UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEIMEI LI and DUO CEN,

Plaintiffs,

v. 08 Civ. 7770 (VM)

DANIEL M. RENAUD, Director, Vermont Service Center, U.S. Citizenship and Immigration Services, *et al.*,

Defendants.

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

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PRELIMINARY STATEMENT

Defendants respectfully submit this reply memorandum to respond to the arguments contained in plaintiffs' Memorandum In Opposition To Defendants' Motion To Dismiss (Dkt. No. 16) ("Plaintiffs' Opp. Br.") and in further support of Defendants' Motion to Dismiss, dated February 11, 2010.

ARGUMENT

I. The Court Should Defer to the BIA's Reasonable Interpretation of 8 U.S.C. § 1153(h)(3)

Plaintiffs have failed to show that the Board of Immigration Appeals' ("BIA") construction of 8 U.S.C. § 1153(h)(3) in *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009), was arbitrary, capricious, or manifestly contrary to the statute. Accordingly, under the principles set forth in *Chevron USA, Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), the Court should defer to the BIA's reasonable interpretation of the statute, and dismiss the complaint.

A. Section 1153(h)(3) Is Ambiguous

As defendants argued in their opening brief, and as found by the BIA, § 1153(h) is ambiguous because 1153(h)(1) and (h)(2) "clearly define the universe of petitions that qualify for the delayed processing formula," *Wang*, 28 I. & N. Dec. at 33, whereas paragraph (h)(3) refers only to "petitions," but "does not expressly state which petitions qualify for automatic conversion and retention of priority dates." *Id.* Against this backdrop, plaintiffs attempt to argue that § 1153(h) is unambiguous by arguing, first, that § 1153(h)(2) unambiguously applies to "*any* 'petition filed under [§ 1154] for classification of the alien's parent,'" and, second,

that § 1153(h)(2) unambiguously applies to § 1153(h)(3). Plaintiffs' Opp. Br. at 9 (emphasis added) (quoting § 1153(h)(2)). Plaintiffs are wrong on both counts.

First, section 1153(h)(2) does not, as plaintiffs contend, provide that it applies to "any" petition filed under § 1154 for classification of the alien's parent, and in fact the word "any" does not appear in that subsection. Rather, § 1153(h)(2), in contrast to § 1153(h)(3), specifically enumerates the petitions to which it applies, *see* § 1153(h)(2)(A) & (B), and the fact that plaintiffs must add the word "any" to support their reading of the statute is itself sufficient to demonstrate its ambiguity. *Zhang v. Napolitano*, 663 F. Supp. 2d 913, 920 (C.D. Cal. 2009) (holding that plaintiffs in that case "effectively concede[d]" that § 1153(h) is ambiguous, because they had to add words to the statute to explain it).

Furthermore, § 1153(h)(2) does not, as plaintiffs contend, unambiguously govern § 1153(h)(3). Section 1153(h)(2) begins with the words "[t]he petition described in *this paragraph*" (emphasis added), and not (as plaintiffs would have it) "in this subsection." Elsewhere, § 1153(h) uses the word "subsection" several times, thus suggesting that the words "paragraph" and "subsection" are not synonymous. Section 1153(h)(2)'s use of the word "paragraph," rather than "subsection," confines its limitations to paragraph (h)(2), thus reinforcing the BIA's conclusion that the use of the word "petition" in § 1153(h)(3) is ambiguous, because § 1153(h)(3) does not clearly define which "petitions" it covers.

B. The Court Should Defer to the BIA's Reasonable Interpretation of § 1153(h)(3)

Because § 1153(h) is ambiguous, the Court must defer to the BIA's construction of the statute unless it is "arbitrary, capricious or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. In attempting to argue that the Court should not defer to *Wang*, plaintiffs offer a number of criticisms of the BIA's reasoning. First, plaintiffs contend that the BIA erred because it failed to follow an earlier, unpublished decision, *Matter of Garcia*, 2006 WL 2183654 (BIA 2006). *See* Plaintiffs' Opp. Br. at 14-16. This reflects a misunderstanding of the legal effect of an unpublished BIA decision. The relevant regulation, 8 C.F.R. § 1003.1(d)(1), provides that the BIA should give guidance on the proper interpretation of the Immigration and Nationality Act "*through precedent decisions*" (emphasis added). An unpublished BIA decision such as *Garcia*, unlike a published decision such as *Wang*, has no precedential value, and is not accorded *Chevron* deference. *Rotimi v. Gonzales*, 475 F.3d 55, 58 (2d Cir. 2007). The BIA, therefore, does not err by declining to adhere to an unpublished earlier decision. *Adjin v. BCIS*, 437 F.3d 261, 264-65 (2d Cir. 2008). Accordingly, the BIA did not err by not following the unpublished decision in *Garcia*.

Second, plaintiffs contend that the BIA improperly relied on the legislative history of the Child Status Protection Act ("CSPA"), because certain comments in the legislative history were made prior to when the provision now codified as § 1153(h)(3) was added to the CSPA. Plaintiffs' Opp. Br. at 13-14. This

misrepresents the BIA's analysis. In *Wang*, the BIA interpreted the terms "convert" and "retain" as they appear in § 1153(h)(3) not by resorting to legislative history, but by comparing them to how they are used in other CSPA statutory provisions and in immigration regulations generally. 25 I. & N. Dec. at 35. Based on how those terms are used elsewhere in the INA, the BIA determined that they should be construed narrowly -- *i.e.*, in a manner that does not lead to "line jumping." *Id.* at 35-36. Only then did the BIA look to the legislative history to determine whether Congress intended broader definitions of those terms, *i.e.*, definitions which would permit "line jumping" and which would assist persons who aged out due to the unavailability of visas, and found no indication in the legislative history that Congress would have intended the terms to be interpreted in such a way. Plaintiffs do not dispute that there is no such indication in the legislative history of the CSPA, from either before or after § 1153(h)(3) was added to the CSPA. The BIA did take note of the pre-§ 1153(h) CSPA legislative history cited by plaintiffs, which, as plaintiffs do not dispute, shows that Congress did not want to permit "line jumping" and did not want to assist persons who aged out due to visa availability issues. In the absence of any CSPA legislative history specifically addressing the terms "convert" and "retain" in § 1153(h)(3), the BIA did not err in citing pre-§ 1153(h)(3) CSPA legislative history in holding that there is no indication that Congress intended the terms "retain" and "convert" to be interpreted more broadly than the narrow historical interpretation.

Plaintiffs also contend that the decision in *Wang* is inconsistent with the

decision in *Baruelo v. Comfort*, No. 05 C 6659, 2006 WL 3883311 (N.D. Ill. Dec. 29, 2006). Plaintiffs' Opp. Br. at 12. *Baruelo* held that § 1153(h)(3) required the conversion of the plaintiff in that case from the F2A category to the F2B category when she aged out while her mother was awaiting a visa. *Baruelo*, 2006 WL 3883311, at **1, 10. But that type of conversion – *i.e.*, a conversion where the F2A application and the F2B application would have the same petitioner – is precisely the type of conversion that the BIA in *Wang* held is appropriate under § 1153(h)(3). *Zhang*, 663 F. Supp. 2d at 920-21. By contrast, this action involves an attempted conversion where the petitioners are two different people, which *Wang* held is not permissible under § 1153(h)(3). *Wang*, 25 I. & N. Dec. at 34-35. Thus, there is no inconsistency between *Baruelo* and *Wang*. *Zhang*, 663 F. Supp. 2d at 921.

Plaintiffs also contend that *Wang*'s limitation of § 1153(h)(3) to F2A to F2B conversions renders the statute superfluous. According to plaintiffs, 8 C.F.R. § 204.2(a)(4), which was in existence at the time Congress enacted § 1153(h)(3), provides for automatic conversion from F2A to F2B when the beneficiary turns 21 years old. Plaintiffs' Opp. Br. at 14. This contention cannot withstand even a cursory reading of § 204.2(a)(4), which makes no mention of automatic conversion.[1]

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[1] 8 C.F.R. § 204.2(a)(4) provides for retention of priority date, but not automatic conversion:

> A child accompanying or following to join a principal alien under section 203(a)(2) of the Act may be included in the principal alien's second preference visa petition. The child will be accorded second preference classification and the same priority date as the principal alien. However, if the child reaches the age of 21 prior to the issuance of the visa to the primary alien parent, a separate petition will be

Plaintiffs further contend that *Wang*'s interpretation of § 1153(h)(3) effectively reads out of the statute the statute's reference to § 1153(d), which governs derivative beneficiaries. Plaintiffs' Opp. Br. at 7. According to plaintiffs, *Wang* excludes derivative beneficiaries from being eligible for automatic conversion and retention of priority date under § 1153(h)(3). But nothing in *Wang* supports that reading. Under *Wang*, an F2A derivative beneficiary who is the "child"– *i.e.*, a son or daughter under the age of 21 – of a lawful permanent resident is eligible for automatic conversion and retention of priority date. Upon turning 21 years old, he or she is automatically converted to the F2B category of adult child of a lawful permanent resident as a primary beneficiary and retains the priority date associated with the F2A petition.

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required. In such case, the original priority date will be retained if the subsequent petition is filed by the same petitioner. Such retention of priority date will be accorded only to a son or daughter previously eligible as a derivative beneficiary under a second preference spousal petition.

CONCLUSION

For the reasons set forth herein and in Defendants' Memorandum of Law in Support of Motion to Dismiss dated February 11, 2010, Defendants respectfully request that the Court dismiss this action.

Dated: New York, New York
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