visa petition context. In 2010, NIJC provided legal services to more than 10,000 non-

[2] Section 203(h)(3) provides two major benefits: automatic conversion of a petition to another category and the retention of the original priority date.

citizens. The NIJC has a direct interest in ensuring that the CSPA is applied in an ameliorative fashion.

The American Immigration Council ("AIC") is a non-profit organization established to increase public understanding of immigration law and policy and to advance fundamental fairness, due process, and constitutional human rights in immigration law and administration. The AIC has a direct interest in ensuring that the CSPA is applied in an ameliorative fashion.

Pursuant to Fed. R. App. P. § 29(c)(5), *Amici Curiae* state that no party, party's counsel, or any other person, (other than the *Amici Curiae* and counsel), has authored this brief in whole or in part, or contributed money to fund the brief.

ARGUMENT

I. Section 203(h)(3)'s Plain Language Provides That It Applies to All Visa Petitions, Including Non-F2A Petitions, and This Plain Meaning Creates No Absurd Results.

The Panel correctly rejected the BIA's contention that Section 203(h)(3) is ambiguous as to whether it applies to Non-F2A petitions. Both the Panel and the Fifth Circuit in *Khalid* concluded that Section 203(h)(3)'s plain language applies to derivative beneficiaries from all of the visa preference categories, not merely the 2A category. *Cuellar De*

Osorio v. Mayorkas, 656 F.3d 954, 961 (9th Cir. 2012); *Khalid*, 655 F.3d at 371. As the parties have extensively briefed this issue, this brief will not rehash those arguments.

Once a Court finds that the language of a statute is plain, it is rare for it also to find that the literal language does not control. *Royal Foods Co., Inc. v. RJR Holdings, Inc.,* 252 F.3d 1102, 1108 (9th Cir. 2001). If the statute can be interpreted as plainly written, a *Chevron* Step-Two analysis is unnecessary, and the BIA should be reversed. The Panel in this case, however, at the Government's urging, found ambiguity in Section 203(h)(3) ***despite the plain language***. *De Osorio*, 656 F.3d at 961 ("Despite this plain language, however, we find that paragraph (3)'s meaning is ambiguous for another reason"). Specifically the Panel held that Section 203(h)(3) is ambiguous as to Non-F2A petitions not because of the plain language, but because its "automatic conversion" benefit "does not practicably apply to F3 and F4 petitions." *Id.* at 962.

Applying Section 203(h)(3)'s plain language would cause no absurdity. First, if the priority date retention and automatic conversion provisions in (h)(3) are read disjunctively, the problem perceived by the

Agency simply does not exist. Second, as the Fifth Circuit explained in *Khalid,* even looking at automatic conversion independently, Non-F2A petitions could automatically convert to another appropriate category once a second visa was approved, as the (h)(3) analysis would not occur until that point in time in any event.

The decision in *Wang* should also be rejected separately and independently because it is premised on a reading of the statute that is erroneous as a matter of law. In this case, the Board made a fundamental legal error in deciding the threshold legal question. That question is whether Section 203(h)(3) plainly applies to Non-F2A petitions by its text. The BIA committed clear legal error in finding it does not. That error necessarily affects the entire analysis that follows, such that it is uncertain that the BIA would have reached the same outcome if it had to start with a different answer to that first legal question. Even if the Court found (h)(3) to have some ambiguity, the plain meaning of the statute would still foreclose the Agency's reasoning here, necessitating remand.

Given that there is no ambiguity in either the plain language of Section 203(h)(3) itself or its application in light of the statutory scheme as a whole, there is no need to proceed to a *Chevron* Step-Two analysis.

A. The Determination that Section 203(h)(3)'s Plain Language Is Clear Should End the Inquiry Without Any Need for a Chevron Step-Two Analysis.

The critical upshot of a finding that Section 203(h)(3) unambiguously applies to Non-F2A petitions is that a *Chevron* Step-Two analysis is unnecessary ***unless*** there is ***no*** practical application of Section 203(h)(3) in light of the overall statutory scheme. *Valladolid v. Pac. Oper. Offshore, LLP*, 604 F.3d 1126, 1133 (9th Cir. 2010) (The statute's plain language "controls unless its application leads to unreasonable or impractical results"). That simply is not the case.

The law in this Circuit is clear that "[i]f the statute's language is unambiguous, its ***plain language controls except in rare and exceptional circumstances.***" *U.S. v. One Sentinel Arms Striker-12 Shotgun Serial No. 001725*, 416 F.3d 977, 979 (9th Cir. 2005) (emphasis added); *Royal Foods Co., Inc. v. RJR Holdings, Inc.,* 252 F.3d 1102, 1108 (9th Cir. 2001) ("There is a strong presumption that the plain language of the statute expresses congressional intent, which is

rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed") (internal citations and quotations omitted). Moreover, the Court cannot look beyond the statute's text ***unless reading the statute itself*** would lead to an obviously impractical or absurd result. *Id*.

Section 203(h)(3) does not present the rare and exceptional instance where plain textual language should be ignored due to impracticable results. Rather, the plain language of Section 203(h)(3) can be applied in a practicable manner to Non-F2A petitions. The Government argues that Section 203(h)(3) cannot be practicably applied according to its terms because (h)(3) does not permit retention of the priority date separately from automatic conversion, and Non-F2A petitions cannot "automatically convert" to another petition category. The Government argues that at the time the derivative beneficiary ages out, there is often no "appropriate category" available under the statutory scheme into which the Non-F2A petitions could convert. *De Osorio*, 656 F.3d at 962; (Government Br. 33-37, ECF No. 23); *see also Wang*, 25 I&N at 35.

Of course, this begs the question of whether the priority date retention and automatic conversion provisions must be read conjunctively. If reading them conjunctively would render the statute absurd, the more natural reading would be to read them disjunctively, as Plaintiffs argue. That would resolve any statutory ambiguity.

Alternately, the Fifth Circuit demonstrated in *Khalid* that even if the two benefits are not severable, automatic conversion can be applied in a reasonable, straightforward manner. Reading (h)(1) and (h)(3) together, the court determined that "(h)(3)'s automatic conversion cannot be triggered until the primary beneficiary's visa becomes available, because until that time (h)(1)'s formula cannot be computed." *Khalid*, 655 F.3d at 372. Once this occurs, "there ***would*** be another category to convert to based on the derivative beneficiary's relationship to the primary beneficiary." *Id.* In other words, if the principal derivative is granted permanent residence status, USCIS could at that point convert the visa petition into a petition by a permanent resident on behalf of an adult child, *i.e.*, a 2B visa petition.

It is in fact the interpretation the Government urges in arguing for upholding the Panel that that would lead to an absurd result, one at

odds with the clear Congressional intent. If Non-F2A petitions are covered by (h)(3), then under the Agency's interpretation, Non-F2A derivative beneficiaries get no benefit under Section 203(h)(3); but it would be strange for Congress to include such beneficiaries in (h)(3), but to categorically provide no benefits to any of them. *Commodity Futures Trading Comm'n v. Frankwell Bullion Ltd.*, 99 F.3d 299, 303 (9th Cir. 1996) ("Where Congress has, as here, intentionally and unambiguously drafted a particularly broad definition, it is not our function to undermine that effort.").

This court can arrive at a reasonable and practical result by applying the plain language of Section 203(h)(3). The analysis should therefore not extend beyond *Chevron* Step-One.

B. A *Chevron* Step-Two Analysis Is Improper Given That the BIA's Decision Is Premised on an Interpretation of the Statute That is Erroneous as a Matter of Law.

The BIA's entire analysis rests on an assumption that Section 203(h)(3) is ambiguous as to whether it applies to Non-F2A petions. If that essential bedrock of the BIA's analysis is incorrect, as the Panel held it is, then the BIA's ultimate decision is not entitled to Step-Two deference. *See e.g. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 50 (1983) ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself."). Rather, remand to the Agency would be required. *INS v. Orlando Ventura*, 537 U.S. 12 (2002).

The Government urges the *en banc* Court to defer to the BIA's ultimate conclusion, even while the Panel rejected aspects of the Agency's analysis on which its conclusion depended. (Government Br. in Opp'n to Pet. for Rehearing at 3, 16, ECF No. 51)(urging deference to final decision, while acknowledging disagreement with *Wang* on fundamental legal question of what the plain language of the statute means). The table below illustrates the Panel's wide divergence from the reasoning of the BIA. These disparities demonstrate first, why the

BIA's decision is flawed, and second, why the Court *en banc* ought not defer to it.

Issue	Panel	BIA
Does the text of 203(h)(3) apply to Non F-2A Beneficiaries according to its plain language?	Yes. *De Osorio*, 656 F.3d at 961.	No. *Wang*, 25 I&N Dec. 25 at 33.
Does the text of 203(h)(3) present "Impractical Results"?	Yes. *Id.* at 962	No Clear Statement, but Implicitly Yes. *Id.* at 35.
Is text of 203(h)(3) ambiguous as to whether the benefits of automatic conversion and priority date retention are joint or independent?	Yes. *Id.* at 963.	No Clear Statement, but Implicitly No. *Id.* at 35.[3]
If the text of 203(h)(3) is ambiguous, should priority date retention be	Yes. *Id.* at 963-64 (Step II question).	No Clear Statement, but Implicitly No. *Id.* at 35.

[3] Although the BIA never addressed the *grammatical* question of whether the two benefits can be read independently, its discussion of how the benefits operate would necessitate such a reading. In essence, the Board first concludes that there is no new petition involved in automatic conversion. 25 I&N Dec. at 35 (finding that automatic conversion typically only applies in the context of the ***same petition*** "without the need to file a new visa petition."). By contrast, *Wang* states that with respect to the retention provision, there will be a new petition, albeit filed by the same petitioner. *Id.* (noting that "we look to see if the ***new petition*** was filed on the beneficiary's behalf by the same petitioner.") *Id.* Because the Board's decision can only be read as reading these as independent benefits, the Panel erred when it first concluded that the Board held the were joint and non-servable, and then deferred to this alleged Board holding. *Id.* at 964.

interpreted as a joint benefit?		
Should 203(h) (3) be interpreted as providing priority date retention to Non-F2A beneficiaries?	No. *Id.* 964 (Step II question).	No. *Id.* 39.

The entire analysis begins with the question of whether Section 203(h)(3)'s plain language states that it applies to Non-F2A petitioners. The Panel held that it does, but the BIA implicitly held it does not. This is a fundamental legal question on which the Panel is correct, and on which the standard of review is de novo with no deference given the BIA. *See Khalid*, 655 F.3d at 371; *Garcia v. Holder*, 659 F.3d 1261, 1265 (9th Cir. 2011) (legal determinations of BIA are reviewed de novo); *John v. U.S.*, 247 F.3d 1032, 1041 (9th Cir. 2001). If the *en banc* Court agrees that the plain language of Section 203(h)(3) applies to Non-F2A petition categories–and the statute leaves little doubt that it must–then everything the BIA decided after that point is premised on a clear legal error and should not be entitled to Step-Two deference.

That fundamental legal error most acutely affects the important issue of whether original priority date retention is an independent benefit, or is inexorably tied to automatic conversion. The parties have hotly contested this issue (Government Br. at 44-47, ECF No. 23.). The

Panel decided that Section 203(h)(3) is ambiguous on this point. *De Osorio*, 656 F.3d at 963. It then went on to give deference to the BIA's ultimate decision that priority date retention does not apply outside F2A. *Id*. at 964.

The BIA's ***ultimate*** decision that priority date retention does not apply to Non-F2A beneficiaries, however, cannot be granted deference where the reasoning behind that conclusion was flawed as a matter of law from the outset. If the Agency has not accurately perceived "its Chevron discretion to interpret the statute in question, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Negusie v. Holder*, 555 U.S. 511, 523 (2009). Faced with the fact that Section 203(h)(3) applies to Non-F2A petitions, it is quite possible that the Agency would interpret that statute differently. The BIA purported to be addressing a statutory ambiguity that simply does not exist. 25 I&N Dec. 28 at 33 ("the language of section 203(h)(3) does not expressly state which petitions qualify for . . . retention of priority dates. Given this ambiguity, we must look to the legislative intent"). In light of a ruling that Section 203(h)(3) indeed applies to Non-F2A beneficiaries, perhaps

the BIA would have interpreted the statute as providing two severable and independent benefits, i.e., priority date retention and automatic conversion.

If the en banc Court decides that the statute plainly applies to Non-F2A beneficiaries, but that other ambiguities linger, it should not proceed to *Chevron* Step-Two, but should reject Wang and remand for a decision not based on a flawed legal premise.

II. The BIA Is Not Entitled to *Chevron* Step-Two Deference Because Its Reading of Section 203(h)(3) Arbitrarily Denies Any Benefit For Non-F2A Derivative Beneficiaries.

Although the Court need not reach *Chevron* Step-Two, for the reasons described above and in Appellants' briefs, if it does, then the Court should find that the BIA's interpretation of Section 203(h)(3) fails Step-Two. As a threshold matter, given *Wang*'s inconsistency with INA regulations and a prior BIA decision, it is questionable that the decision is entitled to *Chevron* deference in its interpretation of Section 203(h)(3).[4] Even analyzed under *Chevron* Step-Two, the BIA's

[4] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view"); s*ee also Lal v. INS*, 255 F.3d 998, 1006-08 (9th. Cir. 2001). *Wang* directly conflicts with a prior BIA decision,

interpretation of Section 203(h)(3) fails because it is an unreasonable, arbitrary and capricious reading of the statute that is irreconcilably at odds with Congressional intent. Congress clearly intended to confer a benefit on Non-F2A derivative beneficiaries, and the BIA interprets the statute in a manner that gives those individual ***no*** benefits. That interpretation is necessarily unreasonable because alternative interpretations exist that would provide Non-F2A derivative beneficiaries a benefit under Section 203(h)(3).

A. The BIA's Interpretation of Section 203(h)(3) Fails Chevron Step-Two Because It Plainly Contradicts Statutory Intent By Not Providing Non-F2A Derivative Beneficiaries Any Benefits.

If this court were to find some portion of the statute ambiguous and reach *Chevron* Step-Two, the Court should still reject the BIA's reading of the statute. An interpretation that a statute provides ***no***

Matter of Garcia, A79 001 587, 2006 WL 2183654 (BIA June 16, 2006). *See Wang*, 25 I&N Dec. at n.7 (noting inconsistent outcome); *Khalid*, 655 F.3d at 370 ("*Matter of Garcia* reached the opposite conclusion on essentially identical facts.") *Wang*'s reasoning that priority date retention can only apply to beneficiaries where the new petition is filed by the same petitioner as the original because the same petitioner has "always" been required for date retention is also inconsistent with multiple regulations. *See Wang*, 25 I&N Dec. at 35. As described more thoroughly below, there are at least five regulations that provide for priority date retention where the new petitioner is different than the original. § II.B.2.

benefits for a class of individuals, when the statute's plain text clearly shows the intent to provide a benefit for those specific individuals, is "arbitrary, capricious, or manifestly contrary to the statute" and therefore fails a *Chevron* Step-Two analysis. *Chevron*, 467 U.S. at 844.

Under a *Chevron* Step-Two analysis, a Court need only defer to reasonable interpretations of statutes. *Akhatar v. Burzynski*, 384 F.3d 1193, 1198 (9th Cir. 2004) (agency interpretations must be "based on a permissible construction of the statute"). A court "may not rubberstamp administrative decisions that are inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Sierra Club*, 671 F.3d at 961 (internal quotations and citations omitted); *Latino Issues Forum v. EPA*, 558 F.3d 936, 941 (9th Cir. 2009); *see also Zheng v. Gonzales*, 422 F.3d 98, 120 (3rd Cir. 2005) (declining to defer to an agency interpretation that "essentially reverses the eligibility structure set out by Congress").

The Third Circuit's decision in *Zheng* is particularly instructive. The Court in *Zheng* was "faced with a statute providing that, in general, aliens paroled into the United States may apply to adjust their status, and a regulation providing that, in general, they may not." 422 F.3d

119. While the court ultimately found sufficient ambiguity in the statute to prevent a *Chevron* Step-One ruling, it concluded that, at Step-Two, the agency rule could not stand because it denied all benefits to a class of aliens that were clearly provided some benefit under a statute. *Id*. at 120; *see also NRDC v. U.S. EPA*, 542 F.3d 1235, 1253 (9th Cir. 2008) (EPA could not decline to promulgate ***any*** standards for certain sources of pollutants when statute clearly required it to promulgated ***some*** standards).

The BIA's gutting of all benefits from Section 203(h)(3) fails Step-Two and must be overruled. The BIA does not have "free reign" to ignore what is ***unambiguous***. By its plain language, the CSPA demonstrates that "Congress intended (h)(3) to apply to any alien who 'aged out' under the formula in (h)(1) with respect to the universe of petitions described in (h)(2)." *Khalid*, 655 F.3d at 371. The Panel correctly analyzed the statute in this respect. *See De Osorio*, 656 F.3d at 961. This means that, by its terms, Section 203(h)(3) unambiguously applies to aged-out beneficiaries from each category ***in some way***.[5] In

[5] The Panel erroneously states that there is a benefit for Non-F2A derivative beneficiaries under Section 203(h)(1), and therefore congressional intent to confer a benefit is not negated by failing to read

other words, Non-F2A derivative beneficiaries must receive ***some*** benefit from Section 203(h)(3). But the BIA's interpretation in *Wang* provides Non-F2A derivatives with ***no*** benefit, reversing the structure set out by Congress. As the Third Circuit did in *Zheng*, the Court should invalidate the BIA's decision insofar as it precludes Non-F2A derivative beneficiaries from receiving ***any*** benefit.

B. The BIA's Non-Textual Limitation Requiring That New Petitions Be Filed by the "Same Petitioner" is Arbitrary, Capricious, and Contrary to Law.

The BIA's interpretation of Section 203(h)(3) fails the Step-Two analysis for another, independent reason. Its interpretation of Section 203(h)(3) as only applying original date retention to beneficiaries where the new petition is filed by the same petitioner is arbitrary, capricious, and contrary to law. The BIA interpreted Section 203(h)(3) as only permitting the transfer of a priority date from an original visa petition filed by the ***same*** petitioner. *Wang*, 25 I&N Dec. at 35. The effect of

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paragraph (h)(3) more broadly. Section 203(h)(3) clearly confers ***additional*** benefits on the same petitioners as 203(h)(1). Otherwise, there would be no reason for it to be drafted so broadly. Moreover, it applies, as does Section 203(h)(1), to "subsections (a)(2)(A) and (d)"; that is, both to the F2A category and to other derivatives. Therefore, the availability of benefits under 203(h)(1) do not render an exclusion from benefits under 203(h)(3) any less problematic.

this is to completely deny Non-F2A derivative beneficiaries the benefit of original priority date retention under Section 203(h)(3). The BIA justified imputing this limitation by reasoning that (a) there was no regulatory precedent for retention of priority dates between visa petitions filed by different petitioners, and (b) the legislative history of the CSPA offered no indication that Congress intended to protect families from separation as a result of the delays in the family's ability to adjust their status. *Id.* As discussed below, each of these justifications is simply wrong, and the BIA's policy-driven, non-textual interpretation is arbitrary and therefore not entitled to deference.

1. The Agency Incorrectly Believed Section 203(h)(3) Codified Existing Regulations, When In Fact There Are Significant Differences Between Them.

The BIA interprets (h)(3) to codify prior agency regulations, leading it to apply the "same petitioner" limitation which was previously located in the regulations. *Matter of Wang*, 25 I&N Dec. at 35 ("We . . . presume that Congress enacted the language in section 203(h)(3) with an understanding of the past usage of these regulatory terms . . . ."). But the Agency failed to note that Congress left out from

the statute precisely those words which would have limited (h)(3)'s reach in that manner.

At the time Congress enacted the CSPA, the administrative regulation at 8 C.F.R. § 204.2(a)(4) permitted a child beneficiary on a spousal petition who "ages out" to retain the original priority date on a new petition filed by the same petitioner. The reason this retention of priority dates was so limited, however, is because that restraint was expressly provided by the ***text*** of the regulation:

> However, if the child reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required. In such a case, the original priority date will be retained ***if the subsequent petition is filed by the same petitioner***.

8 C.F.R. § 204.2(a)(4).

Tellingly, Congress decided ***not*** to include similar limiting language in Section 203(h)(3). Nevertheless, the BIA held that the presence of this limiting language in one prior regulation suggested that Congress implicitly intended to ***include*** the same language in the CSPA. This flips a basic canon of statutory interpretation on its head: when in one statute Congress omits language found in similar provisions, it ordinarily follows that Congress meant to exclude that language and its effects. *Johnson v. Sawyer*, 120 F.3d 1307, 1321 (5th

Cir. 1997); *Camacho v. Bridgeport Financial Inc.*, 430 F.3d 1078, 1081 (9th Cir. 2005).

As the BIA contends, Congress is charged with knowledge of the content of existing regulations. *Matter of Wang*, 25 I&N Dec. at 35. And Congress chose ***not*** to include the same limiting language in Section 203(h)(3)—evidencing its intent not to impose a matching restriction. *See Khalid*, 655 F.3d at 374 (noting that "unlike the regulation, which explicitly states that the petitioner cannot change, nothing in the statute requires that the petitioner remain the same"); *see also Kucana v. Holder,* 130 S. Ct. 827, 837-38 (2010) (holding that where Congress partially codified regulatory language, failure to include other language demonstrated Congress's intent to ***exclude*** that language). Thus, the regulation cited by the BIA does not support its position—on the contrary, it undermines it.

2. Contrary to the BIA's Statement, Retention of Priority Dates Has Not "Always" Been Limited to Petitions Filed by the Same Petitioner in Past Regulatory Practice.

The BIA also attempted to justify its "same petitioner" limitation to the statute by stating that "the concept of 'retention' of priority dates has ***always*** been limited to visa petitions filed by the same family

member." *Matter of Wang*, 25 I&N Dec. at 35. In support of this sweeping statement, the BIA cited just ***one*** immigration regulation. As noted above, the one regulation that the BIA cited—8 C.F.R. § 204.2(a)(4)—actually undercuts the BIA's narrow interpretation of the CSPA.

More importantly, the BIA's statement that the "the concept of 'retention' of priority dates has ***always*** been limited to visa petitions filed by the same family member" is simply false. *See Matter of Wang*, 25 I&N Dec. 28, 35 (BIA 2009). In contrast to the one regulation cited by the BIA, the INA and accompanying regulations contain at least ***five*** instances in which a priority date carries forward from an initial petition to a petition filed by a different person:

- Under 8 C.F.R. § 204.5(e), a noncitizen worker who has been the beneficiary of multiple petitions filed by ***different employers*** may carry forward the priority date from the earliest petition so long as it was never revoked or denied.
- Under 8 C.F.R. § 204.12(f)(1), a noncitizen physician working in a medically underserved area who is the beneficiary of a petition filed by one employer may carry forward that priority date to a subsequent petition filed by a ***different employer***.
- Under 8 C.F.R. § 204.2(h)(2), a beneficiary of a petition filed by an abusive spouse or parent may carry forward that priority date to ***self-petition*** filed pursuant to the Violence Against Women Act.

- Under P.L. 107-56, 115 Stat. 272, 356,357 (Oct. 26, 2001), § 421(c), a victim of the September 11, 2001 terrorist attacks who was previously the beneficiary of a family, employment, or diversity visa petition may carry forward that priority date to a ***self-petition*** under a provision of the USA PATRIOT Act in effect at the time of the CSPA's enactment.

- Finally, the 1976 Congressional reorganization of the visa system for Western Hemisphere immigrants demonstrates that carry-forward of an old priority date by a new petitioner is a long-standing concept in immigration law: Before 1976, Western Hemisphere immigrants were not subject to the established preference system for family and employment-based immigrants but were considered under a different scheme. *See* 22 C.F.R. § 42.53(b). The 1976 amendments to the INA incorporated these immigrants into the established preference system. INA Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703, 207 (October 20, 1976). However, such an immigrant was allowed to retain any priority date established before 1977 and apply that date to future petitions—whether or not filed by a ***different person***. 22 C.F.R. § 52.53(b).

In short, the BIA got it wrong. As this list demonstrates, the "concept of retention of priority dates" has plainly ***not*** "always been limited to visa petitions filed by the same family member." *See Matter of Wang*, 25 I&N Dec. at 35. It appears the agency apparently came to one provision that it erroneously believed supported its interpretation, stopped looking, and missed five provisions, any one of which negates the heart of its reasoning. Again, an agency does not have discretion to simply ignore inconvenient aspects of the issue at hand. *State Farm*, 463 U.S. at 43 (holding that an agency rule is arbitrary and capricious

if the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence"). Accordingly, the BIA's attempt to graft a non-textual limitation onto the CSPA based on past "regulatory practice" was arbitrary and capricious.

3. The BIA's Interpretation Short-Changes the CSPA's Goal of Protecting the Family Unit.

Without text or regulatory precedent on its side, the BIA tried to cobble together legislative history to support its interpretation. Specifically, the BIA asserted that it found "no indication in . . . the legislative history of the CSPA that Congress intended to create a mechanism to avoid the natural consequence of a child aging out of a visa category because of the length of the visa line." *See Matter of Wang,* 25 I&N Dec. at 38. As a threshold matter, this review of the legislative history was improper: the text of (h)(3) ***expressly stated*** that Congress intended to create just such a mechanism to protect aged-out child beneficiaries from returning to the back of the immigration line.

But assuming *arguendo* that it was appropriate to consider legislative history, the BIA's review was so flawed and one-sided that

its conclusion must be deemed arbitrary and capricious. *See U.S. v. Snoring Relief Labs Inc.*, 210 F.3d 1081, 1085 (9th Cir. 2000) (discussing the arbitrary and capricious standard). At bottom, the BIA concluded that (h)(3) should only apply to petitions filed by the "same petitioner" because the CSPA's legislative history established that (a) Congress was solely concerned with children that age out pursuant to initial delays in the processing of visa applications (as opposed to any subsequent delays in the family's ability to adjust their status for other reasons) and (b) Congress did not intend to allow any aged-out child beneficiaries to "cut in line" in front of other visa petitioners. *See Matter of Wang,* 25 I&N Dec. at 36-38. To support these interpretations, the BIA relied on the statement of purpose in the House Report to the initial version of the bill, and a single statement from Congresswoman Sheila Jackson-Lee indicating that the bill will solve the age-out problem "without displacing others who have been waiting patiently in other visa categories." *Id.* at 36-37. There are at least three flaws in the BIA's analysis.

a. The BIA Relied on Legislative History of a Prior Version of the CSPA That Did Not Even Include Section 203(h)(3).

The BIA relies almost entirely on legislative history regarding the initial House version of the CSPA, which did not yet include (h)(3) and its priority-date retention provision. *See* H.R. Rep. No. 107-45, 2001 WL 406244 (Apr. 20, 2001); 147 Cong. Rec. H2901, 2001 WL 617985 (June 6, 2001). As the BIA admitted, the original House bill applied narrowly to petitions filed by U.S. citizens on behalf of their children and only included the special age-formula.[6] *See Matter of Wang,* 25 I&N Dec. at 36-37. However, the Senate subsequently amended the

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6 Visas filed by U.S. Citizens for the "immediate relatives"—children, spouses, and parents—are not subject to a quota so an applicant faces delays only in processing, not the much longer delays associated with numerically limited visas. H.R. Rep. No. 107-45 (2001), 2001 WL 406244, at *2. Under prior law, if a child named on a U.S. citizen's application for an immediate relative visa turned 21 while the application was pending, he or she would no longer be considered an "immediate relative" and would have to start all over again, this time by applying as an adult son or daughter of a U.S. citizen—a different category that is subject to a quota, and which therefore has a line. *Id.* Lawmakers sought to fix this problem in the initial House version by freezing the child's age at the time of filing the petition, thereby allowing the child to remain in the unlimited "immediate relative" category while the petition was pending. *Id.* It was in the context of this narrow initial bill that Rep. Jackson-Lee commented "[t]his bill … will solve the age-out problem without displacing others who have been waiting patiently in other visa categories." 147 Cong. Rec. H2901, 2001 WL 617985 (June 6, 2001).

proposed bill for the purpose of ***expanding*** the class of derivative beneficiaries protected under the CSPA. *Id.* at 37. In fact, Representative Jackson-Lee expressly confirmed the expanded scope of the Senate-approved version:

> The Senate amendment expands age-out protection to cover the following: . . . ***Children of family and employer-sponsored immigrants*** and diversity lottery winners, which allows those who are under visas such as H1(b), which is very helpful. . . . So the Senate has brought about an opportunity to correct or expand upon what was not done in the House. I believe this is an important bill that helps those who are aging out and ***brings families together***. I hope my colleagues will support this legislation enthusiastically.

148 Cong. Rec. H4989-01, 2002 WL 1610632 (July 22, 2002).

The revised Senate version also expanded the ***remedies*** available to derivative beneficiaries. The only remedy in the original House version of the bill was a provision allowing some beneficiaries to retain "child" status beyond their twenty-first birthday. The Senate added (h)(3), providing separate benefits for those who do not maintain their child status, including priority-date retention.[7] The mere inclusion of

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[7] No lawmaker made any specific comment about the addition of (h)(3) on the record. Accordingly, the legislative history of the CSPA is of limited value in resolving any the "ambiguity" the BIA found in (h)(3).

this alternative remedy completely rebuts the BIA's conclusion that Congress was solely concerned about delays in the processing of the initial visa application. Because the age formula in (h)(1) already gives full credit for processing delays, the alternative remedy can ***only*** apply to derivative beneficiaries who age out for other reasons (such as the length of the visa line) before their parents can secure adjustment of status.

Indeed, the legislative history confirms that Congress was concerned with both initial delays in application processing and subsequent delays in visa availability due to the quota system. As explained by Senator Feinstein in commenting on the CSPA: "[A] family whose child's application for admission to the United States has been pending for years may be forced to leave that child behind either because the INS was unable to adjudicate the application before the child's 21st birthday ***or because growing immigration backlogs in the immigration visa category caused the visa to be unavailable before the child reached his 21st birthday***. . . . This is what is commonly known as 'aging out.'" 147 Cong. Rec. 5239 (Apr. 2, 2001) (statement of Sen. Feinstein) (emphasis added).

The BIA did not even attempt to reconcile this glaring inconsistency in its analysis, and its reliance on legislative history that pre-dated the addition of (h)(3) was arbitrary and capricious.

b. The BIA's Ruling in Wang is Inconsistent With the Actual Text and Legislative History.

The BIA's conclusion that Congress could not have intended for any aged-out child beneficiaries to "displace" other applicants in the visa line is contrary to the text of the CSPA and the BIA's own interpretation of the statute. The BIA extrapolates from Rep. Jackson-Lee's single comment (made in regard to the initial House version of the bill) a rule that Congress did not intend to allow any aged-out beneficiaries to ever "'jump' to the front of the line" ahead of applicants in other visa categories. *See Matter of Wang*, 25 I&N Dec. at 38. However, it is inaccurate and misleading to characterize the priority-date provision in (h)(3) as permitting any aged-out beneficiaries to "cut in line." Indeed, the BIA's interpretation cuts these individuals ***out*** of line. Persons eligible for relief under (h)(3)—like Appellants—have already been waiting in the immigration line for ***years***, and have lost the chance to adjust their status with their families through no fault of

their own. Congress's enactment of (h)(3) is an acknowledgment of the importance of family unity in immigration law and the unfairness of throwing the aged-out child to the "back of the line." As such, it trumps any incremental impact on other visa applicants in line.

Moreover, even accepting the BIA's improper characterization, (h)(3) would plainly allow some aged-out beneficiaries to "'jump to the front of the line." Because (h)(3) provides that aged-out child beneficiaries will retain their priority date on a new application, it necessarily follows that some applicants will be "displaced" by the new application. Indeed, even under the BIA's narrow interpretation, a subsequent petition filed by the "same petitioner" (such as a lawful permanent resident on behalf of her adult child after that child ages out) retains the original priority date and thus ***necessarily*** displaces others in the new category. The BIA implicitly acknowledges this, but nonetheless draws an arbitrary line precluding derivative child beneficiaries of Non-F2A primary beneficiaries. There is no basis in the statutory text or the legislative history for such an arbitrary distinction denying relief to certain child beneficiaries but not others, and the agency's decision should therefore be reversed. *See Sierra Club*, 671 F.3

at 963 (an agency must make "a rational connection between the facts found and choice made.").

c. The BIA's Interpretation is Clearly Contrary to the Legislative Purpose.

As discussed *supra* at I(B), the BIA's selective analysis of the legislative history ignores the overriding purpose of CSPA—the protection of the family unit. As explained by Representative Sensenbrenner after the Senate's addition of (h)(3):

> Bringing families together is a prime goal of our immigration system. [The CSPA] facilitates and hastens ***the reuniting of legal immigrants' families***. It is family-friendly legislation that is in keeping with our proud traditions.

148 Cong. Rec. H4991 (July 22, 2002) (Statement of Rep. Sensenbrenner). Here, the BIA's non-textual limitation on (h)(3) would thwart Congress's express goal of protecting the family unit. Nowhere in the legislative history is there any indication that Congress sought to protect some families but not others based solely on the identity of the original petitioner. Such a distinction between immigrant families is arbitrary and completely lacking in any policy justification.

In sum, because the BIA (a) interpreted Congress's intent from selective legislative history that pre-dated the addition of the priority-date retention provision; (b) extrapolated a rule that is violated by its

own interpretation of the statute; and (c) ignored Congress's express goal of preserving the family unit, its effort to import an extrinsic limitation onto (h)(3) was arbitrary and capricious and entitled to no deference. In the end, the BIA in *Wang* appeared not to interpret (h)(3) so much as grasp for a reason to nullify it. Nothing in the text of (h)(3), its legislative history, or its inherent logic suggests that priority-date retention can only operate between two petitions filed by the same petitioner. If it reaches the issue, the Court should conclude that the BIA's interpretation was arbitrary and capricious.

CONCLUSION

In accordance with the foregoing, the Court should hold that Appellants are entitled to the automatic conversion and priority date retention benefits of Section 203(h)(3) and reverse the decision of the District Court.

DATED: May 11, 2012

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 09-56786

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,999 words.

DATED: May 11, 2012

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APPENDIX A

INA Provision	Visa Petition Preference Category
8 U.S.C. § 1153(a)(1)	Unmarried Adult Sons and Daughters of U.S. Citizens
(a)(2)(A)	Spouses and Children of Permanent Residents
(a)(2)(B)	Unmarried Sons and Daughters of Permanent Residents
(a)(3)	Married Sons and Daughters of U.S. Citizens
(a)(4)	Brothers and Sisters of Adult U.S. Citizens
(b)(1)	Priority Workers
(b)(2)	Persons with Advanced Degrees or Exceptional Ability
(b)(3)	Skilled Workers and Other Professionals
(b)(4)	Certain Special Immigrants
(b)(5)	Immigrants Seeking to Create Employment Opportunities
(c)	Diversity Visa Lottery Winners

CERTIFICATE OF SERVICE

I, Nickolas A. Kacprowski, 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 May 11, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participant:

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