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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROSALINA CUELLAR DE OSORIO; ELIZABETH MAGPANTAY; EVELYN Y. SANTOS; MARIA ELOISA LIWAG; NORMA UY and RUTH UY Plaintiffs, v. JONATHAN SCHARFEN, Acting Director of the United States Citizenship and Immigration Services; MICHAEL CHERTOFF, Secretary U.S. Department of Homeland Security; CONDOLEEZA RICE, Secretary of State Defendants.	Case No. SACV 08-840-JVS(SHx) PLAINTIFFS' MEMONRANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR ALTERNATIVE MOTION TO HOLD IN ABEYANCE Date: December 8, 2008 Time: 1:30 p.m. Courtroom: 10C

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

Plaintiffs hereby submit their Memorandum of Points and Authorities in Opposition Defendants' Motion to Dismiss or Alternative Motion to Hold in Abeyance Pursuant to *Costelo et al. v. Chertoff, et. al.*

I.

INTRODUCTION

Plaintiffs in this action seek an order which would compel the Defendants to follow the plain terms of the Child Status Protection Act (CSPA) and apply the proper priority dates to their pending visa petitions. See Pub. L. No. 107-208 § 3, 116 Stat. 927 (2002), codified at § 203(h)(3) of the Immigration and Nationality Act (INA).

The Plaintiffs are primarily lawful permanent residents of the United States, who immigrated based on the visa petitions of United States citizen family members.[1] Due to numerical restrictions and per-country limitations on immigrant visas available each year, Plaintiffs' children turned twenty-one before visa numbers were available to them. Plaintiffs' children thus lost their classification as derivative beneficiaries of the visa petitions filed on behalf of their parents. *See* 8 U.S.C. §1153(d) (providing spouses and children with classification as derivative beneficiaries of visa petitions); 8 U.S.C. § 1101(b) (defining a "child" for purposes

1 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.

of the INA).

Although Plaintiffs' children can no longer be classified as such under the INA, they nevertheless benefit 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. 8 U.S.C. § 1153(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 Defendants have failed to apply the appropriate priority dates to the immigrant visa petitions in contravention of the law.

II.

Plaintiffs Oppose A Stay of These Proceedings

The Defendants urge this Court to follow the order in *Costelo et al. v. Chertoff, et al*. (No. SACV08-688) and hold this matter in abeyance. Def.'s Mot. Dismiss, p. 5 (Sept. 22, 2008). The *Costelo* case similarly involves the proper interpretation and application of 8 U.S.C. § 1153(h)(3). In an order dated August 25, 2008, this Court stayed the *Costelo* action for a period of 180 days to allow the Board of Immigration Appeals (BIA) an opportunity to issue decisions on similar cases currently pending before that administrative body - *Matter of Wang* (A088 484 947), and *Matter of Patel* (A089 726 558). *Costelo et al. v. Chertoff et al*.

(August 25, 2008 Order).

Landis v. North American Co., 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936) establishes the general principal that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." However, the Court in *Landis* cautioned that "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Id.*

The Plaintiffs in the instant matter oppose a stay of these proceedings for several reasons. First, although Defendants' argue that the Plaintiffs in the instant matter are "putative class members in *Costelo*," (Def.'s Motion to Dismiss, p. 3) this Court **denied** the motion to certify the class proposed in the *Costelo* matter. *Costelo et al. v. Chertoff et al*. (August 25, 2008 Order) ("Costelo's motions to amend the class definition and to certify the class are therefore denied without prejudice. If appropriate, Costelo may renew those motions or submit revised motions after the expiration of the stay"). Thus no class currently exists, and it is unknown at this juncture whether the Plaintiffs in the *Costelo* matter will in fact renew the motion for class certification.[2] Plaintiffs in this case should not be forced to wait and see how the litigants in another matter chose to proceed with

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2 Of course, even if a class is eventually certified Plaintiffs may opt out of class

their case.

Secondly, a stay is inappropriate "unless it appears likely the other proceedings will be concluded within a reasonable time." *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 864 (9th Cir. 1997). As this Court noted in its August 25, 2008 Order in *Costelo*, there is no way to determine or approximate when the BIA may issue its decisions in the *Wang* and *Patel* cases. Moreover, the BIA may well choose *not* to issue precedential decisions in these matters. Although agency interpretation could be useful to the Court and the parties, it is not at all clear that the proceedings before the BIA will be completed within a reasonable time.

Third, a prolonged stay of these proceedings will cause significant hardship to the Plaintiffs and their families. *Landis* cautions that, "if there is even a fair possibility that the stay . . . will work damage to some one else," the stay may be inappropriate absent a showing by the moving party of "hardship or inequity." *Landis*, 299 U.S at 255.

Further delays in this case risk added anxiety and hardship to the Plaintiffs and their families. Plaintiffs are currently separated from their adult children, who had to remain in their native countries while the rest of their families immigrated to the United States. At present, the Plaintiffs have been separated from their adult

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certification.

children for a range of one and a half to two and a half years. Plaintiffs do not know when their children may be able to join their families in the United States. Plaintiffs' adult children also may not marry without cancelling the visa petitions filed on their behalf.

Contrary to Defendants' assertions, Plaintiffs do not seek to "move their children to the head of the line." Def.'s Motion to Dismiss, p. 3 (September 22, 2008). 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-eight 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 light of the uncertainty regarding when the BIA will issue decisions on

the matters pending before it, and given the hardship a further delay will cause Plaintiffs and their families, an indefinite stay of these proceedings is not appropriate. Should the Court follow its order in *Costelo* and hold this case in abeyance, such a stay should be of limited duration.

III.

PLAINTIFFS CLEARLY FALL WITHIN THE PROVISIONS OF THE CHILD STATUS PROTECTION ACT

Defendants urge dismissal under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). Defendants argue that, "[u]nder 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." Def.'s Motion to Dismiss, p. 9 (Sept. 22, 2008). Rather, Defendants reason that this section applies only to "sons and daughters of Legal Permanent Residents who age-out while awaiting adjudication of their petitions." Def.'s Motion to Dismiss, p. 10 (Sept. 22, 2008). This assertion is contradicted by the plain language of the CSPA, as well as legislative history and Congressional intent.

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 Child Status Protection Act (CSPA) was enacted in order to address the predicament of certain individuals who were classified as children under the Immigration and Nationality Act (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.

At issue in the case at hand is the provision regarding 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).

CSPA Section 3 contains three subsections. Each of these three subsections references 8 U.S.C. §§ 1153(a)(2)(A), **and** 1153(d). 8 U.S.C. § 1153(a)(2)(A) is the provision relating to spouses or children of lawful permanent residents. 8 U.S.C. § 1153(d) refers to spouses or children of the remaining family-based preference categories, as well as employment- based and diversity immigrants.

The first subsection establishes a formula for determining when derivative

beneficiaries may be able to retain their status as "children" despite reaching twenty-one years of age. The formula allows derivative beneficiaries to subtract the number of days the visa petition was pending with the USCIS from their age on the date the priority date becomes available. 8 U.S.C. § 1153(h)(1).

The second subsection defines which petitions are included within the CSPA's provisions. It includes petitions filed under all family-based preference categories, as well as the employment- based and diversity visa categories. 8 U.S.C. § 1153(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. See 8 U.S.C. § 1153(h)(3). This subsection, entitled "Retention of Priority Date," reads:

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

107 P.L. 208, 116 Stat. 927 (2002) § 3; codified at 8 U.S.C. § 1153(h)(3) (emphasis added).

Defendants' restrictive interpretation of § 1153(h)(3) would only stand if

Congress had limited its applicability to petitions filed under 8 U.S.C. § 1153(a)(2)(A). However, Congress specifically included a reference to 8 U.S.C. § 1153(d), which covers all family-sponsored categories, employment-based categories, and diversity immigrants.

The Plaintiffs in this matter were 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 8 U.S.C. § 1153(d), and are thus specifically included in the priority date retention section of 8 U.S.C. § 1153(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 8 U.S.C. § 1153(h)(1). However they are entitled to retain the priority dates associated with these original petitions. Because the Plaintiffs are plainly covered by the terms of the CSPA, Defendants' motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) must fail.

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IV.

PRUDENTIAL EXHAUSTION DOES NOT REQUIRE DISMISSAL OF PLAINTIFFS' CLAIMS

The Defendants also urge dismissal under the doctrine of prudential exhaustion. Def.'s Motion to Dismiss, p. 11 – 15 (Sept. 22, 2008). When a statute requires exhaustion, a petitioner's failure to pursue administrative remedies deprives the court of jurisdiction. *Reid v. Engen*, 765 F.2d 1457, 1462 (9th Cir. 1985). Even in the absence of a statutory mandate, a court may find prudential exhaustion appropriate where: (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review. *El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 747 (9th Cir. 1999); *see also Castillo-Villagra v. INS*, 972 F.2d 1017, 1024 (9th Cir. 1992) (concluding that prudential exhaustion did not apply where the INS had already taken the challenged position in a number of similar cases).

Although this Court cited to the doctrine of prudential exhaustion in the *Costelo* order, it did not find that dismissal of the action was warranted. Rather, the Court stayed the proceedings for a limited time in order to allow the BIA to issue a

precedential decision on the issue at hand. *Costelo et al. v. Chertoff et al*. (August 25, 2008 Order). Similarly, prudential exhaustion does not require dismissal of the instant action.

The legal questions raised in this matter do not require further development of the administrative record. The Plaintiffs are seeking an order from this Court directing the USCIS to apply the original priority dates to their pending visa petitions on behalf of their adult children. The facts involved in this case are not disputed. The position of the USCIS as to the application of 8 U.S.C. § 1153(h)(3) has been made abundantly clear. *See*, Def.'s Motion to Dismiss, Docs. 12-6, 12-7 (Sept. 22, 2008) (Request for Precedent Decision in *Matter of Patel* and *Matter of Wang*).

There have been numerous decisions which discuss the legislative objectives of the CSPA. *See, e.g*. *Padash v. INS*, 358 F.3d 1161, 1173 (9th Cir. 2004) ("The legislative history makes it clear that the Act was intended to address the often harsh and arbitrary effects of the age-out provisions under the previously existing statute"); *In re Avila-Perez*, 24 I&N Dec. 78, at 14 – 18 (BIA 2007) (discussing the legislative intent and the effective date of the CSPA); *Rodriguez v. Gonzales*, No. CV04-8671 DSF, slip op. at (C.D. Cal. filed May 31, 2006) (discussing the applicability of the CSPA to petitions filed prior to the August 6, 2002 enactment date); *Gomes v. INS*, No. CV05-3767 SJO, slip op. at 8 – 10 (C.D. Cal. Mar. 22,

2006); *Baruelo v. Comfort*, 2006 U.S. Dist. 94309 at 8 – 10, and 28 - 29 (N.D. Ill. Dec. 29, 2006).

These cases do not directly address the issues presented in the instant case; however non-precedential decisions of the BIA contain useful analysis and weigh in favor of the Plaintiffs in this matter. The BIA has issued two non-precedent decisions which support the Plaintiffs' interpretation of the CSPA provision at issue here.[3] In both decisions, the BIA applied the terms of § 1153(h)(3) to aged-out beneficiaries of fourth –preference visa petitions.

On June 16, 2006, the BIA issued a non-precedent decision in the *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:

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3 The Defendants have cited to a third unpublished decision, *In re: (A79 638 092, Name Redacted)*, (BIA September 7, 2007), however the undersigned was unable to locate that decision.

> [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 the *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 8 U.S.C. § 1153(h)(3) to her case.

While a precedential decision from the BIA regarding 8 U.S.C. § 1153(h)(3) could prove useful to the Court, the legal issue involved in this matter is

straightforward: does the CSPA require the USCIS to apply the original priority dates of the third and fourth family-based preference petitions to the Plaintiffs' currently pending visa petitions? The plain terms of the statute, and the legislative intent of the CSPA, require an affirmative answer to this legal question. Under such circumstances, the doctrine of prudential exhaustion does not support dismissal of the case in its entirety.

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CONCLUSION

The Defendants' motion to dismiss must fail as Plaintiffs fall squarely within the class of individuals Congress meant to assist in passing the CSPA. Moreover, the doctrine of prudential exhaustion does require dismissal of the instant action.

The Plaintiffs contend that holding this case in abeyance could cause significant hardship to the Plaintiffs and their families. However, should the Court follow is order in *Costelo*, it would be appropriate to have the duration of the stay expire concurrently with that of *Costelo*, which is set to expire on February 21, 2009.

Dated: November 24, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2008, a copy of the foregoing "Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss or Alternative Motion to Hold in Abeyance" in the matter of Rosalina Cuellar de Osorio et al. v. Jonathan Scharfen et al. was filed electronically using the Court's electronic filing system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Dated: November 24, 2008

Respectfully submitted,

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