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UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

BOARD OF IMMIGRATION APPEALS

In The Matter Of: Mr. Zhuo Min WANG (Petitioner) In Visa Certification Proceedings	Case No. A88-484-947 REQUEST FOR PRECEDENT DECISION; REQUEST FOR ORAL ARGUMENT; REQUEST FOR CONSIDERATION BY THREE MEMBER PANEL; MOTION TO ACCEPT SUPPLEMENTAL AND/OR REPLY BRIEF;

REQUEST FOR PRECEDENT DECISION

In accordance with the procedures described at 8 C.F.R. section 1003.1(g), United States Citizenship and Immigration Services ("USCIS") formally requests that the Board of Immigration Appeals ("Board") consider issuing a precedent decision concerning the interpretation and application of section 203(h)(3) of the Immigration and Nationality Act. Since enactment on August 6, 2002, section 203(h)(3) has been subject to conflicting interpretation, resulting in seemingly inconsistent treatment by the Board[1] and sporadic litigation in the federal

[1] Matter of Maria T. Garcia, A79 001587 (BIA July 16, 2006)(unpublished); Matter of Elizabeth Francisca Garcia, A77 806 733 (BIA July 24, 2007)(unpublished); Matter of Francisco Drilon Yang, A79 638 092 (BIA September 7, 2007)(unpublished); Matter of Stuti Chaitanya Patel, A88 124 902 (BIA April 18, 2008)(unpublished).

district courts. Moreover, the interpretation of section 203(h)(3) has risen to the level of national and public significance as USCIS stakeholders strive to administer the provisions of the section 203(h)(3) in accord with Congressional intent, but in the absence of consistent guidance. A precedent decision will provide a measure of closure to the interpretation of a provision which has gone largely unexplained since its enactment nearly six years ago. In light of the certification before the Board, USCIS believes that the matter is ripe for publication and hereby formally requests that the Board consider issuing a precedent decision.

REQUEST FOR ORAL ARGUMENT

USCIS requests that the Board grant oral argument in this matter as described within the Board of Immigration Appeals Practice Manual ("Practice Manual") at Chapter 4.2(g) and Chapter 8. USCIS is aware that Chapter 8.2 of the Practice Manual references 8 C.F.R. section 1003.1(e)(7) which provides, "[w]hen an appeal has been taken, a request for oral argument if desired shall be included in the Notice of Appeal." In this matter, Petitioner has requested oral argument, and USCIS joins in this request. Oral argument will provide USCIS an opportunity to fully develop the public policy rational behind its interpretation of section 203(h)(3) and further address the conflict and interplay between section 203(h)(3) and other provisions within both the Immigration and Nationality Act and its history of implementing regulations. USCIS believes that a full presentation including oral argument will alleviate the likelihood of a motion for oral argument as described in Chapter 8.2(b) of the Practice Manual and relating to motions to reopen or reconsider. Observing the criteria for oral argument discussed at Chapter 8.2(d) of the Practice Manual, USCIS believes that this matter concerns the resolution of a novel issue of law, requiring clarification of several conflicting and unpublished decisions issuing from the Board, and concerning an issue of significant public interest.

REQUEST FOR CONSIDERATION BY THREE MEMBER PANEL

In accord with the necessity for oral argument in this matter USCIS requests that this matter, if not previously before a three Board Member panel, be appropriately considered for

such treatment. Chapter 8.2 of the Practice Manual provides that "[o]ral argument is not allowed in a case assigned for disposition by a single Board Member." USCIS believes that this matter is not suitable for consideration by a single Board Member as it involves "[t]he need to establish a precedent construing the meaning of law and procedure" as described by Chapter 1.3(a)(i)(2). Moreover, the novel issue of law at issue concerns a "controversy of major national import," as described by Chapter 1.3(a)(i)(4). Accordingly, USCIS requests consideration by a three Board Member panel in conjunction with the request for oral argument.

MOTION TO SUBMIT SUPPLEMENTAL AND/OR REPLY BRIEF

USCIS requests leave to submit a supplemental brief to the memorandum accompanying the request for certification and in the alternative, an opportunity to file a reply to Respondent's brief dated June 10, 2008. For this purpose, USCIS requests a period of thirty days in which to file such brief with the Board.

Date: July 18, 2008____

LYNDEN D. MELMED
Chief Counsel
EVAN FRANKE
Chief, Litigation Coordination Division

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JASON R. GRIMM
Associate Counsel
Service Center Counsel Division

CERTIFICATE OF SERVICE

I, Jason R. Grimm, certify that a copy of this motion has been mailed to Petitioner, his counsel of record, and the Oral Argument Coordinator via first class mail on July 18, 2008 at the following addresses:

Mr. Xiu Yi WANG
3857 West 160th Street
Cleveland, OH 44111

Mr. Scott Bratton, Esq.
C/o Margaret Wong & Associates
3150 Chester Avenue
Cleveland, OH 44114

Oral Argument Coordinator
Clerk's Office
Board of Immigration Appeals
P.O. Box 8530
Falls Church, VA 22041

Date:_July 18, 2008_

LYNDEN D. MELMED
Chief Counsel
EVAN FRANKE
Chief, Litigation Coordination Division

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JASON R. GRIMM
Associate Counsel
Service Center Counsel Division

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: A88-484-947
WAC-06-269-52406

Date: April 15, 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:

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.

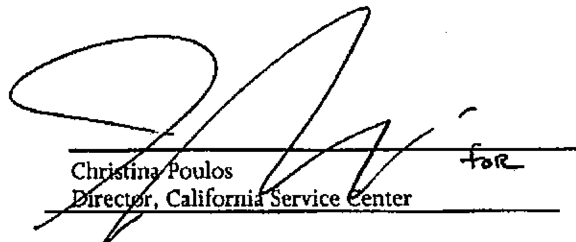
3. ☐ This case has been certified for review to:

   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.



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
April 15, 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.

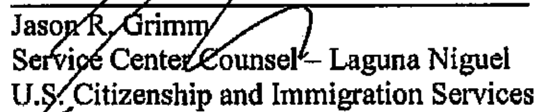
CIS emphasizes that only § 203(a)(2)(A) and Title 8 C.F.R. § 204.2(a)(4) – which relate to derivative beneficiary children whose parent has been petitioned by a spouse – are the only provisions allowing for retention of the earlier priority date. CIS believes that these sections reach appropriate conclusions 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,



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