UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEIMEI LI, DUO CEN, Plaintiffs, v. DANIEL M. RENAUD, Director, Vermont Service Center, U.S. Citizenship And Immigration Services, et al., Defendants	)))))))))	Civil Action No: 09-3776 08Civ. 7770 (VM)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Margaret W. Wong
Margaret W. Wong & Assoc Co., LPA
Attorney for Plaintiffs
3150 Chester Ave.
Cleveland, OH 44114
(216) 566-9908
(216) 566-1125 Fax

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PRELIMINARY STATEMENT

Plaintiffs, Feimei Li and Duo Cen, submit this Opposition to Defendants' Motion to Dismiss. This Court has subject matter jurisdiction and Plaintiffs have stated claims that entitle them to the relief sought. In support of the Motion, Plaintiffs will rely on the Complaint and exhibits attached thereto as well as the arguments and attachments to the instant Memorandum.

The issue in the instant case is whether United States Citizenship and Immigration Services ("USCIS") failed to accord Plaintiffs with the appropriate priority date for their I-130 petition. As will be set forth herein, Plaintiffs contend that USCIS failed to assign the correct priority date under the Child Status Protection Act ("CSPA"). The correct priority date is the date when the I-130 petition was filed on behalf of Feimei Li on June 6, 1994. Plaintiff Cen was a derivative on the I-130 filing.

In the instant case, the plain language of the statute dictates that Plaintiffs are entitled to the original priority date of June 6, 1994. The Board's decision in Matter of Wang, 25 I&N Dec. 28 (BIA 2009) is not entitled to deference. The statute at issue is not ambiguous. The Board narrowly construed the provisions at issue. The Board's interpretation is contradicted by the plain language, structure, history, and purpose of the Section 3 of the Child Status Protection Act ("CSPA"). Plaintiffs will fully set forth their position herein.

STATEMENT OF FACTS

The facts in the instant case are not disputed. The issue is the priority date to be accorded to the I-130 petition filed in 2008.

Plaintiff Feimei Li is a citizen of the People's Republic of China. Feimei Li was born on August 15, 1952. She obtained her permanent resident card on March 18, 2005. (Exhibit B) Plaintiff Li received her green card through the approved I-130 filed on her behalf by her father on June 6, 1994. (Exhibit F) Plaintiff Cen was a derivative beneficiary on that petition but aged-out prior to the priority date becoming current.

Plaintiff Feimei Li is the Petitioner for her son, Plaintiff Duo Cen. (Exhibit C) Plaintiff Duo Cen was born on September 11, 1979. He currently resides in Guangzhou, China. (Exhibit D).

Plaintiff Feimei Li filed an I-130 Petition for Alien Relative on May 1, 2008, requesting a priority date of June 6, 1994, which was the priority date of the I-130 petition filed on behalf of Feimei Li by her father, Yong Guan Li. (Exhibit E). A priority date of June 6, 1994 would enable her son to immediately be eligible for an immigrant visa. The I-130 was approved on August 7, 2008. (Exhibit A) However, the priority date that CIS assigned was April 25, 2008. The impact of CIS' decision is that Plaintiff Cen will have to wait several years to join her family in the United States.

LEGAL ARGUMENT

Plaintiffs oppose Defendants' Motion to Dismiss. This Court has subject-matter jurisdiction over this action and Plaintiffs have set forth claims for which relief can be granted.

Plaintiffs are requesting that this Court issue a decision finding that USCIS' interpretation of CSPA is improper and compelling USCIS to issue a June 6, 1994 priority date. This is purely a legal question involving statutory interpretation. USCIS' decision contradicts the plain language of the statute. It is not entitled to deference. Additionally, the Board's decision in Matter of Wang, 25 I&N Dec. 28 (BIA 2009), which addresses essentially the same issue involved herein, violates the plain language of the statute and is not entitled to deference. Furthermore, Board's decision is unreasonable.

A. The Child Status Protection Act

The Child Status Protection Act, Pub. L. 107-208 (Aug. 6, 2002) was enacted on August 6, 2002. The purpose of the Act was to protect children who aged-out during the long process of applying for lawful permanent residence. INA § 203(h)(1) sets forth a formula for determining whether a person qualifies as a "child" under the Immigration and Nationality Act. If the individual is considered a child, he or she would be eligible to either adjust status or come to the United States as an immigrant under a petition filed on behalf of one of the parents. Under INA § 203(h)(1), the child's age is adjusted by subtracting the amount of time USCIS takes to adjudicate the visa petition from the age of the child on the date he or she becomes eligible to adjust status. If the adjusted age is under 21, that child has not aged-out and is eligible to immigrate with the parent.

INA § 203(h)(3) addresses the retention of a priority date for a person that is considered over the age of 21 after performing the calculation set forth in INA § 203(h)(1). It is undisputed that the beneficiary in the instant case is over 21 for purposes of CSPA. Section 203(h)(3) states:

> "(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."

Subsection (a)(2)(A) refers to INA § 203(a)(2)(A) which provides the statutory authority to issue visas to sons and daughters of lawful permanent residents. INA § 203(a)(2)(A) provides:

> "(a) Preference Allocation for Family-Sponsored Immigrants. – Aliens subject to the worldwide level specified in section 201(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."

The second section referenced in INA § 203(h) is INA § 203(d). Subsection (d) provides the statutory authority to issue visas to derivative beneficiaries (spouses and children) to immigrate with the principal beneficiary. This section provides as follows:

> "Treatment of family members –
>
> A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 101(b)(1) shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, 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."

Thus, INA § 203(d) status that spouses and children of principal beneficiaries of family, employment, and diversity lottery visas are entitled to permanent residence in the same category as the principal.

The issue in the instant case is whether an aged-out derivative beneficiary of an F-2B preference category may utilize the automatic conversion and priority date retention provisions of INA § 203(h)(1). Plaintiffs contend that under the plain language of INA § 203(h)(3), once the alien is determined to be over 21 under (h)(1), the alien's petition shall "be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition."

B. The Board's decision in Matter of Wang.

On June 16, 2009, the Board issued a published decision addressing the provision of CSPA at issue under similar facts. Matter of Wang, 25 I&N Dec. 28 (BIA 2009). In its decision, the Board first discusses whether INA § 203(h) is applicable where the beneficiary did not seek to acquire lawful permanent resident status within one year. Id. at 33. However, the Board did not address this question in light of its holding that the automatic conversion provision set forth in INA § 203(h)(3) is not applicable. Id.

With respect to the automatic conversion provision, the Board found that this would apply only where the petitioner remained the same on both petitions. The Board limited the provision to only a select group of derivative children, which are those of a second preference spouse beneficiary. Thus, under the Board's decision, Plaintiffs would not be entitled to the earlier priority date.

The Board's decision is consistent with the position that USCIS has taken in these cases. Plaintiffs believe that the Board's decision is not entitled to deference and will address the decision in detail herein. The decision contradicts the plain language of the statute. Furthermore, even if the statute could be said to be ambiguous, the Board's decision in Wang is unreasonable.

Plaintiffs would point out that a timely motion to reconsider has been filed in the Wang case. It is currently pending with the Board.

C. USCIS' interpretation of CSPA ignores the plain meaning of the language in the statute, and in effect, rewrites the subsection as if 203(d) were not present in the subsection.

The plain language of the statute at issue clearly supports Plaintiffs' position as to the assignment of the priority date. An Agency's interpretation of a statute is not entitled to deference where the traditional tools of statutory construction reveal Congress' intent. See Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

In the instant case, USCIS erroneously construed the provisions at issue, and in effect, interpreted the statute as if the phrase relating to 203(d) was not even present in the subsection. The interpretation by USCIS effectively ignores a portion of the subsection, divides the subsection so as to provide no weight to the group relating to 203(d), and rewrites the subsection as if 203(d) were not part of the subsection. This interpretation was followed by the Board in Wang. The Agency's interpretation is contradicted by the plain language, structure, history, and purpose of the Section 3 of the Child Status Protection Act.

As set forth by the Ninth Circuit Court of Appeals, the provisions of CSPA should be read broadly. Padash v. INS, 358 F.3d 1161, 1168-74 (9th Cir. 2004). "The legislative objective reflects Congress' intent that the Act be construed so as to provide expansive relief to children of United States citizens and permanent residents." Id. CSPA "was intended to address the often harsh and arbitrary effects of the age out provisions under the previously existing statute." Id. at 1173. Congress stated that the purpose of the Child Status Protection Act was to "address [] the predicament of these aliens, who through no fault of their own, lose the opportunity to obtain [a] . . . visa." H.R. Rep. No. 107-45, *2, reprinted in 2002 U.S.C.C.A.N., at 641.

When interpreting a statute, the Agency must ascertain the intent of Congress by giving effect to its legislative will. Hernandez v. Ashcroft, 345 F.3d 824, 838 (9th Cir. 2003). In analyzing a statute, the first step is to look at the plain meaning of the statute. Additionally, the general canon of statutory construction is that "a rule intended to extend benefits should be interpreted and applied in an ameliorative fashion." Padasah, 358 F.3d at 1173 *quoting* Hernandez, 345 F.3d at 840.

D. A canon of statutory construction is to provide the same phrase within a statute consistent meaning throughout the statute.

The plain language of the statute at issue supports the position of Plaintiffs. Plaintiff Cen is no longer considered a "child" for purposes of CSPA. Cen had aged-out by the time his mother's immigrant visa was approved.

The next step is to look at INA § 203(h)(3). This section specifically applies to all derivative beneficiaries who age out under paragraph (1) and not, as Defendants argue, solely to beneficiaries of INA § 203(a)(2)(A). The structure of the subsection, specifically to include both

"(a)(2)(A) and (d)" clearly indicates Congress' intent to provide the mandatory conversion and automatic retention of priority date. Defendants overlook the inclusion of INA § 203(d), without an adequate explanation as to why those who fall within INA § 203(d) are somehow excluded in the interpretation for one subsection, while recognized for the other subsection, directly opposite of canons of statutory construction.[1]

The phrase "for purposes of subsection (a)(2)(A) and (d)," is used in both subsections (1) and (3). If a phrase is used in different subsections of a statute, it is a well-established canon of statutory construction that Congress intends to give a phrase the same meaning throughout the statute. United States v. Various Slot Machines on Guam, 658 F.2d 697, 703, n. 11 (9th Cir. 1981). In the instant case, the Agency violates this rule when it correctly applies subsection (1) to all derivative beneficiaries under INA § 203(d) but then limits the application of subsection (3) to only derivative beneficiaries of INA § 203(a)(2)(A). The Agency improperly imposes a limitation on subsection (3) that does not exist. See Schneider v. Chertoff, 450 F.3d 944, 956 (9th Cir. 2006)(it is impermissible for an Agency to impose a new requirement that is not intended by Congress). Had Congress intended to limit subsection (3) to derivative beneficiaries of INA § 203(a)(2)(A) only, it would have specified this restriction. In other circumstances, Congress has set forth clear limitations. See e.g. INA § 201(b)(1)(A)(section limited to certain categories of special immigrants); INA § 203(d) (section limited to certain definitions of the term "child"); INA § 201(b)(2)(A)(ii)(section limited to individuals "described in the second sentence of § 201(b)(2)(A)(i)."

Defendants fail to adequately explain how its interpretation of INA § 203(h)(3) would be consistent with the plain language of the remainder of the statute. The Board's decision in Wang

[1] The Board's decision in Wang overlooks the inclusion of INA § 203(d).

also fails to analyze how its interpretation is consistent with the remainder of the statute. INA § 203(h)(2)(B) makes clear that "with respect to an alien child who is a derivative beneficiary under subsection (d)," all of INA § 203(h)("this paragraph") applies to any "petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c)." All of INA § 203(h) applies to any petition filed for an alien child of the primary beneficiary under family-based, employment-based, or diversity petitions. There is no distinction in INA § 203(h)(2)(B) between derivative beneficiaries of family second preference petitions or any other preference. As set forth above, INA § 203(h)(3) specifically references INA § 203(d).

INA § 203(h)(2) describes petitions in "this paragraph" and provides no differentiation between INA § 203(h)(1) and (h)(3). In essence, Defendants' approach to statutory construction would add the qualifying phrase "in the preceding paragraph" to INA § 203(h)(2). Since Congress did not include any limiting language in § 203(h)(2), Defendants' approach is without merit. INA § 203(h)(3) clearly applies to all petitions filed under INA § 203(d).

When reviewing the statute, it is unambiguous. When a derivative child ages-out, "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." INA § 203(h)(3). Since the petitions subject to automatic conversion include any "petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c)," and aged-out child, who is a derivative beneficiary of the visa petition of his parent, can reunite with their family more quickly by utilizing their parent's earlier priority date. See INA § 203(h)(2). This interpretation is consistent with the unambiguous language of the statute.

E. Automatic conversions operate in immigration law in cases where the petitioner does not remain the same.

In Wang, the Board overlooks the many other sections of immigration law permitting conversion and retention of a priority date where the petitioner is not the same. Defendants' decision suffers from the same problem.

One example is contained in 8 C.F.R. § 204.5(e). The regulation 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."

The regulation allows an employer to petition for a person in the EB-1, EB-2, or EB-3 categories. If the person changes employment after the I-140 is approved, another employer may sponsor the person in the same or a different category. Once the second I-140 is approved, the person can adjust by retaining the original priority date of the initial petition. For example, a person who receives an I-140 approval in the EB-3 category from employer/petitioner number 1 can change employment and receive an approved I-140 in the EB-2 category from employer/petitioner number 2, and still retain the original priority date from employer/petitioner number 1's petition. He or she can adjust status in the EB-2 category using the initial priority date of the EB-3 I-140 approval which was filed by a different petitioner but on behalf of the same beneficiary.

The Patriot Act provides another example where Congress provided for retention of a priority date for use in a subsequent petition by a different petitioner. Section 421(c) of the

Patriot Act, P.L. 107-56, 115 Stat. 272 (2001) provides that where a family-sponsored visa petition was revoked or terminated due to specified terrorist activity, the beneficiary could file a new "self-petition" while retaining the priority date of the family members earlier petition.

Additionally, a non-citizen physician working in a medically underserved area who changes jobs may retain the priority date of the prior employer's petition for use with the new employer's petition. 8 C.F.R. § 204.12(f)(1). Another regulation allows transfer of priority date of petition filed by an abusive spouse or parent to a new petition. See 8 C.F.R. § 204.2(h)(2).

USCIS regulations permit individuals to change jobs, preference categories, and petitioners while retaining the original priority date. The automatic conversion clause in CSPA is not the only law that allows a person to retain the priority date of a previous petition where the new petition is filed by a different petitioner. The Board's decision in Wang is significantly flawed as it fails to consider the other sections where retention of a priority date is permitted despite the fact that the second petition involves a new petitioner. The interpretation of the Board is inconsistent with the statutory and regulatory scheme, and incorrectly concludes Congress' intent for automatic conversion only applies for petitions filed by same petitioners.

F. It is incorrect to state that Plaintiff Cen would be jumping in line ahead of those waiting for a visa number to become available.

Defendants take the position of the Board in Wang that it would be unfair to allow a person in Mr. Cen's position to jump ahead of others who are waiting for visa numbers to become available. This misstates the effect of the proper interpretation of INA § 203(h)(3). Defendants' argument is incorrect and also conflicts with the plain language of the statute and Congressional intent. Mr. Cen has already been waiting since 1994. He is not jumping in line

in front of others who waited for a longer time. He is trying to save his place in line and avoid having to go to the back of another long line. See e.g. Baruelo v. Comfort, 2006 U.S.Dist. LEXIS 94309, pages 10-11 (N.D. Ill. Dec. 29, 2006)("This [203(h)(3)] means that when a child beneficiary of a visa application turns twenty-one even after factoring in the CSPA's ameliorative age calculation, she does not end up 'at the end of a long waiting list,' and does not have to file a new petition, but rather keeps the original filing date even after being moved to a lower preference category."). Unfortunately Mr. Cen aged-out while waiting for the immigrant petition to be approved. Although he cannot take advantage of INA § 203(h)(1), he falls under INA§ 203(h)(3) and his petition is automatically converted and "shall" be given the 1994 priority date. Just as Congress includes INA § 203(d) in INA§ 203(h)(3) to refer specifically to derivative beneficiaries, Congress also uses the word "shall" intentionally to indicate that there is no discretion for losing the priority date already obtained for the family. The intent of Congress in passing CSPA was for family unification. Plaintiffs' interpretation is consistent with that intent.

G. The legislative history cited by the Board in Wang does not speak to automatic conversion.

Defendants argue that legislative history supports its position. The Board also discusses legislative history in Wang to support its interpretation of CSPA. However, there is no legislative history of the automatic conversion clause. The discussion of legislative history in Wang is taken from the 2001 House Report and from individual members of the House of Representatives. However, the automatic conversion clause was added in 2002. There is no further legislative history cited by the Board or Defendants to evidence any intent concerning the automatic conversion clause. It is therefore even more appropriate to rest with the clear meaning of the language, as there is no ambiguity to the inclusion of 203(d) in INA§ 203(h)(3), and there

is no legislative history pertaining to the automatic conversion clause upon which to oppose or contradict the plain language written directly in the statute.

It is clear that the Board in Wang cited inapplicable legislative history and selectively cited to the Congressional record in order to support its narrow view of CSPA. This was erroneous.

H. The Board in Wang fails to explain why it believes Congress really only intended to create a statutory benefit for a group who previously had an automatic conversion

In examining the applicability of the statute, the Board addresses the regulations at 8 C.F.R. § 204.2(a)(4), which have been in effect since 1987. Wang 25 I&N Dec. at 34. The Board notes that the retention provision of 8 C.F.R. § 204.2(a)(4) is limited to a lawful permanent resident's son or daughter who was previously eligible as a beneficiary under a second preference spousal petition filed by that same lawful permanent resident. Id. Thus, the petitioner must remain the same. Id.

Relying on 8 C.F.R. § 204.2(a)(4), the Board found that the petitioner must remain the same for the automatic conversion provision to apply. The regulation was in existence at the time that INA § 203(h) was enacted. There is no reason why Congress would have addressed only this situation where a regulation was already in place that provided relief for those derivative children of a second preference spouse beneficiary.

I. In Wang, the Board rejected Matter of Garcia without explanation or analysis, despite its applicability to the case.

In examining the plain language of the statute at issue, it is clear that it does not require the same petitioner. In its decision, the Board briefly addresses its prior unpublished decision in Garcia, which supports the position of Plaintiffs regarding the applicability of INA § 203(h)(3).

Matter of Garcia, 2006 WL 2183654 (BIA June 16, 2006). (Exhibit G) The Board rejects the decision but fails to explain why the analysis in Garcia was in error.

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

In Garcia, the Board addresses whether respondent was eligible to adjust status under INA § 203(h). Garcia first argued that she should be found to be a "child" for purposes of CSPA. The IJ had concluded that Garcia was no longer her mother's "child" for purposes of INA § 203(h)(1) because she did not file the application for adjustment of status within one year after the visa number became available in connection with her mother's visa petition. The Board did not reach the issue of whether Ms. Garcia sought to acquire permanent resident status within one year of a visa number being available. This is because the Board determined that Ms. Garcia would have failed to maintain the status of her mother's child, even if she had applied for adjustment of status within one year after the visa number became available to her mother. The visa number became available when Ms. Garcia was twenty-two years old and the visa petition was approved on the day it was filed. Thus, she was twenty-two for CSPA purposes and no longer could be considered a "child."

In light of the determination that Ms. Garcia was not presently entitled to a visa number as a derivative beneficiary on her mother's F-4 petition, the Board next turned to the question of whether a visa was immediately available to Garcia by operation of the automatic conversion provision at INA § 203(h)(3). The Board held that "where classified as a derivative beneficiary of the original petition, the 'appropriate category' for purposes of section 203(h)(3) is that which applies to the 'aged-out' derivative vis-à-vis the principal beneficiary of the original petition." Thus, the "appropriate category" to which Garcia's petition was converted was the 2B category and respondent retained the 1983 priority date that applied to the original petition. Specifically, the Board held that a derivative beneficiary of the F4 immigrant petition retained the priority date of the initial 1983 petition under INA§ 203(h)(3), without concern to the fact that the petitioner (her mother) was different than the initial immigrant petitioner (her aunt). The same holds true in the instant case.

The Board's prior unpublished decision in Garcia is consistent with the plain language and intent of the statute. INA § 203(h)(3) applies to the petition at issue in the instant case. The automatic conversion provision requires that the petition be given a priority date of June 6, 1994, without concern to whether the petitioner remains the same.

J. USCIS' interpretation of CSPA as applied to Plaintiffs contradicts the plain language of the statute and is not entitled to deference. Plaintiffs have set forth claims for which relief can be granted.

For the reasons set forth herein, the Board should find that INA § 203(h)(3) is applicable and that the appropriate priority date is June 6, 1994. This is consistent with the plain language and intent of CSPA. The Agency's interpretation is contradicted by the plain language, structure, history, and purpose of the Section 3 of the Child Status Protection Act. The focus

should be on the child's relationship with the original primary beneficiary not the original petitioner and derivative beneficiary.

The Agency's decision, which is consistent with the Board's decision in Wang, is inconsistent with the plain language of the statute. Additionally, for the reasons set forth herein, even if the statute can be said to be ambiguous, the Agency's interpretation is not entitled to Chevron deference as it is unreasonable. In its precedent decision, the Board overlooked many important points as addressed herein and relied on irrelevant legislative history. Additionally, for the reasons set forth herein, the decisions of the Central District of California in Zhang v. Napolitano, F.Supp.2d ___, 2009 W.L. 3347345 (C.D. Cal. 2009) and Amershi v. Napolitano, No. 6"09-cv-106, 2009 WL 5173492, at *2 (M.D. Fl. Dec. 9, 2009) are incorrect as the statute is unambiguous and Wang is not entitled to Chevron deference.

In the instant case, the appropriate priority date is the date the original petition was filed. Under INA § 203(h)(3), USCIS' decision is incorrect. Under the plain terms of INA § 203(h)(3), Plaintiff Cen has automatically converted from the derivative beneficiary of a family-based fourth preference petition, to the beneficiary of a family-based second preference petition. He also retains the original priority date of June 6, 1994 associated with the fourth preference petition filed on her mother's behalf. The Defendants' refusal to accord the proper priority dates to Plaintiffs' pending immigrant visa petition is thus arbitrary and capricious, an abuse of discretion, and contrary to INA § 203(h)(3).

Plaintiffs are entitled to relief as a matter of law. There are no disputed facts. The Court has jurisdiction over the action under 28 U.S.C. § 1331; 28 U.S.C. § 2201; 5 U.S.C. § 555 and §

701 et seq.; and 28 U.S.C. § 1361. The Agency's decision is arbitrary and capricious and in violation of the law.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully oppose Defendants' Motion to Dismiss. Plaintiffs have set forth a claim for which relief is warranted.

Respectfully submitted,

/s/ Margaret W. Wong
Margaret Wong
Attorney for Petitioners
3150 Chester Ave.
Cleveland, Ohio 44114
(216) 566-9908
(216) 566-1125 (fax)

CERTIFICATE OF SERVICE

I certify that on the 11th day of March, 2010, the foregoing Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss was filed electronically via CM/ECF. Notice of this filing will be served via the Court's electronic CM/ECF service and one copy will be sent to:

Preet Bharara
David Bober
Attorney for Defendants
86 Chambers St., 3rd Fl.
New York, NY 10007

via regular United States mail.

Respectfully submitted,

/s/ Margaret W. Wong
Margaret Wong
Attorney for Petitioners
3150 Chester Ave.
Cleveland, Ohio 44114
(216) 566-9908
(216) 566-1125 (fax)