UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ZHUO MIN WANG,)
XIUYI WANG,)
Plaintiffs,)
)
v.)
)
)
ERIC HOLDER, JR., United States)
Attorney General)
ALEJANDRO MAYORKAS, Director)
U.S. Citizenship and Immigration Services;)
JANET NAPOLITANO, Secretary,)
Department of Homeland Security;)
CHRISTINA POULOS, Director)
California Service Center, United States)
Citizenship and Immigration Services)
)

1:09cv1641

Civil Action No. _____

JUDGE POLSTER

MAG. WHITE

COMPLAINT

COME NOW, Zhuo Min Wang and Xiuyi Wang, Plaintiffs, in the above-styled and numbered cause, and for cause of action would show unto the Court the following:

I. INTRODUCTION

1. This is a civil action challenging the Board of Immigration Appeals' decision upholding the California Service Center's assignment of a September 5, 2006 priority date to Plaintiffs' I-130 visa petition. The Board erroneously concluded that the visa petition should not be accorded the December 28, 1992 priority date of the original F-4 petition filed on behalf of Plaintiff Zhou Min Wang by his sibling. Plaintiff Xiuyi Wang was a derivative beneficiary on the original petition but was unable to join her father in the United States because the priority date did not become current until after she turned 21 years old. Thus, Zhou Min Wang filed an I-130 petition on behalf of her daughter Xiuyi Wang in the family second preference-B ("F-2B") category. This petition was filed on September 5, 2006 and is the petition at issue in the instant case. Under INA § 203(h)(3), Zhuo Min Wang and Xiuyi Wang are entitled to the priority date of the original petition filed on December 28, 1992.

II. JURISDICTION

2. This Court has jurisdiction over the present action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 2201 (Declaratory Judgment Act); 5 U.S.C. § 555 and § 701 et seq. (Administrative Procedures Act); and 28 U.S.C. § 1361 (mandamus statute). The Board's decision also violates Plaintiffs' due process rights.

3. Relief is requested pursuant to said statutes.

III. VENUE

4. Venue is appropriate in the District Court for the Northern District of Ohio. See *28* U.S.C. § 1391(e). Plaintiff Zhuo Min Wang resides at 1622 East 32nd Street., Cleveland, Ohio 44114, which is within the jurisdiction of the Northern District of Ohio.

IV. PLAINTIFFS

5. Plaintiff Zhuo Min Wang is a citizen of the People's Republic of China. Zhuo Min Wang was born on August 18, 1955. He became a permanent resident of the United States on October 3, 2005. *See* Exhibit A (copy of Plaintiff's permanent resident card).

6. Plaintiff Zhuo Min Wang is the I-130 petitioner for his daughter Plaintiff Xiuyi Wang. *See* Exhibit B (copy of the I-130 Approval Notice, WAC-06-269-52406).

7. Plaintiff Zhuo Min Wang filed an I-130 on September 5, 2006, requesting a priority date of December 28, 1992, which would enable his daughter to immediately be eligible for an immigrant visa upon approval of the I-130 (Exhibit C).

V. DEFENDANTS

8. Defendant Christina Poulus is the Director of the California Service Center in Laguna Niguel, California. The California Service Center is one of the Service Centers for United States Citizenship and Immigration Services ("USCIS"). The California Service Center has original jurisdiction over I-130 Petitions filed by petitioners from Ohio. Her office made the original decision on the I-130 petition in which they assigned a priority date of September 5, 2006. Defendant Alejandro Mayorkas is the Director of USCIS.

9. Defendant Janet Napolitano is the Secretary of the Department of Homeland Security. As a result of a massive reorganization, the Immigration and Naturalization Service was dissolved on March 1, 2003 and its functions were taken over by the Department of Homeland Security. USCIS is a branch of the Department of Homeland Security.

10. Eric Holder is the Attorney General of the United States.

11. All Defendants are being sued in their official capacities.

V. FACTUAL BACKGROUND

12. Plaintiff Zhuo Min Wang became a lawful permanent resident on October 3, 2005. *See* Exhibit A (copy of Plaintiff Zhuo Min Wang's permanent residence card). Mr. Wang's wife and two children were granted immigrant visas after their interview. However, the eldest daughter, Plaintiff Xiuyi Wang, never received an interview notice or an immigrant visa. Xiuyi Wang was over the age of 21 when an immigrant visa number became available and there were no exceptions or laws that allowed her to be eligible for an immigrant visa at that time. Xiuyi Wang is still in China as she must wait until the I-130 is approved and the priority date is current to come to the United States and join her family.

13. Mr. Wang obtained his permanent resident status through an approved I-130 petition filed by Yu Lian Wang in the family fourth-preference category (F-4) for brothers or sisters of United States citizens. *See* Exhibit D (copy of document from National Visa Center; I-130 approval notice) The priority date for Mr. Wang's approved petition was December 28, 1992. Id. Plaintiff Xiuyi Wang is listed as a derivative on the I-130 filed on behalf of her father as they all planned on coming to the United States as a family upon approval of the immigrant visas. Id.

14. On September 5, 2006, Plaintiff Zhuo Min Wang filed an I-130 Immigrant Petition for his daughter Xiuyi Wang. *See* Exhibit E, copy of I-130 Receipt Notice. The I-130 Petition was filed requesting a priority date of December 28, 1992, as Xiuyi Wang was a derivative beneficiary of the December 28, 1992 petition for Zhuo Min Wang. *See* Exhibit F, copy of I-130 Fourth Preference for Plaintiff. The reason the petition was filed was because Plaintiff Xiuyi Wang could not obtain her immigrant visa through the original F-4 petition filed on behalf of her father because she had already turned twenty-one. The current I-130 petition was filed in the family second-preference category ("F-2B")

15. Under INA § 203(h)(1), if the age of the alien is determined to be 21 years or older, 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. If Plaintiffs' I-130 second preference petition is approved with a priority date of December 28, 1992, visa numbers would be available for Xiuyi Wang and she would be eligible to get her immigrant visa and thereafter immigrate to the United States. *See* Exhibit G, Visa Bulletin

16. The I-130 2-B petition was filed with an explicit request to obtain a December 28, 1992 priority date, which would make a visa number available to Xiuyi Wang in China.

17. On February 6, 2008, Plaintiffs filed a Complaint with the United States District Court for the Northern District of Ohio requesting that their I-130 be adjudicated and assigned a priority date of December 28, 1992. (Case No. 1:08cv0294)

18. On March 25, 2008, USCIS, California Service Center issued a Notice of Certification of the case to the Board of Immigration Appeals. *See* Exhibit H, Notice of Certification. The I-130 petition was approved but the priority date assigned was September 12, 2006 rather than the 1992 date that was requested. The case was ultimately forwarded to the Board of Immigration Appeals for a determination of the priority date issue.

19. Based on USCIS' certification to the Board of Immigration Appeals, the parties agreed to a dismissal of the action without prejudice to allow the Board to address this issue in the first instance. On April 8, the United States District Court issued an Order granting Plaintiffs' Motion to voluntarily dismiss the case without prejudice.

20. The parties each filed briefs with the Board of Immigration Appeals. Robert Reeves, who is litigating a similar case in California and has requested class certification, filed an amicus brief with the Board of Immigration Appeals.

21. On June 16, 2009, the Board issued a published decision affirming the decision of the Director with respect to the priority date of September 5, 2006. Matter of Wang, 25 I&N Dec. 28 (BIA 2009)(Exhibit I). In its decision, the Board first discusses whether INA § 203(h) is applicable where the beneficiary did not seek to acquire lawful permanent resident status within one year. Id. at 33. However, the Board did not address this question in light of its holding that the automatic conversion provision set forth in INA § 203(h)(3) is not applicable. Id.

22. With respect to the automatic conversion provision, the Board found that this would apply only where the petitioner remained the same on both petitions. The Board limited the provision to only a select group of derivative children, which are those of a second preference spouse beneficiary.

23. Plaintiffs are filing a Motion to Reconsider the Board's decision in this matter.

VI. CAUSE OF ACTION

24. Plaintiffs incorporate by reference paragraphs 1-23 of the Complaint.

25. Plaintiffs are requesting that this Court review and overturn the Board's decision in this matter. This is purely a legal question involving statutory interpretation. The Board's decision contradicts the plain language of the statute. The Board's interpretation is not required to deference as it violates the plain language of the statute. Furthermore, the decision is unreasonable.

26. The Child Status Protection Act, Pub. L. 107-208 (Aug. 6, 2002) was enacted on August 6, 2002. The purpose of the Act was to protect children who aged-out during the long process of applying for lawful permanent residence. INA § 203(h)(1) sets forth a formula for determining whether a person qualifies as a "child" under the Immigration and Nationality Act. If the individual is considered a child, he or she would be eligible to either adjust status or come to the United States as an immigrant under a petition filed on behalf of one of the parents. Under INA § 203(h)(1), the child's age is adjusted by subtracting the amount of time USCIS takes to adjudicate the visa petition from the age of the child on the date he or she becomes eligible to adjust status. If the adjusted age is un-

der 21, that child has not aged-out and is eligible to immigrate with the parent.

27. INA § 203(h)(3) addresses the retention of a priority date for a person that is considered over the age of 21 after performing the calculation set forth in INA § 203(h)(1). It is undisputed that the beneficiary in the instant case is over 21 for purposes of CSPA. That section states:

> "(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."

Subsection (a)(2)(A) refers to INA § 203(a)(2)(A) which provides the statutory authority to issue visas to sons and daughters of lawful permanent residents. Subsection (d) refers to INA § 203(d) which provides the statutory authority to issue visas to derivative beneficiaries (spouses and children) to immigrate with the principal beneficiary. Under the plain language of INA § 203(h)(3), once the alien is determined to be over 21 under (h)(1), the alien's petition shall "be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition."

28. Plaintiff Wang was previously a derivative beneficiary of an approved I-130 pe-

tition filed on behalf of her father with a December 28, 1992 priority date. Xiuyi Wang is considered 21 years or older for purposes of INA § 203(h)(1)(CSPA) and therefore, the appropriate category must be determined and she shall retain the priority date of the original petition. The appropriate category is F-2B as Plaintiff Xiuyi Wang is the unmarried child (21 or older) of a lawful permanent resident and the priority date must be the priority date of the first approved I-130, which was December 28, 1992. Thus, the priority date is current.

29. In the instant case, the Board erroneously construed the provisions at issue, and in effect, interpreted the statute as if the phrase relating to 203(d) was not even present in the subsection. The interpretation by the Board effectively ignores a portion of the subsection, divides the subsection so as to provide no weight to the group relating to 203(d), and rewrites the subsection as if 203(d) were not part of the subsection. The Board's interpretation is contradicted by the plain language, structure, history, and purpose of the Section 3 of the Child Status Protection Act.

30. As set forth by the Ninth Circuit Court of Appeals, the provisions of CSPA should be read broadly. Padash v. INS, 358 F.3d 1161, 1168-74 (9th Cir. 2004). "The legislative objective reflects Congress' intent that the Act be construed so as to provide expansive relief to children of United States citizens and permanent residents."

Id. CSPA "was intended to address the often harsh and arbitrary effects of the age out provisions under the previously existing statute." Id. at 1173. Congress stated that the purpose of the Child Status Protection Act was to "address [] the predicament of these aliens, who through no fault of their own, lose the opportunity to obtain [a] . . . visa." H.R. Rep. No. 107-45, *2, reprinted in 2002 U.S.C.C.A.N., at 641.

31. When interpreting a statute, the Board must ascertain the intent of Congress by giving effect to its legislative will. Hernandez v. Ashcroft, 345 F.3d 824, 838 (9th Cir. 2003). In analyzing a statute, the first step is to look at the plain meaning of the statute. Additionally, the general canon of statutory construction is that "a rule intended to extend benefits should be interpreted and applied in an ameliorative fashion." Padasah, 358 F.3d at 1173 *quoting* Hernandez, 345 F.3d at 840.

32. When traditional tools of statutory construction reveal Congress' intent, "deference is not required at all." Padash, 358 F.3d at 1168. When a statute is ambiguous, an Agency's "permissible construction" of it is subject to deference. Chevron v. U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

33. The Board did not explicitly rule on USCIS' one-year bar claim. Xiuyi Wang and Zhou Min Wang contend that this bar is inapplicable to the current case.

§203(h)(1)(A). INA §203(h)(1)(A) does indeed have a calculation that takes into account the length and duration of the processing for the underlying immigrant petition, whether it is family or employer based. INA §203(h)(1)(A) also has the requirement that the section is applicable only to those aliens who have sought permanent residence status within one year. Ms. Wang does not claim an immigrant visa under section INA §203(h)(1)(A). In contrast, Ms. Wang claims the right to an automatic retention of the priority date as she was a derivative beneficiary of her father's initial immigrant petition where he was the direct beneficiary of his U.S. citizen sister's petition.

34. The plain language of the statute at issue supports the position of Plaintiffs. Xiuyi Wang is no longer considered a "child" for purposes of CSPA. She had aged-out by the time her father's immigrant visa was approved. The next step is to look at INA § 203(h)(3). This section specifically applies to all derivative beneficiaries who age out under paragraph (1) and not, as the Board concluded, solely to beneficiaries of INA § 203(a)(2)(A). The structure of the subsection, specifically to include both "(a)(2)(A) and (d)" clearly indicates Congress' intent to provide the mandatory conversion and automatic retention of priority date. The Board overlooks the inclusion of INA § 203(d), without explanation as to why those who fall within INA § 203(d) are somehow excluded in the BIA interpretation for one subsection, while recognized for

the other subsection, directly opposite of canons of statutory construction.

35. The phrase "for purposes of subsection (a)(2)(A) and (d)," is used in both subsections (1) and (3). If a phrase is used in different subsections of a statute, it is a well-established canon of statutory construction that Congress intends to have the phrase to have the same meaning throughout the statute. United States v. Various Slot Machines on Guam, 658 F.2d 697, 703, n. 11 (9th Cir. 1981). The Board violates this rule when it correctly applies subsection (1) to all derivative beneficiaries under INA § 203(d) but then limits the application of subsection (3) to only derivative beneficiaries of INA § 203(a)(2)(A). The Board improperly imposes a limitation on subsection (3) that does not exist. See Schneider v. Chertoff, 450 F.3d 944, 956 (9th Cir. 2006)(it is impermissible for an Agency to impose a new requirement that is not intended by Congress). Had Congress intended to limit subsection (3) to derivative beneficiaries of INA § 203(a)(2)(A) only, it would have specified this restriction. In other circumstances, Congress has set forth clear limitations. See e.g. INA § 201(b)(1)(A)(section limited to certain categories of special immigrants); INA § 203(d) (section limited to certain definitions of the term "child"); INA § 201(b)(2)(A)(ii)(section limited to individuals "described in the second sentence of § 201(b)(2)(A)(i))."

36. The Board fails to explain how its interpretation of INA § 203(h)(3) would be

consistent with the plain language of the remainder of the statute. INA § 203(h)(2)(B) makes clear that "with respect to an alien child who is a derivative beneficiary under subsection (d)," all of INA § 203(h)("this paragraph") applies to any "petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c)." All of INA § 203(h) applies to any petition filed for an alien child of the primary beneficiary under family-based, employment-based, or diversity petitions. There is no distinction in INA § 203(h)(2)(B) between derivative beneficiaries of family second preference petitions or any other preference. As set forth above, INA § 203(h)(3) specifically references INA § 203(d).

37. In examining the applicability of the statute, the Board addresses the regulations at 8 C.F.R. § 204.2(a)(4), which have been in effect since 1987. Wang 25 I&N Dec. at 34. The Board notes that the retention provision of 8 C.F.R. § 204.2(a)(4) is limited to a lawful permanent resident's son or daughter who was previously eligible as a beneficiary under a second preference spousal petition filed by that same lawful permanent resident. Id. Thus, the petitioner must remain the same. Id.

38. Relying on 8 C.F.R. § 204.2(a)(4), the Board found that the petitioner must remain the same for the automatic conversion provision to apply. The regulation was in existence at the time that INA § 203(h) was enacted. There is no reason why Con-

gress would have addressed only this situation where a regulation was already in place that provided relief for those derivative children of a second preference spouse beneficiary.

39. In its decision, the Board references various automatic conversion regulations and concludes that when Congress enacted CSPA, they were aware that conversions only operate where the petitioner remains the same. Wang, 25 I&N Dec. at 35. However, this is incorrect. The Board failed to consider many other sections of immigration law permitting conversion and retention of a priority date where the petitioner is not the same.

40. One example is contained in 8 C.F.R. § 204.5(e). That regulation allows an employer to petition for a person in the EB-1, EB-2, or EB-3 categories. If the person changes employment after the I-140 is approved, another employer may sponsor the person in the same or a different category. Once the second I-140 is approved, the person can adjust by retaining the original priority date of the initial petition.

41. The Patriot Act provides another example where Congress provided for retention of a priority date for use in a subsequent petition by a different petitioner. Section 421(c) of the Patriot Act, P.L. 107-56, 115 Stat. 272 (2001) provides that where a

family-sponsored visa petition was revoked or terminated due to specified terrorist activity, the beneficiary could file a new "self-petition" while retaining the priority date of the family members earlier petition.

42. Additionally, a non-citizen physician working in a medically underserved area who changes jobs may retain the priority date of the prior employer's petition for use with the new employer's petition. 8 C.F.R. § 204.12(f)(1). Another regulation allows transfer of priority date of petition filed by an abusive spouse or parent to a new petition. See 8 C.F.R. § 204.2(h)(2).

43. USCIS regulations permit individuals to change jobs, preference categories, and petitioners while retaining the original priority date. The automatic conversion clause in CSPA is not the only law that allows a person to retain the priority date of a previous petition where the new petition is filed by a different petitioner. The Board's decision is flawed as it fails to consider the other sections where retention of a priority date is permitted despite the fact that the second petition involves a new petitioner. The interpretation of the Board is inconsistent with the statutory and regulatory scheme, and incorrectly concludes Congress' intent for automatic conversion to only apply for petitions filed by the same petitioners.

44. In examining the plain language of the statute at issue, it is clear that it does not require the same petitioner. In its decision, the Board briefly addresses its prior unpublished decision in Garcia, which supports the position of Xiuyi Wang and Zhou Min Wang regarding the applicability of INA § 203(h)(3). Matter of Garcia, 2006 WL 2183654 (BIA June 16, 2006) *Exhibit J.* The Board rejects the decision but fails to explain why the analysis in Garcia was in error.

45. In Matter of Garcia, the Board addressed a very similar situation as in the instant case. Garcia was in removal proceedings and applying for adjustment of status before the immigration court. In that case, respondent was a derivative beneficiary of a visa petition filed by his aunt on behalf of his mother in 1983 (F-4 petition). Garcia was 9 years old at the time. However, a visa number did not become available until respondent was 22 years old. Subsequently, respondent's mother filed a 2B petition on her behalf. Garcia argued that she retained her mother's original 1983 priority date for purposes of establishing her eligibility in the second-preference category.

46. In Garcia, the Board addresses whether respondent was eligible to adjust status under INA § 203(h). Garcia first argued that she should be found to be a "child" for purposes of CSPA. The IJ had concluded that Garcia was no longer her mother's "child" for purposes of INA § 203(h)(1) because she did not file the application for

adjustment of status within one year after the visa number became available in connection with her mother's visa petition. The Board did not reach the issue of whether Ms. Garcia sought to acquire permanent resident status within one year of a visa number being available. This is because the Board determined that Ms. Garcia would have failed to maintain the status of her mother's child, even if she had applied for adjustment of status within one year after the visa number became available to her mother. The visa number became available when Ms. Garcia was 22 years old and the visa petition was approved on the day it was filed. Thus, she was 22 for CSPA purposes and no longer could be considered a "child."

47. In light of the determination that Ms. Garcia was not presently entitled to a visa number as a derivative beneficiary on her mother's F-4 petition, the Board next turned to the question of whether a visa was immediately available to Garcia by operation of the automatic conversion provision at INA § 203(h)(3). The Board held that "where classified as a derivative beneficiary of the original petition, the 'appropriate category' for purposes of section 203(h)(3) is that which applies to the 'aged-out' derivative vis-à-vis the principal beneficiary of the original petition." Thus, the "appropriate category" to which Garcia's petition was converted was the 2B category and respondent retained the 1983 priority date that applied to the original petition. Specifically, the Board held that a derivative beneficiary of the F4 immigrant petition retained the

priority date of the initial 1983 petition under INA§ 203(h)(3), without concern to the fact that the petitioner (her mother) was different than the initial immigrant petitioner (her aunt). The same holds true in the instant case.

48. The Board's prior unpublished decision in Garcia, which was decided by a three-member panel of the Board is consistent with the plain language and intent of the statute. INA § 203(h)(3) applies to the petition at issue in the instant case. The automatic conversion provision requires that the petition be given a priority date of December 28, 1992, without concern to whether the petitioner remains the same.

49. In its decision in the instant case, the Board misstates the effect of the proper interpretation of INA § 203(h)(3). The Board believes that it would be unfair for Xiuyi Wang or someone in her position to jump ahead of thousands of aliens of others patiently awaiting consideration.

50. This argument is incorrect and also conflicts with the plain language of the statute and Congressional intent. Ms. Wang has already been waiting since 1992. She is not jumping in line in front of others who waited for a longer time. She is trying to save her place in line and avoid having to go to the back of another long line. Unfortunately Xiuyi Wang aged-out while waiting for the immigrant petition to be ap-

proved. Although she cannot take advantage of INA § 203(h)(1), she falls under INA§ 203(h)(3) and her petition is automatically converted and "shall" be given the 1992 priority date. Just as Congress includes INA 203(d) in INA§ 203(h)(3) to refer specifically to derivative beneficiaries, Congress also uses the word "shall" intentionally to indicate that there is no discretion for losing the priority date already obtained for the family.

51. In its decision, the Board also improperly relies on irrelevant legislative history. There is no legislative history of the automatic conversion clause. The discussion of legislative history is taken from the 2001 House Report and from individual members of the House of Representatives. However, the automatic conversion clause was added in 2002. There is no further legislative history cited by the Board to evidence any intent concerning the automatic conversion clause. It is therefore even more appropriate to rest with the clear meaning of the language, as there is no ambiguity to the inclusion of 203(d) in INA§ 203(h)(3), and there is no legislative history pertaining to the automatic conversion clause upon which to oppose or contradict the plain language written directly in the statute.

52. In the event that this Court finds that the statute is ambiguous, the Board's interpretation is unreasonable. As set forth herein, the Board's decision ignores statuto-

ry provisions that allow for conversions and retention of priority dates. Additionally, the conclusion that INA § 203(h) codified an existing regulation is without support. The Board also relies on irrelevant legislative history.

53. The Board's interpretation of the automatic conversion provision of INA § 203(h)(3) also is not rational or consistent with the statute. It is based on the unsupported assumption that the new category to which the petition converts must be related to the original petitioner.

54. For the reasons set forth herein, this Court should find that INA § 203(h)(3) is applicable and that the appropriate priority date is December 28, 1992. This is consistent with the plain language and intent of CSPA. The Board's interpretation is contradicted by the plain language, structure, history, and purpose of the Section 3 of the Child Status Protection Act. The focus should be on the child's relationship with the original primary beneficiary not the original petitioner and derivative beneficiary. In the instant case, the appropriate priority date is the date the original petition was filed. Under INA § 203(h)(3), the Board's decision is incorrect. The appropriate category for conversion is the F-2B category and Mr. and Ms. Wang retain the 1992 priority date, which is now current.

55. The Board's decision is in violation of the plain language of the statute. It is arbitrary, capricious, and an abuse of discretion. USCIS and the Board failed to adjudicate the I-130 petition in accordance with INA § 203(h). As such, the I-130 was unlawfully denied. The decision is not in accordance with the law.

56. Plaintiffs have been aggrieved by the decisions of USCIS and the Board. Plaintiff Zhuo Min Wang has been deprived of the proper priority date on the petition. Had the proper date been assigned, his daughter would have a visa immediately available and could come join him in the United States. Xiuyi Wang has improperly been denied the ability to come to the United States on an immigrant visa due to the improper designation of a visa number.

57. For the reasons set forth herein, Plaintiffs due process rights were also violated by the improper decisions. The decisions contradict the plain language of the statute. This has deprived the family of an opportunity to reunite in the United States.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court:

(1) Assume jurisdiction of this cause;

(2) Overturn the June 16, 2009 decision of the Board of Immigration Appeals and find that it violates the plain language of INA § 203(h) and is unreasonable.

(3) Declare that the correct priority date of the instant I-130 petition is December 28, 1992.

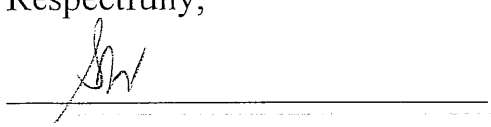
(4) Compel Defendants to assign Plaintiffs the priority date of December 28, 1992.

(5) Grant reasonable attorney's fees;

(6) Grant any other relief as this Court deems proper.

Dated: July 16, 2009

Respectfully,



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Margaret Wong & Associates Co., LPA
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3150 Chester Ave.
Cleveland, Ohio 44114
(216) 566-9908
(216) 566-1125 (fax)

CERTIFICATE OF SERVICE

I, Scott Bratton, hereby certify that I have served a copy of the foregoing this 16th day of July, 2009 to:

- Christina Poulos, Director
  USCIS – California Service Center
  24000 Avila Rd., Suite 2312
  Laguna Niguel, CA 92677

- Eric Holder, Jr., Attorney General
  U.S. Department of Justice
  950 Pennsylvania Ave., NW
  Washington, DC 20530

- Janet Napolitano, Secretary, Department of Homeland Security
  United States Department of Homeland Security
  Washington, DC 20528

- Alejandro Mayorkas, Director
  U.S. Citizenship and Immigration Services
  20 Massachusetts Ave., NW
  Washington, DC 20529

- William J. Edwards, USA
  U.S Attorney's Office
  801 West Superior Avenue, Suite 400
  Cleveland, OH 44113-1852

Scott Bratton
Margaret W. Wong & Associates

EXHIBIT A

PERMANENT RESIDENT CARD

NAME WANG, ZHUO M

A# 057-639-057

Birthdate	Category	Sex
08/18/[illegible]	[illegible]	M

Country of Birth
China, People's Republic of

CARD EXPIRES 11/07/15

Resident Since: 10/03/05

C1USA0576390579SRC0602551130<<
5508187M1511077CHN<<<<<<<<<<<0
WANG<<ZHUO<MIN<<<<<<<<<<<<<<<

EXHIBIT B

UNITED STATES OF AMERICA

RECEIPT NUMBER		CASE TYPE I130 IMMIGRANT PETITION FOR RELATIVE, FIANCE(E), OR ORPHAN
WAC-06-269-52406		
RECEIPT DATE	PRIORITY DATE	PETITIONER A057 639 057
September 12, 2006	September 5, 2006	WANG, ZHUOMIN
NOTICE DATE	PAGE	BENEFICIARY
March 25, 2008	1 of 1	WANG, XIUYI

MARGARET W. WONG
MARGARET W WONG & ASSOC LPA
RE: ZHUOMIN WANG
3150 CHESTER AVE
CLEVELAND OH 44114

Notice Type: Approval Notice
Section: Unmarried child 21/older of permanent resident, 203(a)(2)(B) INA

The above petition has been approved. We have sent the original visa petition to the Department of State National Visa Center (NVC), 32 Rochester Avenue, Portsmouth, NH 03801-2909. NVC processes all approved immigrant visa petitions that need consular action. It also determines which consular post is the appropriate consulate to complete visa processing. NVC will then forward the approved petition to that consulate.

The NVC will contact the person for whom you are petitioning(beneficiary) concerning further immigrant visa processing steps.

If you have any questions about visa issuance, please contact the NVC directly. However, please allow at least 90 days before calling the NVC if your beneficiary has not received correspondence from the NVC. The telephone number of the NVC is (603) 334-0700.

The approval of this visa petition does not in itself grant any immigration status and does not guarantee that the alien beneficiary will subsequently be found to be eligible for a visa, for admission to the United States, or for an extension, change, or adjustment of status.

THIS FORM IS NOT A VISA NOR MAY IT BE USED IN PLACE OF A VISA.

Please see the additional information on the back. You will be notified separately about any other cases you filed.

U.S. CITIZENSHIP & IMMIGRATION SVC
CALIFORNIA SERVICE CENTER
P. O. BOX 30111
LAGUNA NIGUEL CA 92607-0111
Customer Service Telephone: (800) 375-5283

EXHIBIT C

MARGARET W. WONG & ASSOC. CO., LPA
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Phone: 614.221.8892

Margaret W. Wong*
Scott E. Bratton
Troy A. Murphy
Lori A. Pinjuh**
Susan E. Saliba

Of Counsel:
Lawrence J. Hadfield

* Also admitted for practice:
New York State Bar
District of Columbia Bar

** Also admitted for practice:
Maryland State Bar

September 1, 2006

The Director
U.S. DEPT. OF HOMELAND SECURITY
Citizenship and Immigration Services
NEBRASKA SERVICE CENTER
850 S Street
Lincoln, NE 68508

Re: **I-130 Petition for Alien Relative**

Petitioner/Father: Zhuomin WANG – LPR
A057 639 057

Beneficiary/Daughter: Xiuyi WANG
DOB: 11/06/1982; COB: China

Dear Sir/Madam:

Enclosed please find I-130 Petition with all necessary supporting documents and a check in the amount of $190.00 as filing fee for the above-named applicant.

By operation of section 3 of the Child Status Protection Act, Pub.L.no. 107-20, 116 Stat. 927 (2002), codified at section 203(h) of the Immigration and Nationality Act, 8 U.S.C. §1153(h)(1) provides that if the age of the alien is determined to be 21 years of age or older, … 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. Therefore, since Xiuyi Wang was over 21 and remains unmarried, as a derivative beneficiary of the original 4th preference category of her father, Zhoumin Wang, the appropriate category to which the family based conversion is for the second-preference category of a family-based immigrant. Therefore, and according to Board of Immigration Appeals, *In re: Mario T. Garcia*, June 16, 2006, which reiterates this automatic conversion, we request the priority date **December 28th 1992** to remain intact for the instant petition.

We would appreciate it if you would file the Petition accordingly. In addition, we request that the receipts for this filing and other notices or decision be forwarded to the applicant/beneficiary and to our office pursuant to the attached G-28.

Thank you for your courtesy and cooperation and, should you have any questions, please feel free to contact our office.

Very truly yours,

Margaret W. Wong

MWW/aw
CC: Mr. Zhuomin Wang

EXHIBIT D

National Visa Center
32 Rochester Avenue
Portsmouth, NH 03801-2909

February 20, 2004

ZHUO MIN WANG
QINGZHOU VILLAGE, DUHU TOWN
TAISHAN CITY
GUANGDONG PROVINCE 529200
CHINA - MAINLAND

DEAR ZHUO MIN WANG:

Your inquiry has been received at the NVC. The immigrant visa petition you mentioned in your letter has already been entered into our computer system and assigned the case number listed below.

This case is currently under review for applicability of the Child Status Protection Act (CSPA). You will be notified as soon as a decision is made. Please be advised that there is no timeframe for when this will happen. Please do not contact the U.S. Embassy or Consulate General, as they will have no further information.

Please notify the National Visa Center of the petitioner's current mailing address, so we may update our records.

Case Number:	GUZ1993568043
Petitioner's Name:	WANG, YU LIAN
Beneficiary's Name:	WANG, ZHUO MIN
Preference Category:	F4 - BROTHERS AND SISTERS OF U.S. CITIZENS
Your Priority Date:	28DEC1992
Foreign State Chargeability:	CHINA - MAINLAND
U.S. Embassy/Consulate:	CONSULATE GENERAL OF THE UNITED STATES, VISA UNIT 1 SHAMIAN STREET SOUTH GUANGZHOU 510133 PEOPLE'S REPUBLIC OF CHINA

Traveling Applicants:

NAME	DOB	POB
WANG, ZHUO MIN	18AUG1955	CHINA - MAINLAND
CHEN, QIUZHU	23OCT1957	CHINA - MAINLAND
WANG, XIUYI	06NOV1982	CHINA - MAINLAND
WANG, YUZHAO	21AUG1984	CHINA - MAINLAND
WANG, YUGUI	05JUL1986	CHINA - MAINLAND

[CK1.02/20/2004]

Immigration and Naturalization Service

Notice of Action

Applicant/Petitioner A #	Application/Petition I-130
A40 277 674	IMMIGRANT PETITION FOR RELATIVE
Receipt #	Applicant/Petitioner
SAC-93-060-50793	WANG, YU LIAN
Notice Date: February 25, 1993 / Page 1 of 1	Beneficiary WANG, ZHUOMIN

YU LIAN WANG
AVE BOULEVARD 2727
LEVITTOWN PR 00949

Approval Notice
Class: F4
Priority Date: December 28, 1992

Notice also sent to:
None

The above petition has been approved.

We have sent it to the Department of State Immigrant Visa Processing Center (IVPC), Suite 700, 1401 Wilson Blvd, Arlington, VA 22209.

This completes all INS action on this petition. The Department of State Immigrant Visa Processing Center will communicate shortly with the person the petition is for concerning further immigrant visa processing steps.

Please read the back of this form carefully for more information.

You will be notified separately about any other applications or petitions you filed. Save this notice. Please enclose a copy of it if you write to us about this case, or if you file another application based on this decision. Our address is:

IMMIGRATION & NATURALIZATION SERVICE
EASTERN SERVICE CENTER
75 LOWER WELDEN STREET
SAINT ALBANS VT 05479-0001
Tel: (802) 527-3160

Form I-797 (8/03/90) Y

Please see additional information on the back.

EXHIBIT E

U.S. Citizenship and Immigration Services

RECEIPT NUMBER	CASE TYPE
WAC-06-269-52406	I130 IMMIGRANT PETITION FOR RELATIVE, FIANCE(E), OR ORPHAN
RECEIVED DATE: September 5, 2006 / PRIORITY DATE	PETITIONER: A057 639 057 WANG, ZHUOMIN
NOTICE DATE: September 12, 2006 / PAGE: 1 of 1	BENEFICIARY: WANG, XIUYI

MARGARET W. WONG
MARGARET W WONG & ASSOC LPA
RE: ZHUOMIN WANG
3150 CHESTER AVE
CLEVELAND OH 44114

Notice Type: Receipt Notice

Amount received: $ 190.00
Section: Unmarried child 21/older of permanent resident, 203(a)(2)(B) INA

Receipt notice - If any of the above information is incorrect, call customer service immediately.

Processing time - Processing times vary by kind of case.
- You can check our current processing time for this kind of case on our website at **uscis.gov**.
- On our website you can also sign up to get free e-mail updates as we complete key processing steps on this case.
- Most of the time your case is pending the processing status will not change because we will be working on others filed earlier.
- We will notify you by mail when we make a decision on this case, or if we need something from you. If you move while this case is pending, call customer service when you move.
- Processing times can change. If you don't get a decision or update from us within our current processing time, check our website or call for an update.

If you have questions, check our website or call customer service. Please save this notice, and have it with you if you contact us about this case.

Notice to all customers with a pending I-130 petition - USCIS is now processing Form I-130, Petition for Alien Relative, as a visa number becomes available. Filing and approval of an I-130 relative petition is only the first step in helping a relative immigrate to the United States. Eligible family members must wait until there is a visa number available before they can apply for an immigrant visa or adjustment of status to a lawful permanent resident. This process will allow USCIS to concentrate resources first on cases where visas are actually available. This process should not delay the ability of one's relative to apply for an immigrant visa or adjustment of status. Refer to **www.state.gov/travel** <http://www.state.gov/travel> to determine current visa availability dates. For more information, please visit our website at www.uscis.gov or contact us at 1-800-375-5283.

If this receipt is for an I-485, or I-698 application
USCIS WILL SCHEDULE YOUR BIOMETRICS APPOINTMENT. You will be receiving a biometrics appointment notice with a specific time, date and place where you will have your fingerprints and/or photos taken. You MUST wait for your biometrics appointment notice prior to going to the ASC for biometrics processing. This I-797 receipt notice is NOT your biometrics appointment notice and should not be taken to an ASC for biometrics processing.

WHAT TO BRING TO YOUR BIOMETRICS APPOINTMENT:
Please bring your biometrics appointment letter (with specific time, date and place where you will have your fingerprints and/or photo taken) AND your photo identification to your biometrics appointment.
Acceptable kinds of photo identification are:
- a passport or national photo identification issued by your country,
- a drivers license,
- a military photo identification, or
- a state - issued photo identification card.

Always remember to call customer service if you move while your case is pending. If you have a pending I-130 relative petition, also call customer service if you should decide to withdraw your petition or if you become a U.S. citizen.

Please see the additional information on the back. You will be notified separately about any other cases you filed.

U.S. CITIZENSHIP & IMMIGRATION SVC
CALIFORNIA SERVICE CENTER
P. O. BOX 30111
LAGUNA NIGUEL CA 92607-0111
Customer Service Telephone: (800) 375-5283

EXHIBIT F

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Action

Applicant/Petitioner A # A40 277 674	Application/Petition I130C IMMIGRANT PETITION FOR RELATIVE
Receipt # SAC-93-060-50793	Applicant/Petitioner WANG, YU LIAN
Notice Date February 25, 1993 / Page 1 of 1	Beneficiary WANG, ZHUOMIN

YU LIAN WANG
AVE BOULEVARD 2727
LEVITTOWN PR 00949

Approval Notice
Class: E41
Priority Date: December 28, 1992

Notice also sent to:
None

The above petition has been approved.

We have sent it to the Department of State Immigrant Visa Processing Center (IVPC), Suite 700, 1401 Wilson Blvd, Arlington, VA 22209.

This completes all INS action on this petition. The Department of State Immigrant Visa Processing Center will communicate shortly with the person the petition is for concerning further immigrant visa processing steps.

Please read the back of this form carefully for more information.

You will be notified separately about any other applications or petitions you filed. Save this notice. Please enclose a copy of it if you write to us about this case, or if you file another application based on this decision. Our address is:

IMMIGRATION & NATURALIZATION SERVICE
EASTERN SERVICE CENTER
75 LOWER WELDEN STREET
SAINT ALBANS VT 05479-0001
Tel: (802) 527-3160

Form I-797 (8/03/90) Y

Please see additional information on the back.

EXHIBIT G

Visa Bulletin

Number 10
Volume IX
Washington, D.C.

VISA BULLETIN FOR JULY 2009

A. STATUTORY NUMBERS

1. This bulletin summarizes the availability of immigrant numbers during July. Consular officers are required to report to the Department of State documentarily qualified applicants for numerically limited visas; the Bureau of Citizenship and Immigration Services in the Department of Homeland Security reports applicants for adjustment of status. Allocations were made, to the extent possible under the numerical limitations, for the demand received by June 8th in the chronological order of the reported priority dates. If the demand could not be satisfied within the statutory or regulatory limits, the category or foreign state in which demand was excessive was deemed oversubscribed. The cut-off date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limits. Only applicants who have a priority date earlier than the cut-off date may be allotted a number. Immediately that it becomes necessary during the monthly allocation process to retrogress a cut-off date, supplemental requests for numbers will be honored only if the priority date falls within the new cut-off date which has been announced in this bulletin.

2. Section 201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at least 140,000. Section 202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. The dependent area limit is set at 2%, or 7,320.

3. Section 203 of the INA prescribes preference classes for allotment of immigrant visas as follows:

FAMILY-SPONSORED PREFERENCES

First: Unmarried Sons and Daughters of Citizens: 23,400 plus any numbers not required for fourth preference.

Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, and any unused first preference numbers:

A. Spouses and Children: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. Unmarried Sons and Daughters (21 years of age or older): 23% of the overall second preference limitation.

Third: Married Sons and Daughters of Citizens: 23,400, plus any numbers not required by first and second preferences.

Fourth: Brothers and Sisters of Adult Citizens: 65,000, plus any numbers not required by first three preferences.

EMPLOYMENT-BASED PREFERENCES

First: Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences.

Second: Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.

Third: Skilled Workers, Professionals, and Other Workers: 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "Other Workers".

AILA Doc. No. 09061033 (Posted 6/10/09).

Fourth: Certain Special Immigrants: 7.1% of the worldwide level.

Fifth: Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of P.L. 102-395.

4. INA Section 203(e) provides that family-sponsored and employment-based preference visas be issued to eligible immigrants in the order in which a petition in behalf of each has been filed. Section 203(d) provides that spouses and children of preference immigrants are entitled to the same status, and the same order of consideration, if accompanying or following to join the principal. The visa prorating provisions of Section 202(e) apply to allocations for a foreign state or dependent area when visa demand exceeds the per-country limit. These provisions apply at present to the following oversubscribed chargeability areas: CHINA-mainland born, INDIA, MEXICO, and PHILIPPINES.

5. On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are available for all qualified applicants; and "U" means unavailable, i.e., no numbers are available. (NOTE: Numbers are available only for applicants whose priority date is earlier than the cut-off date listed below.)

	All Charge-ability Areas Except Those Listed	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIPPINES**
Family					
1st	15NOV02	15NOV02	15NOV02	01JAN91	01SEP93
2A	22DEC04	22DEC04	22DEC04	22JUN02	22DEC04
2B	15APR01	15APR01	15APR01	01MAY92	01APR98
3rd	22OCT00	22OCT00	22OCT00	01JUL91	01JUL91
4th	22OCT98	22OCT98	22OCT98	15JUN95	08AUG86

*NOTE: For July, 2A numbers EXEMPT from per-country limit are available to applicants from all countries with priority dates earlier than 22JUN02. 2A numbers SUBJECT to per-country limit are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 22JUN02 and earlier than 22DEC04. (All 2A numbers provided for MEXICO are exempt from the per-country limit; there are no 2A numbers for MEXICO subject to per-country limit.)

	All Charge-ability Areas Except Those Listed	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIPPINES**
Employment-Based					
1st	C	C	C	C	C
2nd	C	01JAN00	01JAN00	C	C
3rd	U	U	U	U	U
Other Workers	U	U	U	U	U
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th	C	C	C	C	C
Targeted Employ-ment Areas/ Regional Centers	C	C	C	C	C

AILA Doc. No. 09061033 (Posted 6/10/09).

The Department of State has available a recorded message with visa availability information which can be heard at: (area code 202) 663-1541. This recording will be updated in the middle of each month with information on cut-off dates for the following month.

Employment Third Preference Other Workers Category: Section 203(e) of the NACARA, as amended by Section 1(e) of Pub. L. 105-139, provides that once the Employment Third Preference Other Worker (EW) cut-off date has reached the priority date of the latest EW petition approved prior to November 19, 1997, the 10,000 EW numbers available for a fiscal year are to be reduced by up to 5,000 annually beginning in the following fiscal year. This reduction is to be made for as long as necessary to offset adjustments under the NACARA program. Since the EW cut-off date reached November 19, 1997 during Fiscal Year 2001, the reduction in the EW annual limit to 5,000 began in Fiscal Year 2002.

B. DIVERSITY IMMIGRANT (DV) CATEGORY

Section 203(c) of the Immigration and Nationality Act provides a maximum of up to 55,000 immigrant visas each fiscal year to permit immigration opportunities for persons from countries other than the principal sources of current immigration to the United States. The Nicaraguan and Central American Relief Act (NACARA) passed by Congress in November 1997 stipulates that beginning with DV-99, and for as long as necessary, up to 5,000 of the 55,000 annually-allocated diversity visas will be made available for use under the NACARA program. This reduction has resulted in the DV-2009 annual limit being reduced to 50,000. DV visas are divided among six geographic regions. No one country can receive more than seven percent of the available diversity visas in any one year.

For July, immigrant numbers in the DV category are available to qualified DV-2009 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Listed Separately	
AFRICA	48,700	Except: Egypt 21,600 Ethiopia 21,100 Nigeria 14,400
ASIA	CURRENT	
EUROPE	CURRENT	
NORTH AMERICA (BAHAMAS)	CURRENT	
OCEANIA	CURRENT	
SOUTH AMERICA, and the CARIBBEAN	CURRENT	

Entitlement to immigrant status in the DV category lasts only through the end of the fiscal (visa) year for which the applicant is selected in the lottery. The year of entitlement for all applicants registered for the DV-2009 program ends as of September 30, 2009. DV visas may not be issued to DV-2009 applicants after that date. Similarly, spouses and children accompanying or following to join DV-2009 principals are only entitled to derivative DV status until September 30, 2009. DV visa availability through the very end of FY-2009 cannot be taken for granted. Numbers could be exhausted prior to September 30.

C. ADVANCE NOTIFICATION OF THE DIVERSITY (DV) IMMIGRANT CATEGORY RANK CUT-OFFS WHICH WILL APPLY IN AUGUST

For August, immigrant numbers in the DV category are available to qualified DV-2009 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Listed Separately	
AFRICA	64,300	Except: Egypt 22,750 Ethiopia 22,800 Nigeria 15,650
ASIA	CURRENT	
EUROPE	CURRENT	
NORTH AMERICA (BAHAMAS)	CURRENT	
OCEANIA	CURRENT	
SOUTH AMERICA, and the CARIBBEAN	CURRENT	

D. RETROGRESSION OF AUGUST CUT-OFF DATES

It has been necessary to retrogress the Mexico Family First and Third preference cut-off dates, as well as the China Employment Second preference cut-off date for July to keep visa issuances within those annual category numerical limits.

E. OBTAINING THE MONTHLY VISA BULLETIN

The Department of State's Bureau of Consular Affairs offers the monthly "Visa Bulletin" on the INTERNET'S WORLDWIDE WEB. The INTERNET Web address to access the Bulletin is:

http://travel.state.gov

From the home page, select the VISA section which contains the Visa Bulletin.

To be placed on the Department of State's E-mail subscription list for the "Visa Bulletin", please send an E-mail to the following E-mail address:

listserv@calist.state.gov

and in the message body type:
Subscribe Visa-Bulletin First name/Last name
(example: Subscribe Visa-Bulletin Sally Doe)

To be removed from the Department of State's E-mail subscription list for the "Visa Bulletin", send an e-mail message to the following E-mail address:

listserv@calist.state.gov

and in the message body type: **Signoff Visa-Bulletin**

The Department of State also has available a recorded message with visa cut-off dates which can be heard at: (area code 202) 663-1541. The recording is normally updated by the middle of each month with information on cut-off dates for the following month.

Readers may submit questions regarding Visa Bulletin related items by E-mail at the following address:

AILA Doc. No. 09061033 (Posted 6/10/09).

VISABULLETIN@STATE.GOV

(This address cannot be used to subscribe to the Visa Bulletin.)

Department of State Publication 9514
CA/VO:June 8, 2009

EXHIBIT H

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services

Notice of Certification

TO: Zhouu Min WANG (Petitioner)
C/o
Scott Bratton, Esq. of Margaret Wong & Assoc. Co., LPA
3150 Chester Ave.
Cleveland, OH 44114
(216) 566-9908

File number: WAC-06-269-52406

Date: March 25, 2008

IN THE MATTER OF:
Petition For Alien Relative, Form I-130
Zhou Min WANG – Petitioner
Xiuyi WANG - Beneficiary

The following action has been taken in this case:

RECEIVED
2008 MAR 31 P 12:
CLERK OF THE BOARD
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. ☑ This case has been certified for review to the Board of Immigration Appeals (Board). Within 10 days after receipt of this notice, you may submit to this office a brief or written statement for the Board to consider. If you desire oral argument before the Board, you must send a prompt request by letter to the Board at 5107 Leesburg Pike, Suite 2000, Falls Church, Virginia 22041. (703) 605-1007.

2. ☐ In accordance with 8 CFR 245.13(m)(2) or 8CFR 245.15(r)(3), this case has been certified for review to the Immigration Court located at _____ so that an immigration judge may conduct a hearing to determine whether this decision should be made final. Within 10 days after receipt of this notice, you may submit to this office a brief or written statement for the Court to consider. Regardless of whether you submit a brief, you will be notified by the Immigration Court of the date, time and location of the hearing.

☐ This case has been certified for review to:

A. ☐ The Administrative Appeals Office (AAO), U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, N.W., Rm. 3000, Washington, DC 20529.

B. ☐ The following Service official:

Located at:

Within 30 days of this notice, you may submit to the office where your case was sent, a brief or written statement. Any request for oral argument before the AAO must be made within the 30-day period. If you want, you may waive the 30-day period by writing to the office where your case was sent.

SERVICE CENTER COUNSEL (for)

Christina Poulos
Director, California Service Center

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Chief Counsel

24000 Avila Road, Room 2117
Laguna Niguel, CA 92677
March 17, 2008

Memorandum for Certification

Pursuant to Title 8, Code of Federal Regulations, Section 1003.1(c), the Director of the California Service Center, United States Citizenship and Immigration Services (CIS), hereby submits to the Board of Immigration Appeals, her decision dated March 25, 2008. Jurisdiction by certification is proper since this decision arises under Title 8, Code of Federal Regulations, Section 1003.1(b)(5) and the decision relates to a petition filed in accordance with section 204.

Executive Summary

CIS concludes that the Petition for Alien Relative filed by Petitioner on behalf of Beneficiary in 2006 should not be able to retain/capture the visa "priority date" of a Petition for Alien Relative previously filed on behalf of Petitioner in 1992. CIS reaches this conclusion because there is no provision of law supporting retention of the earlier priority date and that even under section 203(h) of the Child Status Protection Act, only 2nd preference derivative beneficiaries may retain earlier priority dates, not aged-out derivatives of 4th preference visa petitions. However, Petitioner cites to a single unpublished Board of Immigration Appeals (BIA) case supporting his position to the contrary. *See In re: Maria T. Garcia*, 2006 WL 2183654 (BIA 2006 unpublished).

Statement of Facts

1. On January 4, 1993, Yu Lian Wang, a United States citizen, filed a Petition for Alien Relative, Form I-130 ("Petition #1") on behalf of her brother, Zhuo Min Wang (the Primary Beneficiary of Petition #1 and subsequently, the Petitioner in Petition #2).

2. Included for relative visa consideration within Petition #1 were four "derivative beneficiaries," including the Primary Beneficiary's minor daughter (Xiuyi Wang, date of birth: November 6, 1982).

3. On February 24, 1993, the (former) Immigration and Naturalization Service approved Petition #1. Petition #1 was accorded a December 28, 1992 priority date.

4. In February of 2005, the State Department Visa Bulletin indicated that the visa priority date for 4th preference relative visa petitions from China was January 8, 1993. February of 2005 appears to be the first month that the 4th preference visa (from China) became available for the Primary Beneficiary of Petition #1.

5. In October of 2005, the State Department Visa Bulletin indicated that the visa priority date for 4th preference relative visa petitions (from China) was February 1, 1994.

6. On October 3, 2005, Zhuo Min Wang, the Primary Beneficiary of Petition #1 was admitted to the United States as a Lawful Permanent Resident under Family 4th Preference ("F4")(from China).

7. Prior to the admission of Zhuo Min Wang, the Primary Beneficiary of Petition #1, the derivative beneficiary (Xiuyi Wang) turned 21 years of age. She turned 21 on November 6, 2003. Because she had aged-out, she no longer qualified to immigrate as a derivative beneficiary family member under Petition #1.

8. Petitioner has acknowledged his daughter's (Xiuyi Wang) ineligibility to immigrate with him in 2005.

9. On September 12, 2006, Zhuo Min Wang, the Primary Beneficiary of Petition #1 (now a lawful permanent resident) filed a Petition for Alien Relative (Form I-130) ("Petition #2) on behalf of his (over 21 years of age) daughter, Xiuyi Wang, formerly a derivative beneficiary of Petition #1.

10. The priority date given to Petition #2 was September 12, 2006.

11. As the unmarried daughter over 21 years of age, of a lawful permanent resident, Xiuyi Wang would be classified under the 2nd preference "B" visa priority category (from China).

12. The Visa Bulletin for March 2008 indicates that the visa priority date for 2nd preference-B (from China) is February 8, 1999 – almost seven years before the priority date for Petition #2.

13. Petition #2 seeks to classify Xiuyi Wang as the unmarried daughter, over 21, of a lawful permanent resident, yet Petitioner argues that Petition #2 should retain the priority date of Petition #1.

Legal Framework Governing the Immigrant Visa Petition Priority Date

Title 8 C.F.R. § 204.1(c) – Filing date. The filing date of a petition shall be the date it is properly filed under paragraph (d) of this section and shall constitute the priority date.

Title 8 C.F.R. § 204.2(g) – Petition for brother or sister. Only a United States citizen who is 21-years of age or older may file a petition for a brother or sister for classification under § 203(a)(4).

Title 8 C.F.R. § 204.2(g)(4) – Derivative beneficiaries. A spouse or child accompanying or following to join a principal alien beneficiary under this section may be accorded the same preference and priority date as the principal alien without the necessity of a separate petition.

Title 8 C.F.R. § 204.2(h) – Validity of approved petitions. Unless terminated... the approval of a petition to classify an alien as a preference immigrant... shall remain valid for the duration of the relationship to the petitioner and of the petitioner's status as established in the petition.

Title 8 C.F.R. § 204.2(a)(4) – Derivative beneficiaries. (Provides that)... in the case of a child accompanying or following to join a principal alien under § 203(a)(2) of the Act may be included in the principal alien's second preference visa petition... the child will be accorded 2nd preference classification and the same priority date as the principal alien. However, if the child reaches the age of 21 prior to the issuance of the visa to the primary alien parent, a separate petition will be required. In such case, the original priority date will be retained if the subsequent petition is filed by the same petitioner. ***Such retention of priority date will be accorded only to a son or daughter previously eligible as a derivative beneficiary under a 2nd preference spousal petition.***

Analysis

Petitioner seeks for his 23 year old daughter to retain the 1992 priority date for the purpose of the 2nd preference Relative Visa Petition which he filed on her behalf in 2005 (Petition #2). However, Title 8 C.F.R. § 204.2(a)(4) contains language that "***such retention of priority date will be accorded only to a son or daughter previously eligible as a derivative beneficiary under a 2nd preference spousal petition.***" This supports the CIS position that priority date retention is only viable for 2nd preference and not 4th preference classifications.

In this case, Petitioner's 23 year old daughter was previously classified as a derivative beneficiary under the 4th preference Relative Visa Petition (Petition #1). Accordingly, she was not previously classified under the 2nd preference and there is no provision of law that provides for the retention of the earlier priority date.

Petitioner asserts that Petition #2 is entitled to favorable treatment under § 203(h) of the Child Status Protection Act. Discussing the retention of priority dates, § 203(h)(3) states, "if the age of the alien is determined... to be 21 years of age or older for the purposes of subsection (a)(2)(A) and (d), the alien's petition shall automatically convert to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition."

§ 203(a)(2)(A) discusses beneficiaries that are "the spouses or children *of an alien lawfully admitted for permanent residence*..." In this case, CIS believes that such language requires that it is the Petitioner himself, as a lawful permanent resident, that is and always had been, petitioning for the spouse or child.

§ 203(d) discusses the treatment of family members and that, "a child defined in subparagraph (A), (B), (C), (D), or (E) of section 101(b)(1) shall... be entitled to the same status, and the same order of consideration... if accompanying or following to join, the spouse or parent."

Under Petitioner's construction and in accord with the language of the statute, when his daughter, the Beneficiary, turned 21 years old in 2003, she was automatically converted from being a derivative 4th preference category, to a 2nd preference category – even though Petition #1 had in fact, been filed the sister of her father – her aunt . It was not until 2006 that Plaintiff directly filed Petition #2 on behalf of his daughter.

Arguably, the dispute centers around the privity required by § 203(h)(3). Plaintiff asserts that upon his daughter's "age-out" of the 4th preference derivative status, she automatically converted to the 2nd preference status – this is, what Petitioner thinks is the "appropriate category" discussed in § 203(h)(3). CIS disagrees citing the fact that no petitionable relationship exists between the daughter and her aunt following her age-out and that accordingly, the "appropriate category" is actually a non-existing visa category, or no preference category.

CIS emphasizes that only § 203(a)(2)(A) and Title 8 C.F.R. § 204.2(a)(4) – which relate to derivative beneficiary children whose parent has been petitioned by a spouse – are the only provisions allowing for retention of the earlier priority date. CIS believes that these sections reach appropriate conclusions because the 2nd preference category contains 2 sub-sections – one for spouses and children under 21 and the other for children over 21. Conversely, there is no such conversion language within 203(g)(4) for derivatives. Accordingly, if CIS allows a 4th preference to convert to a 2nd preference when no petitionable relationship exists between the original petitioner and the aged-out derivative beneficiary, then CIS allows for the creation of a relative visa petition relationship and visa category not previously provided for by statute.

CIS is aware that the BIA appears to reach a different conclusion in the unpublished case of *In re Mario Garcia (2006 WL 2183654)*. There, the BIA seems to conclud that the natural conversion (under section 203(h)(3) of an aged out child in a similar 4th preference relative visa petition would be to focus not upon the relationship of the original petitioner and the derivative beneficiary, but instead to focus upon the child's familial relationship with the primary beneficiary. However, *In re Mario Garcia* is an unpublished case arising from removal proceedings as litigated by U.S. Immigration and Customs Enforcement ("ICE"), and in light of the foregoing discussion of both the priority classifications and the applicable sections of CSPA § 203, CIS disagrees with the decision.

Conclusion

On review by certification, CIS respectfully requests that the BIA uphold the decision of the Service Center Director, denying retention of the earlier priority date.

Sincerely,

5/27/2008

/s/
Jason R. Grimm
Service Center Counsel – Laguna Niguel
U.S. Citizenship and Immigration Services

EXHIBIT I

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Bratton, Scott E., Esquire
3150 Chester Avenue
Cleveland, OH 44114-0000

USCIS California Service Center
24000 Avila Road, Suite 2117, Div. VII/CRU
Laguna Niguel, CA 92677

Name: Xiuyi Wang

A088-484-947

Date of this notice: 6/16/2009

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Adkins-Blanch, Charles K.
Mann, Ana
Neal, David L

Publish

Matter of Xiuyi WANG, Beneficiary of visa petition filed by Zhuomin Wang, Petitioner

File A088 484 947 - California Service Center

Decided June 16, 2009

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

The automatic conversion and priority date retention provisions of the Child Status Protection Act, Pub L. No. 107-208, 116 Stat. 927 (2002), 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.

FOR RESPONDENT: Scott Bratton, Esquire, Cleveland, Ohio

AMICI CURIAE:[1] Robert L. Reeves, Esquire; Nancy Miller, Esquire; and Jeremiah Johnson, Esquire, Pasadena, California

FOR THE DEPARTMENT OF HOMELAND SECURITY: Jason R. Grimm, Service Center Counsel

BEFORE: Board Panel: NEAL, Acting Chairman; ADKINS-BLANCH, Board Member; and MANN, Temporary Board Member.

MANN, Temporary Board Member:

In a decision dated March 25, 2008, the director of the California Service Center approved a visa petition filed by the lawful permanent resident petitioner on behalf of the beneficiary as his unmarried daughter. Although the director approved the visa petition, she denied the petitioner's request to assign an earlier priority date to the visa petition. Specifically, the director accorded the visa petition a priority date of September 5, 2006, which is the date the visa petition was filed. However, the petitioner sought an earlier priority date of December 28, 1992, the date that a previous visa petition had been filed on the petitioner's behalf by his sister, of which his daughter was a derivative beneficiary. In view of the important questions raised regarding which priority

[1] We acknowledge with appreciation the helpful briefs submitted by both parties and by amici curiae.

date to assign to a visa petition, the director certified her decision to the Board for review. The director's decision will be affirmed. The request for oral argument is denied.

I. FACTUAL AND PROCEDURAL HISTORY

A. 1992 Visa Petition

The petitioner is a native and citizen of China. On December 28, 1992, his United States citizen sister filed a Petition for Alien Relative (Form I-130) on his behalf pursuant to section 203(a)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1153(a)(4) (Supp. IV 1992). That visa petition was approved 2 months later on February 24, 1993, and was accorded a priority date of December 28, 1992. The petitioner was the primary beneficiary of that fourth-preference visa petition (hereinafter referred to as the "1992 visa petition"), and his wife and three children were listed as derivative beneficiaries. The beneficiary of the instant visa petition is his daughter, who was born on November 6, 1982, and was 10 years old when the 1992 petition was filed.

In February 2005 visas became available for nationals of China who were beneficiaries of fourth-preference petitions with a priority date in 1992. *See* Department of State Visa Bulletin, Vol. III, No. 78 (Feb. 2005). Accordingly, the petitioner was admitted to the United States as a lawful permanent resident on October 3, 2005. By this time, however, the beneficiary was 22 years of age and no longer qualified as a "child" who could derive beneficiary status from the petition filed by her aunt on behalf of her father. *See* sections 101(b)(1), 203(d) of the Act, 8 U.S.C. §§ 1101(b), 1153(d) (2006).

B. 2006 Visa Petition

On September 5, 2006, the petitioner filed a second-preference visa petition on behalf of the beneficiary as his unmarried daughter pursuant to section 203(a)(2) of the Act (hereinafter referred to as the "2006 visa petition"). In a cover letter sent with the visa petition, the petitioner requested that the beneficiary be assigned a priority date of December 28, 1992, which was the priority date given to the fourth-preference visa petition that had been filed on his behalf by his sister.

The director approved the second-preference visa petition on March 25, 2008, but she gave it a priority date of September 5, 2006, which is the date the visa petition was filed. In her decision, the director noted that 8 C.F.R. § 204.2(a)(4) (2008) allows for retention of a priority date solely with regard to derivative beneficiaries of a second-preference visa petition, not to

derivative beneficiaries of a fourth-preference visa petition. As the 1992 visa petition was a fourth-preference petition, the director concluded that the second-preference petition filed by the petitioner in 2006 could not retain the more favorable priority date of the 1992 visa petition.

The director acknowledged the petitioner's argument that the beneficiary should be accorded the earlier priority date pursuant to the Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002) ("CSPA"). However, she concluded that the CSPA did not apply to this case. In the absence of published precedent on the applicability of the CSPA in this situation, the director elected to certify her decision to the Board.

II. ISSUE

The issue in this case is whether a derivative beneficiary who has aged out of a fourth-preference visa petition may automatically convert her status to that of a beneficiary of a second-preference category pursuant to section 203(h) of the Act. To answer this question, we must examine whether the CSPA intended for the beneficiary of a second-preference visa petition filed by her father to retain the priority date previously accorded to her as the derivative beneficiary of a fourth-preference visa petition filed by her aunt.

III. CHILD STATUS PROTECTION ACT

A. Who May Qualify as a "Child"?

Section 203(h) of the Act was amended by section 3 of the Child Status Protection Act, 116 Stat. at 928, in part to define who may qualify as a "child" and in part to address the "[t]reatment of certain unmarried sons and daughters seeking" immigrant status in the United States. Section 203(h) provides in pertinent part:

> Rules for Determining Whether Certain Aliens Are Children
> (1) In general
> For purposes of subsections (a)(2)(A)[2] and (d),[3] a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1)[4] 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

---

[2] This provision relates to the spouses or children of lawful permanent residents.

[3] This provision relates to a spouse or child, if accompanying to join the spouse or parent.

[4] This matter notes that the term "child" means an unmarried person under 21.

> 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).[5]
>
> (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.

The CSPA was essentially enacted to provide relief to children who might "age out" of their beneficiary status because of administrative delays in visa processing or adjustment application adjudication. A "child" is defined for immigration purposes as an unmarried individual under the age of 21. Section 101(b)(1) of the Act. In certain visa categories, qualifying as a "child" has a definite advantage. For example, the child of a United States citizen is characterized as an "immediate relative," a category that is not subject to any statutory limit on the number of visas available each year. Thus, the "child" of a United States citizen does not need to wait for a priority date to become current, because a visa will be immediately available for a beneficiary in that category. Section 201(b)(2)(A)(i) of the Act, 8 U.S.C. § 1151(b)(2)(A)(i) (2006). However, should the child of a United States citizen reach the age of 21 before immigrating to the United States, he or she is then classified as a "son" or "daughter" of a United States citizen and falls within the purview of the first-preference category, which is subject to numerical limits and the attendant wait for a visa to become available. *See* section 203 of the Act (establishing the percentage of visas that may be allocated for various relative classifications). To illustrate, had this beneficiary been a child of a United States citizen today, she could immediately seek to immigrate as an immediate relative. However, as a Chinese national who is the unmarried daughter of a

[5] Section 203(a) refers to familial visas, (b) refers to employment based visas, and (c) refers to diversity visas.

lawful permanent resident, she falls within the second-preference category, which is several years from being current.[6]

To protect a child's status from being lost on account of administrative processing delays, section 203(h)(1) of the Act provides a formula for determining whether a son or a daughter who, as in this case, is the derivative beneficiary of a visa petition may still qualify as a "child" when the parent's petition becomes current. The formula subtracts the amount of time it took Department of Homeland Security's United States Citizenship and Immigration Services ("USCIS") to adjudicate the visa petition (that is, the number of days from the date the visa petition was filed to the date the visa petition was approved) from the age of the derivative beneficiary on the date the visa petition became available. If the age of the derivative beneficiary as so calculated is under 21, then she may still be considered a "child," and she may be eligible to adjust her status or immigrate to the United States based on a visa petition filed on behalf of her parent.

The parties in this case agree that the beneficiary could not be considered a "child" under section 203(h)(1) of the Act, because at the time the 1992 visa petition became current, she was not under 21, even subtracting the number of days that the visa petition was pending approval, which was less than 2 months' time. The beneficiary had already aged out when the 1992 visa petition became current, and she was thus not eligible to immigrate with her father in 2005.

B. "One-Year" Bar

The issue then turns on whether the petitioner may use section 203(h)(3) of the Act to convert the priority date from his sister's fourth-preference visa petition to an unrelated second-preference visa petition for his daughter. As noted above, section 203(h)(1) provides a calculation that determines the age of an alien on the date an immigrant visa number becomes available, "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." Section 203(h)(1)(A) of the Act.

As an initial matter, the USCIS argues that the beneficiary may not take advantage of the age calculation provision in section 203(h)(1) of the Act to utilize the priority date retention provision in section 203(h)(3), because she admittedly did not file an application for lawful permanent resident status within 1 year of visa availability. Conversely, the petitioner asserts that the requirement in section 203(h)(1) that an alien must seek permanent resident

[6] The most recent priority date for this nationality and category is February 1, 2001. Department of State Visa Bulletin, Vol. IX, No. 9 (June 2009).

status within 1 year of the visa's availability is inapplicable to his daughter. According to the petitioner, sections 203(h)(1) and (3) of the Act are distinct from each other and provide different benefits.[7]

The record before us contains no evidence that the beneficiary sought to acquire lawful permanent resident status under the 1992 visa petition within a year of the visa petition becoming available, that is, by February 2006. However, we need not address the question whether this bars the beneficiary from using the terms of section 203(h)(3) of the Act, as we have alternatively examined whether section 203(h)(3) permits an automatic conversion from a fourth-preference visa petition to a second-preference visa petition with retention of the priority date of the fourth-preference petition, and we resolve the matter on that basis.

IV. Automatic Conversion and Priority Date Retention Under Section 203(h)(3) of the Act

A. Statutory language

If the beneficiary is determined to be 21 years of age or older pursuant to section 203(h)(1) of the Act, then section 203(h)(3) provides that "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." 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).

The petitioner urges a broad interpretation of section 203(h), contending that section 203(h)(3) is available to all derivative beneficiaries of any visa petition classification. The brief offered by amici curiae similarly maintains that section 203(h) of the Act is ameliorative and inclusive and does not limit its

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[7] The petitioner cites our unpublished decision in *Matter of Garcia*, A79 001 587 (BIA June 16, 2006), 2006 WL 2183654, in which we found that section 203(h)(3) allowed the alien to use the priority date granted to her as a derivative beneficiary of her mother's visa petition. As a rule, unpublished decisions are not authority, and we are not bound by them. *Matter of Arthur*, 20 I&N Dec. 475 (BIA 1992), *modified on other grounds*, *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002); *Matter of Medrano*, 20 I&N Dec. 216 (BIA 1990, 1991). Nevertheless, we observe that the decision in *Garcia* discussed neither the requirement that an alien must seek to acquire lawful permanent resident status within 1 year of visa availability nor the legislative framework of the statute. We therefore decline to adopt the reasoning in *Garcia*. *See* 8 C.F.R. § 1003.1(g) (2009).

automatic conversion and priority date retention provisions to family-based preference petitions. In contrast, the USCIS urges a much narrower interpretation of the CSPA, arguing that section 203(h)(3) mirrors the language of 8 C.F.R. § 204.2(a)(4) and essentially codifies "established regulatory practice," which requires that the original priority date will be retained only if the second visa petition is filed by the same petitioner. Thus, the USCIS maintains that in order to effect an "automatic conversion" under the CSPA, the petitioner also must have been the petitioner on the 1992 visa petition. According to the USCIS, such an interpretation of the statute avoids open-ended petitions with no timeliness considerations. We begin with an examination of the regulatory and statutory context in which Congress enacted the automatic conversion and priority date retention provisions of section 203(h)(3).

B. Use of Visa Petition Conversion and Priority Date Retention Language

In immigration regulations, the phrase "automatic conversion" has a recognized meaning. For example, the relevant provisions of 8 C.F.R. § 204.2(i), which have been in effect since 1987, provide for the "automatic conversion of preference classification" from one preference category to another upon the occurrence of certain events. *See* Automatic Conversion of Classification of Beneficiary, 52 Fed. Reg. 33,797 (Sept. 8, 1987), 1987 WL 140984. Such events include changes in the beneficiary's marital status or the naturalization of the petitioner. Thus, a second-preference petition filed on behalf of the son or daughter of a petitioner who naturalizes would automatically convert to a first-preference petition, and the newly converted petition would retain the original priority date.

Similarly, at the time Congress enacted the CSPA, the regulations at 8 C.F.R. § 204.2(a)(4) provided for "retention" of a priority date for an aged-out child who was accompanying or following to join a principal beneficiary on a second-preference spousal petition. Under 8 C.F.R. § 204.2(a)(4), if a child ages out prior to the issuance of a visa to the principal beneficiary, a separate petition for that son or daughter is then required, but the original priority date is retained if the subsequent petition is filed by the same petitioner. In other words, the retention provision of 8 C.F.R. § 204.2(a)(4) is limited to a lawful permanent resident's son or daughter who was previously eligible as a derivative beneficiary under a second-preference spousal petition filed by that same lawful permanent resident.

In another context, the CSPA added section 201(f) to the Act, which sets forth rules for determining whether certain aliens qualify as immediate relatives. That section treated the terms "automatic conversion" and

"retention" consistently with the existing regulatory schema.[8] Section 201(f) expressly authorizes automatic conversions of petitions upon the naturalization of an alien's parent or the termination of a beneficiary's marriage. In such situations, neither the beneficiary nor an immigration officer need take any action to effect the conversion to the new preference category, because the "conversion" of the originally filed petition based on one preference category to another preference category occurs automatically by operation of law.[9]

As illustrated above, 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. A visa petition filed by another family member receives its own priority date. We therefore presume that Congress enacted the language in section 203(h)(3) with an understanding of the past usage of these regulatory terms. *See Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); *Matter of Devison*, 22 I&N Dec. 1362 (BIA 200).

With this understanding of how the automatic conversion and priority date retention processes have operated historically, we turn to this case to determine how section 203(h)(3) would apply to the beneficiary. First, with regard to the "automatic conversion" referenced in section 203(h)(3), we look to see to which category the fourth-preference petition converted at the moment the beneficiary aged out. When the beneficiary aged out from her status as a derivative beneficiary on a fourth-preference petition, there was no other category to which her visa could convert because no category exists for the niece of a United States citizen. Second, if we apply the "retention" language of section 203(h) here, we look to see if the new petition was filed on the beneficiary's behalf by the same petitioner. In the beneficiary's case, the new visa petition has been filed by her father, not by her aunt (who was the original petitioner). As noted above, her aunt is not eligible to file a new petition for

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[8] In fact, section 2 of the CSPA, 116 Stat. at 927-28, which added section 201(f) to the Act, specifically referenced the preexisting regulatory automatic conversion provisions of 8 C.F.R. §§ 204.2(i)(1) and (3).

[9] By way of further example, section 6 of the CSPA, 116 Stat. at 929, added section 204(k) to the Act to create a new automatic conversion category, wherein a petition filed on behalf of an unmarried son or daughter of a lawful permanent resident who subsequently naturalizes will automatically convert to a petition to classify the alien as the son or daughter of a United States citizen. The "automatic" nature of this transaction is emphasized by the need for aliens to affirmatively opt out of the conversion if they do not wish to move into the new preference category (for example, should the new category provide a less advantageous priority date). *See* section 204(k)(2) of the Act.

her because no category exists for the niece of a United States citizen under our existing visa preference classification system.

The petitioner disregards the context explained above and instead maintains that the CSPA is intended as an ameliorative provision to keep families together and that the beneficiary in one visa preference category should be able to retain the priority date for all derivative beneficiaries who may age out. His argument suggests that any time a son or daughter who is a derivative beneficiary of a visa petition filed on behalf of the parent alien is calculated to be 21 years of age or older pursuant to section 203(h)(1)of the Act, that derivative visa petition automatically converts to a new visa petition that may be filed in the future when the alien parent becomes eligible to file the new visa petition. Thus, by this argument, as long as a parent gains status under any preference category, all children who were derivative beneficiaries would gain favorable priority date status, even with regard to a new visa petition that is wholly independent of the original petition and that may be filed without any time limitation in the future. In other words, a derivative beneficiary would never age out or lose a previous priority date. However, we find no clear indication in the statute that Congress intended to expand the historical categories eligible for automatic conversion and priority date retention in such a fashion. We therefore search the legislative history of the CSPA for evidence of a clear intent by Congress to expand the use of the concepts of automatic conversion and priority date retention, as advocated by the petitioner.

C. Legislative History

In the House Report accompanying H.R. 1209, 107th Cong. (2001), initially entitled the "Child Status Protection Act of 2001," the Committee on the Judiciary identified the purpose of the bill as modifying

> provisions of the Immigration and Nationality Act determining whether an alien is considered a child and eligible for permanent resident status as an immediate relative of a U.S. citizen, principally by providing that the alien's status as a child is determined as of the date on which the petition to classify the alien as an immediate relative is filed.

H.R. Rep. No. 107-45, at 1-2 (2001), *reprinted in* 2002 U.S.C.C.A.N. 640, 640, 2001 WL 406244, at *1-2. Both the report and associated statements from several members of the House of Representatives emphasize that the drive for the legislation was the then-extensive administrative delays in the processing of visa petitions and applications resulting in the aging out of beneficiaries of petitions filed by United States citizens and the associated loss

of child status for immigration purposes. *Id.* at 2, *reprinted in* 2002 U.S.C.C.A.N. 640, 641, 2001 WL 406244, at *2; *see also* 147 Cong. Rec. H2901 (daily ed. June 6, 2001) (statements of Reps. Sensenbrenner, Jackson-Lee, and Smith), 2001 WL 617985.

The legislature subsequently reported changes to the proposed CSPA, regarding retention of child status for immediate relatives and adding section 203(h) of the Act in its current form. CSPA, § 3, 116 Stat. at 928. A report on the activities of the Committee on the Judiciary summarized the CSPA, noting that the statute applied when a child of a United States citizen ages out, when lawful permanent resident parents naturalize after petitioning for their sons and daughters, and when United States citizen parents petition for their married sons and daughters whose marriages are later terminated, and it applied as well to children of lawful permanent residents, family- and employer-sponsored immigrants, and diversity lottery winners. H.R. Rep. No. 107-807 (2003), 2003 WL 131168, at *55-56.

While the legislative record contains generalized references to the Senate amendment regarding children of family- and employment-based visas and diversity visas, there is little discussion explaining the nature of those changes. However, the Chairman of the Committee on the Judiciary did note, in referencing those amendments, that the Senate bill addresses other situations where alien children lose immigration benefits by aging out as a result of processing delays. He noted the same included children of lawful permanent residents, family- and employer-sponsored immigrants, diversity lottery winners, and asylees and refugees. 148 Cong. Rec. H4989 (daily ed. July 22, 2002) (statement of Rep. Sensenbrenner), 2002 WL 1610632, at *H4990-91; *see also* H.R. Rep. 107-807, 2003 WL 131168, at *55-56.

There was repeated discussion in the House, both before and after the Senate amendment, of the intention to allow for retention of child status "without displacing others who have been waiting patiently in other visa categories." 148 Cong. Rec. H4989 (statement of Rep. Jackson-Lee), 2002 WL 1610632, at *H4992; 147 Cong. Rec. H2901, 2001 WL 617985, at *H2902.[10] The historical record regarding the CSPA contains nothing that is contrary to, or reflects any disagreement with, the noted intent of legislators to have the CSPA address the issue of children aging out of visa availability

[10] Representative Sheila Jackson-Lee reported that the bill contained newly added compromise language to reflect the legislature's desire that the bill not displace others already awaiting visas in other preference categories. Indeed, it was expected that this legislation would open up more immigrant visas in the preference categories because more individuals would be eligible for visas as immediate relatives and fewer would be shifted to the limited, family-based preference categories. 147 Cong. Rec. H2901 (statement of Rep. Jackson-Lee), 2001 WL 617985, at *H2902.

as a result of administrative processing delays, without cutting in line ahead of others awaiting visas in other preference categories. While the CSPA was enacted to alleviate the consequences of administrative delays, there is no clear evidence that it was intended to address delays resulting from visa allocation issues, such as the long wait associated with priority dates. If we interpret section 203(h) as the petitioner advocates, the beneficiary, as a new entrant in the second-preference visa category line, would displace other aliens who have already been in that line for years before her. Although her visa petition was filed in 2006, the beneficiary would "jump" to the front of the line by retaining a 1992 priority date, thereby causing all the individuals behind her to fall further behind in the queue.[11]

We recognize the petitioner's concern that the length of the visa queue in certain categories can result in children aging out of visa eligibility and losing the opportunity to immigrate with other family members. However, this delay is not a consequence of administrative delays by the Government. Rather, it is the result of a high demand for a finite number of visas. We find that while the legislative record demonstrates a clear concern on the part of Congress to ameliorate the delays associated with the processing of visa petitions, there is no indication in the statutory language or 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. We find no indication in the legislative record that Congress was attempting to expand on the historical application of automatic conversion and retention of priority dates for visa petitions, and we therefore decline to read such an expansion into the statute.

V. CONCLUSION

When the beneficiary turned 21 years of age before the fourth-preference visa petition became current, she no longer qualified as a "child" under section 203(h)(1) of the Act. Further, the automatic conversion and priority date retention provisions of section 203(h)(3) do not apply to the beneficiary, as those concepts are used historically in Federal regulations and codified elsewhere in the CSPA. First, there was no available category to which the beneficiary's petition could convert because no category exists for the niece of a United States citizen. Moreover, the second-preference petition filed on

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[11] The petitioner's argument is rather similar in nature to one seeking to "grandfather" a priority date. However, Congress did not write the statute in such a manner, although it clearly has the capability of doing so. *See* section 245(i) of the Act, 8 U.S.C. § 1255(i) (2006).

behalf of the beneficiary cannot retain the priority date from the fourth-preference petition filed by her aunt because the second-petition has been filed by her father, a new petitioner.

Absent clear legislative intent to create an open-ended grandfathering of priority dates that allow derivative beneficiaries to retain an earlier priority date set in the context of a different relationship, to be used at any time, which we do not find in the history of the CSPA, we decline to apply the automatic conversion and priority date retention provisions of section 203(h) beyond their current bounds. Accordingly, we will affirm the decision of the director that the priority date to be assigned to the petitioner's visa petition on behalf of his daughter is September 5, 2006, the date the visa petition was filed.

ORDER: The decision of the director is affirmed.

EXHIBIT J

2006 WL 2183654 (BIA)

** THIS IS AN UNPUBLISHED DECISION THAT CANNOT BE CITED **

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

IN RE: MARIA T. GARCIA

File: A79 001 587 - Houston

June 16, 2006

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Lawrence E. Rushton, Esquire
ON BEHALF OF DHS:

Gerrie Zhang
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Adjustment of status

The respondent appeals from an Immigration Judge's February 11, 2005, decision denying her application for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i). The Department of Homeland Security (the "DHS"), formerly the Immigration and Naturalization service (the "INS"), opposes the appeal. The appeal will be sustained in part and the record will be remanded to the Immigration Judge for further proceedings.

The respondent, a 32-year-old native and citizen of Mexico, concedes that she is inadmissible to the United States as charged, but claims that she is eligible to adjust her status to that of a lawful permanent resident pursuant to section 245(i) of the Act. Section 245(i)(1) provides, in pertinent part, that certain aliens who are beneficiaries of immigrant visa petitions filed on or before April

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30, 2001, may apply to the Attorney General for adjustment of status upon payment of $1,000. Upon receiving the alien's application and the required sum, the Attorney General is authorized to adjust the alien's status to that of a lawful permanent resident if, among other things, "an immigrant visa is immediately available to the alien…." Section 245(i)(2)(B) of the Act.

The respondent contends that a visa is immediately available to her as a derivative beneficiary of a visa petition, filed in 1983, that classified her mother as a fourth-preference family-based immigrant (i.e., as the sister of a United States citizen). *See* section 203(a)(4) of the Act, 8 U.S.C. § 1153(a)(4). According to the respondent's appellate brief, her aunt filed a visa petition on behalf of her mother on January 13, 1983, when the respondent was 9 years old, and a visa number became available to her mother on the basis of the petition in June of 1996, when the respondent was 22 years old. Although the respondent is now 32 years old, she asserts that she remains her mother's "child," for purposes of establishing her derivative status under the aforementioned visa petition, by operation of section 3 of the Child Status Protection Act, Pub. L. No. 107-20, 116 Stat. 927 (2002) ("CSPA"), codified at section 203(h) of the Act, 8 U.S.C. § 1153(h).

Section 203(h)(1) of the Act provides in pertinent part that a determination as to whether a derivative beneficiary of a visa petition continues to qualify as a "child" (i.e., as a person under 21 years of age) is to be made by reference to "the age of the alien on … 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 … the number of days in the period during which the applicable petition … was pending." According to the respondent, applying the formula set forth at section 203(h)(1) results in a determination that she is 17 years old and still her mother's "child" for purposes of establishing derivative status.

Alternatively, the respondent contends that even if she is 21 years old or older within the meaning of section 203(h)(1), a visa is nonetheless immediately available to her by operation of section 203(h)(3) of the Act, which provides that "[i]f the age of an alien is determined under [section 203(h)(1)] to be 21 years of age or older …, 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." The respondent asserts that if she is 21 years old or older, then the "appropriate category" to which she was "automatically … converted" is the second-preference category of family-based immigrants (i.e., the unmarried daughter of her mother, a lawful permanent resident). Section 203(a)(2) of the Act. Indeed, in 1997 the respondent's mother actually filed a visa petition on the respondent's behalf, classifying her in that preference category. Furthermore, the respondent contends that under section 203(h)(3) She "retains" her mother's original January 1983 priority date for purposes of establishing her eligibility for a visa in the second-preference category.

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The immigration Judge concluded that the respondent was no longer her mother's "child" for purposes of section 203(h)(1) because she did not file her application for adjustment of status within 1 year after a visa number became available in connection with her mother's visa petition. Furthermore, the Immigration Judge concluded that the 1983 fourth-preference petition did not automatically convert to a second-preference petition with respect to the respondent because section 203(h)(3), which provides for such automatic conversion, did not yet exist in 1997 (when the respondent's mother filed a second-preference petition on the respondent's behalf).

On appeal, the respondent argues that the Immigration Judge misconstrued section 203(h)(1) of the Act when she interpreted the phrase "sought to acquire the status of an alien lawfully admitted for permanent residence" as referring to the formal "filing" of an application for adjustment of status. Furthermore, she claims that she is eligible for automatic conversion to the second-preference category pursuant to section 203(h)(3) because the affirmative application for adjustment of status that she filed on the basis of her approved second-preference petition was still pending before the former INS when the CSPA went into effect in August of 2002.

As a threshold matter, we conclude that we need not address the first issue raised by the respondent on appeal, i.e., whether the Immigration Judge erred by equating the statutory phrase "sought to acquire the status of an alien lawfully admitted for permanent residence" with the concept of "filing" a formal application for adjustment of status. For the following reasons, we conclude that the respondent would have failed to retain the status of her mother's "child," within the meaning section 203(h)(1) of the Act, *even if* she had applied for adjustment of status within 1 year after a visa number became available to her mother.

As noted previously, the respondent's age for purposes of section 203(h)(1) is equal to her actual age on the date when a visa number became available to her mother, reduced by whatever number of days comprised "the period during which the applicable petition … was pending." It is undisputed that a visa number became available to the respondent's mother in June of 1996, when the respondent was 22 years old. Furthermore, the record reflects that the underlying visa petition was approved by the former INS on the day it was filed-January 13, 1983. (See attachment "A" to the DHS' Brief on Respondent's Ineligibility for Adjustment of Status, filed in Immigration Court on January 21, 2005). Applying the section 203(h)(1) formula to this set of facts yields the conclusion that the respondent is 22 years old (i.e., her age in June of 1996 (22 years)), reduced by the number of days in the period during which the visa petition was pending (i.e., 0 days). Accordingly, the respondent is no longer deemed to be her mother's "child" for purposes of establishing her status as a derivative beneficiary of her mother's visa petition.

The respondent's assertion that she is 17 years old for purposes of section 203(h)(1) appears to derive from her assumption that the statutory reference to "the period during which the applicable petition … was pending" refers to the

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period of time between the filing of the visa petition and the date when a visa number became available to her mother. But that assumption is mistaken. In fact, the relevant period is the period between the filing of the visa petition *and its approval;* a visa petition that has been approved by the DHS is no longer "pending" for any purpose within the meaning of the CSPA. In this connection, it must be kept in mind that the CSPA was enacted to prevent alien children from "aging out" as a result of unnecessary administrative processing delays by the DHS. Yet the 161-month delay between January 1983 (when the former INS approved the fourth-preference visa petition filed on behalf of the respondent's mother) and June 1996 (when a visa number became available to the respondent's mother on the basis of that petition) was not attributable to unnecessary administrative processing delays at the former INS, but was instead a function of the fact that the respondent's mother had been approved for classification as an immigrant in an oversubscribed preference category that was (and remains) subject to restrictive annual numerical limits. The CSPA was not intended to override these annual numerical limits or otherwise alter the preference allocation for family-sponsored immigrants, which are set by statute. *See generally* section 203(a) of the Act. Because there was no administrative processing delay in the approval of her mother's fourth-preference visa petition, there is simply no basis for "reduc[ing]" the respondent's age below that which she actually possessed when a visa number became available to her mother. Having concluded that the respondent is not presently entitled to a visa number as a derivative beneficiary of her mother's fourth-preference visa petition, we now turn to the question whether a visa is immediately available to her by operation of the automatic conversion provision at section 203(h)(3) of the Act.

As previously noted, section 203(h)(3) provides that "[i]f the age of an alien is determined under [section 203(h)(1)] to be 21 years of age or older ..., 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." We have determined that the respondent is 21 years of age or older for purposes of section 203(h)(1), and therefore our present task is to ascertain the "appropriate Category" to which her petition is automatically converted. We agree with the respondent that where an was classified as a *derivative* beneficiary of the original petition, the "appropriate category" for purposes of section 203(h)(3) is that which applies to the "aged-out" derivative vis-a-vis the *principal beneficiary* of the original petition.[FN1]

In this instance, the principal beneficiary of the original petition was the respondent's mother, who became a lawful permanent resident of the United States once a visa number became available to her in 1996. The respondent was (and remains) her mother's unmarried daughter, and therefore the "appropriate category" to which her petition was converted is the second-preference category of family-based immigrants, i.e., the unmarried sons and daughters of lawful permanent residents. Furthermore, the respondent is entitled to retain the January 13, 1983, priority date that applied to the original fourth-preference petition, and therefore a visa number under the second-preference category is immediately available

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to the respondent.[FN2]

As noted previously, the Immigration Judge declared that section 203(h)(3) was inapplicable to the respondent because the CSPA, from which section 203(h)(3) is derived, was not intended to apply retroactively to petitions for classification filed before August 6, 2002, the CSPA's effective date. In this regard, the Immigration Judge apparently focused on the respondent's eligibility for a visa number through the visa petition that her mother filed on her behalf in 1997. However, the respondent's entitlement to a visa number under section 203(h)(3) does not derive from the 1997 visa petition, but rather from the original 1983 petition, which is "automatically … converted" to a second-preference petition upon an administrative determination that she is 21 years old or older for purposes of section 203(h)(1).

Furthermore, the CSPA expressly provides that the amendments made therein "apply to any alien who is a … beneficiary of … a petition for classification under section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) approved before [August 6, 2002] but only if a final determination has not been made on the beneficiary's application for an immigrant visa or adjustment of status to lawful permanent residence pursuant to such approved petition." CSPA § 8. The present respondent was a beneficiary of her mother's fourth-preference petition, which was approved prior to August 6, 2002, and the respondent's subsequent application for adjustment of status was filed with the DHS in 1997 but *remained pending* until 2004, after the CSPA had become effective. Thus, section 203(h)(3) was applicable with respect to the respondent's original adjustment application and remains effective to the renewed application that she has filed in removal proceedings.

In conclusion, we have determined that an immigrant visa is not immediately available to the respondent as a derivative beneficiary of her mother's fourth-preference visa petition, but that such a number is available to her in the second-preference category by virtue of section 203(h)(3) of the Act. Accordingly, a visa is immediately available to the respondent within the meaning of section 245(i)(2)(B) of the Act. Therefore, the respondent's appeal will be sustained in part and the Immigration Judge's decision pretermitting her application for section 245(i) adjustment will be vacated. The record will be remanded for further consideration of the respondent's adjustment application and for entry of a new decision.

ORDER: The appeal is sustained in part and the Immigration Judge's decision is vacated to the extent that it pretermitted the respondent's application for adjustment of status.

FURTHER ORDER: The record is remanded for further proceedings consistent with the foregoing decision and for entry of a new decision.

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FN1. Where the aged-out beneficiary was the principal beneficiary of the original petition, the appropriate category is that which applies to the beneficiary vis-a-vis the original *petitioner*.

FN2. According to the State Department's visa bulletin, second-preference family-based visas are currently available to the unmarried daughters of Mexican lawful permanent residents whose priority dates precede November 1991. (http://travel.state.gov/visa/frvi/bulletin/bulletin_2924.html).

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