Nos. 09-56846 & 09-56786

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERESITA G. COSTELO, and LORENZO ONG, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs-Appellants,

v.

JANET NAPOLITANO, Secretary of Homeland Security; *et al.*,

Defendants-Appellees.

ROSALINA CUELLAR DE OSORIO; *et al.*,

Plaintiffs-Appellants,

v.

ALEJANDRO MAYORKAS; *et al.*,

Defendants-Appellees.

DEFENDANTS-APPELLEES' BRIEF

TONY WEST
Assistant Attorney General

ELIZABETH J. STEVENS
Assistant Director
District Court Section
Office of Immigration Litigation

GISELA A. WESTWATER
AARON D. NELSON
Office of Immigration Litigation
U.S. Department of Justice
PO Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 532-4174

Attorneys for Defendants-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

REGULATIONS

INTRODUCTION

These consolidated cases on appeal involve the correct interpretation of 8 U.S.C. § 1153(h)(3), which was enacted as part of the Child Status Protection Act ("CSPA"). The Board of Immigration Appeals ("Board") interpreted paragraph (3) of this subsection in Matter of Wang, 25 I. & N. Dec. 28 (BIA 2009), a precedential decision that articulates the Government's position in this litigation.

In Wang, the Board analyzed paragraph (3) and determined that it was ambiguous because the statute did not clearly define the petitions eligible for the benefits therein. In determining which petitions are eligible for the benefits of paragraph (3), the Board analyzed the subsection's structure, the historical use of the terms "conversion" and "retention" in immigration law, and the practical application of the terms of the statute to various petitions. In conclusion, the Board rejected Wang's arguments that paragraph (3) applies to aged-out derivative beneficiaries of F4 petitions. Instead, the Board limited "automatic conversion" and priority date "retention" to primary and derivative beneficiaries of F2A petitions.

Costelo, *et al.*, and Osorio, *et al.*, represent parents who immigrated to the United States as beneficiaries of F3 or F4 petitions and their sons and daughters

who were ineligible to immigrate as derivative beneficiaries of the F3 and F4 petitions because they aged-out of their derivative status prior to a visa becoming available to their parents. They argue that Wang is not entitled to deference because paragraph (3) is not ambiguous and even if it is ambiguous, Wang is unreasonable. In support thereof, Costelo, Osorio, and *Amici* raise conflicting interpretations of how the terms of the statute should be applied to their cases. First, the fact that so many contrary interpretations are offered by the opposing litigants highlights the ambiguity of the statute. Second, the rationale offered by Costelo, Osorio, and *Amici* for rejecting Wang actually supports it or is inapposite. Third, the interpretations offered by the opposing litigants are contrary to congressional intent because they would "displace others." Fourth, it is unlikely that Congress would enact such an open-ended grandfathering of priority dates without so much as a word of discussion or intent appearing in the legislative history. To the contrary, Congress' silence supports the Board's conclusion that § 1153(h)(3) merely expanded a prior benefit accorded to primary and derivative beneficiaries of F2A petitions.

Because paragraph (3) is ambiguous and the Board's interpretation in Wang is reasonable, the Government asks that the Court affirm the lower court decisions.

STATEMENT OF JURISDICTION AND TIMELINESS

Teresita G. Costelo, *et al.* (No. 09-56846), and Rosalina Cuellar de Osorio, *et al.* (No. 09-56786), seek review of the Orders entered by the United States District Court for the Central District of California on, respectively, November 10, 2009, and October 10, 2009. C.E.R. 3; O.E.R. 000002[1] The Orders were final decisions of the district court regarding all claims raised therein. Fed. R. Civ. P. 54(b).

The courts of appeals have jurisdiction under 28 U.S.C. § 1291 to review final decisions of the district courts. Osorio, *et al.*, filed a notice of appeal on November 3, 2009. O.E.R. 000001. Costelo, *et al.*, filed a notice of appeal on November 18, 2009. C.E.R. 1. The notices of appeal were timely. See Fed. R. App. P. 4(a). Venue is proper in this Circuit pursuant to 28 U.S.C. § 1294(1).

[1] References are to the Osorio Excerpts of Record (O.E.R.), Costelo Excerpts of Record (C.E.R.), Osorio Opening Brief (O.O.B) (No. 09-cv-56786, Dckt # 7), Costelo Opening Brief (C.O.B.) (No. 09-cv-56846, Dckt. # 12-1), Osorio Amici Brief (O.A.B.) (No. 09-cv-56786, Dckt. # 11-1), and Costelo Amici Brief (C.A.B.) (No. 09-cv-56846, Dckt. # 15-2).

COUNTER-STATEMENT OF THE ISSUES PRESENTED

I. Whether 8 U.S.C. § 1153(h)(3) is ambiguous.

II. Whether the Board of Immigration Appeals' Matter of Wang decision is entitled to Chevron deference.

III. Whether USCIS' actions were arbitrary or capricious when it assigned priority dates to the subject I-130 petitions based upon their filing date.

RELEVANT IMMIGRATION LAW

Three basic concepts are at the center of these cases: (1) movement (or "conversion") between various congressionally-authorized immigration classifications; (2) priority date assignment and transfer between immigration petitions; and (3) congressional policies behind family-sponsored immigration classifications. A brief history of the three concepts follows.

A. Family Preference Petitions Under the INA

To enter and remain in the United States lawfully, Congress requires each alien to possess a valid "visa" conferring immigrant or non-immigrant status. 8 U.S.C. §§ 1182(a)(7)(A)&(B). See also Montgomery v. Ffrench, 299 F.2d 730, 734 (8th Cir. 1962) ("Admission of an alien to this country is not a right but a privilege which is granted only upon such terms as the United States prescribes."). There are several ways to obtain "immigrant visas" (otherwise known as "green cards"), the recipients of which are known as "lawful permanent residents" ("LPRs"). One way for an alien to receive an immigrant visa is to have a United States citizen or LPR file a Form I-130 *Petition for Alien Relative* ("petition") with the U.S. Citizenship and Immigration Services ("USCIS") on the alien's behalf. Once approved, the petition will classify the intended "primary beneficiary" under one of the congressionally-created immigrant relative categories in the

Immigration and Nationality Act ("INA"). 8 C.F.R. § 204.1(a)(1). Not all "relatives" or "family members," however, qualify for immigration benefits under the INA. See 8 U.S.C. § 1151(a) ("aliens born in a foreign state or dependent area who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence are limited to . . ."). The congressionally-recognized directly-petitionable familial relationships are as follows:

short-hand	*title of category*	*those eligible for classification*	*corresponding statutory authority*
IR	immediate relative	spouses of U.S. citizens, minor children of U.S. citizens, parents of U.S. citizens (over the age of 21)	8 U.S.C. § 1151(b)(2)(A)(i)
F1	family sponsored first-preference	married sons and married daughters of U.S. citizens	8 U.S.C. § 1153(a)(1)
F2A	family sponsored second-preference	spouses and minor (unmarried) children of LPRs	8 U.S.C. § 1153(a)(2)(A)
F2B	family sponsored second-preference	unmarried adult sons and daughters of LPRs	8 U.S.C. § 1153(a)(2)(B)
F3	family sponsored third-preference	married sons and daughters of U.S. citizens	8 U.S.C. § 1153(a)(3)
F4	family sponsored fourth-preference	siblings of U.S. citizens	8 U.S.C. § 1153(a)(4)

B. Limitations on "Relative Aliens" Recognized Under the INA

In crafting the mechanisms for the immigration of alien family members, Congress made many policy decisions. Congress excluded several categories of "relatives" from the above categories of petitionable relationships. In general, family-sponsored classifications are limited to members of the "immediate" family. Thus U.S. citizens may not petition nieces and nephews or grandchildren. Bolvito v. Mukasey, 527 F.3d 428, 434 (5th Cir. 2008). For LPRs, there are even greater restrictions placed on the "family members" who may be petitioned: LPRs may not file petitions on behalf of married sons and daughters, parents, and siblings. See 8 U.S.C. § 1153(a) (listing relationships recognized under the INA).

C. Priority Dates and the Attendant Waiting Periods for Visa Issuance (or Adjustment of Status)

Once a petition is filed on behalf of an alien is approved, an alien may not necessarily be able to immigrate immediately to the United States. See United States v. Revuelta, 109 F. Supp. 2d 1170, 1176 (N.D. Cal. 2000) (approval of an immigrant petition does not mean that an alien is eligible to immediately immigrate). The total number of family-sponsored immigrant visas per year is capped at 480,000. 8 U.S.C. § 1151(c)(1)(A)(i). Those classified as "immediate relatives" of U.S. citizens are not subject to numerical limits and do not have to

wait for a visa number to become available before they can immigrate. 8 U.S.C. § 1151(a)(1). The other family-based classifications, however, fall under four numerically limited "preference" categories. See 8 U.S.C. § 1153(a). Preference categories are subject to allocation worldwide; in other words, Congress has limited the number of visas that will be granted each year depending on the "priority" of the beneficiary's relationship to the petitioner, and the beneficiary's country of origin. 8 U.S.C. §§ 1151(a)(1) and (c); see also Bolvito, 527 F.3d at 429-32 (explaining the visa petitioning process).

Within each preference category, immigrant visas are made available "to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed." 8 U.S.C. § 1153(e). The filing date of a petition constitutes the "priority date" for that petition and establishes the beneficiary's proverbial "place in line" vis-à-vis that particular petition. 8 C.F.R. § 204.1(c) ("The filing date of a petition shall be the date it is properly filed under paragraph (d) of this section and shall constitute the priority date."). To determine whether an immigrant visa is immediately available in a certain preference category, one looks to the Department of State, Bureau of Consular Affairs Visa Bulletin. 8 C.F.R. § 245.1(g)(1). If the priority date is earlier than the cut-off date indicated in the Visa Bulletin for the relevant classification, a visa is immediately available to the alien

beneficiary. See Revuelta, 109 F. Supp. 2d at 1176 (immigrant visa is not "immediately available" to alien until his priority date has been published in the Visa Bulletin). Because Congress has limited how many immigrant visas the Government may issue in any given year and to any given group, an alien may have to wait several years before a visa number will become available to him or her under the numerical allocation system. See Ogbolumani v. USCIS, 523 F. Supp. 2d 864, 869-70 (N.D. Ill. 2007) (general discussion of immigration procedures). For example, Filipino beneficiaries of F4 petitions must currently wait about twenty years for a visa number to become available but Filipino spouses of U.S. citizens may immigrate immediately. See Visa Bulletin, http://travel.state.gov/visa/bulletin/bulletin_1360.html.

D. Comparative Priority of Familial Relationships Under the INA

As is evident from the overall immigration scheme, Congress' line-drawing in the family-sponsored immigration arena extends beyond the designation of petitionable relationships to the actual prioritization of some classifications over others. In general, relatives of U.S. citizens receive more favorable treatment than relatives of an LPR, and spouses and "children"[2] receive better treatment than

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

adult sons and daughters and siblings. See, generally, 8 U.S.C. §§ 1151(b)(2)(A)(i); 1153(a). For example, although LPRs had long been able to file immigrant petitions on behalf of their minor children, Congress did not authorize LPRs to file petitions on behalf of "unmarried sons and daughters, over the age of 21 years, of lawfully residing aliens" until 1959. 105 Cong. Rec. 1716 (July 6, 1959). In making this new classification, Congress recognized that "although not minors, [unmarried adult sons and daughters] still belong to the family unit." Id. Despite finding that adult sons and daughters "still belong to the family unit," Congress nonetheless accorded them a lower priority than it awarded to minor children of LPRs. Id.

Another example of preferential treatment of children is 8 U.S.C. § 1153(d) which provides:

> Treatment of family members. A spouse or child as defined in [8 U.S.C. § 1101(b)(1)(A), (B), (C), (D), or (E)] shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c), be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

This policy has been found in immigration laws since 1924 and authorizes primary beneficiaries of immigrant petitions to bring their spouses and minor "children" with them or send for them later. See Immigration Act of 1924, Pub. L. No. 68-

139, §§ 4, 6, 43 Stat. 153, 155 (1924) (Congress authorized wives and unmarried children under 18 years of age to accompany or follow to join immigrants born in certain North, Central, and South American countries and wives and dependent children under the age of 16 to accompany or follow to join certain quota immigrants). Thus, even though U.S. citizens and LPRs may not file petitions directly on behalf of their "grandchildren" or "nieces and nephews," such an individual, if qualifying as the "child" of a primary beneficiary of a family preference petition, may "accompany" or "follow to join" the parent when the parent immigrates. 8 U.S.C. § 1153(d). Such a "child" "derives" his or her immigration classification from the primary beneficiary parent and is thus considered to be a "derivative beneficiary" of the immigrant petition filed on behalf of the parent. 3A Am. Jur. 2d Aliens and Citizens § 411 (2010). Upon approval of the I-130 petition, the primary beneficiary and any derivative beneficiaries are classified in the appropriate category based on the primary beneficiary's relationship with the petitioner and the priority date is based on the filing date of the petition by the petitioner. Finally, when immigrating, the "child" is counted against the same immigration category as the primary beneficiary parent. (For example, the married son of a U.S. citizen is classified as an F4. When he immigrates, his visa is counted against the F4 quota. His wife and

children's visas are also counted against the F4 quota, even though neither is the "married son of a U.S. citizen" and would not be independently entitled to classification under the INA.)

Adult and/or married sons and daughters of United States citizens and LPRs have never been treated as favorably under the INA as "children" of U.S. citizens and LPRs. Adult sons and daughters of U.S. citizens are classified as F1s, not IRs. 8 U.S.C. § 1153(a)(1). Adult sons and daughters of LPRs cannot accompany or follow to join a parent and must wait longer to immigrate than their child counterparts. See 8 U.S.C. § 1153(a)(2) (classifying "children" of LPRs in F2A category and "sons and daughters" in F2B category). This distinction reflects policy decisions made by Congress defining its family reunification priorities. See Fiallo v. Bell, 430 U.S. 787, 796, 797-98 (1977) (every line drawn by Congress affects families); Alvidrez v. Ridge, 311 F. Supp. 2d 1163, 1166 (D. Kan. 2004) ("An adult son or daughter can reasonably be expected to live apart from his or her parents while waiting for his or her 2B numbers to become available.").

E. Final Issuance of an Immigrant Visa or Adjustment of Status

Under the INA, eligibility for an immigration benefit is determined on the day of admission to the United States or the date of adjudication of an application to adjust status. 8 U.S.C. § 1154(e) (alien cannot be admitted to United States if

no longer eligible for classification at port of entry); see also Matter of Alarcon, 20 I. & N. Dec. 557, 562 (BIA 1992) ("An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered.") (quoted in Ward v. Holder,608 F.3d 1198, 1201 (11th Cir. 2010) . Thus, because the classification of the child of a primary beneficiary is dependent on his or her status as a "child," approval of the parent's visa petition does not guarantee that the derivative beneficiary will ultimately immigrate to the United States. A one-time derivative beneficiary may lose his "follow to join" status if he fails to maintain the required relationship with the primary beneficiary (i.e., by aging-out or marrying, the parent's losing status, or the parent's dying). See 9 U.S. Dep't of State, Foreign Affairs Manual § 40.1 n. 7.1 (derivative interest in visa petition is valid only "as long as the alien following to join has the required relationship with the principal alien").

Given the provisional and dependent nature of derivative beneficiaries' interests in petitions, derivative beneficiaries are not considered to possess "actual preferences." Santiago v. INS, 526 F.2d 488, 491 (9th Cir. 1975). For example, derivative beneficiaries may not immigrate without the primary beneficiary, and if the primary beneficiary of a visa petition loses eligibility for the visa, then the

spouse and children who previously had derivative eligibility will lose it. See Ward, 2010 WL 2347019 at *2 (alien no longer eligible to "follow to join" a parent after the parent's death); Yuk-Ling Wu Jew v. Attorney General, 524 F. Supp. 1258, 1260 (D.D.C. 1981) (derivative beneficiaries no longer eligible to immigrate after death of primary beneficiary); Matter of Khan, 14 I. & N. Dec. 122, 124 (BIA 1972) (derivative beneficiary erroneously admitted where he preceded the primary beneficiary).

F. The Child Status Protection Act of 2002

Once a visa number becomes available to an alien under the Visa Bulletin, the alien must apply for the issuance of a visa or for adjustment of status. See Ogbolumani, 523 F. Supp. 2d at 869 (describing process for aliens once visa number becomes available). It might take several months for the Department of State to issue a visa or for USCIS to adjudicate an application to adjust status. INS v. Miranda, 459 U.S. 14, 18 (1982). Thus, historically an alien had to maintain eligibility throughout the processing of the required paperwork. See Bae v. INS, 706 F.2d 866, 870 (8th Cir. 1983) (alien seeking adjustment of status as "unmarried son of LPR" ineligible for benefit when he married while adjustment application was pending adjudication).

In the late 1990s and early 2000, large numbers of aliens applied to adjust status as derivative beneficiaries but then aged-out of eligibility while their applications were pending adjudication. See Hong v. INS, 23 Fed. App'x 850 (9th Cir. 2002) (pre-CPSA, alien aged-out of eligibility while application to adjust was pending adjudication); Cardoso v. Reno, 216 F.3d 512 (5th Cir. 2000) (same). The former INS was faced with a large number of visa petitions and lacked the resources to adjudicate the petitions promptly. H.R. Rep. 107-807 at *55-56, 2003 WL 131168 at *50 (Leg. Hist.) (House Judiciary Committee Report for second session of 97th Congress); 147 Cong. Rec. S3275-01, 2001 WL 314380 at *1 (Cong. Rec.) (statement of Sen. Feinstein).

Congress recognized the inequity of an alien waiting years for a visa number to become available, a number actually becoming available and the alien filing a timely application for a visa, and then the alien ultimately losing entitlement due to agency delays. Id. To alleviate these concerns, Congress enacted the Child Status Protection Act ("CSPA"), Pub. L. No. 107-208, 116 Stat. 927 (2002), codified at various sections of the INA. Id. As this Court has previously stated, Congress had "but one goal" in enacting the CSPA - "to override the arbitrariness of statutory age-out provisions that resulted in young immigrants losing opportunities to which they are entitled because of

administrative delays," i.e. "agency delays in processing their applications or petitions." Padash v. INS, 358 F.3d 1161, 1174 (9th Cir. 2004).

It is commonly understood that § 3 of the CSPA, codified at 8 U.S.C. § 1153(h)(1) and (2), alleviates the effects of administrative delays by allowing the exclusion of those periods from the calculation of age for purposes of determining if an alien is a "child" under the INA. Wang, 25 I. & N. Dec. at 38. It is also commonly understood that paragraph (3) of that subsection provides authority for the automatic conversion of a derivative interest in an F2A petition into an independent F2B petition upon the aging-out of the derivative beneficiary - when the aged-out derivative is also the son or daughter of the petitioning parent. Baruelo v. Comfort, No. 05-cv-6659, 2006 U.S. Dist. LEXIS 94309 at *28-29 (N.D. Ill. 2006) (recognizing that CSPA automatically converted F2A petition into F2B petition when alien turned 21 years old); Reducindo v. Gonzales, No. 05-cv-451, 2006 U.S. Dist. LEXIS 28816, at *4 (M.D. Fl. 2006) (derivative F2A petition that had automatically-converted under § 1153(h)(3) was being held in abeyance by USCIS pending F2B availability).

G. Matter of Wang

Due to claims that § 1153(h)(3) applied to a broader range of petitions, USCIS certified a case to the Board of Immigration Appeals ("Board") for

consideration. On June 16, 2009, the Board issued a precedential opinion analyzing claims that § 1153(h)(3) applied to a broader range of petitions. See Matter of Wang, 25 I. & N. Dec. 28 (BIA Jun. 16, 2009). The facts of Wang are as follows: a United States citizen petitioned for her brother ("Wang") to be approved on a fourth-preference ("F4") visa, with his wife and children listed as derivative beneficiaries. Id. at 29. Before a visa number became available to Wang, one of his daughters turned 21. Id. A visa number subsequently became available to Wang as primary beneficiary, and he obtained legal permanent residency along with his wife and minor children. Id. Thereafter, Wang filed a separate petition on behalf of his unmarried adult daughter to classify her for an F2B visa. Id. Wang argued that the priority date from the F4 petition filed by his sister should be applied to the F2B petition that he had filed. Id. The Board rejected this interpretation of § 1153(h)(3). Id. at 39.

1. Board Rejects Unpublished Decisions

First, the Board rejected earlier unpublished decisions that Wang cited in support of his petition. The Board noted that "unpublished decisions are not authority." Wang, 25 I. & N. Dec. at 33 fn. 7 (citations omitted). Further, the Board rejected the earlier unpublished decisions on the merits for failing to adequately address the overall framework of § 1153(h). Id.

2. Board Determines that Statute Is Ambiguous

Next, the Board looked at the language of § 1153(h). See Addendum at 1. The Board noted that Congress did not expressly state which petitions qualify for automatic conversion and retention of priority dates under paragraph (3). Wang, 25 I. & N. Dec. at 33. The Board arrived at this conclusion by noting that paragraph (1) contains the same language as paragraph (3) ("for purposes of subsections (a)(2)(A) and (d)") but that paragraph (1) nonetheless refers to paragraph (2) to define the "universe of petitions that qualify for the 'delayed processing formula'" set out in paragraph (1). Id. Paragraph (3), however, "does not expressly state which petitions qualify for automatic conversion and retention of priority dates" and does not incorporate paragraph (2)'s definition by reference. The Board found the resulting scheme ambiguous. Id.

3. Board Finds Historical Use of Terms "Conversion" and "Priority Date Retention" Do Not Support Wang's Position

In light of the above ambiguity, the Board looked to the regulatory and statutory context in which Congress enacted the statute. The Board began from the premise that, in passing the CSPA, Congress would have intended its language usage to be consistent with the current immigration scheme and past practice, specifically past usage of the terms "automatic," "conversion," and "retention of

priority date." Id. at 35. Under statute and regulation, the term "conversion" had consistently been used to mean that a visa petition (and hence the beneficiary's classification) could convert from one valid family-based visa category to another valid family-based visa category without the need for the petitioner to file a new visa petition on behalf of the beneficiary. Id. at 34-36. For example, under 8 C.F.R. § 205.1(a)(3)(i)(H), an F1 petition ("unmarried adult son or daughter of a United States citizen") would automatically convert to an F3 petition ("married son or daughter of a United States citizen") without the United States citizen parent being required to file a new petition. Prior to the passage of the CSPA, only one transfer from a valid classification to a subsequent valid classification required the filing of a new and separate petition: reclassification from F2A to F2B upon the alien turning 21. See Wang, 25 I. & N. Dec. at 34-35. Instead, for this reclassification to take place, lawful permanent residents were required to file new petitions when their children reached 21 years of age. 8 C.F.R. § 204.2(a)(4). The Board found the similarities between the language used in 8 C.F.R. § 204.2(a)(4) ("In such case, *the original priority date* will be retained if the subsequent petition is filed by the same petitioner.") (emphasis added) and the language used in 8 U.S.C. § 1153(h)(3) ("the alien's petition shall automatically be converted to the appropriate category and the alien shall retain *the original*

priority date issued upon receipt of the original petition.") (emphasis added) to be more than coincidence. Wang, 25 I. & N. Dec. at 34. This similarity suggests that § 1153(h)(3) was designed to bring the F2A conversions in line with conversions between the other classifications. Wang, 25 I. & N. Dec. at 34.

Similarly, the Board noted that "retention" or revalidation of priority dates had historically been limited to visa petitions filed by the same family member, which would not be the case under Wang's interpretation.[3] Wang at 35; see also 8 C.F.R. 204.2(a)(4) (for reclassification from F2A to F2B, the petitioner had to be the same person).

---

[3] Consider the following hypothetical: Alan naturalized in 2001 and immediately filed petitions on behalf of his parents and unmarried sister. As "immediate relatives" of a United States citizen, Alan's parents immigrated immediately. His sister, however, had to wait until a visa became available to her in the F4 category. In 2006, Alan's mother naturalized and filed an F1 petition on behalf of her daughter. In 2009, Alan's sister has about ten more years to wait for an F4 visa with a 2001 priority date and seven more years to wait for an F1 visa with a 2006 priority date. See September 2009 Visa Bulletin, http://www.travel.state.gov/visa/bulletin/bulletin_4558.html. Had she been able to "transfer" the priority date from the F4 petition to the F1 petition, Alan's sister would only have to wait two more years for a visa. Id. Such a transfer, however, is not authorized because the petitioners are not the "same" and the petitions were not filed for "the same preference classification." 8 C.F.R. § 204.2(h)(2); see also Wang, 25 I. & N. Dec. at 35 ("A visa petition filed by another family member receives its own priority date.").

4. Board Finds No Clear Intent in Legislative History that Derivative Beneficiaries Never Lose a Previous Priority Date

The Board next turned to legislative history. Wang, 25 I. & N. Dec. at 36-38. Repeated discussion in the House of Representatives suggested an intent to provide some relief from administrative delays "without displacing others who have been waiting patiently in other visa categories." Id. at 37 (quoting 148 Cong. Rec. H4989 (statement of Rep. Jackson-Lee), 2002 WL 1610632, at *H4992; 147 Cong. Rec. H2901, 2001 WL 617985, at *H2902). Thus, the Board concluded that, "[w]hile the CSPA was enacted to alleviate the consequences of administrative delays, there is no clear evidence that it was intended to address delays resulting from visa allocation issues, such as the long wait associated with priority dates." Wang, 25 I. & N. Dec. at 38. The Board observed that Wang was basically seeking to "'grandfather' a priority date" - something Congress knew how to do but had not specifically done in this case. Id. at n.11.

5. Board Applies Statute to Facts in Wang

In light of the regulatory/statutory context and legislative history, the Board examined to which category the F4 petition would have converted at the moment the derivative beneficiary aged-out. Id. at 35. When Wang's daughter reached 21 years of age, there was no INA preference category for an adult niece of a United

States citizen; hence there was no qualifying relationship supporting "automatic conversion" to another preference category. Id. at 35. Simply put, no "appropriate category" existed to which the petition could convert. Moreover, there was no basis for retaining the earlier priority date because a different petitioner - the father, not the aunt - had filed the F2B petition. Id.

Most importantly, the Board reasoned that if Wang's F2B petition was accorded the earlier priority date, the former derivative beneficiary would "jump" to the front of the line, causing all the individuals behind her to fall further behind in the queue. Id. at 38. Finally, the Board noted that the CSPA was passed so that beneficiaries would not suffer due to governmental administrative delays. Id. The Wangs, however, faced delay that was caused by the high demand for a finite number of visas, not any administrative delay. Id. The Board concluded that, absent clear legislative intent to create open-ended grandfathering of priority dates for derivative beneficiaries in the context of a different relationship, to be used at any time, it would refuse to automatically convert the derivative classification to a [non-existent] family preference or find fault with the priority date USCIS had given to the second petition. Id. at 39.

The Board's decision makes clear that 8 U.S.C. § 1153(h)(3) applies only when an LPR files an F2A petition designating a child as a primary or derivative

beneficiary. If the child turns 21 before a visa number becomes available, the F2A petition will automatically convert to an independent F2B petition with the original priority date. Wang, at 33-38. 8 U.S.C. § 1153(h)(3).

STATEMENT OF THE CASE AND OF THE FACTS

A. District Court Litigation

This consolidated appeal involves challenges to two decisions of the District Court for the Central District of California. These decisions were the first in the nation to interpret § 203(h)(3) of the INA, 8 U.S.C. § 1153(h)(3), a provision contained in the CSPA. Although this appeal only involves two cases, more parties were involved in the litigation below. A total of five cases, all challenging the interpretation of § 1153(h)(3), were pending at the same time in the district.[4] All five cases were assigned or transferred to the same district judge, the Honorable James V. Selna.

Plaintiffs in the first case filed, Costelo v. Napolitano, No. 08-cv-0068-JVS, sought class certification. C.E.R. 486. On July 16, 2009, the district court certified a class in Costelo v. Napolitano, No. 09-56846, consisting of:

[4] In addition to Costelo and Osorio, the other cases were Zhang v. Napolitano, No. 09-cv-93 JVS (SHx); Torossian v. Douglas, No. 08-6919 JVS (SHx); and Dowlatshahi v. Holder, No. 08-cv-53-1 JVS (SHx).

> Aliens who became lawful permanent residents as primary beneficiaries of third- and fourth-preference visa petitions listing their children as derivative beneficiaries, and who subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters, for whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to § [1153](h)(3).

C.E.R. 44.

The next day, the Board issued Matter of Wang, 25 I. & N. Dec. 28 (BIA 2009), a published (precedential) decision interpreting 8 U.S.C. § 1153(h)(3). C.E.R. 488-499.

Osorio and the other three related cases were briefed and argued on the same schedule. O.E.R. 000072-73. A consolidated decision was issued on October 9, 2009, in which the district court determined that § 1153(h)(3) is ambiguous, the Board's interpretation is reasonable and entitled to Chevron deference, and USCIS cannot be compelled to assign the requested earlier priority date where its inaction was not arbitrary, capricious, or an abuse of discretion. O.E.R. 000002-19.

Briefing and argument in Costelo followed closely, with a decision issued on November 10, 2009. C.E.R. 3-24. The district court in Costelo largely incorporated the Osorio decision (published *sub nom* Zhang) by reference. Id. In addition, the district court specifically addressed and rejected the unique

arguments raised by class counsel regarding the affect of 8 U.S.C. § 1153(h)(4) on the overall reading of § 1153(h).

At the time of the decisions below, the only published guidance on point was Matter of Wang, 25 I. & N. Dec. 28. Since then, three district courts have decided this issue *de novo* and have also affirmed the Government's position as set out in Wang. See Co v. USCIS, No. 09-CV-00776, 2010 WL 1742538 (D. Ore. 2010), appeal docketed, No. 10-35547 (9th Cir. Jun. 16, 2010); Amershi v. Napolitano, No. 6:09-cv-106-Orl-18GJK, 2009 WL 5173492 (M.D. Fla. Dec. 9, 2009); Li v. Renaud, --- F. Supp. 2d ---, 2010 WL 1779922 (S.D.N.Y. Apr. 27, 2010), appeal docketed, No. 10-2560 (2d Cir. Jun. 25, 2010). Two other courts have dismissed claims by class plaintiffs on grounds of *res judicata*. See Liao v. Holder, 691 F. Supp. 2d 344 (E.D.N.Y. Mar. 3, 2010); Patel v. USCIS, No. 3:08-cv-2235 (N.D. Ohio Mar. 19, 2010). In addition, the Board recently reaffirmed Matter of Wang. See In re: Wang (BIA May 21, 2010) (hereinafter "Wang II") (attached in Addendum at 3).

B. Plaintiffs-Appellants

Named Class Plaintiff-Appellant Teresita G. Costelo ("Costelo") immigrated to the United States from the Philippines in 2004 as the beneficiary of an F3 visa petition filed by her U.S. citizen mother in 1990. (C.O.B. 5; C.A.A.

870.) Her two daughters were derivative beneficiaries of that petition, but aged out prior to the date that a visa became available to Costelo. (C.O.B. 5; C.A.A. 870.)

Named Class Plaintiff-Appellant Lorenzo P. Ong ("Ong") immigrated to the United States from the Philippines in 2004 as the beneficiary of an F4 visa petition filed by his U.S. citizen sister in 1981. (C.O.B 4; C.E.R. 870.) His two daughters were derivative beneficiaries of that petition, but aged out prior to the date that a visa became available to Ong. (C.O.B. 4; C.A.A. 870.)

Hereinafter, Costelo, Ong, and the members of the certified class, shall collectively be referred to as " Costelo."

Plaintiffs-Appellants Rosalina Cuellar de Osorio, Elizabeth Magpantay, Evenlyn Y. Santos, Maria Eloisa Liwag, and Norma Uy became lawful permanent residents of the United States in 2006 and 2007 as the result of visa petitions filed by their U.S. citizen relatives. (O.O.B. 12-15; C.E.R. 15.) Ruth Uy is Uy's daughter. (O.O.B. 14-15; C.E.R. 15.)

Hereinafter, Osorio, Magpantay, Santos, Liwag, and the Uys, shall collectively be referred to as " Osorio."

Amici curiae are the American Immigration Council ("Immigration Council") and the American Immigration Lawyers Association ("AILA"). AILA

is an association composed of lawyers and law school professors who practice and teach in the field of immigration law and nationality law, except that "[a]ttorneys who work for government agencies and other government officials are not eligible for AILA membership."[5] The Immigration Council was formerly named "the American Immigration Lawyers Foundation" and is considered the litigation and advocacy arm of AILA.[6]

In the original F3 and F4 visa petitions that resulted in the parent-parties' current lawful permanent residence, their sons and daughters (then "children") were listed as derivative beneficiaries. (C.A.A. 15.) The sons and daughters aged out of "derivative status" before visas became available to the parents due to numerical limitations in the allocation of visas.[7] (C.A.A. 15.) After becoming lawful permanent residents, the parent-parties in these cases filed F2B petitions on behalf of their aged-out sons and daughters. (C.E.R. 15.) They then filed suit

---

[5] http://www.aila.org/content/default.aspx?docid=12627

[6] http://www.murthy.com/mb_pdf/052909_P.html (The American Immigration Law Foundation (AILF), the nonprofit arm of the American Immigration Lawyers Association (AILA), ...).

[7] The Osorio Amicus brief erroneously defines "aging out " as a derivative child beneficiary losing the status of "child" "while a visa petition is pending." O.A.B. 1. "Aging-out" actually refers to an alien losing derivative child status while the parent beneficiary is "awaiting visa allocation," not while the petition is pending adjudication.

claiming that, under § 1153(h)(3), "the F2B petitions should be assigned the priority date of the earlier F3 and F4 petitions filed by their U.S. citizen relatives." (C.E.R. 15.)

SUMMARY OF THE ARGUMENT

The district court correctly determined that Costelo and Osorio were not entitled to summary judgment and the Government was because § 1153(h)(3) is ambiguous, the Board's precedential interpretation of paragraph (3) in Matter of Wang is reasonable and therefore entitled to Chevron deference, and in light of Wang, USCIS' refusal to assign the F2B petitions the earlier priority date from the separate, unrelated F3 and F4 petitions was not arbitrary, capricious, or contrary to law. The district court's holding should be affirmed.

As both the Board and the district court found, the ambiguity of paragraph (3) is illustrated by the nonparallel structure of paragraphs (1) and (3). In addition, the ambiguity of paragraph (3) is evidenced by its incongruous operation as applied to different types of immigrant petitions.

Because § 1153(h)(3) is ambiguous, Matter of Wang must be granted deference unless it is unreasonable. Wang is a reasonable interpretation of the ambiguous paragraph because it harmonizes past usage of the terms "automatic conversion" and "priority date retention" in the family-preference categories, is

consistent with the sparse legislative history of the CSPA, and gives meaning to every word in the statute. Plaintiffs-Appellants' arguments to the contrary fall far short of establishing that Wang is unreasonable. In fact, the regulations and statutes cited by Costelo, Osorio, and *Amici* are either inapposite or support Wang. Fatal to their position is Congress' silence regarding § 1153(h)(3). Under Costelo, Osorio, and *Amici*'s interpretations, § 1153(h)(3) would bring about a paradigm shift: according open-ended grandfathering of priority dates to aged-out derivative beneficiaries for use with any subsequent petitions and displacing the sons and daughters of long-time LPRs with the sons and daughters of newly-arriving LPRs. The opposing parties never account for Congress' absolute silence on such a broad benefit when it spoke repeatedly about § 1153(h)(1), a less-generous provision that would be rendered virtually obsolete under their interpretation of § 1153(h)(1). They also fail to explain how their interpretation does not "displace" others in contravention of Congress' stated concern.

Because the Board's interpretation of § 1153(h)(3) in Wang is a published decision and is reasonable, it is entitled to Chevron deference. Applying Wang to the facts of these cases, it is clear that USCIS' assignment of priority dates to the F2B petitions was not arbitrary, capricious, or an abuse of discretion.

STANDARD OF REVIEW

An appellate court reviews a district court's legal conclusions and its grant of a motion for summary judgment *de novo*. T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n., 809 F.2d 626, 629 (9th Cir. 1987). The court's role "is to determine, viewing the evidence in the light most favorable to the non-moving party, whether there exists any genuine issue of material fact and whether the substantive law was correctly applied." 49er Chevrolet, Inc. v. General Motors Corp., 803 F.2d 1463, 1466 (9th Cir. 1986) (citations omitted).

ARGUMENT AND CITATIONS OF AUTHORITY

The Court's review of USCIS' assignment of a priority date to the Plaintiffs-Appellants' F2B petitions is governed by Section 706(2)(A) of the Administrative Procedure Act, which provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). Review under the arbitrary and capricious standard is narrow and an agency's interpretation of an ambiguous statute is controlling so long as it is "reasonable." Duran-Gonzales v. DHS, 508 F.3d 1227, 1235 (9th Cir. 2007) (citing Chevron USA, Inc. V. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984)). Accordingly, review under the APA is highly deferential

and the agency's actions are presumed to be valid. See Negusie v. Holder, 129 S. Ct. 1159, 1163-64 (2009) ("Judicial deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"). A court must affirm the agency's decision if the agency presents a rational basis for the action and if the action is within the agency's statutory authority, Motor Vehicle Manufacturers Ass'n v. State Farm Mutual, 463 U.S. 29, 42-43 (1983).

I. PARAGRAPH (3) OF § 1153(h) IS AMBIGUOUS.

A. Ambiguity evidenced by omission

The first step is to review the language of the statute at issue to determine if "the statute is silent or ambiguous with respect to the specific issue." Chevron, 467 U.S. at 843 (quoted in Ramos-Lopez v. Holder, 563 F.3d 855, 860 (9th Cir. 2009)). A quick review of 8 U.S.C. § 1153(h) reveals the internal ambiguity of this section of the CSPA.

> [U]nlike § 1153(h)(1), § 1153(h)(3) does not contain the same "applicable petition language", does not reference § 1153(h)(2), and does not contain any other language discussing which petitions are eligible for the benefits of automatic conversion and priority date retention contained therein.

Co., 2010 WL 1742538, * 4; accord Wang, 25 I. & N. Dec. at 23; Zhang, 633 F. Supp. 2d 913, 919-20 (C.D. Cal 2009). Under the canons of statutory

construction, Congress is presumed to have acted purposely when it includes language in one provision but not in another. Russello v. United States, 464 U.S. 16, 23 (1983). Thus, the Court must assume that "Congress intentionally did not reference the applicable petition language in § 1153(h)(2) when discussing automatic conversion and priority date retention in § 1153(h)(3)." Co, 2010 WL 1742538, * 4. As such, it is clear that the plain language of § 1153(h)(3) "does not expressly state which petitions qualify for automatic conversion and retention of priority dates." Wang, 21 I. & N. Dec. at 23.

Costelo's claim that any ambiguity disappears when all of § 1153(h) is read "in context and with a view to their place in the overall statutory scheme." C.O.B 21-23. Such a bleed-over reading of the paragraphs of subsection (h) is prohibited by the terms of the paragraphs themselves. As the Li court explained:

> The Court cannot conclude that the petitions described in § 1153(h)(2) clarify the vagueness of those described in § 1153(h)(3) because the former specifically describe only "petition[s] described in this paragraph." Id. (emphasis added). Subsection 1153(h)(2) does not read "the petitions described in this [subsection]" or "the petitions described in this paragraph [and the next paragraph.]" The Court cannot overcome this issue by construing the words "subsection" and "paragraph" to be synonymous for the purposes of these subsections because the CSPA uses the word "subsection" several times, suggesting that the drafters understood the distinction between "subsection" and "paragraph." Thus, the Court finds that the ambiguity present in § 1153(h)(3) is not cured by reading it in conjunction with its immediately-preceding subsections.

Li, 2010 WL 1779922, at 7.

In sum, the range of petitions eligible for consideration under § 1153(h)(3) is neither clear nor unambiguous.

B. Ambiguity manifested by operation

Another area of ambiguity appears when one tries to apply the actual terms of § 1153(h) to specific fact patterns. Under paragraphs (1) and (3), the operation is smooth for primary beneficiaries of F2A petitions and derivative beneficiaries of F2A petitions. For the other types of derivative beneficiaries, however, only the operation under paragraph (1) is smooth, with words needing to be added to the four corners of the provision in order to make paragraph (3) apply to the earlier-filed F3 and F4 petitions or the later-filed F2B petitions.

1. Seamless operation of § 1153(h)(1) as applied to F2A petitions and derivative beneficiaries of all family-preference, employment-preference, and diversity petitions.

When applying the language of § 1153(h)(1) to the beneficiaries of F2A petitions and the derivative beneficiaries of all family, employment, and diversity petitions, the language of the statute operates without problem. For example, a United States citizen files a petition to classify her daughter, "Mae," under F3. USCIS takes two years to adjudicate the petition. Due to oversubscription in the F3 category, several more years pass before a visa becomes available. Mae's

priority date becomes current when her son, "Tim," is twenty-two years old by normal calculations. Mae and Tim seek to obtain immigrant visas. Under § 1153(h)(1), Tim is issued a visa because: (1) he is the beneficiary of a visa petition filed "under (d) of this section" to classify his "parent under subsection (a), (b), or (c) of this section;" (2) he "sought to acquire" status within one year of a visa becoming available to Mae; and (3) under the age calculation, he is only twenty years old (twenty-two years old minus the two years that the petition was awaiting adjudication by USCIS). 8 U.S.C. § 1153(h). In this scenario, every word in 8 U.S.C. § 1153(h)(1) is used, and none is superfluous. The same basic analysis works smoothly for derivative beneficiaries of the other family-based categories.

2. Seamless operation of § 1153(h)(3) as applied to F2A petitions and derivative beneficiaries of F2A petitions.

In applying the terms of § 1153(h)(3) to primary and derivative beneficiaries of F2A petitions, every term operates smoothly again. For example, an LPR files an F2A petition on behalf of his wife, "Maria." Even though he could file a petition directly on behalf of his minor child, "Sue," he decides to save filing fees and instead lists Sue as a derivative of Maria.[8] When Sue turns 21, she no longer

[8] Costelo criticizes the Government for suggesting that Congress may have passed § 1153(h)(3) in order to save filing fees for petitioners and repetitive

qualifies as Maria's derivative beneficiary - but she would be qualified for classification as the LPR's adult daughter. Under § 1153(h)(3), on that same day, the "alien's petition" "automatically converts" to the "appropriate category" and "retains" the original priority date issued upon the receipt of the original petition. It is as though the "original" petition has notionally split into two petitions - the original still classifying the alien wife in the F2A category and the other classifying Sue in the F2B category. Thus, Sue moves seamlessly from one valid "appropriate category" to another valid "appropriate category." Every term of the paragraph is given effect and no term is surplusage. See United States v. Wenner, 351 F.3d 969, 975 (9th Cir. 2003) ("It is a fundamental canon of statutory construction that a statute should not be construed so as to render any of its provisions mere surplusage.").

3. Disjointed operation of § 1153(h)(3) as applied to derivative beneficiaries of F3 and F4 petitions.

When applied to the facts of Plaintiffs-Appellants cases, however, the operation of the technical terms of § 1153(h)(3) is convoluted. In Costelo, for

---

adjudications for USCIS. C.O.B. 37, 45. While it is true that there is no legislative history on point supporting the Government's suggestion, there is no legislative history contradicting it either. Congress has passed legislation to save petitioners and alien money in the past, and the Government is not required to prove a definitive intent behind the statute in order to prevail. The Government must merely show that Wang is a reasonable interpretation of it.

example, Costelo's daughters were listed as derivative beneficiaries on the F3 petition. In contrast to Sue's situation above, while Costelo was waiting for her visa classification to become current, her daughters were not eligible for any independent classification and would not become eligible for classification again until their mother finally immigrated. Id. Thus, under § 1153(h)(3), on the day that each of Costelo's daughters aged-out, their interests in the F3 petition "automatically converted" to the only "appropriate category" - termination.

Only by delaying the conversion until some later date (i.e., until the date that the parent becomes and LPR and the aged-out alien becomes eligible for F2B classification) or creating a new immigration classification (aged-out former derivative awaiting parent to become LPR in order to become eligible for F2B classification) could § 1153(h)(3) apply to Costelo's daughters. Yet, such delayed conversion or new immigration category are not contained within the four corners of § 1153(h)(3) and do not comport with the historical use of the word "conversion." See Wang, 25 I. & N. Dec. at 34 ("conversion" happens upon the occurrence of an event without a gap in time).

4. Exclusion of F2B petitions for consideration under § 1153(h)(3).

Finally, if one adopts Costelo's argument that "retention" applies to F2B petitions under § 1153(h)(3), the application to F2B petition is ambiguous. An

F2B petition filed by the parent after gaining LPR status would not be eligible for consideration under § 1153(h)(1) since it would be filed to classify the son or daughter as a primary beneficiary under F2B - not "with respect to a relationship described in subsection (a)(2)(A)" and also is not "a petition filed . . . for the classification of the alien's parent." 8 U.S.C. § 1153(h)(2)(A) and (B). Thus, it would not be included in the universe of petitions defined in paragraph (2) and would therefore never be eligible for the age determination made under paragraph (1). Accordingly, under the very definitions of § 1153(h) offered by Costelo, Osorio, and *Amici*, the F2B petitions are not eligible for consideration under § 1153(h)(3). See C.O.B. 24-30; O.O.B. 21-22; C.A.B 9-11 (arguing that § 1153(h)(2) defines the petitions eligible for consideration under paragraph (3); that all petitions considered under paragraph (1) are eligible for consideration under paragraph (3); and that petitions eligible for consideration under paragraph (3) are defined as those filed for "purposes of subsection (a)(2)(A) and (d)").

II. WANG IS A REASONABLE, PERMISSIBLE CONSTRUCTION OF THE STATUTE.

The second step is to review the agency's interpretation of the statute to determine "whether the agency's answer is based on a permissible construction of the statute." INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999). A court may "not overturn an agency decision at the second step unless it is arbitrary, capricious, or

manifestly contrary to the statute." Ramos-Lopez v. Holder, 563 F.3d at 860 (internal citations omitted). Wang is a published decision of the Board. 25 I. & N. Dec. 28. Published decisions are accorded Chevron deference, so long as they are reasonable. Aguirre-Aguirre, 526 U.S. at 425.

A. Matter of Wang Gives Meaning to the Paragraph (3).

Costelo and Osorioclaim that the Board's interpretation is wrong because it limits the applicability of paragraph (3) to a group of individuals who already benefitted from a regulation. C.O.B 24; O.O.B. 23. They claim that, because aged-out derivative beneficiaries of F2A already benefitted from priority date retention under 8 C.F.R. § 204.2(a)(4), paragraph (3) is obsolete unless its application is broader. C.O.B 24; O.O.B. 23; A.A.B. *. Such claims ignore the fact that, under Wang, primary and derivative beneficiaries of F2A petitions are not given the "exact same relief" as they had under 8 C.F.R. 204.2(a)(4). Under Wang, lawful permanent residents are no longer required to file separate petitions once their sons and daughters turn 21 years old. Wang, 25 I. & N. Dec. 35. Compare § 1153(h)(3) (original petition converts) with 8 C.F.R. § 204.2(a)(4) (requiring filing of separate petition). Under Wang, the LPR petitioners are saving

hundreds of dollars in filing fees.[9] In addition, because no new petition is filed, USCIS avoids thousands of new petitions being added to the adjudication pile, already backlogged by over a million petitions.[10] See Wang, 25 I. & N. Dec. at 35 ("neither the beneficiary nor an immigration officer need take any action to effect the conversion to the new preference category"). Although Congress did not clearly state its intention in passing paragraph (3) of § 1153(h), saving taxpayer dollars on the petitioner side of the equation and saving the expenditure of resources on the government side are proper motivations for congressional enactments and may have been the intent behind this congressional enactment. See Wang II (noting that, under Wang, paragraph (3) "is not merely duplicative of the existing regulation, but rather provides a new benefit, i.e., the automatic conversion to the appropriate preference category without additional time and

---

[9] According to USCIS' website, a petitioner must submit $355 along with each I-130 petition filed. http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=c67c7f9ded54d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=75783e4d77d73210VgnVCM100000082ca60aRCRD

[10] According to the USCIS Production Update for the First Quarter of 2009, p. 5, over one million I-130 petitions are currently "awaiting adjudication." http://www.uscis.gov/portal/ site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=0e3817f960082210VgnVCM100000082ca60aRCRD&vgnextchannel=2c039c7755cb9010VgnVCM10000045f3d6a1RCRD

resources involved in filing another visa petition."); Li, 2010 WL 1779922 at *11 ("The Court is not persuaded that this section renders the Board's interpretation of § 1153(h)(3) superfluous. For example, § 204.2(a)(4) does not mention automatic conversion, which is at the heart of § 1153(h)(3) . . . .").

B. Matter of Wang Does Not Render "and (d)" Superfluous.

Plaintiffs-Appellants also claim that Wang renders the phrase "and (d)" superfluous because derivatives of F2A petitions are eligible to be F2A beneficiaries themselves. C.O.B 28. This argument, however, ignores the special language used by Congress in this subsection (paragraphs (1), (2), and (3)) to differentiate between petitions filed to classify a primary beneficiary under F2A and petitions filed to classify the parent of an alien child. Compare 8 U.S.C. § 1153(h)(2)(A) (referring to a petition filed to classify an alien child as a primary beneficiary under (a)(2)(A)) with § 1153(h)(2)(B) (referring to a petition filed to classify the alien's parent as a primary beneficiary with the alien child only being a derivative beneficiary under (d)). Although the original petition filed by an LPR to classify his spouse under F2A also has the effect of classifying his child under F2A, this subsection uses a particular vernacular to distinguish between children who are primary versus derivative beneficiaries of F2A petitions.

To further illustrate this point, consider again the case of Maria and Sue. A visa number becomes available to Maria, the alien spouse. She applies to adjust status, including Sue as a derivative beneficiary. The day that USCIS adjudicates the petition it will determine whether Maria still qualifies under "(a)(2)(A)" as the spouse of the LPR petition. If she does, USCIS will then determine whether Sue still qualifies as Maria's child for purposes of "(d)" - not whether Sue is the child of an LPR. Thus, because of the terminology employed by Congress in § 1153(h) as a whole, Congress could not achieve its desired goal of providing relief to primary and derivative beneficiaries of F2A petitions without referring to both "(a)(2)(A)" and "(d)"

C. Matter of Wang Does Not Impermissibly Limit Paragraph (3) to a Subsection of Petitions Considered Under Paragraph (1).

Costelo, Osorio, and *Amici* claim that because the initial clause of § 1153(h)(3) indicates that § 1153(h)(3) "includes all aliens mentioned" in § 1153(h)(1), Wang impermissibly limits the application of paragraph (3). C.O.B. 29-31 (referring to the clause "[i]f the age of the alien is determined under paragraph (1) . . . ."); O.O.B. 23; C.A.B. 11; O.A.B. 9. This claim, however, ignores the fact that the initial clause in paragraph (3) does not read: "Every alien

whose age is determined under paragraph (1) . . . ." The opposing parties are implicitly importing language into paragraph (3) that is not there.

D. The Self-Petition Provisions Do Not Detract From Wang; They Support It.

Costelo mistakenly argues that paragraph (4) of § 1153(h) offers an example of delayed conversions under the INA and of retention of priority date where the original and subsequent petitioners are different. C.O.B 32. Costelo is wrong on both accounts.

First, VAWA self-petitions are *sui generis*. Because Congress wanted to take the abuser out of the VAWA self-petition scheme, normal family-preference rules could not apply to these petitions. Thus, Congress provided explicit authority for determination of family-preference categories and for movement between categories based on the status of the abuser or the aging-out of derivative beneficiaries. See, generally, 8 U.S.C. § 1154(a)(1)(A); 8 U.S.C. § 1154(a)(1)(B); compare 8 C.F.R. § 204.2(i)(3) (providing general authority for F2A spouse and children of LPR to convert to IR spouse and children of U.S. citizen upon naturalization of petitioner) with 8 C.F.R. § 204.2(e)(1)(iii) (classification of child of LPR abuser will not be automatically upgraded to IR relative status upon the naturalization of the abuser). Because the U.S. citizen and LPR relatives are taken

out of the petitioning process but are still relevant in the classification process, comparisons between self-petitioners and normal family-preference petitions are not appropriate

Costelo's VAWA argument is not supported by the facts. Because not every derivative beneficiary of a self-petition qualifies to be a self-petitioner in his or her own right (i.e., not every son or daughter of a self-petitioner is also the son or daughter of the abuser or suffered abuse by the abuser), Congress provided explicit authorization for an aged-out derivative beneficiary of a self-petitioning alien to become his own "VAWA self-petitioner." 8 U.S.C. § 1154(a)(1)(D)(III). This reclassification authority is entirely separate from 8 U.S.C. § 1153(h)(3) and happens automatically upon the alien attaining 21 years of age - without the need for filing a new petition and without a gap in status.[11] 8 U.S.C. § 1154(a)(1)(D)(III). Under this provision, there is a continuity of petitions, much like the continuity of petitions under the Board's interpretation of § 1153(h)(3). This continuity makes the retention of the original priority date similar to that under § 1153(h)(3). Congress specifically chose not to use the words "convert"

[11] Because 8 U.S.C. § 1154(a)(1)(D)(III) is more beneficial to derivative beneficiaries of self-petitions than § 1153(h)(3), the only clear benefit accorded by § 1153(h)(4) is that it allows beneficiaries to deduct administrative delays from their age under § 1153(h)(1) - thereby qualifying as F2As while their applications to adjust status are being adjudicated.

and "retain" in § 1154(a)(1)(D)(III). Compare 8 U.S.C. § 1154(a)(1)(D)(III) (the child "shall be considered . . . a VAWA self-petitioner with the same priority date as that assigned to the petitioner in any petition described in clause (ii)."") with 8 U.S.C. § 1153(h)(3) ("the alien's petition shall automatically be converted . . . and the alien shall retain the original priority date . . . .). This difference in wording of the two provisions undermines Costelo's arguments that § 1154(a)(1)(D)(III) proves that immigration laws allow "retention" where there are different petitioners. C.O.B 32-33. Thus,

> there is no contradiction between Wang and INA § [1153](h)(4). Self-petitioners or derivatives of self-petitioners are explicitly reclassified by statute when they age-out, leaving no gap of ineligibility, unlike the aged-out derivative beneficiaries of F3 or F4 petitions. Section 203(h)(4) supports, rather than contradicts, the Wang interpretation.

C.E.R. 6.

E. Wang Reasonably Determined that Separate F2B Petitions Filed by the Parents Are Not Entitled to the Priority Dates from Unrelated Petitions and that § 1153(h)(3) Did Not Authorize Unbounded Grandfathering of Priority Dates.

Costelo assert sthat in Wang the Board only analyzed "conversion" in conjunction with "retention," when the two are actually separate benefits that must

be analyzed separately.[12] C.O.B 33-35. In Wang, however, the Board did separately consider "conversion" and "retention." First, the Board determined that the F4 petition originally naming Wang's daughter as a derivative beneficiary could not "automatically convert" because "there was no other category to which her visa could convert because no category exists for the niece of a United States citizen." Wang, 25 I. & N. Dec. at 35. Second, the Board rejected the "retention" of the earlier priority for application to the F2B petition because "the new visa petition has been filed by her father, not by her aunt (who was the original petitioner)." Wang, 25 I. & N. Dec. at 35.

Costelo and *Amici* argue that, if "conversion" does not make sense in relation to the F3 and F4 petitions due to the delayed conversion, the two phrases should be read as two separate benefits, with retention applying to the F2B petitions. This argument has several fatal flaws. First, there is no ambiguity in the operation of "conversion" together with "retention" if applied to aged-out primary and derivative beneficiaries of F2A petitions. The ambiguity only arises when

---

[12] *Amici*'s creative argument - that "and" clearly means "or" when used in paragraph (3) and that therefore "conversion" and "retention" are separate benefits, C.A.B. 15, - is misleading because it is the combination of the words "between" and "and" that connote "or" - not "and" used by itself. Compare "He felt that he was being forced to choose between his career and his family," C.A.B. 15, with "He felt that he was being forced to choose his career and his family."

Plaintiffs-Appellants attempt to import F3, F4, and F2B petitions into § 1153(h)(3). The opposing parties should not be able to create their own ambiguity and then claim that the Board unreasonably erred by not analyzing the statute in light of this manufactured ambiguity. Second, breaking down the paragraph into independent clauses is counter to the text of the paragraph and historical structure of "conversion" provisions, which state the category to which the petition converts and the applicable priority date. See discussion of "conversion" provisions, *infra* at 54.

Even if one considers the phrases separately, however, Costelo's arguments still must fail because F2B petitions are not eligible for consideration under § 1153(h)(3). In their brief, Costelo admits as much. Costelo argues that the petitions eligible for consideration under § 1153(h)(3) are coextensive with those eligible for consideration under § 1153(h)(1). C.O.B. 31. Costelo fails to note, however, that F2B petitions are filed to classify the beneficiary under § 1153(a)(2)(B) - not "(a)(2)(A) or (d)." See 8 U.S.C. § 1153(h)(1) ("for purposes of subsection of (a)(2)(A) and (d)") (emphasis added); see also § 1153(h)(2) ("with respect to a relationship described in subsection (a)(2)(A)" and "with respect to an alien child who is a derivative beneficiary") (emphasis added); § 1153(h)(3) ("If the age of the alien is determined under paragraph (1) . . . for

purposes of subsections (a)(2)(A) and (d)") (emphasis added). Thus, since F2B petitions would not be eligible for consideration under § 1153(h)(1) under Costelo's own interpretation of the statute, F2B petitions should also not be eligible to "retain" the original priority date under § 1153(h)(3).

If one analyzes Costelo's and *Amici*'s arguments in further depth, the expansive nature of their interpretations take shape. If retention truly "attaches to the beneficiary" (O.A.B. 17) of all derivative petitions, aged-out derivative beneficiaries would be able to use the earlier priority dates with any petitions - not just F2B petitions. Thus, under opposing litigants' interpretations, aged-out derivatives could apply the earlier priority dates to F2A spousal petitions and even employment petitions. "Absent clear legislative intent to that effect," the Board refused to find such open-ended grandfathering of priority dates. Wang, 25 I. & N. Dec. at 39. Considering the paradigm shift such a provision would effect, the Board did not err in doubting that Congress would sneak such a watershed provision into a statute without there being even a single reference to it in the legislative history.

F. The examples cited by Opposing Parties are inapposite but still support Wang.

In an effort to portray the Board's decision as unreasonable, Costelo, Osorio, and *Amici* allege that the Board engaged in selective recitation of examples of conversion and retention of priority dates but overlooked others. C.A.B. 15, 25; O.A.B. 22; O.O.B. 27. The Board's failure to discuss the provisions cited by the opposing litigants was reasonable, however, because none of those provisions use the terms "conversion" and "retention" in conjunction, most do not use the terms "conversion" or "retention" at all, and, even if considered relevant, these examples actually support the Board's analyses.

1. The family-based immigration provisions cited for comparison are inapposite because they do not involve "automatic conversion" and priority date "retention."

Amici and Osorio cite several examples of aliens "retaining" earlier priority dates. C.A.B. 20-25. Both allege that the Board committed a grave oversight in not discussing these relevant immigration laws. This "oversight" was for good reason because the cited provisions do not use both the terms "conversion" and "retention" and do not allow for a gap in classification under the INA.

First, the litigants claim that 8 C.F.R. § 204.2(h)(2) shows that the original and subsequent petition need not be the same in order to retain an earlier priority

date. C.A.B. 15, 25; O.A.B. 22; O.O.B. 27. This argument fails because 8 C.F.R. § 204.2(h)(2) does not use the terms "retain" or "conversion." It reads:

> Subsequent petition by same petitioner for same beneficiary. When a visa petition has been approved, and subsequently a new petition by the same petitioner is approved for the same preference classification on behalf of the same beneficiary, the latter approval shall be regarded as a reaffirmation or reinstatement of the validity of the original petition, except when the original petition has been terminated pursuant to section 203(g) of the Act or revoked pursuant to part 205 of this chapter, or when an immigrant visa has been issued to the beneficiary as a result of the petition approval. A self-petition filed under section 204(a)(1)(A)(iii), 204(a)(1)(A)(iv), 204(a)(1)(B)(ii), 204(a)(1)(B)(iii) of the Act based on the relationship to an abusive citizen or lawful permanent resident of the United States will not be regarded as a reaffirmation or reinstatement of a petition previously filed by the abuser. A self-petitioner who has been the beneficiary of a visa petition filed by the abuser to accord the self-petitioner immigrant classification as his or her spouse or child, however, will be allowed to transfer the visa petition's priority date to the self-petition. The visa petition's priority date may be assigned to the self-petition without regard to the current validity of the visa petition. . . .

(emphasis added). This provision requires a self-petitioner to file a new petition and then "transfers" the priority date to the self-petition. Id. The same is true for 8 C.F.R. § 204.2(i)(1)(iv) (involving widows of U.S. citizens). C.A.B. 14.

Osorio and *Amici* also cite the USA Patriot Act of 2001 ("Patriot Act"), Pub. L. No. 107-56, § 421(c) 423, 115 Stat. 272, as relevant to an analysis of

"conversion" and "retention" of priority dates. O.O. B. 27-28; C.A.B. 25; O.A.B. 19-20. Yet, the cited provision reads:

> (c) Priority Date.--Immigrant visas made available under this section shall be issued to aliens in the order in which a petition on behalf of each such alien is filed with the Attorney General under subsection (a)(1), except that if an alien was assigned a priority date with respect to a petition described in subsection (b)(1)(A)(i), the alien may maintain that priority date.

USA Patriot Act, § 421(c) (emphasis added). The Patriot Act utilizes neither the term "conversion" nor "retain," making comparisons between the provisions ill advised.[13]

2. The employment-based analogies raised by the opposing litigants do not involve "conversion" and "retention."

Amici and Osorio also insist that the Board in Wang unreasonably failed to consider several priority date transfers allowed in the employment context. C.A.B. 16-17; O.A.B. 18-19; O.O.B. 28. These comparisons are equally unhelpful. First, the procedures governing employment petitions and family petitions are totally different. Different forms are used, different types of evidence are submitted by petitioners, different congressional priorities drive the programs and quotas, and

[13] Of note, however, even if comparisons are made, § 421(c) of the USA Patriot Act provides for a seamless movement from one valid immigration classification to another, without delay, upon the occurrence of an altering event consistent with the meaning of the term "conversion" as employed by the Board in Wang.

different events disqualify the beneficiaries from utilizing the visas. Compare, generally, 8 U.S.C. § 1153(a) with § 1153(b) and 8 C.F.R. § 204.2 with § 204.5. Costelo and Osorio involve only family-preference petitions. Second, none of the employment visa examples cited deals with "automatic conversion" in conjunction with priority date "retention." 8 C.F.R. § 204.5(e) reads:

> Retention of section 203(b) (1), (2), or (3) priority date. -- A petition approved on behalf of an alien under sections 203(b) (1), (2), or (3) of the Act accords the alien the priority date of the approved petition for any subsequently filed petition for any classification under sections 203(b) (1), (2), or (3) of the Act for which the alien may qualify. In the event that the alien is the beneficiary of multiple petitions under sections 203(b) (1), (2), or (3) of the Act, the alien shall be entitled to the earliest priority date. A petition revoked under sections 204(e) or 205 of the Act will not confer a priority date, nor will any priority date be established as a result of a denied petition. A priority date is not transferable to another alien. (emphasis added).

Although the regulation does utilize the term "retention," it does not use it in relation to conversion of petitions. In fact, the regulation specifically refuses to "convert" petitions, instead requiring each separate employer to file a new Form I-140 (Petition for Alien Worker) on behalf of the alien it wishes to sponsor. Id. This regulation also undermines the opposing parties' own arguments because it shows that Congress knows how to explicitly authorize use of an earlier priority date on "any subsequently filed petition for any classification." Id. Had Congress wished to authorize such broad benefits under 8 U.S.C. § 1153(h)(3), it could have

mirrored the language of this regulation rather than that of 8 C.F.R. § 204.2(a)(4). It is also instructive that, contrary to *Amici*'s arguments (C.A.B. 28-29), this regulation does not allow an alien to use the earlier priority date if the earlier petition is no longer valid. See 8 C.F.R. § 204.5(e) (a revoked petition "will not confer a priority date, nor will any priority date be established as a result of a denied petition.").

The provision allowing alien doctors to "retain" priority dates from earlier I-140 petitions is also inapposite. 8 C.F.R. § 204.12(f)(1) reads:

> If the physician beneficiary has found a new employer desiring to petition the Service on the physician's behalf, the new petitioner must submit a new Form I-140 (with fee) with all the evidence required in paragraph (c) of this section, including a copy of the approval notice from the initial Form I-140. If approved, the new petition will be matched with the pending adjustment of status application. The beneficiary will retain the priority date from the initial Form I-140 . . . . (emphasis added).

While allowing the alien to "retain" an earlier priority date, the provision does not involve "conversion" of a petition. As in the earlier examples, the regulation contemplates the filing of a new petition by each sponsoring employer. Id. Although 8 C.F.R. § 204.12(f)(1) provides an example of the agency using the word "retain" when a different petitioner is involved, this example is not directly on point. First, it is not on point because of the differences between the

employment and family immigration schemes. Second, it involves an alien doctor who has already begun working in an under-served area or VA facility based on the earlier approved I-140 petition and is simply changing facilities while the I-485 is pending adjudication. 8 C.F.R. § 204.12(f)(1).

3. The Western Hemisphere Savings Clause does not involve "conversion" and "retention."

Osorio and *Amici* also condemn the Board's decision in Matter of Wang for failing to consider the Western Hemisphere Savings Clause, P.L. 94-571, 90 Stat. 2703 (October 20, 1976), as an analogous provision. O.O.B. 28-29; C.A.B. 16-17; O.A.B. 20. Section 9(b) of the Western Hemisphere Savings Clause reads:

> An alien chargeable to the numerical limitation contained in Numerical section 21(e) of the Act of October 3, 1965 (79 Stat. 921), who established a priority date at a consular office on the basis of entitlement to immigrant status under statutory or regulatory provisions in existence on the day before the effective date of this Act shall be deemed to be entitled to immigrant status under section 203(a) (8) of the Immigration and Nationality Act and shall be accorded the priority date previously established by him. (emphasis added).

The Western Hemisphere Saving Clause likewise is not similar to 8 U.S.C. § 1153(h)(3) because it utilizes neither the term "conversion" nor "retention" - the key operational phrases in 8 U.S.C. § 1153(h)(3). This statute actually undermines

their arguments because it explicitly shows that Congress knows how to allow an alien to utilize a previously established priority date on later petitions filed by different petitioners for different classifications. Had Congress intended to do so in the CSPA, it could have explicitly done so without resorting to conversion of petitions, age formulas, and one-year bars.

4. The historical uses of the terms "conversion" and "retention" in immigration law support Wang.

"In immigration regulations, the phrase 'automatic conversion' has a recognized meaning." Wang, 25 I. & N. Dec. at 32. This meaning took shape as early as 1965 when the INS promulgated regulations allowing family-sponsored immigrant petitions to "convert" from one valid classification to another. See 8 C.F.R. § 205.8 (1965). From 1965 until the present, agency regulations only used the terms "conversion" and "automatic conversion" in relation to family-sponsored visa petitions and only in reference to a "currently valid [visa] petition" that converts from one visa category to another visa category upon the happening of an event that disqualifies the beneficiary under his original category but renders him simultaneously eligible for a new immigrant category. See, generally, 8 C.F.R. § 205.8 (1965), 8 C.F.R. § 204.5 (1966), and 8 C.F.R. § 204.5 (1976).

The earliest "conversion" provision, 8 C.F.R. § 205.8 (1965), applied only to preference petitions where the petitioner naturalized. Section 205.8 (1965) reads:

> **Conversion of classification of third preference beneficiaries upon naturalization of petitioner.**
>
> A currently valid petition according section 203(a)(3) preference status shall be regarded as approved for a nonquota status under section 101(a)(27)(A) or for preference quota status under section 203(a)(2), as appropriate, as of the date the beneficiary acquired such status through the petitioner's naturalization. (emphasis added).

Over time, the "conversion" provisions included conversions on account of marriage, divorce, and aging of beneficiaries, as well as naturalization of petitioners. For example, 8 C.F.R. § 204.5 (1976) provided:

> **Automatic conversion of classification of beneficiary.**
>
> (a) *By change in beneficiary's marital status*. (1) A currently valid petition previously approved to classify the beneficiary as the unmarried son or daughter of a U.S. citizen under section 203(a)(1) of the Act shall be regarded as approved for preference status under section 203(a)(4) of the Act as of the date the beneficiary marries. A currently valid petition previously approved to classify the child of a U.S. citizen as an immediate relative under section 201(b) of the Act shall also be regarded as approved for preference status under section 203(a)(4) of the Act as of the date the beneficiary marries. . . .
>
> (2) A currently valid petition classifying the married son or married daughter of a U.S. citizen for preference status under section 203(a)(4) of the Act shall, upon the presentation of satisfactory evidence of the legal termination of the beneficiary's marriage, be

> regarded as approved for status under section 203(a)(1) of the Act or, if the beneficiary is under 21 years of age, for status as an immediate relative under section 201(b) of the Act, as of the date of termination of the marriage.
>
> (b) *By beneficiary's attainment of the age of 21 years.* A currently valid petition classifying the child of a U.S. citizen as an immediate relative under section 201(b) of the Act shall be regarded as approved for a preference status under section 203(a)(1) of the Act as of the beneficiary's attainment of his 21st birthday if he is still unmarried . . . .
>
> (c) *By petitioner's naturalization*. Effective upon the date of naturalization of a petitioner who had been lawfully admitted for permanent residence, a currently valid petition according preference status under section 203(a)(2) of the Act to the petitioner's spouse, unmarried son, or unmarried daughter, shall be regarded as approved to accord status as an immediate relative under section 201(b) of the Act to the spouse, and unmarried son or unmarried daughter who is under 21 years of age, and to accord preference status under section 203(a)(1) of the Act to the unmarried son or unmarried daughter who is 21 years of age or older.

(emphasis added).

Throughout the evolution of these provisions, each agency regulation using the term "conversion" limited it to a "currently valid petition" shifting from one valid category to another valid category, effective on the date of the event that precipitated the disqualification under the original category. See Bender's Immigration Bulletin, 11-20 Bender's Immigra. Bull. 2 (Oct. 15, 2006) ("When the change of relationship or status of the immediate succeeding relationship is not

one that will support a petition, no new preference is established and the priority date is lost, even if the later status change would support a petition."). In the later versions, the agency added language to clarify whether the applicable priority date was the date of the conversion or the date of the original filing. See generally, 8 C.F.R. § 204.2(i)(1), (2), (3) (for each provision relating to conversions within the preference categories, regulations clarified that the "beneficiary's priority date is the same as the date the [petition for the original] classification was properly filed").

Up until this point, Congress had not enacted any immigration statutes using the term "conversion." Congress' first use of the term "conversion" came in the Violence Against Women Act of 2000, Pub. L. 106-386, 114 Stat. 1533 (2000). In a declaration codified as a note in 8 U.S.C. § 1101, Congress stated that it was "creat[ing] a new nonimmigrant visa classification" and authorizing the Attorney General, in his discretion, "to convert the status of such nonimmigrants to that of permanent residents." 8 U.S.C. § 1101, note entitled "Protection for Certain Crime Victims Including Victims of Crimes Against Women," (2)(B) and (C). The "conversion" explicitly authorized by Congress was from a valid nonimmigrant status directly to immigrant status with no gap in status and contained wording defining the applicable priority date.

The next usage of the term "conversion" by Congress was in the Child Status Protection Act ("CSPA"), Pub. L. 107-208, 116 Stat. 927 (Aug. 6, 2002). In § 2 of the CSPA, Congress specified that "if the petition is later converted [under 8 C.F.R. § 204.2(i)(3)], due to the naturalization of the parent" the alien's age, for purposes of determining if she is an immediate relative, "shall be made using the age of the alien on the date of the parent's naturalization." Id. (codified at 8 U.S.C. § 1151(f)(2)).

Congress further expanded the existing agency regulations in § 2 of the CSPA by providing that for a petition "converted [under 8 C.F.R. 204.2(i)(1)(iii)], due to the legal termination of the alien's marriage," the age of the alien on the date of the termination shall be considered to determine if the alien is an immediate relative. CSPA § 2 (8 U.S.C. § 1151(f)(3)).[14] The term "conversion" as used in § 2 of the CSPA refers to one petition, one petitioner, and the instantaneous movement from one currently valid visa category to another.

---

[14] Immigration law has never authorized the son or daughter of a lawful permanent resident who marries (thus revoking any pending F2B petition under 8 C.F.R. § 205.1(a)(3)(i)(I)) to "convert" to the married son or daughter of a citizen upon the later naturalization of the original petitioner. Such a "conversion" would be from a valid F2B category to a nonexistent category to a valid F3 category. The fact that Congress has never allowed these sons and daughters of U.S. citizens to take advantage of earlier priority dates undercuts Plaintiffs' arguments that Congress nonetheless intended for adult sons and daughters of future immigrants to do so.

Congress' use of the terms "conversion" in conjunction with "retention" in § 3 of the CSPA are the subject of this litigation.

Congress' final use of the term "conversion" in the CSPA was in § 6, which allowed aliens to opt out of the general rule that a "petition shall be converted" automatically upon the naturalization of the parent petitioner. Id. (8 U.S.C. § 1154(k)). Again, the term "conversion" is used in the context of one petition, one petitioner, and the seamless movement from one currently valid visa category to another. The subsection also contains a provision describing the appropriate priority date to apply to the petition. See 8 U.S.C. § 1154(k)(3).

Since the CSPA was enacted, Congress has only used the term "conversion" once in the immigration context. See National Defense Authorization Act ("NDAA") of 2008, Pub. L. 110-242, § 2, 122 Stat. 1567. In the NDAA of 2008, Congress recognized that the "Secretary of Homeland Security or the Secretary of State may convert an approved petition for special immigrant status under [the NDAA of 2006] to an approved petition for special immigrant status under [the NDAA of 2008] . . . ." 8 U.S.C. § 1101, note titled "Authority to convert petitions during transition period." This provision again authorized the seamless transition from one valid category to another valid category of a single petition filed by a single petitioner.

Contrary to Plaintiffs-Appellants' claims, the Board's decision in Wang is consistent with the historical use of the term "conversion": (1) conversion is from one valid category to another; (2) conversion and retention are used together, not in a disjointed fashion; and (3) priority dates from terminated petitions cannot be resurrected by subsequent petitions - regardless of whether they were filed by the same petitioner. See 8 C.F.R. § 204.2(h)(2); 8 C.F.R. § 204.5(e); see also Alonso-Varona v. Mukasey, 319 Fed. Appx. 502, 504 (9th Cir. 2009) (where earlier petition had been revoked by marriage but alien had subsequently divorced, nothing in the CSPA would permit him to reclaim the priority date from the revoked 1992 petition).

G. Wang Furthers Congress' Goals of Protecting those Who Age-Out Due to Administrative Delay, Reuniting Families Without Harming Other Families.

1. Alleviating the effects of visa allocation backlogs was not a congressional priority.

Costelo claims that, contrary to the Board's holding in Wang, the CSPA was passed in order to alleviate the affect of numerical allocation limitations on individuals- not to alleviate financial and administrative burdens - and was aimed at reuniting families. C.O.B 35-38. These contentions are supported neither by the legislative history of the CPSA nor by the CSPA itself. First, the CSPA did

nothing to increase the number of visas that may be allocated each year (which would be the more straight-forward way of alleviating the burden of numerical allocation limits). See Wang, 25 I. & N. Dec. at 38 ("there is no indication in the statutory language or legislative history of the CSPA that Congress intended to create a mechanism to avoid the natural consequence of a child aging out of a visa category because of the length of the visa line"). Contrary to Costelo's claims, § 1154(k) is not evidence of Congress alleviating the affects of numerical backlogs. As the district court below noted, the legislative history relating to § 1154(k) specifically indicates that the provision

> was intended to prevent the unmarried son or daughters of lawful permanent residents from being penalized by their parents attaining U.S. citizenship. 148 Cong. Rec. H4991 (daily ed. July 22, 2002) (statement of Rep. Sensenbrenner). It sought to prevent 'naturalizing out' and is unrelated to the 'aging-out' provisions of CSPA.

Decision of District Court in Costelo, C.E.R. 5 n 1. Costelo offers no direct legislative history to counter this conclusion.

2. Congress' stated goal of reuniting families of LPRs and U.S. citizens was made with the caveat that others could not be displaced.

Costelo's claims that Wang undermines Congress' goal of "reuniting families" (C.O.B. 39-42) is disingenuous because, in arguing for reunification of their families, they are simultaneously arguing for the continued separation of

other families. Costelo, Osorio, and Amici's interpretations are basically a shell game, moving one group of individuals from the front of the line to the middle, and one group from the back to the front. No additional individuals would be entitled to classification under the INA; there would be no net increase in immigrants. Thus, the question is not "did Congress want to reunite families when it passed the CSPA?" The correct questions are "which families did Congress intend to benefit, and at what expense to other families?"

Courts have been clear that, in passing the CSPA, Congress was focused on reuniting the families of current U.S. citizens and Legal Permanent Residents - not the families of intending immigrants. Ochoa-Amaya v. Gonzales, 479 F.3d 989, 991 (9th Cir. 2007) ("The laudable purpose of [8 U.S.C. § 1154(f)] is to prevent children of United States citizens from 'aging-out'".); Chen v. Rice, 2008 U.S. Dist. LEXIS 57052, *28 (E.D. Pa. 2008) ("The CSPA was passed to expedite the unification of qualifying derivative family members of United States citizens and legal permanent residents, which had been delayed by processing backlogs.") In this vein, the CSPA protects "young immigrants losing opportunities, to which they were entitled, because of administrative delays." Padash v. INS, 358 F.3d 1161, 1174 (9th Cir. 2004) (emphasis added). This benefit, however, came with an important caveat: other aliens "who have been waiting patiently in other visa

categories" were not to be displaced. Wang, 25 I. & N. Dec. at 37 (quoting 148 Cong. Rec. H4989 (statement of Rep. Jackson-Lee), 2002 WL 1610632, at *H4992; 147 Cong. Rec. H2901, 2001 WL 617985, at *H2902)). Neither purpose is furthered by opposing litigants' interpretations of the statute: the parent parties were not U.S. citizens or LPRs at the time that the F3 and F4 immigrant petitions were filed, and their sons and daughters did not age-out due to administrative delays.

Costelo claim that the Board unfairly characterizes the aged-out former derivative beneficiaries as "line-jumpers" and that, because their children have been waiting so long to immigrate, it is fair for the sons and daughters to move to the front of the F2B line. C.O.B. 39. The unfairness, however, is easily conveyed by focusing on applicable fact patterns.

In 2000, "Tania" immigrated as the beneficiary of an immediate relative petition. Her son was not eligible to immigrate with her because immediate relatives may not have derivative beneficiaries. 8 C.F.R. § 204.2(a)(4). Tania filed an F2A petition in 2001 for her unmarried son. At the time, he was 18 years old. When he turned 21 years old, the F2A petition converted to an F2B petition. The son is still waiting for a visa number to become available.

Meanwhile, "Mimi" was the beneficiary of a Form I-130 filed in 1995. Her 20 year-old daughter was listed as a derivative beneficiary on the I-130, but when Mimi gained lawful resident status in 2009, her daughter no longer qualified as a "child." In 2009, Mimi filed an F2B petition for her then-34-year-old daughter. If the 1995 priority date were applied to the 2009 petition, a visa number would be immediately available to her daughter.

In 2009, Mimi's 35-year-old daughter and Tania's 26-year-old son were both grown adults. Both were entitled to F2B classification. Both parents consider their adult sons and daughters as being part of the "family unit." Yet, Tania became a lawful permanent resident nine years before Mimi and filed her F2B petition eight years before Mimi filed hers. Tania has been separated from her son since 2000, but Mimi has only been separated from her daughter since 2009. Under the opposing parties' interpretations, Mimi's daughter would be displacing Tania's son - even though he had been patiently waiting in another visa category.

Although Costelo, Osorio, and *Amici* are able to cite generic congressional pronouncements indicating that family unity is a goal of Congress,[15] they cite

[15] "Family unity" is an "interest," not a "right." See Kleindienst v. Mandel, 408 U.S. 753, 770-71 (1972) (upholding "policies and rules for exclusion of aliens" that impact family unity but are based on a "facially legitimate and *bona*

nothing indicating that Congress meant to benefit Mimi to the detriment of Tania. In fact, even the generic guidance on point establishes the error in the opposing parties' arguments:

> Congress has decided that children . . . cannot qualify for preferential status if they are married or are over 21 years of age. 8 U.S.C. § 1101(b)(1). . . . With respect to each of these legislative policy distinctions, it could be argued that the line should have been drawn at a different point and that the statutory definitions deny preferential status to parents and children who share strong family ties . . . But it is clear from our cases . . . that these are policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress.

Fiallo, 430 U.S. at 796, 797-98 (1977); see also Alvidrez v. Ridge, 311 F. Supp. 2d 1163, 1166 (D. Kan. 2004) ("An adult son or daughter can reasonably be expected to live apart from his or her parents while waiting for his or her 2B numbers to become available."); see also 8 U.S.C. § 1153(d) (allowing derivative status for spouses and "children" but not for adult sons and daughters of primary beneficiaries); Akhtar v. Gonzales, 406 F.3d 399, 407-408 (6th Cir. 2005) (in asylum context, determining not to second guess limitations on CSPA's scope because "Congress very well could have determined that older children and

---

fide reason"); Mercado v. Mukasey, 539 F.3d 1102, 1107 n. 5 (9th Cir. 2008) (recognizing that parental "rights" have been limited to "child"-bearing and "child"-rearing decisions and that expanding these rights to immigration in general would be "implausible" because every deportation decision impacts families).

married children are, in general, sufficiently independent such that they do not merit preferential treatment based on the asylum status of their parents").

Contrary to opposing litigants' claims, Mimi's aged-out daughter had not been "waiting in the immigrant visa line" with her. C.O.B. 39-40. Since there is no actual "line," it is easy to split hairs as to the correct analogy. However, one thing is clear: Mimi's daughter was not eligible for classification in the F4 category but for her derivative status; if Mimi chose not to immigrate, her daughter could not immigrate without her even if she was under 21 years old when a visa number became available in the F4 category; and Mimi's daughter was no longer entitled to an F4 visa after she turned 21 years old; Mimi's daughter was not eligible for any follow-on category on the day that she turned 21 years old. Matter of Kwik, 13 I. & N. Dec. 89 (BIA 1968) ("the immigration laws do not provide for visa preference to be granted to nephews"); Santiago v. INS, 526 F.2d 488, 491 (9th Cir. 1975), cert. denied, 425 U.S. 971 (1975) (derivative beneficiary's interests simply are not the equivalent of "actual preferences"). Finally, regardless of whether Mimi's daughter was in the F4 line or not, Costelo cannot argue that their interpretation would displace others who had already been waiting in the F2B line - whether or not such moving ahead is justified.

Osorio cite Baruelo v. Comfort, 2006 U.S. Dist. LEXIS 94309, at *10-*11 (N.D. Ill. Dec. 26, 2009) in support of their position that the adult children should not have to go to the back of another line. O.O.B. 35. Yet, the Baruelo opinion dealt with the derivative beneficiary of an F2A petition who had aged-out of her derivative classification but was simultaneously eligible for classification as a primary beneficiary in the F2B category. Baruelo is exactly the class of alien that the Board determined is eligible to benefit from automatic conversion under § 1153(h)(3). From the date that Baruelo's father filed the I- 130 on behalf of his wife (Baruelo's mother), Baruelo was also entitled to classification as a principal beneficiary. (Baruelo's LPR father most likely included her as a derivative beneficiary rather than filing a separate petition naming Baruelo as the primary beneficiary in order to save on filing fees.) Thus, the Baruelo holding is consistent with, not contrary to, the Board's holding in Wang.

III. THE INTERPRETATIONS OFFERED BY COSTELO, OSORIO, AND *AMICI* ARE NOT REASONABLE.

The interpretations offered by the opposing parties make § 1153(h)(3) more ambiguous instead of clearer, and therefore do not support their claim that Wang is unreasonable.

As discussed earlier, Costelo and *Amici* argue that aged-out derivative beneficiaries of F3 and F4 petitions can transfer the F3 and F4 priority dates to separate F2B petitions. Since the wait for an F2B visa is always shorter than for an F3 or F4 visa, as soon as the F2B petition is filed, a visa number would be "immediately available" in most cases to the former derivative beneficiary. C.E.R. 864. If it had been Congress' intent that aged-out derivatives be able to immigrate with or immediately after their parents, Congress could have dispensed altogether with the complicated formula of § 1153(h)(1) and the conversion process of 8 U.S.C. § 1153(h)(3). Instead, it could have simply frozen the age of all derivatives to the date of filing, as it did in other sections of the CSPA, or created directly-petitionable categories for grandchildren and nieces and nephews. See 8 U.S.C. § 1151(f) (freezing age of child of United States citizen to date petition filed); 8 U.S.C. § 1158(b)(3)(B) (children will not age-out of derivative classification under asylum petitions). This Court has already declined to interpret the CSPA in such a way as to render its formulas superfluous. See Ochoa-Amaya, 479 F.3d at 993.

Costelo, Osorio, and *Amici* also ignore the purpose behind "derivative" status: avoiding the separation of parents and minor children. None of the parents in Costelo or Osorio were separated from their sons and daughters while they were "children." Now that their sons and daughters are grown men and women, there is

no evidence that Congress meant to treat them more favorably than other adult sons and daughters of LPRs. See Alvidrez, 311 F. Supp. 2d at 1166 ("An adult son or daughter can reasonably be expected to live apart from his or her parents while waiting for his or her 2B numbers to become available.").

CONCLUSION

While there are indeed gaps in paragraph (3) of § 1153(h), the Board has filled them - a responsibility specifically left to the agency, not Plaintiffs-Appellants or Amici. See 8 C.F.R. § 1003.1(d)(1). Because the Board filled the gaps in a reasonable manner, this Court, likewise, does not have "authority to reconstrue the statute." Morales-Izquierdo v. Gonzales, 486 F.3d 484, 493 (9th Cir. 2007). The Government requests that this Court affirm the decisions below, granting deference to Wang and finding that its application to the facts of the specific cases was not arbitrary or capricious.

August 16, 2010

Respectfully submitted,

TONY WEST
Assistant Attorney General
Civil Division
U.S. Department of Justice

ELIZABETH J. STEVENS
Assistant Director
District Court Section
Office of Immigration Litigation

/s/ Gisela A. Westwater
GISELA A. WESTWATER
Trial Attorney
Gisela.Westwater@usdoj.gov
District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P. O. Box 868 Ben Franklin Station
Washington, D.C. 20044

/s/ Aaron D. Nelson
AARON D. NELSON
Trial Attorney
Aaron.Nelson@usdoj.gov
District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 868 Ben Franklin Station
Washington, D.C. 200044

Attorneys for Defendants-Appellees

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I hereby certify that Counsel for Defendants-Appellees are aware of only the following related case pending before this Court:

Jhoanna Co v. USCIS, et al, No. 3:09-CV-00776-MO (D. Ore. Apr. 23, 2010), appeal docketed, No. 10-35547 (9th Cir. Jun. 15, 2010).

August 16, 2010

/s/ Gisela A. Westwater
GISELA A. WESTWATER
Trial Attorney, District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice

Attorney for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the Government's Brief:

(1) was prepared using 14-point Times New Roman font;

(2) is proportionally spaced; and

(3) is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 32-2 and consists of 15,836 words and 70 pages, excluding portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

August 16, 2010

/s/ Gisela A. Westwater
GISELA A. WESTWATER
Trial Attorney, District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice

Attorney for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2010, I electronically filed the foregoing Brief for Defendants-Appellees with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participant:

Attorneys for Costelo, et al.:

Anthony J. Favero
REEVES & ASSOCIATES
Ninth Floor
2 North Lake Avenue
Pasadena, CA 91101-1871

Jeremiah Johnson, Attorney
Reeves & Associates, APLC
Suite 1080
388 Market Street
San Francisco, CA 94111

Nancy Ellen Miller, Esquire, Attorney
LAW OFFICES OF REEVES & ASSOCIATES
9th Floor
Two North Lake Avenue
Pasadena, CA 91101

Robert L. Reeves, Esquire, Attorney
LAW OFFICES
Suite 950
Two North Lake Ave.
Pasadena, CA 91101

Attorneys for Osorio, et al.:

Amy Prokop, Attorney
LAW OFFICES OF CARL M. SHUSTERMAN
Suite 1550
600 Wilshire Blvd.
Los Angeles, CA 90017

Carl Shusterman
LAW OFFICES OF CARL M. SHUSTERMAN
Ste. 1550
600 Wilshire Blvd.
Los Angeles, CA 90017

Amici Curiae:

Mary A. Kenney
AMERICAN IMMIGRATION LAW FOUNDATION
1331 "G" Street, NW
Washington, DC 20005

August 16, 2010

/s/ Gisela A. Westwater
GISELA A. WESTWATER
Trial Attorney, District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice

Attorney for Defendants-Appellees