INTRODUCTION

Plaintiffs allege that the Government has failed to properly adjudicate cases filed under Section 3 of the Child Status Protection Act (CSPA), Pub. L. No. 107-208, 116 Stat. 927 (2002), codified at INA Section 203(h), 8 U.S.C. 1153(h). Complaint at ¶¶ 66, 69. The CSPA, signed into law on August 6, 2002, provides that if you are a U.S. citizen or in some cases a Lawful Permanent Resident and you file an I-130 Petition (for alien relative) on behalf of your child before he or she turns 21, your child will continue to be considered a child for immigration purposes even if the United States Citizenship and Immigration Service (USCIS) does not act on the petition before your child turns 21.[1]

In brief, Plaintiffs misread the CSPA to claim that derivative beneficiaries of family visa petitions who "age out" and for whom a later petition is filed, should somehow gain the benefit of the date of the earlier (and now defunct) visa petition. This exact issue is currently before the Court in Costelo, et al., v. Chertoff, et al., (No. SACV08-688) where a group of plaintiffs seek class certification. See Exhibit A [Costelo v. Chertoff, Plaintiffs Reply to Defs' Opp. to Amend Class Definition].

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[1] Definition and discussion of the CSPA can be found through the USCIS website at: http://www.uscis.gov/portal/site/uscis.

There are five named Plaintiffs in this case whose claims can be summarized as follows:

1. Plaintiff Cuellar de Osorio, a Legal Permanent Resident since 2006, and the primary beneficiary of a family third preference visa petition filed by her mother in 1998, alleges that her son, Melvin, who was originally a derivative beneficiary of the visa petition, should be able to transfer the priority date from the 1998 visa to the I-130 family second preference visa petition that Plaintiff Cuellar de Osorio filed on behalf of Melvin in 2007 once she was eligible to do so after obtaining Legal Permanent Resident status. Complaint at ¶¶ 29-34.

2. Plaintiff Norma Uy, the primary beneficiary of a family-fourth preference visa petition filed by her sister in 1981, alleges that her daughter, Ruth Uy, who was originally a derivative beneficiary of the visa petition, should be able to transfer the priority date from the 1981 visa petition to the immigrant petition and the application for permanent residence that Plaintiff Uy filed on her behalf in 2007 after obtaining Legal Permanent Resident status. Complaint at ¶¶ 35-41.

3. Plaintiff Magpantay, a Legal Permanent Resident since 2006 and a beneficiary of a family third preference visa filed by her U.S. citizen father, alleges that her three children who were original derivative beneficiaries of the petition, should be allowed to transfer the priority date form the 1991 petition to the petitions she has subsequently filed for her children after she had obtained Legal Permanent Residence status. Complaint at ¶¶ 42-50.

4. Plaintiff Santos, a Legal Permanent Resident who was the beneficiary of a petition filed by in 1991 by her U.S. citizen father, alleges that her son Dan (a derivative beneficiary of the 1991 petition) should be allowed to transfer the date of that petition to the subsequent petition filed by her in 2008. Complaint at ¶¶ 51-57.

5. Plaintiff Liwag entered the United States as a Legal Permanent Resident who was the beneficiary of a petition filed in 1991 by her father. Liwag alleges that her daughter, Conalu (a derivative beneficiary of the 1991 petition) should be allowed to transfer the date the earlier petition to the current one filed in 2007. Complaint at ¶¶ 58-64.

As explained below, these Plaintiffs are putative class members in Costelo, and should be treated in accordance with the Court's August 25, 2008 Order in that case which held the matter in abeyance for 180 days. See Exhibit B. Alternatively, this case should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

ARGUMENT

I. PLAINTIFFS ARE PUTATIVE CLASS MEMBERS IN COSTELO V. CHERTOFF AND THIS COURT SHOULD HOLD PLAINTIFFS' CASE IN ABEYANCE.

Plaintiffs press this court to adopt their interpretation of 8 U.S.C. § 1153(h)(3), and in so doing, seek to move their children to the head of the line - in front of petitions filed before theirs by individuals who were already U.S. Citizens and Legal Permanent Residents wishing to reunite their families.

Courts have been clear that in passing the CSPA, Congress focused on reuniting the families of current U.S. citizens and Legal Permanent Residents - not the families of intending immigrants. Ochoa-Amaya v. Gonzales, 479 F.3d 989, 991 (9th Cir. 2007) ("The laudable purpose of this provision is to prevent children of United States citizens from 'aging-out'".); Chen v. Rice, 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.") In this vein, the CSPA protects "young immigrants losing opportunities, to which they were entitled, because of administrative delays." Padash v. INS, 358 F.3d 1161, 1174 (emphasis added). Neither purpose is furthered by the Plaintiffs' interpretation of the statute: Plaintiffs were not U.S. Citizens or Legal Permanent Residents at the time that the original immigrant petitions were filed, and Plaintiffs' children did not "age-out" of their derivative statuses due to administrative delays or backlogs.

Numerous cases litigated in federal courts and before the Board of Immigration Appeals, have touched on associated aspects of the CSPA. Ochoa-Amaya v. Gonzales, 479 F.3d 989 (9th Cir. 2007) (considering meaning of "during which the applicable petition . . . was pending" in relation to retention of "child" status under 8 U.S.C. 1153(h)(1)); Padash v. INS, 358 F.3d 1161 (9th Cir. 2004) (determining meaning of "final determination" for purposes of application of CSPA to petitions filed prior to

enactment); Chen v. Rice, 2008 U.S. Dist. LEXIS 57052 (E.D. Penn. 2008) (dismissing claim that consulate should apply CSPA to visa petitions for lack of subject matter jurisdiction based on doctrine of consular nonreviewability); Lopez-Garcia v. Mukasey, 2008 U.S. App. LEXIS 9154 (9th Cir. 2008) (dismissing case where petitioner did not file an adjustment of status application within one year of visa availability as is required by 8 U.S.C. § 1153(h)(1)); Martinez v. Dept. of Homeland Security, 502 F.Supp. 2d 631 (E.D. Mich. 2007) (CSPA does not apply where petitioner had not "aged-out" at time visa became available); Corea v. Att'y Gen. 2006 U.S. App. LEXIS 6226 (11th Cir. 2006) (determining that CSPA does not apply to NACARA); In re Rodolfo Avila-Perez, 241 I.& N. Dec. 78 (BIA 2007) (considering CSPA in context of retaining child status for purposes of immediate relative petition). Since these cases called into question only limited aspects of the CSPA, the intersection of several provisions has remained undecided by the courts. To date, no published opinion has dealt directly with Plaintiffs' claims.

However, in Costelo v. Chertoff, the Costelo Plaintiffs argue exactly what Plaintiffs argue here. In Costelo, this Court, when considering Plaintiffs' motion for class certification, ruled that the case should be held in abeyance for 180 days. See Exhibit B [Costelo, August 25, 2008 Order]. The same result should occur here. Plaintiffs in Costelo sought to define provisional class certification based on characteristics that would include Plaintiffs in the instant case where the class will be composed of persons who:

a) have or will have obtained lawful permanent resident status as a result of being a primary beneficiary of a prior family or employment based visa petition or diversity immigrant visa application on or after August 6, 2002;

b) are the parents of an adult child or children (sons and daughters) who are or were a derivative beneficiary of their prior family or employment based visa petition or diversity immigrant visa application;

c) have or will have filed a subsequent family based immigrant visa petition(s) (Form I-130) for their adult child or children (sons and daughters) under the F2B category; and

d) whose subsequent family based immigrant visa petition(s) (Form I-130) is entitled to the automatic retention of the original priority date of the petitioner's prior family or employment based visa petition or diversity immigrant visa application pursuant to INA § 203(h)(3). . .

See Exhibit C [Costelo, Plaintiffs' Mot. to Amend Proposed Class Definition].

"The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants." Landis v. North American Co., 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936); accord Gates v. Woodford (Rohan ex rel. Gates), 334 F.3d 803, 817 (9th Cir.

2003). Where an administrative body is charged with primary responsibility for an area, "courts may route the threshold decision as to certain issues to the agency." U.S. v. General Dynamics Corp., 828 F.2d 1356 (9th Cir. 1987) (dealing with regulatory schemes).

A stay of proceedings pending consideration of this issue by the Board of Immigration Appeals ("Board") is requested. Such a stay would support the interests of judicial economy and deference to the executive agency's rule-making authority. Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., et al, 467 U.S. 837, 843, 104 S. Ct. 2778; 81 L. Ed. 2d 694, (1994), quoting Morton v. Ruiz, 415 U.S. 199, 231, 39 L. Ed. 2d 270, 94 S. Ct 1055 (1974) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." See also FEC v. Ted Haley Cong'l Comm., 852 F.2d 1111 (9th Cir. 1988).

As this Court has determined to hold in abeyance the case of Costelo et al., v. Chertoff, et al., a similar case that turns on interpretation of the CSPA, so too should it decide in the instant case. A stay by this court would serve the interest of full and fair adjudication of this issue for all interested parties. Given the pendency of this very issue before the Board, a stay would not prejudice the interests of the Plaintiffs.

II. IN THE ALTERNATIVE, DISMISSAL IS APPROPRIATE BECAUSE PLAINTIFFS FAIL TO STATE FACTS UPON WHICH RELIEF MAY BE GRANTED UNDER RULE 12(b)(6).

A motion to dismiss under Rule 12(b)(6) should be granted when a party fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). A federal court's Article III power is limited to decisions that resolve an "actual case or controversy." Allen v. Wright, 468 U.S. 737, 750 (1984). As part of this case or controversy requirement, a plaintiff bears the burden of establishing that it has standing to sue. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). In order to establish standing, a plaintiff must demonstrate, inter alia, "that he 'has sustained or is in immediate danger of sustaining some direct injury'" that is both "real and immediate" and not "conjectural or hypothetical." City of Los Angeles, v. Lyons, 461 U.S. 95, 101-02, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983).

In considering a motion under Rule 12(b)(6), the court must accept all factual allegations of the complaint to be true. Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984). Dismissal is appropriate if it appears beyond a doubt that the plaintiff is unable to prove facts in support of his legal claims which entitle him to relief. A complaint does not need detailed factual allegations; however, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a

cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. ---, 127 S.Ct. 1955, 1964-65 (2007) (alteration in original) (citation omitted). The "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." Id. at 1959.

In the present case, Plaintiffs do not and cannot allege any "injury in fact." Skaff v. Meridien N. Am. Beverly Hills, LLC, 506 F.3d 832, 837 (9th Cir. 2007). Neither Plaintiffs nor their children fit into the "zone of interests" targeted for protection by Congress in the passage of the Child Status Protection Act. Nat'l Credit Union Administration v. First Nat'l Bank and Trust Co., 522 U.S. 479, 486, 118 S. Ct. 927, 140 L. Ed. 2d 1 (1998) (citation omitted). Under no reading of the language of 8 U.S.C. § 1153(h)(3) does it indicate that aged-out derivative beneficiaries of family third and fourth preference petitions get to recapture those earlier priority dates on subsequent petitions filed on their behalf.

8 U.S.C. § 1153(h)(3) reads:

> 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) of this section, 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 apply this section to the original petition filed by Plaintiffs' sponsoring relatives, when the derivative beneficiaries aged-out, "automatic conversion" would occur and the "appropriate" category at that time was no category at all. (There is no family preference category for grandchildren or nieces and nephews of U.S. citizens.) As such, Plaintiffs' children had no preference category available to them and thus there was no longer an outstanding petition on their behalf.

The explicit language of the CSPA makes clear that Plaintiffs' current I-130 petitions do not and cannot receive any benefit under the statute. By its terms, the CSPA applies to petitions filed "with respect to an alien child who is a derivative beneficiary under subsection (d) of this section." 8 U.S.C. § 1153(h)(2)(B). The petitions filed by Plaintiffs in 2007 and 2008 did not involve an alien child or a derivative beneficiary. Those petitions were filed with respect to grown, adult children. Thus, no authority can be cited by Plaintiffs to recapture a priority date from a lapsed status of an earlier petition.

8 U.S.C § 1153(h)(3) applies to sons and daughters of Legal Permanent Residents who age-out while awaiting adjudication of their petitions. These former children may have had petitions filed directly on their behalf (to classify a parent-child relationship described in subsection (a)(2)(A)) or may have been derivatives on the petitions filed on behalf of their alien parent by their resident parent (to classify a spousal relationship under (a)(2)(A)). (Although the Legal Permanent

Resident parent can file a petition directly for the child, one immigrant visa petition is often used for the alien spouse and "derivative" children in order to save on filing fees.) Previously, when the Legal Permanent Resident's children aged-out, he or she would have to file a new petition for classification under 8 U.S.C. § 1153(a)(2)(B) (unmarried sons or unmarried daughters who are not children) but would be able to retain the earlier priority date in accordance with 8 C.F.R. § 204.2(a)(4). Thus, the intent of Congress and the legal effect of 8 U.S.C. 1153(h)(3) is that these unmarried sons and daughters of Legal Permanent Residents no longer have to file new petitions upon aging-out in order to convert to the new preference category and retain the priority dates of the original petitions.

As 8 U.S.C. § 1153(h)(3) clearly is not applicable to Plaintiffs' petitions, they fail to state a claim upon which relief may be granted, and the case should be dismissed.

III. LIKE IN COSTELO, PRUDENTIAL EXHAUSTION APPLIES.

As this Court recognized in Costelo, the Board is expected to interpret the same statutory provision at issue in this case, and this Court "would benefit greatly from any interpretation of § 203(h)(3) which the BIA might issue." Costelo August 25, 2008 Order at 1.

A correct interpretation of this statute can only be made by reviewing the provision in its full context. Gallard v. INS, 486 F.3d 1136, 1140 (9th Cir. 2007) (reading a statute with a view to its place in the overall statutory scheme also requires reading it in "historical context"), citing Southeastern Cmty. Coll. v.

Davis, 442 U.S. 397, 411, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (1979). Without such a detailed and thorough airing of the statute's origins, the meaning or ambiguity of certain words or phrases may be missed. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-133, 120 S.Ct. 1291, 146 L.Ed. 2d 121 (2000).

The proper body to conduct this thorough analysis is the Board. The Board possesses subject-matter expertise in the area of immigration thorough its familiarity with past agency practices, statutes, rules, regulations, decisions, and actions and will be able to draw upon these in fulling analyzing the issues raised in this case. Shao v. BIA, 465 F.3d 497, 502 (2d Cir. 2006) (stating that "the BIA possesses far more relevant expertise than we do [despite] our heavy immigration caseload.").

In recognition of its technical expertise in this area, the Board has been entrusted by Congress and courts to provide guidance in the area of immigration. Rafaelano v. Wilson, 471 F.3d 1091, 1098 (9th Cir. 2006) ("We infer such deference to the executive agency to be the intent of the immigration laws generally.") Under 8 C.F.R. § 1003.1(d)(1), the Board is mandated to provide "clear and uniform guidance" regarding the "interpretation of the Act and its implementing regulations." It gives meaning to "ambiguous statutory terms" through "a process of case by case adjudication." INS v. Aguirre-Aguirre, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed. 2d 590 (1999), quoting INS v. Cardozo-Fonseca, 480 U.S. 421, 428-429, n.6, 107 S.Ct. 1207, 94 L.Ed. 2d 434 (1987).

It is this "relevant subject-matter expertise" and ability to precedentially state agency policy that should be called upon in the present case. Quinchia v. U.S. Att'y Gen., 2008 U.S. App. LEXIS 16624 (11th Cir. 2008), quoting Shao, 465 F.3d at 501-03. Any analysis of the provisions at issue must take into consideration the impact of various statutory interpretations on preference categories, visa allotments, past actions by Congress to codify agency practice, and agency backlogs spurring congressional action. The Board is best equipped to make such a full analysis.

In contrast, a decision by this court would foreclose in-depth review by the Board and other district courts. At such an early juncture in the crystallization process, this issue is unripe for a final judicial determination. Thus, the present action should be dismissed in order for the Board to consider Plaintiffs' claims.

The Board has addressed claims similar to those raised by Plaintiffs in at least three unpublished cases, each with a different outcome. See In re Maria T. Garcia, 2006 WL 2183654 (BIA 2006 unpublished) (concluding that the relationship to focus upon when converting a fourth preference relative visa petition would be that of the derivative child to the primary beneficiary); In re: Elizabeth Francisca Garcia, 2007 WL 2463913 (BIA 2007 Unpublished) (reconsidering matter in light of In re: Maria T. Garcia); In re: (A79 638 092, Name Redacted) (BIA September 7, 2007) (finding no retention of priority date when petitioner on original and subsequent petitions is not same).

In the present case, the Government is already aware of alleged ambiguities in 8 U.S.C. § 1153(h)(3) and has already taken action to provide clear, precedential guidance in this area. On July 18, 2008, United States Citizenship and Immigration Services (USCIS) certified two cases to the Board, with requests for precedential (published) decisions. One case involves the aged-out derivative beneficiary on an I-130 petition and the other case involves the aged-out derivative beneficiary on an I-140 petition. On August 20, 2008, USCIS submitted supplemental briefs to the Board for its consideration in the matter. At present, the Government is awaiting decision by the Board. (See Exhibits D & E.)

Consideration of Plaintiffs' claims at this time would deprive the agency of the opportunity to resolve this issue administratively, potentially moot the actions taken by litigants before other courts to resolve the matter, and waste judicial resources. For these reasons, prudential exhaustion of administrative remedies should be required and the case should be dismissed. See Costelo August 25, 2008 Order at 2 (citing El Rescate Legal Services, Inc., v. Executive Office of Immigration Review, 959 F.2d 742, 747 (9th Cir. 1999), "(A court may apply a prudential exhaustion requirement where (1) agency expertise makes agency consideration necessary to generate a record and reach a decision; (2) not applying exhaustion would encourage bypass of administrative scheme; and (3) administrative review is likely to allow the agency to correct its mistake and preclude the need for judicial review.)." Order at 2.

The Board should have the first opportunity to determine this matter. Dismissal allows for conservation of judicial resources and reinforces the special role of Board in clarifying immigration laws. See, e.g., Simmonds v. INS, 326 F.3d 351, 357 (2d Cir. 2003) ("Prudential ripeness is . . . a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial.")

CONCLUSION

Based on the foregoing, the Government respectfully submits that the Court should dismiss Plaintiffs' complaint or in the alternative, should stay the case pending a precedential opinion by the Board of Immigration Appeals.

Respectfully submitted,

GREGORY G. KATSAS
Assistant Attorney General
VICTOR LAWRENCE
Principal Assistant Director

S/ Aaron D. Nelson
AARON D. NELSON
Trial Attorney
Aaron.Nelson@usdoj.gov
Office Of Immigration Litigation
District Court Section
Civil Division
Department of Justice
P. O. Box 868
Washington, D.C.

Attorneys for Defendants

Dated: September 22, 2008

DECLARATION OF AARON D. NELSON

I, Aaron D. Nelson, declare and state as follows:

1. I am a trial attorney for the Department of Justice, Civil Division, Office of Immigration Litigation. I am assigned as lead counsel in the matter of Rosalina Cuellar de Osorio, et al., v. Jonathan Scharfen, et al., SACV 08-840 JVS (SHx). I am fully familiar with the facts set forth herein and, if called as a witness, could testify competently thereto.

2. On September 18, 2008, I spoke with Amy Prokop, counsel for plaintiffs in this action. I informed Ms. Prokop, pursuant to Local Rule 7-3, that defendants intended to file a motion to dismiss pursuant to Federal Rule of Civil Procedure 12 (b)(6); or in the alternative to hold in abeyance on September 22, 2008. I also explained the basis for the motion. Ms. Prokop and I were unable to come to agreement in this case and thus I now file the motion to dismiss.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 22rd day of September 2008, at Washington, D.C.

s/Aaron D. Nelson

AARON D. NELSON

Trial Attorney

Office of Immigration Litigation

CERTIFICATE OF SERVICE

Case No. SACV08-840 JVS (SHx)

I hereby certify that on September 22, 2008, a copy of the foregoing "NOTICE OF MOTION AND MOTION TO DISMISS OR HOLD IN ABEYANCE" 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.

S/ Aaron D. Nelson
AARON D. NELSON
Trial Attorney
Aaron.Nelson@usdoj.gov

Office Of Immigration Litigation
Civil Division
Department of Justice
P. O. Box 868
Washington, D.C. 20044

(202) 305-0691