10-2560

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEIMEI LI,
DUO CEN
Plaintiffs-Appellants,

v.

DANIEL M. RENAUD, Director, Vermont Service Center, U.S. Citizenship and Immigration Services
ALEJANDRO MAYORKAS, Director, U.S. Citizenship and Immigration Services;
ERIC HOLDER, Attorney General of the United States
JANET NAPOLITANO, Secretary, Department of Homeland Security;

Defendants-Appellees.

Appeal of the Decision of the United States District Court for the Eastern District of New York in Case No. 1:08-cv-07770

APPELLANTS' REPLY BRIEF

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I. An aged-out derivative beneficiary of a second preference family-based visa petition can utilize the automatic conversion and priority date retention provisions of the Child Status Protection Act set forth at 8 U.S.C. § 1153(h)(3)

A. Introduction

The Child Status Protection Act, Pub. L. 107-208 (Aug. 6, 2002) was enacted on August 6, 2002. The purpose of the Act is to protect children who aged-out during the long process of applying for lawful permanent residence due to administrative processing delays, oversubscription of immigrant visa categories, or other inequities in the immigrant visa process. Congress drafted 8 U.S.C. § 1153(h)(3) to protect children from aging out of their own immigrant visa category through no fault of their own. Congress formulated a clear statutory scheme to accomplish this. As set forth at length in Plaintiffs' brief and herein, if the child's CSPA calculation remains over 21, he or she is protected by 8 U.S.C. § 1153(h)(3).

B. The plain and unambiguous language of 8 U.S.C. 1153 makes clear that an aged-out derivative beneficiary of a second preference family-sponsored preference category can utilize the automatic conversion and priority date retention provisions set forth at 8 U.S.C. § 1153(h)(3).

Defendants erroneously contend that 8 U.S.C. § 1153(h) is an ambiguous statute. However, a review of the plain language of the statute establishes that it is

not ambiguous.

Defendants rely heavily on the Board's decision in Matter of Wang, 25 I&N Dec. 28 (BIA 2009) to support their position that the statute is ambiguous. Defendant's Brief at 26-31.[1] Defendants take this position despite the fact that Wang contains no analysis of the plain language of § 1153(h) and little more than a conclusory statement that § 1153(h) is ambiguous. Matter of Wang, 25 I&N Dec. at 33. The Board's only analysis of this issue is as follows:

> "Unlike §§ 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 § 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 § 203(h)(3)."

Id.

Section § 1153(h)(3) must be read in connection with the other provisions of § 1153(h). It is clear that (h)(3) provides benefits to all beneficiaries who have been found to have aged-out under (h)(1). This includes visa applicants such as Plaintiff.

Defendants argue that § 1153(h)(3) is ambiguous because it does not specify which petitions it intends to cover. Defendant's brief at 26-27. Plaintiffs and amici

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1 Defendants argue throughout their brief that deference should be given to the Board's decision in Wang, which Plaintiffs' dispute. However, even if such deference should be given, this Court would be restricted to considering only the reasoning provided by the Agency in its decision and

have rebutted this contention by previously demonstrating how the three subsections of § 1153(h) are interrelated, and how § 1153(h)(3) must be read to apply to the same universe of petitions to which subsections (h)(1) and (h)(2) apply. Plaintiffs' brief at 12-14, 16-23; Amici Brief at 4-13)

The first step is to perform the age calculation set forth in § 1153(h)(1). Subsection(h)(3) only applies after performing the age calculation in (h)(1) where it is determined that the person is over 21 years of age for CSPA purposes.

The next step is to look at 8 U.S.C. § 1153(h)(3). This section specifically applies to all derivative beneficiaries who age out under paragraph (1) and not solely to beneficiaries of § 1153(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. While Defendants' argue that it is not clear what petitions (h)(3) applies to, it is clear that § 1153(h)(3)'s application is completely contingent upon first performing § 1153(h)(1)'s calculation. Thus, it must operate on the same petitions. Section (h)(3) incorporates subsection (h)(2)'s "definition of petitions described" through both its contingent relationship with § 1153(h)(1) and the use of the language "(a)(2)(A) and (d)" which directly reflects the language of § 1153(h)(2). If the

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not alternate reasons in support of the Agency's decision proposed by Defendants. See e.g.

child's age is over 21, his or her original petition should automatically convert to the appropriate category and he or she should retain the priority date from the original petition.

Defendants further argue that the use of the different terms "paragraph" and "subsection" in 8 U.S.C. § 1153(h) supports its position that the statute is ambiguous. Defendants' brief at 28-30. The different uses of "subsection" and "paragraph" is not relevant to the analysis when looking at the plain language and operation of the statute. The analysis set forth by Plaintiffs is consistent with the language, purpose, and operation of the statute. Section 1153(h)(3) directly and implicitly incorporates the entirety of (h)(1) and (h)(2). The statute could not operate if not by reference to the two prior paragraphs in (h)(1) and (2). Thus, Defendants' argument ignores the language and operation of the statute.

Defendants also argue that the statute is ambiguous as to operation of the automatic conversion clause. Defendants' brief at 30-31. Defendants set forth an example of a "straightforward" operation of the statute when applied to F-2A petitions and derivatives. However, the operation of the law is not unclear where the beneficiary of the original petition is a derivative.

When a derivative child ages-out, "the alien's petition shall automatically be

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Bowen v. Georgetown University Hospital, 488 U.S. 204-212-13 (1988).

converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." Section § 1153(h)(3). This section applies to an alien who is determined to be over 21 in § 1153(h)(1) for purposes of petitions filed under § 1153(a)(2)(A) and (d). Since the petitions subject to automatic conversion include any "petition filed under section 1154 for classification of the alien's parent under subsection (a), (b), or (c)," an 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 8 U.S.C. § 1153(h)(2). This interpretation is consistent with the unambiguous language of the statute.

C. Congressional intent supports Plaintiffs' position

Defendants' position is also based on the erroneous argument that Congress did not intend that CSPA benefit someone in Plaintiffs' position. Defendants' brief at 39-43. Plaintiff contends that the Senate made its position clear.2

Senator Diane Feinstein introduced the Child Status Protection Act in the Senate on April 2, 2001. See 147 Cong. Rec. S 3275 (April 2, 2001). This was entitled "A bill to amend the Immigration and Nationality Act to provide for

2 Plaintiffs contend that analyzing legislative history is irrelevant because the statutory language makes Congress' intent clear. However, if this Court determines that the language of the statute does not evince Congress' intent, then consideration of legislative intent is relevant to a step one

continued classification of certain alien as children for purposes of that Act in cases where the aliens age-out while awaiting immigration processing, and for some other purposes, to the Committee on the Judiciary." Id. In discussing the importance of the legislation, Senator Feinstein stated:

> "INS backlogs have carried a very heavy price: children who are the beneficiaries of petitions and applications are 'aging out' of eligibility for their visas, even though they were fully eligible at the time their applications were filed. This has occurred because some immigration benefits are only available to the 'child' of a United States citizen or lawful permanent resident, and the Immigration and Nationality Act defines a "child" as an unmarried person under the age of 21.
>
> As a consequence, a family whose child's application for admission to the United States has been pending for years may be forced to leave that child behind either because the INS was unable to adjudicate the application before the child's 21st birthday, **or because growing immigration backlogs in the immigration visa category caused the visa to be unavailable before the child reached his 21st birthday.** As a result, the child loses the right to admission to admission to the United States. This is what is [sic.] commonly known as aging-out."

Id. (emphasis added) Feinstein's remarks also state that the legislation she introduced applies to family-based, employment-based, and diversity petitions. Id. During her remarks, Senator Feinstein gives the example of children who aged-out "although the INS approved the petition." Id. She states:

> "The legislation I have introduced today would provide a child, whose timely filed application for a family-based, employment-based, or diversity visa was

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Chevron analysis.

> submitted before the child reached his or her 21st birthday, the opportunity to remain eligible for that visa until the visa becomes available."

Id.

Senator Feinstein's remarks made it clear that CSPA was meant to address more than simply administrative delays. Congress also intended 8 U.S.C. § 1153(h) to address and remedy the situation where a child ages-out waiting for a visa number to become current. Her statements reaffirm what is evident from the existence of § 1153(h)(3) – Congress' concern that all children who age-out through no fault of their own have some remedy that will, at a minimum, preserve their place in the line they have been waiting in for years.

Importantly, it was this Senate version of the bill, not the House version, which added § 1153(h). Thus, Senator Feinstein's remarks, made at the time of the bills' introduction, are important in determining Congressional intent. They show that Congress was concerned with more than just administrative delays.

In Matter of Wang, the Board discusses legislative history but does not address Senator Feinstein's remarks. Matter of Wang, 25 I&N Dec. at 36-38. Her remarks are critical to determining the legislative history of CSPA. There was no objective to Senator Feinstein's introduction. Contrary to Defendants' contention, the Congressional record shows an intent to benefit family-based, employment-based and diversity categories as well as providing relief for those who age out due

to oversubscription and administrative delays.

The Child Status Protection Act is a watershed immigration law. By passing CSPA, Congress meant to change immigration law in a significant way rather than just codify existing regulations. CSPA provides a comprehensive remedy for than thousands of families torn apart during the typically lengthy immigration process. Defendants' restrictive interpretation of CSPA and specifically § 1153(h)(3) stands in direct conflict with the legislative history and purpose of CSPA.

D. The Board did not construe the terms "retention" and "conversion" consistently with other family-based provisions of CSPA and immigration regulations

The terms "retention" and "conversion" are not defined in the Immigration and Nationality Act. Historically, Congress and USCIS have provided for conversions and retentions without the use of this specific terminology. In the absence of statutory definition, the terms "retention" and "automatic conversion" as used in the CSPA should be given their ordinary meaning. Cleveland v. City of L.A., 420 F.3d 981, 989 (9th Cir. 2005)(when construing a word, we generally construe the term in accordance with its "ordinary, contemporary, common meaning).

According to the Merriam-Webster Dictionary, which can be accessed on-

line, to "retain" means "to keep in possession or use." See http://www.merriamwebster.com/dictionary/retain (accessed March 7, 2011). The word "convert means "to convert from one for or function to another." See http://www.merriam-webster.com/dictionary/convert (accessed March 7, 2011). Plaintiffs' interpretation of 8 U.S.C. § 1153(h) is consistent with the plain meaning and historical use of the terms conversion and retention. The terms are not restricted in their meaning as argued by Defendants or the BIA.

The Board concluded in Wang that conversion has been consistently used to mean that a visa petition converts from one visa category to another and that the beneficiary falls into a new category without the need of filing an additional petition. Thus, the Board contends that the concept of retention of priority dates has always been limited to visa petitions filed by the same family member. This is incorrect.

The Board's reasoning is flawed. This is demonstrated by numerous provisions involving "retention" and "conversion" which do not meet the Board's restrictive interpretation. Defendants counter that the examples are not persuasive because many do not use the terms conversion or retention. However, under the Defendants' reasoning, the examples employed by the Board in Wang should also be disregarded. The Board cited only three provisions in its analysis of the meaning

of the relevant terms in § 1153(h)(3)3. None use the terms "conversion" and "retention" in conjunction.

Each of the retention provisions cited by Plaintiffs and amici in their opening briefs demonstrate that retention of a priority date occurs when beneficiaries of a visa petition are able to keep a priority date in their possession for later use. Plaintiffs' brief at 25-27; Amici Brief at 19-22. The fact that different terminology may be used in the sections cited by Plaintiffs is of no significance. Plaintiffs' examples use words such as "transfer" (8 C.F.R. § 204.2(h)(2) and "maintain" (USA Patriot Act § 421(c)). However, these provisions are consistent with the plain language of the terms "conversion" and "retention." The examples cited by Plaintiffs establish that retention of a priority date occurs even where the petitioner changes, contrary to the Board's and Defendants' contentions.

It is also improper to hold that conversion may never involve the filing of a new petition. Under 8 C.F.R. § 204.2(i)(1)(iv), an abused spouse can file a self-petition and retain an earlier priority date. Under this regulation, the petitioner changes (from the abusive spouse to the self-petitioner) and the beneficiary must file a new petition. Thus, it directly contradicts the Board's rules set forth in its analysis of the case. This regulation is actually a sub-provision of a regulation cited

3 The Board cites 8 C.F.R. § 204.2(a)(4), 8 C.F.R. § 204.2(i), and INA § 201(f).

by the Board in Wang entitled "AUTOMATIC CONVERSION OF PREFERENCE CLASSIFICATION." A provision falling within the very regulation cited by the Board is clearly relevant yet the Board's conclusion contradicts it. This is another reason that Wang is entitled to no deference.

E. 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 argue 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 8 U.S.C. § 1153(h). This argument 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. Instead, 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.").

Defendants see no problem with F-2A beneficiaries maintaining their original priority date when they turn 21 for CSPA purposes. However, Defendants contend that it is line-jumping when others seek to retain the priority date of the original petition. This argument is inconsistent.

Additionally, the Board cites 8 C.FR. § 204.2(a)(4) and 8 C.F.R. § 204.2(i) to justify its restrictive interpretation of the law. These provisions allow beneficiaries to change categories while retaining their original priority date. This would be what the Board and Defendants consider line-jumping.

There is absolutely no merit to Defendants position that Plaintiffs should not be permitted to jump in line. The rationale is inaccurate and not supported by the Board's examples when addressing the issue.

F. The District Court opinions cited by Defendants should not be followed by the Court.

In their brief, Defendants argue that District Court decisions on the issue raised herein show that the Agency's interpretation is reasonable. Defendant's brief at 46-47. However, these non-binding decisions are unpersuasive and should be

given no weight by the Court. These decisions are logically unsound, incomplete, and deferential to Wang without independent analysis. As set forth in Plaintiffs' briefs, the plain language of the statute supports Plaintiffs' reading of the statute. Furthermore, even if the Court gets to step two of the Chevron analysis, deference is not owed to the Agency's decision.

CONCLUSION

In the instant case, the appropriate priority date is the date the original petition was filed. Deference is not owed to the Agency's interpretation. Under 8 U.S.C. § 1153(h)(3), USCIS' decision is incorrect. Under the plain terms of 8 U.S.C. § 1153(h)(3), Plaintiff Cen has automatically converted from the derivative beneficiary of a family-based second 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 second preference petition filed on her mother's behalf. The Defendants' refusal to accord the proper priority dates to Plaintiffs' pending immigrant visa petition is inconsistent with the plain language of the statute, arbitrary and capricious, an abuse of discretion, and contrary to 8 U.S.C. § 1153(h)(3).

Plaintiffs are entitled to relief as a matter of law. The grant of the Motion to Dismiss was improper since Plaintiffs set forth a claim for which relief could be granted.

Respectfully Submitted,

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I certify that on the 7th day of March 2011, I sent two copies of the foregoing reply brief via regular United States Mail and via ecf to:

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