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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

TERISITA COSTELO, *et al.*, Plaintiffs, v. JANET NAPOLITANO, Secretary, Department of Homeland Security, *et al.*, Defendants.	No. SACV 08-00688 JVS(SHx) NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF GISELA WESTWATER Date: November 9, 2009 Time: 1:30 p.m. Courtroom: 10C Honorable James V. Selna

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Monday, November 9, 2009 at 1:30 p.m., or as soon thereafter as the matter may be heard, before the Honorable James V. Selna, United States District Judge, Courtroom 10C, 411 West Fourth Street, Room 1053, Santa Ana, California 92701-4516, Defendants, by and through their attorney, Gisela A. Westwater, will and hereby do move the Court to grant summary judgment in favor of Defendants.

This Motion is based on the following Memorandum of Points and Authorities, Declaration, attached Exhibits, and on such other and further arguments, documents, and grounds as may be advanced at, before, and after the hearing on this matter.

STATEMENT OF COMPLIANCE WITH LOCAL RULE 7-3

Defendants contacted opposing counsel's office on September 8, 2009 and spoke directly with counsel on September 11, 2009 regarding cross-motions for summary judgment.

Respectfully submitted,

Dated: October 1, 2009

s/ Gisela A. Westwater
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Trial Attorney
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

REGULATIONS

FEDERAL RULES OF CIVIL PROCEDURES

PUBLIC LAWS

MEMORANDUM OF POINTS AND AUTHORITIES

FACTUAL BACKGROUND

Plaintiff Teresita Costelo ("Costelo") is a lawful permanent resident ("LPR") of the United States. (Complaint, ¶ 19.) She immigrated to the United States as the beneficiary of a family-sponsored third-preference ("F3") petition filed by her mother in 1990. (Id.) Costelo's two daughters were listed as Costelo's derivative beneficiaries. (Id.) When an F3 visa number became available in 2004, Costelo's daughters were ineligible to immigrate with her because they had aged-out (i.e., turned 21 years old under the age formula contained in the Immigration and Nationality Act ("INA")). (Id.) After immigrating, Costelo filed family-sponsored second-preference ("F2B") petitions on behalf of her daughters on September 23, 2004. (Id.) Costelo requested that her F2B petitions be assigned the priority date from the F3 petition. (Id.)

Plaintiff Lorenzo Ong ("Ong") immigrated to the United States as the beneficiary of a family-sponsored fourth-preference ("F4") petition filed by his sister in 1981. (Id., ¶ 20.) Ong's daughter was listed as his derivative beneficiary. (Id.) By the time a F4 visa number became available in 2002, Ong's daughter was no longer eligible for derivative benefits. (Id.) On March 8, 2005, Ong filed an F2B petition on behalf of his daughter and requested that the F2B petition be assigned the same priority date the F4 petition. (Id.)

On July 16, 2009, the Court certified a class consisting of:

> Aliens who became lawful permanent residents as primary beneficiaries of third- and fourth preference visa petitions listing their children as derivative

> beneficiaries, and who subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters, for whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to § 203(h)(3).

(Doc. 74.)

LEGAL BACKGROUND

A. Family Preference Petitions Under the INA.

"Admission of an alien to this country is not a right but a privilege which is granted only upon such terms as the United States prescribes." Montgomery v. French, 299 F.2d 730, 734 (8th Cir. 1962). To enter and remain in the United States lawfully, Congress requires each alien to possess a valid visa conferring immigrant or non-immigrant status. 8 U.S.C. §§ 1182(a)(7)(A)&(B).

There are several different types of "immigrant visas." The family-sponsored immigrant visa categories - which are the type at issue in this case – require a United States citizen or LPR "petitioner" to file a Form I-130 with USCIS[1] in order to classify the intended "primary beneficiary" under one of the congressionally-created immigrant relative categories in the INA. 8 C.F.R. § 204.1(a)(1). There are various immigrant classifications for relatives of United States citizens and lawful permanent residents; however, there is no statutory category that permits a grandparent to petition directly for his or her grandchild or for an aunt or uncle to petition directly for a niece or nephew. See, generally, 8 U.S.C. § 1153(a)

[1] Although 8 U.S.C. § 1154(a)(1)(A)(i) provides for filing with the "Attorney General," the Homeland Security Act of 2002, Pub. L. No. 107-296 § 451(b), 116 Stat. 2135, 2196 (2002), transferred the authority over these matters to USCIS.

(listing familial relationships recognized by Congress for immigrant visas).

Immigrant visas are made available "to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed." 8 U.S.C. § 1153(e). The filing date of a petition constitutes the "priority date" for that petition and establishes the beneficiary's proverbial "place in line." 8 C.F.R. § 204.1(c).

The total number of family-sponsored immigrant visas per year is capped at 480,000. 8 U.S.C. § 1151(c)(1)(A)(i). Those classified as "immediate relatives" are not subject to numerical limits and do not have to wait for allocation of a visa number before they can immigrate. 8 U.S.C. § 1151(a)(1). The other family-based classifications, however, fall under four numerically limited "preference" categories. See 8 U.S.C. § 1153(a). Preference categories are subject to allocation worldwide; in other words, Congress has limited the number of visas that will be granted each year depending on the "priority" of the beneficiary's relationship to the petitioner and the beneficiary's country of origin. 8 U.S.C. §§ 1151(a)(1) and (c); see also Bolvito v. Mukasey, 527 F.3d 428, 429-32 (5th Cir. 2008) (explaining the visa petitioning process).

Because Congress has limited how many visas the Government may issue in any given year and to any given group, an alien may have to wait several years before a visa number will become available to him or her under the numerical allocation system. See Ogbolumani v. USCIS, 523 F. Supp. 2d 864, 869-70 (N.D. Ill. 2007). To determine whether an immigrant visa is immediately

available, one looks to the Department of State, Bureau of Consular Affairs Visa Bulletin. 8 C.F.R. § 245.1(g)(1).

Despite not having created a directly-petitionable category for "grandchildren" or "nieces and nephews" of United States citizens, Congress has historically allowed "children"[2] of aliens to "derive" immigration benefits from their parents in order to avoid separating "children" from parents. These "children" of primary beneficiaries are allowed to accompany or follow to join their parents under "the same status" and "order" so long as they maintain the required relationship with the primary beneficiary. 8 U.S.C. § 1153(d).[3] See 9 U.S. Dep't of State, Foreign Affairs Manual § 40.1 n. 7.1 (derivative interest in visa petition is valid only "as long as the alien following to join has the required relationship with the principal alien") (quoted in Ward v. Holder, No. 07-cv-443, 2009 WL 453390, *3 (M.D. Fla. 2009)). Nonetheless, derivative beneficiaries' interests in a petition are not the equivalent of "actual preferences." Santiago v. INS, 526 F.2d 488, 491 (9th Cir. 1975). For example, a derivative

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[2] "Child" is a legally operative term defined in the INA in pertinent part as "an unmarried person under twenty-one years of age." 8 U.S.C. § 1101(b)(1). For purposes of derivatives of F3 and F4 petitions, age is calculated under 8 U.S.C. § 1153(h)(1).

[3] 8 U.S.C. § 1153(d) provides:

> Treatment of family members. A spouse or child as defined in [8 U.S.C. § 1101(b)(1)(A), (B), (C), (D), or (E)] 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.

beneficiary may not immigrate before the primary beneficiary, and if the primary beneficiary of a visa petition loses eligibility for the visa, then the spouse and children who previously had derivative eligibility will lose it. Ward, 2009 WL 453390 at *3; Yuk-Ling Wu Jew v. Attorney General, 524 F. Supp. 258 (D.C. 1981); Matter of Khan, 14 I. & N. Dec. 122 (BIA 1972).

B. The Child Status Protection Act of 2002

Once an immigrant visa becomes available to an alien under the visa petition, the alien must then apply for the issuance of a travel visa or for adjustment of status. See Ogbolumani, 523 F. Supp. 2d at 869 (describing process for aliens once visa number becomes available). Under the INA, eligibility for the immigration benefit is determined on the day of admission to the United States or the date of adjudication of an application to adjust status. 8 U.S.C. § 1154(e) (alien cannot be admitted to United States if determined no longer eligible for classification at port of entry). Thus, an alien who had an immigrant visa available still had to maintain eligibility for that visa classification until the date he or she obtained LPR status. See Bae v. Immigration & Naturalization Service, 706 F.2d 866, 870 (8th Cir. 1983) (alien seeking adjustment of status as "unmarried son of LPR" ineligible for benefit when married while application was pending adjudication). It might take several months for the Department of State to issue a visa or for USCIS to adjudicate an application to adjust status. INS v. Miranda, 459 U.S. 14, 18, 103 S. Ct. 281, 74 L. Ed. 2d 12 (1982).

Due to backlogs in adjudication of adjustment applications, large numbers of aliens were aging-out of eligibility for

immigration benefits for which they had previously qualified. See Matter of Wang, 25 I. & N. Dec. 28, 36-37 (BIA 2009) (discussing congressional history). Congress recognized the inequity of an alien waiting years for a visa number to become available only to lose final entitlement due to agency delays in issuance of the visa (or adjudication of the adjustment of status application). Id. To alleviate these concerns, Congress enacted the Child Status Protection Act ("CSPA"), Pub. L. No. 107-208, 116 Stat. 927 (2002), codified at various sections of the INA. Id. The CSPA did not create new family preference categories (i.e., did not authorize grandparents to file petitions directly on behalf of grandchildren or aunts and uncles to file petitions directly on behalf of nieces and nephews). See 8 U.S.C. § 1153(h). The CSPA also did not alleviate the effects of numerical limitations. Ochoa-Amaya v. Gonzales, 479 F.3d 989, 994 (9th Cir. 2007). Rather, the CSPA provided relief by allowing certain aliens to exclude periods of administrative delay from their chronological age. See 8 U.S.C. § 1153(h)(1); Wang, 25 I. & N. Dec. at 31.

It is commonly understood that portions of Section 3 of the CSPA, codified at 8 U.S.C. § 1153(h)(1) and (2),[4] alleviate the

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[4] (1) *In general*

For the purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement [as a child] 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) of this section, the date on which an

effects of administrative delays by allowing the exclusion of those periods from the calculation of age for purposes of determining if an alien is a "child" under the INA. Wang, 25 I. & N. Dec. at 38. It is also commonly understood that 8 U.S.C. § 1153(h)(3)[5] provides authority for the automatic conversion of a petition filed to classify the "child" of an LPR as a derivative beneficiary of the LPR's spouse. Under § 1153(h)(3), this petition converts into a petition filed to classify the alien directly under 8 U.S.C. § 1153(a)(2)(B) without the petitioner needing to file a new petition. Reducindo v. Gonzales, No. 05-cv-451, 2006 U.S. Dist. LEXIS 28816, at *4 (M.D.

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immigrant visa number became available for the alien's parent), ...; reduced by (B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

(2) *Petitions described*

The petition described in this paragraph is –

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

[5] (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)[spouses/children of LPRs] and (d)[derivative beneficiaries] of this section, 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.

Fl. 2006) (derivative F2A petition that had automatically-converted under § 1153(h)(3) was being held in abeyance by USCIS pending F2B availability); Baruelo v. Comfort, No. 05-cv-6659, 2006 U.S. Dist. LEXIS 94309 at *28-29 (N.D. Ill. 2006) (recognizing that CSPA automatically converted F2A petition into F2B petition).

USCIS does not allow aged-out former derivative beneficiaries of other immigrant classifications to benefit from § 1153(h)(3). The only published guidance on this point supports USCIS' position. Matter of Wang, 25 I. & N. Dec. 28 (BIA 2009).

ARGUMENT

The question in this case is whether, under 8 U.S.C. § 1153(h)(3), aliens who lost their derivative entitlement to benefits under F3 and F4 petitions filed on behalf of their parents may transfer the priority date from the F3 or F4 petitions to F2B petitions subsequently filed by their parents.

I. LEGAL STANDARD FOR SUMMARY JUDGMENT.

Summary judgment is appropriate when 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 judgment as a matter of law." Fed. R. Civ. P. 56(c).

This Court's review of USCIS' assignment of a priority date to Plaintiffs' F2B petitions is governed by Section 706(2)(A) of the Administrative Procedure Act ("APA"), which provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). See Spencer Enters. v. United States, 345 F.3d 683, 693 (9th Cir. 2003) ("[A]n agency decision or finding of fact may be reversed if it is 'arbitrary, capricious, [or] an abuse of discretion,' or 'unsupported by substantial evidence.'"). Review under the arbitrary and capricious standard is narrow, and an agency's interpretation of an ambiguous statute is controlling so long as it is "reasonable." Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).

Accordingly, review under the APA is highly deferential and the agency's actions are presumed to be valid. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415, 91 S. Ct. 814, 28 L. Ed. 2d 136, (1971), abrogated on other grounds by Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977). The Court must affirm the agency's decision if the agency presents a rational basis for the action and if the action is within the agency's statutory authority. Motor Vehicle Manufacturers Ass'n v. State Farm Mutual, 463 U.S. 29, 42-43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE 8 U.S.C. § 1153(h)(3) DOES NOT AUTHORIZE THE TRANSFER OF A PRIORITY DATE FROM A TERMINATED DERIVATIVE INTEREST IN AN F3 OR F4 PETITION TO A SEPARATE AND UNRELATED F2B PETITION.

A. 8 U.S.C. § 1153(h)(3) IS AMBIGUOUS.

The first step in analyzing Plaintiffs' claim is to review the statute at issue to determine if "the statute is silent or ambiguous with respect to the specific issue." Chevron, 467 U.S. at 843, 467 U.S. at 843 (quoted in Ramos-Lopez v. Holder, 563

F.3d 855, 860 (9th Cir. 2009)). A quick review of 8 U.S.C. § 1153(h) reveals the internal ambiguity of this section of the CSPA. The language in 8 U.S.C. §§ 1153(h)(1) and (h)(3) is identical. Yet, determining that "(a)(2)(A) and (d)" is not self-explanatory, Congress added section § 1153(h)(2) to clarify the exact petitions that might be considered for relief under § 1153(h)(1). There is no corresponding paragraph indicating which petitions are eligible for relief under § 1153(h)(3). Therefore, 8 U.S.C. § 1153(h)(3) is ambiguous.

When applying the language of § 1153(h)(1) to the beneficiaries of F2A petitions and the derivative beneficiaries of all family, employment, and diversity petitions, the language of the statute operates without problem. For example, a United States citizen files an I-130 petition to classify her daughter, "Mae," under F3. USCIS takes two years to adjudicate the petition. Due to oversubscription in the F3 category, several more years pass before a visa becomes available. Mae's priority date becomes current when her son, "Tim," is twenty-two years old by normal calculations. Mae and Tim seek to obtain immigrant visas. Under § 1153(h)(1), Tim is issued a visa because: (1) he is the beneficiary of a visa petition filed "under (d) of this section" to classify his "parent under subsection (a), (b), or (c) of this section;" (2) he "sought to acquire" status within one year of a visa becoming available to Mae; and (3) under the age calculation, he is only twenty years old (twenty-two years old minus the two years that the petition was awaiting adjudication by USCIS). 8 U.S.C. § 1153(h). In the above scenario, every word in 8 U.S.C. § 1153(h)(1) is used, and none

is superfluous. The same basic analysis works smoothly for derivative beneficiaries of the other family-based categories.

However, in applying the terms of § 1153(h)(3) to derivative beneficiaries of all family-based petitions, the result is convoluted. The operative language of § 1153(h)(3) only makes sense in reference to petitions originally filed to classify an alien as the primary or derivative beneficiary of an F2A petition. For example, a lawful permanent resident files an F2A petition on behalf of his wife. Even though he could file a petition directly on behalf of his minor child, "Sue," he decides to save filing fees and instead lists Sue as a derivative of his wife. When Sue turns 21, she no longer qualifies as a derivative beneficiary. On that day, the "alien's petition" "automatically converts" to the "appropriate category" and "retains" the original priority date issued upon the receipt of the original (and only) petition. The appropriate category on that date is F2B. Thus, Sue moves seamlessly from one valid "appropriate category" to another valid "appropriate category."

When applied to the facts of Plaintiffs' cases, however, the result is less clear. As stated earlier, Costelo was the beneficiary of an F3 petition and Ong of an F4 petition. Although their daughters were listed as derivative beneficiaries on those F3/F4 petitions just like Sue in the example above, Cosetlo and Ong's daughters were not eligible for any other status when the F3/F4 petition was filed. Costelo's mother and Ong's sibling could not have filed a petition directly for Plaintiffs' daughters because the INA does not recognize a classification for grandchildren or nieces and nephews of United

States citizens. See Bolvito,527 F.3d at 434 (no classification for grandchildren). Thus, when Plaintiffs' daughters aged-out, their petitions, if eligible for consideration under § 1153(h)(3), would "automatically convert" to the only "appropriate category" - termination. Plaintiffs daughters "fell off the INA map," so to speak.

Plaintiffs' arguments that the clear language of the statute calls for the CSPA to apply to the F2B petition filed by Plaintiffs in 2004 and 2005 misses the mark. The petitions filed by Plaintiffs to classify their daughters under "(a)(2)(B)" were not with respect to alien children or derivative beneficiaries. See 8 U.S.C. § 1153(h)(3) (limiting provision to aliens determined over 21 years of age "for the purposes of subsections (a)(2)(A) and (d)"). Thus, the "plain language" of 8 U.S.C. § 1153(h)(3) defeats Plaintiffs' claim that their F2B petitions are eligible for consideration under this paragraph of the CSPA. The Court must conclude that the statute's meaning is ambiguous.

B. THE AGENCY'S INTERPRETATION OF 8 U.S.C. § 1153(h)(3) IS REASONABLE.

Having determined that the statute's meaning is ambiguous, the next step is to review the agency's interpretation of the statute to determine "whether the agency's answer is based on a permissible construction of the statute." INS v. Aguirre-Aguirre, 526 U.S. 415, 425, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999). The Court may "not overturn an agency decision at the second step unless it is arbitrary, capricious, or manifestly contrary to the statute." Ramos-Lopez v. Holder, 563 F.3d at 860 (internal citations omitted).

In this case, the agency's interpretation of the statute is found in Matter of Wang, 25 I. & N. Dec. 28 (2009).[6] The BIA's interpretation of 8 U.S.C. § 1153(h)(3) in Matter of Wang is reasonable. A correct interpretation of this statute can only be made by reviewing the provision in its full context, as was done by the BIA in Matter of Wang. See Gallard v. INS, 486 F.3d 1136, 1140 (9th Cir. 2007) (reading a statute with a view to its place in the overall statutory scheme also requires reading it in "historical context").

1. Factors Cited in Matter of Wang Establishing that BIA's Interpretation is Reasonable.

On June 16, 2009, the BIA issued a precedential opinion analyzing the CSPA's "automatic conversion" and "priority date retention" provision. See Matter of Wang, 25 I. & N. Dec. 28 (BIA Jun. 16, 2009). The facts of Wang are as follows: a United States citizen petitioned for her brother ("Wang") to be approved on a fourth-preference visa ("F4"), with his wife and children listed as derivative beneficiaries. Before a visa number became available to Wang, one of his daughters turned 21. A visa number subsequently became available to Wang as primary beneficiary, and he obtained legal permanent residency. Thereafter, Wang filed a separate petition on behalf of his unmarried adult daughter to classify her for an F2B visa. Wang argued that the priority date from the F4 petition filed by his sister should be applied to the F2B petition that he had filed and that the F2B petition should

[6] Published decisions of the Board of Immigration Appeals ("BIA") are accorded Chevron deference. Aguirre-Aguirre, 526 U.S. at 425.

"automatically convert" to an "appropriate category." The BIA rejected this interpretation of the CSPA.

The BIA began by noting that the CSPA does not expressly state which petitions qualify for automatic conversion and retention of priority dates. Id. at 33. In light of that ambiguity, the Board looked to the regulatory and statutory context in which Congress enacted the statute.

The BIA began from the premise that, in passing the CSPA, Congress would have intended its language usage to be consistent with the current immigration scheme and past practice, specifically past usage of the terms "automatic," "conversion," and "retention of priority date." Id. at 35. Under statute and regulation, the term "conversion" had consistently been used to mean that a visa petition (and hence the beneficiary's classification) could convert from one valid family-based visa category to another valid family-based visa category without the need for the petitioner to file a new visa petition on behalf of the beneficiary. Id. at 34-36. For example, under 8 C.F.R. § 205.1(a)(3)(i)(H), an F1 petition ("unmarried adult son or daughter of a United States citizen") would automatically convert to an F3 petition ("married son or daughter of a United States citizen") without the United States citizen parent being required to file a new petition. Prior to the passage of the CSPA, only one transfer from a valid classification to a subsequent valid classification required the filing of a new and separate petition: reclassification from F2A to F2B upon the alien turning 21. See Matter of Wang at 34-35. Instead, for this reclassification to take place, lawful permanent residents were

required to file new petitions when their children reached 21 years of age. 8 C.F.R. § 204.2(a)(4). The BIA found the similarities between the language used in 8 C.F.R. § 204.2(a)(4) ("In such case, the original priority date will be retained if the subsequent petition is filed by the same petitioner.") (emphasis added) and the language used in 8 U.S.C. § 1153(h)(3) ("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.") (emphasis added) to be more than coincidence. Matter of Wang at 34. This similarity suggests that § 1153(h)(3) was designed to bring the F2A conversions in line with conversions between the other classifications. Wang, 25 I. & N. Dec. at 34.

Similarly, the BIA noted that "retention" or revalidation of priority dates had historically been limited to visa petitions filed by the same family member.[7] Matter of Wang at 35; see also 8 C.F.R. 204.2(a)(4) (for reclassification from F2A to F2B, the petitioner had to be the same person).

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[7] Consider the following hypothetical: Alan naturalized in 2001 and immediately filed petitions on behalf of his parents and unmarried sister. As "immediate relatives" of a United States citizen, Alan's parents immigrated immediately. His sister, however, had to wait until a visa became available to her in the F4 category. In 2006, Alan's mother naturalized and filed an F1 petition on behalf of her daughter. In 2009, Alan's sister has about ten more years to wait for an F4 visa with a 2001 priority date and seven more years to wait for an F1 visa with a 2006 priority date. See September 2009 Visa Bulletin at Exhibit A. Had she been able to "transfer" the priority date from the F4 petition to the F1 petition, Alan's sister would only have to wait two more years for a visa. Id. Such a transfer, however, is not authorized because the petitioners are not the "same" and the petitions were not filed for "the same preference classification." 8 C.F.R. 204.2(h)(2).

The BIA next turned to legislative history. Id. at 36-38. Repeated discussion in the House of Representatives suggested an intent to provide some relief "without displacing others who have been waiting patiently in other visa categories." Id. at 37 (quoting 148 Cong. Rec. H4989 (statement of Rep. Jackson-Lee), 2002 WL 1610632, at *H4992; 147 Cong. Rec. H2901, 2001 WL 617985, at *H2902). Thus, the BIA concluded that, "[w]hile the CSPA was enacted to alleviate the consequences of administrative delays, there is no clear evidence that it was intended to address delays resulting from visa allocation issues, such as the long wait associated with priority dates." Matter of Wang at 38.

In light of the regulatory/statutory context and legislative history, the Board examined to which category the first Wang petition would have converted at the moment the derivative beneficiary aged-out. When that child reached 21 years old, there was no INA preference category for an adult niece of a United States citizen; hence there was no qualifying relationship supporting "automatic conversion" to another preference category. Matter of Wang at 35. Simply put, no "appropriate category" existed to which the petition could convert. Moreover, there was no basis for retaining the earlier priority date because a different petitioner - the father, not the aunt - had filed the F2B petition. Id. at 35.

Most importantly, the BIA reasoned that if Wang's F2B petition was accorded the earlier priority date, the former child beneficiary would "jump" to the front of the line, causing all the individuals behind her to fall further behind in the queue. Matter of Wang at 38. Finally, the BIA noted that the CSPA was

passed so that beneficiaries would not suffer due to governmental administrative delays. The Wangs, however, faced delay that was caused by the high demand for a finite number of visas, not any administrative delay. Id. at 38. The BIA concluded that, absent clear legislative intent to create open-ended grandfathering of priority dates for derivative beneficiaries in the context of a different relationship, to be used at any time, it would refuse to automatically convert the derivative classification to a [non-existent] family preference or find fault with the priority date USCIS had given to the second petition. Id. at 39.

The Board's decision makes clear that 8 U.S.C. § 1153(h)(3) applies only when a LPR files an F2A petition designating a child as a primary or derivative beneficiary. If the child turns 21 before a visa number becomes available, the F2A petition will automatically convert to an independent F2B petition with the original priority date. Matter of Wang, at 33-38. 8 U.S.C. § 1153(h)(3).

2. Other Factors Establishing that Matter of Wang is a Reasonable Interpretation.

In addition to the reasons articulated by the BIA in Matter of Wang, there are several other reasons why the BIA's interpretation of 8 U.S.C. § 1153(h)(3) is reasonable.

Under the INA and agency regulations, terminated petitions cannot be resurrected by subsequent petitions - regardless of whether they were filed by the same petitioner. 8 C.F.R. § 204.2(h)(2) (cannot reaffirm earlier petition by filing a new one if the earlier one has been revoked or terminated). The CSPA did nothing to change this. See Alonso-Varona v. Mukasey, 319

Fed. Appx. 502, 504 (9th Cir. 2009) (where earlier petition had been revoked by marriage but alien had subsequently divorced, nothing in the CSPA would permit him to reclaim the priority date from the revoked 1992 petition). In addition, subsequent petitions filed by a different petitioner lack the privity necessary to claim the earlier priority date. See 8 C.F.R. § 204.2(h)(2) (only the same petitioner, filing for the same beneficiary in the same category, can reaffirm earlier unrevoked petition).

Also, despite the INA allowing "automatic" conversions between many classifications, Congress never provided for "delayed" conversions where an alien was "temporarily" ineligible for classification under the INA. Even in the case of employment-based visas, a later visa petition is not entitled to an earlier visa petition's priority date where the earlier petition has been terminated or revoked. 8 C.F.R. 204.5(e) (revoked employment petition will not confer a priority date for transfer to other employment petitions and "priority date is not transferable to another alien"). See Bender's Immigration Bulletin, 11-20 Bender's Immigra. Bull. 2 (Oct. 15, 2006) ("When the change of relationship or status of the immediate succeeding relationship is not one that will support a petition, no new preference is established and the priority date is lost, even if the later status change would support a petition."). Compare this with the treatment of the son of a United States citizen. He may marry and divorce without losing his priority date because there would always be an "appropriate category" for him under the INA.

Additionally, Courts have been clear that, in passing the CSPA, Congress was focused on reuniting the families of current U.S. citizens and Legal Permanent Residents - not the families of intending immigrants. Ochoa-Amaya v. Gonzales, 479 F.3d 989, 991 (9th Cir. 2007) ("The laudable purpose of this provision is to prevent children of United States citizens from 'aging-out'".); Chen v. Rice, 2008 U.S. Dist. LEXIS 57052, *28 (E.D. Penn. 2008) ("The CSPA was passed to expedite the unification of qualifying derivative family members of United States citizens and legal permanent residents, which had been delayed by processing backlogs.") In this vein, the CSPA protects "young immigrants losing opportunities, to which they were entitled, because of administrative delays." Padash v. INS, 358 F.3d 1161, 1174 (9th Cir. 2004). Neither purpose is furthered by Plaintiffs' interpretation of the statute: Plaintiffs were not U.S. Citizens or LPRs at the time that F3/F4 immigrant petitions were filed, and their daughters did not age-out due to administrative delays.

C. PLAINTIFFS' POSITION IS NOT REASONABLE.

Plaintiffs' interpretation of § 1153(h)(3) does not comport with a literal or contextual reading of the CSPA. To accept Plaintiffs' position, the Court would have to ignore the operative terms of § 1153(h)(3). But under basic tenets of statutory interpretation, a statute should not be construed to render words or phrases mere surplusage. See United States v. Wenner, 351 F.3d 969, 975 (9th Cir. 2003).

Plaintiffs argue that aged-out derivative beneficiaries of F3 and F4 petitions can transfer the F3/F4 priority dates to separate F2B petitions. Since the wait for an F2B visa is always

shorter than for an F3 or F4 visa, as soon as the F2B petition is filed, a visa number would be immediately available under Plaintiffs' position. If it had been Congress' intent that aged-out derivatives be able to immigrate immediately after their parents, Congress could have dispensed altogether with the complicated formula of § 1153(h)(1) and the conversion process of 8 U.S.C. § 1153(h)(3). Instead, it could have simply frozen the age of all derivatives to the date of filing, as it did in other sections of the CSPA. See 8 U.S.C. § 1151(f) (freezing age of child of United States citizen to date petition filed); 8 U.S.C. § 1158(b)(3)(B) (children will not age-out of derivative classification under asylum petitions). The Ninth Circuit has already declined to interpret the CSPA in such a way as to render its formulas superfluous. See Ochoa-Amaya, 479 F.3d at 993.

Plaintiffs' bid to affix the F3 and F4 priority dates to separate F2B petitions also ignores the CSPA's mandate that the "alien's petition shall automatically be converted to the appropriate category." 8 U.S.C. § 1153(h)(3). The F2B petitions do not need to "convert" because they were originally filed in the appropriate category - F2B. Plaintiffs cannot have "retention" without "conversion".

Plaintiffs also ignore the purposes behind "derivative" status and the CSPA. Plaintiffs were never separated from their daughters while they were children - the purpose behind "accompanying or following to join" status. And now that their daughters are grown women, Plaintiffs are in the same position as all other LPR parents wanting to reunite with adult sons and daughters.

D. EXAMPLES UNDER COMPETING INTERPRETATIONS.

To illustrate the inequity in Plaintiffs' position, consider the following hypothetical:

In 2000, "Tania" immigrated as the beneficiary of an immediate relative petition. Her son was not eligible to immigrate with her because immediate relatives may not have derivative beneficiaries. 8 C.F.R. § 204.2(a)(4). Tania filed an F2B petition in 2001 for her unmarried son. He is still waiting for a visa number to become available.

Meanwhile, "Mimi" was the beneficiary of a Form I-130 filed in 1995. When Mimi gained lawful resident status in 2009, however, her daughter no longer qualified as a "child." In 2009, Mimi filed an F2B petition for her daughter. If the 1995 priority date were applied to the 2009 petition, a visa number would be immediately available to her daughter.

Mimi's daughter and Tania's son are both grown adults. Both are entitled to F2B classification. Both parents love their offspring and want them to live close by. Yet, Tania became a lawful permanent resident nine years before Mimi and filed her F2B petition eight years before Mimi filed hers.

Clearly, Congress did not intend Mimi's daughter to resurrect the earlier priority date because, as a child, she was never really "in line." But for her "child" status, Mimi's daughter did not fit into any of Congress' priority categories back in 1995. Mimi's apron strings were cut by adulthood. Upon filing of the second petition, Mimi's daughter stepped into an entirely different line with different rules. The Government

should consider Tania's and Mimi's petitions on a first come, first served basis in compliance with 8 U.S.C. § 1153(e).

III. ANY CLAIMS RELATED TO THE PROMULGATION OF REGULATIONS MUST FAIL.

In their filings (Complaint, ¶¶ 4, 16, 83) and in this Court's order certifying a class (Doc. 74), reference is made to Defendants' alleged failure to promulgate regulations implementing the CSPA. Plaintiffs have failed, however, to identify any requirement that Defendants promulgate such regulations, that Plaintiffs have standing to enforce a requirement if it existed, or that the issuance of Matter of Wang does not render any such claim moot. Additionally, Plaintiffs failed to request any specific relief related to the alleged failure to promulgate regulations. See Complaint, Section X, Prayer for Relief (omitting any reference to Defendants' "alleged failure to promulgate regulations" and requesting no order that Defendants' promulgate any such regulations). Accordingly, the Court should dismiss any claims for relief pertaining to the promulgation of regulations.

Alternatively, even if the Court finds that Plaintiffs' complaint raised a claim for relief relating to Defendants' alleged failure to promulgate regulations, Plaintiffs lack standing to raise these claims because (1) Plaintiffs have not been harmed by any such failure; (2) Defendants had no such duty; (3) no private right of action exists; and (4) the issue is moot. Additionally, any request for relief should be dismissed for failure to state a claim because the remedy for such violation –

a Court order requiring the promulgation of the regulations – would not redress any of Plaintiffs' alleged injuries.

In order to have standing to bring suit, a plaintiff has the burden of establishing: "(1) an injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly traceable to the challenged action of the defendant; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 46, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976); Central Delta Water Agency v. United States, 306 F.3d 938, 947 (9th Cir. 2002). Where a plaintiff alleges that agency action has been unlawfully withheld or unreasonably delayed pursuant to the APA, the appropriate remedy is for the court to compel the action in question. See 5 U.S.C. § 706(1); Fernandez v. Brock, 840 F.2d 622, 626 (9th Cir. 1988) (the injury must be fairly traceable to or caused by the Secretary's failure to promulgate regulations and must be likely to be redressed by compelling the promulgation of regulations) (citing Allen v. Wright, Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315 , 82 L. Ed. 2d 556 (1984)). Moreover, the satisfaction of such a remedy may remove an issue from the "case or controversy" requirement of Article III of the Constitution, and result in the dismissal of the claim as moot. See Thomas v. Anchorage Equal Rights Commission, 220 F.3d 1124 (9th Cir. 2000); Cooney v. Edwards, 971 F.2d 345, 346 (9th Cir. 1992).

Here, the BIA's issuance of Matter of Wang on June 16, 2009 satisfied the remedy that a plaintiff challenging the delayed promulgation of regulations may seek. Thus, there remains no remediable case or controversy stemming from USCIS's allegedly unlawful delay in the promulgation of an implementing regulation, and the Court should dismiss any related claim that it deems to have been raised in Plaintiffs' complaint.

Furthermore, Plaintiffs have failed to establish that Defendants had a duty to promulgate any implementing regulation. The Supreme Court has noted that "the only agency action that can be compelled under the APA is action legally required. This limitation appears in [5 U.S.C. §] 706(1)'s authorization for courts to 'compel agency action unlawfully withheld.'" Norton v. So. Utah Wilderness Alliance, 542 U.S. 55, 63, 124 S. Ct. 2373; 159 L. Ed. 2d 137 (2004) (emphasis in the original). The Court reasoned further that the APA simply extended the traditional practice, prior to its passage, of achieving judicial review through a writ of mandamus and that the mandamus remedy was normally confined to enforcement of "a specific, unequivocal command." Id. (internal quotations and citations omitted). Plaintiffs have cited no "unequivocal command" that USCIS promulgate regulations implementing 8 U.S.C. § 1153(h)(3).

Finally, Plaintiffs have failed to establish that a private right of action exists authorizing them to enforce a requirement to promulgate regulations. Private rights of action to enforce alleged violations of federal statutes must be created by Congress. See Alexander v. Sandoval, 532 U.S. 275, 287, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). Absent an express or implied

statutory intent to create a private right to enforce a statute and an accompanying remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." Alexander, 532 U.S. at 286-87. Not only have Plaintiffs failed to establish a private right of action, they have failed to establish a "duty" to promulgate regulations and that Matter of Wang has not satisfied any general requirement to provide guidance that might exist.

IV. PLAINTIFFS' CLAIMS MUST FAIL.

Nothing in the CSPA extends its benefits to F2B petitions. Thus, no authority required Defendants to assign a priority date to the F2B petitions different than their 2004 and 2005 filing dates. The CSPA does not authorize automatic conversion of Plaintiffs' daughters' derivative interests in the F3 and F4 petitions upon their turning 21. Their daughters were not eligible for any classification at that time and the CSPA did not create a new classification. As a result, Plaintiffs have failed to identify a discrete agency action that Defendants were required to take or that was "unlawfully withheld." No relief, by writ of mandamus or declaratory judgment, is warranted under the facts of this case.

CONCLUSION

The Defendants respectfully request this court grant Defendants' motion and enter summary judgment for the Defendants.

DATED: October 1, 2009

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CERTIFICATE OF SERVICE

Case No. SACV 09-06919 JVS(SHx)

I hereby certify that on October 1, 2009, a copy of the foregoing "NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT" was filed electronically using the Court's electronic filing system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

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