ORIGINAL

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FLORENTINA RODRIGUEZ,

Plaintiff,

v.

ALBERTO GONZALES, etc., et al.,

Defendants.

CASE NO. CV 04-8671 DSF (AJWx)

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Florentina Sapida Rodriguez filed her First Amended Complaint ("FAC") for Writ of Mandamus and Declaratory Judgment in this Court on April 11, 2005 against Defendants Alberto Gonzales, Attorney General of the United States, and numerous others (collectively, "Defendants"). Plaintiff seeks review of Defendants' decision denying an "immediate relative" classification to Plaintiff's son. Plaintiff seeks a writ of mandamus compelling Defendants to forward an approved Petition for Alien Relative, Form I-130, filed by Plaintiff on behalf of her son to the American Embassy in the Philippines, and a declaratory judgment that certain provisions of the Immigration and Nationality Act added in 2002 apply to her son.

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Plaintiff's Motion for Summary Judgment and Plaintiff's Memorandum in Support of Motion for Summary Judgment; the Declaration of Thomas H. Chung in Support of Plaintiff's Motion for Summary Judgment ("Chung Declaration"); and Plaintiff's Appendix of Exhibits in Support of Plaintiff's Motion for Summary Judgment were filed on November 4, 2005. A Statement of Uncontroverted Facts and Conclusions of Law in Support of Plaintiff's Motion for Summary Judgment ("Plaintiff's SUF") was lodged on the same date. Defendants' Opposition to Plaintiff's Motion for Summary Judgment and Notice of Cross-Motion and Cross-Motion for Summary Judgment and to Strike Plaintiff's Appendix of Exhibits and Memorandum of Points and Authorities in Support were filed on December 16, 2005, and a Statement of Uncontroverted Facts and Conclusions of Law ("Defendants' SUF") was lodged on the same date. Plaintiff's Reply to Defendants' Opposition to Motion for Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment and Motion to Strike Plaintiff's Exhibits was filed on January 9, 2006.

The Court heard oral argument on January 23, 2006, and ordered supplemental briefing. Defendants' Supplemental Briefing in Further Opposition to Plaintiff's Motion for Summary Judgment and in Further Support of Defendants' Cross-Motion for Summary Judgment was filed on March 13, 2006 along with the Declaration of Jeffrey H. Gorsky ("Gorsky Declaration") and the Declaration of Helen deThomas ("deThomas Declaration"). Plaintiff's Supplemental Brief in Support of Her Motion for Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment was filed on April 3, 2006.

Having considered the papers submitted by the parties, except as noted below, and having heard the oral argument of counsel, the Court GRANTS Plaintiff's Motion and DENIES Defendants' Cross-Motion.

II. LEGAL STANDARD

Summary judgment shall be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

When parties submit cross-motions for summary judgment, each motion must be considered on its own merits. Fair Hous. Council of Riverside County, Inc. v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001). Nevertheless, the Court must consider the appropriate evidentiary material identified and submitted in support of both motions before ruling on each of them. Id.

Declarations must be based on personal knowledge, must set forth facts that would be admissible at trial, and must show that the declarant is competent to testify as to the facts at issue. Fed. R. Civ. P. 56(e). Declarations on "information and belief" are inappropriate to demonstrate a genuine issue of fact. Taylor v. List, 880 F.2d 1040, 1045 n.3 (9th Cir. 1989). Specific facts are required; conclusory allegations will not suffice. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990); FTC v. Publ'g Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." (citations omitted)).

Only admissible evidence can be considered. Orr v. Bank of Am., NT & SA, 285 F.3d 764, 773 (9th Cir. 2002). "Authentication is a 'condition precedent to admissibility,' and this condition is satisfied by 'evidence sufficient to support a finding that the matter in question is what its proponent claims.'" Id. (citation and footnotes omitted). The Ninth Circuit has repeatedly held that unauthenticated documents cannot be considered on a motion for summary judgment. Id. (citations

omitted). "[D]ocuments authenticated through personal knowledge must be 'attached to an affidavit that meets the requirements of [Rule] 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence.'" Id. at 773-74 (citation and footnote omitted). A proper foundation may be laid by any means permitted by the Federal Rules of Evidence. Id. at 774.

III. STATEMENT OF FACTS

The facts are not in dispute. Plaintiff has been a citizen of the United States since at least 1989. (Defs.' SUF ¶ 2.)[1] On January 8, 1999 Plaintiff filed a Petition for Alien Relative, Form I-130 (the "Petition"), on behalf of her son, Glenn Sapida Rodriguez ("Mr. Rodriguez"), with what was then the Immigration and Naturalization Service ("INS"). (Pl.'s SUF ¶¶ 2-4; Defs.' SUF ¶¶ 2-3.) The INS, formerly part of the Department of Justice ("DOJ"), was abolished by the Homeland Security Act, Pub. L. No. 107-296, § 471(a), 116 Stat. 2135, 2205 (Nov. 25, 2002). Its functions with respect to applications for immigration benefits were assumed by the United States Citizenship and Immigration Services ("USCIS"), a sub-agency of the Department of Homeland Security ("DHS"). Dong Li Qui v. Ridge, Case. No. 02 Civ. 7178(HB), 2005 U.S. Dist. LEXIS 17261, at *2 n.2 (S.D.N.Y. Aug. 19, 2005). The Petition was filed at the INS's California Service Center ("CSC") and was assigned file number WAC-99-074-50032. (Pl.'s SUF ¶ 4.) By this Petition, Plaintiff sought to classify Mr. Rodriguez as an "immediate relative" of a United States citizen. Mr. Rodriguez, an unmarried individual, was born on January 13, 1979 in the Philippines. (Pl.'s SUF ¶ 5, Defs.' SUF ¶ 3.) He turned twenty-one on January 13, 2000. (Defs.' SUF ¶ 4.)

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[1] Defendants failed to submit their SUF in proper form as required by the Court's Standing Order, filed October 22, 2004. Defendants do not appear to dispute any of Plaintiff's factual allegations, and the Court deems them admitted.

The Petition was approved by the CSC on October 23, 2001. (Pl.'s SUF ¶ 8; Defs.' SUF ¶ 6.) Because Mr. Rodriguez was twenty-one at the time the Petition was approved, he was given a first preference family-sponsored immigrant visa classification for unmarried sons and daughters of United States citizens. (Pl.'s SUF ¶ 9; Defs.' SUF ¶ 6.)

On August 6, 2002, Congress enacted the Child Status Protection Act of 2002 ("CSPA"), Pub. L. No. 107-208, 116 Stat. 927 (2002). As will be discussed further below, the CSPA allows some aliens formerly treated as first preference immigrants to be classified as immediate relatives. On January 28, 2004, Plaintiff's attorneys wrote to the National Visa Center ("NVC") claiming that Mr. Rodriguez was covered by the CSPA and was now eligible for classification as an immediate relative; Plaintiff requested that the NVC apply the CSPA and allow Mr. Rodriguez to obtain a visa immediately. (Pl.'s SUF ¶ 10.) On November 22, 2004, the NVC forwarded the case to the United States Embassy in Manila, Philippines. (Gorsky Decl. ¶ 3.) The Consular Officer at the embassy determined that the CSPA did not apply to Mr. Rodriguez and therefore returned the Petition to the NVC. (Gorsky Decl. ¶ 4.) Mr. Rodriguez has not yet filed an application for or been granted an immigrant visa.

IV. EVIDENTIARY ISSUES

Defendants argue that the Court should strike Plaintiff's Exhibits 5 through 8 because under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, the Court's review of Defendants' decision must be limited to the administrative record. Defendants also state that these exhibits are hearsay and inadmissible.

The APA allows a court to set aside an agency decision if the court determines that the decision was arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A). Defendants are correct that such review must be based on the facts before the agency at the time of decision, as evidenced by the administrative

record. Tongatapu Woodcraft Haw., Ltd. v. Feldman, 736 F.2d 1305, 1308 (9th Cir. 1984) ("Under the Administrative Procedure Act, . . . [t]he determination must be made on the administrative record before the [INS]."); Navarro v. Dist. Director of the U.S. INS, 574 F.2d 379, 383 (7th Cir. 1978) (in a declaratory judgment action, although the court did not rely on the APA for jurisdiction, the court must make its determination "upon the administrative record before the INS"). However, Exhibits 5 through 8 do not present any additional facts relating to Plaintiff's case. Exhibit 5 provides background information about the NVC and its procedures. Exhibits 6 and 7 provide background information about the CSPA and its effect on immigration procedures. Exhibit 8 consists of documents pertaining to individual aliens who chose to exercise their opt-out rights under section 6 of the CSPA. These documents relate to immigration procedures in general, the proper interpretation of the INA, and the CSPA; they are more in the nature of legal argument than factual allegations. They in no way seek to add to the record on which the agency based its review. The APA does not bar consideration of these exhibits.[2]

The Court next considers Defendants' other objections. Exhibit 5 consists of information downloaded from the web page of the United States Department of State pertaining to the National Visa Center. (Chung Decl. ¶ 2.) Under Federal Rule of Evidence 802, hearsay is not admissible as evidence. Even if this document fell under one of the hearsay exceptions, it would not be properly authenticated. Federal Rule of Evidence 901(a) provides that documents are sufficiently authenticated by evidence that will support a finding that they are what their proponent contends they are. Evidence printed from the internet lacks authentication where the proponent is unable to show that the information has

[2] Defendants object to Exhibits 2 through 4 (Defendants' answer and discovery responses) on the same grounds. The objections are overruled.

been posted by the organizations to which it is attributed. See, e.g., United States v. Jackson, 208 F.3d 633, 638 (7th Cir. 2000); Wady v. Provident Life & Accident Ins. Co., 216 F. Supp. 2d 1060, 1064 (C.D. Cal. 2002); St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999) ("Anyone can put anything on the Internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation.") Exhibit 5 is therefore inadmissible.

Exhibit 6 is a memorandum dated February 14, 2003 issued by Johnny N. Williams of the United States Department of Justice. This memorandum might fall within the hearsay exception for public records and reports, as a statement setting forth the activities of the INS. Fed. R. Evid. 803(8). The Court need not decide the matter because Defendants have submitted a nearly identical copy of the same memorandum (deThomas Decl. Ex. D); the objection is therefore waived.

Exhibit 7 is a document downloaded from the USCIS website, purportedly consisting of a March 23, 2004 interoffice memorandum issued by Joe Cuddihy of the USCIS to overseas district directors. Defendants have submitted a copy of the same document (deThomas Decl. Ex. G); the objection is therefore waived.

Exhibit 8 purportedly consists of documents pertaining to opt-out proceedings by other aliens under section 6 of the CSPA. This exhibit likely falls under the hearsay exception for public records and reports. Fed. R. Evid. 803(8). However, it has not been properly authenticated. The exhibit is supported by the Chung Declaration stating that Chung has "personal knowledge" of these documents. (Chung Decl. ¶ 3.) However, the declaration does not "show affirmatively that the affiant is competent to testify to the matters stated therein." See Fed. R. Civ. P. 56(e). These documents are not self-authenticating under Rule 902. Nor has Plaintiff authenticated them through any of the other methods permitted under Rule 901. See Orr, 285 F.3d at 776 n.24 (explaining that while documents introduced by being attached to an affidavit must be authenticated

through personal knowledge under Rule 56(e), documents introduced in an exhibit list may be authenticated by any method permitted by Rule 901). In any event, the Court need not consider this exhibit to reach a decision favorable to Plaintiff.

The Court grants Defendants' motion to strike Exhibits 5 and 8 only.

V. DISCUSSION

A. Statutory and Administrative Background

The Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq., governs the allocation and processing of visas for prospective immigrants. For sons and daughters of current United States citizens, the immigration process consists of two phases: a petition for classification, and, if the petition is approved, a formal application for an immigrant visa or for adjustment of status.[3]

The INA provides that "[a]ny citizen of the United States claiming that an alien is entitled to classification by reason of a relationship described in [8 U.S.C. § 1153(a)(1), (3), or (4)] or to an immediate relative status under [8 U.S.C. § 1151(b)(2)(A)(I)] may file a petition with the Attorney General for such classification." INA § 204(a)(1)(A)(I), 8 U.S.C. § 1154(a)(1)(A)(I). A United States citizen seeking classification for a son or daughter must first file a Petition for Alien Relative, or Form I-130. 8 C.F.R. § 204.1(a)(1). At the time Plaintiff filed her Petition, I-130 petitions were processed by the INS; I-130 petitions are now processed by the DHS.

Under the INA, a "first preference" classification is granted to "[q]ualified

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[3] The INA does not define the terms "petition" and "application." Defendants explain that a petition is a document submitted to the agency to classify a relationship between the petitioner and the beneficiary of the petition (for instance, to classify a beneficiary as an immediate relative), while an application is a document submitted to the agency to seek an immigration benefit (such as an immigrant visa). (Defs.' Supp. Brief 10-11.) For purposes of this order, the Court focuses on the sons and daughters of United States citizens; parallel procedures exist for other types of family-sponsored immigrants.

immigrants who are the unmarried sons or daughters of citizens of the United States . . . ." INA § 203(a)(1), 8 U.S.C. § 1153(a)(1). "First preference" aliens are subject to certain numerical limits and waiting periods before they can formally apply for visas. INA § 201(a), 8 U.S.C. § 1151(a); 22 C.F.R. § 42.54. However, the INA exempts from these quotas and waiting periods those aliens classified as "immediate relatives." 8 U.S.C. § 1151(b)(2)(A)(I). These individuals may apply for a visa immediately upon approval of their petition. An immediate relative includes a child, spouse, or parent of a United States citizen. Id. For purposes of qualification as an immediate relative, a "child" is defined as an unmarried person under twenty-one years of age. INA § 101(b)(1), 8 U.S.C. § 1101(b)(1).

The INA provides that "[a]fter an investigation of the facts in each case, . . . the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative . . . or is eligible for preference . . . , approve the petition." 8 U.S.C. § 1154(b). A copy of the approved petition is sent to the Department of State. Id.

Once the beneficiary's I-130 petition is approved, the next step in the process differs depending on whether the beneficiary is currently in the United States. A beneficiary who is in the United States may file an application for adjustment of status, or Form I-485 (Application for Permanent Residence). 8 C.F.R. § 245.2(a)(3)(ii). The application for adjustment of status may be filed concurrently with the I-130 petition if the I-130 petition seeks an immediate relative classification, or if the I-130 petition seeks a first preference classification and a visa is immediately available. 8 C.F.R. § 245.2(a)(2)(i)(B). Otherwise, the beneficiary must wait until a visa would be available to apply, even though the beneficiary does not need an actual immigrant visa. Adjustment of status to that of lawful permanent resident is granted "by the Attorney General, in his discretion and under such regulations as he may prescribe." INA § 245(a), 8 U.S.C. § 1255(a).

If the beneficiary resides outside of the United States, the case is transferred to the Department of State, which is ultimately responsible for granting or denying visas. INA §§ 104, 204; 8 U.S.C. §§ 1104, 1154(b). The beneficiary must complete an application for an immigrant visa, or Form OF-230 (Application for Immigrant Visa and Alien Registration), and submit it to "the consular office having jurisdiction over the alien's place of residence." 22 C.F.R. §§ 42.61(a), 42.63. The consular officer may issue the visa only after receiving an approved I-130 petition and granting the beneficiary the status accorded in the approved petition. 22 C.F.R. §§ 42.41, 42.42. The beneficiary applies formally for a visa only when requested to do so by the consular officer. 22 C.F.R. § 42.54. Thus a first preference beneficiary must wait until his or her "priority date" becomes current before completing the formal application for a visa. 22 C.F.R. § 42.54. The priority date is the filing date of the petition for classification. 22 C.F.R. § 42.53(a). In contrast, an immediate relative may apply for a visa once his or her petition has been approved.

On August 6, 2002, the CSPA took effect and amended 8 U.S.C. § 1153 by adding a new subsection (f). Pub. L. No. 107-208, § 8, 116 Stat. 927, 930. Under prior law, if a beneficiary turned twenty-one before an application for an immigrant visa or adjustment of status was approved, the beneficiary was said to have "aged out" and was no longer considered a child eligible for immediate relative status. See H.R. Rep. No. 107-45, at 2 (2001), as reprinted in 2002 U.S.C.C.A.N. 640, 641 ("Under current law, the date at which the age of an alien is measured for purposes of eligibility for an immigrant visa is the date the adjustment of status application filed on his or her behalf is processed by the INS . . . "); see also Padash v. INS, 358 F.3d 1161, 1167 (9th Cir. 2004) (noting that alien had aged out under prior law "because he had turned twenty-one and his application [for adjustment of status] had not yet been acted upon"). This had the unfortunate result of rendering individuals ineligible for immediate relative

classification due to delays in processing their I-130 petitions. Padash, 358 F.3d at 1173. Under the INA as amended by section 2 of the CSPA, the determination of whether an alien satisfies the age requirement for a "child" is now made "using the age of the alien on the date on which the petition is filed with the Attorney General under [8 U.S.C. § 1154] to classify the alien as an immediate relative." 8 U.S.C. § 1151(f)(1).

The CSPA also addresses the age determination for beneficiaries who become eligible for immediate relative status after a classification petition is filed on their behalf, as a result of the naturalization of a parent or the termination of a marriage. Pub. L. No. 107-208, § 2. Furthermore, the CSPA includes similar age-out protections for other categories of beneficiaries, including unmarried sons and daughters of permanent residents, id. § 3; children of family and employer-sponsored immigrants and diversity lottery winners, id.; and children of asylees and refugees, id. §§ 4-5. Section 6 of the CSPA provides relief for beneficiaries over twenty-one years of age whose parents are permanent residents when the petitions are filed but subsequently become naturalized citizens. By default, the classification for such a beneficiary would change from second preference under 8 U.S.C. § 1153(a)(2)(B) to first preference under 8 U.S.C. § 1153(a)(1). 8 U.S.C. § 1154(k)(1). While in most instances this shortens the waiting time for a visa, some countries, such as the Philippines, actually have longer wait times for first-preference beneficiaries than for second preference beneficiaries. Section 6 of the CSPA allows such beneficiaries to opt out of the reclassification by filing a written statement with the Attorney General. 8 U.S.C. § 1154(k)(2).

The CSPA applies to petitions filed after enactment, and in some cases to petitions filed before enactment as well. Section 8 of the CSPA provides:

> The amendments made by this Act shall take effect on the date of the enactment of this Act and shall apply 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;
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> (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.

Pub. L. No. 107-208, § 8, 116 Stat. 927, 930.

B. Agency Interpretations of the CSPA

The dispute here is whether Mr. Rodriguez qualifies as an "immediate relative" under 8 U.S.C. § 1151(b) or whether he is properly classified as a first preference unmarried son of a United States citizen under 8 U.S.C. § 1153(a). Mr. Rodriguez was over twenty-one when Plaintiff's Petition was approved on October 23, 2001. Under prior law, Mr. Rodriguez would have "aged out" and would be ineligible for immediate relative status. However, under current law, Mr. Rodriguez would be entitled to immediate relative status, as he was nineteen years of age at the time the Petition was filed. (Pl.'s SUF ¶ 6; Defs.' SUF ¶ 3.) The Court therefore must determine whether the CSPA applies to Mr. Rodriguez. The Petition was approved on October 23, 2001. (Pl.'s SUF ¶ 8; Defs.' SUF ¶ 6.) In order to be covered by the CSPA, then, Plaintiff must show that a final determination had not been made as of August 6, 2002 on an application for an immigrant visa or adjustment of status. Pub. L. No. 107-208, § 8(1). Mr. Rodriguez did not file an application for an immigrant visa or adjustment of status

based on the Petition. (Defs.' SUF ¶ 6; Reply 3:8-11; see also Pl.'s Ex. 1.)[4] Indeed, Mr. Rodriguez could not do so because, as a first preference alien, his priority date was not current.

Defendants contend that section 8(1) of the CSPA does not apply to Mr. Rodriguez because he did not file an application for an immigrant visa. Because no application has been filed, Defendants argue that no application is pending. In contrast, Plaintiff argues that there cannot have been a final determination on the application because no application was filed; thus Mr. Rodriguez is covered by section 8(1). The question appears to be one of first impression.

No regulations have been promulgated concerning section 8(1) of the CSPA. (Gorsky Decl. ¶ 7.) The Department of State has issued a series of telegrams to its diplomatic posts, including the United States Embassy in the Philippines, providing guidance on application of the CSPA. (Gorsky Decl. Exs. 1-4.) Defendants have also submitted several INS and USCIS interoffice memoranda explaining the application of the CSPA.

The government's most current interpretation of the CSPA is contained in a January 2003 telegram entitled "Child Status Protection Act: ALDAC 2" ("ALDAC 2"). (Gorsky Decl. Ex. 2.)[5] In ALDAC 2, the Department of State

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[4] The administrative record does contain Plaintiff's January 28, 2004 written request to Defendants to classify Mr. Rodriguez as an immediate relative after the Petition was approved. (Pl.'s SUF ¶ 10.) However, neither party claims that this request is an application for an immigrant visa or adjustment of status; instead, this seems more like a request for Defendants to reconsider the Petition.

[5] In an August 2002 telegram entitled "Child Status Protection Act of 2002: ALDAC #1" ("ALDAC 1"), the Department of State addressed the application of section 8(1) of the CSPA in cases relating to classification of unmarried children of permanent resident aliens, rather than citizens. ALDAC 1 explained that "beneficiaries (and derivative beneficiaries) of petitions approved prior to August 6, 2002 who have never applied for a visa prior to August 6 because they had aged out will receive no benefit from [section 3 of the CSPA] and cannot apply afterward in order to receive a benefit." (Gorsky

explains:

> The CSPA may also apply to certain cases involving petitions approved before August 6, 2002, but only if either (a) the alien aged out on or after August 6, 2002, or (b) the alien aged out before that date but had applied for a visa before aging out and was refused under [INA § 221(g), 8 U.S.C. § 1201(g)]. If the petition was approved before August 6, 2002 and the alien aged out before that date and failed to apply before aging out (or applied after aging out and was denied on that basis), then the CSPA would not apply.

(Id. ¶ 2.)[6] In a February 14, 2003 memorandum, the INS stated:

> If an alien aged out prior to August 6, 2002, the petition must have been filed on or before August 6, 2002, and either 1) remained pending on August 6, 2002, or; 2) been approved before August 6, 2002, with an adjustment application filed on or before August 6, 2002, and no final determination made prior to August 6, 2002.

(deThomas Decl. Ex. D at 69.) "'Final determination' for purposes of the adjustment application means agency approval or denial issued by the Service or Executive Office for Immigration Review." (Id.) This interpretation was incorporated into the Adjudicator's Field Manual. (Id. at 73.)

Decl. Ex. 1 ¶ 17.) Although this case concerns section 2 of the CSPA, rather than section 3, the interpretation in ALDAC 1 is instructive.

[6] 8 U.S.C. § 1201(g) governs denial of a visa on grounds listed in 8 U.S.C. § 1182(a), including health-related, criminal, or security reasons; likelihood of becoming a public charge; lack of labor certification or qualification; illegal entry; lack of documentation; permanent ineligibility for citizenship; previous removal; and other grounds. If a visa application is denied on the basis of 8 U.S.C. § 1182, the denying officer must provide written notice of the statutory provision on which the denial is based. 8 U.S.C. § 1182(b). Neither party has suggested that Mr. Rodriguez was denied a visa under 8 U.S.C. § 1201(g).

C. Standard of Review

The APA governs judicial review of agency actions, except where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). In conducting its review, the Court must interpret constitutional and statutory provisions as necessary to reach a decision, and may set aside any conclusions the Court finds "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706. However, the APA does not provide standards for the Court's review.

Defendants urge the Court to apply the highly deferential standard of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). (Defs.' Supp. Brief 9:6-22.) Chevron requires a two-step analysis in reviewing "an agency's construction of the statute which it administers." Chevron U.S.A. Inc., 467 U.S. at 842. First, the court must ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. Thus "[d]eference to the INS's interpretation of the immigration laws is only appropriate if Congress' intent is unclear." Socop-Gonzalez v. INS, 272 F.3d 1176, 1187 (9th Cir. 2001) (citing Chevron U.S.A. Inc., 467 U.S. at 842). If, however, "the statute is silent or ambiguous with respect to the specific issue," the court must then consider "whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A. Inc., 467 U.S. at 843. So long as the agency's construction is permissible, it must be upheld, even if the court might have reached a different conclusion. Id.

Although Plaintiff's Motion originally relied on the Chevron standard, Plaintiff now counters that Chevron does not apply. (Pl.'s Supp. Brief 8:5-20.) The Supreme Court has held that "administrative implementation of a particular

statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). "Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent." Id. Chevron deference may be appropriate even in the absence of formal adjudication or notice-and-comment rulemaking; the court should consider such factors as "the interstitial nature of the legal question, the related expertise of the [a]gency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the [a]gency has given the question over a long period of time." Barnhart v. Walton, 535 U.S. 212, 222 (2002); Mead Corp., 533 U.S. at 230-31. If Chevron does not apply, the reviewing court must instead apply the less deferential standard of Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), according to the agency's ruling only "a respect proportional to its 'power to persuade.'" Mead Corp., 533 U.S. 218, 221 (quoting Skidmore, 323 U.S. at 140).

In general, the INS has the authority to make rules carrying the force of law. See United States v. Aguirre-Aguirre, 526 U.S. 415, 424-25 (1999). The Ninth Circuit has held that courts should "review de novo purely legal questions regarding the requirements of the Immigration and Nationality Act . . . , although the [agency's] interpretation of the meaning of the statute is entitled to [Chevron] deference . . . ." Ladha v. INS, 215 F.3d 889, 896 (9th Cir. 2000) (citation and internal quotation marks omitted); accord Padash v. INS, 358 F.3d 1161, 1168 (9th Cir. 2003); Socop-Gonzalez, 272 F.3d at 1187.

Chevron deference is not necessarily appropriate in all immigration cases, however. "'Interpretations such as those in opinion letters – like interpretations

contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference.'" Acosta v. Gonzales, 439 F.3d 550, 553 (9th Cir. 2006) (quoting Christensen v. Harris County, 529 U.S. 576, 587 (2000)). The Ninth Circuit has also held that although some case-by-case adjudications in immigration cases may be subject to Chevron deference, such deference is not appropriate where there is no indication that the BIA intended to issue an interpretation of the statute, the decision was not designated as precedential, the BIA did not focus on the disputed term, and the BIA opinion contained no definition or explicit consideration of the term. Hernandez v. Ashcroft, 345 F.3d 824, 839 n.13 (9th Cir. 2003) (citations omitted). Similarly, "*Chevron* deference does not apply to an [Immigration Judge's] statutory interpretation summarily affirmed by the BIA." Alvarado v. Gonzales, 441 F.3d 750, 758-59 (9th Cir. 2006) (noting that IJ decisions do not have the force of law because they are "not legally relevant to any future decision-making").

Defendants argue that Congress has explicitly or implicitly "left a gap for the agency to fill" and that the ambiguity in the CSPA constitutes a "delegation of authority to the agency to elucidate a specific provision of the statute by regulation." See Chevron U.S.A. Inc., 467 U.S. at 843-44. The Court is not persuaded. Congress has expressly stated to whom the CSPA should apply; the Court must now determine the meaning of the statement. Congress did not intend for the agency to interpret the provision at issue. At least arguably here, as in Padash, normal rules of statutory construction compel a finding in Plaintiff's favor.

The government's interpretation of the CSPA is not embodied in any regulation; instead, Defendants have provided the Court with several telegrams and interoffice memoranda regarding implementation of the CSPA. These documents do not warrant Chevron deference. Acosta, 439 F.3d at 553.

Defendants have also submitted the Declaration of Helen deThomas, a USCIS official responsible for formulating agency interpretations of the CSPA and for writing memoranda and regulations pertaining to the CSPA. (deThomas Decl. ¶¶ 1-2.) According to deThomas, "innumerable internal agency meetings were conducted regarding the interpretations of the various provisions of the CSPA . . . including Section 8." (Id. ¶ 4.) However, deThomas does not elaborate on the decision-making process used or the alternatives considered at these meetings. Indeed, although she acknowledges that two interpretations of section 8(1) of the CSPA are possible, she does not explain what these two interpretations are or even indicate that both alternatives were considered by the USCIS. (Id. ¶ 6.) The deThomas Declaration does not alter the conclusion that Chevron deference is unwarranted.

This case differs from Aguirre-Aguirre, Ladha, Padash, and Socop-Gonzales in that it has not come before the BIA; all of these cases involved appeals from written BIA decisions. The only agency decisions challenged by Plaintiff here are the approval of the I-130 Petition for Alien Relative on October 23, 2001, and the decision of the Consular Officer in Manila to return the Petition to the NVC because the CSPA did not apply.[7] (Defs.' Supp. Brief 3:6-12.) The memorandum from the Manila office to the NVC explained its reasoning as follows: "The CSPA may apply to certain cases involving petitions approved before August 6, 2002 but only if the alien aged out on or after August 6, 2002. For this case,

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[7] Defendants suggest that the consular officer's decision is immune from review, citing Ventura-Escamilla v. INS, 647 F.2d 28, 30-31 (9th Cir. 1981). However, the Ninth Circuit has clarified that "[n]ormally a consular official's discretionary decision to grant or deny a visa [application] is not subject to judicial review. However, when the suit challenges the authority of the consul to take or fail to take an action as opposed to a decision taken within the consul's discretion, jurisdiction exists." Patel v. Reno, 134 F.3d 929, 931-32 (9th Cir. 1997) (citations omitted). This is not a decision the consular officer had discretion to make.

applicant aged-out before this date and he was not able to apply for a visa before ageing [sic] out." (Pl.'s Ex. 1 at 11.) The officer also noted, on what appears to be a standard form, that Mr. Rodriguez did not apply for a visa on or before August 6, 2002. (Id.) There is no indication that this decision was intended to have precedential effect or that the officer meant to issue a binding interpretation of the CSPA. The officer merely restated the analysis embodied in a telegram from the Department of State. (Gorsky Decl. Ex. 2.) Thus the agency's interpretation must be reviewed under the standard set out in Mead and Skidmore; Chevron deference is inappropriate.

Even where Chevron is inapplicable, Mead and Skidmore may nevertheless mandate some deference to the agency's interpretation. In some instances, the reviewing court should give due consideration to the "'specialized experience and broader investigation and information' available to the agency, and . . . the value of uniformity in its administrative and judicial understandings of what a national law requires." Mead Corp., 533 U.S. at 235 (citing Skidmore, 323 U.S. at 139-40). The weight given to the agency's interpretation depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore, 323 U.S. at 140. For purposes of this analysis, the Court assumes that Skidmore deference applies.

D. Section 8(1) of the CSPA Does Not Require That an Application Have Been Filed

As a preliminary matter, the Court notes that the CSPA does not expressly state that an application for an immigrant visa must have been filed in order for the beneficiary to be covered by section 8(1). The filing requirement imposed by Defendants is simply not present on the face of the statute. Defendants propose reading the concept of a pending or filed application into section 8(1). However,

Congress used the word "pending" in sections 8(2) and 8(3) of the CSPA. It seems unlikely that Congress intended to include a "pending" requirement into section 8(1) but failed to do so.

The plain language of the text therefore seems to resolve the matter. Nevertheless, for purposes of this analysis, the Court assumes that such a filing requirement could reasonably be inferred from the text.

1. Congressional Objectives

The legislative history of the CSPA indicates that Congress was concerned with INS delays in processing classification petitions. The House Report on the CSPA noted the "enormous backlog" of petitions pending before the INS, and remarked that "about 1,000 of the [adjustment of status] applications reviewed each year are for persons who have turned 21 since they filed their petitions."[8] H.R. Rep. No. 107-45, at 4, as reprinted in 2002 U.S.C.C.A.N. at 643. As one member of Congress stated, "This bill protects the children of American citizens whose opportunity to receive a visa quickly has been lost because of INS delays. It will also apply to those rare cases where a child 'ages out' overseas during the usually more expeditious State Department visa processing." 148 Cong. Rec. H4989, H4992 (2002) (statement of Rep. Gekas). Congress sought to avoid punishing beneficiaries for INS delays, 147 Cong. Rec. H2901, H2901 (2001) (statement of Rep. Sensenbrenner), and to promote the reunification of families, 148 Cong. Rec. H4989, H4991 (statement of Rep. Jackson-Lee). At the same

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[8] The House Report refers to "an enormous backlog of adjustment of status (to permanent residence) applications," and more generally refers to INS delays in processing both "petitions" and "applications." For immediate relatives and some first preference aliens already located in the United States, classification petitions and adjustment of status applications are filed concurrently. However, for aliens located outside of the United States, immigrant visa applications are not processed by the INS but by the Department of State. The House Report suggests that Congress was somewhat less concerned with delays relating to immigrant visa applications.

time, Congress sought to avoid "displacing others who have been waiting patiently in other visa categories." 147 Cong. Rec. H2901, H2901 (statement of Rep. Gekas).

The legislative history contains very little discussion of section 8(1) of the CSPA. In Padash, the Ninth Circuit considered the origins of the provision. The original version of H.R. 1209, which eventually became the CSPA, was much shorter than the version ultimately enacted. As originally conceived, H.R. 1209 consisted of what would become the first two sections of the CSPA, and affected only petitions for immediate relative classification. H.R. 1209, 107th Cong. (as introduced in House, Mar. 26, 2001). The original bill contained a "sweeping retroactivity provision," Padash, 358 F.3d at 1171, stating that the CSPA would apply to all immediate relative classification petitions filed and determinations made "*before, on or after* the date of the enactment." H.R. 1209, 107th Cong. § 2(b) (as introduced in House, Mar. 26, 2001) (emphasis added).

However, the DOJ expressed reservations about this broad retroactivity, explaining that it could require "reopening an undetermined number of past, completed adjudications" dating back to 1952. H.R. Rep. No. 107-45, at 6, as reprinted in 2002 U.S.C.C.A.N. at 644. The DOJ appeared concerned with both the burden on the INS of re-processing so many cases, and the difficulty of identifying and locating paperwork for cases to which the CSPA would apply. See id. ("The [INS] does not track the cases of aliens who have 'aged out' . . . ."). The bill was amended in response to this concern. Padash, 358 F.3d at 1171-72. In the version presented to the House of Representatives on June 6, 2001, the provisions of section 2 extended only to "'all petitions and applications pending before the Department of Justice or the Department of State *on or after*'" the date of enactment. 147 Cong. Rec. H2901, H2901 (emphasis added); see also H.R. 1209, 107th Cong. § 2(b) (as referred in Senate, June 7, 2001).

The Senate then expanded the bill to include a variety of other protections

for prospective immigrants, as already discussed above. 148 Cong. Rec. S5560 (2002). Furthermore, the Senate bill introduced the three-pronged retroactivity provision found in the final version of the CSPA. Sections 8(2) and 8(3) together cover all of the individuals who would have been covered by the previous version of the bill – petitions pending before the Department of Justice on or after the date of enactment are included under sections 8(2), and applications pending before the Department of Justice or the Department of State on or after the date of enactment are included under section 8(3). In addition to these two sections, however, the Senate version of the bill also included section 8(1). The Padash court noted that "[w]ith the addition of provision (1), Congress effectively expanded the class of petitioners to whom relief would be provided beyond the class of petitioners already covered by [provisions (2) and (3)] . . . so as to include individuals awaiting final judicial determination of the matter." Padash, 358 F.3d at 1172. "[O]nly if provision (1) is understood to expand coverage beyond that afforded by the amended House bill, can the Act be read so as to give substantive content to that provision . . . ." Id.

The Padash court concluded that Congress intended the CSPA to be construed "so as to provide expansive relief to children of United States citizens and permanent residents." Id. at 1172. Padash makes clear that the scope of the CSPA is limited; it covers only "those applications that were still active in the decisional process" and does not "sweep up long terminated cases in which the files might be unavailable." Id. at 1172. "Congress did not make the Act retroactive to all immigrants previously denied relief. Instead it provided relief only to those individuals whose cases had not yet been finally resolved, and thus only to those whose records were readily available to the agency." Id. at 1174.

In sum, then, Congress aimed to balance several goals in enacting the CSPA: providing expansive relief from the age-out problem so that beneficiaries are not penalized for INS delays; avoiding subjecting the INS to a flood of long

since terminated cases in need of re-processing; and minimizing displacement of those currently awaiting visas. In addition, the Court notes that it must, whenever possible, avoid interpreting statutes in such a way as to render any portion of the statute redundant or unnecessary. Finally, as the Ninth Circuit has explained:

> In determining congressional intent, we should adhere to the general rule of construction that when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion. This rule applies with additional force in the immigration context, where doubts are to be resolved in favor of the alien.

Akhtar v. Burzynski, 384 F.3d 1193, 1200 (9th Cir. 2004) (citations and internal quotation marks omitted). The Court construes the CSPA in light of these objectives.

2. Protecting Beneficiaries from INS Delays

The first objective, protecting beneficiaries from being penalized for INS delays, favors Plaintiff's interpretation. Plaintiff waited more than two and a half years for the INS to process her I-130 Petition; Mr. Rodriguez aged out during that time. As a result, Mr. Rodriguez may have to wait well over a decade for his priority date to become current. See H.R. Rep. 107-45, at 2, as reprinted in 2002 U.S.C.C.A.N. at 641 (noting that as of 2001, first preference aliens from the Philippines faced a 13-year wait before their priority dates became current). In view of the "expansive relief" contemplated by Congress, Padash, 358 F.3d at 1172, Plaintiff's view of the CSPA is more persuasive. Defendants' interpretation is neither expansive nor logical. Mr. Rodriguez did not file an application for an immigrant visa – not because of any delay on his part, but because he had been rendered ineligible to do so by his conversion from immediate relative to first preference alien during the INS processing. Thus he falls outside of section 8(1) of the CSPA, as interpreted by Defendants, in whole – or at least in large part –

because of the INS delay that Congress sought to remedy.

Defendants could argue that for many beneficiaries who have not yet been able to file visa applications, the main problem is not the INS delays but rather the waiting periods imposed by the visa allocation system. As one member of Congress noted, at the time of enactment there were "just over 23,000 family-first preference visas available each year . . . [while] the waiting list at times has been in excess of over 90,000 people." 148 Cong. Rec. H4989, H4991 (statement of Rep. Jackson-Lee). Although INS processing may take a substantial period of time, the wait for a priority number to become current often constitutes the bulk of the time between the filing of a classification petition and the granting of a visa. Despite these problems, the legislative history suggests that in enacting the CSPA, Congress was concerned primarily with INS delays. There are repeated references to "INS processing delays," id., but virtually no discussion of the reasons for the lengthy wait once a beneficiary has been assigned to a preference category and the case transferred to the Department of State. Defendants could (but apparently do not) argue that their interpretation furthers the congressional policy of addressing INS backlogs, but not the delay in waiting for a visa to become available.

However, as noted above, Mr. Rodriguez would not face any additional waiting time if not for the INS delay in processing his petition. If his petition had been approved within a reasonable time (i.e., one year), he would have been classified as an immediate relative and could already be in the United States as a lawful immigrant. In theory, Defendants' interpretation of the CSPA also excludes a beneficiary in a slightly different situation from Mr. Rodriguez: if the beneficiary aged out *after* the INS approved a petition for immediate relative classification, but before enactment of the CSPA, that beneficiary would be excluded provided that he or she had not yet filed an application for an immigrant visa or adjustment of status. Unlike Mr. Rodriguez, such a beneficiary would be prejudiced primarily by the wait for a current priority date, rather than by INS

delay. The exclusion of such a beneficiary would be consistent with congressional policy. In practice, however, such a situation would almost never arise, at least for beneficiaries of immediate relative petitions. These beneficiaries would be eligible to apply immediately after their petitions were approved – or even concurrently with the filing of the petitions.

3. Administrative Burden

The second objective, alleviating the DOJ's concerns of additional burdens on the INS, arguably favors Defendants' interpretation of the CSPA. In Plaintiff's view, any beneficiary who aged out prior to enactment of the CSPA and who had been ineligible to file an application for an immigrant visa would be covered by the CSPA and would therefore be permitted to apply immediately.[9] Although neither party has provided an estimate of the number of beneficiaries that would be covered under Plaintiff's interpretation, given that in some cases beneficiaries wait well over a decade for their priority dates to become current, this number might be in the tens of thousands.

However, Congress appears to have been concerned less with the number of cases than with the age and procedural posture of those cases. Congress does not appear to have been very sympathetic to INS concerns of increased workload. See 147 Cong. Rec. H2901, H2902 (statement of Rep. Gekas) (noting that Congress planned to "restructure[] the INS" to enable it to "provide[] immigration benefits in a more professional and expeditious manner"); H.R. Rep. 107-45, at 3, as reprinted in 2002 U.S.C.C.A.N. at 641 (noting that Congress "expects the INS to make substantial and consistent progress in reducing the backlog"). In discussing

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[9] Defendants mischaracterize Plaintiff's interpretation of the CSPA as covering "all persons who ever filed a classification petition prior to its enactment and nothing more." (Defs.' Supp. Brief 11:20-12:1.) Plaintiff's interpretation acknowledges that an individual who filed a classification petition and received approval of that petition prior to enactment, but whose subsequent application for an immigrant visa was rejected and finally adjudicated would not be covered by the CSPA.

the legislative history of the CSPA, the Padash court focused on the DOJ's concern with re-opening cases. As the court noted, "the agency . . . removes applications for adjustment [of status] from its tracking system after the pertinent litigation is completed." Padash, 358 F.3d at 1171. The DOJ proposed amending the bill to limit retroactivity based on the date the beneficiary aged out. H.R. Rep. No. 107-45, at 6-7, as reprinted in 2002 U.S.C.C.A.N. at 644. Congress instead adopted a different, more tailored approach, specifically excluding those cases that the agency had ceased to track. Padash, 358 F.3d at 1171 n.11.

It is unlikely that very many of these disputed cases would be as old as Defendants suggest.[10] Defendants' fears of "the specter of the 50 year old attempting to be classified as a child today" (deThomas Decl. ¶ 6) are exaggerated. Even in countries like the Philippines, where the wait time for a priority date to become current is roughly 13 years, the priority date for a 50-year-old beneficiary who had aged out prior to visa approval would long ago have become current; that beneficiary would in all likelihood have applied for a visa. If the application was approved, the beneficiary would no longer need the protections of the CSPA; if the application was denied and the judicial process exhausted, the CSPA would no longer apply.

Indeed, Defendants' reading could contradict their claim that Congress intended to limit review to the most recent cases. The closer the date on which a claimant's pre-CSPA I-130 petition was approved comes to the enactment of the CSPA, the more likely that the claimant has not been able to file a visa application because his or her priority date is not yet current.[11]

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[10] Plaintiff's case is relatively recent. The administrative record shows that the case has been actively litigated, and that Defendants have had no problem retrieving the necessary records.

[11] As an example, suppose that a beneficiary from the Philippines ages out on January 1, 2002, just after his I-130 petition for immediate relative classification is filed; the

Thus section 8(1) of the CSPA as interpreted by Plaintiff would not address the DOJ's concerns with respect to the sheer number of cases covered, but would address concerns about the age of those cases.

4. Displacement of Other Applicants

Congress expressed concern for avoiding displacement of other beneficiaries who had been awaiting visas. For a given year, the INS calculates the worldwide number of visas available for preference aliens as follows. From a total allocation of 480,000, the INS subtracts the number of immediate relatives who were granted permanent resident status in the previous year, aliens born to permanent residents during a temporary visit abroad and granted permanent resident status in the previous year, and aliens paroled into the United States under INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) for humanitarian reasons or public benefit in the second preceding fiscal year. 8 U.S.C. § 1151(c). The INS then adds the number of any unused employment-based visas for the previous fiscal year. Id. However, the total number of visas available must always be a minimum of 226,000. 8 U.S.C. § 1151(c)(1)(B)(ii). Thus each immediate relative admitted in a given year reduces by one the number of visas available to preference aliens in the following year, subject to the statutory minimum. Furthermore, each additional alien in a certain preference category admitted in a particular year reduces the number of visas available to aliens in lower preference categories. 8

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beneficiary is then treated as a first preference alien. Assuming a 13-year waiting period, his priority date does not become current until January 1, 2015. Under Defendants' interpretation, this beneficiary would not be covered by the CSPA. In contrast, suppose a beneficiary ages out on January 1, 1989, just after his I-130 petition for immediate relative classification is filed. Again assuming a 13-year waiting period, his priority date becomes current on January 1, 2002. If the second beneficiary files an application for an immigrant visa on that date, and there is no final determination as of August 6, 2002, this beneficiary would be covered by the CSPA – even though he applied thirteen years earlier. At that point, however, the CSPA would be of no use to the beneficiary because a visa number would already be available for him.

U.S.C. § 1153(a).

Defendants correctly argue that this consideration favors a narrow reading of section 8 of the CSPA, in order to minimize displacement of aliens currently waiting in preference categories. (See deThomas Decl. ¶ 7; Pl.'s Supp. Brief 10:6-22.) A beneficiary who is admitted as an immediate relative pursuant to the CSPA may mean that there is one less visa available in the following year for a preference alien who might have an earlier priority date than that beneficiary.[12] However, it is doubtful that this consideration was sufficient to override Congress' interest in providing relief.

5. Interaction of Sections 8(1) and 8(3) of the CSPA

The Court must ensure that the interpretation given to the CSPA does not create conflicting or inconsistent results. Plaintiff argues that Defendants inconsistently apply section 8 of the CSPA because they read the provision more narrowly for those seeking relief under section 2 than for those seeking relief under section 6. As noted above, section 6 allows a beneficiary to opt out of reclassification from second preference to first preference upon the naturalization of his or her parent. Pub. L. No. 107-208, § 6. Plaintiff points out that the government applies section 6 to beneficiaries whose parents naturalized before enactment, but who had not filed an application for an immigrant visa or adjustment of status as of the enactment date.

Defendants, however, persuasively argue that such beneficiaries are covered by section 8(3) of the CSPA, rather than section 8(1). Under section 8(3), a beneficiary is covered if he or she has "an application pending before the

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[12] Because of the statutory minimum, the Court cannot conclude that this effect ever actually occurs without more information about the actual numbers of immigrants. If, even excluding those beneficiaries covered by the CSPA, the worldwide number of visas available reaches the statutory minimum, then additional beneficiaries admitted as immediate relatives pursuant to the CSPA would have no effect on the number of visas available.

Department of Justice or the Department of State on or after" the date of enactment. Section 8(3) does not specify what type of application is meant. In contrast, section 8(1) is expressly limited to "application[s] for an immigrant visa or adjustment of status." The omission suggests that the term "application" in section 8(3) should be read more broadly; a broad reading would encompass a written statement filed with the Attorney General pursuant to section 6. Furthermore, such a statement constitutes the type of document that is generally considered an application, because it seeks a benefit – a change from first preference to second preference treatment – rather than a declaration of eligibility.

Plaintiff argues that if the term "application" in section 8(3) is read broadly, it must also encompass an application for an immigrant visa or adjustment of status. While the Court is inclined to agree with this reading of the term, it does not help Mr. Rodriguez. As a first preference alien, Mr. Rodriguez will at some point become eligible to file an application for an immigrant visa; however, he has not yet done so and thus there has been no "application pending" at any time on or after the enactment date of the CSPA. Plaintiff appears to be urging an interpretation of section 8(3) that would cover any beneficiaries who were or at some point would become eligible to file an application as of the enactment date. The Court finds this reading too broad, given the "pending" language of section 8(3).[13]

Furthermore, such a reading would render section 8(1), as read by Plaintiff, redundant. Any beneficiary with an approved petition who had already filed an application but whose application had not yet been adjudicated would be covered

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[13] Instead, a more logical reading would seem to be that the CSPA becomes applicable once an application is filed. In the case of an application for an immigrant visa or adjustment of status, the CSPA would no longer be helpful at that point, as a visa number must already be available. However, the CSPA could help aliens filing other types of applications, such as requests under section 6.

by section 8(3); similarly, a beneficiary who had not yet filed an application but who would at some point become eligible to do so would also be covered by section 8(3).

Plaintiff creatively argues that section 8(1) differs from section 8(3) because section 8(1) covers applications still pending before the judicial branch, but not before an administrative agency. In Padash, the Ninth Circuit found that such applications were indeed covered by section 8(1). Padash, 358 F.3d at 1173. However, it does not follow that Congress was focused solely on these cases in enacting section 8(1). If Congress intended to add a specific provision to the CSPA targeting cases still pending in court, it could have done so with more clear and direct language.

In any case, the Court need not decide whether Plaintiff's reading of section 8(3) would render Plaintiff's reading of section 8(1) redundant, because the Court finds Plaintiff's reading of section 8(3) unpersuasive. Nevertheless, because the Court agrees that Mr. Rodriguez is covered by section 8(1), the Court need not rely on section 8(3) to rule in Plaintiff's favor. Indeed, it seems likely that Congress added section 8(1) not only to cover applications pending before the judicial branch, but also to aid beneficiaries in precisely the same situation as Mr. Rodriguez – that is, beneficiaries whose petitions have been approved but who have not yet been able to file an application. Such a reading is consistent with the Padash court's statement that section 8(1) must have expanded the retroactivity already provided under sections 8(2) and 8(3).

6. Defendants' Two-Pronged Test Leads to Anomalous Results

Defendants' latest interpretation of the CSPA appears to be more complex than described in their papers. According to the documents provided by Defendants, the government now applies a two-pronged test to determine whether a beneficiary is covered by the CSPA. First, the government asks whether the beneficiary aged out after the date of enactment; if so, then he or she is covered. If

not, the government moves to the second prong of the analysis and asks whether the beneficiary has filed an application for an immigrant visa or adjustment of status that has not yet been finally adjudicated. (Gorsky Decl. Ex. 2 ¶ 2; deThomas Decl. Ex. D at 69.) For a beneficiary who aged out after the enactment date, the government does not require that the beneficiary have filed an application, because that beneficiary is already covered under the first prong of the government's test.

Defendants provide no basis for the first prong of this test, and the Court cannot discern one from the text of the CSPA. It appears that this first prong is intended to replicate section 8(2) of the CSPA, which covers any beneficiary with a classification petition pending on or after the enactment date. The government's interpretation differs from statutory text, however, in that it focuses on the date on which the beneficiary ages out. In contrast, the statute focuses on the status of the beneficiary's petition and/or application as of the enactment date. As a result, the first prong of the government's test may be broader than section 8(2). For instance, suppose a beneficiary had his or her petition approved prior to the enactment date, but then aged out after enactment and had not yet filed an application. Such a beneficiary would be covered under the government's test. However, he or she would not be covered under section 8(2) – or under sections 8(1) or 8(3), as interpreted by Defendants.

It is unclear why the government does not impose the filing requirement it advocates here on beneficiaries who aged out on or after the enactment date. It may be that the government expected relatively few beneficiaries to find themselves in such a situation. In the case of a beneficiary of an immediate relative petition, that beneficiary is eligible to apply for a visa immediately upon approval of the petition; he or she is likely to apply promptly, before aging out. However, an unmarried son or daughter of an immediate relative does not have this option, because even before aging out he or she is subject to a lengthy wait.

In any event, Defendants' interpretation of section 8 imposes a filing requirement on some beneficiaries but not on others, with no basis for this distinction on the face of the statute. It appears arbitrary. Plaintiff's interpretation treats beneficiaries the same regardless of the date on which they age out.[14]

The Court finds that the considerations described above favor Plaintiff's interpretation of section 8(1) of the CSPA. No filing requirement is evident on the face of the statute or from the legislative history. A broad reading of the statute is consistent with its plain language and furthers the congressional objective of providing expansive relief and promoting family reunification. Though the increased burden on the INS is likely to be substantial, it is unlikely that many of the cases to be re-examined would be as old as Defendants suggest. Furthermore, Defendants' interpretation seems unsupported by the text of the statute and could produce anomalous results. Although Defendants raise legitimate concerns about administrative burdens and displacement of other beneficiaries, the Court finds that these are insufficient to overcome the considerations favoring Plaintiff's position. The Court therefore grants summary judgment in favor of Plaintiff.

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[14] The Court also notes that Defendants' interpretation of section 8(1) could result in different treatment of beneficiaries in and out of the United States. A beneficiary inside the United States may properly file an application for adjustment of status concurrently with the I-130 petition "[i]f, *at the time of filing*, approval of a visa petition filed for classification under [8 U.S.C. § 1151(b)(2)(A)(i)] . . . would make a visa immediately available to the alien beneficiary." 8 C.F.R. § 245.2(a)(2)(i)(B) (emphasis added). Thus if Mr. Rodriguez had been in the United States at the time the I-130 petition was filed, he would have been permitted to file an application concurrently, because he was eligible for immediate relative status at that time. Even if Mr. Rodriguez had subsequently aged out, he would be covered by the CSPA under Defendants' interpretation because his application would be pending. However, equal treatment of beneficiaries in and outside of the United States does not appear to have been a congressional priority, since Congress already distinguishes between the two groups by permitting beneficiaries in the United States to file concurrently.

E. Plaintiff's Claims for Relief

Plaintiff seeks two forms of relief: a declaratory judgment, and a writ of mandamus.

28 U.S.C. § 2201(a) provides that "[i]n a case of actual controversy within its jurisdiction . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration." The Court finds that declaratory judgment in favor of Plaintiff is appropriate. Because Mr. Rodriguez is covered by the CSPA, he is properly classified as an immediate relative under INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

Under 28 U.S.C. § 1361, a district court has "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." The Ninth Circuit has explained: "'A writ of mandamus is appropriately issued only when (1) the plaintiff's claim is clear and certain; (2) the defendant official's duty to act is ministerial, and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available.'" Garcia, 40 F.3d at 302 (quoting Barron v. Reich, 13 F.3d 1370, 1374 (9th Cir. 1994)) (internal quotation marks omitted). Thus "[m]andamus may not be used to instruct an official how to exercise discretion unless that official has ignored or violated statutory or regulatory standards delimiting the scope or manner in which such discretion may be exercised." Id. (citation and internal quotation marks omitted).

Plaintiff asks the Court to order Defendants to classify Mr. Rodriguez as an immediate relative, transfer the Petition to the U.S. Embassy in Manila, and give notice of the transfer to Plaintiff, Mr. Rodriguez, and Plaintiff's counsel. The Ninth Circuit has held that "a consular official's discretionary decision to grant or deny a visa [application] is not subject to judicial review." Patel, 134 F.3d at 931 (citations omitted). As noted above, decisions on applications for immigrant visas

are within the consular official's discretion. Decisions on classification petitions, however, do not appear to be discretionary. Rather, the INA provides that "the Attorney General *shall*, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative . . . , approve the petition." 8 U.S.C. § 1154(b) (emphasis added); see Spencer Enters. v. United States, 345 F.3d 683, 691 & n.4 (9th Cir. 2003). Mandamus is therefore an appropriate remedy.

VI. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is GRANTED. Defendants' Cross-Motion for Summary Judgment is DENIED. The Court emphasizes that it does not indicate whether a visa should eventually be granted to Mr. Rodriguez. Plaintiff is ordered to lodge and serve a more specific proposed order, identifying which specific Defendants should be ordered to perform which specific acts.

IT IS SO ORDERED.

Dated: May 31, 2006

Dale S. Fischer
United States District Judge