1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendants submit this memorandum of points and authorities
3 in support of their motion for summary judgment.

4 **FACTUAL BACKGROUND**

5 Plaintiffs Cuellar de Osorio, Magpantay, Santos, Liwag, and
6 Norma Yu have been in the United States as Legal Permanent
7 Residents (LPR) since either 2006 or 2007 as the result of visa
8 petitions filed on their behalf by their United States Citizen
9 relatives. Plaintiff Ruth Uy is the daughter of Plaintiff Norma
10 Uy and is currently in the United Staates under an F-1, non-
11 immigrant student visa. In the original visa petitions that
12 resulted in Plaintiffs' current LPR status, their children were
13 listed as derivative beneficiaries. While Plaintiffs waited for
14 their priority date to become current, they remained with their
15 children in their home countries.

16 However, by the time Plaintiffs adjusted to LPR status,
17 their children were grown adults who had reached the age of
18 twenty-one. Thus, they lost their status as derivative
19 beneficiaries and became ineligible for classification under the
20 Immigration and Nationality Act ("INA"), 8 U.S.C. 1101, et seq.
21 As a result, Plaintiffs filed Form I-130 visa petitions to
22 classify their now-adult children under the second-preference
23 family-sponsored ("F2B") category ("unmarried adult son of a
24 lawful permanent resident" under 8 U.S.C. § 1153(a)(2)(B)).

25 **LEGAL BACKGROUND**

26 **A. Family Preference Petitions Under the INA.**

27 "Admission of an alien to the United States is a privilege
28 granted by the sovereign United States Government. Such a

privilege is granted to an alien only upon such terms as the United States shall prescribe." U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, S.Ct. 389 (1950). To enter and remain in the United States lawfully, Congress requires each alien to possess a valid visa conferring immigrant or non-immigrant status. 8 U.S.C. §§ **1182(a)(7)(A)&(B). The Supreme Court has long recognized that "[t]he conditions of entry for every alien . . . have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of [federal courts] to control." Fiallo v. Bell, 430 U.S. 787, 792 (1977). Congress must balance myriad interests in making these determinations, including those of United States citizens and lawful permanent residents to reunite with members of their immediate and extended families, as well as the nation's employment needs and interests in encouraging immigration from a diversity of nations. Cong. Research Svc Rep. for Congress, "Immigration Fundamentals," dated Sept. 15, 1999, http://digital.library.unt.edu/govdocs/_crs/permalink/meta-crs-997:1. The resulting balancing in reflected in the visa petition rubric codified in the INA.**

1. The Petitioning Process.

There are several different types of "immigrant visas." The family-based immigrant visa category - at issue in this case - requires a United States citizen or LPR "petitioner" to file a Form I-130 with USCIS in order to classify the intended "primary beneficiary" under one of the congressionally-created immigrant

1 relative categories under the INA. 8 C.F.R. §§ 204.1(a)(1).[1] Of
2 note, there is no statutory category that permits a grandparent
3 to petition for his or her grandchild. Bolvito v. Mukasey, 527
4 F.3d 428, 434 (5th Cir. 2008) (no category for grandchildren).
5 (See Table at Exhibit A.)
6 Immigrant visas are made available "to eligible immigrants
7 in the order in which a petition in behalf of each such immigrant
8 is filed." 8 U.S.C. § 1153(e). The filing date of a petition
9 constitutes the "priority date" for that petition and establishes
10 the primary beneficiary's proverbial "place in line." 8 C.F.R.
11 § 204.1(c).
12 **2. Visa Allocation and Availability.**
13 Not all classifiable relationships are treated alike for
14 immigration purposes. The total number of family-sponsored
15 immigrant visas per year is capped at 480,000. 8 U.S.C.
16 § 1151(c)(1)(A)(i). Those classified as "immediate relatives"
17 are not subject to numerical limits and do not have to wait for
18 allocation of a visa number before they can immigrate. 8 U.S.C.
19 § 1151(a)(1). The other family-based classifications, however,
20 fall under four numerically limited "preference" categories. See
21 8 U.S.C. § 1153(a); Exhibit A. Preference categories are subject
22 to allocation worldwide; in other words, Congress has limited the
23 number of visas that will be granted each year depending on the
24 "priority" of the beneficiary's relationship to the petitioner
25
26
27 [1] Although 8 U.S.C. § 1154(a)(1)(A)(i) provides for filing with the "Attorney General," the Homeland Security Act of 2002, Pub. L. No. 107-296 § 451(b), 116 Stat. 2135, 2196 (2002),
28 transferred the authority over these matters to USCIS.

and the beneficiary's country of origin. 8 U.S.C. § 1151(a)(1) and (c); see also Bolvito v. Mukasey, 527 F.3d at 429-32 (explaining the visa petitioning process).

Because Congress has limited how many visas the Government may issue in any given year and to any given group, an alien may have to wait several years before a visa number will become available to him or her under the numerical allocation system. See Ogbolumani v. USCIS, 523 F. Supp. 2d 864, 869-70 (N.D. Ill. 2007) ("due to oversubscriptions in that visa preference category, visa numbers might not be immediately available for the alien relative."). To determine whether an immigrant visa is immediately available, one looks to the Department of State, Bureau of Consular Affairs Visa Bulletin. 8 C.F.R. § 245.1(g)(1).

In order to avoid separating "children"[2] from parents, the "children" of primary beneficiaries may accompany or follow to join their parents under "the same status" and "order" as the primary beneficiaries so long as they maintain the required relationship with the primary beneficiary. 8 U.S.C. § 1153(d).[3] See 9 U.S. Dep't of State, Foreign Affairs Manual § 40.1 n. 7.1

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[2] "Child" is a legally operative term defined in the INA in pertinent part as "an unmarried person under twenty-one years of age." 8 U.S.C. § 1101(b)(1).

[3] 8 U.S.C. § 1153(d) provides:

> Treatment of family members. A spouse or child as defined in [8 U.S.C. § 1101(b)(1)(A), (B), (C), (D), or (E)] 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.

(derivative interest in visa petition is valid only "as long as the alien following to join has the required relationship with the principal alien.") (quoted in Ward v. Holder, No. 07-cv-443, 2009 WL 453390, *3 (M.D. Fla. 2009)). Nonetheless, derivative beneficiaries' interests in a petition are not the equivalent of "actual preferences." Santiago v. INS, 526 F.2d 488, 491 (9th Cir. 1975). For example, a derivative beneficiary may not immigrate before the primary beneficiary, and if the primary beneficiary of a visa petition loses eligibility for the visa (i.e., through expiration of the visa or death of the primary beneficiary), then the spouse and children who previously had derivative eligibility will lose it. Ward v. Holder, 2009 WL 453390; Yuk-Ling Wu Jew v. Attorney General, 524 F. Supp. 258 (D.C. 1981); Matter of Khan, 14 I. & N. Dec. 122 (BIA 1972).

B. The Child Status Protection Act of 2002

While a beneficiary parent awaits the adjudication of an immigrant petition or even the administrative issuance of a travel visa, his or her derivative beneficiary may turn twenty-one and no longer qualify as a "child" entitled to the parent's status under 8 U.S.C. § 1153(d). Congress recognized the inequity of losing visa eligibility due to agency delays and enacted the CSPA, which provides rules for determining whether certain aliens will be able to exclude periods of administrative delay from their chronological age. The statute has two subsections providing relief and one describing the petitions eligible for relief.

It is commonly understood that 8 U.S.C. § 1153(h)(1) and (2)[4] alleviate the effects of administrative delays by allowing the exclusion of those periods from the calculation of age for purposes of determining if an alien is a "child" under the INA. Matter of Wang, 25 I. & N. Dec. 28, 38 (BIA 2009). The CSPA was not intended, however, to alleviate the effects of numerical limitations. Ochoa-Amaya v. Gonzales, 479 F.3d 989, 994 (9th Cir. 2007).

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[4] (1) *In general*

> For the purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement [as a child] 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) of this section, the date on which an immigrant visa number became available for the alien's parent), ...; 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) of this section, a petition filed under section 1154 of this title for classification of an alien child under subsection (a)(2(A) of this section; or (B) with respect to an alien child who is a derivative beneficiary under subsection (d) of this section, a petition filed under subsection (d) of this title for classification of the alien's parent...

It is also commonly understood that 8 U.S.C. § 1153(h)(3)[5] allows the "child" of a lawful permanent resident to convert, upon turning twenty-one years old, from being the primary or derivative beneficiary of an F2A petition to the primary beneficiary of an F2B petition without the petitioner needing to file a new petition. Reducindo v. Gonzales, No. 05-cv-451, 2006 U.S. Dist. LEXIS 28816, *4 (M.D. Fl. 2006) (derivative F2A petition that had automatically-converted under § 1153(h)(3) was being held in abeyance by USCIS pending F2B availability); Baruelo v. Comfort, No. 05-cv-6659, 2006 U.S. Dist. LEXIS 94309, *28-*29 (N.D. Ill. 2006) (recognizing that CSPA converted F2A petition into F2B petition).

To date, USCIS does not allow aged-out derivative beneficiaries of other immigrant classifications to benefit from § 1153(h)(3). The only published guidance on this point supports USCIS' position. Matter of Wang, 25 I. & N. Dec. 28 (BIA 2009).

ARGUMENT

The question posed in this case is whether, under 8 U.S.C. § 1153(h)(3), aliens who aged-out of their derivative F3 classification may transfer the priority date from the F3 petition to a later F2B petition when the petitions are filed by

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[5] (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)[spouses/children of LPRs] and (d)[derivative beneficiaries] 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.

different petitioners and after there has been a gap in eligibility for classification under the INA. This question is complex due to the inclusive language but exclusive operation of § 1153(h), as will be discussed further below.

Defendants submit that resurrection of dead petitions and transfer of priority dates from those expired petitions to altogether new petitions is at odds with the operative language of the statute, Congress' specific intent not to displace others, and the requirement of identity of petitioners that undergirds the preference scheme.

I. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE 8 U.S.C. § 1153(h)(3) DOES NOT AUTHORIZE THE TRANSFER OF A PRIORITY DATE FROM AN EXPIRED DERIVATIVE INTEREST IN AN F3 PETITION TO A SEPARATE AND UNRELATED F2B PETITION.

A. LEGAL STANDARD FOR SUMMARY JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 56 AND THE APA, 5 U.S.C. §706(2)(A).

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).

This Court's review of USCIS' assignment of a priority date to Plaintiffs' F2B petitions is governed by Section 706(2)(A) of the APA, which provides that 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). See Spencer Enters. v. United States, 345 F.3d 683, 693 (9th Cir. 2003) ("[A]n agency decision or finding of fact may be reversed

1 if it is 'arbitrary, capricious, [or] an abuse of discretion,' or
2 'unsupported by substantial evidence.'"). See also Negusie v.
3 Holder, 129 S. Ct. 1159, 1163-64 (2009) ("Judicial deference in
4 the immigration context is of special importance, for executive
5 officials 'exercise especially sensitive political functions that
6 implicate questions of foreign relations.'"). Review under the
7 arbitrary and capricious standard is narrow and an agency's
8 interpretation of an ambiguous statute is controlling so long as
9 it is "reasonable." Duran-Gonzales v. DHS, 508 F.3d 1227, 1235
10 (citing Chevron USA, Inc. V. Natural Resources Defense Council,
11 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).
12 Accordingly, review under the APA is highly deferential and
13 the agency's actions are presumed to be valid. See Citizens to
14 Preserve Overton Park v. Volpe, 401 U.S. 402, 415, 91 S. Ct. 814,
15 28 L. Ed. 2d 136, (1971), abrogated on other grounds by Califano
16 v. Sanders, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977).
17 The Court must affirm the agency's decision if the agency
18 presents a rational basis for the action and if the action is
19 within the agency's statutory authority. Motor Vehicle
20 Manufacturers Ass'n v. State Farm Mutual, 463 U.S. 29, 42-43, 103
21 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).
22 **B. 8 U.S.C. § 1153(h)(3) IS AMBIGUOUS.**
23 The first step in analyzing Plaintiffs' claim is to
24 determine if "the statute is silent or ambiguous with respect to
25 the specific issue." Chevron, 467 U.S. at 843, (quoted in
26 Ramos-Lopez v. Holder, 563 F.3d 855, 860 (9th Cir. 2009)).
27 Review of 8 U.S.C. § 1153(h) reveals the internal ambiguity of
28 this section of the CSPA. The language in each subsection of 8

U.S.C. § 1153(h) is identical, implying that all primary beneficiaries of petitions filed under § 1153(a)(2)(A) and all derivative beneficiaries of petitions filed under section 1153 (i.e., family-based, employment-based, and diversity petitions) may be eligible to benefit from the provision. By giving meaning to § 1153(h)(3)'s operational terms, however, it becomes clear that § 1153(h)(3) is not as inclusive as § 1153(h)(1).

When we apply the language of § 1153(h)(1) to the beneficiaries of F2A petitions and the derivative beneficiaries of all family- and employment-based petitions, we see that the language of the statute operates without problem. For example, a United States citizen files an I-130 petition to classify her daughter, "Mae," under F3. USCIS takes two years to adjudicate the petition. Due to oversubscription in the F3 category, several more years pass before a visa becomes available. Mae's priority date becomes current when her son, "Tim," is twenty-two years old by normal calculations. Mae and Tim seek to obtain immigrant visas. Under § 1153(h)(1), Tim is issued a visa because: (1) he is the beneficiary of a visa petition under filed "under (d) of this section," (2) he "sought to acquire" status within one year of a visa becoming available to Mae, and (3) under the age calculation, he is only twenty years old (twenty-two years old minus the two years that the petition was awaiting adjudication by USCIS). 8 U.S.C. § 1153(h). In the above scenario, every word in 8 U.S.C. § 1153(h)(1) is used and none is superfluous. The same basic analysis works smoothly for derivative beneficiaries of the other family-based categories.

When we attempt to apply the terms of § 1153(h)(3) to derivative beneficiaries of all family-based petitions, however, the result is not equally smooth. Instead, the operative language of § 1153(h)(3) only makes sense in reference to petitions originally filed to classify an alien as the primary or derivative beneficiary of an F2A petition. See Exhibit A. For example, a lawful permanent resident files an I-130 petition on behalf of his wife under F2A. Even though he could file a petition directly on behalf of his minor child, "Sue," he decides to save filing fees and instead lists Sue as a derivative on his wife's F2A petition. When Sue turns twenty-one years old, she is no longer qualified to be treated as a derivative. On that day, the "alien's petition"[6] "automatically converts" to the "appropriate category" and "retains" the original priority date issued upon the receipt of the original (and only) petition. The appropriate category on that date is F2B. Thus, Sue moves seamlessly from one valid "appropriate category" to another valid "appropriate category."

When applied to the facts of Plaintiffs' case, however, the result is not so clear. Although Plaintiffs' children were derivative beneficiaries of the original petition just like Sue in the example above, Plaintiffs' cases are distinguishable because they were not eligible for any other status when the F3/F4 petitions were filed. The original sponsors could not have

[6] The alien's petition is defined as the "petition filed under section 1154 of this title for classification of the alien's parent." 8 U.S.C. § 1153(h)(2).

filed petitions directly for these derivative beneficiaries because the INA does not recognize such a classification. See Bolvito, 527 F.3d at 434. Thus, when Plaintiffs' children aged-out, their petitions "automatically converted" to the only "appropriate category" - termination.

Plaintiffs' arguments that the clear language of the statute calls for the CSPA to apply to the F2B petitions filed separately (and long after) the original petition, misses the mark. The petitions filed by Plaintiffs to classify their children under "(a)(2)(B)" was not with respect to an alien child or a derivative beneficiary. See 8 U.S.C. § 1153(h)(2) (restricting application of "this paragraph" to petitions filed "with respect to a relationship described in subsection (a)(2)(A) of this section" and "with respect to an alien child who is a derivative beneficiary under subsection (d) of this section"). Thus, the "plain language" of 8 U.S.C. § 1153(h)(3) defeats Plaintiffs' claim that the F2B petitions they filed in 2007 and 2008 are even eligible for consideration under this paragraph of the CSPA.

Given the split between the inclusive language but restrictive operation of 8 U.S.C. § 1153(h)(3), this Court must conclude that the statute's meaning is ambiguous.

C. THE AGENCY INTERPRETATION OF 8 U.S.C. § 1153(h)(3) IS REASONABLE.

The next step for this Court in analyzing Plaintiffs' claims is to review the agency's interpretation of the statute to determine "whether the agency's answer is based on a permissible construction of the statute." INS v. Aguirre-Aguirre, 526 U.S. 415, 425, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999). The Court may "not overturn an agency decision at the second step unless it

1 is arbitrary, capricious, or manifestly contrary to the statute."
2 Ramos-Lopez v. Holder, 563 F.3d 855, 860 (9th Cir. 2009)
3 (internal citations omitted). In this case, the agency's
4 interpretation of the statute at issue is found in Matter of
5 Wang, 25 I. & N. Dec. 28 (2009). Published decisions of the
6 Board of Immigration Appeals are accorded Chevron deference
7 because they "give[] ambiguous statutory terms concrete meaning
8 through a process of case-by-case adjudication."
9 Aguirre-Aguirre, 526 U.S. at 425 (internal quotation omitted).

10 The BIA's interpretation of 8 U.S.C. § 1153(h)(3) in Matter
11 of Wang is reasonable; in fact no other interpretation makes
12 sense in view of the full context of the provision. A correct
13 interpretation of this statute can only be made by reviewing the
14 provision in its full context, as was done by the BIA in Matter
15 of Wang. See Gallard v. INS, 486 F.3d 1136, 1140 (9th Cir. 2007)
16 (reading a statute with a view to its place in the overall
17 statutory scheme also requires reading it in "historical
18 context") (citing Southeastern Cmty. Coll. v. Davis, 442 U.S.
19 397, 411, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (1979)).

20 **1. Factors Cited in Matter of Wang Establishing that BIA's Interpretation is Reasonable.**
21

22 On June 16, 2009, the BIA issued a precedential opinion
23 analyzing the CSPA's "automatic conversion" and "priority date
24 retention" provision. See Matter of Wang, 25 I. & N. Dec. 28
25 (BIA Jun. 16, 2009). The facts of the case are as follows: a
26 United States citizen petitioned for her brother ("Wang") to be
27 approved on a fourth preference visa ("F4") with his wife and
28 children listed as derivative beneficiaries. Before a visa

number became available to Wang, one of his daughters turned twenty-one, thus terminating her derivative status under the petition. A visa number subsequently became available to Wang as primary beneficiary, and he obtained legal permanent residency. Thereafter, Wang filed a separate petition on behalf of his unmarried adult daughter to classify her for a category F2B family preference visa. Wang argued that the priority date from the F4 petition filed by his sister should be applied to the F2B petition that he had filed and the F2B petition should "automatically convert" to an "appropriate category." The BIA rejected this interpretation of the CSPA.

The BIA began by noting that the CSPA does not expressly state which petitions qualify for automatic conversion and retention of priority dates. Id. at 33. In light of that ambiguity, the Board looked to the regulatory and statutory context in which Congress enacted the statute.

The BIA began from the premise that, in passing the CSPA, Congress would have intended its language usage to be consistent with the current immigration scheme and past practice, specifically past usage of the terms "automatic," "conversion," and "retention of priority date." Id. at 35. Under statute and regulation, the term "conversion" had consistently been used to mean that a visa petition (and hence the beneficiary's classification) could convert from one valid family-based visa category to another valid family-based visa category without the need for the petitioner to file a new visa petition on behalf of the beneficiary. Id. at 34-36. For example, under 8 C.F.R. § 205.1(h), an F1 petition ("unmarried adult son or daughter of a

United States citizen") would automatically convert to an F3 petition ("married son or daughter of a United States citizen") without the United States citizen parent being required to file a new petition. Prior to the passage of the CSPA, only one conversion from a valid classification to a subsequent valid classification required the filing of a new and separate petition: conversion from F2A to F2B upon the alien turning twenty-one. See Matter of Wang, at 34-35 (discussing automatic conversions under statute and regulation); see also Table of Conversion Provisions, Exhibit B. Instead, for this conversion category, prior to passage of the CSPA, lawful permanent residents were required to file new petitions when their children reached twenty-one years old and no longer qualified for F2A classification. 8 C.F.R. § 204.2(a)(4). The BIA found the similarities between the language used in 8 C.F.R. § 204.2(a)(4) ("In such case, the original priority date will be retained if the subsequent petition is filed by the same petitioner.") (emphasis added) and the language used in 8 U.S.C. § 1153(h)(3) ("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) to be more than coincidence and supported an interpretation that § 1153(h)(3) was designed to bring the F2A conversions in line with conversions between the other classifications. Matter of Wang, 25 I. & N. Dec. at 34.

Similarly, the BIA noted that "retention" or revalidation of priority dates had historically been limited to visa petitions filed by the same family member. Matter of Wang, 25 I. & N. Dec.

at 35; see also 8 C.F.R. 204.2(a)(4) (for conversion from F2A to F2B, the petitioner had to be the same person).

Lacking any clear indication from the statute itself that Congress intended for derivative beneficiaries never to lose a previous priority date, the BIA turned for guidance to legislative history. Id. at 36-38. Repeated discussion in the House of Representatives manifested the intent to allow for retention of child status "without displacing others who have been waiting patiently in other visa categories." Id. at 37 (quoting 148 Cong. Rec. H4989 (statement of Rep. Jackson-Lee), 2002 WL 1610632, at *H4992; 147 Cong. Rec. H2901, 2001 WL 617985, at *H2902). Thus, the BIA concluded that, "[w]hile the CSPA was enacted to alleviate the consequences of administrative delays, there is no clear evidence that it was intended to address delays resulting from visa allocation issues, such as the long wait associated with priority dates." Matter of Wang, at 38.

In light of the regulatory/statutory context and Congressional intent, the Board examined to which category the first Wang petition would have converted at the moment the derivative beneficiary aged-out. When that child reached twenty-one years old, there was no INA preference category for an adult niece of a United States citizen; hence there was no qualifying relationship supporting automatic conversion to another preference category. Matter of Wang at 35. Simply put, no "appropriate category" existed to which the petition could convert. Moreover, there was no basis for retaining the earlier priority date because a different petitioner -- the father, not the aunt -- had filed the second Form I-130. Id. at 35.

Most importantly, if plaintiffs were granted the earlier priority date, the BIA reasoned, the former child beneficiary would "jump" to the front of the line, causing all the individuals behind her to fall further behind in the queue. Matter of Wang at 38. Finally, the BIA remarked that the CSPA was passed so that beneficiaries would not suffer due to governmental administrative delays. The Wangs, however, faced delay that was caused by the high demand for a finite number of visas, not any administrative delay on the Government's part. Id. at 38. The BIA concluded that, absent clear legislative intent to create open-ended grandfathering of priority dates for derivative beneficiaries in the context of a different relationship, to be used at any time, it would refuse to automatically convert Wang's derivative status to a [non-existent] family preference or find fault with the priority date USCIS had given to the second petition. Id. at 39.

Thus, the Board's decision makes clear that 8 U.S.C. § 1153(h)(3) applies only when a legal permanent resident files an F2A petition for children as primary or derivative beneficiaries. If such a child of lawful permanent resident turns twenty-one before a visa number becomes available, his or her F2A petition will automatically convert to an independent F2B petition with the original priority date. Matter of Wang, at 33-38. 8 U.S.C. § 1153(h)(3).

2. Other Factors Establishing that Matter of Wang is Reasonable Interpretation.

1 In addition to the reasons articulated by the BIA in Matter
2 of Wang, there are several other reasons why the BIA's
3 interpretation of 8 U.S.C. § 1153(h)(3) is reasonable.
4 Under the INA and agency regulations, terminated petitions
5 cannot be resurrected by subsequent petitions - regardless of
6 whether they were filed by the same petitioner. 8 C.F.R.
7 § 204.2(h)(2) (cannot reaffirm earlier petition by filing a new
8 one if the earlier one has been revoked or terminated). The CSPA
9 did nothing to change this. See Alonso-Varona v. Mukasey, 319
10 Fed. Appx. 502, 504 (9th Cir. 2009) (where earlier petition had
11 been revoked by marriage but alien had subsequently divorced,
12 nothing in the CSPA would permit him to reclaim the priority date
13 from the revoked 1992 petition). In addition, subsequent
14 petitions filed by a different petitioner lack the privity
15 necessary to claim the earlier priority date. See 8 C.F.R. §
16 204.2(h)(2) (only the same petitioner, filing for the same
17 beneficiary in the same category, can reaffirm earlier unrevoked
18 petition). Bolvito, 527 F.3d at 436 (the CSPA did not authorize
19 an aged-out derivative beneficiary to recapture the priority date
20 when a different petitioner - her mother and the former primary
21 beneficiary - filed a petition on her behalf).
22 Also, despite the INA allowing "automatic" conversions
23 between many classifications, Congress never provided for
24 "delayed" conversions where an alien was ineligible for
25 classification under the INA. This gap in classification is
26 critical because, even in the case of employment-based visas, a
27 later visa petition is not entitled to an earlier visa petition's
28 priority date where the earlier petition has been terminated or

revoked. 8 C.F.R. 204.5(e) (revoked employment petition will not confer a priority date for transfer to other employment petitions and "priority date is not transferable to another alien"). For example, an F2B petition filed on behalf of the son or daughter of a lawful permanent resident is automatically revoked upon the beneficiary's marriage because there is no classification for "married sons or daughters of lawful permanent residents." 8 C.F.R. 205.1 (a)(3)(i)(I). See Exhibit A. Even if the alien subsequently divorces and again becomes eligible for classification under F2B, Congress has not provided authority for the alien to revitalize the earlier petition or to recapture its priority date with a subsequent petition. Likewise, when a lawful permanent resident naturalizes, his or her married son or daughter becomes qualified for a new classification: "married son or daughter of a United States citizen" (F3). Again, Congress has not provided authority for the alien to reclaim the earlier priority date. See 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."). Compare this with the treatment of sons and daughters of United States citizens. They are able to marry and divorce without losing their priority dates because there is always an INA classification for which they are eligible.

Additionally, Courts have been clear that, in passing the CSPA, Congress was 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. Neither purpose is furthered by Plaintiffs' interpretation of the statute: Plaintiffs were not U.S. Citizens or LPRs at the time that the original immigrant petition was filed, and Plaintiffs did not age-out due to administrative delays.

Finally, the language of § 1153(h)(3) cannot be reconciled with granting any relief. First, application of the CSPA to the F2B petition is explicitly prohibited under § 1153(h)(2), as discussed supra. Second, the operational terms of § 1153(h)(3) provide Plaintiffs no relief: the F3 petition could not "automatically convert" since there was no "appropriate category" and the F2B petition cannot "automatically convert" since it is already filed in "appropriate category."

D. PLAINTIFFS' POSITION IS NOT REASONABLE AS IT IGNORES THE OPERATIVE TERMS OF THE STATUTE.

Plaintiffs' proposed interpretation of § 1153(h)(3) does not comport with a literal or contextual reading of the CSPA. Despite the Ninth Circuit's endorsement of a broad reading of the

CSPA generally, the Ninth Circuit and other jurisdictions have consistently declined to expand the CSPA beyond the literal limits established by Congress. Compare Padash v. INS, 358 F.3d 1161 (9th Cir. 2004) ("adopting a restrictive reading of the statute in order to limit relief, would contravene Congress's intent, and the purpose and objective of the law") with Flores del Toro v. Mukasey, 286 Fed. Appx. 425 (9th Cir. 2008) (CSPA does not impute parent's continued presence in the United States to children); Alonso-Varona v. Mukasey, 319 Fed. Appx. 502, 504 (9th Cir. 2009) (CSPA does not revive terminated petitions); Ochoa-Amaya v. Gonzales, 479 F.3d 989, 992-93 (9th Cir. 2007) (CSPA does not encompass the time spent awaiting visa availability); Perez-Olano v. Gonzales, No. 05-03604, 2008 US Dist LEXIS 85675 (C.D. Cal. 2008) (CSPA does not apply to special immigrant juveniles); Catalan-Zacarias v. Ashcroft, 73 Fed. Appx. 284 (9th Cir. 2003) (CSPA did not apply to derivative deportation relief); Corea v. AG, 170 Fed. Appx. 700 (11th Cir. 2006) (CSPA does not apply to NACARA); Midi v. Holder, 2009 WL 1298651 (4th Cir. May 12, 2009) (CSPA does not apply to some Haitian refugees even though Congress affords CSPA protection "to the children of many other refugees"). This Court, similarly, should limit 8 U.S.C. § 1153(h)(3) to its true purpose: allowing the children of lawful permanent residents to automatically convert from one valid derivative classification (F2A) to another valid primary classification (F2B) without requiring the lawful permanent resident to file a new petition.

The critical flaw in Plaintiffs' position is the need to ignore the operative terms of § 1153(h)(3) in order to adopt

1 their position. Under basic tenets of statutory interpretation,
2 no words or phrases should be rendered surplusage. See United
3 States v. Wenner, 351 F.3d 969, 975 (9th Cir. 2003).
4 Plaintiffs argue that aged-out derivative beneficiaries of
5 F3/F4 petitions can transfer the F3/F4 priority date to the F2B
6 petition. Since the wait for an F2B visa is always shorter than
7 for an F3/F4 visa, as soon as the F2B petition is filed, a visa
8 number would be immediately available. If it had been Congress'
9 intent that aged-out derivatives be able to immigrate immediately
10 after their parents, Congress could have dispensed altogether
11 with the complicated formula and conversion provisions of 8
12 U.S.C. § 1153(h). Instead, it could have frozen the age of all
13 derivatives to the date of filing. See 8 U.S.C. § 1151(f)
14 (dispensing with formulas by freezing age of child of United
15 States citizen to date petition filed); 8 U.S.C. § 1158(b)(3)(B)
16 (providing that children will not age-out of derivative
17 classification under asylum petitions). The Ninth Circuit has
18 already declined to interpret the CSPA in such a way as to render
19 its formulas superfluous. See Ochoa-Amaya, 479 F.3d at 993
20 ("Ochoa-Amaya's interpretation would indeed render the formula
21 superfluous, in violation of a basic rule of statutory
22 interpretation.").
23 Plaintiffs' bid to affix the F3/F4 priority date to the F2B
24 petition also ignores the CSPA language mandating that the
25 "alien's petition shall automatically be converted to the
26 appropriate category." 8 U.S.C. § 1153(h)(3). The F2B petition
27 does not need to "convert" because it was originally filed in the
28 appropriate category - F2B. Plaintiffs cannot pick and chose

portions of the petitions and sew them together. Plaintiffs cannot have "retention" without "conversion". There being no basis for automatic conversion, Plaintiffs cannot retain the earlier priority date.

Plaintiffs also ignore the purpose behind "derivative" status and the purpose behind the CSPA. Plaintiff Babomian was never deprived of the opportunity to supervise her son while he was a child - the purpose behind allowing "children" of primary beneficiaries to "accompany or follow to join" their parents. Now that Plaintiffs' children are grown men and women, Plaintiffs are in the same position as all other lawful permanent resident parents seeking to reunite with their adult sons and daughters.

E. EXAMPLES UNDER COMPETING INTERPRETATIONS.

To illustrate the inequity in Plaintiffs' position, a brief comparison is helpful:

In 1999, Mr. X, a United States citizen, filed a petition for his wife, Tania, as primary beneficiary to come to this country as an immediate relative. Her son, age nineteen, was not eligible to immigrate with his mother because immediate relatives may not have derivative beneficiaries. 8 C.F.R. § 204.2(a)(4). In 2000, Tania became a legal permanent resident. Tania filed an F2B petition in late 2001 for her unmarried son. He is still waiting for a visa number to become available.

Meanwhile, Mimi was the beneficiary of a Form I-130 filed in 1995. At the time, her daughter was ten and qualified as a derivative beneficiary. When Mimi immigrated in 2009, however, her daughter was twenty-four. In 2009, as soon as she gained legal residency, Mimi filed an F2B petition for her daughter.

1 Mimi wants to claim the priority date of the 1995 petition
2 because a visa number would be immediately available to her.
3 Mimi's daughter is just as much of an adult as Tania's son.
4 Both are F2Bs. Both parents love their offspring and want them
5 to live close by. Yet, Tania became a legal permanent resident
6 nine years before Mimi and filed her F2B petition eight years
7 before Mimi filed hers.
8 Clearly, Congress did not intend Mimi's daughter to
9 resurrect the earlier priority date because, as a child, she was
10 never really "in line." But for her "child" status, Mimi's
11 daughter did not fit into any of Congress' priority categories
12 back in 1995. Mimi's daughter hung onto her mother's apron
13 strings until they were cut by adulthood. Upon filing of the
14 second petition, Mimi's daughter stepped into an entirely
15 different line with different rules. The Government should
16 consider Tania and Mimi's petitions on a first come, first served
17 basis in compliance with 8 U.S.C. § 1153(e).
18 **II. PLAINTIFFS' CLAIMS FAIL.**
19 The Supreme Court has noted that "the only agency action
20 that can be compelled under the APA is action legally required.
21 This limitation appears in [5 U.S.C. §] 706(1)'s authorization
22 for courts to 'compel agency action <u>unlawfully withheld</u>.'"
23 <u>Norton v. So. Utah Wilderness Alliance</u>, 542 U.S. 55, 63 (2004)
24 (emphasis in the original). The Court reasoned further that the
25 APA simply extended the traditional practice, prior to its
26 passage, of achieving judicial review through a writ of mandamus
27 and that the mandamus remedy was normally confined to enforcement
28

of "a specific, unequivocal command." Id. (internal quotations and citations omitted).

Nothing in the CSPA extends its benefits to F2B petitions. Thus, no authority required Defendants to assign a priority date to the F2B petition different than its 2007 filing date. Neither does the CSPA authorize automatic conversion of Plaintiff Torossian's derivative interest in the F3 petition upon his turning twenty-one - because he was not eligible for any classification at that time and the CSPA did not create a new classification. As a result, Plaintiffs have failed to identify a discrete agency action that the Government was required to take or that was "unlawfully withheld." No relief, by writ of mandamus or declaratory judgment, is warranted under the circumstances.

CONCLUSION

The Defendants respectfully request this Court grant Defendants' motion and enter summary judgment for the Defendants.

DATED: August 31, 2009

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1 **CERTIFICATE OF SERVICE**

2 Case No. SACV 09-0840 JVS(SHx)

3 I hereby certify that on August 31, 2009, a copy of the
4 foregoing "NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT" was
5 filed electronically using the Court's electronic filing system.
6 I understand that notice of this filing will be sent to all
7 parties by operation of the Court's electronic filing system.

8

9

10 */s/ Aaron D. Nelson*
11 AARON D. NELSON
Trial Attorney

12 Attorney for Defendants

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