No. 10-60373

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOHAMMAD ABUBAKAR KHALID,

Petitioner,

v.

ERIC HOLDER, U.S. ATTORNEY GENERAL,

Respondent.

PETITIONER'S RESPONSE TO RESPONDENT'S PETITION FOR REHEARING EN BANC

DHS No. A089 417 017

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Mohammad A. Khalid, Petitioner

Tony West, Attorney for Respondent

Donald E. Keener, Attorney for Respondent

Patrick J. Glen, Attorney for Respondent

Eric Holder, Respondent

/s/LAWRENCE E. RUSHTON
Attorney for the Petitioner

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STATEMENT OF THE PROCEEDINGS AND RELEVANT FACTS

The Petitioner is in general agreement with the Respondent's recitation of the course of proceedings and the facts as presented. However, the Petitioner does not agree with the argument and conclusory statements included by the Respondent in his recitation of the facts and course of proceedings, and addresses those contentions in argument below. The Petitioner incorporates by reference his statement of the facts and the course of proceedings as presented in his original brief.

SUMMARY OF THE ARGUMENT

The Respondent asserts that rehearing *en banc* is warranted in the instant case, due to a split among the Federal Circuit Courts of Appeal, and alleging that the interpretation of the statute by the prior sitting panel of this Honorable Court was in error. In his petition Respondent claims that the relevant statutory provisions are ambiguous, but does not address the specific analysis of the prior panel and merely reiterates the arguments previously raised before that panel. It is true that there is, at the moment, a split among the Federal Circuit Courts of Appeal, but the interpretation of the statute by the prior panel of this Honorable Court is the most faithful to

the canons of statutory construction and the intent of Congress, thus *en banc* consideration is not warranted in this matter.

ARGUMENT

I. The prior panel decision of this Honorable Court correctly found the statutory provision at issue here to be clear and unambiguous.

The prior panel held that the statutory language was clear and not ambiguous and thus no deference to the agency's interpretation was warranted. *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984); *Martinez v. Mukasey*, 519 F.3d 532, 543. The relevant statutory provision reads as follows:

> **(h) Rules for determining whether certain aliens are children**
>
> **(1) In general**
>
> For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 1101 (b)(1) of this title 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) of this section, 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 applicable petition described in paragraph (2) was pending.

(2) Petitions described

The petition described in this paragraph is—

(A) with respect to a relationship described in subsection (a)(2)(A) of this section, a petition filed under section 1154 of this title for classification of an alien child under subsection (a)(2)(A) of this section; or

(B) with respect to an alien child who is a derivative beneficiary under subsection (d) of this section, a petition filed under section 1154 of this title for classification of the alien's parent under subsection (a), (b), or (c) of this section.

(3) Retention of priority date

If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, 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.

(4) Application to self-petitions

> Paragraphs (1) through (3) shall apply to self-petitioners and derivatives of self-petitioners.

8 U.S.C. § 1153(h); INA § 203(h), as amended by the Child Status Protection Act (CSPA) Pub. L. 107-208 (Aug. 6, 2002). The statutory provision at issue in the instant case is subsection (h)(3) described as "Retention of priority date." 8 U.S.C. § 1153(h)(3); INA § 203(h)(3). The prior panel found, and the Respondent concurs, that the language employed in subsection (h)(3) relates back to subsection (h)(1), which in turn refers to petitions described in (h)(2). See Respondent's Petition, pg. 8 ("Thus, the 'petitions' referred to by section 203(h)(3) by necessity must refer to those same petitions within section 203(h)(2) that would have been the subject of the section 203(h)(1) calculation."). As the universe of eligible petitions is described by the exact same statutory language in subsections (h)(1) and (h)(3), the prior panel correctly found that the language was clear and unambiguous that the same petitions were being described in both subsections and thus the retention of priority date provision in subsection (h)(3) was applicable to the Petitioner, Mr. Khalid, as his original petition is described in section 1153(d) as referenced in subsection 1153(h)(3). 8 U.S.C. §§ 1153(d), 1153(h)(3); INA §§ 203(d), 203(h)(3). The Respondent asserts that the prior panel erred in not finding the language within (h)(3) to be ambiguous as it relates to the petitions described therein.

The Respondent reiterates his previous arguments concerning the terms "conversion" and "retention" and his assertion that those terms are ambiguous in this statutory context. However, the prior panel did address those terms as employed in the statute and found the Respondent's arguments lacking. Specifically, the phrase "automatically be converted" only applies after the formula in subsection (h)(1) determines that the alien is over 21 for immigration purposes and cannot be made at the moment that the child turns 21, or "ages out," as that determination is not made until the visa priority date becomes available, often many years later. *Khalid v. Holder*, 655 F.3d 363, 372 (5th Cir. 2011). As automatic conversion cannot occur until a visa is available for the principal beneficiary, then an appropriate category exists vis-à-vis the principal beneficiary (now a new petitioner) and the derivative beneficiary. *Id.* In fact this was the statutory interpretation applied by the Board of Immigration Appeals (BIA) in an unpublished decision issued in 2006, that was abandoned by the BIA in *Matter of Wang*, which justified the reversal by saying the prior decision did not discuss the "legislative framework of the statute." *Matter of Wang*, 25 I&N Dec. 28, 33 n.7 (BIA 2009); citing *Matter of Garcia*, 2006 WL2183654 ("We agree with the respondent that where an [alien] was classified as a derivative beneficiary of the original petition, the 'appropriate category' for

purposes of section [1153(h)(3)] is that which applies to the 'aged-out' derivative vis-à-vis the principal beneficiary of the original petition."); cited also in *Khalid, supra* at 372. Although not addressed here by Respondent, automatic conversion from one family category to another *without a new petition* was not found in immigration law prior to the enactment of the CSPA; and, in spite of the Respondent's argument that currently "no new petition needs to be filed" for the adult son or daughter of a lawful permanent resident and that they "automatically convert" status, he has failed to enact that interpretation by regulation to this very date, some nine years after the passage of the CSPA. 8 C.F.R. § 204.2(a)(4); see Respondent's Petition, pg. 9. Similarly, the retention of visa priority date provision that the Respondent here claims to be ambiguous was addressed at length by the prior panel decision, yet the Respondent has failed to address that analysis in his present motion. *Khalid v. Holder, supra* at 372-373. The Court observed that, "retention of priority dates despite a change in petitioner is not without precedent. For example, beneficiaries of employment-based visa petitions retain the priority date of an approved petition for 'any subsequently filed petition for any classification' of a new job within three major employment categories, regardless of a change in the employer who files the petition." *Id.*; 8 C.F.R. § 204.5(e). Likewise, the

prior panel noted that the statutory language does not accord with the Respondent's interpretation regarding retention of priority dates, "if this benefit only applied to petitions that 'automatically converted to the appropriate category,' there would be no need for the statute to explicitly state that the alien 'retain[s] the original priority date issued upon the receipt of the original petition,' § 1153(h), because there would always be only one petition with an unchanged priority date. The BIA's interpretation renders the retention benefit provision redundant and reads it out of the statute." *Khalid, supra* at 373.

The interpretation urged by the Respondent is problematic, as it relies on an ambiguity imported to the statute by the agency itself. The Respondent acknowledges that the clear language of section 1153(h)(3) contemplates all those petitions described in section 1153(h)(2), yet it claims that the same provision excludes some of the petitions that were in fact included by the clear statutory language. See Respondent's Petition, pg. 10. The argument that subsection 1153(h)(3) is merely restating the principal of retention of visa priority dates for aged-out children of lawful permanent residents runs afoul of the bar to interpreting the statutory language as to render any part superfluous as it does not address the broader inclusion of subsection 1153(d), in addition to subsection 1153(a)(2)(A), in the statutory

language. 8 U.S.C. §§ 1153(a)(2)(A), 1153(d); INA §§ 203(a)(2)(A), 203(d). Had Congress simply wished to legislate that the children of lawful permanent residents who aged-out would be entitled to retain the original second preference visa priority date, then they did not need to specifically refer to subsection 1153(d)(which refers to derivative beneficiaries like Petitioner Khalid), in addition to subsection 1153(a)(2)(A)(which refers only to the children of lawful permanent residents), within the text of subsection 1153(h)(3). Finding subsection 1153(h)(3) limited only to those petitions filed under subsection 1153(a)(2)(A) renders the inclusion of subsection 1153(d) superfluous, and that is barred by the principles of statutory interpretation. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 US 552, 562 (1990); *Bailey v. US*, 516 US 137, 145 (1995). Rather, the Respondent would have this Honorable Court believe that Congress included all petitions as described in the preceding paragraphs in the statutory language of subsection 1153(h)(3), but chose to use an esoteric reference to the legislative intent to simultaneously disqualify all of those petitions referenced just a few words prior in the same subsection, rendering the statutory language mere surplusage. If Congress had this extremely narrow intent, then they presumably would have stated that subsection 1153(h)(3) applies to petitions initially filed under section 1153(a)(2)(A) and be done

with it, but this they did not do as they also included those petitions filed under 1153(d). 8 U.S.C. §§ 1153(a)(2)(A), 1153(d), 1153(h); INA §§ 203(a)(2)(A), 203(d), 203(h).

In support of this quest for ambiguity the Respondent herein repeats the factually false argument that "there is no indication in the legislative history" that Congress intended the interpretation found by the prior panel. See Respondent's Petition, pg. 10. In fact, the legislative history does contain reference to the intent of the CSPA being, in part, to ameliorate the situation of children in Petitioner Khalid's position. *Khalid, supra* at 371-372, citing statement of Sen. Feinstein, 147 Cong. Rec. S3275 (daily ed. Apr. 2, 2001). That statement in the Congressional record was ignored by the BIA in *Matter of Wang* as well. *Matter of Wang, supra.* The statutory language at issue here is not ambiguous, and the decision of the prior panel was correct. *Khalid v. Holder, supra.*

II. Although the prior decision of this Honorable Court does conflict with the current holdings of two Circuit Courts of Appeal, the prior panel decision was issued after the contrary decision of the Second Circuit Court of Appeals which it discussed at length in declining to follow, and the subsequent decision of the Ninth Circuit Court of

<u>Appeals was itself based on the conclusions of the Second Circuit which this Honorable Court considered and found inappropriate.</u>

The prior panel of this Honorable Court addressed the decision of the Second Circuit Court at length in its decision, and declined to follow their analysis. *Li v. Renaud*, 654 F.3d 376 (2nd Cir. 2011). In declining to follow the Second Circuit, this Honorable Court's prior panel stated, "[n]otably absent from the *Li* court's analysis is any discussion of the universe of petitions described in subsection (h)(2) and its relationship with subsection (h)(3)." *Khalid, supra* at 373. The panel found it "unlikely that Congress would exclude an entire class of derivative beneficiaries from subsection (h)(3)'s benefits by silent implication based on the unwritten assumption that the petitioner must remain the same." *Id.* at 374.

Although the Ninth Circuit's decision in *Osorio v. Mayorkas* was not specifically addressed by this Honorable Court's prior panel decision, the issues raised therein were so addressed. *Osorio v. Mayorkas*, 656 F.3d 954 (9th Cir. 2011). The *Osorio* decision focused exclusively on the word "automatically" to the exclusion of other relevant terms such as "original priority date" and "original petition" and commits the error that the *Khalid* panel avoided by rendering "the retention benefit provision redundant and [reading] it out of the statute." *Khalid, supra* at 373; *Osorio v. Mayorkas,*

supra at 962. Where in the instant case the universe of eligible petitions is defined by identical language in the same statutory provision, it would be highly unusual for Congress to intend for those words to have different meanings without explicitly stating so. Given the conflicts the *Osorio* holding generates with other terms in the subsection, and its attendant requirement that many more words be rendered surplusage in order to give that one word predominance, the presence of the word "automatically" in (h)(3) then should be interpreted by its practical meaning as a procedural instruction that Congress would likely leave to the interpretation of the agency, not a fundamental definition of eligibility by class, which Congress does not typically leave to the interpretation of the agency without an explicit intent to do so. See *e.g.* 8 U.S.C. § 1255(a), INA § 245(a)(describing the classes of eligible aliens but committing ultimate decisions on adjustment of status to the Attorney General "in his discretion and under such regulations as he may prescribe"). It should also be noted that *Osorio* is also subject to a pending petition for rehearing *en banc*, and the Respondent has been called upon to respond.

This Honorable Court has jurisdiction vested by statute to review orders of removal and the questions of law underlying those decisions. *Calcano-Martinez v. INS*, 533 U.S. 348, 350 n.2 (2001); *Ramirez-Molina v.*

Zigler, 436 F.3d 508, 512 (5th Cir. 2006); 8 U.S.C. § 1252(a)(2)(D); INA § 242(a)(2)(D). No deference is due to the Ninth Circuit because a district court in that jurisdiction has described a case *not* arising from an order of removal as a class action. As the decision of the panel in *Khalid* is consistent with the clear statutory language, and gives effect to the entire statutory provision without elaborate excuses and convoluted reference to a mixed legislative history, this Honorable Court owes no deference to the Second or Ninth Circuit Courts of Appeals, and should expect those Courts to modify their holdings in accordance with *Khalid v. Holder*.

III. The holding of this Honorable Court in *Khalid v. Holder* is consistent with the expressed intent of the Child Status Protection Act and the nation's immigration laws in general.

The Respondent asserts that this Honorable Court's holding in *Khalid* "worked a sea-change to the accepted system of family-based immigration," and claims that it has effectively created new categories of eligible aliens. Respondent's Petition, pg. 14. This is an exaggeration of the effect of the prior panel's decision. At the end of the day what this decision means for the Petitioner, Mr. Khalid, and his family, is that after waiting patiently for eleven years to become lawful permanent residents, Mr. Khalid's parents

will not have to see their son return to the end of the line and start all over for another eight year wait before he can join them, he does not “jump to the front of line,” but merely gets to keep his place in line for his subsequent petition in an already existing family category as the son of a lawful permanent resident. *Matter of Wang*, *supra* at 38.

The Respondent’s argument that the CSPA was originally designed to address delays caused by government delays in processing, and that there was not necessarily a relevant governmental delay in the Petitioner’s case, is generally true but not determinative. Simply because Congress mentions one significant reason in passing legislation does not thereby exclude any other motivations, and this counter-argument can only stand if the Respondent can show that this Honorable Court’s interpretation leads to an absurd result, or that it serves to “frustrate the unmistakable purpose of the law”. *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 739 (5th Cir. 2005). It is well-established that one of the goals of our immigration laws is to foster family unity, and Congress’ intent to protect children from aging-out due to government delay is merely one element of a larger goal of promoting family unity. *Matter of Lee,* 16 I&N Dec. 305, 307 (BIA 1977); H.R. Rep. No. 89-745, at 1, 12 (1965) ("Reunification of families is emphasized as the foremost consideration [of the legislation]."). Indeed, there is evidence that

some members of Congress were concerned about other delays in reuniting families not necessarily related to governmental delay. See statement of Sen. Feinstein, 147 Cong. Rec. S3275 (daily ed. Apr. 2, 2001)("As a consequence, a family whose child's application for admission to the United States has been pending for years may be forced to leave that child behind either because the INS was unable to adjudicate the application before the child's 21st birthday, or *because growing immigration backlogs in the immigration visa category caused the visa to be unavailable before the child reached his 21st birthday*." (emphasis added)).

In the instant case, Congress, while not permitting derivative beneficiary-children who had aged out due to non-governmental delay to adjust as children under their parents' petitions, still sought to provide some limited form of relief to that class of derivative beneficiaries and allowed them to retain the original visa priority date established in their parents' petitions for subsequent petitions filed by their now lawful permanent resident parents for the overall goal of family unity, and this Honorable Court's interpretation is certainly consistent with that goal, and is not in conflict with the discernible Congressional intent, to the extent that it is relevant where the statutory language is clear on its face. *Freeman v.*

Quicken Loans, Inc., 626 F.3d 799, 804 n.9 (5th Cir. 2010); *Khalid v. Holder, supra* at 371.

CONCLUSION

The panel decision of this Honorable Court was correct in its interpretation of the statutory language concerning which categories of alien children, derivative beneficiaries, were entitled to retain the visa priority dates of immigrant visa petitions originally filed on behalf of their parents. 8 U.S.C. § 1153(h)(3); INA § 203(h)(3). The statutory language clearly defines the universe of eligible aliens, the derivative beneficiaries of petitions originally filed under sections 1153(a)(2)(A) and 1153(d), any immigrant visa petition. 8 U.S.C. § 1153(a)(2)(A) and (d); INA § 203(a)(2)(A) and (d). The statute establishes that these derivative beneficiaries are entitled to retain the visa priority dates from those original petitions for use with a subsequently filed visa petition by their now lawful permanent resident parents.

For the foregoing reasons of fact and law, the Petitioner respectfully suggests that rehearing *en banc* is not warranted in the instant case.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petitioner's Response to Respondent's Petition for Rehearing En Banc was served on Respondent's counsel by the Court's electronic filing system:

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On this the 29th day of December 2011.

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