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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROSALINA CUELLAR DE OSORIO, ET AL Plaintiffs, v. JONATHAN SCHARFEN, ET AL Defendants.	Case No. SACV 08-840-JVS(SHx) **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Date: September 28, 2009 Time: 3:00 p.m. Courtroom: 10C Hon. James V. Selna

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

Plaintiffs hereby submit their Memorandum of Points and Authorities in Reply to Defendants' Opposition to Plaintiffs' Motion to for Summary Judgment.

As a preliminary matter, Plaintiffs respectfully request that the Court consider the instant reply notwithstanding the fact that it is filed beyond the stipulated briefing schedule. See Docket No. 36, Order Approving Briefing Schedule (July 9, 2009). As stipulated by the parties and approved by the Court, oppositions were to be filed no later than September 8, 2009. Reply papers were due by September 14, 2009. However, Defendants' opposition was filed on September 14, 2009. Thus the instant reply is filed beyond the September 14 deadline set by the parties.

I. THE INTERPRETATION SET FORTH IN *MATTER OF WANG* IS CONTRARY TO LAW SHOULD BE GIVEN NO DEFERENCE

A. The BIA's decision conflicts with the plain language of the statute

This case involves the proper interpretation of a single sentence codified at INA § 203(h)(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 [203](a)(2)(A) and [203](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."

In *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), the BIA held that this provision does not apply to an individual who ages out of a fourth-preference visa

petition notwithstanding the fact that such a derivative is included in INA § 203(d). The BIA's holding means that INA § 203(h)(3) will only apply to an individual who ages out as the derivative of a second-preference spousal petition filed under INA § 203(a)(2)(A).

Defendants contend that the BIA's interpretation gives meaning to the statutory language of § 203(h)(3) because derivative beneficiaries of family-based second preference petitions (F2A) are also included in subsection 203(d). Def.'s Memo. of Points and Auth. page 18 (Docket No. 45, filed Sept. 14, 2009). However, this reading renders the inclusion of § 203(d) superfluous. Such applicants are already covered by § 203(a)(2)(A), and thus the reference to § 203(d) would be unnecessary.

Moreover, such beneficiaries were already protected by the regulatory scheme in place when Congress enacted the CSPA. 8 C.F.R. § 204.2(a)(4) provides that when the derivative beneficiary of a second preference spousal petition (F2A) ages out, he may retain the original priority date associated with the F2A petition upon the filing of a F2B petition by his permanent resident parent. Thus, aged-out derivatives in the F2A category were already guaranteed they would keep their place in line, and Congressional action would be unnecessary to benefit such derivatives.

Finally, it is undisputed that when Congress used the terms "**for purposes of subsections (a)(2)(A) and (d)**" in INA § 203(h)(**1**), this provision applies equally

to derivatives in all family, employment and diversity categories. The derivative son of an employment-based applicant, the derivative daughter of a third family preference beneficiary, or the derivative son of a diversity lottery winner may each utilize the formula at § 203(h)(1) to determine whether he or she is still considered a "child" for immigration purposes. In *Wang*, the BIA essentially ignores the inclusion of the same phrase "**for purposes of subsections (a)(2)(A) and (d)**" when it is repeated in INA § 203(h)(**3**). The practical effect of the BIA's interpretation is that this phrase has suddenly changed to include only the aged-out derivatives of second preference family petitions. Such an interpretation impermissibly conflicts with the statute.

B. The BIA's discussion of "automatic conversion" and "priority date retention" is incomplete.

In *Matter of Wang,* the BIA concludes that:

> 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."

Matter of Wang, 25 I&N Dec. 28, 35 (BIA 2009).

The BIA's discussion of how the "automatic conversion and priority date retention processes have operated historically" is simply incomplete. *Matter of Wang*, at 34. In prior filings, Plaintiffs cited to numerous instances where priority

date retention is allowed notwithstanding changes in the petitioner and/or the preference category. *See*, 8 C.F.R. § 204.2(h)(2) (the beneficiary of a petition filed by an abusive spouse may retain his or her priority date in connection with a new self petition); Section 421(c) of the U.S. Patriot Act, P.L. 107 – 56, 115 Stat. 272 (2001) (allows beneficiaries to file self-petitions and retain their priority dates if their petitions were revoked or terminated as a result of a specified terrorist activity); 8 C.F.R. § 204.5(e) (beneficiaries in the first, second or third employment-based categories may retain the priority date of an approved petition for any subsequently filed petition for classification under INA § 203(b)(1), (2), or (3)); 8 C.F.R. § 204.12(f)(1) (physicians with approved national interest waivers under INA § 203(b)(2) may change employers and retain the priority date associated with their initial visa petition); Immigration and Nationality Act Amendments of 1976. Pub. L. No. 94 – 571, 90 Stat. 2703, 2707 § 9(b) (allowed Western Hemisphere immigrants, and their spouses and children, to retain priority dates established prior to January 1, 1977 in connection with *any* family based or employment based preference petition subsequently approved on his or her behalf).

Defendants argue that examples involving employment-based immigrants should be disregarded because "the procedures governing employment petitions and family petitions are totally different." Def.'s Memo. of Points and Auth. page 20 (Docket No. 45, filed Sept. 14, 2009). While the application forms, filing fees, and types of evidence submitted to the USCIS may vary, both the family-based and

employment-based schemes are comprised of preference categories with statutory limits. Moreover, both provide for the establishment of a "priority date" upon the filing of a petition on behalf of the immigrant. Thus the fundamental concepts of preference categories and priority dates are the same whether one is dealing with family-based or employment-based visa petitions. The examples of priority date retention in the employment-based context are relevant and demonstrate that the concept is not as limited as the BIA contends in *Wang*.

Defendants further assert that because Plaintiffs' examples do not use the exact terms "retention" and "automatic conversion" they are irrelevant to the issue at hand. Def.'s Memo. of Points and Auth. pages 19-22 (Docket No. 45, filed Sept. 14, 2009). However, these examples plainly involve the retention of priority dates even if the exact word "retention" is not used. A similar instance can be found in one of the CSPA's provisions codified at INA § 204(k). This section allows the beneficiary of a 2B petition to "opt-out" of conversion to the first preference category upon naturalization of the petitioning parent. Subsection (3) states that, regardless of whether a petition converts under this subsection, the beneficiary may "**maintain** [the] priority date" assigned to the initial 2B petition. INA § 204(k)(3) (emphasis added). There can be no doubt that the word "maintain" used in this section has the same meaning and practical effect as the word "retain" used in other contexts. Likewise, the provisions cited by the Plaintiffs also have the same meaning and impact even if the word "retain" is not used.

Indeed, some of the examples relied on by the BIA in *Wang* similarly do not use the exact terms "retention" and "automatic conversion." For instance, the BIA cites to INA § 201(f) as an example of retention and conversion. Paragraph (1) of § 201(f) does not use either term. Paragraphs (2) and (3) use the term "converted" only. However, in *Wang* the BIA concludes that INA § 201(f) "treat[s] the terms 'automatic conversion' and 'retention' consistently with the existing regulatory schema. *Wang* at 34-35.

An additional example cited by the BIA is the regulations at 8 C.F.R. § 204.2(i) which set forth instances of "automatic conversion of preference classification." Although these instances also involve the retention of a previously established priority date, the word "retention" is not used in this regulation. Nonetheless, these are instances of priority date retention as recognized by the BIA itself. *See Matter of Wang*, at 34 ("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**") (emphasis added).

The BIA apparently fails to see that this very regulatory section also allows for automatic conversion with a change in the petitioner. The provisions of 8 C.F.R. § 204.2(i)(1)(iv) read, in part, "A currently valid visa petition previously approved to classify the beneficiary as an immediate relative as the spouse of a United States citizen must be regarded, upon the death of the petitioner, as having

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been approved as a Form I-360, Petition for …Widow(er)...” Thus the regulation allows for the “automatic conversion” of a petition filed by a U.S. citizen spouse, to a “self-petition” in which the beneficiary becomes the petitioner.

It is clear that the BIA’s decision overlooks relevant instances of conversion and priority date retention in arriving at its restrictive interpretation of the CSPA. As this interpretation conflicts with the plain language of § 203(h)(3), it should be given no deference.

III. CONCLUSION

For the foregoing reasons, Plaintiffs request that summary judgment in Plaintiff’s favor be granted.

Dated: September 8, 2009

Respectfully submitted,
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s/ Amy Prokop

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2009, a copy of the foregoing "Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment" in the matter of De Osorio et al. v. Scharfen et al. was filed electronically using the Court's electronic filing system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Dated: September 21, 2009

Respectfully submitted,

s/ Amy Prokop

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