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.*	No. 09-56846 D.C. No. 8:08-cv-00688-JVS-SH Central District of California, Santa Ana **MOTION TO FOR LEAVE TO FILE BRIEF AND ATTACHED EXHIBITS IN RESPONSE TO AMICUS BRIEFS**
ROSALINA CUELLAR DE OSORIO; *et al.*, *Plaintiffs-Appellants*, v. ALEJANDRO MAYORKAS; *et al.*, *Defendants-Appellees.*	No. 09-56786 D.C. No. 5:08-cv-00840-JVS-SH Central District of California, Riverside

Appellees, Janet Napolitano, *et al.*, respectfully move the Court to accept the attached brief and related exhibits responding to arguments raised by amici after briefing had closed in this case. Three separate amicus briefs were accepted by the Court for filing on May 23, 2012. The three briefs were all filed in support of Plaintiffs-Appellants and had a combined total of over 14,795 words.

Appellees' single brief responds to three briefs. Appellees have attempted to limit their reply to the equitable and legal arguments raised by amici in their briefs that have not been previously addressed in Appellees' earlier filings. This matter is set for en banc hearing on June 19, 2012.

In accordance with Circuit Rule 29-3, a representative of each amici organization contacted the undersigned counsel to ascertain Appellees' position regarding the filing of an amicus brief. In each instance, undersigned counsel stated that Appellees do not oppose the filing of the amicus briefs on the condition that Appellees are afforded an opportunity to respond to the briefs. For unknown reasons, amici failed to inform the Court of this stipulation in any of their filings.

The attached brief consists of 9,834 words and 44 pages. Four exhibits are attached thereto. Two of the exhibits consist of public documents available over the internet that are appropriate for judicial notice. Two of the exhibits consist of unpublished decisions of the Board of Immigration Appeals that are not readily available via a publicly-accessible electronic database.

Counsel for *Costelo* have consented to the filing of this brief in reply. Although contacted, counsel in *Cuellar de Osorio* have not yet informed undersigned counsel of their position.

June 6, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2012, I electronically filed the foregoing Motion for Leave to File Brief and Attached Exhibits in Response to Amicus Briefs with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participant:

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DEFENDANTS-APPELLEES' BRIEF IN REPLY TO AMICI

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INTRODUCTION

These consolidated cases involve the interpretation of 8 U.S.C. § 1153(h), a provision enacted as part of the Child Status Protection Act ("CSPA"), Pub. L. No. 107-208, 116 Stat. 927 (2002). Plaintiffs-Appellants urge this Court to adopt an interpretation of the CSPA that is good for them but does nothing in the aggregate to benefit aliens waiting for issuance of an F2B visa. In fact, Plaintiffs-Appellants' interpretation is deleterious for others waiting for a visa because they will be shoved to the back of the line and separated from their families for a longer time than currently anticipated.

Recently, several amici were granted permission to intervene in these cases and filed three separate briefs in support of Plaintiffs-Appellants' proposed interpretation of 8 U.S.C. § 1153(h)(3).[1] Amici purport to represent aliens who would be benefitted by this Court's adoption of the Fifth Circuit's interpretation in *Khalid v. Holder*, 655 F.3d 363 (5th Cir. 2011). However, it is clear that amici, perhaps unbeknownst to themselves, also represent aliens who would be harmed by

[1] The amici and designation of their briefs are as follows: Active Dreams LLC, ECF No. 73 (May 11, 2012) (hereinafter "Dreamactivist"); American Immigration Lawyers Association and Catholic Legal Immigration Network, Inc., ECF No. 76-1 (May 11, 2012) (hereinafter "AILA & CLINIC"); National Immigrant Justice Center and the American Immigration Council, ECF No. 80-2 (May 11, 2012) (hereinafter "NIJC & AIC").

an adoption of the interpretation adopted by the Fifth Circuit in *Khalid*. In this brief, Defendants-Appellees ("the Government") hope to give a voice to this silent and ignored group of aliens.

In their filings, amici focus on two aspects of the case: (1) anecdotal stories of the "real life effects" of the Government's interpretation on intending immigrants, and (2) statutory analyses of the Government's position. AILA & CLINIC, Mot. to File Amicus Brief, ECF No. 76-1, May 11, 2012, at p. 3. Amici's arguments fail, however, because they do not account for the "real life effects" of their interpretation on other categories of intending immigrants and gloss over, or totally ignore, statutory language that detracts from their interpretation. In this brief, the Government attempts to limit its responses to the equitable and legal arguments raised by amici in their briefs that have not already been addressed in earlier filings.

First, amici fail to acknowledge that the allocation of visas in the preference categories is a zero-sum game. Amici act as though the sons and daughters of lawful permanent residents ("LPRs") currently at the front of the F2B line are less deserving than the aged-out derivative beneficiaries whose parents recently became LPRs. But those currently at the front of the F2B line are the adult sons and daughters of LPRs, too. In addition, those aliens currently at the front of the F2B line, who amici wish to displace, are the "sons and daughters" of current LPRs who

have been waiting for many years longer for family reunification than those who amici seek to displace them with.

Amici pretend that the question is whether the aged-out former derivative beneficiaries may immigrate as the sons and daughters of lawful permanent residents. The appropriate question, however, is whether Congress unambiguously favored the adult sons and daughters of F3 and F4 beneficiaries over the adult sons and daughters of those who are already LPRs. When Congress did not create directly-petitionable categories for nieces and nephews and grandchildren of U.S. citizens and did not freeze the age of derivative beneficiaries to the date the petition was filed for their parents, it specifically chose to leave in place the current visa allocation system along with its attendant visa allocation backlog.

Second, amici's statutory construction arguments erroneously fault the Board of Immigration Appeals ("Board") for overlooking inapt analogies. The Board's analysis in *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009), a unanimous published decision, addressed all of the regulatory and statutory comparisons raised by the parties before it. The statutes and regulations that amici now claim were overlooked by the Board were analyzed and rejected as inapt by the Board in a later unpublished decision, by the district court below, and by the original Ninth Circuit panel. In light of the statute's ambiguity, the Board's interpretation is reasonable.

Moreover, amici erroneously overlook the ambiguity introduced by their own interpretation, as evidenced by the unprecedented open-ended grandfathering of priority dates that would occur under amici's interpretation.

For the reasons more fully stated herein, this Court should affirm the lower court's finding: the statute is ambiguous and the Board's reasonable interpretation is entitled to deference.

ARGUMENT

I. Amici's invocation of "family unity" to support their position ignores the fact that numerous families will be devastated by the reshuffling of beneficiaries that would take place under amici's interpretation and cause them to wait ever longer for the reunification of their families.

In their briefs, amici recount anecdotal stories of aliens who hope to use 8 U.S.C. § 1153(h)(3) to propel them to the front of the F2B line. These anecdotal accounts of intending immigrants should not affect this Court's statutory interpretation for two reasons: (1) amici's hand-selected anecdotal stories ignore the equally-compelling stories of aliens waiting at the beginning of the F2B line who would be shunted to the back of the F2B line under amici's interpretation, and (2) amici's anecdotal aliens, once they ceased being minor children of primary beneficiaries, did not re-qualify as members of the relevant "family unit" until *after* their parents became LPRs.

A. All LPRs with adult sons and daughters are affected by the oversubscription in the F2B category – not just LPRs who obtained their status as beneficiaries of F3 and F4 petitions.

In their briefs, amici imply that their hand-selected stories of intending immigrants are representative of those waiting in the F2B line. Amici's anecdotal stories, however, are a slight-of-hand used to shift the Court's focus from their shell game. And it is rightly called a shell game because no matter how one interprets 8 U.S.C. § 1153(h)(3), the bottom line is that there are a limited number of F2B visas available each year. 8 U.S.C. § 1151(c)(ii); 8 U.S.C. § 1153(a)(2). Under amici's interpretation, there would be no increase in the number of visas available in the F2B category. All amici really propose doing is moving one group of beneficiaries from the front of the F2B line to the back and another group from the back of the F2B line to the front. Said another way, for every F2B beneficiary propelled to the front of the F2B line, one F2B beneficiary must by definition be pushed to the back of the F2B line.

Amici do not explain why those at the back of the line, who only recently became eligible for primary classification under the INA, merit preferential treatment over those who are currently at the front of the line and have been eligible for primary classification for many more years. Aliens at the front of the F2B line and at the back of the F2B line both have close family members living in the United

States (hence their eligibility for F2B classification). Aliens in both groups likewise can claim to be waiting for legal authorization to live permanently in the United States.

The question, therefore, is not whether the adult sons and daughters of recently-arrived LPRs should be able to immigrate. Rather, the question is whether, in 8 U.S.C. § 1153(h)(3), Congress clearly expressed an intent to move the sons and daughters of long-time LPRs behind the sons and daughters of newly-arriving LPRs. The answer is: No.

i. When viewed in the correct perspective, the overall F2B allocation "backlog" will not be affected by amici's interpretation.

Amici American Immigration Lawyers Association and Catholic Legal Immigration Network, Inc. claim that their interpretation of 8 U.S.C.§ 1153(h)(3) will "address the reality of untenable backlogs . . . ." AILA & CILN at p. 16. Amicus Active Dreams LLC actually goes so far as to imply that their interpretation of 8 U.S.C. § 1153(h)(3) will somehow prevent the "separation of families, the disruption of family life, [and] the deportation of long-term residents of the U.S. who entered the country as children years before." Dreamactivist at p.2. Amici's proffered interpretation, however, will do nothing of the sort.

Today, under the interpretation espoused by the Board in *Matter of Wang*, there are approximately 212,000 Mexican nationals waiting abroad for F2B visa numbers. *Immigrant Waiting List by Country*, Department of State, 4, http://www.travel.state.gov/pdf/ WaitingListItem.pdf (attached as Exhibit A). Since there is an annual per country cap of 1,838 visas in the F2B category, the result is a 100-year backlog according to amici. AILA & CILN at p. 16.

Even if this Court were to adopt the interpretation espoused by amici, there would still be approximately 212,000 Mexicans waiting abroad for F2B visas; the 1,838 per country visa cap would remain in place; and those at the end of the F2B line would still have to wait about 100 years for a visa. Changing the assignment of priority dates will not create new visa numbers and therefore will not affect the net number of aliens becoming lawful permanent residents in any given year.

Amici's interpretation would result in only two real changes: (1) the priority dates on the Visa Bulletin would retrogress to account for the redistribution of priority dates (instead of the F2B priority date cut-off being January 1, 1992 for Mexico it might retrogress to 1986 or earlier, and instead of December 8, 2001 for the Philippines, the cut-off might retrogress to 1982 or earlier); and (2) former aged-out derivative beneficiaries whose parents recently immigrated under the lowest preference categories will get move ahead of aliens whose parents

immigrated years earlier as the beneficiaries of IR, asylee, refugee, and higher-priority family- and employment-preference petitions. Thus, while some aliens may benefit under amici's interpretation, there will be no net increase in the number of F2B visas issued each year and no overall reduction in the number of families affected by the backlog in immigrant visas.

Amici's interpretation is a shell game under which F2B beneficiaries get moved backwards and forwards in the F2B line, creating new groups of discontents to replace the aliens mentioned in amici's briefs.

ii. Amici's hand-selected intending immigrants are not any more deserving than any other intending immigrants.

Amici present the cases of several aliens hoping to apply earlier F3 and F4 priority dates to pending F2B petitions. AILA & CLINIC at pp. 3-10; Dreamactivist at pp. 6-15. But the stories recounted by amici are no more moving than the stories of aliens who would be adversely affected by their interpretation of 8 U.S.C. § 1153(h)(3).

Take Kim, for example.[2] Kim is a citizen and national of Philippines. She entered the United States with her parents and older brother on nonimmigrant tourist

[2] Kim is a fictional alien based upon the profiles of aliens whose cases come before U.S. Citizenship and Immigration Services and Immigration and Customs Enforcement every day.

visas in 1999 when she was 11years old. Kim and her family did not return to the Philippines at the expiration of their nonimmigrant visas. In 2001, Kim's older brother married a U.S. citizen. In 2002, he adjusted his status to LPR. Four years later, in 2005, Kim's brother became a naturalized citizen of the United States and filed I-130 petitions on behalf of his parents to classify them as immediate relatives. He also filed an I-130 petition on behalf of his sister for classification as an F4. Kim's parents adjusted their status to LPRs in 2006. Kim could not adjust with them because, even though she was still a "minor child" at the time (she was 18 years old at the time), aliens adjusting as immediate relatives may not pass on benefits to derivative beneficiaries. *See* 8 U.S.C. § 1154(a)(1)(A)(i). In late 2006, Kim's mother filed an I-130 on Kim's behalf to classify her for an F2A visa. In 2009, before a number became available to Kim in the F2A category, she turned 21 year old. She is now waiting for a visa number in the F2B category to become available.

Although Kim's lawful status in the United States ended at the end of 2001, Kim was able to graduate from high school and college. At 24 years of age, she has spent all of her adult life in the United States, has all of her immediate family in the United States, and has earned a bachelor's degree from a top university. If a visa number does not become available to her in the near future, Kim risks separation

from her family, disruption of her life, and removal from the United States. Her dreams of achieving the American dream would be shattered if she were forced to return to the Philippines, a country she hardly remembers.

Under the Board's interpretation of 8 U.S.C. § 1153(h)(3), Kim may receive a visa in about three years.[3] Under amici's interpretation of 8 U.S.C. § 1153(h)(3), Kim would not be entitled to an earlier priority date because she never qualified as a derivative of the I-130 petitions filed on behalf of her parents. Yet, even though Kim's priority date would remain the same under amici's interpretation, she could expect a much longer wait for a visa under their interpretation because the F2B priority date cut-off would have to retrogress to account for the aged-out sons and daughters of recently-arrived LPRs who amici would move to the front of the line.[4]

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[3] This period is calculated by referring to the State Department's Visa Bulletin for June 2012, showing worldwide chargeability priority date of April 15, 2004, in the F2B category. *Visa Bulletin*, June 2012, http://www.travel.state.gov/visa/bulletin/bulletin_5712.html (attached as Exhibit B).

[4] According to the Visa Bulletin, aliens are currently immigrating to the United States with priority dates of April 1, 2002 and earlier in the F3 category and January 8, 2001 and earlier in the F4 category. Thus, all of the aged-out former derivative beneficiaries of these petitions (and earlier petitions) would move to the F2B category with priority dates at least 5 years, if not more, earlier than Kim's 2007 priority date. Until the F3 and F4 priority date cut-offs reach 2007 (perhaps in another six years), Kim will see the sons and daughters of newly-minted LPRs jump ahead of her in line. In support of this projection, the Government assumes that, for every F3 and F4 beneficiary who has immigrated in the last nine years (since about

And, as the years pass, Kim will never have a good idea of where she is in the F2B line because she will continue being pushed backwards as new F3 and F4 beneficiaries immigrate and pass on their pre-2006 priority dates to their aged-out former derivative beneficiary sons and daughters.[5]

It is evident that Kim, a young graduate with dreams of making the United States her permanent home, will be harmed, and not helped, by amici's interpretation.

B. "Family Unity" does not support amici's interpretation because aged-out derivative beneficiaries are not part of the relevant "family unit" until after their parents become LPRs.

August 2002, the effective date of the CSPA), two out of ten beneficiaries had at least one-child who had aged-out of derivative status before a visa number became current. Since 65,000 F4 visas and 23, 400 F3 visas are issued each year, approximately 901,000 F3 and F4 visas have been issued since the passage of the CSPA. A conservative estimate, therefore, anticipates that at least 180,000 aliens would qualify for earlier priority dates under amici's interpretation. Because there is an annual cap of 26,266 F2B visas per year, these new F2B beneficiaries with 10 and 20 year old priority dates will push the visa priority date back at least 6 ½ years. If amici argue their interpretation should apply to F3 and F4 visas issued before the CSPA effective date, the retrogression of priority dates would be even larger.

[5] Looking at the Visa Bulletin cut-off dates, beneficiaries of F3 and F4 petitions filed in 2008 on behalf of Filipino nationals will not be available for at least 15 to 20 years. Under amici's interpretation, this backlog means that the aged-out sons and daughters of parents who do not become LPRs until the year 2020 will be eligible for F2B visas before Kim, even though her parents became LPRs in 2006, 14 years earlier.

Under amici's proffered interpretation, former derivative beneficiaries are treated better than all other sons and daughters of LPRs; and the lower the parent's preference classification the higher the boost received under 8 U.S.C. § 1153(h)(3). Amici pretend that such a result is in line with Congress's "family unity" priorities. But amici fail to offer any rationale for distinguishing between the adult sons and daughters of LPRs who aged-out of F3 and F4 derivative classification and the adult sons and daughters of LPRs who did not.

Consider a recently-immigrated LPR, Lana, with two adult offspring. Lana's son was twenty years old when Lana's U.S. citizen father filed an F3 petition on her behalf. Lana's daughter was twenty-one years old when the F3 petition was filed. Lana's son is forty when an F3 visa becomes available to her, and Lana's daughter is forty-one. Lana files F2B petitions on behalf of both of her offspring after she immigrates. Under the Board's interpretation, Lana's son and daughter will each have to wait the same amount of time for visa numbers to become available to them. Under amici's interpretation, Lana's forty year old son, who was only eligible for derivative classification for less than a year, will be able to immigrate immediately but Lana's forty-one year old daughter will be displaced by every aged-out former derivative beneficiary of a petition filed over the last twenty years.

Amici's interpretation would turn the immigration scheme on its head, by discriminating between the sons and daughters of LPRs inversely to Congress's prioritization of the immigration classification under which the parents immigrated. The lower the immigration preference of the parent, the bigger the jump in line of the aged-out former derivative beneficiary.

Consider another example. Abi, a citizen of the Philippines ,is the primary beneficiary of an I-140 petition filed in 2003. Because Congress prioritizes the immigration of highly-skilled workers, Abi only had to wait one year for his priority date to become current. Unfortunately, Abi's son aged-out during this one year period. Abi adjusted status in 2004 and filed an F2B petition on behalf of his son. Under the Board's interpretation, Abi's son would be entitled to a 2004 priority date. The petition Abi filed for his son would hold a place in the F2B line for his son ahead of any later-filed F2B petitions and Abi's son could expect to receive a visa about three years from now (in 2015). Under amici's interpretation, the result is not so transparent. Abi's F2B petition would be entitled to a 2003 priority date as opposed to the 2004 priority date under the Board's interpretation. This year bump up appears to benefit Abi's son, but F2B petitions filed by newly-immigrating F4 beneficiaries from the Philippines would be assigned priority dates from 1989 and earlier. Until the F4 priority date for Filipinos is equal to or later than 2004, Abi

would never be able to calculate the effective number of aliens ahead of his son in the F2B line.

Amici's scheme will effectively move the adult offspring of Congress's lowest-priority immigrants ahead of the adult offspring of its highest-priority immigrants, based not in proportion to the time the parent has been an LPR (the current scheme), but in inverse relation to the parent's prioritization by Congress.

C. If Congress was concerned with keeping the aged-out children of newly-arriving immigrants with their parents, it would not have drafted the statute as it did.

To support their arguments, amici play to the Court's emotions, painting a dismal picture of a visa allocation system strained by too few visas and too many hopeful recipients. This picture, however, could have been redrawn by Congress when it passed the CSPA. Congress declined to do so.

If Congress was concerned with the visa number backlog, as amici allege, Congress could have increased the yearly number of preference visas available, thus lowering the number of aliens who would age-out of derivative status. In the past, Congress has addressed visa number backlogs by increasing the number of visas available in any given year, or by exempting certain categories of individuals from preference categories. *See* Immigration Act of 1990 ("IMMACT 1990"), Pub. L. No.101- 649, § 112(a), 104 Stat. 4978, 4987 (responding to the backlog in F2A visa

availability caused by legalized aliens petitioning for their spouses and minor children by providing "additional visa numbers" to these family members over a three-year period); and IMMACT 1990, Pub. L. No. 101-649, § 152(d), 104 Stat. 4987, 5005 (anticipating exodus of aliens from Hong Kong as control returned to mainland China by providing for "500 visas [to be] made available to aliens as special immigrants [without being] counted against any numerical limitation"). Congress did neither in 8 U.S.C. § 1153(h)(3).

If Congress wanted all derivatives to be able to immigrate with or shortly after their parents, as amici imply, Congress could have frozen the ages of all derivative beneficiaries to the date of filing. Congress knew how to freeze derivative eligibility when it passed the CSPA because it did exactly that in other sections of the CSPA benefitting the children of U.S. citizens and asylees. *See* 8 U.S.C. § 1151(f) (freezing age of children of U.S. citizens to date petition is filed by parent); 8 U.S.C. § 1158(b)(3)(B) (freezing age of derivative children of asylees to date petition asylum petition filed). By freezing the age of derivative beneficiaries, Congress could also have ensured that aged-out derivative beneficiaries from one category would not displace primary beneficiaries in other categories. Under such a scenario, the visas issued to primary and derivative beneficiaries of F3 petitions would be chargeable to the appropriate F3 quota and thus not displace aliens waiting

in other categories. Under amici's interpretation, on the contrary, a select subset of aliens will continuously be displacing other aliens and upsetting settled expectations regarding the immigrant visa allocation scheme.

By freezing the age of all derivative beneficiaries to the day that the petition was filed on behalf of the primary beneficiary, Congress could have dispensed altogether with the complicated age and conversion formulas found in section 1153, and more clearly ensured that all derivative beneficiaries would be able to immigrate with their parents. (Of course, if every derivative beneficiary is able to immigrate with the primary beneficiary parent and is therefore chargeable under the parent's category of chargeability, the number of F3 and F4 visas sought in any given year will increase and cause the priority dates to retrogress.)

Absent clear language from Congress lifting the numerical visa caps or freezing the ages of derivative beneficiaries of preference petitions, there is no support for amici's contention that Congress enacted the CSPA to "address the reality of untenable backlogs." AILA & CLINIC at p. 16. In reality, the "untenable" backlogs would still exist.

II. The board's interpretation, not amici's, is consistent with past usage of terms "convert" and "retain."

The Board's interpretation harmonizes past usage of the terms "conversion" and "retention" and leaves intact Congress's current immigration visa priority

scheme. Amici's interpretation, on the other hand, would part with past practice by unlinking "conversion" and "retention" and totally reordering those waiting for F2B visas according to the source of their parents' immigration status as opposed to the date their parents filed F2B petitions on their behalf

A. The Board properly determined that there is no "appropriate category" to which aged-out former derivative beneficiaries of F3 and F4 petitions can convert.

Amici argue that 8 U.S.C. § 1153(h)(3) must provide a benefit to every aged-out beneficiary of a petition filed to classify the alien under "(a)(2)(A) an (d)" because paragraph (3) refers directly to paragraph (1) and hence incorporates paragraph (2) which refers to all categories of family and employment preference petitions. NIJC & AIC at pp. 2, 5-8. Amici's position fails for three reasons. First, paragraph (3) incorporates the *age calculation formula* found in paragraph (1) but does not state whether *all* of the petitions considered under paragraph (1) - or just a subset thereof - are eligible for consideration under paragraph (3). Second, even if paragraph (3) unambiguously states that all derivative petitions are eligible for *consideration* under paragraph (3), paragraph (3) does not unambiguously guarantee that all petitions considered under paragraph (3) will also receive a *benefit* under paragraph (3). Third, even if the plain language of paragraph (3) can be interpreted as providing an actual benefit to all aged-out derivative beneficiaries, the operation

of the paragraph is so awkward when applied to aged-out derivative beneficiaries of F3 and F4 petitions that this Court may not ignore the inherent ambiguity of the provision.

If the Court finds any or all three of these bases for ambiguity, it must defer to the Board's interpretation of the provision in *Matter of Wang* unless that it finds that decision arbitrary or capricious.

i. Paragraph (1) should be viewed as providing a formula for determining age under paragraph (3) and not as defining the applicable petitions.

In its original panel decision, this Court determined that, through paragraph (3)'s reference to paragraph (1), Congress unambiguously indicated that all of the petitions described in paragraph (2) are eligible for consideration under paragraph (3). Opinion, ECF No. 44-1 at 16809-10, Sept. 2, 2011. Amici urge this Court to reaffirm this finding. NIJC & AIC at pp. 5-6. The Government respectfully disagrees with this interpretation. Paragraph (1) clearly provides a formula for calculating the age of beneficiaries under paragraph (3), but paragraph (1) does not unambiguously define the world of petitions eligible for consideration under paragraph (3).

Paragraph (3) refers to paragraph (1)'s age calculation, not to the petitions considered under paragraph (1). Therefore, it is plausible that Congress intended

only a subset of the petitions eligible for consideration under paragraph (1) to be considered under paragraph (3).

ii. Even if this Court concludes that *all* petitions considered under paragraph (1) are eligible for *consideration* under paragraph (3), the text of the statute does not mandate that all petitions considered under paragraph (1) *qualify for a benefit* under paragraph (3).

Even if all petitions considered under paragraph (1) are eligible for consideration under paragraph (3), the Board's interpretation is still reasonable. Any petition filed to classify an alien under "(a)(2)(A) and (d)" may be considered for relief under paragraph (1), but to receive relief, the alien must:

- be under twenty-one at the time a visa number becomes available using the formula in paragraph (1), and
- must seek to acquire a visa within one year of availability.

Likewise, even if all petitions filed to classify an alien under "(a)(2)(A) and (d)" may be considered for relief under paragraph (3), the alien must:

- qualify for an "appropriate category" on the day a visa becomes available to the alien or parent under "(a)(2)(A) and (d)."

Such reasoning comports with the Third Circuit Court of Appeals' decision in *Zheng v. Gonzales*, 422 F.3d 98 (3rd Cir. 2005), a case heavily cited by amici. NIJC & AIC at pp. 18-20. In *Zheng*, the Third Circuit rejected a regulation that

prevented paroled aliens from applying to adjust status, finding that it conflicted with 8 U.S.C. § 1255(a), which provides that "an alien who was inspected and admitted or paroled into the United States" may apply for adjustment of status. Although 8 U.S.C. § 1255(a) provides that a paroled alien must have an opportunity to apply for adjustment of status, the provision still requires that the paroled alien otherwise qualify for adjustment (i.e., that he be eligible to receive an immigrant visa, be admissible to the United States, and have a visa immediately available to him at the time he filed his application to adjust status). 8 U.S.C. § 1255(a). The Third Circuit's decision did not exempt paroled aliens from otherwise meeting the requirements for adjustment of status.

If this Court finds that 8 U.S.C. § 1153(h)(3) unambiguously requires that all petitions considered under paragraph (1) be considered under paragraph (3), it does not follow that all of those petitions qualify for benefits under the terms explicitly delineated by Congress: that the alien qualify for a follow-on classification on the date that a visa becomes available under the original classification. Because the Board's interpretation provides relief for some beneficiaries of petitions filed to classify an alien under "(d)," the Board's interpretation gives meaning to every term of the statute and is reasonable.

iii. The awkward operation of the technical terms of the statute justifies this Court finding the statute ambiguous.

Amici argue that the panel was not justified in disregarding the "plain language" of the statute simply because the statute did not make sense when applied to F3 and F4 petitions. NIJC & AIC at p. 6. Amici argue that the Court should have ignored any awkwardness in the operation of the technical terms of the statute because the "plain language controls except in rare and exceptional circumstances." NIJC & AIC at p. 8 (quoting *United States v. One Sentinel Arms Striker-12 Shotgun Serial No. 001725*, 416 F.3d 977, 979 (9th Cir. 2005)). Amici fail to realize, however, that awkward operation and even underlying assumptions can cause an otherwise "clear" statute to be found ambiguous. For example, in *United States v. LeCoe*, 936 F.2d 398, 403 (9th Cir. 1991), a case cited in *One Sentinel Arms Striker*, this Court determined that a statute which clearly referred to "the aggregate face value, if more than one Treasury check or bond or security of the United States," was ambiguous as to whether the face value of bonds should be considered in the aggregate. *LeCoe*, 936 F.2d at 403. This Court found the statute ambiguous because Congress knew of the underlying assumption that each count in an indictment must be capable of standing on its own and therefore would not normally be aggregated. This Court, therefore, determined that a more exhaustive analysis of the statute was required to ascertain Congress's true intent.

In this case, Congress crafted paragraph (3) knowing how automatic conversion and priority date retention operate. Finding that those terms do not flow smoothly for aged-out derivatives of F3 and F4 petitions, this Court properly looked outside the text of the statute to ascertain its meaning.

B. The Board did not abuse its discretion when it determined that "conversion" and "retention" should be read together rather than as independent benefits.

Amici argue that "automatic conversion" and "priority date retention" were viewed as separate benefits by the Board in *Matter of Wang*. NIJC & AIC at p. 13 n.3. To the contrary, the Board in *Wang* simply analyzed the two arguments raised in the briefing to determine how they might operate jointly and in isolation. 25 I. & N. Dec. at 35. After doing so, the Board found that only by interpreting the terms in their traditional senses did the statute make sense. 25 I. & N. Dec. at 38-39.

Amici's arguments that "conversion" and "retention" are separate benefits under paragraph (3) are undermined by three facts. NIJC & AIC at p. 10.

i. "Conversion" and "retention" historically go hand-in-hand.

Since 1987, conversion provisions have always included language identifying the priority date that should be applied to the petition after conversion. The term "conversion" appeared as early as 1965 in immigration regulations and has always described the reclassification of a single petition from one valid visa category to

another valid visa classification, without a gap in classification. *See* Gov't Answer Br. at pp. 56-57 (discussing historical usage of the terms "conversion" and "convert"). The earliest conversion provisions, however, did not specify if the applicable priority date after conversion was the date associated the petition was originally filed or the date that the petition converted to the new classification. For example, 8 C.F.R. § 204.5(a) (1986) provided:

> *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 [8 U.S.C. § 1153(a)(1)] shall be regarded as approved for preference status under section [1153(a)(4)] as of the date the beneficiary marries. A currently valid petition previously approved to classify the child of a United States citizen as an immediate relative under section [1151(b)] shall also be regarded as approved for preference status under section [1153(A)(4)] as of the date the beneficiary marries.

In 1987, the applicable regulations were amended to "clarif[y] for the Service, immigration attorneys and representatives, and the public the process for the automatic conversion of classification of a beneficiary of an approved Form I-130, Petition for Alien Relative, to the proper classification *and* the retention of the original priority date when conversion is done." Automatic Conversion of Classification of Beneficiary, 52 Fed. Reg. 33797, 33797 (Sept. 8, 1987) (emphasis added). The resulting regulation provided:

> *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 United States citizen under [8 U.S.C. § 1153(a)(1)] shall be regarded as approved for preference status under section [1153](a)(4) as of the date the beneficiary marries. *The beneficiary's priority date is the same as the date the petition for classification under section 203(a)(1) was properly filed.*

8 C.F.R. § 204.5(a)(1) (1988) (emphasis added).

Since that time, every provision allowing reclassification of petitions between preference categories (whether through "conversion" or some other mechanism) has contained language defining the applicable priority date.[6] *See, e.g.*, IMMACT 1990, § 161(c) (providing for transition between old employment preference classifications and new employment preference classification and specifically requiring an employer to file a "new petition for classification" of the employee in order to "maintain the priority date" established by the original petition).

ii. When Congress does not intend for "conversion" to go hand-in-hand with "retention," it says so explicitly.

The only case in which conversion between family preference categories and priority date assignment have been treated disjointedly was in another part of the CSPA codified at 8 U.S.C. § 1154(k). In section 1154(k), Congress *specifically*

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[6] Provisions reclassifying aliens as immediate relatives do not refer at all to priority dates because immediate relative visas are immediately available without regard to a priority date.

allowed aliens to convert their petitions and retain the original priority date or to opt out of conversion and retain the original priority date. 8 U.S.C. § 1154(k). Because Congress knew explicitly how to unlink conversion and priority date retention and had in fact done so in another section of the CSPA, the Board's interpretation that Congress did not intend to do so in paragraph (3) is reasonable. *See* Christina A. Pryor, *"Aging-Out" of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act*, 80 Fordham L. Rev. 2199, 2233 (2012) (determining that paragraph (3) is ambiguous as to whether "conversion" and "retention" are linked and that the Board's interpretation linking the two was reasonable).

iii. "And" may not properly be read as meaning "or" unless it clearly furthers a stated purpose of Congress.

Reading "conversion" and "priority date retention" as separate benefits is not supported by the language of the statute, which joins the two "benefits" with the conjunction "and," not "or." "And" could only be read to mean "or" if this meaning was clear from the face of the statute or if this interpretation is necessary to achieve a purpose of Congress in enacting the legislation.

Although the word "and" has been found to mean "or" in some statutes, such a reading is not clear on its face in this case. This point is evidenced by the fact that, in the pleadings below, the *Costelo* plaintiffs disavowed seeking priority date

retention independent of conversion. *See* Costelo's Opp. to Defs.' Statement of Uncontroverted Facts and Conclusions of Law, Costelo Excerpts of Record Volume II at pp. 269-270 ("Plaintiffs have never asserted that a new petition is required."). *See also* Govt's Opening Br. at p. 45 n.12 (discussing instances where the word "and" is used in conjunction with other terms to convey the meaning "or").

When it is not clear that "and" should be interpreted as meaning "or", a court may not adopt this uncommon meaning unless such a reading is required to fulfill one of the stated goals of Congress in enacting the legislation. *See Slodov v. United States*, 436 U.S. 238, 247 (1978) (construing "and" in disjunctive sense only after determining that it was the only reading consistent with the purpose of the statute). Amici argue that Congress intended for 8 U.S.C. § 1153(h)(3) to alleviate the effects of the visa number backlog and thus "and" should be read to accomplish this goal. NIJC & AIC at p. 30.

Amici's comments are misleading, however, because their interpretation does not alleviate the effect of visa number backlogs for F2B beneficiaries in general. But, even if amici's interpretation would alleviate the allocation backlog for a small subset of F2B beneficiaries (albeit to the detriment of other F2B beneficiaries), "and" may not be interpreted as meaning "or" unless it is clear that Congress intended to benefit such a small subset of F2B beneficiaries.

Amici cite for support statements made by Senator Feinstein over one year before the enactment of the final version of the CSPA, in which she discusses provisions in her original Senate bill that did not end up in the compromise House bill that was ultimately enacted as the CSPA. NIJC & AIC at p. 30 (quoting 147 Cong. Rec. S3275, 2001 WL 314380 at *1 (statement of Sen. Feinstein)).

In contrast with Senator Feinstein's lofty (yet ambiguous) comments, the House, from the very beginning, had more conservative goals for the Child Status Protection Act. In introducing the House bill in April 2001, Representative Gekas stated:

> Here's what the situation is. When aliens are permitted to apply for permanent residency and citizenship in the United States, automatically their children under 21 years of age are granted similar permanent status. However, because of the INS's longstanding problem with the process of monitoring these applications, these children, sometimes 12, 13, 14, and 16, become over 21, and when they reach that age, they're automatically put into a preference status, not the immediate relatives status that's granted to minor children.
>
> This Bill seeks to correct that to say that if, indeed, the application was filed, the process began while the child was a minor, that even if that child turns 21, that they – it would not be shifted, that child would not be shifted into the preference more-strict category that is part of the INS structure, but rather be considered at the time of the application as a minor, thereby receiving permanent status."

H.R. Rep. 107-45, 2001 WL 406244, at p. 12. No comments touched on children of intending immigrants or their aging-out due to backlogs in visa allocation.

Representative Jackson Lee then introduced the House bill by stating,

> [T]he Child Status Protection Act of 2001 is co-sponsored by myself and the Chairman, and it is a culmination of a bipartisan agreement that addresses the status of unmarried children of U.S. citizens who turn 21 while in the process of having an immigrant visa petition adjudicated. . . . This bill with the new added compromise language that I proposed last year will solve the age-out problem without displacing others who have been waiting patiently in other visa categories, which was one of the issues that disturbed [House members]."

H. R. Rep. 107-45 at p. 13 (comments of Representative Jackson Lee) – comments made on April 4, 2001. Again, Representative Jackson Lee failed to mention the children of intending immigrants. In fact, it is clear that the House back in 2001 did not even intend for the CSPA to apply to any children other than the children of U.S. citizens.

On July 6, 2001, again introducing the House bill, Representative Jackson Lee explains that the bill

> will solve the age-out problem without displacing others [and] provides a solution, but is also equitable. It is fair to all who are now under this particular process; and more importantly, it gives the INS the tools it needs to work with to be fair to those who are themselves seeking to be governed by the laws of the United States of America.

On April 4 or July 6, 2001, not a single comment in the House record refers to the derivative children of intending immigrants or the effects of backlogs in numerical

limitations on anyone other than the child of a U.S. citizen who ages-out because of processing delays. *See generally* H.R. Rep. 107-45, 2001 WL 406244.

When the House bill is introduced again on July 22, 2002, it is in its final form after being modified "in the Senate to provide relief to other children who lose out when the INS takes too long to process their adjustment of status applications." 148 Cong. Rec. H4989-01, 2002 WL 1610632 (Jul. 22, 2002) (comments of Representative Jackson Lee). Both Representative Sensenbrenner and Representative Jackson Lee explain that the Senate's modifications expand age-out protection beyond the children of U.S. citizens to three "other situations where alien children lose immigration benefits by 'aging-out' as a result of INS processing delays." *Id*. Those three "other situations" affected by "INS processing delays" and addressed by the Senate amendments are explicitly identified as children of LPRs; children of family and employment-sponsored immigrants and diversity lottery winners, and children of asylees and refugees. *Id*. Representatives Sensenbrenner and Jackson Lee explain that, just like the children of U.S. citizens, these children will be protected now from "'aging-out' *as a result of INS processing delays.*" *Id*. (emphasis added). Representative Jackson Lee goes on to give a detailed explanation of the conversion opt-out provision codified at 1154(k).

Not once, however, does Representative Jackson Lee, or any other legislator, mention that the final language of the CSPA contained a provision alleviating the effects of the visa allocation system on preference immigrants and their derivative children. It is clear that any paradigm-shifting aspirations held by Senator Feinstein back in April of 2001 fell to the side as legislators compromised on the Act's final scope and language.

In the absence of a stated congressional intent to allow aged-out derivative beneficiaries to jump ahead of other F2B beneficiaries, the Board reasonably interpreted "and" in the more common and literal conjunctive sense.

III. Amici's interpretation is not supported by the plain language of the statute because it would open up huge gaps in the statute that are not there under the Board's interpretation.

Amici's interpretation is all the more untenable given the huge gaps and ambiguities that would emerge under their interpretation. The courts would be busy for years trying to figure out the reach and scope of relief under 8 U.S.C. § 1153(h)(3) as interpreted by amici, especially as the disgruntled sons and daughters of LPRs who have been shunted to the back of the F2B line speak up.

A. If paragraph (1) describes the petitions eligible for consideration under paragraph (3), does the one-year sought-to-acquire language limit the petitions eligible for relief under paragraph (3)?

As discussed earlier, amici argue that all petitions eligible for consideration under paragraph (1) are eligible for relief under paragraph (3). NIJC & AIC at pp. 5-6. Amici's interpretation of the interaction between paragraphs (1) and (3) raises questions not presented by the Government's interpretation. For, if all petitions considered under paragraph (1) are eligible for consideration under paragraph (3), and a petition is not considered under paragraph (1) unless the alien seeks to acquire immigrant status within one year of visa availability, how can an alien qualify for consideration under paragraph (3) without also meeting the one year sought-to-acquire requirement? And, if the original petition (which was filed to classify the alien under "(a)(2)(A) and (d)") does not convert, how does the alien qualify for "retention" of the earlier priority date for later petitions since any later petition filed on behalf of the aged-out alien will not be filed under "(a)(2)(A) and (d)"?

Both of these issues have been considered by the Board in *Matter of Wang*, and also in other unpublished Board decisions. The Government discusses some of the unpublished Board decisions below as evidence of the ambiguity in the statute, not for the Court to give deference to those decisions.[7]

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[7] In their brief, amici imply that *Matter of Wang*, a unanimous, published Board decision in which the respondent, ICE, and amici filed multiple briefs, is not

In *Matter of Wang*, the Board of Immigration Appeals assumed, without deciding, that the one-year sought-to-acquire language in 8 U.S.C. § 1153(h)(1) applied to petitions considered under § 1153(h)(3). *See Matter of Wang*, 25 I. & N. Dec. 28, 33 n. 7 (BIA 2009) ("[W]e observe that the decision in [*Matter of Garcia*, 2006 WL 2183654 (BIA June 16, 2006)]. discussed neither the requirement that an alien must seek to acquire lawful permanent resident status within 1 year of visa availability nor the legislative framework of the statute."). This same assumption had compelled the Board in other unpublished decisions to reject claims under 8 U.S.C. § 1153(h)(3).

In one such decision, predating *Matter of Wang*, the Board wrote:

> We agree with the Immigration Judge that in order to benefit from the "retention of priority date" provision under section [1153(h)(3)], the respondent was required to have "sought to acquire the statue of an alien lawfully admitted for permanent residence within 1 year of [the date on which an immigrant visa became available]" for his father, as provided in section [1153(h)(1)]. Like the Immigration Judge, we conclude that the incorporation of section [1153(h)(31)] into section [1153(h)(3)] plainly calls for such a result. It is undisputed that the respondent did not seek to acquire lawful permanent resident status within 1 year of a visa becoming available for his father. Accordingly, the respondent cannot retain the July 7, 1997, priority date from his father's employment-based visa petition.

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entitled to *Chevron* deference because the holding conflicts with an earlier unpublished decision. NIJC & AIC, pp. 16-17 n.4. This argument is absurd and ignores the purpose behind publication designations.

Matter of Robles Tenorio (BIA Apr. 10, 2009) (attached as Exhibit C). After *Matter of Wang* was decided, *Robles-Tenorio* was remanded to the Board for reconsideration in light of *Matter of Wang*. Even then, the Board reaffirmed its previous finding that aliens must comply with paragraph (1)'s "sought to acquire" requirement in order to benefit from paragraph (3). *Matter of Robles Tenorio* (BIA May 10, 2010) (attached as Exhibit C), *pet. den'd* , No. 08-3297, 2011 WL 3792396 (4th Cir. Aug. 26, 2011).

In yet another decision issued after *Wang*, the Board wrote:

> As noted, the petitioner has essentially conceded that the beneficiary did not seek to acquire lawful permanent resident status within one year of visa availability pursuant to the employment-based petition filed on his behalf. While the petitioner suggests that section [1153(h)(1)] is inapplicable to her son's case and she only wishes to proceed under section [1153(h)(3)], the statute does not permit such a choice. Rather, section [1153(h)(3)] expressly limits use of its provisions to alien who have been "determined under [section 1153(h)(1)] to be 21 years of age or older." In turn, section [1153(h)(1)] expressly mandates that use of its age calculator is available 'only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year" of visa availability. Given the petition's concession that the beneficiary made no such application, the petitioner is statutorily barred from utilizing the provisions of section [1153(h)(3)].

Matter of Patel (BIA Jan. 11, 2011) (attached as Exhibit D).

While these unpublished decisions are not precedential interpretations of the interactions between paragraphs (1) and (3), they clearly show that the interpretation

reached by the panel and urged by amici is not clearly mandated by the ambiguous text of the statute.

B. If an alien who ages-out is no longer a derivative beneficiary, may he immigrate based upon another petition filed on his behalf regardless of whether his parent immigrates?

Under amici's interpretation of the statute, there is no requirement that the parent of the aged-out former derivative beneficiary actually immigrate to the United States. Once the alien ages out, a literal reading of 8 U.S.C. § 1153(h)(3) would allow the alien to retain the priority date for application to any later-filed petition – filed by any petitioner for any classification. May the statute, nonetheless, be interpreted as requiring that the alien only be entitled to "retain" the priority date after the original primary beneficiary immigrates and only on an F2B petition filed by the primary beneficiary? Courts have generally refused to equate derivative interests with primary interests without explicit language to that effect. *See Santiago v. INS*, 526 F.2d 488, 491 (9th Cir. 1975) ("If Congress had wished to equate derivative preferences with actual preferences the words 'accompanying, or following to join' would be absent from this statute."). But, absent explicit language expressing Congress's intent, it is unclear what the result would be under amici's proffered interpretation.

C. If after an alien ages out of derivative status, he marries and then divorces, may the alien nonetheless "retain" the priority date from the earlier petition filed on behalf of his parent?

As the Government stated in its Answer Brief, an alien may not reaffirm an earlier petition or recapture an earlier priority date if the alien's interest in the earlier petition had been terminated. Answer Brief, ECF No. 24-1, Aug. 16, 2010, at p. 58 n. 14. Based upon the textual reading urged by amici, it appears that an alien who ages-out, marries, and then divorces, would be eligible to "retain" the priority date assigned to the original petition under which his interests terminated when he aged-out. After all, if the usual rule, that a gap in status prevents the transfer of priority dates between petitions, does not apply in the 8 U.S.C. 1153(h)(3) regime, would the intervening marriage and divorce have any effect on an aged-out former derivative beneficiary's ability to "retain" the priority date if he should ever divorce? Or, what if the alien does not divorce, but instead his parent becomes a LPR and then many years thereafter becomes a naturalized citizen. If the parent then files an F3 petition on behalf of her adult married son eight years after she first immigrated based as the primary beneficiary of an F4 petition, may her son apply the priority date from the earlier F3 petition to her F3 petition?

D. Since Congress limited paragraph (1) to aliens who acted within one year, should there be a time limit on priority date retention?

Under 8 U.S.C. § 1153(h)(1), Congress put a premium on acting quickly, allowing aliens to freeze their age during processing delays only if they sought to acquire status within one year of visa availability. 8 U.S.C. § 1153(h)(1)(A). Yet, under amici's interpretation, the primary beneficiary of an F3 or F4 petition can wait years – even decades – before filing an F2B petition on behalf of his or her aged-out former derivative sons and daughters. Because Congress did not place a timing requirement in paragraph, LPR parents could wait years before filing an F2B petition on behalf of their aged-out sons and daughters, but, as soon as they file the F2B petitions, the former derivative beneficiaries are entitled to the priority date from the F3 or F4 petition and will jump ahead of other F2B beneficiaries.

When an F2A petition automatically converts under the Government's interpretation, the alien must act within one year of visa availability to obtain a visa. Otherwise, the petition becomes subject to 8 U.S.C. § 1153(g). 8 U.S.C. § 1153(g) ("The Secretary of State shall terminate the registration of any alien who fails to apply for an immigrant visa within one year following notification to the alien of the availability of such visa . . . .") Clearly, Congress did not anticipate that 8 U.S.C. § 1153(h)(3) would apply in cases where the "original" petitions could not

automatically convert to a new "appropriate" category and thus would be subject to open-ended retention claims.

E. How does the effective date of the CSPA affect priority date retention?

Section 8 of the CSPA limited the applicability of the CSPA to:

> any alien who is a derivative beneficiary or any other beneficiary of—
> (1) a petition for classification under [8 U.S.C. 1154] approved before such date but only if a final determination has not been made on the beneficiary's application for an immigrant visa or adjustment of status to lawful permanent residence pursuant to such approved petition;
> (2) a petition for classification under [8 U.S.C. 1154] pending on or after such date; or
> (3) an application pending before the Department of Justice or the Department of State on or after such date.

Under this effective date provision, it appears that aliens who aged-out of derivative classification before the passage of the CSPA but whose parents did not immigrate until after its passage would be eligible for priority date retention. Because amici's interpretation does not require LPRs to file F2B petitions on behalf of their adults sons and daughters within any specific time period, aliens who aged out in 1980 and earlier may now have the priority dates from the F3 and F4 petitions that their parents immigrated under in 2002 applied to I-130 petitions currently pending or filed at any time in the future. The intending immigrants featured in amici's briefs may find that their own

hopes are dashed by a surge in F2B petition filings by long-time LPRs who had never filed petitions on behalf of their sons and daughters in the past because of the daunting visa backlogs. Realizing that their adult sons and daughters would zip to the front of the F2B line under amici's interpretation, late-filed F2B petitions would become the commonplace and render the entire visa allocation scheme unpredictable.

F. Does fairness require that an aged-out derivative beneficiary of an F3 or F4 petition have the period that he was not "in line" deducted from his priority date?

Since the aged-out former derivative beneficiary stops "waiting" in line when he ages-out of derivative classification and does not "wait" again until a new petition is filed on his behalf, the retention provision as interpreted by amici actually gives aged-out derivative beneficiaries credit for time that their parents were waiting in line, not just for the time that they were waiting with their parents. Basically, amici's interpretation treats aged-out derivative beneficiaries as though they had been entitled to some immigration classification all along, with entitlement to day-for-day credit for every day since F3 or F4 petition was filed. This broad reading finds no support in the legislative history and contradicts language in other immigration provisions prohibiting aliens to "retain" priority dates where the earlier classification is no longer valid. *See* 8 C.F.R. § 204.5(e) (specifying that priority

dates may not be transferred from revoked employment-preference petitions to later employment-preference petitions); 8 C.F.R. § 204.2(h)(2) (allowing "transfer" of a priority date between certain petitions "except when the original petition has been terminated pursuant . . . or revoked . . .").

G. Did Congress clearly intend open-ended grandfathering of priority dates?

Under amici's interpretation, once an alien has aged-out of derivative status, he may transfer the earlier priority date to any later petition field by any petitioner for any classification. In the other priority date transfer provisions cited by Amici Heartland in their brief, Congress explicitly discussed the future petitions that might qualify for application of the earlier priority date. Dreamactivist at 24-25.

For example, in the Western Hemisphere Savings Clause, Congress explicitly stated which petitions, filed by which petitioners, to accord which preferences were entitled to an earlier priority date. *See* Western Hemisphere Savings Clause, Pub. L. No. 94-571, § 9(b), 90 Stat 2703, (1976) ("Any petition filed by, or in behalf of, such an alien to accord him a preference status under section [1153](a) shall, upon approval, be deemed to have been filed as of the priority date previously established by such alien.")

Again, in the Patriot Act, Congress explicitly described the priority date retention scheme: which earlier petitions (family- and employment-preference

petitions that had been denied or revoked as a result of terrorist activity); new petitions filed by which new petitioners ("the alien"); and filed to classify in which new preferences (as "special immigrants"). *See* Patriot Act, P.L. 107-56, 115 Stat. 272, 356, 357 (Oct. 26, 2001), § 421(c).

Even the regulations cited by amici in support of their position define the applicable old petitions, in which categories the new petitions must be filed, and who the new petitioners must be. *See* 8 C.F.R. § 204.5(e) (restricting transfer of priority dates from earlier-filed *employment*-preference petitions to later-filed *employment*-preference petitions and specifying that priority dates cannot be applied to other aliens and may not be transferred from revoked petitions to later petitions); 8 C.F.R. § 204.12(f)(1) (restricting transfer of priority dates from earlier-filed physician-preference petitions to later-filed physician preference petitions).

The only instances in which statutes or regulations have failed to detail the relevant old and new petitions for transfer of priority dates are cases of automatic conversion. In such cases, there is no need to define the new classifications that may use the old priority ate because there are no new petitions or petitioners. Amici's interpretation would leave huge gaps in congressional intent, but the Board's interpretation leaves no gaping holes.

Under amici's interpretation, aged-out former derivative beneficiaries would be able to "retain" the priority dates assigned to petitions filed on behalf of their parents for application to any petitions later filed on their behalf, regardless of whether their parents ever immigrated, the classification, and the delay. "Absent clear legislative intent to create an open-ended grandfathering of priority dates that allow derivative beneficiaries to retain an earlier priority date set in the context of a different relationship, to be used at any time, which we do not find in the history of the CSPA, [the Board of Immigration Appeals] decline[d] to apply the automatic conversion and priority date retention provisions of section 203(h) beyond their current bounds." *Wang*, 25 I. & N. Dec. at 39. This Court should likewise decline

CONCLUSION

Although amici point to several harsh effects of the backlog in allocation of visas, those effects are not alleviated by their interpretation. And, where their interpretation would cause more uncertainty and less transparency in the family-preference categories, amici's interpretation is not clearly compelled by the language of the statute. Rather, this Court should determine that 8 U.S.C. § 1153(h)(3) is ambiguous for one or more of the many grounds cited by the Government and defer to the Board of Immigration Appeals' reasonable interpretation of the provision in *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009).

June 6, 2012

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that Defendants-Appellees' Brief in Reply to Amici:

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

(2) is proportionally spaced;

(3) contains 9,834 words; and

(4) is accompanied by a motion for leave to file a brief in reply to amici.

June 6, 2012

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I hereby certify that on June 6, 2012, 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:

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Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based preferences Registered at the National Visa Center as of November 1, 2011

Most prospective immigrant visa applicants qualify for status under the law on the basis of family relationships or employer sponsorship. Entitlement to visa processing in these classes is established ordinarily through approval by Citizenship and Immigration Services (CIS) of a petition filed on the applicant's behalf. The petitions of applicants who will be processed at an overseas post are forwarded by CIS to the Department of State; applicants in categories subject to numerical limit are registered on the visa waiting list. Each case is assigned a priority (i.e., registration) date based on the filing date accorded to the petition. Visa issuance within each numerically limited category is possible only if the applicant's priority date is within the applicable cut-off dates which are published each month by the Department of State in the Visa Bulletin. Family and Employment preference applicants compete for visa numbers within their respective categories on a worldwide basis according to priority date; a per-country limit on such preference immigrants set by INA 202 places a maximum on the amount of visas which may be issued in a single year to applicants from any one country, however.

In October, the Department of State asked the National Visa Center (NVC) at Portsmouth, New Hampshire to report the totals of applicants on the waiting list in the various numerically-limited immigrant categories. Applications for adjustment of status under INA 245 which are pending at CIS Offices are not included in the tabulation of the immigrant waiting list data which is being provided at this time. As such, the following figures ONLY reflect petitions which the Department of State has received, and do not include the significant number of applications held with the CIS Offices.

The following figures have been compiled from the NVC report submitted to the Department on November 1, 2011, and show the number of immigrant visa applicants on the waiting list in the various preferences and subcategories subject to numerical limit. All figures reflect persons registered under each respective numerical limitation, i.e., the totals represent not only principal applicants or petition beneficiaries, but their spouses and children entitled to derivative status under INA 203(d) as well.

EXHIBIT A

Family-sponsored Preferences

Category	FY 2011	FY 2012	Increase/Decrease From 2011 Totals (and % of change)
FAMILY FIRST	271,018	295,168	+ 24,150 (+ 8.9%)
FAMILY SECOND TOTAL	913,611	839,755	-73,856 (- 8.1%)
2A-Spouses/Children:	361,038	322,636	- 38,402 (-10.6%)
2B- Adult Sons/Daughters:	552,573	517,119	- 35,454 (- 6.4%)
FAMILY THIRD	853,083	846,520	-6,563 (- 0.8%)
FAMILY FOURTH	2,515,062	2,519,623	+4,561 (+ 0.2%)
TOTAL	**4,552,774**	**4,501,066**	**-51,708 (- 1.1%)**

Employment-based Preferences

Category	FY 2011	FY 2012	Increase/Decrease From 2011 Totals (and % of change)
EMPLOYMENT FIRST	2,961	2,118	-843 (- 28.5%)
EMPLOYMENT SECOND	6,738	6,888	+150 (+ 2.2%)
EMPLOYMENT THIRD TOTAL	119,183	112,023	-7,160 (- 6.0%)
Skilled Workers:	102,395	97,060	-5,335 (- 5.2%)
Other Workers:	16,788	14,963	-1,825 (- 10.9%)
EMPLOYMENT FOURTH TOTAL	554	498	-56 (- 10.1%)
EMPLOYMENT FIFTH TOTAL	1,183	1,806	+623 (+52.7%)
TOTAL	**130,619**	**123,333**	**-7,286 (- 5.6%)**
GRAND TOTAL	**4,683,393**	**4,624,399**	**-58,994 (- 1.3%)**

EXHIBIT A

Immigrant Waiting List
By Country

Immigrant visa issuances during fiscal year 2012 are limited by the terms of INA 201 to no more than 226,000 in the family-sponsored preferences and approximately 144,000 in the employment-based preferences. (Visas for "Immediate Relatives" - i.e., spouses, unmarried children under the age of 21 years, and parents - of U.S. citizens are not subject to numerical limitation, however.)

It should by no means be assumed that once an applicant is registered, the case is then continually included in the waiting list totals unless and until a visa is issued. The consular procedures mandate a regular culling of visa cases to remove from the count those unlikely to see further action, so that totals are not unreasonably inflated. If, for example, a consular post receives no response within one year from an applicant to whom the visa application instruction letter (i.e., the consular "Packet 3" letter) is sent when the movement of the visa availability cut-off date indicates a visa may become available within a reasonable time frame, the case is considered "inactive" under the consular procedures and is no longer included in waiting list totals.

The fourteen countries with the highest number of waiting list registrants in FY 2012 are listed below; together these represent 79.5% of the total. This list includes all countries with at least 60,000 persons on the waiting list. The per-country limit in INA 202 sets an annual maximum on the amount of preference visas which may be issued to applicants from any one country; the 2012 per-country limit will be approximately 25,900.

Country	Applicants
Mexico	1,374,294
Philippines	503,266
India	343,401
Vietnam	281,439
China-mainland born	248,494
Dominican Republic	171,217
Bangladesh	161,769
Pakistan	118,985
Haiti	112,450
Cuba	85,908
El Salvador	83,221
Jamaica	66,016
Korea, South	64,020
Colombia	61,430
All Others	948,489
Worldwide Total	**4,624,399**

EXHIBIT A

Immigrant Waiting List
By Preference Category

FAMILY-SPONSORED PREFERENCES

Family FIRST Preference:

The worldwide Family FIRST preference numerical limitation is 23,400. The top ten countries with the highest F1 waiting list totals are:

Country	Family First Preference Total	Percent of Category Waiting List
Mexico	90,546	30.7%
Philippines	29,529	10.0%
Dominican Republic	20,230	6.9%
Jamaica	19,669	6.7%
Haiti	16,412	5.6%
El Salvador	8,749	3.0%
Vietnam	8,106	2.7%
Guyana	8,098	2.7%
Cuba	7,476	2.5%
Colombia	6,353	2.1%
All Others	80,000	27.1%
Total	**295,168**	**100%**

Cases are being added to the waiting list in this category not only by the approval of new FIRST preference petitions, but also through automatic conversion of pending 2B cases into FIRST preference upon the naturalization of the petitioner.

Given the 517,119 Family 2B waiting list and the several years' interval between 2B petition filing and visa issuance, it is likely that increasing numbers of petitioners will be naturalized and the petitions converted to Family FIRST preference long before 2B visas become available. The prospect is for increasing oversubscription in the FIRST preference, with slower advances in the worldwide cut-off date the consequence. Only two countries, Mexico and the Philippines, have FIRST preference cut-off dates which are earlier than the worldwide date.

EXHIBIT A

Family SECOND Preference:

The total Family SECOND preference waiting list figure is 839,755. Of these, 322,636 (38.4%) are spouses and children of permanent residents of the United States (the 2A class), and 517,119 (61.6%) are adult unmarried sons/daughters of permanent residents (the 2B class). The Family SECOND preference represents 18.7% of the total Family preference waiting list. It will receive 114,200 visa numbers for FY 2012, just over half of the 226,000 family preference total; 77% of SECOND preference numbers are provided to 2A applicants, while the remaining 23% go to the 2B class.

2A: About 88,000 visa numbers are expected to be available during FY 2012. The top five countries with the highest 2A waiting list totals are:

Country	Family 2A Preference Total	Percent of Category Waiting List
Mexico	138,628	43.0%
Dominican Republic	30,963	9.6%
Cuba	16,084	5.0%
Haiti	15,804	4.9%
Philippines	14,598	4.5%
All Others	106,559	33.0%
Total	**322,636**	**100%**

Upon naturalization of the petitioner, a pending 2A case is converted automatically into the "Immediate Relative" visa category, which is not subject to numerical limit and therefore has no visa waiting period. As a result, the amount of cases being processed in the "Immediate Relative" category may increase and partially offset new F2A filings.

EXHIBIT A

2B: Visa numbers for this class of adult sons and daughters will be approximately 26,250 during FY 2012. The waiting list far exceeds the annual limit. The top ten countries with the highest 2B waiting list totals are:

Country	Family 2B Preference Total	Percent of Category Waiting List
Mexico	212,621	41.1%
Dominican Republic	57,385	11.1%
Philippines	52,823	10.2%
Haiti	25,851	5.0%
El Salvador	17,370	3.4%
China-mainland born	17,170	3.3%
Cuba	14,035	2.7%
Vietnam	9,442	1.8%
Jamaica	8,223	1.6%
Guatemala	7,610	1.5%
All Others	94,589	18.3%
Total	**517,119**	**100%**

As noted above, some of the 2B cases are applicants converted from the 2A class upon their turning 21.

Family THIRD Preference:

The annual visa limit is 23,400. Two oversubscribed countries (Mexico and Philippines) have sufficiently heavy demand in this preference to require a cut-off date substantially earlier than the worldwide date. The top ten countries with the highest F3 waiting list totals are:

Country	Family Third Preference Total	Percent of Category Waiting List
Mexico	180,982	21.4%
Philippines	156,107	18.4%
Vietnam	77,653	9.2%
India	66,569	7.9%
China-mainland born	33,049	3.9%
Cuba	21,239	2.5%
Pakistan	16,896	2.0%
Poland	16,021	1.9%
Dominican Republic	15,204	1.8%
Jamaica	15,072	1.8%
All Others	247,728	29.2%
Total	**846,520**	**100%**

EXHIBIT A

Family FOURTH Preference:

Applicants registered in the Family FOURTH preference total 2,519,623. Annual visa issuances are limited to 65,000. The waiting period for the Family FOURTH preference is longer than any other category because the demand severely exceeds the number of available visas. The countries listed below have the largest number of FOURTH preference applicants:

Country	Family Fourth Preference Total	Percent of Category Waiting List
Mexico	746,815	29.6%
India	237,445	9.4%
Philippines	205,342	8.2%
Vietnam	179,648	7.1%
China-mainland born	175,417	7.0%
Bangladesh	149,526	5.9%
Pakistan	92,458	3.7%
Dominican Republic	47,356	1.9%
Haiti	43,441	1.7%
South Korea	38,385	1.5%
All Others	603,790	24.0%
Total	**2,519,623**	**100%**

The steadily growing waiting period in this preference is now more than eleven years for countries of most favorable visa availability and even longer for some oversubscribed countries.

EXHIBIT A

EMPLOYMENT-BASED PREFERENCES

It is important to note that over eighty-five percent of all Employment preference immigrants are currently being processed as adjustment of status cases at CIS offices. Cases pending with CIS are not counted in the consular waiting list tally which is presented below. Therefore, in several Employment categories the waiting list totals being provided below understate real immigrant demand. The Employment waiting list counts not only prospective workers, but also their spouses and children entitled under the law to derivative preference status.

Employment FIRST Preference:

Top countries are:

Country	Employment First Preference	Percent of Category Waiting List
China-mainland born	268	12.7%
Canada	232	11.0%
Great Britain & Northern Ireland	222	10.5%
India	164	7.7%
Venezuela	107	5.0%
Korea, South	106	5.0%
Japan	80	3.8%
Mexico	57	2.7%
Philippines	57	2.7%
France	52	2.4%
All Others	773	36.5%
Worldwide Total	**2,118**	**100%**

Visa availability is "current" for all countries.

Employment SECOND Preference:

Top countries are:

Country	Employment Second Preference	Percent of Category Waiting List
India	3,705	53.8%
China-mainland born	1,053	15.3%
Korea, South	379	5.5%
Philippines	292	4.2%
Canada	161	2.3%
All Others	1,298	18.9%
Worldwide Total	**6,888**	**100%**

This category is "current" at present for all but two countries.

EXHIBIT A

Employment THIRD Preference:

Top countries are:

Country	Employment Third Preference	Percent of Category Waiting List
Philippines	42,872	44.2%
India	21,119	21.8%
China-mainland born	6,191	6.4%
Korea, South	2,955	3.0%
Mexico	2,271	2.3%
All Others	21,652	22.3%
Worldwide Total	**97,060**	**100%**

Employment Third "Other Workers":

Top Countries are:

Country	Employment Third Preference: Skilled Worker/ Professional Components	Percent of Waiting List in These Classes
China-mainland born	4,718	31.5%
Korea, South	3,051	20.4%
Mexico	2,277	15.2%
Philippines	1,615	10.8%
India	605	4.1%
All Others	2,697	18.0%
Worldwide Total	**14,963**	**100%**

With visa demand well in excess of the Employment Third Preference annual limits, a significant wait for a visa must be expected to continue for the indefinite future.

EXHIBIT A

Employment FOURTH Preference:

Top countries are:

Country	Employment Fourth Preference	Percent of Waiting List in These Classes
India	107	21.5%
Korea, South	32	6.5%
Philippines	27	5.4%
Nigeria	26	5.2%
Colombia	25	5.0%
Israel	21	4.2%
All Others	260	52.2%
Worldwide Total	**498**	**100%**

Visa availability is "current" for all countries.

Employment FIFTH Preference:

Top countries are:

Country	Employment Fifth Preference	Percent of Waiting List in These Classes
China-mainland born	1,157	64.1%
Korea, South	182	10.1%
Venezuela	58	3.2%
Iran	49	2.7%
China-Taiwan born	43	2.4%
India	31	1.7%
All Others	286	15.8%
Worldwide Total	**1,806**	**100%**

Visa availability is "current" for all countries.

EXHIBIT A

Family
Immigrant Waiting List
By Country

The seven countries with the highest number of Family-sponsored waiting list registrants are listed below; together these represent 66.5% of the total. This list includes all countries with at least 150,000 persons on the waiting list. (The per-country limit in INA 202 sets an annual maximum on the amount of Family preference visas which may be issued to applicants from any one country; the FY 2012 per-country limit will be 15,820.)

Family Preferences

Country	Total
Mexico	1,369,592
Philippines	458,399
India	317,670
Vietnam	281,221
China-mainland born	235,106
Dominican Republic	171,138
Bangladesh	161,567
All Others	1,506,373
Worldwide Total	**4,501,066**

Family
Immigrant Waiting List
By Region

A breakdown of the NVC waiting list by region is:

Region	Total
Africa	122,725
Asia	1,915,772
Europe	160,899
N. America*	2,034,395
Oceania	12,046
S. America	255,229
Family Total	**4,501,066**

*North America includes Canada, Mexico, Central America and the Caribbean.

EXHIBIT A

Employment
Immigrant Waiting List
By Country

The five countries with the highest number of Employment-based waiting list registrants are listed below; together these represent 77.3% of the total. This list includes all countries with at least 4,500 persons on the waiting list. (The per-country limit in INA 202 sets an annual maximum on the amount of Employment preference visas which may be issued to applicants from any one country; the FY 2012 per-country limit will be approximately 10,080.)

Employment Preferences

Country	Total
Philippines	44,867
India	25,731
China-mainland born	13,388
Korea, South	6,705
Mexico	4,702
All Others	27,940
Worldwide Total	**123,333**

Employment
Immigrant Waiting List
By Region

A breakdown of the NVC waiting list by region is:

Region	Total
Africa	2,813
Asia	100,432
Europe	6,441
N. America*	9,007
Oceania	305
S. America	4,335
Family Total	**123,333**

*North America includes Canada, Mexico, Central America and the Caribbean.

EXHIBIT A

United States Department of State
Bureau of Consular Affairs

VISA BULLETIN

Number 45 Volume IX **Washington, D.C.**

IMMIGRANT NUMBERS FOR JUNE 2012

A. STATUTORY NUMBERS

1. This bulletin summarizes the availability of immigrant numbers during June. Consular officers are required to report to the Department of State documentarily qualified applicants for numerically limited visas; U.S. Citizenship and Immigration Services in the Department of Homeland Security reports applicants for adjustment of status. Allocations were made, to the extent possible, in chronological order of reported priority dates, for demand received by May 8th. If not all demand could be satisfied, the category or foreign state in which demand was excessive was deemed oversubscribed. The cut-off date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limits. Only applicants who have a priority date earlier than the cut-off date may be allotted a number. If it becomes necessary during the monthly allocation process to retrogress a cut-off date, supplemental requests for numbers will be honored only if the priority date falls within the new cut-off date announced in this bulletin.

2. Section 201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at least 140,000. Section 202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. The dependent area limit is set at 2%, or 7,320.

3. INA Section 203(e) provides that family-sponsored and employment-based preference visas be issued to eligible immigrants in the order in which a petition in behalf of each has been filed. Section 203(d) provides that spouses and children of preference immigrants are entitled to the same status, and the same order of consideration, if accompanying or following to join the principal. The visa prorating provisions of Section 202(e) apply to allocations for a foreign state or dependent area when visa demand exceeds the per-country limit. These provisions apply at present to the following oversubscribed chargeability areas: CHINA-mainland born, INDIA, MEXICO, and PHILIPPINES.

EXHIBIT B

4. Section 203(a) of the INA prescribes preference classes for allotment of Family-sponsored immigrant visas as follows:

FAMILY-SPONSORED PREFERENCES

First: (**F1**) Unmarried Sons and Daughters of U.S. Citizens: 23,400 plus any numbers not required for fourth preference.

Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, plus any unused first preference numbers:

A. (**F2A**) Spouses and Children of Permanent Residents: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. (**F2B**) Unmarried Sons and Daughters (21 years of age or older) of Permanent Residents: 23% of the overall second preference limitation.

Third: (**F3**) Married Sons and Daughters of U.S. Citizens: 23,400, plus any numbers not required by first and second preferences.

Fourth: (**F4**) Brothers and Sisters of Adult U.S. Citizens: 65,000, plus any numbers not required by first three preferences.

On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are available for all qualified applicants; and "U" means unavailable, i.e., no numbers are available. (NOTE: Numbers are available only for applicants whose priority date is **earlier** than the cut-off date listed below.)

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	22JUN05	22JUN05	22JUN05	15MAY93	01JUL97
F2A	01JAN10	01JAN10	01JAN10	08DEC09	01JAN10
F2B	15APR04	15APR04	15APR04	01JAN92	08DEC01
F3	01APR02	01APR02	01APR02	15JAN93	22JUL92
F4	08JAN01	15DEC00	08JAN01	01JUN96	22JAN89

*NOTE: For June, F2A numbers EXEMPT from per-country limit are available to applicants from all countries with priority dates earlier than 08DEC09. F2A numbers SUBJECT to per-country limit are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 08DEC09 and earlier than 01JAN10. (All F2A numbers provided for MEXICO are exempt from the per-country limit; there are no F2A numbers for MEXICO subject to per-country limit.)

EXHIBIT B

5. Section 203(b) of the INA prescribes preference classes for allotment of Employment-based immigrant visas as follows:

EMPLOYMENT-BASED PREFERENCES

First: Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences.

Second: Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.

Third: Skilled Workers, Professionals, and Other Workers: 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "*Other Workers".

Fourth: Certain Special Immigrants: 7.1% of the worldwide level.

Fifth: Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of Pub. L. 102-395.

On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are available for all qualified applicants; and "U" means unavailable, i.e., no numbers are available. (NOTE: Numbers are available only for applicants whose priority date is **earlier** than the cut-off date listed below.)

Employment-Based	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C
2nd	C	U	U	C	C
3rd	08JUN06	08AUG05	15SEP02	08JUN06	22MAY06
Other Workers	08JUN06	22APR03	15SEP02	08JUN06	22MAY06
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th Targeted Employment Areas/ Regional Centers and Pilot Programs	C	C	C	C	C

EXHIBIT B

*Employment Third Preference Other Workers Category: Section 203(e) of the Nicaraguan and Central American Relief Act (NACARA) passed by Congress in November 1997, as amended by Section 1(e) of Pub. L. 105-139, provides that once the Employment Third Preference Other Worker (EW) cut-off date has reached the priority date of the latest EW petition approved prior to November 19, 1997, the 10,000 EW numbers available for a fiscal year are to be reduced by up to 5,000 annually beginning in the following fiscal year. This reduction is to be made for as long as necessary to offset adjustments under the NACARA program. Since the EW cut-off date reached November 19, 1997 during Fiscal Year 2001, the reduction in the EW annual limit to 5,000 began in Fiscal Year 2002.

6. The Department of State has a recorded message with visa availability information which can be heard at: (202) 663-1541. This recording is updated on or about the tenth of each month with information on cut-off dates for the following month.

B. DIVERSITY IMMIGRANT (DV) CATEGORY

Section 203(c) of the INA provides up to 55,000 immigrant visas each fiscal year to permit additional immigration opportunities for persons from countries with low admissions during the previous five years. The NACARA stipulates that beginning with DV-99, and for as long as necessary, up to 5,000 of the 55,000 annually-allocated diversity visas will be made available for use under the NACARA program. **This resulted in reduction of the DV-2012 annual limit to 50,000.** DV visas are divided among six geographic regions. No one country can receive more than seven percent of the available diversity visas in any one year.

For June, immigrant numbers in the DV category are available to qualified DV-2012 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Listed Separately		
AFRICA	CURRENT		
ASIA	CURRENT		
EUROPE	CURRENT	Except: Uzbekistan	17,050
NORTH AMERICA (BAHAMAS)	CURRENT		
OCEANIA	CURRENT		
SOUTH AMERICA, and the CARIBBEAN	CURRENT		

EXHIBIT B

Entitlement to immigrant status in the DV category lasts only through the end of the fiscal (visa) year for which the applicant is selected in the lottery. The year of entitlement for all applicants registered for the DV-2012 program ends as of September 30, 2012. DV visas may not be issued to DV-2012 applicants after that date. Similarly, spouses and children accompanying or following to join DV-2012 principals are only entitled to derivative DV status until September 30, 2012. DV visa availability through the very end of FY-2012 cannot be taken for granted. Numbers could be exhausted prior to September 30.

C. ADVANCE NOTIFICATION OF THE DIVERSITY (DV) IMMIGRANT CATEGORY RANK CUT-OFFS WHICH WILL APPLY IN JULY

For July, immigrant numbers in the DV category are available to qualified DV-2012 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Listed Separately		
AFRICA	CURRENT		
ASIA	CURRENT		
EUROPE	CURRENT	Except: Uzbekistan	17,700
NORTH AMERICA (BAHAMAS)	CURRENT		
OCEANIA	CURRENT		
SOUTH AMERICA, and the CARIBBEAN	CURRENT		

EXHIBIT B

D. CHINA-MAINLAND AND INDIA EMPLOYMENT SECOND PREFERENCE CATEGORY IS UNAVAILABLE

Despite the retrogression of the China and India Employment Second preference cut-off date to August 15, 2007, demand for numbers by applicants with priority dates earlier than that date remained excessive. Such demand is primarily based on cases which had originally been filed with the U.S. Citizenship and Immigration Services (USCIS) for adjustment of status in the Employment Third preference category, and are now eligible to be upgraded to Employment Second preference status. The potential amount of such "upgrade" demand is not currently being reported, but it was evident that the continued availability of Employment Second preference numbers for countries other than China and India was being jeopardized. Therefore, it was necessary to make the China and India Employment Second preference category "Unavailable" in early April, and it will remain so for the remainder of FY-2012.

Numbers will once again be available for China and India Employment Second preference cases beginning October 1, 2012 under the FY-2013 annual numerical limitations. Every effort will be made to return the China and India Employment Second preference cut-off date to the May 1, 2010 date which had been reached in April 2012. Readers should be advised that it is impossible to accurately estimate how long that may take, but current indications are that it would definitely not occur before spring 2013.

USCIS has indicated that it will continue accepting China and India Employment Second preference I-485 filings during May, based on the originally announced May cut-off date.

E. EMPLOYMENT FIRST AND SECOND PREFERENCE VISA AVAILABILITY

Item F of the May Visa Bulletin (number 44) provided projections regarding visa availability in the coming months. Information received from the USCIS after the publication of that item requires an update in the projections for the Employment First and Second preference categories.

Employment First: Based on the current rate of demand, it may be necessary to establish a cut-off date at the end of the fiscal year in an effort to limit number use within the annual numerical limit.

Employment Second: Based on the current rate of demand, it may be necessary to establish a cut-off date for this category for all countries other than China and India. Such action may be required at any time during the next few months.

Please be advised that the above are only estimates for what could happen during the next few months based on applicant demand patterns experienced in recent months.

EXHIBIT B

F. DIVERSITY VISA LOTTERY 2013 (DV-2013) RESULTS

The Kentucky Consular Center in Williamsburg, Kentucky has registered and notified the winners of the DV-2013 diversity lottery. The diversity lottery was conducted under the terms of section 203(c) of the Immigration and Nationality Act and makes available *50,000 permanent resident visas annually to persons from countries with low rates of immigration to the United States. Approximately 105,628 applicants have been registered. Applicants may check the status of their entry using the confirmation number through Entrant Status Check on the website www.dvlottery.state.gov. Entrants selected may make an application for an immigrant visa. Since it is likely that some of the first *50,000 persons registered will not pursue their cases to visa issuance, this larger figure should insure that all DV-2013 numbers will be used during fiscal year 2013 (October 1, 2012 until September 30, 2013).

Applicants registered for the DV-2013 program were selected at random from 7,941,400 qualified entries (12,577,463 with derivatives) received during the 30-day application period that ran from noon, Eastern Daylight Time on Tuesday, October 4, 2011, until noon, Eastern Daylight Time on Saturday, November 5, 2011. The visas have been apportioned among six geographic regions with a maximum of seven percent available to persons born in any single country. During the visa interview, principal applicants must provide proof of a high school education or its equivalent, or show two years of work experience in an occupation that requires at least two years of training or experience within the past five years. Those selected will need to act on their immigrant visa applications quickly. Applicants should follow the instructions provided on the website www.dvlottery.state.gov.

Registrants living legally in the United States who wish to apply for adjustment of their status must contact USCIS for information on the requirements and procedures. Once the total *50,000 visa numbers have been used, the program for fiscal year 2013 will end. Selected applicants who do not receive visas by September 30, 2013 will derive no further benefit from their DV-2013 registration. Similarly, spouses and children accompanying or following to join DV-2013 principal applicants are only entitled to derivative diversity visa status until September 30, 2013.

Dates for the DV-2014 program registration period will be widely publicized in the coming months. Those interested in entering the DV-2014 program should check the Department of State's Visa web page for more details in September.

* The Nicaraguan and Central American Relief Act (NACARA) passed by Congress in November 1997 stipulated that up to 5,000 of the 55,000 annually-allocated diversity visas be made available for use under the NACARA program. The reduction of the limit of available visas to 50,000 began with DV-2000.

EXHIBIT B

The following is the statistical breakdown by foreign-state chargeability of those registered for the DV-2013 program:

AFRICA

ALGERIA 2,161
ANGOLA 47
BENIN 809
BOTSWANA 18
BURKINA FASO 296
BURUNDI 94
CAMEROON 3,858
CAPE VERDE 25
CENTRAL AFRICAN REP. 18
CHAD 28
COMOROS 8
CONGO 156
CONGO, DEMOCRATIC REPUBLIC OF THE 3,924
COTE D'IVOIRE 805
DJIBOUTI 79
EGYPT 5,015
EQUATORIAL GUINEA 19
ERITREA 804
ETHIOPIA 4,910
GABON 38
GAMBIA, THE 85
GHANA 5,105
GUINEA 1,350
GUINEA-BISSAU 25
KENYA 4,410
LESOTHO 6
LIBERIA 1,916
LIBYA 138
MADAGASCAR 40
MALAWI 29
MALI 80
MAURITANIA 31
MAURITIUS 67
MOROCCO 2,068
MOZAMBIQUE 10
NAMIBIA 21
NIGER 53
NIGERIA 6,218
RWANDA 369
SAO TOME AND PRINCIPE 0
SENEGAL 394
SEYCHELLES 0
SIERRA LEONE 2,516
SOMALIA 197
SOUTH AFRICA 956
SOUTH SUDAN 5
SUDAN 747
SWAZILAND 3
TANZANIA 150
TOGO 1,065
TUNISIA 145
UGANDA 513
ZAMBIA 87
ZIMBABWE 169

ASIA

AFGHANISTAN 128
BAHRAIN 15
BHUTAN 4
BRUNEI 8
BURMA 403
CAMBODIA 986
HONG KONG SPECIAL ADMIN. REGION 92
INDONESIA 215
IRAN 6,029
IRAQ 164
ISRAEL 175
JAPAN 440
JORDAN 251
NORTH KOREA 0
KUWAIT 137
LAOS 1
LEBANON 269
MALAYSIA 67
MALDIVES 0
MONGOLIA 167
NEPAL 4,370
OMAN 10
QATAR 24
SAUDI ARABIA 287
SINGAPORE 31
SRI LANKA 802
SYRIA 170
TAIWAN 360
THAILAND 75
TIMOR-LESTE 1
UNITED ARAB EMIRATES 98
YEMEN 266

EXHIBIT B

EUROPE

ALBANIA 1,520
ANDORRA 0
ARMENIA 1,174
AUSTRIA 108
AZERBAIJAN 373
BELARUS 1,195
BELGIUM 79
BOSNIA & HERZEGOVINA 54
BULGARIA 1,299
CROATIA 75
CYPRUS 10
CZECH REPUBLIC 73
DENMARK 77
  Faroe Islands 9
ESTONIA 47
FINLAND 72
FRANCE 549
  French Polynesia 11
  New Caledonia 0
  Saint Barthelemy 4
GEORGIA 723
GERMANY 1,253
GREECE 99
HUNGARY 246
ICELAND 38
IRELAND 138
ITALY 396
KAZAKHSTAN 533
KOSOVO 183
KYRGYZSTAN 237
LATVIA 140
LIECHTENSTEIN 0
LITHUANIA 248
LUXEMBOURG 4
MACEDONIA 262
MALTA 4
MOLDOVA 1,330
MONACO 3
MONTENEGRO 11
NETHERLANDS 109
  Aruba 8
  Curacao 7
  Sint Maarten 2
NORTHERN IRELAND 45
NORWAY 50
POLAND 2,038
PORTUGAL 40
  Macau 2
ROMANIA 711
RUSSIA 2,846
SAN MARINO 0
SERBIA 303
SLOVAKIA 100
SLOVENIA 5
SPAIN 196
SWEDEN 162
SWITZERLAND 131
TAJIKISTAN 330
TURKEY 1,807
TURKMENISTAN 94
UKRAINE 6,424
UZBEKISTAN 5,101
VATICAN CITY 0

NORTH AMERICA

BAHAMAS, THE 16

OCEANIA

AUSTRALIA 1,035
  Christmas Islands 0
  Cocos Islands 2
  Norfolk Island 4
FIJI 597
KIRIBATI 5
MARSHALL ISLANDS 0
MICRONESIA, FEDERATED
 STATES OF 1
NAURU 14
NEW ZEALAND 373
  Cook Islands 0
  Niue 7
  Tokelau 7
PALAU 1
PAPUA NEW GUINEA 18
SAMOA 0
SOLOMON ISLANDS 0
TONGA 91
TUVALU 3
VANUATU 5
WESTERN SAMOA 30

SOUTH AMERICA, CENTRAL AMERICA, AND THE CARIBBEAN

ANTIGUA AND BARBUDA 3
ARGENTINA 117
BARBADOS 5
BELIZE 22
BOLIVIA 74
CHILE 42
COSTA RICA 63
CUBA 490
DOMINICA 17
GRENADA 18
GUYANA 43
HONDURAS 90
NICARAGUA 65
PANAMA 31
PARAGUAY 8
SAINT KITTS AND NEVIS 5
SAINT LUCIA 19
SAINT VINCENT AND
 THE GRENADINES 14
SURINAME 4
TRINIDAD AND TOBAGO 137
URUGUAY 15
VENEZUELA 924

Natives of the following countries were not eligible to participate in DV-2013: Bangladesh, Brazil, Canada, China (mainland-born, excluding Hong Kong S.A.R., Macau S.A.R., and Taiwan), Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, India, Jamaica, Mexico, Pakistan, Peru, the Philippines, South Korea, United Kingdom (except Northern Ireland) and its dependent territories, and Vietnam.

EXHIBIT B

G. OBTAINING THE MONTHLY VISA BULLETIN

The Department of State's Bureau of Consular Affairs publishes the monthly Visa Bulletin on their website at www.travel.state.gov under the Visas section. Alternatively, visitors may access the Visa Bulletin directly by going to:

http://www.travel.state.gov/visa/bulletin/bulletin_1360.html.

To be placed on the Department of State's E-mail subscription list for the "Visa Bulletin", please send an E-mail to the following E-mail address:

listserv@calist.state.gov

and in the message body type:
Subscribe Visa-Bulletin *First name/Last name*
(example: Subscribe Visa-Bulletin Sally Doe)

To be removed from the Department of State's E-mail subscription list for the "Visa Bulletin", send an e-mail message to the following E-mail address:

listserv@calist.state.gov

and in the message body type: **Signoff Visa-Bulletin**

The Department of State also has available a recorded message with visa cut-off dates which can be heard at: (202) 663-1541. The recording is normally updated by the middle of each month with information on cut-off dates for the following month.

Readers may submit questions regarding Visa Bulletin related items by E-mail at the following address:

VISABULLETIN@STATE.GOV

(This address cannot be used to subscribe to the Visa Bulletin.)

Department May 8, 2012

EXHIBIT B

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: [redacted] - Arlington, VA Date: APR 10 2009

In re: OSCAR ALBERTO ROBLES-TENORIO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Xavier Racine, Esquire

ON BEHALF OF DHS: Susan Marcantoni
Assistant Chief Counsel

APPLICATION: Adjustment of Status

The respondent has appealed the Immigration Judge's September 20, 2007, decision which denied his application for adjustment of status.[1] The Department of Homeland Security ("DHS") has requested that the Immigration Judge's decision be summarily affirmed. The respondent's appeal will be dismissed.

The facts of this case are not disputed. The respondent is a native and citizen of El Salvador who was born on May 11, 1977. On an undetermined date, the respondent's father became the beneficiary of an approved employment-based visa petition with a priority date of July 7, 1997, and which the respondent claimed accorded him derivative status at that time. On December 6, 2001, when the respondent was 24 years old, his father adjusted his status to that of a lawful permanent resident. On or about May 4, 2005, the respondent arrived in the United States without being admitted or paroled after inspection by an immigration officer. On August 9, 2005, the respondent's father filed a visa petition on his behalf under section 203(a)(2)(B) of the Act ("2B visa"), as the unmarried son of a lawful permanent resident. The DHS subsequently approved this visa petition which has a priority date of August 8, 2005. The record includes an adjustment of status application that was signed by the respondent in November 2006.

The respondent sought to apply for adjustment of status before the Immigration Court, claiming that section 203(h)(3) of the Act, as amended by the Child Status Protection Act ("CSPA"), enables him to retain the July 7, 1997, priority date of his father's employment visa petition and apply it to his 2B visa category.[2] The respondent argues that retention of his father's July 7, 1997, priority date would give him an immediately available visa.

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[1] The respondent does not contest that he is inadmissible under section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i).

[2] The respondent concedes that he cannot adjust his status as a "child" and derivative beneficiary of his father's original employment-based visa petition under section 203(h)(1) of the Act (Respondent's Br. at 4; Tr. at 2-3, 21-22).

EXHIBIT C

A[redacted]

We agree with the Immigration Judge that in order to benefit from the "retention of priority date" provision under section 203(h)(3) of the Act, the respondent was required to have "sought to acquire the status of an alien lawfully admitted for permanent residence within 1 year of [the date on which an immigrant visa became available]" for his father, as provided in section 203(h)(1) of the Act. Like the Immigration Judge, we conclude that the incorporation of section 203(h)(1) into section 203(h)(3) of the Act plainly calls for such a result. It is undisputed that the respondent did not seek to acquire lawful permanent resident status within 1 year of a visa becoming available for his father. Accordingly, the respondent cannot retain the July 7, 1997, priority date from his father's employment-based visa petition.

Because the respondent is unable to retain his father's July 7, 1997, priority date, the only other priority date that can be considered for the purpose of adjusting the respondent's status is the August 8, 2005, priority date of the 2B visa petition filed on his behalf by his father. As of the date of this decision, the current cut-off date for the 2B preference category is September 1, 2000. *See* Department of State Visa Bulletin for April 2009, Number 7, Volume XI. Because the respondent's priority date is not yet current, he does not have an immigrant visa immediately available to him that would allow him to adjust his status. We therefore affirm the Immigration Judge's decision to deny the respondent's application for adjustment of status.[3]

We note that, in support of his arguments, the respondent has referred to unpublished decisions by the Board relating to two sisters. However, unpublished Board decisions are not binding precedent. *See Matter of Zangwill*, 18 I&N Dec. 22, 27 (BIA 1981), *overruled on other grounds*, *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988). Moreover, as discussed above, we must follow the plain language of the statute. In view of the foregoing, the following order shall be entered.

ORDER: The respondent's appeal is dismissed.

FOR THE BOARD

[3] In light of this disposition, we need not address whether or not the respondent is exempt from the physical presence requirement of section 245(i) of the Act.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
901 North Stuart Street, Suite 1300
Arlington, Virginia 22203

IN THE MATTER OF:	**IN REMOVAL PROCEEDINGS**
ROBLES-TENORIO, Oscar Alberto	**File No.: A#** [redacted]
Respondent	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "Act"), as amended, as an alien who is present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATION: Respondent's eligibility for INA § 245(i)

APPEARANCES

ON BEHALF OF RESPONDENT:
Xavier Racine, Esq.
5693 Colombia Pike, Suite 201
Falls Church, Virginia 22041

ON BEHALF OF THE DHS:
Susan Marcantoni, Esq.
Assistant Chief Counsel
Department of Homeland Security
901 North Stuart Street, Suite 1307
Arlington, Virginia 22203

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. INTRODUCTION

The Respondent is a 30-year-old native and citizen of El Salvador who entered the United States on May 4, 2005, without being admitted or paroled. On May 5, 2005, the DHS charged Respondent with removability under INA § 212(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

EXHIBIT C

At a master calendar hearing on March 22, 2006, Respondent, through counsel, conceded proper service of the NTA, admitted the factual allegations contained therein, and conceded removability as charged. This Court finds the charges of removability for Respondent to be sustained by clear and convincing evidence. *See* 8 C.F.R. § 1240.8(a).

On December 6, 2001, Respondent's father, Oscar Alberto Robles, in an employment-based case, adjusted status to lawful permanent residence ("LPR"), with a July 7, 1997 priority date. On August 9, 2005, Mr. Robles filed an I-130 for Respondent, as an unmarried child over the age of 21.

On May 19, 2006, Respondent filed a brief in support of eligibility for adjustment of status under INA § 245(i) under INA § 203(h)(3), arguing that he is eligible to recapture his father's 1997 priority date under the Child Status Protection Act ("CSPA"). On July 27, 2006, the former Immigration Judge issued an order pretermitting Respondent's application. The Immigration Judge later voided the order of pretermission.

In his June 22, 2007 brief, the Respondent argued that while INA § 203(h)(1)(A) requires an affirmative step within one year of availability of a visa number, this step is not required because Respondent relies solely on INA § 203(h)(3) (not § 203(h)(1)) to recover the original priority date. He added that a plain reading of INA § 203(h)(3) and a recent Board of Immigration Appeals ("Board") case, *Matter of Garcia*, A789-001-587 (June 16, 2006), indicates that Respondent should be able to apply a July 7, 1997 priority date to his I-130 petition, as this is now the "appropriate category" and the "original priority date." Moreover, the petition in *Garcia* remained pending for years before the respondent sought to acquire LPR status.

Respondent also argued that the December 2000 physical presence requirement does not apply to Respondent. First, he will retain the July 7, 1997 date under INA § 203(h), triggering the original INA § 245(i), which does not require physical presence. Second, even under the current INA § 245(i), the physical presence requirement does not apply to "spouses or children accompanying or following to join a principal alien" under 8 C.F.R. § 1245.10(a)(1)(ii).

For the reasons that follow, the Court finds Respondent ineligible to adjust status under INA § 245(i).

II. ANALYSIS

A. Respondent's Application for INA § 245(i) Relief Fails Under INA § 203(h)

The Court finds that Respondent's request for INA § 245(i) relief fails under INA § 203(h). Respondent did not seek to acquire his father's LPR status within one year of its December 6, 2001 availability. Rather, he waited more than three and a half years, until August 9, 2005, to file for status.

Beneficiaries of employment petitions filed after January 14, 1998, who were physically present in the United States on December 21, 2000 and submit a payment of $1,000, may apply to adjust status to lawful permanent residence if an immigrant visa is immediately available. INA § 245(i)(1)(C).

Determinations of whether an alien satisfies the age requirement for a beneficiary shall be made using:

> (A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date on which an immigrant visa number became available for the alien's parent), *but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability*; reduced by (B) the number of days in the period during which the application petition...was pending. INA § 203(h)(1). (Emphasis added).

INA § 203(h)(3) clarifies and incorporates INA § 203(h)(1), by specifying:

> If the age of an alien is determined *under paragraph (1)* to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d), the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition. INA § 203(h)(3). (Emphasis added).

The incorporation of INA § 203(h)(1) into this clarification in INA § 203(h)(3) suggests that the calculations and provisions in INA § 203(h)(1) still apply to aliens who fall under INA § 203(h)(3). INA § 203(h)(1) requires a calculation of the alien's age on the date on which an immigrant visa number becomes available. However, this calculation applies only if the alien sought to acquire the status within one year of availability. INA § 203(h)(3) then applies only if, after subtracting the days when the application was pending in INA § 203(h)(1), the Respondent's age is 21 years or older.

Therefore, the Respondent cannot benefit from INA § 203(h)(3) until he makes the initial calculation in INA § 203(h)(1), and he cannot make that initial calculation unless he sought to acquire LPR status within one year of availability.

In *Matter of Garcia*, [redacted] (June 16, 2006), the Board gave little weight to the IJ's conclusion that the respondent did not file her application for adjustment of status within one year after a visa number became available in connection with her mother's visa petition. *See Garcia*, at 2. The Court reasoned that the Respondent would have "failed to retain the status of her mother's "'child'" under INA § 203(h)(1) even if she applied for adjustment of status within one year after a visa number was available to her mother. *Id.* at 3. This conclusion suggests that once a respondent ages out of the derivative beneficiary category, the one-year bar does not apply.

However, the results of this unpublished case are not binding in this Court. Moreover, this finding on the one-year requirement is incompatible with other evidence that the one-year rule applies to Respondent. Specifically, a policy memorandum from the DHS explicitly states that an otherwise eligible CSPA

beneficiary under INA § 203(h)(3) cannot benefit from the CSPA when he or she did not file an I-485 within one year of visa availability. *See* Memo, Williams, Exec. Assoc. Comm. (HQADN 70/6.1.1) (Feb. 14, 2003). Both Respondent and the respondent in *Garcia* would be ineligible to adjust status under this provision due to the one-year rule.

B. The Physical Presence Requirement Applies to Respondent

The Court also disagrees with Respondent's contention that the physical presence requirement does not apply to him.

Respondent's application does not trigger the former version of INA § 245(i), which includes no physical presence requirement, unless the Court agrees that he retains the original July 7, 1997 priority date under INA § 203(h)(3). As Respondent failed to comply with the one-year requirement under INA § 203(h)(1), it follows that he does not benefit from the CSPA under INA § 203(h)(3). *See* Memo, Williams, Exec. Assoc. Comm. (HQADN 70/6.1.1) (Feb. 14, 2003). Therefore, the physical presence requirement under the current version of INA § 245(i) applies to Respondent's case.

Eligibility for the current version of INA § 245(i) requires that the "beneficiary of a petition for classification, or an application for labor certification" filed after January 14, 1998 be "physically present in the United States on December 21, 2000. INA § 245(i)(1). This physical presence requirement applies only to the principal applicant, and not to "spouses or children accompanying or following to join a principal alien." 8 C.F.R. § 1245.10(a)(1)(ii).

Respondent interprets 8 C.F.R. § 1245.10(a)(1)(ii) to read that Respondent's *father* is the principal applicant and only he, not Respondent (as a child following to join him), must prove physical presence. However, the plain language of 8 C.F.R. § 1245.10(a)(1)(ii) refers to the "beneficiary" as the principal applicant, specifying that the *beneficiary* be physically present. Under this reading, Respondent's spouse and children would not have to prove physical presence, but he, as the principal beneficiary and grandfathered applicant, would.

The Court therefore finds that the CSPA provisions under INA § 203(h) do not permit Respondent to adjust status under INA § 245(i). Accordingly, the Court enters the following order:

EXHIBIT C

ORDER

It Is Ordered that: Respondent's application to adjust status under INA § 245(i) is hereby denied.

It Is Further Ordered that: Respondent be **REMOVED** pursuant to the charge in the Notice to Appear.

9/20/07
Date

Brian M. O'Leary
United States Immigration Judge

EXHIBIT C

File: [redacted] Arlington, VA Date: MAY 10 2010

In re: OSCAR ALBERTO ROBLES-TENORIO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ofelia L. Calderon, Esquire

APPLICATION: Adjustment of status

This case was last before us on April 10, 2009, when we dismissed the respondent's appeal of the Immigration Judge's decision denying his application for adjustment of status under section 245(i) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1255(i). This case is now again before us pursuant to a September 18, 2009, order from the United States Court of Appeals for the Fourth Circuit which granted the government's unopposed motion to remand. In its motion, the government requested that the case be remanded so that the Board may reexamine the respondent's claim under its recent decision in *Matter of Wang,* 25 I&N Dec. 28 (BIA 2009). Upon reexamination of the record in light of this Board's decision, we will again dismiss the respondent's appeal.

In our April 10, 2009, decision, we concluded that the automatic conversion and priority date retention provisions under section 203(h)(3) of the Act do not apply to the respondent because he admittedly failed to file an application for lawful permanent resident status within 1 year that the immigrant visa became available. We find no error in our prior decision, and we incorporate by reference our April 10, 2009, decision, and reiterate the analysis contained therein.

Alternatively, the Board's recent decision in *Matter of Wang, supra,* also forecloses the respondent's claim that although he is determined to be 21 years of age and no longer a "child" for immigration purposes, he is still able to retain the July 7, 1997, priority date of his father's employment-based visa petition. Applying the analysis in *Matter of Wang, supra,* the respondent cannot benefit from the automatic conversion and priority date retention provision of section 203(h)(3) of the Act. First, there was no available category to which the beneficiary's petition could convert because there is no category that exists for the unmarried son in the context of his father's employment-based visa petition. Moreover, the second preference family-based visa petition filed on his behalf in August 2005, cannot retain the priority date from his father's employment-based visa petition because there is no evidence that the two visa petitions were filed by the same petitioner. *Matter of Wang, supra,* at 38-39. We find unavailing the respondent's assertion that *Matter of Wang, supra,* is inapplicable in his case or should be reversed.

As in our April 10, 2009, decision we again conclude that the respondent cannot retain the July 7, 1997, priority date from his father's employment-based visa petition. The second preference family-based visa petition("2B") filed on his behalf by his now lawful permanent resident father has

EXHIBIT C

A [redacted]

a priority date of August 8, 2005, and the current cut-off date for this preference category is March 1, 2002. See Department of State Visa Bulletin for April 2010, Number 19, Volume IX. The respondent's priority date is not current, and thus, he remains unable to adjust his status.[1]

In view of the foregoing, the following order shall be entered.

ORDER: The respondent's appeal is dismissed.

FOR THE BOARD

[1] We need not address the respondent's claim that he does not have to show that he was physically present in the United States on December 21, 2000, to be eligible for adjustment of status under section 245(i) of the Act. The Immigration Judge properly denied the respondent's application for adjustment of status under section 245(i) of the Act because the respondent does not have an immigrant visa that is immediately available to him. *See* section 245(i)(2)(B) of the Act.

EXHIBIT C

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: [redacted] - California Service Center Date: JAN 11 2011

In re: VISHALKUMAR RAJENDRA PATEL, Beneficiary of a visa petition filed by JYOTI R. PATEL, Petitioner

IN VISA PETITION PROCEEDINGS

MOTION

ON BEHALF OF PETITIONER: Pro se[1]

AMICUS CURIAE: Robert L. Reeves
Reeves & Associates

ON BEHALF OF DHS: Jason R. Grimm
Service Center Counsel

APPLICATION: Petition to classify status of alien relative for issuance of immigrant visa

In a June 5, 2008, decision the Director of the California Service Center approved a visa petition filed by the lawful permanent resident petitioner on behalf of the beneficiary as her unmarried son pursuant to section 203(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(a)(2). The petitioner had requested that the beneficiary be accorded a priority date of January 16, 1998, which was the date given an employment-based third preference visa petition previously filed on the petitioner's behalf, and of which the beneficiary had been a derivative beneficiary. However, the Director assigned the petition a priority date of February 24, 2006, the date the family-based visa petition was filed by the petitioner on the beneficiary's behalf. The California Service Center Director certified the decision to the Board to address the question of which priority date should be granted.

The petitioner contends that under the Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002) (hereinafter "CSPA"), the beneficiary is entitled to retain the 1998 priority date. Specifically, she avers that as the beneficiary is not considered a "child" under section 203(h)(1) of the Act, reference then must be made to section 203(h)(3), which provides that the petition shall "be converted to the appropriate category" with associated retention of the original priority date accorded the original visa petition. The petitioner argues that sections 203(h)((1) and (3) are distinct sections

[1] The Notice of Appeal was signed by Scott Bratton, Esquire, who submitted a Form EOIR-27 Notice of Entry of Appearance As Attorney on behalf of the beneficiary. The attorney did not provide a properly completed Form EOIR-27 in the petitioner's name, as required to indicate that he represents the petitioner. Thus, we decline to recognize counsel as the petitioner's attorney of record. However, as a courtesy, we are sending a copy of this opinion to Mr. Bratton.

EXHIBIT D

A [redacted]

with differing requirements, and avers that she is not seeking the benefit of section 203(h)(1), but claims the right to automatic retention of the earlier priority date as the beneficiary was the derivative beneficiary of the petitioner's employment-based visa petition, which she now contends has converted to that of a family-based petition. The petitioner contends that both the plain language of section 203(h) and Congressional intent support her interpretation of the statute, and her arguments as to its intent to allow retention of the earlier priority date. The petitioner also cites two unpublished Board decisions, most particularly *In Re Garcia*, 2006 WL 2183654 (BIA 2006), in support of her arguments.

The brief submitted by amici curiae similarly urges the Board to follow its decision in *In Re Garcia, supra* (Amicus Br. at 2-4, 10). This brief also argues that section 203(h)(3) should be read broadly in an ameliorative manner to allow all family and employment-based visa petitions to "automatically convert to the appropriate category" and retain the original priority date.[2]

In contrast, the Department of Homeland Security ("DHS") contends that prior Board decisions addressing the priority date issue are not controlling as they failed to fully analyze the statutory sections at issue. Further, DHS argues that the beneficiary must satisfy section 203(h)(1) of the Act before reference can be made to section 203(h)(3), contrary to her arguments otherwise. Section 203(h)(1) includes the requirement that the beneficiary must have "sought to acquire" lawful permanent resident status within one year of the availability of an immigrant visa number, which the beneficiary has indicated he did not do. DHS contends that section 203(h)(3) of the Act codifies regulations and agency practice relating to the automatic conversion of visa petitions. In addition, DHS argues that the beneficiary did not have a valid preference category pursuant to the employment-based visa petition before he aged out of eligibility for adjustment under that visa, and he did not fall within any preference category once he aged-out. DHS avers that Congress enacted the CSPA to provide redress to those harmed by administrative delays in the processing of visa petitions, and did not intend to allow for the expansive interpretation urged by the petitioner.

The Board addressed a similar issue in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009). Therein we specifically declined to follow the holding in *In Re Garcia, supra*, as we are not bound by nonprecedential unpublished Board decisions, and as that decision failed to fully evaluate all the requirements enumerated in section 203(h) of the Act regarding retention of "child" status. *Matter of Wang, supra* at 33. We find no basis to overturn that ruling.

As noted, the petitioner has essentially conceded that the beneficiary did not seek to acquire lawful permanent resident status within one year of visa availability pursuant to the employment-based petition filed on his behalf. While the petitioner suggests that section 203(h)(1) is inapplicable to her son's case and she only wishes to proceed under section 203(h)(3), the statute does not permit such a choice. Rather, section 203(h)(3) expressly limits use of its provisions to aliens who have been "determined under [section 203(h)(1)] to be 21 years of age or older." In turn, section 203(h)(1) expressly mandates that use of its age calculator is available "only if the alien has sought

[2] We thank Mr. Reeves for his amicus brief and his helpful participation in this case.

A[redacted]

to acquire the status of an alien lawfully admitted for permanent residence within one year" of visa availability. Given the petitioner's concession that the beneficiary made no such application, the petitioner is statutorily barred from utilizing the provisions of section 203(h)(3) of the Act.

Furthermore, we find that this beneficiary, as with the beneficiary in *Matter of Wang*, would not benefit by the provisions of section 203(h)(3) of the Act. There does not exist a visa category to which the visa petition seeking preference status for a petitioner's son as the derivative beneficiary of an employment-based visa petition could have converted once the son aged out. The visa preference system has never provided a preference category for an unmarried son or daughter (i.e., over the age of 21 years) of the primary beneficiary of a labor-based visa petition.

Similarly, the second visa petition filed on the beneficiary's behalf was filed by his mother, not by the employer who filed the first visa petition, of which he was a derivative beneficiary. As there existed no "appropriate category" into which the original visa petition could change, and since the second visa petition at issue was filed by a new petitioner, no "automatic conversion" could have, or did, occur. *Matter of Wang*, *supra* at 36, 39. Therefore, there could not be any associated retention of the priority date, as the petitioner argues. In sum, we find that the Director correctly found that the appropriate priority date of the second preference visa petition filed by the petitioner was the date that the Form I-130, Petition for Alien Relative, was properly filed, February 24, 2006.

ORDER: The decision of the Director is affirmed.

FOR THE BOARD

EXHIBIT D