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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROSALINA CUELLAR DE OSORIO, ET AL
Plaintiffs,
vs.
JONATHAN SCHARFEN, ET AL
Defendants

Case No. 08-CV-0840 JVS (SHx)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DATE: September 28, 2009
TIME: 3:00 p.m.
COURTROOM: 10C

Hon. James V. Selna

Plaintiffs hereby submit the following Memorandum of Points and Authorities in support of their motion for summary judgment:

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Plaintiffs hereby submit the following Memorandum of Points and Authorities in support of their motion for summary judgment.

I. INTRODUCTION

This is an action for declaratory and mandamus relief which centers on the proper interpretation and application of the Child Status Protection Act (CSPA). Pub. L. No. 107-208 § 3, 116 Stat. 927 (2002). Specifically, this action involves the automatic conversion and priority date retention provisions of § 203(h)(3) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1153(h)(3).

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs Rosalina Cuellar de Osorio, Elizabeth Magpantay, Evelyn Santos, Eloisa Liwag

Plaintiffs Rosalina Cuellar de Osorio, Elizabeth Magpantay, Evelyn Santos, and Eloisa Liwag are all lawful permanent residents of the United States, who immigrated based on the visa petitions of United States citizen family members.

Each Plaintiff is the parent of a child or children who were initially included as derivative beneficiaries of the visa petitions filed on her behalf. However, due to numerical restrictions and per-country limitations on immigrant visas available each year, their children turned twenty-one before visa numbers were available. They consequently lost their classification as derivative beneficiaries.

Although Plaintiffs' children can no longer be classified as such under the INA, they have requested benefits from a provision of the CSPA which allows such aged-out derivatives to retain the priority date associated with the initial petition filed on behalf of his or her parent. INA § 203(h)(3). Plaintiffs have filed immigrant visa petitions on behalf of their adult children, and have requested that the original priority dates be assigned to these petitions in accordance with the plain terms of the Act. The petitions of each Plaintiff remain pending with the USCIS.

Plaintiff Ruth Uy and Plaintiff Norma Uy

Plaintiff Ruth Uy is currently in valid F-1 (student) non-immigrant status and was the derivative beneficiary of a visa petition filed on behalf of her mother, Plaintiff Norma Uy. On July 12 2007 Norma Uy submitted an immigrant petition on behalf her daughter. At the same time, Ruth Uy submitted an application for permanent residence (aka "green card" application). Included was a request to retain the February 4, 1981, priority date pursuant to Section 3 of the CSPA, codified at INA § 203(h)(3). The USCIS rejected the I-130 Petition and I-485 application. The rejection notices states that, "based on the information you provided, a visa number does not appear to be available for your immigration category at this time."

Norma Uy re-submitted her immigrant visa petition on behalf of her

daughter to the USCIS California Service Center, again requesting the February 4, 1981, priority date pursuant to Section 3 of the CSPA. This petition is currently pending.

On June 23, 2008, Plaintiffs filed a complaint for declaratory and mandamus relief. They seek an order which would declare the Child Status Protection Act applies in the instant case and allows retention of the original priority dates.

III. OVERVIEW OF FAMILY – SPONSORED IMMIGRATION

Immigration on the basis of a family relationship with a citizen or lawful permanent resident of the United States is one of the primary ways for foreign nationals to immigrate to the United States.[1] The family-sponsored immigration categories are subject to a maximum allotment of 480,000 visas each year, less the number of immigrant visas issued to immediate relatives, and plus the number of unused employment-sponsored immigrant visas, if any. See INA § 201(c). The Immigration and Nationality Act establishes a minimum of 226,000 available immigrant visa numbers for the family-sponsored preference categories.

Certain family members of U.S. citizens are considered "immediate relatives," and are not subject to the numerical limitations. Immediate relatives

1 Other means include immigration through an employer's petition, asylum, and the diversity visa lottery. INA §§ 203(b), 209 and 203(c).

include the children of U.S. citizens, spouses of U.S. citizens, and parents of U.S. citizens who are at least twenty-one years of age. INA § 201(b)(2)(A)(i). There is no similar provision for the "immediate relatives" of lawful permanent residents.

For those individuals who are not "immediate relatives," the Immigration and Nationality Act establishes four family-sponsored immigrant visa preference categories which are subject to numerical limitations. INA § 203(a). These categories are:

> a) *First family-sponsored preference category*: Unmarried adult sons and daughters of United States citizens. INA § 203(a)(1).
>
> b) *Second family-sponsored preference category*: Spouses and children, and unmarried sons and daughters of lawful permanent residents. INA § 203(a)(2)(A) & (B).
>
> c) *Third family-sponsored preference category*: Married sons and daughters of U.S. citizens. INA § 203 (a)(3).
>
> d) *Fourth family-sponsored preference category*: Brothers and sisters of adult U.S. citizens. INA § 203 (a)(4).

A spouse or child of the alien beneficiary of a family-sponsored immigrant visa petition is entitled to the same status and priority date as the principal alien beneficiary. INA § 203 (d). The spouse or child is considered a "derivative beneficiary" of the visa petition. In order to meet the definition of a "child" for immigration purposes, the individual must be unmarried and under the age of

twenty-one. INA § 101(b). Once an individual reaches the age of twenty-one or marries, he or she can no longer be considered a "child" for immigration purposes.

Immigrant visas are made available in the order in which a visa petition is received by the USCIS. Because the demand for immigrant visas in each family sponsored preference category far exceeds the statutory allotment each year, beneficiaries and their immediate family members often experience long waiting times before they are eligible to receive an immigrant visas.

Filing an immigrant visa petition (Form I-130, Petition for Alien Relative) with the USCIS is the first step in the family-sponsored immigration process. The receipt date of the I-130 petition is commonly referred to as the "priority date" because it indicates the beneficiary's "place in the line" to receive an immigrant visa. See 8 C.F.R. § 204.1(c). Beneficiaries of visa petitions must monitor the progression of their priority dates on the U.S. State Department's Visa Bulletin.[2]

The Visa Bulletin shows when a visa number is available for beneficiaries of approved visa petitions. Only beneficiaries who have a priority date earlier than the cut-off date on the current Visa Bulletin may be allotted a visa number. This is

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2 Current and archived visa bulletins are available on the State Department website: http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html (Accessed August 5, 2009).

commonly referred to as having a "current priority date." Once a beneficiary has a "current priority date," she may take the second step of applying for adjustment of status (aka "green card") if she resides in the United States, or for an immigrant visa at the appropriate U.S. Consulate if she resides abroad.

IV. THE CHILD STATUS PROTECTION ACT

The CSPA was enacted in order to address the predicament of certain individuals who were classified as children under the INA when an immigrant visa petition was filed, but who turned twenty-one and subsequently lost their eligibility for immigration benefits.

In its original form, H.R. 1209, the CSPA only applied to visa petitions filed for immediate relatives as defined by the INA. The Senate then expanded the bill to include protections for prospective immigrants in other immigration categories. 148 Cong. Rec. S5560 (2002).

In its final version, the CSPA's various provisions apply to a broad range of categories:

1) Sons and daughters of United States citizens. See Pub. L. No. 107 – 208 § 2.

2) Unmarried sons and daughters of permanent residents. Id. at § 3.

3) Children of family and employment-sponsored immigrants and

diversity lottery winners. Id.

4) Children of asylees and refugees Id. at §§ 4 – 5.

The provisions of the Child Status Protection Act apply to visa petitions and applications for permanent residence pending on or after the date of enactment (August 6, 2002). The CSPA applies to beneficiaries of petitions approved before August 6, 2002 only "if a final determination has not been made on the beneficiary's application for an immigrant visa or adjustment of status to lawful permanent residence pursuant to such approved petition." CSPA § 8, 116 Stat. at 930.

At issue in the case at hand is the provision regarding automatic conversion and priority date retention found at Section 3 of the CSPA. Section 3 of the CSPA is entitled "Treatment of Certain Unmarried Sons and Daughters Seeking Status as **Family-Sponsored, Employment-Based and Diversity Immigrants**." 107 P.L. 208, 116 Stat. 927 (2002) (emphasis added). This provision reads as follows:

> Section 203 of the Immigration and Nationality Act (8 U.S.C. 1153) is amended by adding at the end the following:

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

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

(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date

on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by

(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

(2) Petitions described.-- The petition described in this paragraph is—

(A) **with respect to a relationship described in subsection (a)(2)(A)**, a petition filed under section 204 for classification of an alien child under subsection (a)(2)(A); or

(B) **with respect to an alien child who is a derivative beneficiary under subsection (d)**, a petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c).

(3) Retention of priority date.-- If the age of an alien is determined under paragraph (1) to be 21 years of age or older f**or the purposes of subsections (a)(2)(A) and (d),** the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition."

107 P.L. 208, 116 Stat. 927 (2002) § 3; codified at INA § 203(h)(3) (emphasis added).

The first subsection establishes a formula for determining when a derivative beneficiary may be able to retain status as a "child" despite reaching twenty-one years of age. If the resulting calculation brings the beneficiary under the age of twenty-one, she will still be considered a "child" provided she seeks to acquire permanent residence within one year of visa availability. INA § 203(h)(1).

The second subsection defines which petitions are covered by Section 3 of

the CSPA. This subsection references petitions filed under all family-based preference categories, as well as the employment- based and diversity visa categories. INA § 203(h)(2).

The final subsection provides for the retention of the original priority date for derivative beneficiaries who cannot preserve their status as “children” under the CSPA’s formula. INA § 203(h)(3).

Because each subsection of INA § 203(h) refers to "**subsections (a)(2)(A) and (d)**" of INA § 203, it is necessary to read and understand both of these provisions as well.

INA § 203(a)(2)(A) provides as follows:

> (a) Preference Allocation for Family-Sponsored Immigrants. - Aliens subject to the worldwide level specified in section 201(c) for family-sponsored immigrants shall be allotted visas as follows:
>
> > (2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens. - Qualified immigrants –
> >
> > > (A) who are the spouses or children of an alien lawfully admitted for permanent residence.

INA § 203(a)(2)(A) thus refers to spouses and children of permanent residents who are petitioned under the family-based 2A category.

The second section referenced is INA § 203(d), which provides as follows:

> Treatment of family members –
>
> > A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E)

> of section 101(b)(1)[3] shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, 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.

INA § 203(d) thus states that the spouses and children of principal beneficiaries of family, employment, and diversity lottery visas are entitled to permanent residence in the same category as the principal.

For example, if a U.S. citizen brother petitions his sister for a green card, not only does the sister obtain permanent residence in the family-based fourth preference category, but her husband and children also qualify under the same category. Similarly, if a person qualifies for a green card through employment or through the visa lottery, his spouse and children also qualify under the same category as the principal.

The issue presented in the instant case is whether an aged-out derivative beneficiary of a third family-sponsored preference category may utilize the automatic conversion and priority date retention provisions of INA § 203(h)(3).

V. ARGUMENT

A. The priority date retention and automatic conversion clause of the CSPA

[3] INA § 101(b)(1) defines "child" for purposes of immigrating to the U.S. In general, a child is defined as a person who is under 21 years of age and who is unmarried.

clearly applies to aged-out derivatives of all family, employment, and diversity categories.

Proper statutory construction begins with the words of the statute, which should be given their ordinary and natural meaning. *Bailey v. United States*, 516 U.S. 137, 144 – 45 (1995); *INS v. Cardoza-Fonesca*, 480 U.S. 421, 431 (1987). Courts should give effect to every word of the statute. *Bowsher v. Merck & Co.*, 460 U.S. 824, 833, 103 S. Ct. 1587, 75 L. Ed. 2d 580 (1983) (applying the "settled principle of statutory construction that we must give effect, if possible, to every word of the statute"); *see also, United States v. Wenner*, 351 F.3d 969, 975 (9th Cir. 2003) (noting the fundamental principle of statutory construction that a statute should not be construed to render certain words or phrases mere surplusage).

The Ninth Circuit has recognized that, "when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion. This rule applies with additional force in the immigration context, where doubts are to be resolved in favor of the alien." *Akhtar v. Burzynski*, 384 F.3d 1193, 1200 (9th Cir. 2004); *see also Padash v. INS*, 358 F.3d 1161, 1173 (9th Cir. 2004).

The priority date retention provision of § 203(h)(3) is clear and unambiguous. Each of the three subsections of § 203(h) reference petitions filed

under INA §§ 203(a)(2)(A) **and** (d). Indeed, § 203(h)(2), entitled "Petitions described," states that "the petition described in this paragraph is" a petition filed for classification of an alien child under section (a)(2)(A), or a petition filed for a derivative beneficiary under subsection (d). The reference to "this paragraph" clearly refers to section 203(h) as a whole. By the consistent and repeated reference to sections (a)(2)(A) **and** (d), it is plain that each provision of section 203(h) applies to derivative beneficiaries in the family, employment and diversity preference categories.

Although there have been numerous decisions which discuss the legislative objectives and other aspects of the CSPA, to date no federal court has issued a published decision addressing whether § 203(h)(3) applies to an aged-out derivative of a family-based third preference petition. However, the Board of Immigration Appeals (BIA) has issued non-precedential decisions, and more recently published a precedential decision that squarely address the applicability of INA § 203(h)(3) to derivative beneficiaries of the fourth family-based preference category. *See*, *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009)

Prior to *Wang*, the BIA issued two non-precedent decisions that applied the terms of § 203(h)(3) to aged-out beneficiaries of fourth –preference visa petitions. On June 16, 2006, the BIA issued a non-precedent decision in *Matter of Maria T. Garcia*, 2006 WL 2183654 (BIA June 16, 2006).

Maria Garcia was the derivative beneficiary of a fourth-preference family-based petition filed on behalf of her mother on January 13, 1983. A visa number did not become available until thirteen years later, by which time Ms. Garcia was twenty-two years old. Upon becoming a permanent resident, Ms. Garcia's mother filed a new I-130 petition on her behalf.

Ms. Garcia argued that she retained the 1983 priority date from the original fourth-preference petition, and was thus immediately eligible for permanent residence. A three-member panel of the BIA agreed. The BIA reasoned that:

> [W]here an alien was classified as a *derivative* beneficiary of the original petition, the 'appropriate category' for purposes of section 203(h)(3) is that which applies to the 'aged-out' derivative vis-à-vis the *principal* beneficiary of the original petition…The respondent was (and remains) her mother's unmarried daughter, and therefore the 'appropriate category' to which her petition was converted is the second-preference category of family-based immigrants …Furthermore, the respondent is entitled to retain the January 13, 1983, priority date that applied to the original fourth-preference petition…"

Matter of Maria T. Garcia, 2006 WL 2183654 at p. 4 (BIA June 16, 2006) (emphasis in original).

Subsequently, the Board decided *Matter of Elizabeth F. Garcia*, 2007 WL 2463913 (BIA July 24, 2007). In this case, which had been remanded from the Fifth Circuit Court of Appeals based on an unopposed motion, a single member of the Board reversed its earlier determination that Elizabeth Garcia could not keep the priority date associated with the original fourth-preference petition filed on

behalf of her mother. The BIA adopted the reasoning of *Maria Garcia*, and applied the provisions of § 203(h)(3) to her case.

However, the BIA rejected this reasoning in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009). In *Wang*, the BIA held that the automatic conversion and priority date retention provisions of the Child Status Protection Act do *not* apply to an alien who ages out of eligibility for an immigrant visa as the derivative beneficiary of a fourth-preference visa petition, and on whose behalf a second-preference petition is later filed by a different petitioner.

The BIA's reasoning in *Matter of Wang* impermissibly conflicts with the plain language of the statute and is owed no deference. See, *Padash*, 358 F.3d at 1168. Without any meaningful analysis, the BIA summarily states that, "the language of section 203(h)(3) does not expressly state which petitions qualify for automatic conversion and retention of priority dates." *Wang*, 25 I&N Dec. at 33. The BIA thus concludes that the language is ambiguous, and they must therefore look to legislative intent to determine the proper application of § 203(h)(3). This conclusion overlooks the statute's inclusion of INA §§ 203(a)(2)(A) **and** (d) discussed in detail above. Thus the BIA's conclusion that the CSPA does not "expressly state which petitions qualify for automatic conversion and retention of priority dates" is wrong.

After ignoring the plain and unambiguous language of the statute, the BIA

moves on to a discussion of other statutory provisions dealing with automatic conversion and priority date retention. *Wang*, 25 I&N Dec. at 34. For instance, the decision cites to 8 C.F.R. § 204.2(a)(4), which allows the aged-out derivative of a second preference petition to retain his original priority date in connection with a subsequent petition filed by the same lawful permanent resident parent. The BIA also cites to the provisions of 8 C.F.R. § 204.2(i), which allows for automatic conversion upon naturalization of the petitioner or upon marriage of the beneficiary.

Based on these provisions the BIA concludes that, "the term 'conversion' has consistently been used to mean that a visa petition converts from one visa category to another, and the beneficiary of that petition then falls within a new classification without the need to file a new visa petition. Similarly, the concept of 'retention' of priority dates has always been limited to visa petitions filed by the same family member." *Wang*, 25 I&N Dec. at 35.

This selective recitation of examples overlooks other instances where the statute and regulations allow for retention of priority dates without requiring the same petitioner. There are several such provisions in the INA and the federal regulations. For instance, the beneficiary of a petition filed by an abusive spouse may retain his or her priority date in connection with a new self petition. 8 C.F.R. § 204.2(h)(2). Similarly Section 421(c) of the U.S. Patriot Act, P.L. 107 – 56, 115

Stat. 272 (2001) allows beneficiaries to file self-petitions and retain their priority dates if their petitions were revoked or terminated as a result of a specified terrorist activity. This provision applies to all family-based *and* employment-based petitions. In fact, this provision also allows the beneficiary of a fiancée visa petition under INA § 101(a)(15)(K), or an application for labor certification under INA § 212(a)(5)(A) to file a self-petition with the USCIS.

In the employment-based context, retention of priority dates can and often does involve different petitioners. 8 C.F.R. § 204.5(e) allows beneficiaries in the first, second or third employment based categories to retain the priority date of an approved petition for any subsequently filed petition for classification under INA § 203(b)(1), (2), or (3). Under this section the beneficiary may have not only a new petitioner, but may also have a petition in a completely different employment-based preference category, and still retain his original priority date. Finally, under 8 C.F.R. § 204.12(f)(1) physicians with approved national interest waivers under INA § 203(b)(2) may change employers and retain the priority date associated with their initial visa petition.

Such broad application of priority date retention is hardly a new concept under the immigration laws. Until 1976, immigrants who were born in the Western Hemisphere or Canal Zone were termed "Western Hemisphere immigrants" and were not subject to the established preference system for family

and employment-based immigrants. This changed with the Immigration and Nationality Act Amendments of 1976. Pub. L. No. 94 – 571, 90 Stat. 2703, 2707. With the 1976 Amendments, Western Hemisphere immigrants were placed in the establish preference system thereby losing a significant advantage in terms of waiting times.

However, a savings clause in the 1976 law allowed Western Hemisphere immigrants to retain their priority dates as long as it was established prior to January 1, 1977. Id. at § 9(b). Under this savings clause, as long as the noncitizen established a priority date prior to January 1, 1977, he or she could use that priority date for the purpose of *any* preference petition subsequently approved on his or her behalf. See 9 FAM 42.53 Note 4.1.

Moreover, the spouse or child of the Western Hemisphere immigrant could use the same priority date in connection with a future preference petition. For instance, an adult child covered by the Western Hemisphere priority date provisions could use his father's 1976 priority date in connection with a new petition filed by an employer today. Or the priority date could be used in connection with a family-based petition filed by a U.S. citizen sibling.

This longstanding provision, together with the numerous other provisions cited above, demonstrates that the BIA erred in concluding that priority date retention "has always been limited to visa petitions filed by the same family

member." The concept of priority date retention is not as limited as the BIA contends in *Wang*.

As further support for its holding in *Wang*, the BIA examines legislative history to determine the proper application of § 203(h)(3). *Wang*, 25 I&N Dec. at 36 – 38. But the specific statements cited by the BIA have nothing to do with § 203(h)(3). For instance, the BIA cites to comments made by Representatives Sheila Jackson-Lee, Sensenbrenner and Smith. *Id.* at 37, n. 10, citing 147 Cong. Rec. H2901 (statement of Rep. Jackson-Lee), 2001 WL 617985, at H2902. These statements were made *prior to* the *Senate* revisions that added Section 203(h)(3) to the CSPA, and thus they can provide no guidance on the proper application of the provisions at hand. *See*, 148 Cong. Rec. S. 5558 (June 13, 2002).

The House version of the bill focused exclusively on children of United States citizens. The Senate expanded the CSPA significantly. When the bill was returned to House for further consideration and agreement, several Representatives noted that the Senate version made important and appropriate additions to the prior House version of the CSPA. 148 Cong. Rec. H4990 (July 22, 2002). For instance, Representative Sensenbrenner stated that the Senate bill addresses three additional age-out situations, including:

> Case number two: Children of family and employer-sponsored immigrants and diversity lottery winners. Under current law, when an alien receives permanent residence as a preference visa recipient or a winner of the

> diversity lottery, a minor child receives permanent residence at the same time. After the child turns 21, the parent would have to apply for the child to be put on the second preference B waiting list.

Mr. Sensenbrenner continued that, "[b]ringing families together is a prime goal of our immigration system. H.R. 1209 facilitates and hastens the reuniting of legal immigrants' families. It is family-friendly legislation that is in keeping with our proud traditions." *See*, 148 Cong. Rec. H4991 (Statement of Rep. Sensenbrenner).

It is clear that the BIA in *Wang* cited inapplicable legislative history, and also selectively cited to the Congressional record in order to support its narrow view of the CSPA. This was in error.

Finally, the BIA's decision highlights supposed equitable concerns with enabling the beneficiary *Wang* and similarly situated non- citizens to retain the original priority date under the CSPA. The BIA speaks in terms of such non-citizens "cutting in line," "displacing other aliens," and "jump[ing] to the front of the line." *Wang*, 25 I&N Dec. at 38.

This reasoning clearly misstates the impact of § 203(h)(3). As noted by one commentator:

> "It takes a particularly twisted sort of formalism to describe [Wang's] father's desire to save her place in line in front of those who stated their immigration process much later – perhaps more than 10 years later (say, in 2003 or 2004) – as an attempt to 'displace other aliens who have already been in … line for years before her,' just because the line that Xiuyi Wang is

now waiting in is technically different from the line she waited in, to no avail, for more than twelve years." See, David A. Isaacson, "BIA Rejects *Matter of Maria Garcia* in Precedent Decision Interpreting the Child Status Protection Act," http://www.cyrusmehta.com/News.aspx?SubIdx=ocyrus20096221176 (June 22, 2009).

A better reasoned view of this provision's effects is that it allows aged-out derivatives to avoid **another** lengthy wait for visa availability. *See*, e.g. *Baruelo v. Comfort*, 2006 U.S. Dist. LEXIS 94309, pages 10 – 11 (N.D. Ill Dec. 26, 2009) ("This [203(h)(3)] means that when a child beneficiary of a visa application turns twenty-one even after factoring in the CSPA's ameliorative age calculation, she does not end up 'at the end of a long waiting list,' and does not have to file a new petition, but rather keeps her original filing date even after being moved to a lower preference category").

In the instant case, Plaintiffs and their children patiently waited for many years while their immigration cases progressed. For Plaintiffs Rosalina Cuellar de Osorio and her son Melvin, this process began on May 5, 1998 when the third preference petition was initially filed by Rosalina's U.S. citizen father. For Plaintiffs Norma Uy and Ruth Uy, the process began nearly twenty-nine years ago, on February 4, 1981, when Norma Uy's U.S. citizen sister filed a visa petition on her behalf. For Plaintiffs Elizabeth Magpantay, Evelyn Santos, and Maria Eloisa Liwag and their children, the process began on January 29, 1991 with the filing of

the third preference petition by their U.S. citizen father. Although the Plaintiffs' adult children have aged-out and could not immigrate with the rest of their families, the CSPA's provision regarding priority date retention was meant to avoid such derivative beneficiaries having to once again move to the back of the line to receive immigrant visas.

In sum, the BIA's decision in *Matter of Wang* ignores the plain language of the statute and is owed no deference. See, *Akhtar v. Burzynski*, 384 F.3d 1193, 1202 (9th Cir. 2004). The plain language § 203(h)(3) is unambiguous and clearly benefits derivatives of all family, employment and diversity preference categories. And as noted by the Ninth Circuit, "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." *Padash v. INS*, 358 F.3d 1161, 1174 (9th Cir. 2004).

B. **The USCIS' rejection of Ms. Ruth Uy's application for permanent residence is arbitrary and conflicts with the law because she benefits from the conversion and priority date retention provisions of the Child Status Protection Act.**

Under the plain terms § 203(h)(3), Ms. Uy has automatically converted from the derivative beneficiary of a family-based fourth preference petition, to the beneficiary of a family-based second preference petition. She additionally retains the original priority of February 4, 1981 associated with the fourth preference

petition filed on her mother's behalf. This priority date was and is current for the second preference category, which renders Ms. Uy immediately eligible for status as a lawful permanent resident. Thus the USCIS' rejection of Ms. Uy's application for adjustment of status on July 23, 2007, stating that a visa number was not available, was in error.

C. The USCIS has failed to adjudicate Plaintiffs' I-130 petitions in accordance with INA § 203(h)(3).

The remaining Plaintiffs in this matter were direct beneficiaries of visa petitions filed in the third preference category (for married sons and daughters of U.S. citizens), and the fourth preference category (for brothers and sisters of U.S. citizens). These petitions fall within INA § 203(d), and are thus specifically included in the priority date retention section of § 203(h)(3). Their children were derivative beneficiaries of these visa petitions who can no longer be considered "children" under the CSPA's formula found at INA § 203(h)(1). However they are entitled to retain the priority dates associated with these original petitions. The Defendants' refusal to accord the proper priority dates to Plaintiffs' pending immigrant visa petitions is thus arbitrary and capricious, an abuse of discretion, and contrary to § 203(h)(3).

//

VI. CONCLUSION

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

Dated: August 31, 2009

Respectfully submitted,
Carl Shusterman

/s Amy Prokop
AMY PROKOP
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2009, a copy of the foregoing "Plaintiffs' Memorandum of Points and Authorities in Support of 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. Parties may access this filing through the Court's system.

Dated: August 31, 2009

Respectfully submitted,

/s Amy Prokop
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