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., Esq.
Margaret Wong & Associates
3150 Chester Avenue
Cleveland, OH 44114-0000

USCIS California Serv. Ctr./CSC
24000 Avila Rd., Div. VII/CRU
Laguna Niguel, CA 92677

Name: Xiuyi Wang

A088-484-947

Date of this notice: 5/21/2010

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

trans

File: A088 484 947 - California Service Center Date: MAY 21 2010

In re: XIUYI WANG, Beneficiary of a visa petition filed by
ZHUOMIN WANG, Petitioner

IN VISA PETITION PROCEEDINGS

MOTION

ON BEHALF OF PETITIONER: Scott Bratton, Esquire

ON BEHALF OF DHS: Jason R. Grimm
Service Center Counsel

APPLICATION: Petition to classify status of alien relative for issuance of immigrant visa

This case was previously before the Board on June 16, 2009, on certification from the California Service Center Director. In the decision issued on that date, we affirmed the Service Center Director's decision to accord a 2006 priority date to the Petition for Alien Relative (Form I-130) filed by the petitioner. The Director had decline to accord an earlier priority date to the approved visa petition based on an earlier visa petition filed on behalf of the petitioner. The petitioner has filed a motion to reconsider our decision. The motion will be denied.

In the decision at issue, we held that the automatic conversion and retention of priority date provisions of the Child Status Protection Act (CSPA), Pub. L. No. 107-208, 116 Stat. 927 (2002), codified at section 203(h)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(h)(3), 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 visa petition is later filed by a different petitioner. *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009). In so holding, we found that the relevant language in the Act was ambiguous and that the principles of statutory construction do not support as broad an interpretation as advocated by the petitioner. *Id.* at 33-38.

A motion for reconsideration must specify the error of fact or law in the previous Board decision and must be supported by pertinent authority. 8 C.F.R. § 1003.2(b)(1). The motion is a request that the Board reexamine its prior decision in light of a change in law or additional legal arguments that could not have been raised earlier. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Arguments raised in a motion to reconsider should flow from new law or a de novo legal determination reached by the Board that may not have been addressed by the parties. *Id.*

In this case, the petitioner's motion to reconsider our decision in *Matter of Wang* (hereinafter "Petitioner's Motion") alleges a number of errors in the decision. However, much of the motion is substantially similar to the appellate brief already considered by the Board, and does not establish

that a previously-raised issue was overlooked, that new law affects the determination, or that a previously-unbriefed issue requires additional consideration. *Id.* In particular, the petitioner's contentions with respect to the applicability of our unpublished decision in *Matter of Garcia*, A79 001 587 (BIA June 16, 2006) and our characterization of the petitioner's position as permitting the beneficiary to "jump ahead in line" are essentially identical to the arguments presented on appeal (Petitioner's Brief at 3-4; Petitioner's Supplemental Brief at 8-10). Petitioner's Motion at 11-13.[1] Contrary to the petitioner's assertion, we explicitly declined to adopt the reasoning from *Matter of Garcia*, emphasizing that it was not binding on the Board and that it did not fully develop the arguments raised and considered throughout the balance of the *Wang* decision. *Matter of Wang*, *supra*, at 33 n.7. The petitioner's disagreement or dissatisfaction with the explanation provided does not render it legally erroneous.

Moreover, the crux of the petitioner's contention that the Board's decision conflicts with the plain language of section 203(h)(3) of the Act, as it refers to derivative beneficiaries under section 203(d) is substantially unchanged from the arguments proffered on appeal concerning the interpretation of the statute by the Service Center Director (Petitioner's Supplemental Brief at 4-6).[2] Petitioner's Motion at 4-8. In this regard, we emphasize that in *Wang* we concluded, inter alia, that automatic conversion of a visa petition could operate properly only when there was an appropriate category available for such conversion. *Matter of Wang*, *supra*, at 35-36. For example, in the instant case, when the beneficiary turned 21 years old on November 6, 2003 (some 14 months before the priority date for the 1992 visa petition became current) and no longer qualified as a derivative beneficiary of the approved visa petition filed on behalf of her father as the sibling of a United States citizen, there was no preference category specified within the Act into which she could automatically convert. The petitioner has not articulated a circumstance under which a child derivative beneficiary of an approved visa petition classified under section 203(b) of the Act or section 203(c) of the Act

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[1] We note that the petitioner incorrectly states that the beneficiary aged out while waiting for the visa petition to be approved. Petitioner's Motion at 13; Petitioner's Supplemental Brief at 10. The record shows that the visa petition at issue was filed on December 28, 1992, and was approved less than 2 months later on February 24, 1993, when the beneficiary was 10 years of age. The beneficiary turned 21 years old while waiting for the priority date for the approved fourth-preference visa category to become current, which occurred in February 2005. This wait is a function of the statutory scheme that limits the number of visas that may be issued annually according to country and type of visa in question, not a result of any visa petition processing. *See* sections 201 and 202 of the Act, 8 U.S.C. §§ 1151, 1152.

[2] We observe that the only court to consider our decision in *Matter of Wang* to date has agreed with our determination that the statute is ambiguous, as well as with our interpretation of that statute in light of its language and legislative history. *See Zhang v. Napolitano*, 663 F. Supp. 2d (C.D. Cal. 2009). *See also Costelo v. Chertoff*, No. SA08-00688-JVS(SHx) (C.D. Cal. Nov. 10, 2009) (unpublished) (citing *Zhang*, *supra*).

has an otherwise appropriate preference category available for automatic conversion when that child turns 21 years old.[3]

To the extent the petitioner has made arguments that may be appropriate bases for reconsideration, we are not persuaded that such action is warranted. For example, the petitioner argues that the Board did not explain why Congress would have intended the statute, as interpreted in *Matter of Wang*, to essentially duplicate the age-out protection provided by an existing regulation, 8 C.F.R. § 204.2(a)(4). Petitioner's Motion at 8-9. However, the petitioner's argument misconstrues our decision. The discussion the petitioner refers to in his motion considers the terms "automatic conversion" and "retention" of a priority date in the context of existing immigration law and regulations. For example, as we stated in *Matter of Wang*, pursuant to 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 required, but the original priority date is retained if the subsequent petition is filed by the same petitioner. *Matter of Wang*, *supra*, at 34. We also discussed the recognized meaning of the term "automatic conversion" in other immigration statute sections. *Id.* at 34-35. We did not rely solely on any one particular provision in arriving at our conclusion, but rather assessed how the terms from section 203(h)(3) of the Act were most appropriately construed in light of their previous usage in the immigration context. Moreover, we emphasize that 8 C.F.R. § 204.2(a)(4) does not have a provision for the automatic conversion of the first visa petition; its terms specifically require that a new visa petition be filed. Therefore, as the Service Center Director points out in opposition to the petitioner's motion, section 203(h)(3) of the Act is not merely duplicative of the existing regulation, but rather provides a new benefit, i.e., the automatic conversion to the appropriate preference category without expending additional time and resources involved in filing another visa petition.

In a similar vein, the petitioner claims that it was legal error for the Board to conclude that the automatic conversion and priority date retention provision operated only when the petitioner was the same by relying on a few examples present in immigration law and assuming that Congress must have known about those examples. Petitioner's Motion at 9-11. Although he provides other examples that he believes support his position, the petitioner fails to explain how the cited provisions with respect to retention in employment-based petitions that do no use the term automatic conversion are sufficiently analogous to the family-based visa petitions addressed in *Matter of Wang* to persuade us to find legal error in that decision. The provisions in the family-based examples cited, which involve cases of terrorist activity or abuse on the part of the petitioner or the United States citizen or lawful permanent resident relative, require the beneficiary to file a visa petition in order to retain any earlier priority date; neither provision contains language that automatically converts a prior visa

[3] Similarly, we are not aware of, and the petitioner does not identify, a situation under section 203(a) of the Act, other than under subsection (2)(A), where a child derivative beneficiary may age out of such eligibility for a visa petition and automatically convert to another appropriate category.

petition to the current appropriate category.[4] *See Zhang, supra*, at *7 (finding unpersuasive the argument that other regulatory and statutory provisions support a different reading of section 203(h)(3) of the Act because none of the cited examples uses the terms "conversions" and "retention" in conjunction).

Finally, the petitioner asserts that the Board relied on irrelevant legislative history in interpreting the automatic conversion provision in section 203(h)(3) of the Act. Petitioner's Motion at 14-15. This assertion is not supported by a plain reading of the decision, which concedes that the legislative history reveals little discussion about the nature of the changes that are reflected in the current language of section 203(h)(3) of the Act. *Matter of Wang, supra*, at 37. Primarily, our discussion of the legislative history addresses the overall intent of Congress in passing the CSPA to ameliorate the penalty to visa beneficiaries who aged out of eligibility for a visa petition due to administrative delays in visa processing through a modest change in immigration law. *Id.* at 36-38. We declined to apply the CSPA provisions at issue in the expansive manner advocated by the petitioner absent a clear indication that Congress intended us to do so. *Id.* at 38. Although the petitioner states that the Board failed to cite any legislative history following the insertion of section 203(h) into the proposed statute in 2002, he does not identify any legislative history that explains the intended interpretation and effect of section 203(h)(3) of the Act or that directly conflicts with the construction we adopted in *Matter of Wang*, or any other pertinent legal authority overlooked in our decision that reflects a contrary intent of Congress or otherwise supports his proposed construction of the statute. *See Zhang, supra*, at *6.

In light of the above discussion, we cannot conclude that the petitioner has established factual or legal error to warrant reconsideration of the Board's decision in *Matter of Wang*. Accordingly, the following order will be entered.

ORDER: The motion is denied.

FOR THE BOARD

[4] Inasmuch as these provisions allow for the retention of an earlier priority date, we note that the terrorist activity or abuse addressed therein, like the administrative delays in visa processing that the CSPA intended to ameliorate, are circumstances that occur through no fault of the beneficiary.