

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

|                                     |   |                                 |
|-------------------------------------|---|---------------------------------|
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| ROSALINA CUELLAR DE                 | ) |                                 |
| OSORIO; <i>et al.</i> ,             | ) |                                 |
|                                     | ) | No. 09-56786                    |
| <i>Plaintiffs-Appellants,</i>       | ) |                                 |
|                                     | ) | D.C. No. 5:08-cv-00840-JVS-SH   |
| v.                                  | ) | Central District of California, |
|                                     | ) | Riverside                       |
| ALEJANDRO MAYORKAS; <i>et al.</i> , | ) |                                 |
|                                     | ) |                                 |
| <i>Defendants-Appellees.</i>        | ) |                                 |
| <hr/>                               |   |                                 |
| TERESITA G. COSTELO, and            | ) |                                 |
| LORENZO ONG, Individually and       | ) |                                 |
| On Behalf of All Others Similarly   | ) | No. 09-56846                    |
| Situated,                           | ) |                                 |
|                                     | ) | D.C. No. 8:08-cv-00688-JVS-SH   |
| <i>Plaintiffs-Appellants,</i>       | ) | Central District of California, |
|                                     | ) | Santa Ana                       |
| v.                                  | ) |                                 |
|                                     | ) |                                 |
| JANET NAPOLITANO, Secretary of      | ) |                                 |
| Homeland Security; <i>et al.</i> ,  | ) |                                 |
|                                     | ) |                                 |
| <i>Defendants-Appellees.</i>        | ) |                                 |
| <hr/>                               |   |                                 |

**GOVERNMENT’S UNOPPOSED MOTION TO EXTEND THE STAY OF  
THE MANDATE PENDING THE GOVERNMENT’S DECISION  
WHETHER TO FILE A PETITION FOR CERTIORARI**

Pursuant to Fed. R. App. P. 41(d), Defendants-Appellees Alejandro Mayorkas, et al., and Janet Napolitano, et al., (“the Government”) respectfully move this Court for an order extending the stay of the mandate for 30 additional days, up to and including January 25, 2013, pending the filing of a petition for a

writ of certiorari to the Supreme Court, or until the Solicitor General determines not to seek Supreme Court review. The mandate currently is scheduled to issue in this case on December 26, 2012. One previous stay of the mandate was granted on November 16, 2012. ECF No. 100. A petition for a writ of certiorari currently is due on December 26, 2012, ninety days from the entry of judgment. *See* Sup. Ct. R. 13. One extension of this deadline has been sought and is awaiting action. *See* <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12a612.htm>. Counsel for the Government has conferred with opposing counsel in both of these consolidated cases, and neither opposes the Government's motion to extend the stay of the mandate.

1. These consolidated cases involve challenges to the Government's interpretation of 8 U.S.C. § 1153(h)(3), a provision enacted as part of the Child Status Protection Act ("CSPA"), Pub. L. No. 107-208, 116 Stat. 927 (2002). In two separate but related decisions, the district court held that the provision is ambiguous as to those immigration petitions that are intended to benefit from "conversion" and "priority date retention" under paragraph (3) of 8 U.S.C. § 1153(h), and it held that the Board of Immigration Appeals' interpretation of section 1153(h)(3) in *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009), is reasonable and entitled to deference.

2. A unanimous panel of the Ninth Circuit entered a consolidated opinion affirming the decisions of the district court, and this Court thereafter granted rehearing *en banc*.

3. On September 26, 2012, the *en banc* Court issued a sharply divided opinion in these consolidated cases. *De Osorio v. Mayorkas*, 695 F.3d 1003 (9th Cir. 2012). A six-judge majority of the Court concluded that section 1153(h)(3) unambiguously provided relief to aged-out derivative beneficiaries of family third- and fourth-preference petitions. *De Osorio*, 695 F.3d at 1016. The dissenting opinion was joined by the remaining five judges, who wrote that they “would hold that 8 U.S.C. § 1153(h)(3) is ambiguous because it contains language simultaneously including and excluding derivative beneficiaries of [family third- and fourth-preference] visa petitions from the benefits of [section 1153(h)(3)].” *De Osorio*, 695 F.3d at 1017.

4. Fed. R. App. P. 41(d)(1) provides that the Court may stay the mandate for a period not to exceed 90 days, and that such a stay continues until the Supreme Court’s final disposition of the case. The Government’s request that the mandate be stayed for an additional 30 days (for a total of 67 days) does not exceed the period set out in Rule 41.

5. A stay of the mandate is appropriate where a petition for a writ of certiorari “would present a substantial question” and “there is good cause for a

stay.” Fed. R. App. P. 41(d)(2)(A). This Court’s previous grant of the Government’s motion to stay the mandate manifests that both of those requirements were met in these consolidated cases. *See* Mot. ECF No. 99 (outlining bases for seeking a stay of the mandate); ECF No. 100 (granting stay). Accordingly, this Court should find that those same factors still weigh in favor of staying the mandate until such time as the Solicitor General decides whether to seek further review.

6. The decision to seek a writ of certiorari on behalf of the United States is entrusted to the Solicitor General of the United States. 28 C.F.R. § 0.20(a). Before making a decision to seek or forgo further review of an adverse decision, the Solicitor General must evaluate not only the merits of these cases but also the positions of the affected agencies and the overall litigation strategy of the United States. *See* Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General’s Changing Role in Supreme Court Litigation*, 51 B.C. L. Rev 1323, 1329-31 (2010) (discussing decision-making process of Solicitor General). An extension of the stay of the mandate is appropriate in light of the thorough deliberative process engaged in by the Solicitor General in determining whether to seek a writ of certiorari. Although the Solicitor General has not yet made a decision regarding further review of these cases, a decision is anticipated in the near future. If the Solicitor General decides to seek a writ of certiorari in these

cases, the extension of the stay will provide him the time necessary to prepare the petition.

**CONCLUSION**

For the reasons stated above, the Court should extend its previous stay of the mandate for a period of 30 additional days, up to and including January 25, 2012.

Dated: December 18, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 18, 2012, I electronically filed the foregoing **GOVERNMENT’S UNOPPOSED MOTION TO EXTEND THE STAY OF THE MANDATE PENDING THE GOVERNMENT’S DECISION WHETHER TO FILE A PETITION FOR CERTIORARI** with the Clerk of the Court using the CM/ECF system which will send notification to representatives of each party.

Dated: December 18, 2012

Respectfully submitted.

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