EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

IN THE MATTER OF:
Petition for Alien Relative, Form I-130
Zhou Min WANG – Petitioner
Xiuyi WANG –Beneficiary

File Number: WAC-06-269-52406

BRIEF OF ZHOU MIN WANG AND XIUYI WANG ON ISSUE OF RETENTION OF PRIORITY DATE ON THEIR I-130 PETITION

SUMMARY:

This case comes before the Board on certification by the Director of the California Service Center, United States Citizenship and Immigration Services ("CIS"). In its March 25, 2008 decision, CIS concluded that the petition for alien relative (I-130) filed by Petitioner on behalf of Beneficiary should not be able to retain/recapture the priority date of a previously filed petition on behalf of Petitioner in 1992. Xiuyi Wang (Beneficiary)was a derivative beneficiary on the 1992 visa petition filed on behalf of her mother. The Wangs contend that under the Child Status Protection Act ("CSPA"), they are entitled to retention of the 1992 priority date. After Beneficiary turned 21, the original visa petition that was filed under the family 4th preference category automatically converted to the second preference category as the unmarried child of a lawful permanent resident. Pursuant to INA § 203(h)(3), The Wangs are entitled to the priority date of 1992 petition.

According to the Notice of Certification, Zhou Min Wang and Xiuyi Wang have 10 days from receipt of the Notice to submit a brief to the Board of Immigration Appeals. On March 27, 2008, counsel for the Wangs received the Notice of Certification and Memorandum of Certification via e-mail. On April 1, 2008, undersigned counsel received the Notice and Memorandum by mail. Based on the Notice of Certification, Zhou Min Wang and Xiuyi Wang are filing the instant brief.

FACTS:

Zhou Min Wang is a citizen of the People's Republic of China. His daughter, Xiuyi Wang, was born on November 6, 1982.

On December 28, 1992, Zhou Min Wang's sister filed a visa petition (Form I-130) on his behalf. The petition was filed in the fourth preference (F-4) category. Xiuyi Wang was a derivative beneficiary on the 1992 I-130 petition. This petition was approved by the Legacy Immigration and Naturalization Service on February 24, 1993.

An immigrant visa number became available for the first time in February 2005. Thus, this was the first opportunity that the Wangs had to file their applications for lawful permanent residence. On October 3, 2005, Zhuo Min Wang, the primary beneficiary on the I-130 petition, was admitted to the United States as a lawful permanent resident under the F-4 classification. However, Xiuyi Wang was unable to come to the United States at that time because she was over 21. Additionally, Ms. Wang was not covered under the Child Status Protection Act.

On September 12, 2006, Zhou Min Wang filed an I-130 petition on behalf of Xiuyi Wang as the unmarried child (over 21 years of age) of a lawful permanent resident. Thus, Xiuyi Wang's current I-130 petition is under the second preference-B category. The priority date for this category is not current. However, when filing the I-130, counsel requested that the petition be given the priority date of December 28, 1992 pursuant to the Child Status Protection Act. If the petition is given the December 28, 1992 priority date, then

Xiuyi Wang would be immediately eligible for an immigrant visa that would allow her to join her family in the United States.

The I-130 petition has been approved. However, CIS denied the request for the December 28, 1992 priority date. CIS concluded that the appropriate priority date was September 12, 2006.

ISSUE:

Whether Zhou Min Wang and Xiuyi Wang are entitled to the priority date of December 28, 1992 on their visa petition under INA § 203(h)(3)?

ARGUMENT:

The instant visa petition should be given the priority date of the first I-130 petition where Xiuyi Wang was derivative beneficiary. The automatic conversion provisions of CSPA dictate that the earlier priority date is warranted. This argument is supported by an unpublished Board case. See Matter of Garcia, A79 001 587, 2006 WL 2183654 (BIA June 16, 2006). CIS acknowledges that the Garcia decision is inconsistent with its decision in the instant case.

The Child Status Protection Act, Pub. L. 107-208 (Aug. 6, 2002) was enacted on August 6, 2002. The purpose of the Act was to protect children who aged-out during the long process of applying for lawful permanent residence. The provisions of the Act should be read broadly. Padash v. INS, 358 F.3d 1161, 1168-74 (9th Cir. 2004).

Zhou Min Wang is not alleging that she falls under INA § 203(h)(1) as she no longer qualifies as a child. However, CSPA is applicable. INA § 203(h)(3) states:

> "If the age of the 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."

The instant petition shall automatically be converted to the 2B category and Ms. Wang is entitled to the priority date from the original petition.

In Matter of Garcia, the Board addressed a nearly identical situation as in the instant case. The difference was that Garcia was in removal proceedings and applying for adjustment of status before the immigration court. In that case, respondent was a derivative beneficiary of a visa petition filed by his aunt on behalf of his mother in 1983 (F-4 petition). Respondent was 9 years old at the time. However, a visa number did not become available until respondent was 22 years old. Subsequently, respondent's mother filed a 2B petition on her behalf. Respondent argued that she retained her mother's

original 1983 priority date for purposes of establishing her eligibility in the second-preference category.

In Garcia, the Board addressed whether respondent was eligible to adjust status under INA § 203(h). Since respondent was found to be 21 years or older, the issue was to ascertain the "appropriate category" to which her petition is automatically converted. The Board held that "where 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." Thus, the "appropriate category" to which Garcia's petition was converted was the 2B category and respondent retained the 1983 priority date that applied to the original petition.

The Board should follow the holding in Garcia. This is consistent with the plain language and intent of CSPA. The focus should be on the child's relationship with the original primary beneficiary not the original petitioner and derivative beneficiary. In the instant case, the appropriate priority date is the date the original petition was filed. Under INA § 203(h)(3), CIS' decision is incorrect. The appropriate category for conversion is the F-2B category and the Wangs retain the 1992 priority date, which is now current.

CONCLUSION

CIS erroneously concluded that the visa petition should not be accorded the December 28, 1992 priority date of the original F-4 petition. Under INA § 203(h)(3), Zhuo Min Wang and Xiuyi Wang are entitled to the priority date of the original petition.

Respectfully submitted this 4 day of April, 2008.

Scott Bratton
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3150 Chester Ave.
Cleveland, Ohio 44114
(216) 566-9908

CERTIFICATE OF SERVICE

I certify that I sent a copy of the foregoing by regular first-class mail to Jason R. Grimm, Service Center Counsel-Laguna Niguel, United States Citizenship and Immigration Services, 24000 Avila Rd, Suite 2117, Laguna Niguel, CA 92677.

on the 4 day of April, 2008.

Respectfully submitted,

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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services

Notice of Certification

TO: Zhouu Min WANG (Petitioner)
C/o
Scott Bratton, Esq. of Margaret Wong & Assoc. Co., LPA
3150 Chester Ave.
Cleveland, OH 44114
(216) 566-9908

File number: WAC-06-269-52406

Date: March 25, 2008

IN THE MATTER OF:
Petition For Alien Relative, Form I-130
Zhou Min WANG – Petitioner
Xiuyi WANG - Beneficiary

The following action has been taken in this case:

1. ☑ This case has been certified for review to the Board of Immigration Appeals (Board). Within 10 days after receipt of this notice, you may submit to this office a brief or written statement for the Board to consider. If you desire oral argument before the Board, you must send a prompt request by letter to the Board at 5107 Leesburg Pike, Suite 2000, Falls Church, Virginia 22041. (703) 605-1007.

2. ☐ In accordance with 8 CFR 245.13(m)(2) or 8CFR 245.15(r)(3), this case has been certified for review to the Immigration Court located at _____ so that an immigration judge may conduct a hearing to determine whether this decision should be made final. Within 10 days after receipt of this notice, you may submit to this office a brief or written statement for the Court to consider. Regardless of whether you submit a brief, you will be notified by the Immigration Court of the date, time and location of the hearing.

3. ☐ This case has been certified for review to:

   A. ☐ The Administrative Appeals Office (AAO), U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, N.W., Rm. 3000, Washington, DC 20529.

   B. ☐ The following Service official:

   Located at:

Within 30 days of this notice, you may submit **to the office where your case was sent**, a brief or written statement. Any request for oral argument before the AAO must be made within the 30-day period. If you want, you may waive the 30-day period by writing to the office where your case was sent.

Christina Poulos
Director, California Service Center

2006 WL 2183654 (BIA)

** THIS IS AN UNPUBLISHED DECISION THAT CANNOT BE CITED **

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

IN RE: MARIA T. GARCIA

File: A79 001 587 - Houston

June 16, 2006

IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT:
Lawrence E. Rushton, Esquire
ON BEHALF OF DHS:

Gerrie Zhang
Assistant Chief Counsel

CHARGE:
Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Adjustment of status

The respondent appeals from an Immigration Judge's February 11, 2005, decision denying her application for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i). The Department of Homeland Security (the "DHS"), formerly the Immigration and Naturalization service (the "INS"), opposes the appeal. The appeal will be sustained in part and the record will be remanded to the Immigration Judge for further proceedings.

The respondent, a 32-year-old native and citizen of Mexico, concedes that she is inadmissible to the United States as charged, but claims that she is eligible to adjust her status to that of a lawful permanent resident pursuant to section 245(i) of the Act. Section 245(i)(1) provides, in pertinent part, that certain aliens who are beneficiaries of immigrant visa petitions filed on or before April 30, 2001, may apply to the Attorney General for adjustment of status upon payment of $1,000. Upon receiving the alien's application and the required sum, the Attorney General is authorized to adjust the alien's status to that of a lawful permanent resident

if, among other things, "an immigrant visa is immediately available to the alien…." Section 245(i)(2)(B) of the Act.

The respondent contends that a visa is immediately available to her as a derivative beneficiary of a visa petition, filed in 1983, that classified her mother as a fourth-preference family-based immigrant (i.e., as the sister of a United States citizen). *See* section 203(a)(4) of the Act, 8 U.S.C. § 1153(a)(4). According to the respondent's appellate brief, her aunt filed a visa petition on behalf of her mother on January 13, 1983, when the respondent was 9 years old, and a visa number became available to her mother on the basis of the petition in June of 1996, when the respondent was 22 years old. Although the respondent is now 32 years old, she asserts that she remains her mother's "child," for purposes of establishing her derivative status under the aforementioned visa petition, by operation of section 3 of the Child Status Protection Act, Pub. L. No. 107-20, 116 Stat. 927 (2002) ("CSPA"), codified at section 203(h) of the Act, 8 U.S.C. § 1153(h).

Section 203(h)(1) of the Act provides in pertinent part that a determination as to whether a derivative beneficiary of a visa petition continues to qualify as a "child" (i.e., as a person under 21 years of age) is to be made by reference to "the age of the alien on … 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 … the number of days in the period during which the applicable petition … was pending." According to the respondent, applying the formula set forth at section 203(h)(1) results in a determination that she is 17 years old and still her mother's "child" for purposes of establishing derivative status.

Alternatively, the respondent contends that even if she is 21 years old or older within the meaning of section 203(h)(1), a visa is nonetheless immediately available to her by operation of section 203(h)(3) of the Act, which provides that "[i]f the age of an alien is determined under [section 203(h)(1)] to be 21 years of age or older …, 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." The respondent asserts that if she is 21 years old or older, then the "appropriate category" to which she was "automatically … converted" is the second-preference category of family-based immigrants (i.e., the unmarried daughter of her mother, a lawful permanent resident). Section 203(a)(2) of the Act. Indeed, in 1997 the respondent's mother actually filed a visa petition on the respondent's behalf, classifying her in that preference category. Furthermore, the respondent contends that under section 203(h)(3) She "retains" her mother's original January 1983 priority date for purposes of establishing her eligibility for a visa in the second-preference category.

The immigration Judge concluded that the respondent was no longer her mother's "child" for purposes of section 203(h)(1) because she did not file her application for adjustment of status within 1 year after a visa number became available in connection with her mother's visa petition. Furthermore, the Immigration Judge concluded that the 1983 fourth-preference petition did not automatically convert to a second-preference petition with respect to the respondent because section 203(h)(3), which provides for such automatic conversion, did not yet exist in 1997 (when the respondent's mother filed a second-preference petition on the

respondent's behalf).

On appeal, the respondent argues that the Immigration Judge misconstrued section 203(h)(1) of the Act when she interpreted the phrase "sought to acquire the status of an alien lawfully admitted for permanent residence" as referring to the formal "filing" of an application for adjustment of status. Furthermore, she claims that she is eligible for automatic conversion to the second-preference category pursuant to section 203(h)(3) because the affirmative application for adjustment of status that she filed on the basis of her approved second-preference petition was still pending before the former INS when the CSPA went into effect in August of 2002.

As a threshold matter, we conclude that we need not address the first issue raised by the respondent on appeal, i.e., whether the Immigration Judge erred by equating the statutory phrase "sought to acquire the status of an alien lawfully admitted for permanent residence" with the concept of "filing" a formal application for adjustment of status. For the following reasons, we conclude that the respondent would have failed to retain the status of her mother's "child," within the meaning section 203(h)(1) of the Act, *even if* she had applied for adjustment of status within 1 year after a visa number became available to her mother.

As noted previously, the respondent's age for purposes of section 203(h)(1) is equal to her actual age on the date when a visa number became available to her mother, reduced by whatever number of days comprised "the period during which the applicable petition … was pending." It is undisputed that a visa number became available to the respondent's mother in June of 1996, when the respondent was 22 years old. Furthermore, the record reflects that the underlying visa petition was approved by the former INS on the day it was filed-January 13, 1983. (See attachment "A" to the DHS' Brief on Respondent's Ineligibility for Adjustment of Status, filed in Immigration Court on January 21, 2005). Applying the section 203(h)(1) formula to this set of facts yields the conclusion that the respondent is 22 years old (i.e., her age in June of 1996 (22 years)), reduced by the number of days in the period during which the visa petition was pending (i.e., 0 days). Accordingly, the respondent is no longer deemed to be her mother's "child" for purposes of establishing her status as a derivative beneficiary of her mother's visa petition.

The respondent's assertion that she is 17 years old for purposes of section 203(h)(1) appears to derive from her assumption that the statutory reference to "the period during which the applicable petition … was pending" refers to the period of time between the filing of the visa petition and the date when a visa number became available to her mother. But that assumption is mistaken. In fact, the relevant period is the period between the filing of the visa petition *and its approval;* a visa petition that has been approved by the DHS is no longer "pending" for any purpose within the meaning of the CSPA. In this connection, it must be kept in mind that the CSPA was enacted to prevent alien children from "aging out" as a result of unnecessary administrative processing delays by the DHS. Yet the 161-month delay between January 1983 (when the former INS approved the fourth-preference visa petition filed on behalf of the respondent's mother) and June 1996 (when a visa number became available to the respondent's mother on the basis of that petition) was not attributable to unnecessary administrative processing delays at the former INS, but was instead a function of the fact that the respondent's mother had been approved for classification as an immigrant in an oversubscribed

preference category that was (and remains) subject to restrictive annual numerical limits. The CSPA was not intended to override these annual numerical limits or otherwise alter the preference allocation for family-sponsored immigrants, which are set by statute. *See generally* section 203(a) of the Act. Because there was no administrative processing delay in the approval of her mother's fourth-preference visa petition, there is simply no basis for "reduc[ing]" the respondent's age below that which she actually possessed when a visa number became available to her mother. Having concluded that the respondent is not presently entitled to a visa number as a derivative beneficiary of her mother's fourth-preference visa petition, we now turn to the question whether a visa is immediately available to her by operation of the automatic conversion provision at section 203(h)(3) of the Act.

As previously noted, section 203(h)(3) provides that "[i]f the age of an alien is determined under [section 203(h)(1)] to be 21 years of age or older …, 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." We have determined that the respondent is 21 years of age or older for purposes of section 203(h)(1), and therefore our present task is to ascertain the "appropriate Category" to which her petition is automatically converted. We agree with the respondent that where an 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-a-vis the *principal beneficiary* of the original petition.[FN1]

In this instance, the principal beneficiary of the original petition was the respondent's mother, who became a lawful permanent resident of the United States once a visa number became available to her in 1996. 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, i.e., the unmarried sons and daughters of lawful permanent residents. Furthermore, the respondent is entitled to retain the January 13, 1983, priority date that applied to the original fourth-preference petition, and therefore a visa number under the second-preference category is immediately available to the respondent.[FN2]

As noted previously, the Immigration Judge declared that section 203(h)(3) was inapplicable to the respondent because the CSPA, from which section 203(h)(3) is derived, was not intended to apply retroactively to petitions for classification filed before August 6, 2002, the CSPA's effective date. In this regard, the Immigration Judge apparently focused on the respondent's eligibility for a visa number through the visa petition that her mother filed on her behalf in 1997. However, the respondent's entitlement to a visa number under section 203(h)(3) does not derive from the 1997 visa petition, but rather from the original 1983 petition, which is "automatically … converted" to a second-preference petition upon an administrative determination that she is 21 years old or older for purposes of section 203(h)(1).

Furthermore, the CSPA expressly provides that the amendments made therein "apply to any alien who is a … beneficiary of … a petition for classification under section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) approved before [August 6, 2002] but 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. The present respondent was a beneficiary of her mother's fourth-preference petition, which was approved prior to August 6, 2002, and the respondent's subsequent application for adjustment of status was filed with the DHS in 1997 but *remained pending* until 2004, after the CSPA had become effective. Thus, section 203(h)(3) was applicable with respect to the respondent's original adjustment application and remains effective to the renewed application that she has filed in removal proceedings.

In conclusion, we have determined that an immigrant visa is not immediately available to the respondent as a derivative beneficiary of her mother's fourth-preference visa petition, but that such a number is available to her in the second-preference category by virtue of section 203(h)(3) of the Act. Accordingly, a visa is immediately available to the respondent within the meaning of section 245(i)(2)(B) of the Act. Therefore, the respondent's appeal will be sustained in part and the Immigration Judge's decision pretermitting her application for section 245(i) adjustment will be vacated. The record will be remanded for further consideration of the respondent's adjustment application and for entry of a new decision.

ORDER: The appeal is sustained in part and the Immigration Judge's decision is vacated to the extent that it pretermitted the respondent's application for adjustment of status.

FURTHER ORDER: The record is remanded for further proceedings consistent with the foregoing decision and for entry of a new decision.

<Signature>

FOR THE BOARD

FN1. Where the aged-out beneficiary was the principal beneficiary of the original petition, the appropriate category is that which applies to the beneficiary vis-a-vis the original *petitioner.*

FN2. According to the State Department's visa bulletin, second-preference family-based visas are currently available to the unmarried daughters of Mexican lawful permanent residents whose priority dates precede November 1991. (http://travel.state.gov/visa/frvi/bulletin/bulletin_2924.html).

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