EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

IN THE MATTER OF:
Petition for Alien Relative, Form I-130
JYOTI R. PATEL, Petitioner
VISHALKUMAR R. PATEL, Beneficiary, A89 726 558

BRIEF OF JYOTI PATEL AND VISHALKUMAR PATEL ON ISSUE OF RETENTION OF PRIORITY DATE ON THEIR I-130 PETITION

SUMMARY:

This case comes before the Board on certification by the Director of the California Service Center, United States Citizenship and Immigration Services ("CIS"). In its June 4, 2008 decision, USCIS concluded that the petition for alien relative (I-130) filed by Petitioner on behalf of Beneficiary should not be able to retain/recapture the priority date of a previously filed petition on behalf of Petitioner in 1998. Vishalkumar Patel (Beneficiary) was a derivative beneficiary on the 1998 visa petition filed on behalf of his mother Jyoti Patel. The Patels contend that under the Child Status Protection Act ("CSPA"), they are entitled to retention of the 1998 priority date. After Beneficiary turned 21, the original visa petition that was filed under the employment 3rd preference category automatically converted to the family-based second preference category as the unmarried child of a lawful permanent resident. Pursuant to INA § 203(h)(3), The Patels are entitled to the priority date of 1998 petition.

According to the Notice of Certification, Jyoti Patel and Vishalkumar Patel have 10 days from receipt of the Notice to submit a brief to the Board of Immigration Appeals. On June 17, 2008, counsel for the Patels received the Notice of Certification and Memorandum of Certification via United States mail. Based on the Notice of Certification, the Patels are filing the instant brief.

FACTS:

Jyoti Patel is a citizen of India. She was born on June 1, 1964. Ms. Patel became a lawful permanent resident on January 12, 2006.

Vishalkumar Patel is the son of Jyoti Patel. Mr. Patel is a citizen of India and is currently residing in India. He was born on November 10, 1984.

On January 16, 1998, Vimco Corporation filed a labor certification on behalf of Jyoti Patel. The case was certified on August 14, 2000.

On June 2, 2003, Vimco filed an I-140 petition on behalf of Ms. Patel. The I-140 was given a priority date of January 16, 1998 as this was the date the labor certification was filed. Mr. Patel was a derivative beneficiary on the I-140 petition.

On June 2, 2003, Ms. Patel filed her application for adjustment of status with USCIS. On or about January 19, 2006, Ms. Patel's adjustment of status application was approved. Subsequently, an I-824 (application for action on approved application or petition) was filed on behalf of Vishalkumar Patel. However, Mr. Patel was no longer eligible for an immigrant visa because he was over 21.

On February 24, 2006, Ms. Patel filed an I-130 petition on behalf of Mr. Patel as the unmarried son of a lawful permanent resident. The Patels argued that under the Child Status Protection Act, they were entitled to the priority date of January 16, 1998.

On June 4, 2008, USCIS approved the I-130 petition at issue. However, USCIS accorded a priority date of February 24, 2006 rather than the priority date

Based on current processing times, it will take approximately ten years for Mr. Patel to come to the United States.

ISSUE:

Whether Jyoti Patel and Vishalkumar Patel are entitled to the priority date of January 16, 1998 on their visa petition under INA § 203(h)(3)?

ARGUMENT:

The instant visa petition should be given the priority date of the first I-130 petition where Vishalkumar Patel was derivative beneficiary. The automatic conversion provisions of CSPA dictate that the earlier priority date is warranted. This argument is supported by two unpublished Board cases. See Matter of Garcia, A79 001 587, 2006 WL 2183654 (BIA June 16, 2006); Matter of Elizabeth Garcia, 2007 WL 2463913 (BIA July 24, 2007)[1]. USCIS acknowledges that the these decisions are inconsistent with its decision in the instant case.

The Child Status Protection Act, Pub. L. 107-208 (Aug. 6, 2002) was enacted on August 6, 2002. The purpose of the Act was to protect children who aged-out during the long process of applying for lawful permanent residence. The provisions of the Act have been read broadly. Padash v. INS, 358 F.3d 1161, 1168-74 (9th Cir. 2004).

For purposes of this appeal, Mr. Patel is not alleging that he falls under INA § 203(h)(1) as he is now over 21. However, CSPA is still applicable. INA § 203(h)(3) states:

> "If the age of the alien is determined under paragraph (1) to be 21 years of age or older for 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."

The instant petition shall automatically be converted to the 2B category and Mr. Patel is entitled to the priority date from the original petition.

[1] Counsel will refer to Matter of Garcia as Garcia and Matter of Elizabeth Garcia as Elizabeth Garcia in order to distinguish between the two cases.

USCIS and the Department of State have issued various memoranda interpreting CSPA. However, no regulations regarding the implementation of CSPA have been published. None of the memoranda address the provision regarding automatic conversion and retention of priority dates codified at 8 U.S.C. § 1153(h)(3).

In Matter of Garcia, the Board addressed a very similar situation as in the instant case. Garcia was in removal proceedings and applying for adjustment of status before the immigration court. In that case, respondent was a derivative beneficiary of a visa petition filed by his aunt on behalf of his mother in 1983 (F-4 petition). Respondent was 9 years old at the time. However, a visa number did not become available until respondent was 22 years old. Subsequently, respondent's mother filed a 2B petition on her behalf. Respondent argued that she retained her mother's original 1983 priority date for purposes of establishing her eligibility in the second-preference category.

In Garcia, the Board addressed whether respondent was eligible to adjust status under INA § 203(h). Since respondent was found to be 21 years or older, the issue was to ascertain the "appropriate category" to which her petition is automatically converted. The Board held that "where classified as a derivative beneficiary of the original petition, the 'appropriate category' for purposes of section 203(h)(3) is that which applies to the 'aged-out' derivative vis-à-vis the principal beneficiary of the original petition." Thus, the "appropriate category" to which Garcia's petition was converted was the 2B category and respondent retained the 1983 priority date that applied to the original petition.

The Board should follow the holding in Garcia. This is consistent with the plain language and intent of CSPA. The focus should be on the child's relationship with the original primary beneficiary not the original petitioner and derivative beneficiary. In the instant case, the appropriate priority date is the date the original petition was filed. Under INA § 203(h)(3), USCIS' decision is incorrect. The appropriate category for conversion is the F-2B category and the Patels retain the 1998 priority date, which is now current.

CONCLUSION

USCIS erroneously concluded that the visa petition should not be accorded the January 16, 1998 priority date of the original F-4 petition. Under INA § 203(h)(3), Jyoti Patel and Vishalkumar Patel are entitled to the priority date of the original petition.

Respectfully submitted this 25th day of June, 2008.

Scott Bratton
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CERTIFICATE OF SERVICE

I certify that I sent a copy of the foregoing by regular first-class mail to Jason R. Grimm, Service Center Counsel-Laguna Niguel, United States Citizenship and Immigration Services, 24000 Avila Rd, Suite 2117, Laguna Niguel, CA 92677.

on the 25th day of June, 2008.

Respectfully submitted,

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2006 WL 2183654 (BIA)

** THIS IS AN UNPUBLISHED DECISION THAT CANNOT BE CITED **

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

IN RE: MARIA T. GARCIA

File: A79 001 587 - Houston

June 16, 2006

IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT:
Lawrence E. Rushton, Esquire
ON BEHALF OF DHS:

Gerrie Zhang
Assistant Chief Counsel

CHARGE:
Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Adjustment of status

The respondent appeals from an Immigration Judge's February 11, 2005, decision denying her application for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i). The Department of Homeland Security (the "DHS"), formerly the Immigration and Naturalization service (the "INS"), opposes the appeal. The appeal will be sustained in part and the record will be remanded to the Immigration Judge for further proceedings.

The respondent, a 32-year-old native and citizen of Mexico, concedes that she is inadmissible to the United States as charged, but claims that she is eligible to adjust her status to that of a lawful permanent resident pursuant to section 245(i) of the Act. Section 245(i)(1) provides, in pertinent part, that certain aliens who are beneficiaries of immigrant visa petitions filed on or before April 30, 2001, may apply to the Attorney General for adjustment of status upon payment of $1,000. Upon receiving the alien's application and the required sum, the Attor-

ney General is authorized to adjust the alien's status to that of a lawful permanent resident if, among other things, "an immigrant visa is immediately available to the alien…." Section 245(i)(2)(B) of the Act.

The respondent contends that a visa is immediately available to her as a derivative beneficiary of a visa petition, filed in 1983, that classified her mother as a fourth-preference family-based immigrant (i.e., as the sister of a United States citizen). *See* section 203(a)(4) of the Act, 8 U.S.C. § 1153(a)(4). According to the respondent's appellate brief, her aunt filed a visa petition on behalf of her mother on January 13, 1983, when the respondent was 9 years old, and a visa number became available to her mother on the basis of the petition in June of 1996, when the respondent was 22 years old. Although the respondent is now 32 years old, she asserts that she remains her mother's "child," for purposes of establishing her derivative status under the aforementioned visa petition, by operation of section 3 of the Child Status Protection Act, Pub. L. No. 107-20, 116 Stat. 927 (2002) ("CSPA"), codified at section 203(h) of the Act, 8 U.S.C. § 1153(h).

Section 203(h)(1) of the Act provides in pertinent part that a determination as to whether a derivative beneficiary of a visa petition continues to qualify as a "child" (i.e., as a person under 21 years of age) is to be made by reference to "the age of the alien on … 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 … the number of days in the period during which the applicable petition … was pending." According to the respondent, applying the formula set forth at section 203(h)(1) results in a determination that she is 17 years old and still her mother's "child" for purposes of establishing derivative status.

Alternatively, the respondent contends that even if she is 21 years old or older within the meaning of section 203(h)(1), a visa is nonetheless immediately available to her by operation of section 203(h)(3) of the Act, which provides that "[i]f the age of an alien is determined under [section 203(h)(1)] to be 21 years of age or older …, 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." The respondent asserts that if she is 21 years old or older, then the "appropriate category" to which she was "automatically … converted" is the second-preference category of family-based immigrants (i.e., the unmarried daughter of her mother, a lawful permanent resident). Section 203(a)(2) of the Act. Indeed, in 1997 the respondent's mother actually filed a visa petition on the respondent's behalf, classifying her in that preference category. Furthermore, the respondent contends that under section 203(h)(3) She "retains" her mother's original January 1983 priority date for purposes of establishing her eligibility for a visa in the second-preference category.

The immigration Judge concluded that the respondent was no longer her mother's "child" for purposes of section 203(h)(1) because she did not file her application for adjustment of status within 1 year after a visa number became available in connection with her mother's visa petition. Furthermore, the Immigration Judge concluded that the 1983 fourth-preference petition did not automatically convert to a second-preference petition with respect to the respondent because section 203(h)(3), which provides for such automatic conversion, did not yet exist in 1997 (when the respondent's mother filed a second-preference petition on the respondent's behalf).

On appeal, the respondent argues that the Immigration Judge misconstrued section 203(h)(1) of the Act when she interpreted the phrase "sought to acquire the status of an alien lawfully admitted for permanent residence" as referring to the formal "filing" of an application for adjustment of status. Furthermore, she claims that she is eligible for automatic conversion to the second-preference category pursuant to section 203(h)(3) because the affirmative application for adjustment of status that she filed on the basis of her approved second-preference petition was still pending before the former INS when the CSPA went into effect in August of 2002.

As a threshold matter, we conclude that we need not address the first issue raised by the respondent on appeal, i.e., whether the Immigration Judge erred by equating the statutory phrase "sought to acquire the status of an alien lawfully admitted for permanent residence" with the concept of "filing" a formal application for adjustment of status. For the following reasons, we conclude that the respondent would have failed to retain the status of her mother's "child," within the meaning section 203(h)(1) of the Act, *even if* she had applied for adjustment of status within 1 year after a visa number became available to her mother.

As noted previously, the respondent's age for purposes of section 203(h)(1) is equal to her actual age on the date when a visa number became available to her mother, reduced by whatever number of days comprised "the period during which the applicable petition … was pending." It is undisputed that a visa number became available to the respondent's mother in June of 1996, when the respondent was 22 years old. Furthermore, the record reflects that the underlying visa petition was approved by the former INS on the day it was filed-January 13, 1983. (See attachment "A" to the DHS' Brief on Respondent's Ineligibility for Adjustment of Status, filed in Immigration Court on January 21, 2005). Applying the section 203(h)(1) formula to this set of facts yields the conclusion that the respondent is 22 years old (i.e., her age in June of 1996 (22 years)), reduced by the number of days in the period during which the visa petition was pending (i.e., 0 days). Accordingly, the respondent is no longer deemed to be her mother's "child" for purposes of establishing her status as a derivative beneficiary of her mother's visa petition.

The respondent's assertion that she is 17 years old for purposes of section 203(h)(1) appears to derive from her assumption that the statutory reference to

"the period during which the applicable petition … was pending" refers to the period of time between the filing of the visa petition and the date when a visa number became available to her mother. But that assumption is mistaken. In fact, the relevant period is the period between the filing of the visa petition *and its approval;* a visa petition that has been approved by the DHS is no longer "pending" for any purpose within the meaning of the CSPA. In this connection, it must be kept in mind that the CSPA was enacted to prevent alien children from "aging out" as a result of unnecessary administrative processing delays by the DHS. Yet the 161-month delay between January 1983 (when the former INS approved the fourth-preference visa petition filed on behalf of the respondent's mother) and June 1996 (when a visa number became available to the respondent's mother on the basis of that petition) was not attributable to unnecessary administrative processing delays at the former INS, but was instead a function of the fact that the respondent's mother had been approved for classification as an immigrant in an oversubscribed preference category that was (and remains) subject to restrictive annual numerical limits. The CSPA was not intended to override these annual numerical limits or otherwise alter the preference allocation for family-sponsored immigrants, which are set by statute. *See generally* section 203(a) of the Act. Because there was no administrative processing delay in the approval of her mother's fourth-preference visa petition, there is simply no basis for "reduc[ing]" the respondent's age below that which she actually possessed when a visa number became available to her mother. Having concluded that the respondent is not presently entitled to a visa number as a derivative beneficiary of her mother's fourth-preference visa petition, we now turn to the question whether a visa is immediately available to her by operation of the automatic conversion provision at section 203(h)(3) of the Act.

As previously noted, section 203(h)(3) provides that "[i]f the age of an alien is determined under [section 203(h)(1)] to be 21 years of age or older …, 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." We have determined that the respondent is 21 years of age or older for purposes of section 203(h)(1), and therefore our present task is to ascertain the "appropriate Category" to which her petition is automatically converted. We agree with the respondent that where an was classified as a *derivative* beneficiary of the original petition, the "appropriate category" for purposes of section 203(h)(3) is that which applies to the "aged-out" derivative vis-a-vis the *principal beneficiary* of the original petition.[FN1]

In this instance, the principal beneficiary of the original petition was the respondent's mother, who became a lawful permanent resident of the United States once a visa number became available to her in 1996. The respondent was (and remains) her mother's unmarried daughter, and therefore the "appropriate category" to which her petition was converted is the second-preference category of family-based immigrants, i.e., the unmarried sons and daughters of lawful permanent res-

idents. Furthermore, the respondent is entitled to retain the January 13, 1983, priority date that applied to the original fourth-preference petition, and therefore a visa number under the second-preference category is immediately available to the respondent.[FN2]

As noted previously, the Immigration Judge declared that section 203(h)(3) was inapplicable to the respondent because the CSPA, from which section 203(h)(3) is derived, was not intended to apply retroactively to petitions for classification filed before August 6, 2002, the CSPA's effective date. In this regard, the Immigration Judge apparently focused on the respondent's eligibility for a visa number through the visa petition that her mother filed on her behalf in 1997. However, the respondent's entitlement to a visa number under section 203(h)(3) does not derive from the 1997 visa petition, but rather from the original 1983 petition, which is "automatically ... converted" to a second-preference petition upon an administrative determination that she is 21 years old or older for purposes of section 203(h)(1).

Furthermore, the CSPA expressly provides that the amendments made therein "apply to any alien who is a ... beneficiary of ... a petition for classification under section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) approved before [August 6, 2002] 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." CSPA § 8. The present respondent was a beneficiary of her mother's fourth-preference petition, which was approved prior to August 6, 2002, and the respondent's subsequent application for adjustment of status was filed with the DHS in 1997 but *remained pending* until 2004, after the CSPA had become effective. Thus, section 203(h)(3) was applicable with respect to the respondent's original adjustment application and remains effective to the renewed application that she has filed in removal proceedings.

In conclusion, we have determined that an immigrant visa is not immediately available to the respondent as a derivative beneficiary of her mother's fourth-preference visa petition, but that such a number is available to her in the second-preference category by virtue of section 203(h)(3) of the Act. Accordingly, a visa is immediately available to the respondent within the meaning of section 245(i)(2)(B) of the Act. Therefore, the respondent's appeal will be sustained in part and the Immigration Judge's decision pretermitting her application for section 245(i) adjustment will be vacated. The record will be remanded for further consideration of the respondent's adjustment application and for entry of a new decision.

ORDER: The appeal is sustained in part and the Immigration Judge's decision is vacated to the extent that it pretermitted the respondent's application for adjustment of status.

FURTHER ORDER: The record is remanded for further proceedings consistent with the

foregoing decision and for entry of a new decision.

<Signature>

FOR THE BOARD

FN1. Where the aged-out beneficiary was the principal beneficiary of the original petition, the appropriate category is that which applies to the beneficiary vis-a-vis the original *petitioner*.

FN2. According to the State Department's visa bulletin, second-preference family-based visas are currently available to the unmarried daughters of Mexican lawful permanent residents whose priority dates precede November 1991. (http://travel.state.gov/visa/frvi/bulletin/bulletin_2924.html).

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** THIS IS AN UNPUBLISHED DECISION THAT CANNOT BE CITED **

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

IN RE: ELIZABETH FRANCISCA GARCIA

FILE: A77 806 733 - HOUSTON

July 24, 2007

IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT:

Lawrence E. Rushton, Esquire

CHARGE:
Notice Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Adjustment of status

This case was last before us on March 6, 2006, when we dismissed the respondent's appeal from the Immigration Judge's decision. This matter is now before us pursuant to the September 27, 2006, order of the United States Court of Appeals for the Fifth Circuit granting an unopposed motion to remand to further consider the respondent's application for adjustment of status. On remand to the Board, the respondent filed a brief again seeking to apply for adjustment of status. The Department of Homeland Security (DHS) has not submitted a brief on remand. The record will be remanded.

We are asked to address (1) whether the respondent complied with the requirements of section 203(h)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(h)(1)(A), if an immigrant visa became available to the respondent's mother in November 1994 (fourth preference), by virtue of a visa application form apparently completed and signed by her in May 1995, when the respondent was a minor, and (2) whether, under section 203(h)(3) of the Act, the July 7, 1997, visa petition filed by the respondent's mother on behalf of the respondent (second preference) reverts

back to the October 18, 1983, visa petition priority date filed by the United States citizen sister of the respondent's mother on behalf of the respondent's mother.

With regard to the fourth preference petition for which the respondent claims derivative status, we find that the respondent did not seek to acquire her lawful permanent residence within 1 year of her priority date becoming current, as required under the Child Status Protection Act ("CSPA"), Pub. L. No. 107-208, 116 Stat. 927 (2002), for the reasons stated in our prior decision of March 6, 2006. *See Matter of Avila-Perez*, 24 I&N Dec. 78, 83 (BIA 2007) ("Congress expressly provided that the age of a child of a lawful permanent resident would be determined based on a special mathematical formula, 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.' *See* CSPA § 3, 116 Stat. at 928."). Moreover, the completion and signing of a visa petition by the respondent's lawful permanent resident mother on the respondent's behalf, alone, does not satisfy this requirement. Rather, filing of an application for adjustment of status is required.

Nevertheless, the respondent contends that an unpublished decision from this Board, dated June 16, 2006, relates to her sister and involves similar circumstances to those in this case. *See* Respondent's Brief on Remand, filed January 5, 2007, at Tab A. In that decision, the Board found that an immigrant visa was not immediately available to the alien as a derivative beneficiary of the fourth-preference (sibling) visa petition filed on behalf of her now lawful permanent resident mother. However, the Board further found that a visa number was available to her, and was current, in the second-preference category by virtue of section 203(h)(3) of the Act. In light of our analysis and findings in that case, which was issued subsequent to our March 6, 2006, decision in this matter, we will withdraw from our prior finding that the priority date for the second-preference visa petition filed by the respondent's lawful permanent resident mother on the respondent's behalf is July 7, 1997, and is not current. Instead, we recognize the "original priority date issued upon receipt of the original petition," January 13, 1983, for the mother's second-preference petition on the respondent's behalf. Section 203(h)(3) of the Act. This priority date is current and the respondent is, therefore, eligible to apply for adjustment. Thus, we will vacate our prior order insofar as it found the respondent ineligible for adjustment of status, and we will remand this matter.

ORDER: The Board's March 6, 2006, decision is vacated insofar as it found the respondent ineligible to apply for adjustment of status.

FURTHER ORDER: The record is remanded for further proceedings consistent with this opinion, and for the entry of a new decision.

Edward R. Grant
FOR THE BOARD

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