

Nos. 09-56786 & 09-56846

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ROSALINA CUELLAR DE OSORIO; et al.,

Appellants,

v.

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

Appellees.

**APPELLEES' UNOPPOSED MOTION TO CONSOLIDATE APPEALS
AND RESET THE BRIEFING SCHEDULE**

Appellees, Alejandro Mayorkas, et al., respectfully move the Court, in accordance with Fed. R. App. P. 3(b)(2), to: (1) consolidate the two closely-related cases of Rosalina Cuellar de Osorio, et al., v. Alejandro Mayorkas, et al., (Case No. 09-56786) and Teresita Costello, et al., v. Janet Napolitano, et al., (Case No. 09-56846) currently docketed separately before the Court; and (2) reset the briefing schedule to reflect consolidation.¹ In the district court below, both actions were heard by the same judge, followed the same legal and procedural posture,

¹ Appellees are contemporaneously filing the same motion in Costello v. Napolitano, Case No. 09-56846.

and were decided by summary judgment in decisions that rested on identical legal reasoning. Likewise, the two cases now before this Court have followed the same appellate procedural posture and their outcome here rests on the same dispositive legal issue.

As such, consolidation would serve the interests of judicial economy, as only one panel would need to consider the dispositive legal issue at hand. Furthermore, consolidation would obviate the need for duplicative and wasteful expenditures of time and resources by all parties. The dispositive legal issue in both cases is the same, having been decided below by the same court, based on the identical legal reasoning of Chevron deference. The underlying issue, the proper interpretation of a section of the Child Status Protection Act (“CSPA”) is not only a matter of first impression before this Court, but is also the first of its kind to be heard by any circuit court of appeals. Thus, to consolidate these cases will not only conserve resources and avoid further delay, but also avoid the possibility of separate panels reaching different decisions on the same, dispositive legal issue. This motion is unopposed.²

Appellants filed their opening brief in Osorio v. Mayorkas (Case No. 09-

² Undersigned counsel spoke with counsel of record in both matters to ascertain their position on this motion. They do not oppose this motion for consolidation.

56786) on April 19, 2010 where Appellees' answering brief is currently due on July 19, 2010. In the matter of Costello v. Napolitano (Case No. 09-56846), Appellants' opening brief was filed on May 19, 2010, and Appellees' answering brief is currently due on June 17, 2010.³ Counsel for Appellants in both the Osorio and Costello matters were contacted by undersigned counsel and neither has any objection to consolidation.

Corollary to this Motion to Consolidate, Appellees' further move the Court to reset the briefing schedule to align the remaining deadlines. To wit, that Appellees' answering brief in the consolidated matter be due on Monday, August 16, 2010, with any optional reply brief due 14 days after service of Appellees' answering brief.⁴

PROCEDURAL BACKGROUND

A. Commencement of Proceedings

Appellants are parents (and in some cases their adult children) who filed suit in federal district court arguing that their interpretation of a provision of the

³ Appellees' will file a motion for an extension of time of 60 days in which to file their answering brief in Costello v. Napolitano (Case No. 09-56846). If granted, Appellees' answering brief would be due August 16, 2010.

⁴ Appellees' proposed, reset briefing schedule reflects their requested extension of 60-days time in which to file their brief in Costello v. Napolitano (Case No. 09-56846). That motion is filed concurrently with this motion to consolidate.

CSPA allowed derivative beneficiaries of visa petitions to transfer the priority date from one preference category to that of a subsequently filed petition in a different preference category. See §203(h)(3) of the Immigration and Nationality Act (“INA”), codified at 8 U.S.C. §1153(h)(3). Both actions were filed in the Central District of California and were heard by the same judge, the Honorable James. V. Selna.¹

The litigants in the Osorio suit (Ninth Circuit Case No. 09-56786) filed their action in United States District Court, Central District of California on June 23, 2008. The Costello case (Ninth Circuit Case No. 09-56786) was docketed with the same court on June 20, 2008 and a class was eventually certified that included:

Aliens who became lawful permanent residents as primary beneficiaries of third and fourth preference visa petitions listing their children as derivative beneficiaries, and who subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters, for whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to 203(h)(3).

Costello v. Chertoff, C.D. Cal. Case No. 08-CV-00688, docket no. 74.

¹ All related CSPA cases filed contemporaneously in the Central District of California were directed to the docket of Judge James V. Selna. See Zhang v. Napolitano, Case No. CV09-93; Torossian v. Douglas, Case No. CV08-6919; Dowlatishahi v. Holder, Case No. 08-5301. Indeed, Judge Selna joined these three cases with the Osorio matter for purposes of summary judgment. Plaintiffs’ counsel in all four cases appeared together at the summary judgment hearing.

The Osorio plaintiffs declined to join the Costello class though the two actions followed parallel tracks before Judge Selna.

B. District Court Deferred to Agency Interpretation in Both Cases

In the proceedings below, the district court stayed both Cuellar de Osorio and Costello until the Board of Immigration Appeals (“BIA” or “Board”) issued a decision in a case certified before it with precedential effect on those district court actions. The case before the Board, Matter of Wang, turned on the same, dispositive issue of the proper interpretation of the very section of the CSPA at issue in both the Osorio and Costello matters. Judge Selna waited to rule on the CSPA matters until the Board’s Matter of Wang decision was issued. On June 16, 2009, the Board issued its decision in Matter of Wang, which fully articulated the agency interpretation of section 203(h)(3) of the INA (the CSPA). See Matter of Wang, 25 I&N Dec. 28 (BIA 2009).

C. Summary Judgment

In light of Matter of Wang, the district court directed the litigants in both Osorio and Costello to brief summary judgment. Thereafter, in both cases, the court granted summary judgment to Appellees-Defendants in light of Matter of

Wang. “Wang is dispositive of this motion,” the lower court held in the Osorio case. See Order, Osorio, Case No. 08-840, docket no. 63 at 5.

Similarly, when the lower court ruled on the cross motions for summary judgment in Costello, it stated: “This Court decided this exact issue in [Osorio].”² See Order, Costello, Case No. 08-0688, docket no. 92 at 2. Indeed the court cast its decisions in both cases within the Chevron paradigm where the provision at issue was found to be ambiguous and the agency’s interpretation of that provision was found to be reasonable. The court applied this analysis in its decisions in both cases. See Osorio, Order at 11-14; Costello, Order at 4 (“For the reasons laid out in [Osorio], the Court finds that Section 203(h)(4) is ambiguous and that the BIA’s interpretation is reasonable.”).

DISCUSSION

A. The Cases Should Be Consolidated Because Osorio and Costello Are Procedurally Linked and Involve the Same Dispositive Legal Issue Decided by the Same Court Below.

In the interest of judicial economy and to avoid unnecessary duplication of effort and expenditure of time and resources of all parties, Appellees respectfully request that the Court consolidate the aforementioned related cases currently on

² The court refers to its decision in the Osorio decision under the abbreviated name, Zhang, which was the name of the first case appearing on the docket where summary judgment proceedings were consolidated. See fn. 1 supra.

appeal. Consolidation is appropriate because the cases arise from the same lower court, where they followed the same procedural posture, and where the dispositive issue was decided identically. Indeed, as noted above, the underlying issue in these cases concerns the interpretation of a provision of the CSPA. In proceedings below, these related cases were directed to the same district court judge.

Furthermore, the judge below decided both cases using the identical analysis at the summary judgment stage; the opinion and order in the latter-issued decision explicitly referenced the earlier one.

Because of the similar district court lineage and because the legal analysis applied to each case was identical below, Appellees further contend that the issues before this Court, the standard of review to be applied to their appeals, and even any possible facts to be entertained will be the same in both cases. As such, these several identical variables lend themselves toward consolidation.

B. The Different Legal Posture of the Named Plaintiffs Does Not Affect Consolidation.

Most of the plaintiffs in the above mentioned cases share the same legal posture. To wit, they are aliens who became lawful permanent residents as primary beneficiaries of third and fourth preference visa petitions and who had listed children as derivative beneficiaries of those same petitions. These aliens

later filed separate visa petitions in a different category (second-preference) and listed their children (now beyond the age of twenty-one) as direct beneficiaries. They sought to re-capture the priority date of the earlier visa petitions and apply it to the later petitions.

However, not every plaintiff is a legal permanent resident. For example, one plaintiff from the Osorio case, Ruth Uy, is a named beneficiary of an extant visa petition filed by her mother, Norma Uy. The younger Uy had been listed as a derivative beneficiary of her mother on an earlier petition that resulted in the elder Uy receiving legal permanent resident status. Ruth Uy had reached the age of twenty-one by the time her mother was granted that status. In the action below, the Uys argued that they should re-capture the priority date for the earlier petition and apply to the current petition.

Despite the fact that one or more plaintiffs may be beneficiaries in petitions still pending before the agency, and thus holds a different legal posture from the majority of plaintiffs, the underlying legal issue is no different. The lower court's analysis at the summary judgment stage did not differentiate between the posture or legal status of the plaintiffs in either case. Indeed, as articulated above, the district court's decisions at the summary judgment stage were announced within the Chevron deference paradigm. Thus, the fact that one or more named plaintiffs

is currently a listed beneficiary of an extant petition does not affect the ability to consolidate the two cases on appeal.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court consolidate the appeals in Osorio v. Mayorkas, Ninth Circuit Case No. 09-56786, and Costello v. Napolitano, Ninth Circuit Case No. 09-56846. Additionally, Appellees request that the Court re-set the briefing schedule to reflect the order of consolidation.

Dated: June 6, 2010

Respectfully submitted,
TONY WEST
Assistant Attorney General
Civil Division

GJON JUNCAJ
Senior Litigation Counsel

/s/ Gisela A. Westwater
GISELA A. WESTWATER
Trial Attorney
Office of Immigration Litigation
Civil Division, Dept of Justice
P.O. Box 868 Ben Franklin Station
Washington, D.C. 20044
(202) 532-4174

/s/ Aaron D. Nelson
AARON D. NELSON
Trial Attorney
Office of Immigration Litigation
Civil Division, Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 305-0691

Dated: June 6, 2010

Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2010, I electronically filed the foregoing “Motion to Consolidate Appeals and Reset Briefing Schedule” with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Aaron D. Nelson
AARON D. NELSON
Trial Attorney
Office of Immigration Litigation