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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

| | |
|---|---|
| **DE OSORIO V. SCHARFEN;** | **No. SACV 08-0840 JVS (SHx)** |
| DOWLATSHAHI v. MUKASEY; | No. SACV 08-05301 JVS(SHx) |
| TOROSSIAN V. DOUGLAS; | No. SACV 08-06919 JVS (SHx) |
| ZHANG v. CHERTOFF. | No. SACV 09-00093 JVS (SHx) |
| | MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT |
| | Date: September 28, 2009<br>Time: 3:00 p.m.<br>Courtroom: 10C<br>Honorable James V. Selna |

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**FACTUAL BACKGROUND**

Defendants assume the Court's familiarity with the facts of these cases as articulated in prior filings. Plaintiffs are parents, and in some cases their adult children who seek to transfer the priority date from family third ("F3") and fourth ("F4") preference visa petitions to family second-preference ("F2B") visa petitions. The F3 and F4 petitions were filed by United States citizen relatives on behalf of the parent-Plaintiffs. The F2B petitions were filed by the parent-Plaintiffs themselves on behalf of their adult sons and daughters after the parents became lawful permanent residents (LPR)of the United States. The adult sons and daughters had been named as derivative beneficiaries of the F3 and F4 petitions but lost eligibility to immigrate as derivative beneficiaries of their parents when they turned twenty-one under the age calculations of the Child Status Protection Act before a visa number became available to their parents.[1]

**LEGAL BACKGROUND**

As early as 1965, the Immigration and Naturalization Services ("INS"), the precursor to the U.S. Citizenship and Immigration Services ("USCIS"), promulgated regulations utilizing the term "conversion" in relation to family-sponsored immigrant

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[1] Per the Court's invitation (Doc. 43, fn. 2), Defendants have elected to file consolidated briefs in the four captioned cases. Because Plaintiff Dowlatshahi did not file his motion for summary judgment until 11 days after the filing deadline and even then only an incomplete copy of the brief was delivered via PACER, Defendants request the right to submit a supplemental memorandum in opposition once Defendants receive and review Plaintiff Dowlatshahi's complete memorandum of points and authorities. Defendants' cite to Plaintiffs' documents as filed under Torossian v. Douglas (08-06919).

petitions. See 8 C.F.R. § 205.8 (1965). From 1965 until present, agency regulations only used the terms "conversion" and "automatic conversion" in relation to family-sponsored visa petitions and only in reference to a "currently valid [visa] petition" that converts from one visa category to another visa category upon the happening of an event that disqualifies the beneficiary under his original category but renders him simultaneously eligible for a new immigrant category. See, generally, 8 C.F.R. § 205.8 (1965), 8 C.F.R. § 204.5 (1966), and 8 C.F.R. § 204.5 (1976).

The earliest "conversion" provision, 8 C.F.R. § 205.8 (1965), applied only to preference petitions where the petitioner naturalizes. 8 C.F.R. § 205.8 (1965) reads:

> **Conversion of classification of third preference beneficiaries upon naturalization of petitioner.**
>
> A currently valid petition according section 203(a)(3) preference status shall be regarded as approved for a nonquota status under section 101(a)(27)(A) or for preference quota status under section 203(a)(2), as appropriate, as of the date the beneficiary acquired such status through the petitioner's naturalization. (emphasis added).

Over time, the "conversion" provisions included conversions on account of marriage, divorce, and aging of beneficiaries as well as naturalization of petitioners. For example, 8 C.F.R. § 204.5 (1976) provided:

> **Automatic conversion of classification of beneficiary.**
>
> (a) *By change in beneficiary's marital status.* (1) A currently valid petition previously approved to classify the beneficiary as the unmarried son or daughter of a U.S. citizen under section 203(a)(1) of the Act shall be regarded as approved for preference status under section 203(a)(4) of the Act as of the date the beneficiary marries. A currently valid petition previously approved to classify the child of a U.S. citizen as an immediate relative under section 201(b) of the Act shall also be regarded as approved

> for preference status under section 203(a)94) of the Act as of the date the beneficiary marries. . . .
>
> (2) A currently valid petition classifying the married son or married daughter of a U.S. citizen for preference status under section 203(a)(4) of the Act shall, upon the presentation of satisfactory evidence of the legal termination of the beneficiary's marriage, be regarded as approved for status under section 203(a)(1) of the Act or, if the beneficiary is under 21 years of age, for status as an immediate relative under section 201(b) of the Act, as of the date of termination of the marriage.
>
> (b) *By beneficiary's attainment of the age of 21 years*. A currently valid petition classifying the child of a U.S. citizen as an immediate relative under section 201(b) of the Act shall be regarded as approved for a preference status under section 203(a)(1) of the Act as of the beneficiary's attainment of his 21st birthday if he is still unmarried . . . .
>
> (c) *By petitioner's naturalization*. Effective upon the date of naturalization of a petitioner who had been lawfully admitted for permanent residence, a currently valid petition according preference status under section 203(a)(2) of the Act to the petitioner's spouse, unmarried son, or unmarried daughter, shall be regarded as approved to accord status as an immediate relative under section 201(b) of the Act to the spouse, and unmarried son or unmarried daughter who is under 21 years of age, and to accord preference status under section 203(a)(1) of the Act to the unmarried son or unmarried daughter who is 21 years of age or older.

(emphasis added).

Throughout this evolution, each and every time agency regulations limited "conversion" to a "currently valid petition" shifting from one valid category to another valid category, effective on the date of the event that precipitated the disqualification under the original category. See 8 C.F.R. § 205.8 (1965) (authorizing "conversion" of a "currently valid petition" "upon naturalization of petitioner"); 8 C.F.R. § 204.2(i) (2009) (authorizing "automatic conversion" of "currently valid petition" "as of the date" that beneficiary marries, divorces, or attains age of 21 or petitioner

naturalizes). Cf. 8 C.F.R. § 204.5(a)(2) (1976) (explicitly stating that conversion does not take place until evidence of termination of the marriage has been presented but is still effective as of the date of the termination of the marriage). See also Bender's Immigration Bulletin, 11-20 Bender's Immigra. Bull. 2 (Oct. 15, 2006) ("When the change of relationship or status of the immediate succeeding relationship is not one that will support a petition, no new preference is established and the priority date is lost, even if the later status change would support a petition.").

In 1993, a regulation was added pertaining to children included as derivative beneficiaries on second-preference spousal petitions filed by a lawful permanent resident parent on behalf of an alien parent. See 57 Fed. Reg. 41059 (Sep. 9, 1992) (codified at 8 C.F.R. § 204.2(a)(4)). The regulation reads:

> Derivative beneficiaries. . . . A child accompanying or following to join a principal alien under section 203(a)(2) of the Act 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. Such retention of priority date will be accorded only to a son or daughter previously eligible as a derivative beneficiary under a second preference spousal petition. (Emphasis added.)

Unlike the earlier family-preference provisions, this one did not provide for "conversion" of the petition, instead requiring the same petitioner to file a separate petition directly naming the former derivative beneficiary as primary beneficiary. It should be noted that this is the only case where an alien who was immediately eligible for a follow-on category

was not also the primary beneficiary of his own petition. Thus, on the day that this alien aged-out, his alien parent (the spouse of the lawful permanent resident) still retained primary interest in the petition and was still waiting for a visa number to become available to her under that visa petition.

Up until this point, Congress had not enacted any immigration statutes using the term "conversion." Congress' first use of the term "conversion" came in the Violence Against Women Act of 2000, Pub. L. 106-386, 114 Stat. 1533. In a declaration codified as a note in 8 U.S.C. § 1101, Congress stated that it was "creat[ing] a new nonimmigrant visa classification" and authorizing the Attorney General, in his discretion, "to convert the status of such nonimmigrants to that of permanent residents." 8 U.S.C. § 1101, note entitled "Protection for Certain Crime Victims Including Victims of Crimes Against Women," (2)(B) and (C). The "conversion" authorized by Congress was from a valid nonimmigrant status directly to immigrant status.

The next usage of the term "conversion" by Congress was in the Child Status Protection Act ("CSPA"), Pub. L. 107-208, 116 Stat. 927 (Aug. 6, 2002). In § 2 of the CSPA, Congress specified that "if the petition is later converted [under 8 C.F.R. § 204.2(i)(3)], due to the naturalization of the parent" the alien's age, for purposes of determining if she is an immediate relative, "shall be made using the age of the alien on the date of the parent's naturalization." Id. (codified at 8 U.S.C. § 1151(f)(2)).

Congress further expanded the existing agency regulations in § 2 of the CSPA by providing that, for a petition "converted

[under 8 C.F.R. 204.2(i)(1)(iii)], due to the legal termination of the alien's marriage," the age of the alien on the date of the termination shall be considered to determine if the alien is an immediate relative. CSPA § 2 (8 U.S.C. § 1151(f)(3)).[2] The term "conversion" as used in § 2 of the CSPA refers to one petition, one petitioner, and the instantaneous movement from one currently valid visa category to another.

In § 6 of the CSPA, Congress allowed aliens to opt out of the general rule that a "petition shall be converted" automatically upon the naturalization of the parent petitioner. Id. (8 U.S.C. § 1154(k)). Again, the term "conversion" is used in the context of one petition, one petitioner, and the seamless movement from one currently valid visa category to another.

Congress' final use of the term "conversion" in the CSPA was in § 3. This provision amends 8 U.S.C. § 1153 to read:

> (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 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.

(emphasis added).

The stated purpose of the CSPA was to protect "young immigrants losing opportunities, to which they were entitled,

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[2] Immigration law has never authorized the son or daughter of a lawful permanent resident who marries (thus revoking any pending F2B petition under 8 C.F.R. § 205.1(a)(3)(i)(I)) to "convert" to the married son or daughter of a citizen upon the later naturalization of the original petitioner. Such a "conversion" would be from a valid F2B category to a nonexistent category to a valid F3 category. The fact that Congress has never allowed these sons and daughters of U.S. citizens to take advantage of earlier priority dates undercuts Plaintiffs' arguments that Congress nonetheless intended for adult sons and daughters of future immigrants to do so.

because of administrative delays." Padash v. INS, 358 F.3d 1161, 1174 (9th Cir. 2004). The legislative history indicates, however, that there was no discussion of this exact provision of the CSPA. See Matter of Wang, 25 I. & N. Dec. 28, 36-38 (BIA 2009) (detailed review of congressional history).

Since the CSPA was enacted, Congress has only used the term "conversion" once in the immigration context. See National Defense Authorization Act ("NDAA") of 2008, Pub. L. 110-242, § 2, 122 Stat. 1567. In the NDAA of 2008, Congress recognized that the "Secretary of Homeland Security or the Secretary of State may convert an approved petition for special immigrant status under [the NDAA of 2006] to an approved petition for special immigrant status under [the NDAA of 2008] . . . ." 8 U.S.C. § 1101, note titled "Authority to convert petitions during transition period." This provision again authorized the seamless transition from one valid category to another valid category of a single petition filed by a single petitioner.

The only published decision interpreting the meaning of the word "conversion" in the context of 8 U.S.C. § 1153(h)(3) is Matter of Wang, 25 I. & N. Dec. 28 (BIA 2009). In Wang, the Board of Immigration Appeals ("Board" or "BIA") determined that the former derivative beneficiary of a family fourth-preference petition may not transfer the priority date from the fourth-preference ("F4")petition to a second-preference (F2B) petition subsequently filed by her lawful resident parent (the primary beneficiary of the F4 petition).

**ARGUMENT**

Plaintiffs are not entitled to summary judgment because 8 U.S.C. § 1153(h)(3) is ambiguous, the agency's interpretation

as stated in Matter of Wang is reasonable and entitled to Chevron deference, and under Wang, Plaintiffs' are not entitled to "convert" the family third and fourth-preference petitions to the second-preference category and are not entitled to transfer the priority date from the third and fourth-preference petitions to the second-preference petition. Plaintiffs' arguments to the contrary are unpersuasive because they require the Court (1) to fill in the gaps of a statute while pretending that the statute is nonetheless unambiguous; (2) to give deference to an unpublished decision over a published decision; and (3) to ignore the technical meanings of "conversion" and priority date "retention."

**a. Standard for Summary Judgment**

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Defendants, having filed their own motion for summary judgment, agree that there is no dispute as to any material fact. Doc. 39.

**b. Jurisdiction and Standard of Review**

Plaintiffs claim jurisdiction under 28 U.S.C. § 1331 to review USCIS' determinations that Plaintiffs were not eligible to adjust status based on a conversion of the F3 and F4 visa petitions filed by their grandparents and were not entitled to transfer priority dates from the F3 and F4 petitions to the F2B petition filed by their parents. Plaintiffs seek relief under 28 U.S.C. § 1651 (All Writs Act), 28 U.S.C. § 2201 (Declaratory

Judgment Act), 5 U.S.C. § 701 *et seq.* (Administrative Procedure Act, "APA"), and 28 U.S.C. § 1361 (Mandamus Act).

Defendants agree that jurisdiction exists under 28 U.S.C. § 1331 in conjunction with the APA, which provides the standard of review. See Spencer Enters. v. United States, 345 F.3d 683, 688 (9th Cir. 2003). Under § 706(2)(A) of the APA, a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). "Judicial deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" Negusie v. Holder, 129 S. Ct. 1159, 1163-64 (2009).

**I. THE STATUTE IS AMBIGUOUS.**

Plaintiffs disingenuously claim that 8 U.S.C. § 1153(h)(3) is unambiguous. Plaintiffs can only arrive at their "plain meaning" of the statute, however, by ignoring the technical meaning of "conversion." Congress is presumed to have used the term "conversion" consistent with its technical meaning in immigration law. See Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); United States v. Hunter, 101 F.3d 82, 85 (9th Cir. 1996) ("[A]s a matter of statutory construction, we 'presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.'") (quoting Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85, 108 S. Ct. 1704, 100 L. Ed. 2d 158 (1988)). Thus,

Plaintiffs impermissively alter the meaning of "conversion" in service to their conclusion that the statute is unambiguous.

The "plain meaning" of conversion under prior statutory and regulatory provisions is, as discussed *supra*, "seamless transfer between valid classifications under one petition (with one petitioner) upon the occurrence of a disqualifying event." This technical meaning does not support Plaintiffs' arguments that "automatic conversion" occurs upon the filing of a second petition by a different petitioner or upon the adjustment of status of the primary beneficiary years after the alien lost his classification as a derivative beneficiary. In the past, conversions triggered "by beneficiary's attainment of the age of 21 years" took place "as of the beneficiary's attainment of this 21st birthday." 8 C.F.R. § 204.5(b). The plain language of 8 U.S.C. § 1153(h)(3) does not indicate that Congress intended to alter the previous analysis, although it did alter slightly how one's "21st birthday" is calculated.

Most significant, however, is Plaintiffs' erroneous assertion that a visa petition can convert between statutorily sanctioned classifications based on the relationship of one *beneficiary* to another *beneficiary*. Doc. 32-2 at 13. Although the statute itself is silent on which relationship drives the "appropriate category" analysis, Plaintiffs' can hardly claim that § 1153(h)(3) provides for conversion to an "appropriate category" based on the relationship of the former derivative beneficiary to the former primary beneficiary. Quite to the contrary, long standing statutes prescribe both the "petitioning" procedures the statutorily sanctioned classifications, comprising

those relationships allowed by Congress. Section 1153(h)(3) creates exceptions to those long standing statutory provisions.

Under 8 U.S.C. §§ 1154(a)(1)(A)(i) and (a)(2)(B)(i), United States citizens and lawful permanent residents may only file a petition directly on behalf of "an" alien "entitled to classification by reason of a relationship described in" §§ 1153(a) or 1151(b)(2)(A)(i). If something changes to alter the relationship between the petitioner and the beneficiary such that the alien is "found not to be entitled to such classification," the visa petition is no longer valid. 8 U.S.C. § 1154(e). See also 8 C.F.R. § 205.1 (automatically revoking prior approval of petition upon the death of the petitioner or beneficiary and upon conversion to a new category); 8 C.F.R. 204.2(h)(1) (petition only valid "for duration of the relationship to the petitioner"). Conversely, there is no statutory authority to file a visa petition seeking classification of a relationship unrecognized by Congress. In fact, petitions may not be filed *directly* on behalf of an alien based on a derivative relationship described in 8 U.S.C. § 1153(d) (limiting derivative status to children of the primary beneficiary under the age of 21). Instead, § 1153(d) only provides a contingent mechanism through which certain derivative beneficiaries may be accorded the same status, and same order of consideration. When the adult children aged-out, they were no longer described by §1153(d) as a child defined by §1101(b)(1). Therefore, they lost derivative eligibility based upon the petition filed for their parents. Thus, Plaintiffs' contention that one petition can automatically convert based on a relationship unrecognized by Congress with a person who did not file the petition runs contrary to both 8 U.S.C. §§ 1154 and

1153(d). Certainly, §1153(h)(3) does not "unambiguously" provide such authority.

Finally, Plaintiffs ignore the fact that the operation of the terms of the statute are not clear when applied to their situation. As discussed in Defendants' Motion for Summary Judgment, Doc. 39, Plaintiffs' proposed constructions do not give clear meaning to the wording of the statute. First, the F3 and F4 petitions could not "automatically convert" to a valid classification on the age-out date under the CSPA age formula because there is no category for "grandchildren" of United States citizens. See Bolvito v. Mukasey, 527 F.3d 428, 434 (5th Cir. 2008). Second, there is no clear guidance that the "automatic conversion" should take place on the day the parents became LPRs or on the date they filed the separate second-preference petitions for their now adult children. See 8 C.F.R. § 204.5(a)(2) (1975) (specifically delaying conversion until a separate event, namely filing of evidence, takes place). Third, regardless of when the petition converts, the statute does not direct that the "appropriate category" is determined by the relationship of the derivative beneficiary to the primary beneficiary. In fact, the settled rule on this point was just the opposite. See 9 U.S. Dep't of State Foreign Affairs Manual 42.53 n.6.1(b) ("A preference applicant's priority date is linked to the underlying petition and qualifications for that particular status. Loss of entitlement to status (through demise, attaining the age of 21 years, etc.) results in the loss of a priority date."); Immigration Law and Procedure, Vol. 3, § 37.05[2][a], 37-16 ("[T]he requisite spousal or parental relationship must persist both at the derivative's visa issuance and his or her

admission to the United States. Thus, a qualifying familial relationship that is terminated due to death, 'aging out,' divorce or other events no longer entitles the derivative noncitizen to accompanying or following to join benefits.") (quoted in Bolvito, 527 F.3d at 435-436 (emphasis omitted)).

Although Plaintiffs claim that the language of § 1153(h)(3) compels their conclusions, Plaintiffs' arguments rely on a series of "gap-fillers" as to what Congress must have meant by the terms "automatically convert" and "appropriate category." Gap-filling, however, has been specifically left to USCIS, not courts or Plaintiffs. See Morales-Izquierdo v. Gonzales, 486 F.3d 484, 493 (9th Cir. 2007) ("When Congress has explicitly or implicitly left a gap for an agency to fill, and the agency has filled it, we have no authority to re-construe the statute.").

Furthermore, the language of 8 U.S.C. § 1153(h) clearly prohibits Plaintiffs from receiving CSPA relief for the later (recent) petitions filed by their parents (themselves erstwhile beneficiaries) for several reasons. First, "automatic conversion" in an immigration context has never required or happened upon the filing of a second petition. Second, the statute itself limits its benefits to petitions filed to classify aliens under "(a)(2)(A) and (d)." For example, the Form I-130 filed by Plaintiff Babomian in 2007 was to classify her son under "(a)(2)(B)" - not "(a)(2)(A)" or "(d)."

The most recent visa petitions filed by Plaintiffs are for unmarried sons or daughters over the age of twenty-one. Thus, the "appropriate category" clause of §1153(h)(3) proves as problematic as the "automatic conversion" clause. Congress could not have intended that the second visa petition convert to a new

category. As filed under (a)(2)(B), it already is in the "appropriate category." In fact no other category could be more appropriate.

## II. MATTER OF WANG IS A REASONABLE INTERPRETATION OF THE STATUTE AND THUS IS ENTITLED TO CHEVRON DEFERENCE.

In support of their position, Plaintiffs attempt to undermine the Board's published decision in Matter of Wang by citing as authority unpublished Board cases specifically rejected in the published Wang decision; glossing over the mechanics of the statute under which they claim benefits; and arguing for comparisons between inappropriate provisions. Plaintiffs' attempts must be rejected.

### A. Unpublished Board decisions are not legal authority in light of published Board guidance on the issue.

Plaintiffs repeatedly cite two unpublished decisions by the BIA in support of their position – In re: Maria T. Garcia, 2006 WL 2183654 (BIA Jun. 16, 2006), and In re: Elizabeth F. Garcia. Doc. 38-2 at 13-14. Yet these decisions were explicitly rejected by the BIA in Matter of Wang, 25 I. & N. Dec. at 33. Therefore, the unpublished Garcia decisions should not be accorded any deference in judicial proceedings. See Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1014 (9th Cir. 2006) (refusing to give deference to unpublished Board opinion because "the precise issue of statutory interpretation had been answered by the BIA in a published decision that carried the force of law."); Leal-Rodriguez v. INS, 990 F.2d 939, 946 (7th Cir. 1993) ("We will not bind the BIA with a single non-precedential, unpublished decision any more than we ourselves are bound by our own unpublished orders.").

The significance of Matter of Wang's repudiation of the unpublished Maria T. Garcia decision cannot be overstated. As required by 8 C.F.R. §1003.1(g), decisions of the Board may only be published as "precedential" upon a majority vote of the permanent Board members. From this we may deduce that no less than eight (8) of the current fourteen (14) permanent Board members agreed that publication of the interpretation and conclusions reached in Matter of Wang was appropriate. Conversely, despite Plaintiffs' Maria T. Garcia harpings, we can know definitively that a majority of the Board could not have agreed with Maria T. Garcia. In fact, we have even seen a departure from member Brian O'Leary's participation in Maria T. Garcia through his subsequent decisions as an immigration judge. See infra, In Re Robles-Tenorio.

Maria T. Garcia and Elizabeth F. Garcia are but two of several unpublished administrative cases interpreting 8 U.S.C. § 1153(h)(3). Defendants refrain from citing the cases prior to Wang, even where the CSPA interpretations accord with Defendants' position here, for the very reason that these cases are not authoritative. Yet, because Plaintiffs rest their interpretative claim so heavily on the Board's unpublished Maria T. Garcia decision, that case should be put into its proper context.

One year after the Maria T. Garcia decision, the case of In re: Robles-Tenorio was decided. (attached as Exhibit A) This case also turned on interpretation of the CSPA, though here the decision flatly rejected Maria T. Garcia, noting that "the results of this unpublished case are not binding in this Court" and that the earlier decision failed to address the incorporation of § 1153(h)(1) into § 1153(h)(3). Ex. A at 7. In re: Robles-

Tenorio is noteworthy because, as referenced above, the judge who heard that case had been on the three-member panel in Maria T. Garcia. On appeal to the Board, the holding of Maria T. Garcia was again rejected and accorded no deference because "unpublished Board decisions are not binding precedent." In re: Robles-Tenorio, A098-889-758 (BIA April 10, 2009) (citations omitted). Ex. A at 4.

Both the IJ and the Board ruled against Robles-Tenorio on the ground that he had not "sought to acquire" lawful permanent resident status within one year of visa availability as is required by 8 U.S.C. § 1153(h)(1). Ex. A at 4 & 7. Both the IJ and the Board determined that § 1153(h)(1)'s one-year bar was incorporated into § 1153(h)(3) by reference.[3] These decisions mirror the opinion issued by USCIS regarding Plaintiff Torossian's first adjustment of status application. Plaintiffs claim that the agency decision contained legal error because the one-year bar only "relates to the provisions of § [1153](h)(1)." Doc. 38-2 at 22. Robles-Tenorio illustrates, at the very least, that the statute is not as "unambiguous" as Plaintiffs claim.

Defendants' position remains that unpublished BIA decisions hold no precedential value, especially where a later published decision decides the same dispositive issue. Plaintiffs' repeated efforts to anchor their argument to Maria T. Garcia reveals that their position has effectively no independent support. Morever, it seems remarkable that Plaintiffs seek to rebuff a reasoned, 12-page published decision specifically addressing the issue in

[3] The Board in Wang specifically chose not to reach this issue because it decided the case on a different ground. Wang, 25 I. & N. Dec. at 32-33. Nor do Defendants argue this point.

dispute, by relying upon roughly three sentences of repudiated, mis-analysis from a decision that a majority of the Board, following application of the regulations, could not have agreed with.

**B. Plaintiffs misquote legislative history in their effort to undermine Matter of Wang.**

In their brief, Plaintiffs try to undermine Matter of Wang by spinning legislative history and even the text of the statute in their favor. To do this, Plaintiffs pick and choose which phrases to emphasize. For instance, in stating that the "purpose" of the CSPA was to protect those "who turned twenty-one and subsequently lost their eligibility for immigration benefits," Doc. 38-2 at 6, Plaintiffs neglected to qualify that the CSPA was only meant to protect those who age-out "as a result of delays in visa processing and adjudication." Padash v. INS, 358 F.3d 1161, 1163 (9th Cir. 2004). See also Chen v. Rice, No. 07-cv-4462, 2008 U.S. Dist. LEXIS 57052, *28 (E.D. Penn. 2008) ("The CSPA was passed to expedite the unification of qualifying derivative family members of United States citizens and legal permanent residents, which had been delayed by processing backlogs."). The adult children here did not age-out due to administrative delay; nor at the time they aged out were they LPRs. Thus, Wang is consistent with Congress' intent. See Padash, 358 F.3d at 1174 (advocating broad reading of CSPA to meet Congress' intent only - not to exceed Congress' intent). Plaintiffs cite to a statement by Representative Sensenbrenner to show that the Senate bill addressed three additional age-out cases that the House had not considered. Doc. 38-2 at 24. But the statement only supports age-out protection for derivative

beneficiaries who lost eligibility while USCIS processed their adjustment of status applications. Protection for such aliens was provided in 8 U.S.C. § 1153(h)(1) - not § 1153(h)(3). Doc. 38-2 at 24. Plaintiffs fail to cite any legislative history supporting their interpretation of the statute.

Plaintiffs also misquote 8 U.S.C. § 1153(h)(2), claiming that, under this provision, the CSPA applies to "all" family-preference, employment-based, and diversity visas. Doc. 38-2 at 16. The provision itself, however, explicitly limits its application to petitions filed to classify an alien under 8 U.S.C. §§ 1153(a)(2)(A) and (d). Thus, primary beneficiaries of "all" family-preference, employment-based, and diversity visas" are not eligible for CSPA benefits - only primary beneficiaries of F2A petitions are eligible.

Finally, Plaintiffs assert that the Board's interpretation renders "and (d)" superfluous. Yet, beneficiaries of petitions filed under "subsection (d)" include derivative beneficiaries of family second-preference (F2A) petitions. Thus, under the Board's interpretation, a petition filed for "classification of an alien child" in the F2A category automatically converts to the F2B category when the alien, the primary beneficiary, ages out under the formula at § 1153(h)(1). Likewise, "an alien child who is a derivative beneficiary under subsection (d)" of a petition filed "for classification of the alien's parent" under F2A automatically converts to the F2B category when the alien, the derivative beneficiary, ages out under the formula. Both "(a)(2)(A)" and "(d)" are given effect under the Board's interpretation limiting automatic conversion to primary and derivative beneficiaries of F2A petitions.

**C. The immigration provisions cited by Plaintiffs for comparison are inapposite because they do not involve "automatic conversion" and priority date "retention."**

In an effort to portray the Board's decision as unreasonable, Plaintiffs allege that the Board engaged in "selective recitation" of examples of conversion and retention of priority dates but overlooked others. Doc. 38-2 at 21-23. The Board's failure to discuss the provisions cited by Plaintiff was reasonable, however, because none of those provisions use the terms "conversion" and "retention" in conjunction.

**1. Plaintiffs' family-based analogies do not involve "conversion" and "retention."**

Plaintiffs allege that the Board committed a grave oversight in not discussing 8 C.F.R. § 204.2(h)(2). This "oversight" was for good reason. 8 C.F.R. § 204.2(h)(2) reads:

> Subsequent petition by same petitioner for same beneficiary. When a visa petition has been approved, and subsequently a new petition by the same petitioner is approved for the same preference classification on behalf of the same beneficiary, the latter approval shall be regarded as a reaffirmation or reinstatement of the validity of the original petition, except when the original petition has been terminated pursuant to section 203(g) of the Act or revoked pursuant to part 205 of this chapter, or when an immigrant visa has been issued to the beneficiary as a result of the petition approval. A self-petition filed under section 204(a)(1)(A)(iii), 204(a)(1)(A)(iv), 204(a)(1)(B)(ii), 204(a)(1)(B)(iii) of the Act based on the relationship to an abusive citizen or lawful permanent resident of the United States will not be regarded as a reaffirmation or reinstatement of a petition previously filed by the abuser. A self-petitioner who has been the beneficiary of a visa petition filed by the abuser to accord the self-petitioner immigrant classification as his or her spouse or child, however, will be allowed to transfer the visa petition's priority date to the self-petition. The visa petition's priority date may be assigned to the self-petition without regard to the current validity of the visa petition. . . . (emphasis added).

This provision deals neither with "conversion" nor with "retention" - instead requiring a self-petitioner to file a new petition despite having had a petition previously filed on his/her behalf by the abuser and then "transferring" the priority date to the self-petition. Id.

Plaintiffs also vaguely refer to the USA Patriot Act of 2001 ("Patriot Act"), Pub. L. No. 107-56, § 421(c) 423, 115 Stat. 272, again without quoting any of the statute's language. Doc. 38-2 at 16. The cited provision reads:

> (c) Priority Date.--Immigrant visas made available under this section shall be issued to aliens in the order in which a petition on behalf of each such alien is filed with the Attorney General under subsection (a)(1), except that if an alien was assigned a priority date with respect to a petition described in subsection (b)(1)(A)(i), the alien may maintain that priority date.

USA Patriot Act, § 421(c) (emphasis added). Again, the Patriot Act does not utilize the terms "conversion" or "retain," making comparisons between the provisions ill advised.

**2. Plaintiffs' employment-based analogies do not involve "conversion" and "retention."**

Plaintiffs also insist the Board was unreasonable in not considering several priority date transfers allowed in the employment context. Doc. 38-2 at 21-22. These comparisons are equally unhelpful. First, the procedures governing employment petitions and family petitions are totally different. Different forms are used, different types of evidence are submitted by petitioners, different congressional priorities drive the programs and quotas, and different events disqualify the beneficiaries from utilizing the visas. Compare, generally, 8 U.S.C. § 1153(a) with § 1153(b) and 8 C.F.R. § 204.2 with § 204.5. Plaintiffs' cases involve only family-preference

petitions. Second, none of the employment visa examples cited by Plaintiffs deals with "automatic conversion" in conjunction with priority date "retention." 8 C.F.R. § 204.5(e) reads:

> Retention of section 203(b) (1), (2), or (3) priority date. -- A petition approved on behalf of an alien under sections 203(b) (1), (2), or (3) of the Act accords the alien the priority date of the approved petition for any subsequently filed petition for any classification under sections 203(b) (1), (2), or (3) of the Act for which the alien may qualify. In the event that the alien is the beneficiary of multiple petitions under sections 203(b) (1), (2), or (3) of the Act, the alien shall be entitled to the earliest priority date. A petition revoked under sections 204(e) or 205 of the Act will not confer a priority date, nor will any priority date be established as a result of a denied petition. A priority date is not transferable to another alien. (emphasis added).

Although the regulation does utilize the term "retention," it does not use it in relation to conversion of petitions. In fact, the regulation specifically refuses to "convert" petitions, instead requiring each separate employer to file a new Form I-140 (Petition for Alien Worker) on behalf of the alien it wishes to sponsor. Id. This regulation also undermines Plaintiffs' own arguments because it shows how to explicitly authorize use of an earlier priority date on "any subsequently filed petition for any classification." Id. Had Congress wished to authorize such broad benefits under 8 U.S.C. § 1153(h)(3), it could have mirrored the language of this regulation rather than that of 8 C.F.R. § 204.2(a)(4).[4] It is also instructive that this regulation does not allow an alien to use the earlier priority date if the

[4] It should be noted that the beneficiary of an F4 petition filed by her brother in 1999 and of an family first-preference ("F1") petition filed by her parents on 2009 is not able to "retain," "maintain," or "transfer" the F4 petition's priority date to the F1 petition. 8 C.F.R. § 204.1(C) (absent other authority, the "filing date of a petition . . . shall constitute the priority date").

earlier petition is no longer valid. 8 C.F.R. § 204.5(e) (a revoked petition "will not confer a priority date, nor will any priority date be established as a result of a denied petition."). The case of a revoked petition is most similar to that of Plaintiffs where the adult children's interest in earlier petition terminated upon aging-out after their 21st birthday.

The provision allowing alien doctors to "retain" priority dates from earlier I-140 petitions is also inapposite. 8 C.F.R. § 204.12(f)(1) reads:

> If the physician beneficiary has found a new employer desiring to petition the Service on the physician's behalf, the new petitioner must submit a new Form I-140 (with fee) with all the evidence required in paragraph (c) of this section, including a copy of the approval notice from the initial Form I-140. If approved, the new petition will be matched with the pending adjustment of status application. The beneficiary will retain the priority date from the initial Form I-140. . . . (emphasis added).

While allowing the alien to "retain" an earlier priority date, the provision does not involve "conversion" of a petition. As in the earlier examples, the regulation contemplates the filing of a new petition by each sponsoring employer. Id.

**3. The Western Hemisphere Savings Clause does not involve "conversion" and "retention."**

Plaintiffs also condemn the Board's decision in Matter of Wang for failing to consider the Western Hemisphere Savings Clause, P.L. 94-571, 90 Stat. 2703 (October 20, 1976), as an analogous provision. Doc. 38-2 at 22-23. Section 9(b) reads:

> An alien chargeable to the numerical limitation contained in Numerical section 21(e) of the Act of October 3, 1965 (79 Stat. 921), who established a priority date at a consular office on the basis of entitlement to immigrant status under statutory or regulatory provisions in existence on the day before the effective date of this Act shall be deemed to be entitled to immigrant status under section 203(a) (8) of the Immigration and Nationality Act and shall be

> accorded the priority date previously established by him. (emphasis added).

The Western Hemisphere Saving Clause likewise is not similar to 8 U.S.C. § 1153(h)(3) because it utilizes neither the term "conversion" nor "retention" - the key operational phrases in 8 U.S.C. § 1153(h)(3). This statute actually undermines Plaintiffs' arguments because it explicitly shows that Congress knows how to allow an alien to utilize a previously established priority date on later petitions filed by different petitioners for different classifications. Had Congress intended to do so in the CSPA, it could have explicitly done so without resorting to conversion of petitions, age formulas, and one-year bars.

**D. Plaintiffs' position would undermine Congress' intent not to displace others.**

Plaintiffs cite an immigration law firm's internet blog as "authority" to show that they are not trying to displace others in the F2B line. Doc. 38-2 at 20. This blog makes light of many facts. It ignores that the aged-out children were never actually in line themselves; rather only waiting to see if their parents could get to the head of the line before they turned 21 years old. Congress had not authorized them to wait in the line in their own right. The blog ignores the fact that many other aliens also consider themselves to be "waiting" for their parents to attain one status or another so that they, too, might become eligible in their own right for immigration benefits. Finally, the blog glosses over the fact that Plaintiffs are jumping ahead of individuals younger than themselves whose parents became LPRs years before the parents here did. The blogger asserts these are "technicalities," but to the alien whose parent immigrated years before Plaintiff parents here, they are rules with a difference.

Plaintiffs also cite Baruelo v. Comfort, 2006 U.S. Dist. LEXIS 94309, at *10-*11 (N.D. Ill. Dec. 26, 2009) in support of their position that the adult children should not have to go to the back of another line. Yet, the Baruelo opinion dealt with the derivative beneficiary of an F2A petition who had aged-out of her derivative classification but was simultaneously eligible for classification as a primary beneficiary in the F2B category. Baruelo is exactly the class of alien that the Board determined is eligible to benefit from automatic conversion under § 1153(h)(3). From the date that Baruelo's father filed the I-130 on behalf of his wife (Baruelo's mother), Baruelo was also entitled to classification as a principal beneficiary. He most likely included her as a derivative beneficiary rather than filing a separate petition naming Baruelo as the primary beneficiary in order to save on filing fees. Thus, the Baruelo holding is consistent with, not contrary to, the Board's holding in Wang.

**III. USCIS' ACTIONS ARE NOT ARBITRARY OR CAPRICIOUS.**

The Board decision in Wang is reasonable. It gives effect to all of the operative terms of the statute, harmonizes the meaning of these terms with their historical technical usage, and furthers Congress' stated goal. "In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (U.S. 1984). Matter of Wang must be accorded Chevron deference.

In light of Wang, USCIS' determination that an immigrant visa was not immediately available to the adult children under

the F3/F4 petitions was not arbitrary or capricious. Likewise, Plaintiffs fail to state a claim for relief under the F2B petitions because the F2B petitions are not eligible for relief under the very terms of the CSPA.

**CONCLUSION**

The Defendants respectfully request this court deny Plaintiffs' motion for summary judgment.

DATED: September 14, 2009

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**CERTIFICATE OF SERVICE**

Case No. SACV 08-0840 JVS(SHx)

I hereby certify that on September 14, 2009, a copy of the foregoing "OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT" 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.

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