No. 10-60093

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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TING-TING WU,

Petitioner,

v.

ERIC HOLDER, JR.,
ATTORNEY GENERAL
OF THE UNITED STATES,

Respondent.

ON REVIEW FROM A DECISION OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for Petitioner hereby certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Eric Holder, Jr., U.S. Attorney General,

2. Petitioner Ting-Ting Wu,

3. Counsel for Petitioner, National Immigrant Justice Center, Charles Roth, Hena Mansori

4. Amici Curiae American Immigration Council and American Immigration Lawyers Association, Mary Kenney.

s/ Mary Kenney

Mary Kenney
American Immigration Council

Dated: June 17, 2010

CORPORATE DISCLOSURE STATEMENT UNDER RULE 26.1

I, Mary Kenney, attorney for the *Amici Curiae,* American Immigration Council, certify that this organization is a non-profit organization which does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

s/ Mary Kenney

Mary Kenney
American Immigration Council

Dated: June 17, 2010

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I. INTRODUCTION AND STATEMENT OF AMICI

This case raises a pure question of statutory interpretation involving the Child Status Protection Act (CSPA), Pub. L. No. 107-20, 116 Stat. 927 (2002). At issue is what categories of aged-out children Congress intended to benefit in 8 U.S.C. § 1153(h)(3).

In general, the CSPA protects child beneficiaries of immigrant visa petitions from the detrimental impact of "aging out;" that is, turning 21 while a visa petition is pending and losing the status of "child." With respect to family-based preference visa petitions, employment-based visa petitions and diversity visa petitions, Congress established a formula for adjusting the age of a child beneficiary to offset delays in visa petition processing. 8 U.S.C. § 1153(h)(1). Under this formula, the age of many "child" beneficiaries who have turned 21 is adjusted to under 21 and in this way these beneficiaries retain the status of "child," notwithstanding their biological age. *Id.*

Congress also specifically recognized, however, that the age of some beneficiaries would not be adjusted to under age 21 under the CSPA formula, and that these beneficiaries would age out of child status. To compensate, Congress provided two alternate benefits for this group of aged-out beneficiaries: 1) the opportunity to have the original visa petition on

which the child was listed as a beneficiary "automatically convert" to the appropriate visa category for the now-adult beneficiary; and 2) the ability to retain the priority date from the original visa petition, which ensures that the beneficiary will not lose his or her place on the waiting list for an immigrant visa. 8 U.S.C. § 1153(h)(3). Under the plain language of the statute, these alternate benefits are available to all aged-out children of family, employment and diversity visas.[1]

In its precedent decision *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), the BIA narrowly interpreted § 1153(h)(3), holding that this provision is applicable to only a limited group of beneficiaries. The opening brief of petitioner comprehensively demonstrates how the BIA's interpretation ignores the plain language of the statute, violates Congress's intent, and misconstrues legislative history.

Amici curiae, the American Immigration Council (Immigration Council) and the American Immigration Lawyers Association (AILA), adopt petitioner's arguments in full. In this brief, amici expand upon the petitioner's statutory construction argument by demonstrating how the

[1] While the petitioner in the present case was a derivative beneficiary of an employment-based visa filed on behalf of her father, amici contend that § 1153(h)(3) applies equally to aged-out derivative beneficiaries of family-based and diversity visas. Thus, this Court's interpretation of the statute will impact many beyond those who fall within the class.

structure of § 1153(h)(3) compels the conclusion that all categories of derivative beneficiaries are covered by § 1153(h)(3). Amici also demonstrate that the two benefits provided in § 1153(h)(3) are independent of one another and that the Court can rule on the petitioner's right to retain the earlier priority date without having to reach the meaning of the automatic conversion provision.

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

AILA is a national association with more than 10,000 members nationwide, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

II. ARGUMENT

A. IN PLAIN AND UNAMBIGUOUS LANGUAGE, CONGRESS MADE CLEAR THAT § 1153(h)(3) APPLIES TO ALL AGED-OUT DERIVATIVE BENEFICIARIES OF FAMILY-BASED, EMPLOYMENT-BASED AND DIVERSITY VISAS.

In *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), the BIA considered the meaning of 8 U.S.C. § 1153(h)(3)[2] and erroneously concluded that the entire provision was ambiguous. In reaching this conclusion, the BIA failed

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[2] 8 U.S.C. § 1153(h) reads in full:

(h) Rules for Determining Whether Certain Aliens Are Children.—

(1) In general.-- For purposes of subsections (a)(2)(A) and (d), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) 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 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).

(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.

to consider the particular language chosen by Congress, the structure of § 1153(h) as a whole, or the provision's interrelated paragraphs.

The starting point of all statutory interpretation is the intent of Congress, and "'[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *White v. INS,* 75 F.3d 213, 215 (5th Cir. 1996) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-43 (1984)); *see also Waggoner v. Gonzales*, 488 F.3d 632, 636 (5th Cir. 2007) (finding agency interpretation not entitled to deference because the statutory language was clear). "In determining the plain meaning of a statute, the court must 'look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'" *Pongetti v. GMAC,* 101 F.3d 435, 439 (5th Cir. 1996) (quoting *Crandon v. United States,* 494 U.S. 152, 158 (1990)); *see also Sung v. Keisler,* 505 F.2d 372, 376 (5th Cir. 2007) (interpreting an immigration law provision by "[t]aking into account the statutory scheme as well as Congress's construction" of the provision).

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1. *Matter of Wang Impermissibly Denies the Benefits of § 1153(h)(3) to Members of the Class of Visa Petition Beneficiaries that Congress Specifically Covered Under this Provision.*

In *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), the BIA held that 8 U.S.C. § 1153(h)(3) was ambiguous with respect to which visa petitions qualify for automatic conversion and retention of priority date. In fact, however, when read in context with the remainder of section (h), paragraph (3) specifies not only the petitions but also – and equally importantly – the visa petition beneficiaries to which it pertains.

The universe of petitions to which paragraph (3) of § 1153(h) applies is coextensive with the petitions to which paragraph (1) of the same provision applies. With respect to derivative beneficiaries under 8 U.S.C. § 1153(d),[3] the BIA in *Matter of Wang* first correctly interprets paragraph (1) as applying to *all* derivative beneficiaries covered by § 1153(h),[4] but then incorrectly interprets (3) as applying to *only a portion of one of category* of

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[3] 8 U.S.C. § 1153(d) reads in full:

(d) Treatment of family members.—A spouse or child as defined in subparagraph (A), (B), (C), (D) or (E) of section 101(b)(1) shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c), be entitled to the same status and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

[4] There are eleven categories of derivative beneficiaries that fall under § 1153(h). *See* Petitioner's Opening Brief at 27 n.6 (specifically identifying twelve categories of beneficiaries covered by § 1153(h), eleven of which are categories of derivative beneficiaries).

derivative beneficiaries covered by § 1153(h) – children named as derivative beneficiaries on petitions filed by LPRs under § 1153(a)(2)(A) where the LPRs also could have petitioned directly for the children.[5] *See Matter of Wang,* 25 I&N Dec. at 33, 39.

The BIA did not engage in a thorough analysis of the statutory language prior to reaching this conclusion. As a result, its decision impermissibly imposes a limitation on paragraph (3)'s reference to § 1153(d) that simply does not exist. "This the [BIA] may not do; it has no power to either ignore clear congressional intent or amend the legislation." *Hernandez v. Reno,* 91 F.3d 776, 780 (5th Cir. 1996) (rejecting an immigration regulation that violated the plain meaning of the statute); *see also White,* 75 F.3d at 215 ("By adding eligibility requirements without textual authority, the agency is exceeding its delegated authority"). An agency cannot interpret a statute to cut-off eligibility based on requirements that Congress did not impose. *See Sung v. Keisler*, 505 F.3d 372, 376-77

[5] 8 U.S.C. § 1153(a)(2)(A) describes the family preference visa category for lawful permanent residents who petition for spouses or minor children. In some cases, an LPR will not have the required relationship with the children of his or her spouse to petition directly for these children, and thus the only choice is to include them as derivatives on the spouse's petition. In other cases, however, an LPR could petition for his or her children or stepchildren directly, but nevertheless include them as derivative beneficiaries on the spouse's petition. It is these latter cases that are the subset of this derivative beneficiary category that the BIA in *Matter of Wang* found eligible for the benefits of § 1153(h)(3).

(5th Cir. 2007) (striking down BIA interpretation because, contrary to the statute, it distinguished between adjustment applications pending before DHS and those pending before the immigration court); *accord Jama v. Immigration & Customs Enforcement,* 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply . . .")

"It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (quoting *Davis v. Mich. Dep't of Treasury,* 489 U.S. 803, 809 (1989)). Here, the three paragraphs of § 1153(h) are interrelated and must be read as such. First, paragraph (1) sets forth a formula to determine the age of a visa petition beneficiary "for purposes of subsections (a)(2)(A) and (d) [of § 1153]." 8 U.S.C. § 1153(h)(1). Application of this age-determining formula allows some beneficiaries to retain the status of a "child" – notwithstanding that the beneficiary may be over the biological age of 21 – for purposes of classification as the child of an LPR (§ 1153(a)(2)(A)) or as a derivative child of a family-based, employment based or diversity visa petition (§ 1153(d)). Paragraph (1) also

specifies that the formula for determining a beneficiary's age applies to petitions "described in paragraph (2)." 8 U.S.C. § 1153(h)(1).

In turn, paragraph (2) describes two sets of visa petitions to which the formula in paragraph (1) can be applied. 8 U.S.C. § 1153(h)(2). First, with respect to a child of an LPR, paragraph (2) describes a visa petition filed under 8 U.S.C. § 1154 for classification of the child under § 1153(a)(2)(A). *Id.* Second, and relevant here, with respect to a derivative child under § 1153(d), paragraph (2) describes a visa petition filed under § 1154 for classification of the parent (the principal beneficiary) under §§ 1153(a), (b), or (c) (family-based, employment-based or diversity visa petitions respectively). *Id.* Thus, Congress made clear that a child named as a derivative beneficiary of any family, employment or diversity visa petition was eligible to have his or her age determined under the formula of paragraph (1).

Finally, the purpose of paragraph (3) of § 1153(h) is to provide alternate benefits – automatic conversion of the visa petition and retention of the original priority date – to those beneficiaries who are determined under the formula found in paragraph (1) to be over 21 years of age. 8 U.S.C. § 1153(h)(3). Paragraph (3) applies to "an alien [who] is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections

(a)(2)(A) and (d)." 8 U.S.C. § 1153(h)(3). The BIA found that this paragraph was not clear as to the petitions to which it applied because, unlike paragraph (1), it does not reference the petitions described in paragraph (2). *Matter of Wang,* 25 I&N Dec. at 33. However, the BIA overlooked the interrelation of the three paragraphs and the fact that paragraph (3) references and is wholly dependant on paragraph (1) for its meaning.

Significantly, the only limit that Congress placed on the term "an alien" as used in paragraph (3) was that the individual have been found to be over 21 when the age-determining formula of paragraph (1) is applied.[6] Application of paragraph (3) thus is dependent on the application of the formula in paragraph (1). The formula found in paragraph (1) will be applied only to beneficiaries of petitions described in paragraph (2). Of necessity, then, paragraph (3) also will be applied only to the petitions identified in paragraph (2), since it is only those petitions that trigger the age-determination of paragraph (1). Moreover, Congress's use of the otherwise unlimited term "an alien" in paragraph (3) demonstrates its intent that all aliens found to have aged out under paragraph (1) be covered by

[6] "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) …" 8 U.S.C. § 1153(h)(3) (emphasis added).

paragraph (3). Thus, taking into account the entire interrelated structure of § 1153(h), *all* derivatives of family, employment and diversity visas – as specified in paragraph (2) – are covered under paragraph (3).

This result is reinforced by the fact that both paragraphs (1) and (3) use the identical phrase "for purposes of subsections (a)(2)(A) and (d)." Section 1153(d) provides that a child who is not a principal beneficiary of a visa petition can be named as a derivative beneficiary on a family-based, employment-based, or diversity visa filed on behalf of the parent. When this occurs, the derivative child beneficiary is entitled to the same status and same priority date as the parent. 8 U.S.C. § 1153(d).

Congress clearly intended – and the BIA so found – that its unrestricted reference to § 1153(d) in paragraph (1) encompass all derivatives of family, employment and diversity visas, consistent with its description of the covered petitions in paragraph (2). As such, the unrestricted reference to § 1153(d) in paragraph (3) also must be read as covering derivatives of all three visa categories. Congress's use of the identical phrase in two paragraphs within the same section is a strong indication that it intended that they be given the same meaning. *See Vielma v. Eureka Co.,* 218 F.3d 458, 465 (5th Cir. 2000) ("In the absence of some indication to the contrary, we interpret words or phrases that appear

repeatedly in a statute to have the same meaning"); *In re Missionary Baptist Foundation, Inc.,* 667 F.2d 1244, 1246 (5th Cir. 1982) ("[T]here is a presumption that where the same words are used in different parts of an act, and where the meaning in one instance is clear, other uses of the word in the act have the same meaning as that where the definition is clear"). Here, through its unrestricted reference to § 1153(d), Congress meant all derivatives under this section and not a small subset of these derivatives as the BIA and the government contend.

2. *Had Congress Intended to Limit the Class of Beneficiaries Eligible for the Benefits of § 1153(h)(3), It Would Have Done So Explicitly.*

Had Congress intended to limit the scope of paragraph (3) to derivative beneficiaries of § 1153(a)(2)(A) only, as the BIA held, it would have specified this restriction, as it repeatedly has done in similar situations. *See Russello v. United States,* 464 U.S. 16, 23, (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal quotations omitted); *Arif v. Mukasey,* 509 F.3d 677, 682 (5th Cir. 2007) (finding the absence of derivative beneficiary language in the withholding of removal statute significant in light of the presence of this language in the asylum statute).

For example, in *Akhtar v. INS,* the Ninth Circuit noted, with respect to the V visa category,[7] that Congress made clear that "only those individuals within [family-based] preference category 2A are eligible to receive a V Visa." 384 F.3d 1193, 1198 (9th Cir. 2004) (citing 8 U.S.C. § 1101(a)(15)(V)). The V visa is granted to "an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section [1153](d)) of a petition to accord status under section 203(a)(2)(A)." 8 U.S.C. § 1101(a)(15)(V). Notably, Congress was able to limit without ambiguity its reference to § 1153(d) derivatives to only those named in a family-based 2A visa petition. Had this been the result that Congress sought with respect to § 1153(h)(3), it easily could have done the same. Instead, the specificity of the V visa provision is in marked contrast to the general and unrestricted reference to derivative beneficiaries in § 1153(h)(3).

Additionally, there are numerous other provisions in which Congress successfully limited a reference to a subset of a broader immigrant classification. *See* 8 U.S.C. §§ 1151(b)(1)(A) (section limited to certain categories of special immigrants); § 1153(d) (section limited to certain

[7] The V visa is a nonimmigrant visa for spouses and children of LPRs who, because of immigrant quota backlogs, are forced to wait more than three years for a visa to become available.

specified definitions of term "child"); § 1154(a)(1)(A)(ii) (section limited to individuals "described in the second sentence of § [1151](b)(2)(A)(i)").

"It is well established that, when one interpretation of a statute or regulation obviously could have been conveyed more clearly with different phrasing, the fact that the authors eschewed that phrasing suggests, *ceteris paribus*, that they in fact intended a different interpretation." *U.S. v. Ibarra-Galindo*, 206 F.3d 1337, 1339 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 837 (2001). The clear limits that Congress set forth for V visas and in similar immigration provisions indicates that Congress intended no similar restriction on derivative beneficiaries in § 1153(h)(3).

3. *Contrary to the Board's Conclusion, An Interpretation of § 1153(h)(3) As Applying To All Derivative Beneficiaries Is Consistent With Past Practice.*

The BIA bolsters its holding that §1153(h)(3) does not apply to all derivative beneficiaries by attempting to demonstrate that any other conclusion would upset longstanding precedent on the use of automatic conversion and retention of priority dates. In her opening brief, petitioner thoroughly reputed this claim, pointing to multiple examples in the statute and regulations which provide for these benefits in situations comparable to that found in §1153(h)(3). *See* Opening Brief of Petitioner at 34-38.[8]

[8] Amici adopt and incorporate petitioner's arguments in full without restating them here.

As petitioner's brief demonstrates, there is precedent for automatic conversions across visa categories (including situations in which a new visa petition is required). *Id.* There also is precedent for a beneficiary retaining a priority date from an earlier petition for use in a subsequent petition by a different petitioner. *Id.* Thus, contrary to the BIA's conclusion, application of §1153(h)(3) to all derivative beneficiaries – as Congress clearly intended – does not contravene longstanding practice with respect to either automatic conversion or retention of priority dates. Instead, this interpretation gives meaning to all parts of §1153(h), reading them as consistent and interrelated parts of a whole.

B. AUTOMATIC CONVERSION AND RETENTION OF PRIORITY DATES ARE DISTINCT AND INDEPENDENT BENEFITS UNDER § 1153(h)(3); A BENEFICIARY CAN BE ELIGIBLE FOR ONE WITHOUT HAVING TO BE ELIGIBLE FOR THE OTHER.

Section 1153(h)(3) affords two distinct potential benefits for eligible, aged-out beneficiaries: 1) the automatic conversion of a petition to an appropriate category; and 2) the beneficiary's retention of the earlier priority date. The BIA mistakenly read § 1153(h)(3) as if these benefits were wholly dependant upon one another; that is, as if an aged-out beneficiary must be able to benefit from *both* or otherwise would be unable to benefit from either.

However, to resolve *Matter of Wang*, the BIA was not required to address whether automatic conversion was applicable to Wang's case. Wang's father, after securing his own lawful permanent resident status, filed a visa petition to classify Wang as his adult daughter under 8 U.S.C. § 1153(a)(2)(B) (2B family preference category). *Matter of Wang,* 25 I&N Dec. at 29. Because Wang and her father had this independent avenue for a visa for Wang after she had aged out, they did not need to request an automatic conversion of the earlier family fourth preference visa petition – under which Wang was a derivative beneficiary – to the family 2B visa category.[9] Instead, what they requested under § 1153(h)(3) was retention of the priority date from the earlier fourth preference visa petition – on which Wang was named as a derivative – for use with the newly filed 2B visa petition. *See Matter of Wang,* 25 I&N Dec. at 29 (noting the petitioner's written request that Wang be assigned the earlier priority date).

Despite this, the BIA framed the issue as one of automatic conversion, defining it as "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" under § 1153(h)(3). *Matter of*

[9] The same is true in the present case. Upon becoming an LPR based upon the employment visa petition filed on his behalf, Wu's father filed a petition for her under § 1153(a)(2)(B) (petition for the adult child of an LPR).

Wang, 25 I&N Dec. at 30. The Board further stated that to resolve the automatic conversion question, it had to determine if 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." *Id.*

In this way, the BIA inextricably coupled its determination of whether Wang qualified for retention of the priority date, as she and her father requested, with the question of whether she qualified for automatic conversion of the original visa petition. The BIA's subsequent analysis of the entire provision was marred by this mistaken coupling of the two statutory benefits.

The relevant portion of § 1153(h)(3) states 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." (Emphasis added). Congress intended for the word "and" as used here to operate simply as a means to connect two independent phrases – the automatic conversion phrase and the retention of priority date phrase. Consistent with this reading, one of several definitions for the word "and" is that it is "[]used to connect alternatives[]: *He felt that he was being forced to choose between his career and his family*." *Dictionary.com Unabridged*,

Random House, Inc., (accessed Apr. 26, 2010). http://dictionary.reference.com/browse/and.

This certainly is not an uncommon construction of the word "and." For example, "[a]s often noted, the [Fourth] Amendment consists of two independent clauses joined by the conjunction 'and.'" *Ybarra v. Illinois*, 444 U.S. 85, 100 (1979) (Burger, J., dissenting) (referencing the "search and seizure" clause and the "warrant" clause). Another example within the Fourth Amendment is the phrase "unreasonable searches and seizures." While both types of government action are prohibited, both need not occur in the same incident to trigger the amendment's protection.

Similarly, Congress often uses the word "and" to connect two independent terms. In fact, the word "and" in the phrase "for the purposes of subsections (a)(2)(A) and (d)" in § 1153(h)(3) serves just this purpose. Because a person cannot be a beneficiary under both of these subsections at the same time, Congress instead used the term to reference beneficiaries of either category. As the Supreme Court has explained, "to ascertain the clear intention of the legislature . . . courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or.'" *United States v. Fisk,* 70 U.S. 445, 447 (1865); *see also Slodov v. U.S.,* 436 U.S. 338, 245, 247 (1978) (construing the word "and" in a statute as disjunctive where it was the only

reading consistent with the purpose of the statute); *Bruce v. First Federal Savings and Loan Assoc*., 837 F2d 712, 715 n.2 (5th Cir. 1988) (finding that a strict grammatical construction of the word "and" would frustrate Congress's intent); *USA v. Pereira-Salmeron,* 337 F.3d 1148, 1151 (9th Cir. 2003) ("Despite the … use of the conjunctive 'and,'" the court read the two subparts of the statute as presenting alternate definitions); *National Railroad Passenger Corp. v. USA,* 431 F.3d 374, 376 (D.C. Cir. 2005) ("To be sure, Congress does sometimes use the word 'and' disjunctively"); *Thomas v. Money Mart Financial Services,* 428 F.3d 735, 737 n.3 (8th Cir. 2005) (finding no merit to a construction of the statute at issue that would read the word "and" conjunctively).

Here, Congress granted an "aged-out" beneficiary two distinct types of benefits, one of which attaches to the visa petition (automatic conversion) and one of which attaches to the beneficiary (retention of priority date). 8 U.S.C. § 1153(h)(3). At the time the CSPA was enacted, there were numerous precedents allowing a visa petition beneficiary to retain an earlier priority date independent of whether there is an automatic conversion of the earlier petition to another category following a change in circumstances.

For example, in precisely one of the situations covered by § 1153(h)(3), a regulation existing at the time the CSPA was enacted (and still existing

today) provided for retention of a priority date for a child who is named as a derivative beneficiary on a 2A visa petition and who ages out before a visa becomes available. 8 C.F.R. § 204.2(a)(4).[10] This regulation would apply to an LPR who filed a visa petition for his or her spouse and included the couple's child as a derivative beneficiary. If the child ages out before a visa becomes available, the regulation permits the child to retain the priority date of the 2A visa petition for use with any family 2B visa petition subsequently filed by the same petitioning parent.[11] The retention of the priority date is allowed even though the regulation did not provide for automatic conversion

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[10] The relevant portion of this regulation reads:

"A child accompanying or following to join a principal alien under [8 U.S.C. § 1153](a)(2) [ ] may be included in the principal alien's second preference visa petition. The child will be accorded second preference classification and the same priority date as the principal alien. However, if the child reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required. In such a case, the original priority date will be retained if the subsequent petition is filed by the same petitioner." 8 C.F.R. § 204.2(a)(4).

[11] This regulation specifically requires that the 2B petition for the aged-out child be filed by the same parent who filed the original 2A petition. 8 C.R.F. § 204.2(a)(4); *see also Bolvito v. Mukasey*, 527 F.3d 428, 436 (5th Cir. 2008) (discussing regulation in a case not involving the CSPA). In *Matter of Wang,* the BIA found that this requirement supported limiting the reach of § 1153(h)(3) to family 2A petitions, reasoning that in no other visa category will the same petitioner file the subsequent visa petition for the aged out derivative child. Contrary to the BIA's conclusion, however, the regulation's requirement says nothing about the meaning of §1153(h)(3), where this requirement is notably absent. In fact, by broadening the class of beneficiaries covered by § 1153(h)(3) to derivatives of all family, employment and diversity visa categories, Congress signaled its intent that the same petitioner was not required.

of the visa petition, but to the contrary, required the filing of a new visa petition.

The employment-based visa context provides additional examples of a beneficiary being able to retain an earlier priority date without automatic conversion of the earlier visa petition. Beneficiaries of visa petitions in three major employment-related categories retain the priority date of an approved petition for "any subsequently filed petition for any classification" of a new job within the same three employment categories. 8 C.F.R. § 204.5(e). Similarly, an immigrant physician working in a medically underserved area who changes jobs may retain the priority date of the former employer's petition for use with the new employer's petition. In both of these situations, there is no automatic conversion of the visa petition filed by the first employer, but instead a new petition by a new petitioning employer is required. 8 C.F.R. § 204.12(f)(1).

Certain special legislation, adopted to address a discrete problem (as was the CSPA) also allows the retention of an earlier priority date without an automatic conversion of the earlier visa petition. For example, in § 421(c) of the U.S. Patriot Act, Pub. L. 107-56, 115 Stat. 272 (2001), Congress provided that certain victims of the September 11, 2001 attack could file "self-petitions" for special immigrant status. The statute also

provided for the retention of earlier priority dates from unrelated family-based, employment-based and diversity visa petitions for use with these subsequently-filed new self-petitions. *Id.*

Similarly, another example is found in the regulation implementing legislation for immigrant victims of domestic violence. Under 8 C.F.R. § 204.2(h)(2), the child of an abusive parent can transfer the priority date of the petition filed on his or her behalf by the parent to an independent self-petition that is separately filed by the child. While retention of priority dates is allowed in both situations, none involve the automatic conversion of the initial visa petition.

Finally, the CSPA itself contains another example of Congress authorizing a beneficiary to retain an earlier priority date independent of whether an automatic conversion of the petition takes place. Section 6 of the CSPA specifically allows an adult son or daughter of an LPR, named as a beneficiary on a family 2B preference petition, to retain the earlier priority date upon the parent's naturalization regardless of whether the beneficiary opts out of an automatic conversion of the petition to family first preference. 8 U.S.C. § 1154(k).

These examples illustrate the precedent for reading § 1153(h)(3) as providing an aged-out beneficiary the opportunity to retain an earlier priority

date regardless of whether the earlier petition is automatically converted to a new visa category. Thus, these examples both support and are consistent with an interpretation of § 1153(h)(3) which allows a beneficiary to retain a priority date irrespective of whether the original petition automatically converts to a petition in a different category.

1. *There Is No Ambiguity In the Phrase "the Alien Shall Retain the Original Priority Date."*

There is nothing ambiguous in the phrase "the alien shall retain the earlier priority date issued upon receipt of the original petition." 8 U.S.C. § 1153(h)(3). In the context of this provision, the "original petition" clearly applies to the petition under which the beneficiary was found to have aged-out under paragraph (1). As demonstrated in section A, above, covered petitions will include those filed under family preference 2A as well as other family preference, employment-based and diversity visas, consistent with both the reference to § 1153(d) and the entire structure of the provision.

In narrowly interpreting § 1153(h)(3), the BIA also takes issue with the fact that a broader reading would result in a beneficiary retaining "favorable priority date status, even with regard to a new visa petition that … may be filed without any time limitation in the future." *Matter of Wang,* 25 I&N Dec. at 36. In suggesting that such a gap in coverage is impermissible, the BIA fails to recognize the instances in which this already

occurs. For example, under 8 C.F.R. § 204.5(e), a beneficiary of a visa petition filed within the first, second or third employment-based visa categories is eligible to retain the priority date from this initial visa petition for use in a subsequently filed visa petition within any of the same three visa categories. There is no restriction on when the second visa petition must be filed in order for the beneficiary to retain the earlier priority date. There can be – and often is – a gap in eligibility, during which the beneficiary is no longer eligible to immigrate based upon the first job and either has not yet secured the second job or the second employer has not yet filed the visa petition.[12]

A gap in eligibility also can occur under 8 C.F.R. § 204.2(a)(4). This section concerns, *inter alia*, derivative beneficiaries of family based 2A visa petitions. Where the derivative child ages-out before the issuance of a visa to the parent (the principal beneficiary), the regulation requires that the petitioner file a new 2B visa petition for the aged out derivative beneficiary. Between the time that the beneficiary ages out and the filing of the new 2B visa petition, the aged-out beneficiary has no basis to immigrate. However,

[12] For example, a beneficiary of an employment-based visa may lose his eligibility if the employer goes bankrupt and dissolves, and thus cannot employ him. The beneficiary would retain the priority date from this initial petition and could use it with respect to a second petition filed by a new employer, even if there was a gap in eligibility between these two petitions.

the regulation contains no time limit for filing the new petition and thus months or longer could pass before the second petition is filed.[13]

Because there is no ambiguity in Congress's directive that a beneficiary – including all derivative beneficiaries of family, employment and diversity visas – "shall retain the original priority date issued upon receipt of the original petition," this Court must give effect to it. The Court should find that petitioner is entitled to retain the priority date from the initial petition.

III. CONCLUSION

For all the reasons stated above, amici urge the Court to overturn the decision of the BIA and to read § 1153(h)(3) in accord with its plain language and Congress's intent.

Respectfully submitted,

s/ Mary Kenney

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[13] Of course, in cases involving an age-determination under § 1153(h)(3), there is no "age-out" until the determination in paragraph (1) is complete. Because this determination includes a one-year period within which the beneficiary is required to seek to acquire LPR status, the determination cannot be completed until the conclusion of the one year period. Thus, in all such cases, beneficiaries found to have aged-out will be over 21 when the age determination is made. Despite this, the "gap" in eligibility would not begin until the § 1153(h)(1) determination is made.

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CERTIFICATE THAT REQUIRED PRIVACY REDACTIONS HAVE BEEN MADE

I hereby certify that pursuant to 5th Cir. R. 25.2.13 the required privacy redactions have been made to this brief.

s/ Mary Kenney

Mary Kenney
American Immigration Council
Dated: June 17, 2010

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A virus check using McAfee Virus Scan Enterprise ver 8.5i has been run on the file containing the electronic version of this brief, and no viruses have been detected.

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No. 10-60093
Ting-Ting Wu v. Eric Holder, Jr.

I, Mary A. Kenney hereby certify that the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on June 17, 2010.

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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