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UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

BOARD OF IMMIGRATION APPEALS

In The Matter Of:	Case No. A88-484-947
Mr. Zhou Min Wang,(Petitioner)	
Ms. Xiuyi Wang, (Beneficiary)	
In Visa Certification Proceedings	

SUPPLEMENTAL BRIEF REGARDING THE APPLICATION OF SECTION 203(h)(3) OF THE IMMIGRATION AND NATIONALITY ACT

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I.

ISSUE PRESENTED FOR REVIEW

Whether, under section 203(h)(3) of the Immigration and Nationality Act ("INA"), Ms. Xiuyi Wang, as an adult beneficiary of a Petition for Alien Relative ("I-130 #2"), is entitled to benefit from the priority date previously accorded to her father, Mr. Zhou Min Wang ("Mr. Wang"), on the Petition for Alien Relative ("I-130 #1") filed by his sister, Ms. Yu Lian Wang ("Y. Wang") on his behalf.

II.

STATEMENT OF JURISDICTION

The Board of Immigration Appeals ("Board") may review this petition pursuant to Title 8, Code of Federal Regulations ("C.F.R.") § 1003.1(c) This regulation permits any "duly authorized officer of the Service" to certify any case "arising under paragraph (b) of this section" to the Board. Id. The regulation at 8 C.F.R. § 1003.1(b)(5) permits appeals from decisions filed in accordance with section 204 of the Immigration and Nationality Act ("INA"). In this case, the I-130 arises under INA § 204 and has been certified by the Service Center Director, a duly authorized officer. Jurisdiction over this case is therefore proper.

III.

PROCEDURAL HISTORY

On September 5, 2006, Mr. Wang filed the I-130 #2 on behalf of X. Wang as the unmarried daughter of a lawful permanent resident ("LPR"). On February 6, 2008, both Mr. Wang and X. Wang filed suit[1] in the United States District Court for the Northern District of Ohio seeking relief related to their interpretation of INA § 203(h)(3).[2] Recognizing that several unpublished cases[3] addressing the application of INA § 203(h)(3) had issued from the Board since enactment of the provision, the parties to

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[1] Mr. Wang alleged federal jurisdiction pursuant to 28 U.S.C. § 1331 (Federal Question), 28 U.S.C. § 2201 (Declaratory Judgment Act), 28 U.S.C. § 1361 (Mandamus statute), and the Administrative Procedures Act.

[2] Wang v. Poulos, No. CV08-00294 (N.D. Ohio, dismissed April 8, 2008)

[3] Matter of Maria T. Garcia, A79-001-587 (BIA July 16, 2006) (unpublished) (granting priority date retention to aged-out derivative); Matter of Elizabeth Francisca Garcia, A77-806-733 (BIA July 24, 2007) (unpublished) (initially denying priority date retention, but reversing on motion to reconsider); Matter of Francisco Drilon Yang, A79-638-092 (BIA September 7, 2007) (unpublished) (finding that "section 203(h)(3)... does not permit the respondent to retain the priority date of his father's immediate relative petition..."); Matter of Stuti Chaitanya Patel, A88-124-902 (BIA April 18, 2008) (unpublished) (indicating disagreement with USCIS interpretation but denying applicant's appeal on other grounds).

the Wang v. Poulos litigation reached an agreement to dismiss the federal litigation in order to present arguments on this issue before the Board. On April 8, 2008, the district court entered an order dismissing the action. In response to the Notice of Certification ("I-290C") filed with the Board on April 28, 2008, Mr. Wang filed a brief in support of his position with the Board on June 10, 2008. In response to Mr. Wang's brief USCIS filed a motion before the Board entitled, "Request For Precedent Decision; Request For Oral Argument; Request For Consideration By Three Member Panel; Motion To Accept Supplemental And/Or Reply Brief" on July 21, 2008. Pursuant to the Motion to Accept Supplemental and/or Reply Brief, USCIS submits this agency brief in order to fully address the historical background of the Child Status Protection Act ("CSPA"), the inadequacies of Mr. Wang's statutory interpretation of INA § 203(h), and to advance what USCIS concludes to be the appropriate statutory interpretation of INA § 203(h) when this provision is read in conjunction with other provisions of the INA and within the context of the concerns Congress sought to address through the enactment of the CSPA.

IV.

STATEMENT OF FACTS

On December 28, 1992, Y. Wang filed I-130 (#1) on behalf of her brother, Mr. Wang, classifying him as the brother of a United States citizen pursuant to INA § 203(a)(4). This I-130 (#1) was accorded a priority date of December 28, 1992 and was later approved on February 25, 1993. On both December 28, 1992 and February 25, 1993, the Department of State Visa Bulletin ("Visa Bulletin") indicated that the family based fourth preference immigrant visas were available only for those petitions with priority dates before 1983.[4] At the time that I-130 (#1) was approved, X. Wang was 10 years old.

In February of 2005, the Visa Bulletin indicated the availability of family based fourth preference visas for those petitions filed on or before January 8, 1993. In February of 2005, X. Wang was already 22 years of age. By the time that Mr. Wang immigrated to the United States as a Lawful Permanent Resident

[4] The December 1992 Visa Bulletin indicates that 4th preference visas were available only to those petitions filed before August 15, 1983. The February 1993 Visa Bulletin indicates that 4th preference visas were available only to those petitions filed before October 15, 1983.

Alien ("LPR") on October 3, 2005, X. Wang was nearly 23 years old, "and unable to come to the United States."[5] [6] [7] [8]

Since X. Wang was over 21 years of age at the moment of Mr. Wang's approval for LPR status, she was not able to benefit from INA § 203(d), because she no longer satisfied the definition of "child" under INA § 101(b). Accordingly, the consulate denied her entry into the United States. Mr. Wang and X. Wang have not challenged the determination and decision by the Department of State that X. Wang was not eligible to immigrate as a derivative beneficiary following to join a principal beneficiary.

On September 5, 2006, almost one year after he acquired LPR status, Mr. Wang filed a Petition for Alien Relative (I-130 #2) on behalf of X. Wang. As the unmarried daughter of an LPR, visa availability for X. Wang is governed by the family based second preference "B" visa category. In September of 2006, immigrant visas were only available for petitions with priority dates on or before October 1, 1994. Currently, second preference "B" immigrant visas are only available for those petitions filed on or before April 8, 1997. Since a second-preference visa is currently unavailable, X. Wang remains unable to immigrate to the United States.

In correspondence dated September 1, 2006 and April 17, 2007, Mr. Wang submitted a written request that the I-130 (#2) filed on behalf of X. Wang retain the priority date previously accorded to his I-130 (#1). On March 25, 2008, USCIS issued a decision approving the I-130B filed by Mr. Wang on behalf of X. Wang and assigning the September 5, 2006 priority date based upon the receipt of the I-130 (#2). The Director denied the request that the I-130 (#2) be accorded the priority date previously accorded the I-130 (#1) filed by filed by Ms. Yu Lian Wang on behalf of Mr. Wang. On April 28, 2008, the Director certified her decision to the Board for consideration.

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[5] Petitioner Brief at 2.

[6] INA § 203(d) – if at the time that Mr. Wang immigrated to the United States, X. Wang qualified as a child pursuant to INA § 101(b), she would, "be entitled to the same status... if accompanying or following to join."

[7] Department of State Guidance, Child Status Protection Act: ALDAC #2, Ref 02 State 163054, 123775 – in cases involving a derivative seeking to follow to join a principal who adjusted in the United States, the derivative can benefit from the CSPA if the principal filed a Form I-824 for the derivative within one year of a visa becoming available (i.e., within one year of the case becoming current or petition approval, whichever is later).

[8] Mr. Wang did not file the I-824 on behalf of X. Wang.

V.

ARGUMENT

At issue are the scope and application of INA § 203(h)(3)'s age calculations and the benefits that flow to derivative beneficiaries. The technical framework is complex, but nonetheless clear, consistent, and unambiguous. Prior Board decisions, including Matter of Maria T. Garcia, have analyzed only selected parts of subsection (h). A full application and analysis are necessary in order to properly construe the statutory framework.

As the argument below explains in more detail, the correct interpretation of INA § 203(h) is that while most derivative beneficiaries may initially fit within the age-calculating provisions of the subsection, the CSPA age calculator has a limited time window once an immigrant visa becomes available. The priority date retention provisions are likewise limited to beneficiaries who (1) are entitled to use the age calculator, and (2) began as qualifying children (including derivative children) of LPRs under § 203(a)(2)(A) and subsection (d). This analysis falls squarely in line with the legislative history, similar provisions within CSPA, and the broader context of the INA.

Mr. Wang's decontextualized argument that the text of INA § 203(h)(3) broadly provides for the transfer of his I-130 (#1) priority date to his formerly derivative daughter's I-130 (#2) ignores the principles of statutory construction and advocates an absurdly overbroad result.

A. X. Wang does not meet the requirements of a § 203(h)(1) age determination because he failed to seek timely status.

X. Wang's case cannot survive the required analysis of § 203(h) because her situation lies outside the scope of the statute. Under certain circumstances, § 203(h) provides that beneficiaries may have their age determined via a formula that subtracts the time an "applicable petition" was pending. The statute specifically describes a wide range of petitions that are considered an "applicable petition" for age-counting purposes, including family- or employment-based petitions filed under INA § 204 for which the alien child is a derivative beneficiary. § 203(h)(2)(B). X. Wang clearly "was" a derivative beneficiary of I-130 (#1), but whether she "is" a beneficiary depends on the strictness of the Board's construction of such a phrase.

Assuming that X. Wang is, indeed, a derivative, the applicability of I-130 (#1) to the age formula is the only requirement of § 203(h) that X. Wang might meet. The statute unequivocally states that the alien's age on the date when an immigrant visa number became available may be taken into account "only if the alien has sought to acquire the status of an alien lawfully admitted for permanent resident status within one year of such availability." § 203(h)(1)(A) (emphasis added). As acknowledged by Mr. Wang's brief, X. Wang did not seek status in a timely manner. Therefore, X. Wang does not meet the requirements of subparagraph (h)(1)(A), so there is no starting age from which to deduct the pendency of any "applicable petition" that (h)(2)(B) might afford her, and she cannot benefit from the age calculation that would have allowed her to accompany or follow-to-join her father.[9]

B. The text of § 203(h)(3) limits priority date retention only to those seeking conversion of (a)(2)(A) and (a)(2)(A) derivative classifications.

Even if the age determination were made and X. Wang was found to be over 21, the plain text of the statute precludes the limitations on priority date retention and category conversion. Mr. Wang's contention that I-130 derivatives may retain priority dates under subparagraph (h)(3) skips the required analysis and impermissibly ignores or distorts the plain text.

Age determinations under § 203(h)(3) are made "for purposes of subsection (a)(2)(A) and (d)." This phrase begins the very first sentence of § 203(h)(1) and is reiterated in the priority date retentions of § 203(h)(3). Its meaning must therefore be analyzed and applied.

Given the unambiguous indication that § 203(h) has some tight limits, the issue turns to the scope of those limits. Despite its difficulties, the "for purposes of subsections (a)(2)(A) and (d)" is unambiguous and cannot be glossed over or ignored. Under ordinary canons of statutory construction,

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[9] Furthermore, because Wang did not fulfill the requirement to seek acquire status within one year, she may not be entitled to seek the benefit of a retained priority date.

"and" is to be read as conjunctive and every phrase must be given meaning and full effect. [10] Departure from these principles may be justified where other jurisprudential principles may prevail.

A close reading of "for purposes of subsections (a)(2)(A) and (d)" in § 203(h)(3) makes clear that only a limited subclass of derivative beneficiaries will ultimately benefit from priority date retention. The statute does not say "(a)(2)(A) or (d)." Instead, the use of "and" strongly indicates that only those whose classifications are related to the 2A preference are eligible for priority date retention.

A short examination of three of Congress' alternatives is instructive. First, in setting this limit, it is true that Congress could have omitted the "(d)," imposing the strict limit of allowing only 2A beneficiaries to convert. However, this would cut off families who, for example, filed one 2A-preference I-130 for a spouse and, instead of filing separately for the children, added them as derivatives under (d). The conjunctive language allows for the possibility, under, INA § 203(a)(2)(A), the child of an LPR may be both primary or derivative beneficiaries of a petition. Finally, in promulgating (h)(4), which applies the prior three paragraphs of § 203(h) to self-petitioners, Congress could have specified which self-petitioners were covered. This was not necessary because this provision refers only to derivative VAWA claims, which, read in conjunction with § 204(a)(1)(D)(i)(III), turns former derivative abused children of LPRs into self-petitioners.[11] Mr. Wang's expansive interpretation ignores so much of the plain text that it cannot be considered reasonable.

C. An expansive interpretation of § 203(h) is inconsistent with other statutory and regulatory provisions.

1. INA § 203(h)(3) Codifies Existing Regulation and Agency Practice

INA § 203(h)(3) instructs that the conversion of "the alien's petition" will take place automatically, and that the alien shall retain the original priority date issued upon receipt of the original petition." Agency regulations further illustrate the narrow scope of the statute. When compared, INA §

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[10] See, e.g., In re First Magnus Financial Corp., 390 B.R. 667 (Bankr. D. Ariz. June 20, 2008) (quoting 2A Sutherland Statutes and Statuory Construction § 47:27 (Thomson Reuters/West 7th ed. 2008))

[11] A parallel provision is found for children of citizens at § 201(f)(4).

203(h)3) and 8 C.F.R. § 204.2(a)(4) bear striking similarities. The respective sections provide in pertinent part:

> 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 subsection (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.** INA § 203(h)(3) (emphasis added)

> Derivative beneficiaries. ...**A child accompanying or following to join a principal alien under section 203(a)(2) of the Act** may be included in the principal alien's second preference visa petition. The child will be accorded second preference classification and the same priority date as the principal alien. However, **if the child reaches the age of 21 prior to the issuance of the visa to the primary alien parent, a separate petition will be required. In such case, the original priority date will be retained if the subsequent petition is filed by the same petitioner.** Such retention of priority date will be accorded only to a son or daughter previously eligible as a derivative beneficiary under a second preference spousal petition. 8 C.F.R. § 204.2(a)(4) (emphasis added).[12]

INA § 203(h)(3) is essentially the codification of an already established regulatory practice. The language of "for the purposes of (a)(2)(A) and (d)" is remarkably similar to the preexisting language of 8 C.F.R. § 204.2(a)(4), which addresses the derivative beneficiaries of petitions filed under INA § 203(a)(2)(A). Previously under the regulation, an intending immigrant child could be included as a derivative on a petition filed for a spouse under INA § 203(a)(2)(A). If, however, the child turned 21 years old before the primary intending immigrant spouse gained status, that aged-out child would be able to retain the priority date of the INA § 203(a)(2)(A) petition by the mere filing of a subsequent petition. This clause within INA § 203(h)(3) reflects the language of the regulations which provide that "the original priority date will be retained if the subsequent petition is filed by the same petitioner."

This interpretation of INA § 203(h)(3) avoids the difficulty of identifying the "appropriate category" when considering the automatic conversion which is related to the relationship between the petitioner and the beneficiary.[13] In the case of a derivative child under INA § 203(a)(2)(A), who aged out and was ineligible for a derivative benefit under INA § 203(d), such son or daughter may otherwise

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[12] First introduced on August 19, 1991 (56 FR 41084)

proceed based upon their relationship as an unmarried son or unmarried daughter under INA § 203(a)(2)(B), while still retaining the precise familial relationship with the petitioner.

2. CSPA's limited extension of processing times and conversion to a small subclass does not override the interest of granting visas in the order and the category in which petitions were filed.

X. Wang's circumstances are not addressed or ameliorated by INA § 203(h)(3). Even though we have already shown why X. Wang cannot even reach § 203(h)(3), Mr. Wang wishes us to adopt an interpretation where any alien who is over 21 years old may benefit from its priority date retention provisions, or perhaps, a "conversion" of the I-130 fourth preference into an I-130 second preference petition. INA § 203(h)(3) instructs that the conversion of "the alien's petition" will take place automatically, and that the alien shall retain the original priority date issued upon receipt of the original petition."

The first clash with this interpretation that I-130 (#2) will automatically convert, which leaves open-ended policy implications concerning timeliness. Here, Mr. Wang seemingly urges the utilization of the I-130 (#2) filed for X. Wang as a means of revitalizing an approved I-130 (#1) for which immigrant status was available. Such treatment of the subsequent I-130 not only ignores the visa category friction described below, but it also raises concerns including whether time limitations condition the clause "the alien's petition." The section could not have been written with the intention urged by Mr. Wang because an open-ended application of the clause would contravene paragraph (h)(1) and the interests of timely administration. Assuming no other legal barriers, Mr. Wang's proposed application of INA § 203(h)(3) fails because of long-standing considerations to visa number impact after automatic conversion to an appropriate category and/or the retention of a priority date. Generally, Congressional intent is that visas be allocated in order of receipt, stating that, "[I]mmigrant visas made available under this subsection (a) or (b) of this section **shall be issued to eligible immigrants in the order in which a petition in behalf of such immigrant is filed....**" INA § INA § 203(e) (emphasis added).

Applying the I-130 (#1) priority date to X. Wang's I-130 (#2) abrogates this section by allowing the petition to jump far ahead of the thousands of petitions patiently awaiting consideration.[14] Because the application of INA § 203(h)(3) urged by Mr. Wang is not supported by either statutory language of INA § 203(h)(3) or even companion provisions of law working in concert, USCIS cannot agree that INA § 203(h)(3) unambiguously provides for the result of transferring the priority date of Mr. Wang's I-130 (#1) to X. Wang's I-130 (#2).

To illustrate the impossibility of what petitioner suggests, and assuming *arguendo* that X. Wang was entitled to a benefit pursuant to INA § 203(h)(3) in the case of either I-130, the difficulty then becomes one of identification. Visa categories are based upon the relationship existing between the petitioner and the beneficiary, and limited to a defined set of petitioner-beneficiary relationships. Separating the petitioner-beneficiary relationship from conversion mutates the intent of category conversion.[15]

The only petition in existence at the time X. Wang "aged-out" of her eligibility to "the same status and order of consideration" pursuant to INA § 203(d) was the I-130 (#1) filed by Y. Wang on behalf of Mr. Wang. The I-130 (#1) reflected the relationship between Mr. Wang and Y. Wang as described by 203(a)(4), not a relationship between X. Wang and Y. Wang. In fact, no visa preference category exists to reflect the relationship between aunt and niece. It is only by operation of INA § 203(d), and not the prescribed visa categories, that X. Wang could even secure an immigration benefit had she remained a qualifying derivative beneficiary.

Because the fundamental element reflected by the various relationships allowed by INA §§ 203(a)(4) and 204(a)(1)(A)(i) and is one of the relationship between the sibling-petitioner and the sibling-beneficiary, X. Wang, a neice, cannot meaningfully rely upon the conversion based upon the I-130

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[14] USCIS is concerned that individuals who have only recently acquired LPR status, and thus the ability to file petitions on behalf of others, will realize an advantage over other petitioners who have possessed a recognized petitionable relationship with their beneficiary from the moment of filing.

15 This conceptualization is consistent with 204(k), the only other part of the INA that allows for category conversion. Specifically, 2B-preference sons or daughters convert to first-preference in the event the petitioning parent naturalizes.

(#1). X. Wang had neither a valid preference classification prior to age out, nor does a statutorily recognized category exist following her age-out.[16]

Mr. Wang's argument in support of priority date retention also bypasses the companion clause within INA § 203(h)(3) which mandates that the "alien's petition shall automatically be converted to the appropriate category." Any argument that the priority date retention clause operates independently of a direct transition to a related visa category lacks merit. The I-130 (#1) has no upgrade available; the petitioner falls out of the picture and the connection becomes tenuous. Such automatic conversion creates an absurd result since as the principal beneficiary of the I-130 (#2), X. Wang is already the unmarried daughter of an LPR, and appropriately entitled to a family-based second preference "B" visa classification. USCIS simply cannot identify what more "appropriate category" than the category to which X. Wang naturally belongs.

D. Congressional intent comports with the plain text's focus on narrow relief for those harmed by processing delays.

In addition to the textual, interpretive, and procedural flaws, Congress' stated intent contradicts Mr. Wang's argument. Reviewing the United States House proceedings of July 22, 2002, the record reflects that Representative Sensenbrenner specifically contemplated CSPA as addressing X. Wang's situation:

> The Senate passed H.R. 1209 with a few appropriate additions, and the motion today is to concur in those additions. The Senate bill addresses three other situations where alien children lose immigration benefits by "aging out" as a result of INS processing delays... Case number two: Children of family and employment-sponsored immigrants... Under current law, when an alien receives permanent residence as a preference visa recipient... 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.

The concern highlighted by Representative Sensenbrenner has been addressed by INA § 203(h)(1), which provides that the eligibility of an alien for an immigration benefit will be frozen, so long

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[16] It is also important to note only Congress has the authority to create visa categories. There is no plausible reading of section 203(h)(3) that permits the Department of Homeland Security or the Attorney General to convert a petition on behalf of a beneficiary into a category in which the beneficiary doesn't fit or a visa category that does not exist.

as "the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability." This case simply did not suffer long processing delays; the petition was approved years before visa numbers came current. The allocation of limited visa numbers leads to these long waiting lists, and skipping ahead in line does nothing to alleviate the problem. Indeed, it seems counterintuitive to allow an applicant who began in a lower preference to skip ahead of someone who has always occupied a higher preference category. In the 2A/2B conversion context, beneficiaries who suffer a "downgrade" are sometimes allowed to keep a better priority date, in order to soften the blow. X. Wang argues for a bonus: a sweetened priority date in addition to the "upgrade" from fourth to second preference.

Congress also stated a countervailing concern about displacing others in line, an issue that Mr. Wang's argument does not address. Representative Jackson-Lee provided an even more detailed description of the problem faced by alien children of United States citizens that age out:

> Generally, 23,400 family-first preference visas are available each year to the adult, unmarried sons... of citizens... this bill, with the newly added compromise language that I proposed last year, will solve the age-out problem **without displacing others** who have been waiting patiently in other visa categories. (emphasis supplied). Congressional Record – House, June 6, 2001 at H2902; June 22, 2002 at H4991.

Mr. Wang's argument, if adopted, would be the exception that swallowed the rule. Thousands of derivative beneficiaries would permanently preserve their place in line—even if they failed to file an I-824—to the obvious detriment of spouses or children who started in a higher preference or who initiated the immigration process only after the principal acquired LPR status. INA § 203(h)(1) merely placed a reasonable restriction on an otherwise open-ended benefit by requiring that the alien seek to acquire status within one year of the visas availability.

The sister provisions of 203(h) further demonstrate Congressional Intent. Following Representative Sensenbrenner's statement on section 2 of CSPA, Representative Jackson-Lee provided an even more detailed description of the problem faced by alien children of United States citizens that age out:

> The child of a U.S. citizen is eligible for admission as an immediate relative. Immediate relatives of U.S. citizens are not subject to any numerical restrictions.... When a child of a U.S. citizen ages out by becoming 21, the child automatically shifts from the immediate-relative category to the family first-preference category. This puts him... at

> the end of a long waiting list for a visa... Generally, 23,400 family-first preference visas are available each year to the adult, unmarried sons... of citizens... this bill, with the newly added compromise language that I proposed last year, will solve the age-out problem **without displacing others** who have been waiting patiently in other visa categories. (emphasis supplied). Congressional Record – House, June 6, 2001 at H2902; June 22, 2002 at H4991.

CSPA Section 4 provides additional support for USCIS' reluctance to venture into Congress' plenary power to enact immigrant law without a reasonable statutory instruction. Amending INA § 208(b)(3), CSPA section 4 provided for asylum beneficiaries to benefit in much the same way as described above.

It is this clarity, present in the sister provisions to INA § 203(h)(3) enacted by CSPA, that USCIS relies upon in concluding that Congress did not draft, nor intend the result urged by Mr. Wang. As Representative Jackson-Lee commented, "the Senate expanded this bill to cover other situations where alien children lose immigration benefits by aging out as a result of INS processing delays, to included children of permanent residents." It is illogical—and unfair to other applicants—to interpet 203(h) broadly.

VI.

CONCLUSION

In light of the above, USCIS respectfully requests that the Board uphold the decision of the Director of the California Service Center, denying retention of the earlier priority date. Mr. Wang's argument and desired remedy are not supported by the existing statutory language and would require an unreasonable interpretation of INA § 203(h)(3). USCIS urges the Board to clarify the state of this provision by upholding the decision of the Service Center Director, California Service Center.

VII.

RENEWED REQUEST FOR PRECEDENT DECISION

In accordance with the procedures described at 8 C.F.R. section 1003.1(g), USCIS renews its request that the Board issue a precedent decision concerning the interpretation and application of INA § 203(h)(3). Since enactment on August 6, 2002, INA § 203(h)(3) has been subject to conflicting

interpretation[17] and intensifying litigation in the federal district courts. Moreover, the interpretation of INA § 203(h)(3) has risen to the level of national and public significance as USCIS stakeholders strive to administer the provisions of the INA § 203(h)(3) in the absence of consistent guidance. USCIS believes the matter is ripe for publication and hereby formally requests that the Board consider issuing a precedent decision.

VIII.

RENEWED REQUEST FOR ORAL ARGUMENT

USCIS renews its request that the Board grant oral argument in this matter as described within the Board of Immigration Appeals Practice Manual ("Practice Manual") at Chapter 4.2(g) and Chapter 8. In this matter, Petitioner has requested oral argument, and USCIS joins in this request. Observing the criteria for oral argument discussed at Chapter 8.2(d) of the Practice Manual, this matter concerns the resolution of a novel issue of law, requiring clarification of several conflicting and unpublished decisions issuing from the Board, and concerning an issue of significant public interest.

IX.

RENEWED REQUEST FOR CONSIDERATION BY THREE MEMBER PANEL

In accord with the necessity for oral argument in this matter, USCIS renews its request that this matter, if not previously before a three Board Member panel, be appropriately considered for such treatment. This matter involves "[t]he need to establish a precedent construing the meaning of law and procedure," as described by 8 C.F.R. § 1003.1(e)(6)(ii) and Chapter 1.3(a)(i)(2) of the Practice Manual. Moreover, the novel issue of law concerns a "controversy of major national import," as described by 8 C.F.R. § 1003.1(e)(6)(iv) and Chapter 1.3(a)(i)(4) of the Practice Manual. Accordingly, USCIS requests consideration by a three Board Member panel in conjunction with the request for oral argument.

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[17] Matter of Maria T. Garcia, A79 001587 (BIA July 16, 2006)(unpublished); Matter of Elizabeth Francisca Garcia, A77 806 733 (BIA July 24, 2007)(unpublished); Matter of Francisco Drilon Yang, A79 638 092 (BIA September 7, 2007)(unpublished); Matter of Stuti Chaitanya Patel, A88 124 902 (BIA April 18, 2008)(unpublished).

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