Case No. 10-60093

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TING-TING WU,	§
	§
Petitioner,	§
	§
v.	§
	§
ERIC HOLDER,	§
U.S. ATTORNEY GENERAL	§
	§
Respondent.	§

OPENING BRIEF

Dated: June 10, 2010

Pro Bono Counsel for Petitioner
Charles Roth
Hena Mansori
NATIONAL IMMIGRANT JUSTICE CENTER
208 S. LaSalle St., Suite 1818
Chicago, IL 60604
tel. 312-660-1613
fax. 312-660-1505

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CERTIFICATE OF INTERESTED PERSONS

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

1. The full name of the party that the attorneys in this case represent is Ting Ting Wu, also known as Tina Wu ("the Petitioner"). The Petitioner is a natural person, not a corporation.

2.Ms. Ting is currently represented by the National Immigrant Justice Center.

3. Ms. Ting was previously represented before this Court and before the administrative agency by Patrick Metcalf, of Metcalf & Associates, and by Laura Klosowski of the same office.

4.In removal proceedings before the United States Department of Justice, Executive Office for Immigration Review, United States Immigration Court, and related proceedings before the administrative agencies, including the former Immigration and Naturalization Service, the United States Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, and the Department of Labor, Ms. Ting was previously represented by Scott Bratton and Margaret Wong, of the Law Offices of Margaret Wong; Marian S. K. Ming; James Liang; and Peter Ferrara.

5.Opposing counsel in this case is the Department of Justice, including John Beadle Holt, Tangerlia Cox, and Luis Enrique Perez.

6. Before the Executive Office for Immigration Review, opposing counsel included attorneys from the Department of Homeland Security and the Department of Justice.

ORAL ARGUMENT

The Petitioner believes that Oral Argument would be helpful in this case. The case raises a question of law which is a matter of first impression before the Courts of Appeals, which would benefit from oral argument. The case also presents a significant issue with regard to the Court's jurisdiction to consider the legal issues presented herein. Petitioner requests Oral Argument.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

ORAL ARGUMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 3

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 4

SUMMARY OF THE ARGUMENT 14

ARGUMENT 19

I. Standard of Review 19

II. The IJ Erred as a Matter of Law in Finding That Petitioner Was Precluded from Coverage under the CSPA Because a "Final Decision" in Her Removal Case Had Been Made Prior to the CSPA's Effective Date 19

III. Under 8 U.S.C. §1153(h)(3), Ms. Wu is Entitled to Apply the Earlier "Priority Date" from Her Father's Original Petition, on Which She Was a Derivative Beneficiary, to the New Petition Filed on Her Behalf 26

CONCLUSION 55

TABLE OF AUTHORITIES

JUDICIAL CASES:

Alvarado de Rodriguez v. Holder,
585 F.3d 227 (5th Cir. 2009) 1, 2

Board of Governors v. Dimension Financial Corp.
474 U.S. 361 (1986) 42

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 17, 18, 29

Continental Air Lines, Inc. v. Department of Transp,
843 F.2d 1444 (D.C.Cir. 1988) 42

Costello v. INS,
376 U.S. 120, 84 S.Ct. 580, 11 L.Ed.2d 559 (1964) 49

Dada v. Mukasey,

554 U.S. 1, __, 128 S.Ct. 2307, 2317 (2008) 49

Enriquez-Alvarado v. Ashcroft,
371 F.3d 246 (5th Cir. 2004) 2

Heckler v. Chaney,
513 U.S. 251(1995).......... 2

Good Samaritan Hosp. v. Shalala,
508 U.S. 402 (1993).......... 30

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987).......... 30, 40

INS v. St. Cyr,
533 U.S. 289 (2001).......... 30

INS v. Ventura,
537 U.S. 12 (2002).......... 52

Johnson v. Sawyer,
120 F.3d 1307 (5th Cir. 1997) 40

Lorillard v. Pons,
434 U.S. 575, 580 (1978) 40

Ovalles v. Holder,
577 F.3d 288 (5th Cir. 2009) 2

Ramos-Bonilla v. Mukasey,
543 F.3d 216 (5th Cir.2008) 2

Sierra Club v. U.S. Fish and Wildlife Service,
245 F.3d 434 (5th Cir. 2001) 38

Silva et al. v. Bell,
605 F.2d 978 (7th Cir. 1979) 38

Smith v. Gonzales,
468 F.3d 272 (5th Cir. 2006) 19

Soadjede v. Ashcroft,
325 F.3d 830 (5th Cir. 2003) 19

Solis-Ramirez v. Dept. of Justice,
758 F.2d 1426 (11th Cir. 1985) 38

United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.,
484 U.S. 365 (1988) 45

United States v. Marek,
198 F.3d 532 (5th Cir.1999) 48

United States v. Menasche,
348 U.S. 528 (1955) 48

United States v. Nordic Village, Inc.
503 U.S. 30 (1992) 48

United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985) 47

ADMINISTRATIVE CASES:

Matter of Avila-Perez,
24 I& N Dec. 78 (BIA 2007) 15, 21, 22, 23, 25

Matter of Lozada,
19 I&N Dec. 637 (BIA 1988) 12

Matter of Maria T. Garcia,
WL 2183654 (BIA June 16, 2006) 12

Matter of Velarde,
23 I&N Dec. 253 (BIA 2002) 22

Matter of Wang,
25 I&N Dec. 28 (BIA 2009) .... passim

<u>STATUTES AND REGULATIONS:</u>

8 U.S.C. § 1101(b) 53

8 U.S.C. § 1101(b)(1) 4

8 U.S.C. § 1151(f) 6

8 U.S.C. § 1153(a) 4, 8

8 U.S.C. § 1153(a)(1) 4

8 U.S.C. § 1153(a)(2)(A) .... passim

8 U.S.C. § 1153(a)(2)(B) 28, 29, 46

8 U.S.C. § 1153(a)(3) 4

8 U.S.C. § 1153(b) 4, 8, 35

8 U.S.C. § 1153(c) 4, 8

8 U.S.C. § 1153(d) .... passim

8 U.S.C. § 1153(h) .... passim

8 U.S.C. § 1153(h)(1) ... passim

8 U.S.C. § 1153(h)(2) ... 8, 31, 33

8 U.S.C. § 1153(h)(3) ... passim

8 U.S.C. § 1154(b) ... 53

8 U.S.C. § 1252(a)(2)(B)(i) ... 1

8 U.S.C. § 1252(a)(2)(D) ... 1, 15

8 U.S.C. § 1255 ... 1

8 U.S.C. § 1255(a) ... 24

8 U.S.C. § 1255(i) ... 15, 55

8 C.F.R. § 203(b)(1) ... 31, 32

8 C.F.R. § 203(b)(2) ... 31, 32

8 C.F.R. § 203(b)(3) ... 31, 32

8 C.F.R. § 204.2 ... 34

8 C.F.R. § 204.2(a)(4) ... 39, 40

8 C.F.R. § 204.2(h)(2) ... 36, 39

8 C.F.R. § 204.2(i)(2) ... 39

8 C.F.R. § 204.5(e) ... 35

8 C.F.R. § 204.12(f)(1) ... 36

8 C.F.R. § 1245.2(a)(1)(i) ... 24

22 C.F.R. § 42.53(b) ... 37

22 C.F.R. § 42.61 ... 24

Child Status Protection Act of 2002,
Pub. L. No. 107-20, 116 Stat. 927 (2002) .... passim

Immigration and Nationality Act Amendments of 1976,
Pub. L. No. 94-571, 90 Stat. 2703, 2707 (October 20, 1976) 37, 38

U.S. Patriot Act,
Pub.L. 107-56, 115 Stat. 272, § 421(c) (2001)... 36

Violence Against Women Act,
Pub. Law 109-162, 120 Stat. 750 (2006)... 33

OTHER SOURCES:

2A Sutherland Statutory Construction § 46.06 (6th ed. 2000) 48

Department of State Visa Bulletin:
http://travel.state.gov/visa/bulletin/bulletin_1360.html (Accessed June 10, 2010) 5, 50

Sarah Ignatius & Elisabeth Stickney, National Lawyers Guild, Immigration Law
and the Family (West Group 1998), §§ 1, 2, 11 .... 4, 33

JURISDICTIONAL STATEMENT

Ms. Wu seeks review of the order of the Board of Immigration Appeals (BIA or Board) entered on January 7, 2010, affirming without opinion the decision of the immigration judge issued on July 31, 2008 denying her *sua sponte* motion to reopen proceedings. Ms. Wu filed a timely Petition for Review on February 8, 2010.

Ms. Wu does not challenge any discretionary decision on the part of the agency. Rather, Ms. Wu challenges the determination that she was statutorily ineligible for adjustment of status under 8 U.S.C. § 1255, a determination based on the Board's interpretation of 8 U.S.C. § 1153(h). Notwithstanding 8 U.S.C. § 1252(a)(2)(B)(i) (generally stripping federal jurisdiction over determinations relating to relief applications under § 1255), the Court has jurisdiction under 8 U.S.C. § 1252(a)(2)(D), which permits judicial review of questions of law and constitutional claims. The Government has conceded that the agency based its decision below on legal grounds, and that this appeal involves purely legal questions. *See* Respondent's Motion to Dismiss, at 7. Where a claim is made that the agency misinterpreted a statute or regulation, the Court does not ask whether the agency abused its discretion but rather whether it properly interpreted the law. *Alvarado de Rodriguez v. Holder*, 585 F.3d 227, 233

(5th Cir. 2009). The Court reviews the agency's legal interpretations *de novo*. *Id.*

While the Court lacks jurisdiction over a discretionary decisions with regard to reopening in the *sua sponte* context, *see Ramos-Bonilla v. Mukasey,* 543 F.3d 216, 220 (5th Cir.2008), this is because the statute and regulations provide no legal standard against which the Board's exercise of jurisdiction may be judged. *Id.*, *see also Enriquez-Alvarado v. Ashcroft,* 371 F.3d 246, 249-50 (5th Cir. 2004) (citing *Heckler v. Chaney,* 470 U.S. 821, 830, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) ("[R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.")). Where the claim is one of legal error rather than abuse of discretion, this reasoning is inapplicable. Thus, in *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009), the Court reached and decided the merits of the legal issues involving a *sua sponte* reopening request, rather than dismissing the appeal. *Id.* at 300.

The Court has jurisdiction over the instant Petition.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the Board of Immigration Appeals and Immigration Judge erred in finding Petitioner statutorily ineligible to adjust status to lawful permanent resident status, based on its legally erroneous determinations that (1) the effective date provisions of the Child Status Protection Act ("CSPA") made it inapplicable to Petitioner, and (2) the provisions of 8 U.S.C. § 1153(h)(3) did not benefit the Respondent by permitting her to retain the "priority date" on the visa petition on which she had been a derivative beneficiary.

STATEMENT OF THE CASE

The immigration judge denied Petitioner Ting-Ting Wu's motion to reopen removal proceedings on July 31, 2008. AR 31-33. The Board of Immigration Appeals summarily affirmed the immigration judge's decision without opinion on January 7, 2010. On February 8, 2010, Ms. Wu timely filed a Petition for Review. Respondent Mr. Eric H. Holder, Jr., U. S. Attorney General filed a motion to dismiss this Petition for lack of jurisdiction on March 19, 2010, and Ms. Wu filed her response to the Respondent's motion on March 29, 2010. On April 16, 2010, this Court

denied the Respondent's motion to dismiss, without prejudice, and also granted Ms. Wu's motion for a stay of removal pending review.

STATEMENT OF THE FACTS

I. The Immigrant Visa Process and the Child Status Protection Act

Pursuant to the Immigration & Nationality Act (INA), noncitizens generally obtain immigrant visas in one of three ways: (1) a petition by their employer; (2) a petition by their family member; (3) distribution of diversity visas. *See* 8 U.S.C. §§ 1153(a) – (c). The individual filing the petition is known as the "petitioner," while the individual for whom the petition is filed is known as the "beneficiary." *See, generally,* Sarah Ignatius & Elisabeth Stickney, National Lawyers Guild, Immigration Law and the Family (West Group 1998), § 1, 2. The statute permits spouses and children of beneficiaries for most visa petitions to obtain the same status as the "principal beneficiary." 8 U.S.C. § 1153(d). Such individuals are referred to as "derivative beneficiaries." For purposes of the INA, a "child" is generally defined as an unmarried individual under the age of 21. 8 U.S.C. § 1101(b)(1). A child who is over 21 for purposes of the statute is called a "son or daughter." 8 U.S.C. § 1153(a)(1), (3).

Immigrant visa petitions are assigned a preference category, based on the relationship between the petitioner and beneficiary, and immigrant visas are allocated amongst the various preference categories. Because there is a greater demand for immigrant visas than those actually available any given year, visa petition beneficiaries are assigned a "priority date" and placed on a waiting list until a visa number becomes "available" to them, at which point they may seek permanent resident status. *See* Department of State Visa Bulletin, *available at* http://travel.state.gov/visa/bulletin/bulletin_1360.html. In addition to the waiting period before an immigrant visa becomes "available," applicants face delays in adjudication of visa petitions and other applications by the U.S. Citizenship and Immigration Services (USCIS).

Prior to 2002, the rule was that if a child turned 21 before their applications could be approved, the child would "age out" and become ineligible for relief. Congress enacted the Child Status Protection Act of 2002 (CSPA), Pub. L. No. 107-20, 116 Stat. 927 (2002) in order to alleviate the harsh consequences of long delays for such children. H.R. Rep. No. 107-42, *2. It sought to "address[] the predicament of those aliens, who through no fault of their own, lose the opportunity to obtain a visa." *Id.* In passing the CSPA, Congress's broad intent was to promote family

unification (see 148 Cong. Rec. H4991, statement of Rep. Sensenbrenner that the CSPA's purpose is to "facilitate[] and hasten[] the reuniting of legal immigrants' families."). The CSPA amended Immigration and Nationality Act (INA) by adding § 203(h), 8 U.S.C. § 1153(h), which contains provisions intended to benefit both direct and derivative beneficiaries of family- and employment-based petitions who would have "aged out" under the old law.

The CSPA provides protection to certain children of United States citizens and lawful permanent residents in variety of ways. Children of United States citizens are treated as children under the INA so long as they are under 21 years of age at the time of the filing of the visa petition, at the time their parent becomes a citizen, or (if previously married) at the time they divorce. 8 U.S.C. § 1151(f). For other categories, the CSPA creates a formula for determining when a beneficiary retains status as a "child" despite reaching the age of 21. For individuals who "age out" despite this formula, the CSPA grants two benefits to former "children" (now "sons and daughters"): it converts their original I-130 petitions to an appropriate visa

petition, and permits them to retain their original priority date. See 8 U.S.C. § 1153(h).[1]

The formula for calculating whether an individual remains a child is at 8 U.S.C. § 1153(h)(1):

> (1) IN GENERAL.-- For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 1101(b)(1) shall be made using--
>
> (A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by
>
> (B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

Basically, the formula freezes the age of the child at the time the visa petition became "available" (though permitting the child to subtract any delays in adjudication of the visa petition), but imposes as a condition of benefitting under this provision that the child apply for an immigrant visa within one year of eligibility.

The next part of § 1153(h) explains in very clear terms that the formula of (h)(1) applies to a broad universe of visa petitions:

---

[1] In its original form, H.R. 1209, the CSPA only applied to visa petitions filed by immediate relatives. The Senate then expanded the bill to include protections for prospective immigrants in other immigration categories. 148 Cong. Rec. S5560 (2002).

(2) PETITIONS DESCRIBED- The petition described in this paragraph is--

> (A) with respect to a relationship described in subsection (a)(2)(A), a petition filed under section 1154 for classification of an alien child under subsection (a)(2)(A); or
>
> (B) with respect to an alien child who is a derivative beneficiary under subsection (d), a petition filed under section 1154 for classification of the alien's parent under subsection (a), (b), or (c).

8 U.S.C. § 1153(h)(2).

In turn, 8 U.S.C. §§ 1153(a)(2)(A) and 1153(d) read:

> (a) Preference Allocation for Family-Sponsored Immigrants. - Aliens subject to the worldwide level specified in section 1151(c) for family-sponsored immigrants shall be allotted visas as follows:
>
> (2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens. - Qualified immigrants -
>
> (A) who are the spouses or children of an alien lawfully admitted for permanent residence, or
> ....
>
> (d) Treatment of Family Members. - A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 1101(b)(1) shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c), be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

8 U.S.C. §§ 1153(a)(2)(A), (d). Subsections (a), (b), and (c) refer to family-sponsored immigrants, employment-based immigrants, and diversity immigrants. *See* 8 U.S.C. § 1153(a)-(c).

For individuals who do not remain "children" under the formula of (h)(1), the next part of § 1153(h) provides them with some more limited benefits:

> (3) RETENTION OF PRIORITY DATE- If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d), 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.

8 U.S.C. § 1153(h)(3).

II. Factual and Procedural Background

Petitioner Ting-Ting Wu ("Petitioner" or "Ms. Wu"), a native of the Republic of China (Taiwan), entered the United States as a nonimmigrant visitor on July 28, 1984 at age six. Administrative Record (hereinafter "AR") 430. On June 22, 1987, Petitioner and her parents were placed in deportation proceedings for having overstayed their visas. *Id.* A series of missteps by her parents' attorney resulted in the entry of a voluntary departure order against all the three family members on August 7, 1987, AR 429, and the failure of Ms. Wu and her parents to depart. Ms. Wu's father's employer filed an I-140 immigrant petition for alien worker on Mr. Wu's behalf on December 27, 1988. AR 415. Ms. Wu was 10 years old at this time and was therefore a derivative beneficiary on the petition. The visa petition was assigned a priority date of December 27, 1988 and was subsequently approved on January 28, 1992. *Id.*

The family's attorney, James Liang, filed applications seeking permanent resident status for the family in December 1994, when Ms. Wu was 16 years of age. However, he erroneously filed the applications with the former Immigration and Naturalization Service ("INS"). AR 113, 217. Because Ms. Wu and her family had been served with Orders to Show Cause, triggering their deportation proceedings, the regulations gave the Immigration Court sole jurisdiction over their applications for adjustment of status. 8 C.F.R. § 245.2(a) (1994). This error, which constituted ineffective assistance of counsel, was not rectified for six years. By the time Ms. Wu's father discovered the problem and sought reopening, Ms. Wu was two months shy of her 21st birthday.

Ms. Wu's father sought *sua sponte* reopening of his case in April 1999, explaining the nature of the prior attorney's misstep and arguing that he was eligible for adjustment of status based on his approved I-140 petition. AR 143-49. He explained that the motion's untimeliness was due to prior counsel's ineffective assistance. AR 146-48. The Board of Immigration Appeals agreed with Ms. Wu's father that reopening was warranted and remanded the case to the Immigration Judge ("IJ") to grant *sua sponte* reopening to Ms. Wu's father. AR 168-70. In granting Mr. Wu's case, the Board found that Mr. Wu had demonstrated ineffective assistance of counsel

by his prior attorney ("The respondent demonstrated that the ineffective assistance of his counsel explains the untimeliness of his motion and constitutes an exceptional circumstance warranting the invocation of our sua sponte authority to reopen the proceedings") and moreover that Mr. Wu appeared to be prima facie eligible for adjustment of status. AR 169. Mr. Wu's motion was granted in 2002, at which point Ms. Wu was well over 21. Subsequently, Ms. Wu's mother also sought *sua sponte* reopening based on the former attorney's ineffective assistance and her eligibility to seek permanent residency as a derivative beneficiary on her husband' petition; on March 18 2002, the Immigration Court granted the motion of Ms. Wu's mother. AR 173. Ms. Wu's parents were eventually granted adjustment of status and became lawful permanent residents in 2005. AR 176-81. Ms. Wu's father filed a second preference I-130 petition for Ms. Wu on November 6, 2006; this petition was approved on February 2, 2007. AR 183.

While the cases of Ms. Wu's parents remained pending, yet another attorney, Marian Ming, filed a *sua sponte* motion to reopen on Ms. Wu's behalf on November 15, 2004, arguing that Ms. Wu would be eligible to adjust her status through a separate I-140 filed on her behalf, which was pending at the time. AR 244-52. The IJ denied Ms. Wu's motion, concluding

that Ms. Wu had not demonstrated *prima facie* eligibility for the relief sought based on the pending petition and noting that the motion was time-barred. AR 228-31.

On June 9, 2008, Ms. Wu, through a new attorney, Margaret Wong, filed her ultimate motion to reopen, the motion under consideration by the Court in this action. AR 38-48. Ms. Wu requested that her case be reopened so that she could seek permanent resident status, as she had now become eligible to adjust her status pursuant to the Child Status Protection Act (CSPA). AR 43-44. Ms. Wu noted the ineffective assistance of the family's former attorney James Liang, which prevented her from being able to seek permanent resident status with the Immigration Court while she was still well under 21 AR 42-43. As part of her motion and in compliance with the Board's requirements under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd* 857 F.2d 10 (1st Cir. 1988). Ms. Wu submitted to the Immigration Court an affidavit regarding the former attorney's ineffective representation, AR 217-218, a complaint to the Office of the Chief Disciplinary Counsel in Missouri, AR 220-223, and a letter to Mr. Liang regarding his ineffective representation. AR 225-226. Ms. Wu argued that under the CSPA, she should be considered a "child," and thus allowed to adjust as a derivative on her father's petition. AR 43-44. Alternately, she

argued that § 1153(h)(3) permitted her to retain the original 1988 priority date from her father's I-140 petition, and to apply it to the visa petition subsequently filed on her behalf by her father. With that date, an immigrant visa is immediately available to her. AR 44-45.

The IJ denied Ms. Wu's motion to reopen on July 31, 2008. AR 24-26. The IJ noted that the application was both untimely and in excess of the statutorily-permitted one motion to reopen. This fact meant that Ms. Wu's application could be considered only pursuant to the IJ's *sua sponte* authority (indeed, Ms. Wu had not alleged timeliness, she asked for *sua sponte* reopening only).

The IJ gave three reasons for denying *sua sponte* reopening. First, the IJ found that Ms. Wu had not sought to obtain permanent resident status within one year. Under the CSPA, only individuals who sought resident status within one year of eligibility may maintain their status as children after turning 21 years of age. Second, the IJ found that the removal order entered in 1987 was a "final decision" making the CSPA inapplicable to the Petitioner. Finally, the IJ rejected Ms. Wu's argument that § 1153(h)(3) applied to her, finding instead that Ms. Wu was not eligible for adjustment of status through the I-130 family visa petition filed for her by her father, because the "priority date" was not "current."

Ms. Wu filed a timely appeal to the Board of Immigration Appeals. AR 20-23. While Ms. Wu did not file an appeal brief to the BIA (apparently due to confusion after a change in attorneys), the Notice of Appeal filed by Ms. Wu was specific and detailed, and put the Board on notice of her arguments. *See id.* The Board of Immigration Appeals affirmed the IJ's decision without opinion. AR 1-3. A timely Petition for Review was filed with this Court.

SUMMARY OF THE ARGUMENT

The Petitioner is a young woman who entered the United States with her parents at age six. As a minor, she was a derivative beneficiary on a visa petition filed on behalf of her father, but due to a series of attorney missteps, she did not properly seek permanent resident status before turning 21 years of age. An order of deportation was entered against Ms. Wu and her parents when she was ten years old; the immigration courts reopened the deportation orders against Ms. Wu's parents, after becoming convinced of her attorney's ineffective assistance of counsel, but refused to reopen Ms. Wu's case. The reasons given for that refusal were purely legal.

Herein, she challenges the determination of the Agency below that the approved visa petition filed by her father on her behalf was not

"available" to her, a finding premised on the Agency's finding that 8 U.S.C. § 1153(h)(3) did not apply to her.[2]

The provisions of the CSPA codified at 8 U.S.C. § 1153(h)(3) permit individuals who have ceased to qualify as "children" for visa purposes (individuals who have "aged out" of treatment as children) to receive some lesser benefits designed to advance family unity. Specifically, § 1153(h)(3) permits individuals to maintain the priority date previously assigned to them, as well as permitting automatic conversion of the prior petition.

The Board has issued two relevant precedential decisions interpreting the CSPA. First, in *Matter of Avila-Perez*, 24 I&N Dec. 78 (BIA 2007), it interpreted the effective date provisions of the CSPA. Petitioner agrees with the Board's decision in *Avila-Perez*, that the CSPA effective date provisions do indeed make the CSPA applicable to her. The Agency decision below, however, did not apply its *Avila-Perez* analysis, but rather, found that a final deportation order had been entered in her case (years before she became eligible to seek adjustment of status) constituted a final determination as to her eligibility for adjustment of status. That decision was legally erroneous. The CSPA clearly applies to non-citizen children

[2] The Immigration Judge's finding that she did not qualify as a "child" under 8 U.S.C. § 1153(h)(1) was legally erroneous, but Petitioner chooses not to pursue that challenge in these proceedings. The Administrative Record does not contain information sufficient to demonstrate her eligibility under § 1153(h)(1), so Ms. Wu does not now pursue that claim.

who are the beneficiaries of approved visa petitions but who have "aged out" before they could seek adjustment of status, and who do not have a final determination on an application for adjustment of status. CSPA, § 8.

The second relevant precedential decision is *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009). That decision interpreted 8 U.S.C. §1153(h)(3) to be the codification of existing regulations, rather than a provision which applied broadly to all individuals who "aged out" of CSPA eligibility. That decision was wrong as a matter of law. The Board's interpretation in *Wang* cannot be squared with the plain language of the statute, which clearly makes § 1153(h)(3) applicable to all individuals who have aged out of eligibility to remain children under § 1153(h)(1). The perceived ambiguities in the statute identified by the Board simply do not exist. While the Board believed that a plain reading of § 1153(h)(3) would create a system of retention of priority dates without precedent in the immigration laws, the Board overlooked numerous other instances where such retention exists in the current law, as well as a substantial history of the use of such retention in past periods in the nation's immigration history.

Moreover, while the Board cited regulations which were analogous to § 1153(h)(3) in some aspects, and then interpreted § 1153(h)(3) to be consistent with those regulations, that analysis overlooked the fact that the

CSPA effectuated a wide-ranging alteration in the laws applicable to children, and the fact that those regulations contain limiting language not present in the CSPA. The Board essentially read limiting language into the CSPA based on vaguely analogous regulatory provisions. However, the fact that Congress borrowed some language from the regulations, but not other language, is a strong indication that Congress did not wish to incorporate the non-incorporated language into the CSPA. Thus, the regulations support Petitioner's view of § 1153(h)(3), rather than undercutting it. Similarly, the Board cites selective legislative history for the proposition that Congress did not intend the CSPA to permit children to "cut in line" before other applicants. This ignores the way that § 1153(h) functions. In fact, every time that § 1153(h) applies, a child is placed before other adults who are waiting in line. The CSPA evinces a Congressional design to privilege family unification notwithstanding some incidental impact on other individuals waiting in line.

Thus, § 1153(h)(3) has a plain meaning, a meaning consistent with the legislative history and supported by other tools of statutory construction. Since the Board's reading conflicts with the statute's plain meaning, the Board's interpretation should be rejected under step one of the *Chevron*

analysis. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Alternately, even if the statute is ultimately found to be ambiguous, the Board's interpretation is not a reasonable one. While Congress made § 1153(h)(3) applicable to all cases where individuals "age out" under § 1153(h)(1), the Board's interpretation would limit § 1153(h)(3) to situations where the same petitioner could sponsor the "aged out" child. This would render § 1153(h)(3) irrelevant to the majority of situations wherein it applies. Such a reading is disfavored, because the Courts aim to give meaning to all words in the statute. Moreover, the Board was flatly wrong in finding that the more obvious meaning of the statutory text would be without precedent; Petitioner cites numerous other situations where priority dates may be retained even as to petitions filed by other petitioners. Finally, the Board's analysis of the legislative history was deeply flawed, extrapolating from one legislator's comment to a policy which simply cannot be squared with the statute. Thus, even if the statute were ambiguous under step one of *Chevron*, the Board's holding would be unreasonable under step two of the *Chevron* test.

ARGUMENT

I. Standard of Review

This Court has jurisdiction to review agency determinations of questions of law. See 8 U.S.C. § 1252(a)(2)(D). This Court reviews questions of law *de novo*. *See Smith v. Gonzales*, 468 F.3d 272, 275 (5th Cir. 2006). As the Board of Immigration Appeals affirmed the Immigration Judge's decision without opinion, this Court reviews the Immigration Judge's decision as the final agency decision. *Soadjede v. Ashcroft*, 325 F.3d 830, 831 (5th Cir. 2003).

II. The IJ Erred as a Matter of Law in Finding That Petitioner Was Precluded from Coverage under the CSPA Because a "Final Decision" in Her Removal Case Had Been Made Prior to the CSPA's Effective Date.

A. Contrary to the Immigration Judge's Conclusion, Under Agency Precedent, the CSPA Applies Where No Final Determination Has Been Made on a Noncitizen's Application for an Immigrant Visa or Adjustment of Status

The immigration judge interpreted the CSPA's effective date provisions as precluding that statute's applicability in this case, because a final immigration court decision had previously been made in her case. AR

26.[3] A proper reading of the CSPA's effective date provisions, however, allows a person in Petitioner's shoes – an aged out derivative beneficiary of an approved petition who has never received a final determination on an application to adjust her status – to benefit from the CSPA. Moreover, the IJ's decision is inconsistent with a published decision of the Board of Immigration Appeals with regard to the CSPA effective date provisions, a decision which was correct in this regard.

Section 8 of the CSPA, the statute's effective date portion, reads:

> The amendments made by this Act shall take effect on the date of the enactment of this Act [August 6, 2002] and shall apply to any alien who is a derivative beneficiary or any other beneficiary of -
>
> (1) a petition for classification under section 204 of the Immigration and Nationality Act (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;*
>
> (2) a petition for classification under section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) pending on or after such date; or
>
> (3) an application pending before the Department of Justice or Department of State on or after such date.

Child Status Protection Act § 8 (emphasis added).

[3] The immigration judge cited the INS Adjudicators' Field Manual for this requirement, *see* A.R. at 26; the field manual's language, like USCIS's May 2008 memorandum, interprets the "final determination" language in CSPA § 8(1) to mean a final decision on an application to adjust status to permanent residence on the immigrant visa petition upon which the noncitizen claims to be a child. *See* INS Adj. Field Manuel 21.2(e)(1)(ii). It is unclear what support the IJ believed supported the field manual's language; however, presumably the immigration judge intended to say that the CSPA's effective date provision precluded application of the CSPA to Petitioner.

The Board of Immigration Appeals interpreted the CSPA effective date provisions in a published decision, and found that the CSPA applied to individuals whose visa petitions were approved prior to August 6, 2002, and who sought adjustment of status after that date. *Matter of Avila-Perez*, 24 I. & N. Dec. 78 (BIA 2007). In *Avila-Perez*, the Department of Homeland Security argued that Avila-Perez was not eligible for CSPA protection because his visa petition had been approved prior to August 6, 2002, but he had not filed for adjustment of status prior to August 6, 2002. 24 I. & N. Dec. at 79.

The Board first analyzed the plain language of the statute. It noted that while CSPA § 8(2) and 8(3) applied to applications and petitions "pending" on or after the effective date, that § 8(1) applied on its face to petitions approved before the CSPA effective date. *Id.* at 82-83. It also compared § 8(1) with 8 U.S.C. § 1153(h)(1), which required action within a specified time period; the absence of such a requirement in § 8(1) suggested a broader reading of that statute. *Id.* at 83. Nevertheless, while the Board found the statutory language supportive of a broad interpretation of § 8(1), it found the statutory ambiguity not entirely resolved by its analysis. *Id.* at 82, 83.

The Board therefore turned to the CSPA's legislative history. The initial draft of the CSPA, in the House of Representatives, would have made its changes fully retroactive. *Id.* at 84. That caused the Department of Justice[4] to express concern that it might create a major administrative burden, leading to a substitution of effective date language which would have made the CSPA only prospective. *Id.* at 84. When the Senate voted in favor of the CSPA, it incorporated the House's prospective effective date language in sections § 8(2) and 8(3), but added § 8(1), without giving any public explanation.

The Board concluded that the Senate's addition of § 8(1) indicated an intent to expand the House's purely prospective language, to include some limited retroactive application. *Id.* at 85. It found "no indication in the legislative history that Congress intended to exclude from coverage of the CSPA those aliens whose visa petitions were approved before the effective date of the statute merely because they waited until after its enactment to file an adjustment application." *Id* at 84. Thus, the Board held that individuals whose visa petitions had been approved prior to the CSPA's enactment, but

[4] Prior to the creation of the Department of Homeland Security and reconfiguration of the federal immigration agencies, the Immigration & Naturalization Service (INS) was located within the Department of Justice.

whose adjustment applications were filed subsequently to the CSPA's enactment, would be covered by the CSPA.[5]

The Board's precedential decision in *Avila-Perez* is binding on the Department of Justice and the Department of Homeland Security, 8 C.F.R. § 1003.1(g). Such decisions are entitled to deference under the rubric of *Chevron*. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

B. The Immigration Judge Misinterpreted the Meaning of "Final Determination" in the CSPA's Effective Date Provisions and Consequently Incorrectly Concluded That Petitioner Was Not Eligible for the CSPA's Benefits

The immigration judge misconstrued the CSPA's "final determination" language as referring to *any* final decision in Petitioner's case, rather than applying the Board's precedential decision in *Matter of Avila-Perez* and determining whether a final determination had been made on an application for an immigrant visa or adjustment of status. *See supra* at 19-20. The IJ treated the administratively final grant of voluntary departure on August 14, 1987 as a final determination rendering her ineligible for coverage under the CSPA. *Id.* However, the plain text of § 8(1) of the

[5] The Ninth Circuit in *Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004), also construed the CSPA's effective date provisions broadly, beyond those awaiting an agency determination on their adjustment of status application to include those individuals who had an agency determination on their applications but whose appeals were pending in the courts. 358 F.3d at 1171-72. The Ninth Circuit found support for this expansive interpretation in the CSPA's legislative history. *See id.*

CSPA (referring to "a final determination ... on the beneficiary's application for an immigrant visa or adjustment of status to lawful permanent residence") clearly refers to a more specific sort of final determination. The CSPA's "final determination" language refers not to a final decision in a deportation proceeding but to a final determination on a noncitizen's *application for an immigrant visa or adjustment of status*. CSPA § 8(1), 116 Stat. at 930.

A final decision by the IJ or Board of Immigration Appeals may sometimes constitute a final decision on an application for adjustment of status, e.g., where a noncitizen has sought permanent residence before the immigration court. *See* 8 C.F.R. § 1245.2(a)(1)(i). However, it does not follow that every deportation order constitutes a final decision on adjustment of status. Some individuals will have been ordered removed without having ever sought adjustment of status, and it is not uncommon for individuals in removal proceedings to plan to seek permanent resident status through a U.S. consulate abroad, such as where the individual is not eligible for adjustment of status within the United States. Cf. 8 U.S.C. § 1255(a) (generally allowing adjustment of status only where an individual has been "admitted or paroled" into the United States); 22 C.F.R. § 42.61 et seq. (governing immigrant visa applications in U.S. consulates abroad).

Here, Petitioner did not seek adjustment of status before the immigration court in 1987; rather, Petitioner's attorney only sought voluntary departure on behalf of Petitioner and her parents. AR 429. The IJ's voluntary departure grant did not constitute a final determination as to eligibility for an immigrant visa or adjustment of status; indeed, it did not discuss such relief at all.

Because there was no "final determination" on an application by Petitioner to adjust her status to that of a permanent resident, Petitioner is not barred from the CSPA's protections. Under the Board of Immigration Appeals' decision in *Avila-Perez*, the Board would apply the CSPA today if her case were reopened, thus allowing her to file an application to adjust her status. The IJ erred as a matter of law in finding the CSPA not applicable to Petitioner simply because she had an administratively final order in her removal case.

C. Even If the Final Agency Decision in Petitioner's Removal Case Did Constitute a Final Determination for CSPA Purposes, Upon Reopening Petitioner Would No Longer Have a Final Determination and Would Be Eligible to Seek Adjustment of Status

Finally, even if the immigration judge were correct in concluding that the final agency decision in Petitioner's removal case constituted a final determination for CSPA purposes, if Petitioner's case were reopened she

would no longer have a final order of deportation. At that point, the application would be "pending" before the Department of Justice, and thus fall squarely within the provisions of CSPA § 8(3). The IJ's reasoning that Petitioner is not eligible for the CSPA's protections because a final decision has already been made in her case was thus circular, inasmuch as reopening the removal case would undo the finality of the court's earlier decision. The Board has repeatedly considered applications for reopening in cases where noncitizens with final removal orders become eligible to adjust their status. *See, e.g., Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002). Regardless of whether the CSPA's effective date provisions refer to a final determination on an application for an immigrant visa or to adjust status, or any final decision in a removal case, Petitioner remains eligible to seek the CSPA's benefits.

III. Under 8 U.S.C. §1153(h)(3), Ms. Wu is Entitled to Apply the Earlier "Priority Date" from Her Father's Original Petition, on Which She Was a Derivative Beneficiary, to the New Petition Filed on Her Behalf.

The portion of the CSPA which applies to children of individuals who are not U.S. citizens has two operative provisions. First, it creates a formula through which individuals over age 21 may still be considered "children" for purposes of the act. 8 U.S.C. § 1153(h)(1). Second, the CSPA extends

alternate lesser immigration relief to sons and daughters of immigrants who do not benefit from (h)(1). In so acting, Congress recognized that under the formula set forth in § 1153(h)(1), many individuals would nonetheless be considered 21 years of age or older and thus be unable to benefit from that provision. The provisions of (h)(3) apply to aged out sons and daughters for whom a visa would be available under a separate preference category. Under § (h)(3), if an individual's CSPA "age" is over 21, they are not considered a "child," but may still retain the priority date from the original petition, which can be transferred to a new preference category.

Section 1153(h)(1) covers beneficiaries and derivative beneficiaries under (a)(2)(A) and (d). This includes child beneficiaries in twelve different family and employment based categories.[6]

Section 1153(h)(3) is applicable to individuals who do not qualify as "children" under § (h)(1); in other words, individuals who have "aged out" as children in each of the 12 categories listed above. 8 U.S.C. § 1153(h)(3) (applying "[i]f the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)").

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[6] These are: (1) children of lawful permanent residents; (2) derivative beneficiaries of spouses of lawful permanent residents; (3) derivative beneficiaries of children of lawful permanent residents; (4) derivative beneficiaries of unmarried sons and daughters of lawful permanent residents; (5) derivative beneficiaries of married sons and daughters of United States citizens; (6) derivative beneficiaries of brothers and sisters of United States citizens; (7) derivative beneficiaries of diversity visa petitions, (8) – (12) derivative beneficiaries of workers in the five employment-based categories. *See* 8 U.S.C. §§ 1153(a), (b), and (d).

This would indicate that Congress intended for § (h)(3) to apply to the twelve categories of individuals to whom § (h)(1) may apply.

However, the Board of Immigration Appeals, in *Matter of Wang*, interpreted (h)(3) narrowly to apply only where the individual who filed the initial visa petition could file a subsequent visa petition for the child beneficiary. *See Matter of Wang,* 25 I&N Dec. 28 (BIA 2009). *Wang* involved a young woman who had been the derivative beneficiary of a fourth preference family visa petition filed by her citizen aunt on behalf of her father. *See id.* at 29. After obtaining lawful permanent resident status, Ms. Wang's father filed a new second preference category on his daughter's behalf and requested that the petition be assigned the original priority date from the fourth preference petition. *Id.* at 28. The Board held that Ms. Wang was not entitled under § 1153(h)(3) to use her original priority date. *Id.* at 39.

The Board in *Matter of Wang* found the statute ambiguous and then determined that section (h)(3) only applied where a petition could automatically convert from one preference category to another and where the petition involved the same petitioner. *Matter of Wang*, 25 I. & N. at 34-35. The Board held, in effect, that (h)(3) only applies to beneficiaries under 8 U.S.C. § 1153(a)(2)(B), because only beneficiaries with parents who are

currently permanent residents could be immediately sponsored by the same petitioner. Aged out derivative beneficiaries in all other categories, under the Board's holding, cannot benefit from section (h)(3).

A. *The Board's Decision in Matter of Wang Fails Under Step 1 of the Chevron Test Because It Contradicts the Statute's Plain Meaning*

Under the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, whether an agency's construction of a statute it is charged with administering will be afforded deference is evaluated under a two-step test. 467 U.S. 837, 842 (1984). First, the court must ask whether Congress has "directly spoken" to the precise question at issue and, "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*. *Id.* at 843. Where the statute is ambiguous, a court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844.

However, deference is only given to statutes which are ambiguous "after applying the normal 'tools of statutory construction.'" *I.N.S. v. St. Cyr*, 533 U.S. 289, 320, n45 (2001) (quoting *Chevron*, 467 U.S. at 843, n. 9; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-448 (1987)).

1. Under the Plain Text of the Statute, § 1153(h)(3) Applies to All Aged Out Beneficiaries Under § 1153(a)(2)(A) and Derivative Beneficiaries Under § 1153(d)

The starting point in interpreting a statute is its language, for 'if the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993) (quoting *Chevron*, 467 U.S. at 842). The Board of Immigration Appeals erred in *Matter of Wang* in concluding that section (h)(3) is ambiguous, when the plain language of (h)(3) as well as the structure of § 1153(h) as a whole clearly indicates that (h)(3) applies to all aged out derivative beneficiaries of family-sponsored, employment-based, and diversity visas, such as Ms. Wu.

Section 1153(h)(3) expressly and unambiguously applies to individuals covered under § 1153(h)(1) who do not qualify as "children," that is, sons and daughters of lawful permanent residents who are no longer covered under § 1153(a)(2)(A) and sons and daughters who were derivative beneficiaries on family- and employment-based petitions but who no longer qualify as derivatives under § 1153(d) due to their age. The section states:

"If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)," and then sets forth the benefits provided to this category of individuals. The latter part of the above phrase in (h)(3) directly parallels its counterpart in (h)(1), which likewise states its application "for purposes of subsections (a)(2)(A) and (d)."

Section 1153(h)(2), titled "Petitions Described," lays out in more words the petitions to which "this paragraph" – § 1153(h) – applies:

> (2) PETITIONS DESCRIBED- The petition described in this paragraph is--
>
> (A) with respect to a relationship described in subsection (a)(2)(A), a petition filed under section 204 for classification of an alien child under subsection (a)(2)(A); or
>
> (B) with respect to an alien child who is a derivative beneficiary under subsection (d), a petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c).

Section 1153(h)(2). In describing the application of "this paragraph" to the above-listed petitions, rather than limiting application to solely (h)(1), the language of (h)(2) reinforces (h)(3)'s explicit language applying the section's benefits to beneficiaries under both (a)(2)(A) and (d).

The remainder of the first part of (h)(3) then limits (h)(3) to those sons and daughters who would not be considered "children" pursuant to (h)(1). Thus, by the plain language of section (h)(3), it is unambiguous that the

automatic conversion and priority date retention provisions apply to: (1) an alien, (2) who is over 21 notwithstanding section (h)(1)'s formula, (3) for purposes of § 1153(a)(2)(A) and § 1153(d). In other words, section (h)(3)'s benefits apply to all those who were direct or derivative beneficiaries but who aged out notwithstanding (h)(1).

Despite the above, the Board determined that the statute was ambiguous as to whom section (h)(3)'s benefits apply. The Board stated:

> Unlike sections 203(h)(1) and (2), which when read in tandem clearly define the universe of petitions that qualify for the "delayed processing formula," the language of section 203(h)(3) does not expressly state which petitions qualify for automatic conversion and retention of priority dates. *Given this ambiguity*, we must look to the legislative intent behind section 203(h)(3).

25 I&N Dec. at 33 (emphasis added).

This analysis is plainly flawed. While the Board claims that "the language of section 203(h)(3) does not expressly state which petitions qualify for automatic conversion and retention of priority dates," section (h)(3)'s first phrase ("if the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)") provides with great precision to whom the section applies.

Moreover, this language is almost identical to the language in (h)(1). Cf. 8 U.S.C. § 1153(h)(1) ("for purposes of subsections (a)(2)(A) and (d)") with § 1153(h)(3) ("for the purposes of subsections (a)(2)(A) and (d)"). This

repetition similarly reinforces that Congress intended that each section of § 1153(h) apply to the same exact categories of petitions.

Section 1153(h)'s structure as a whole also makes it clear that (h)(3) covers petitions in *all* of the categories listed above. Section 1153(h) is divided into three interrelated paragraphs, (h)(1) – (h)(3). Paragraph (h)(1) sets forth a formula for determining the age of a visa petition for purposes of (a)(2)(A) and (d). Paragraph (h)(2) describes the two sets of visa petitions to which the (h)(1) formula can be applied: (1) petitions filed on behalf of noncitizen children of lawful permanent residents under (a)(2)(A), and (2) petitions filed on behalf of a child's parents under §§ 1153(a), (b), or (c) and on which the child is a derivative, as described in § 1153(d). Finally, paragraph (h)(3) provides alternate benefits to those beneficiaries who are determined under (h)(1)'s formula to be over 21. While (h)(3), unlike (h)(1), does not directly reference (h)(2), the interrelation between the three paragraphs as well as the fact that (h)(3) is wholly dependent on (h)(1) for its meaning, as expressly stated in the paragraph's first phrase, make it clear that (h)(3) refers to the exact same set of petitions described in (h)(1) and (h)(2).

2. <u>The Statute Unambiguously Contains Two Separate and Distinct Benefits: Automatic Conversion and Priority Date Retention</u>

Read in light of the clear applicability of § 1153(h)(3) to derivative beneficiaries such as Ms. Wu, the rest of § 1153(h)(3) becomes clear. When § (h)(3) applies, "the alien's petitions shall automatically be converted to the appropriate category *and* the alien shall retain the original priority date issued upon receipt of the original petition." (emphasis added).

The Board assumes that these two phrases must be read together to mean that a petition must convert from one category to another *and then* retain the priority date from the original petition. However, that reading of this phrase would make (h)(3) inapplicable to the vast majority of the individuals to whom Congress made it applicable. Insofar as (h)(3) is clearly applicable to individuals such as Ms. Wu, the meaning of the disputed text must be to read the word "and" as tying together alternative and independent terms, i.e., that it allows for both (1) automatic conversion of a petition, in appropriate cases, and (2) retention of the original priority date.

The Board found ambiguity, in part, on the basis of its finding that the term "retention" has "*always* been limited to visa petitions filed by the same family member." *Id.* (emphasis added). But this conclusion is flatly mistaken. The Board looked to the provisions of 8 C.F.R. § 204.2, which generally permit retention of a priority date only where the same petitioner

sponsors the same beneficiary. However, when the Board extrapolated from that single regulation to find that the term has "always" been employed in so limited a way, the Board erred.

There are multiple other examples within the INA and its accompanying regulations where beneficiaries *have* been entitled to earlier priority dates despite different petitioners and without automatic conversion from one category to another. One example is contained in 8 C.F.R. § 204.5(e), titled "Retention of Section 203(b)(1), (2), or (3) priority date, which states:

> A petition approved on behalf of an alien under sections 203(b)(1), (2), or (3) of the Act accords the alien the priority date of the approved petition for any subsequently filed petition for any classification under sections 203(b)(1), (2), or (3) of the Act for which the alien may qualify. In the event that the alien is the beneficiary of multiple petitions under sections 203(b)(1), (2), or (3) of the Act, the alien shall be entitled to the earliest priority date. A petition revoked under sections 204(e) or 205 of the Act will not confer a priority date, nor will any priority date be established as a result of a denied petition. A priority date is not transferable to another alien.

8 C.F.R. § 204.5(e). This regulation allows a noncitizen worker who has been the beneficiary of multiple employment-based petitions under 8 U.S.C. § 1153(b), INA § 203(b), to use the earliest priority date, so long as that petition was not revoked or denied. Under this regulation, if the noncitizen worker changes employment after the I-140 employment-based petition is approved, another employer may sponsor him in the same or a different

category. Once the subsequent petition is approved, the beneficiary may adjust by retaining the original priority date from the initial petition. Under this regulation, the petitioning employer in the subsequent petition need not be the same employer who filed the initial petition. Nor is the original priority date retained as the result of a petition automatically converting from one preference category to another.

A second example within the immigration regulations is found at 8 C.F.R. § 204.12(f)(1). That regulation allows a noncitizen physician working in a medically underserved area who changes jobs to retain the priority date of the prior employer's petition for use with the new employer's petition.

A third example is at 8 C.F.R. § 204.2(h)(2), which allows a beneficiary of a petition filed by an abusive spouse or parent to retain the priority date from that petition in a new self-petition filed pursuant to the Violence Against Women Act.

Yet a fourth example of priority date retention within law existing at the time of the CSPA's enactment is § 421(c) of the U.S. Patriot Act, P.L. 107-56, 115 Stat. 272 (2001), which allowed certain victims of the September 11, 2001 attack to file self-petitions while retaining earlier

priority dates from unrelated family, employment and diversity visa petitions. *Id.*

An older example of priority date retention occurred in 1976, when Congress reorganized the visa system to incorporate Western Hemisphere immigrants into the scheme which applied to the rest of the world. Prior to 1976, Western Hemisphere immigrants were not subject to the established preference system for family and employment-based immigrants, but were considered under a different scheme. *See* 22 C.F.R. § 42.53(b), *see also* Immigration Law and the Family, § 11.04. With amendments to the INA in 1976, Western Hemisphere immigrants were incorporated into the established preference system. *See* Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703, 2707 (October 20, 1976). The 1976 law, however, allowed these immigrants to retain their priority dates as long as they were established prior to January 1, 1977. 22 C.F.R. 42.53(b). The intending immigrant could use that priority date for any preference petition subsequently approved on his behalf. *Id.* Moreover, the spouse or child or a Western Hemisphere immigrant could use the same priority date in connection with a future preference petition. *Id.* The 1976 law further reinforces that retention of one's original priority date in future petitions – regardless of the petitioner and including priority dates on

petitions on which one was a derivative beneficiary – is not a new concept. Rather, it is a long-standing concept in immigration law. *Id.*; *see also Silva et al. v. Bell*, 605 F.2d 978 (7th Cir. 1979); *Solis-Ramirez v. Dept. of Justice*, 758 F.2d 1426 (11th Cir. 1985) (discussing the 1976 amendment and its clause permitting immigrants to retain their old priority date).[7]

Were the Board correct in its conclusion that there is no precedent for transferring a priority date from petitions involving different petitioners, this might have supported its contention that (h)(3) is ambiguous. *See Wang,* 25 I&N Dec. at 33-34. However, inasmuch as the Board's contention is flatly wrong, and there is in fact precedent for the retention of priority dates despite different petitioners, that provides no support for the Board's finding of ambiguity.

Thus, by the statute's plain language, Petitioner, a derivative beneficiary under § 1153(d) on her father's original I-140 petition, can use the original priority date from that petition in her subsequently filed second preference family petition.

3. The Regulations Cited By the Board Undermine Its Interpretation Rather Than Supporting It.

[7] The Board itself found just a few years earlier – albeit in a non-precedential decision – that a respondent who aged out and could therefore no longer adjust as a derivative beneficiary on a fourth preference petition did nonetheless retain the original priority date from that original petition in the subsequently filed second preference petition on her behalf. *Matter of Maria T. Garcia*, 2006 WL 2183654 (BIA June 16, 2006).

Ultimately, the Board in *Wang* interpreted § 1153(h)(3) to "essentially codif[y] 'established regulatory practice.'" 25 I&N Dec. at 34. The Board "presume[d] that Congress enacted the language in section 203(h)(3) with an understanding of the past usage of these regulatory terms," *id.* at 35, and therefore refused to interpret § 1153(h)(3) so as "to expand the historical categories eligible for automatic conversion and priority date retention." *Id.* at 36.

It is uncontested that the regulations permit automatic retention and conversion of priority dates and visa petitions in certain circumstances. *See, e.g.*, 8 C.F.R. § 204.2(h)(2) (allowing use of a prior priority date for "a new petition by the same petitioner ... for the same beneficiary"), 8 C.F.R. § 204.2(i)(2) (permitting automatic conversion of visa petitions where a minor turns 21 years of age). However, Congress passed the CSPA *in order to change* those rules.

In comparing the statute with the regulations, the Board fails to note that the regulatory provisions expressly incorporate limiting terms – terms which are not found in § 1153(h)(3). For instance, the title of § 204.2(h)(2) is "Subsequent petition by same petitioner for *same beneficiary*," (emphasis added) and the regulation expressly applies only to "“a new petition by the same petitioner." Similarly, 8 C.F.R. § 204.2(a)(4) provides for retention of

a priority date; but expressly applies only "if the subsequent petition is filed by the same beneficiary."

By contrast, § 1153(h)(3) contains none of the limiting language of the regulations. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Inasmuch as Congress presumptively legislated in light of those provisions, Congress' failure to include similar limiting language is illuminative of Congressional intent. *See, e.g.*, *Johnson v. Sawyer*, 120 F.3d 1307, 1321 (5th Cir. 1997). The Board focused on the similarities between the regulations and the statute, but ignored the fact that the statute not only lacked the limiting language of those regulations, but affirmatively included language applying the rule to a broader universe of individuals than the regulations cited by the Board.

4. The CSPA's Legislative History Does Not Support the Board's Reading.

The Court may also consult legislative history as a tool in finding a plain meaning of a statute. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 442 n.51 (5th Cir. 2001). In this case, the legislative history does not support a

finding of any ambiguity, but rather, supports the Petitioner's position herein.

While the Board found nothing in the legislative history to preclude its holding in *Matter of Wang*, the full legislative history of the CSPA supports the Petitioner's position. The Board in *Wang* focused on language from the House Report and associated statements relating to the initial version of the bill, but those statements were made *prior to* the Senate revisions that added section (h)(3) to the CSPA. 25 I. & N. Dec. at 36-37. The statements by House members noted extensive administrative delays in the processing of visa petitions as the motivation for the legislation, which at that point addressed immediate relative petitions filed by United States citizen parents on behalf of their children and did not include the additional benefits later added to the bill. *Id.* at 37. The Board extrapolated from that language to find a legislative intent to remedy administrative processing delays rather than address lengthy visa lines. *Id.* at 38-39.

In fact, while the CSPA's legislative history does not contain any specific statements regarding the purpose of (h)(3), its legislative purpose is clear in light of the overall statute. The Board makes much of one legislator's comment that the CSPA would help some children "without displacing others who have been waiting patiently in other visa categories."

Id. at 37-38 (quoting 148 Cong. Rec. H4989). Seizing on the above statement, the Board concluded that interpreting (h)(3) to allow the respondent to retain her priority date would mean that she, "as a new entrant in the second preference visa category line, would displace other aliens who have already been in that line for years before her." *Id.* at 38.

With respect, the Board's focus on this one consideration is no substitute for careful consideration of the statute and the goals underlying it. "Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action." *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986); *see also Continental Air Lines, Inc. v. Department of Transp.*, 843 F.2d 1444, 1450 (D.C.Cir. 1988) (rejecting "[j]udicial seizing upon a single Congressional goal and transmogrifying that desire into the measuring rod against which to measure agency fidelity to supposed legislative norms").

The Board's analysis contains several flaws. First, it overlooks the fact that every application of § 1153(h), *by its very nature*, puts some individuals in line in front of others. Because every one of the categories at issue in § 1153(h) is currently oversubscribed, every individual permitted to enter under any of the visa categories covered by § 1153(h) takes up a

"number" in the visa line, necessarily disadvantaging some other applicant. CSPA accepts this tradeoff, in the interest of promoting family unity. By enacting the CSPA, Congress decided that the benefits of this displacement outweighed its drawbacks. Thus, the comment on which the Board focuses simply cannot be taken as representing legislative intent in the interpretation of § 1153(h) generally, or (h)(3) in particular.

Second, while the Board treats priority date retention as allowing beneficiaries to "cut in line," that view ignores the fact that these young individuals have already been *waiting* in line for an available visa since an original petition was filed on their or their parent's behalf. Upon aging out, these beneficiaries move into a preference category with a long wait rather than adjusting status with their parents. Allowing these beneficiaries to retain their original priority date allows them to *keep* a place in line rather than start from scratch at the back of the line with those individuals who never were in line for a visa number in the past. Thus, assuming arguendo that Congress would wish to avoid any unfairness in this regard, the interpretation urged by Ms. Wu would not accomplish any unfairness.

Finally, contrary to the Board's conclusion, Congress intended to do more than simply address processing delays through the passage of the CSPA. The Board found no clear evidence that Congress intended to

ameliorate delays associated with the high demand for visas and resulting backlog in addition to processing delays. *Id.* However, there is evidence that Congress intended to address visa allocation and backlog issues. In fact, the passage of (h)(3) itself, which at the very least indisputably allows for beneficiaries in the (2)(A) category to retain their priority date even where they have aged out notwithstanding the (h)(1) formula, shows that the CSPA was intended to address more than just processing delays. The (2)(A) beneficiary who ages out and remains 21 or older for CSPA purposes *despite* subtracting from her age the amount of time the petition is pending does not face problems resulting from processing delays but rather is disadvantaged by the long wait time for an available visa. The addition of (h)(3), which at least allows that beneficiary to retain her place in line rather than having to move to the back of the line, squarely addresses visa backlog issues and shows that Congress's intent went beyond alleviating problems resulting from processing delays.

If the simple fact of § 1153(h)'s existence were not sufficient to disprove the Board's thesis, the CSPA's legislative history contains other indicators showing Congress' broad intent to reunite families. Following the Senate amendments, Representative Sensenbrenner referenced the problem of aged-out derivative beneficiaries of family, employment, and diversity

visa petitions, and stated that, "[b]ringing families together is a prime goal of our immigration system. [The bill] facilitates and hastens the reuniting of legal immigrants' families. It is family-friendly legislation that is in keeping with our proud traditions." 148 Cong. Rec. H4991 (Statement of Rep. Sensenbrenner). This is at least as representative of overall Congressional intent as the comment on which the Board bases its analysis. Congress clearly intended to do more than simply provide a fix for processing delays; Congress intended to make family reunification a priority and provide benefits that would allow families to reunite more quickly.

5. Any Other Interpretation of § 1153(h)(3) Would Render it a Nullity as to the Majority of Derivative Beneficiaries; But Congress Specifically Included Derivative Beneficiaries Within the Reach of § 1153(h)(3).

"Statutory construction ... is a holistic endeavor." *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988). The fact that the Board's interpretation would make no sense in light of the overall purpose and structure of statute is reason to reject that interpretation.

In *Matter of Wang*, the Board found that § 1153(h)(3)'s benefits were limited to cases where the petitioner for the original visa petition could file a petition for the aged-out beneficiary. This interpretation, in effect, limits §

1153(h)(3) to beneficiaries under (a)(2)(A) (children of lawful permanent residents) who age out and became (a)(2)(B) beneficiaries (sons and daughters of lawful permanent residents) and children of spouses of lawful permanent residents who aged out but for whom the same petitioner could file a new petition. The plain language of § 1153(h)(3), however, applies to beneficiaries under § 1153(d), which includes all derivative beneficiaries of family- and employment-based petitions. As Congress specifically included all derivative beneficiaries within the reach of § 1153(h)(3), it would make no sense to then read into the statute a limitation that would render it a nullity to the majority of the beneficiaries covered by (h)(3).

The Board in *Wang* "presumed" that Congress did not intend to alter the historical meaning of the word retention, *id.* at 35, and therefore asked whether the petitioner therein could provide some clear indication in the statute that Congress intended to expand the categories eligible for automatic conversion and priority date retention. As argued above, the Board's historical view was flatly wrong. Once this "presumption" drops out, the error of the Board's view of the legislative history become evidence. There is no indication that Congress intended to *restrict* (h)(3) to direct and derivative beneficiaries of (a)(2)(A) only. Given the § 1153(h)'s structure and the interrelation between the three paragraphs, as well as (h)(3)'s first

phrase which is nearly identical to the first phrase of (h)(1) with respect to which petitions it references, it would seem that in order to *limit* application of (h)(3)'s benefits to only a small subset of petitions covered in (h)(1), Congress would do so explicitly.

In the absence of any such evidence, the Board should have applied the plain meaning of (h)(3), and permitted the retention of priority dates by individuals such as Ms. Wu.

B. Alternatively, the Board's Decision in Wang Fails Under Step 2 of Chevron Because an Interpretation Which Renders the Statute a Nullity in the Vast Majority of Situations Where It Would Apply Is Unreasonable.

If the Court finds that § 1153(h)(3) lacks a plain meaning, even after recourse to tools of statutory construction, it must then ask whether the Board's interpretation of § 1153(h)(3) is reasonable "in light of the language, policies and legislative history of the Act." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

1. The Board's Application of § 1153(h)(3) to a Small Sub-Portion of Derivative Beneficiaries is Unreasonable

Petitioner submits that 8 U.S.C. § 1153(h)(3) unambiguously allows derivative beneficiaries under both §§ 1153(a)(2)(A) *and* (d) to either automatically convert their petition or retain their original priority date. If, however, this Court finds that § 1153(h)(3) is in fact ambiguous, Petitioner

submits that the Board's interpretation of that section is not entitled to *Chevron* deference as it is an unreasonable interpretation of the statute.

It is well-established that courts should avoid a construction that renders any provision superfluous, but rather, "to give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). "A statute should be interpreted so as to give each provision significance." *United States v. Marek*, 198 F.3d 532, 536 (5th Cir.1999) (citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992)); *see* 2A Sutherland Statutory Construction § 46.06 (6th ed. 2000) ("A statute should be construed so that effect is given to all its provisions, so that no part would be inoperative or superfluous."). Insofar as the Board's interpretation would render the reference in § 1153(h)(3) to derivative beneficiaries under § 1153(d) of no legal significance, that interpretation must be viewed as highly dubious.

As discussed above, *see supra* at 45-47, the Board's interpretation of § 1153(h)(3) would render the section's benefits a nullity for the majority of aged-out derivative beneficiaries, applying CSPA benefits to only second preference beneficiaries who remain second preference beneficiaries after aging out. While individuals may be derivative beneficiaries of many classes of visa petitions under 8 U.S.C. § 1153(d) – in Ms. Wu's case, under

an employment-related petition – the agency interprets § 1153(h)(3) as applying only to one circumstance. Such an interpretation of the statute – which renders it meaningless to a large portion of the derivative beneficiaries it expressly purports to cover – must be disfavored. It would tend to render portions of the statute a nullity. In various other contexts, the courts have declined to adopt such readings. *See, e.g., Costello v. INS*, 376 U.S. 120, 127-128, 84 S.Ct. 580, 11 L.Ed.2d 559 (1964) (counseling long hesitation "before adopting a construction of [the statute] which would, with respect to an entire class of aliens, completely nullify a procedure so intrinsic a part of the legislative scheme"). Most recently, the Supreme Court rejected an interpretation of the voluntary departure rules which "would render the statutory right to seek reopening a nullity in most cases." *Dada v. Mukasey*, 554 U.S. 1, __, 128 S.Ct. 2307, 2317 (2008). The Court was "reluctant" to accept that agency interpretation, "particularly ... when the plain text of the statute reveals no such limitation." Id. at 2318.

The same reasoning applies to § 1153(h)(3), and the Court should likewise be "reluctant" to adopt a reading so unsupported by the statutory text.

2. <u>Contrary to the Board's Assertion, There is Precedent for the Use of Old Priority Dates for New Petitions Filed by a Different Petitioner.</u>

In determining that Congress could only have intended for priority date retention to apply where the petitioner is the same in both the initial and subsequent petition, the Board simply stated, "[T]he concept of 'retention' of priority dates has always been limited to visa petitions filed by the same family member. A visa petition filed by another family member receives its own priority date." *Matter of Wang*, 25 I. & N. Dec. at 35. This is flatly incorrect, as noted above. *See supra* at 35-38. The Board ignored a host of past precedent in which such retention occurred, and instead narrowly looked to one regulation to conclude that priority date retention only involves petitions filed by a single petitioner.[8]

3. The CSPA's History Supports Permitting Priority Date Retention As Described Above

As Petitioner has argued above, *see supra* at 40-45, the legislative history of the CSPA also supports her interpretation of the statute. The Board focuses on one isolated statement in the legislative history which is flatly inconsistent with the thrust of much of the CSPA, but this statement

[8] It may be that the Board ignored this precedent because none of these examples involved the terms "retention" and "conversion" used in conjunction. However, as discussed in Section XXX, § 1153(h)(3)'s can just as easily be read to permit a beneficiary to automatically convert a petition from one category to another *or* retain an original priority date for use with a subsequent petition, *See supra* __. Moreover, the Board's second example, priority date retention under 8 C.F.R. § 204.2(a)(4), involves priority date retention and not conversion.

offers little support for the Board's reading of the CSPA as simply continuing the pre-CSPA treatment of aged-out children. Moreover, in reaching this interpretation, the Board discounts a host of other legislative history which supports the reading of the statute urged by Petitioner.

Petitioner submits that the CSPA, broadly speaking, acts precisely by favoring family unification over alternate readings which would permit other individuals in line behind a given beneficiary to immigrate sooner. This is consistent with the overall purpose of the statute, which focuses on, "[b]ringing families together" and "facilitate[ing] and hasten[ing] the reuniting of legal immigrants' families." 148 Cong. Rec. H4991 (Statement of Rep. Sensenbrenner). Each time § 1153(h) is operative, a visa number is taken from someone waiting in line and given to the child of an individual being permitted to immigrate legally to the United States. In that sense, § 1153(h) acts in a manner precisely contrary to the Board's reading of it. While the Board evinces an understanding that § 1153(h) should be read narrowly so as not to displace individuals waiting further down in line, Congress intended to privilege family reunification over individuals awaiting visa numbers.

The Board's blatant misreading of the relevant Congressional purpose precludes a finding that the Board's reasoning was consistent with the statute.

4. If the Court Finds the Board's Interpretation Unreasonable, It May Remand Under *Ventura*.

Under step two of *Chevron*, the Court ought to find that the Agency's analysis was substantially flawed, and that it cannot support the reading of the statute which the Board ultimately adopted. Petitioner believes that the Court may then proceed to adopt her proposed reading of the statute, which is the best reading of the statute.

However, the Court might also wish to remand the case to the Board, should it find the Board's analysis unreasonable, to permit the Board to re-analyze the legal matter in the first instance. *INS v. Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam) (remanding to allow the Board "the opportunity to address the matter in the first instance in light of its own experience.").

C. Ms. Wu, a derivative beneficiary under § 1153(d) on her father's I-140 petition, can therefore use the priority date from that petition for the second preference I-130 petition her father subsequently filed on her behalf.

It is undisputed that Petitioner was a derivative beneficiary of the approved I-140 petition filed by her father's employer on her father's behalf.

That petition was filed when Petitioner was just 10 years of age, and therefore a child who qualified as a derivative beneficiary on her parent's petition. *See* 8 U.S.C. §§ 1153(d), 1154(b), 1101(b).

If the Court does not accept the argument that Petitioner remains a child under § 1153(h)(1) of the CSPA, then Petitioner, as an aged-out derivative beneficiary under § 1153(d), retains the priority date from the original I-140 petition and can apply this priority date to the second preference I-130 petition that her lawful permanent resident filed on her behalf on November 6, 2006. Thus, Petitioner is entitled to use the December 27, 1988 priority date from the original I-140 petition while seeking a second preference visa. As Category 2B visas (second preference visas for unmarried sons and daughters of lawful permanent residents) are currently available for individuals with priority dates up to July 1, 2002, Petitioner currently has a visa number available to her and is eligible to adjust her status.

This must be the case notwithstanding the Board's determination in *Matter of Wang* that § 1153(h)(3) works only when a petition can automatically convert from one category to another, and where each petition has the same petitioner. The plain language of § 1153(h)(3) does not limit the section's benefits to that situation, and the Board erred first in finding the

section ambiguous and second in reading limitations into the text that restricted its benefits to a small sub-class of derivative beneficiaries.

Moreover, the language in (h)(3) does not that require that a beneficiary seeking to retain his original priority date *also* have a single petition automatically converted from one preference category to another. Rather, these two parts of (h)(3) can be read as independent benefits: (1) the automatic conversion of a petition where a petition can automatically move from one category to another, such as from 2A to 2B, and (2) where a new petition is filed because there is no automatic category for the beneficiary to fall under upon aging out, retention of the original priority date. Thus, leaving the "automatic conversion" portion of the statute aside, Petitioner can utilize the portion of (h)(3) that allows for retention of one's original priority date, without having to address whether the original I-140 petition automatically converted to the second preference category upon filing of the subsequent I-130 petition.

D. The Agency Does Not Dispute that If Ms. Wu Can Employ The 1988 Priority Date to Her 2006 Application, She Is Currently Eligible for Adjustment of Status If Her Case is Reopened.

As discussed above, *see supra* at 21, if Petitioner can employ the 1988 priority date from her father's approved I-140 petition on which she was a

derivative beneficiary, Petitioner is currently eligible to seek adjustment of status. The agency does not dispute this, as it is evident from the Department of State's Visa Bulletin that a visa number would be immediately available to Petitioner should she be able to use the 1988 priority date. Petitioner is not inadmissible on any other grounds. She was inspected and admitted upon her entry to the United States in 1984 on a B1/B2 visa. As an applicant with a current visa number who is not inadmissible on any other grounds, Petitioner is eligible to seek adjustment of status under 8 U.S.C. § 1255(i). Thus, if the Court rejects the Agency's erroneous interpretation of the relevant statutes, it should remand this matter for the Board to decide this case under the proper legal standard.

CONCLUSION

For the reasons discussed above, Petitioner respectfully asks that this Court: (1) reverse the decision of the BIA summarily affirming the immigration judge's decision denying her motion to reopen, and (2) find that she qualifies for adjustment of status under 8 U.S.C. § 1255(i) pursuant to the Child Status Protection Act.

Respectfully Submitted:

_/S/ CHARLES ROTH___________________

Charles Roth
Hena Mansori
NATIONAL IMMIGRANT JUSTICE CENTER
208 S. LaSalle St., Suite 1818
Chicago, IL 60604
tel. 312-660-1613
fax. 312-660-1505

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 10, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

John Beadle Holt
Luis Enrique Perez
U.S. Department of Justice, Civil Divison
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

Counsel for Respondent

/s/ Charles Roth

FED. R. APP WITH 5TH CIR. R. & IOPs

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/s Charles Roth

Attorney for: Petitioner

Dated: June 10, 2010