U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services

Notice of Certification

TO: Jyoti R. PATEL (Petitioner)
Scott Bratton, Esq. of Margaret Wong & Assoc. Co., LPA
3150 Chester Ave.
Cleveland, OH 44114
(216) 566-9908

File number: A89-726-558

I-130 Receipt Number: WAC 06-121-52497

IN THE MATTER OF:
Petition For Alien Relative, Form I-130
Jyoti R. PATEL – Petitioner
Vishalkumar R. PATEL – Beneficiary

Date: June 12, 2008

The following action has been taken in this case:

1. ☒ This case has been certified for review to the Board of Immigration Appeals (Board). Within 10 days after receipt of this notice, you may submit to this office a brief or written statement for the Board to consider. If you desire oral argument before the Board, you must send a prompt request by letter to the Board at 5107 Leesburg Pike, Suite 2000, Falls Church, Virginia 22041. (703) 605-1007.

2. ☐ In accordance with 8 CFR 245.13(m)(2) or 8CFR 245.15(r)(3), this case has been certified for review to the Immigration Court located at ______________________________ so that an immigration judge may conduct a hearing to determine whether this decision should be made final. Within 10 days after receipt of this notice, you may submit to this office a brief or written statement for the Court to consider. Regardless of whether you submit a brief, you will be notified by the Immigration Court of the date, time and location of the hearing.

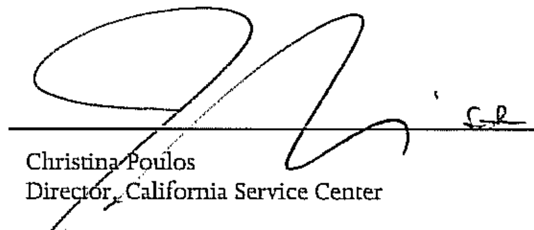
3. ☐ This case has been certified for review to:

   A. ☐ The Administrative Appeals Office (AAO), U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, N.W., Rm. 3000, Washington, DC 20529.

   B. ☐ The following Service official:

   Located at:

Within 30 days of this notice, you may submit **to the office where your case was sent**, a brief or written statement. Any request for oral argument before the AAO must be made within the 30-day period. If you want, you may waive the 30-day period by writing to the office where your case was sent.



Christina Poulos
Director, California Service Center

I-797, Notice of Action

RECEIPT NUMBER		CASE TYPE
WAC-06-121-52497		I130 IMMIGRANT PETITION FOR RELATIVE, FIANCE(E), OR ORPHAN
RECEIPT DATE	PRIORITY DATE	PETITIONER
March 9, 2006	February 24, 2006	A097 112 529 PATEL, JYOTI R.
NOTICE DATE	PAGE	BENEFICIARY
June 4, 2008	1 of 1	PATEL, VISHALKUMAR R.

MARGARET W. WONG
MARGARET W WONG & ASSOC LPA
RE: JYOTI R PATEL
MWW CENTER 3150 CHESTER AVE
CLEVELAND OH 44114

Notice Type: Approval Notice
Section: Unmarried child 21/older of permanent resident, 203(a)(2)(B) INA

The above petition has been approved. We have sent the original visa petition to the **Department of State National Visa Center (NVC), 32 Rochester Avenue, Portsmouth, NH 03801-2909.** NVC processes all approved immigrant visa petitions that need consular action. It also determines which consular post is the appropriate consulate to complete visa processing. NVC will then forward the approved petition to that consulate.

The NVC will contact the person for whom you are petitioning(beneficiary) concerning further immigrant visa processing steps.

If you have any questions about visa issuance, please contact the NVC directly. However, please allow at least 90 days before calling the NVC if your beneficiary has not received correspondence from the NVC. The telephone number of the NVC is **(603) 334-0700**.

The approval of this visa petition does not in itself grant any immigration status and does not guarantee that the alien beneficiary will subsequently be found to be eligible for a visa, for admission to the United States, or for an extension, change, or adjustment of status.

THIS FORM IS NOT A VISA NOR MAY IT BE USED IN PLACE OF A VISA.

Please see the additional information on the back. You will be notified separately about any other cases you filed.
U.S. CITIZENSHIP & IMMIGRATION SVC
CALIFORNIA SERVICE CENTER
P. O. BOX 30111
LAGUNA NIGUEL CA 92607-0111
Customer Service Telephone: (800) 375-5283

U.S. Department of Homeland Security
P. O. Box 10130
Laguna Niguel, CA 92607-1013

U.S. Citizenship and Immigration Services

Date: JUN 0 5 2008

Jyoti Patel
730 Brookside Dr.
Columbus, OH 43209

Refer to file no.: WAC 06-121-52497

On February 24, 2006 the petitioner filed Form I-130, Petition for Alien Relative, on behalf of Vishalkumar Patel. The petitioner is requesting that the I-130 be granted the priority date previously accorded her employment based I-140 petition, (LIN 03-192-51819) which was filed on June 3, 2003. The I-140 had been accorded a priority date of January 16, 1998 based upon the receipt of an Application for Labor Certification (Form ETA-750).

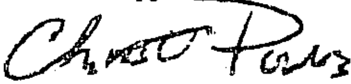
The Director of the California Service Center, U.S. Citizenship and Immigration Services (USCIS) will approve the I-130 petition but will not assign the requested priority date. Title 8 C.F.R. § 204.1(c) provides that the filing date of a petition shall be the date it is properly filed... and shall constitute the priority date. Because the I-130 was properly filed on February 24, 2006, it will be accorded a February 24, 2006 priority date.

Title 8 C.F.R. 204.2(a)(4) provides for the retention of a priority date, but only for a derivative child on a second preference relative visa petition. The petitioner of such second preference petition must be the person filing the new petition in behalf of the son/daughter in order to keep the earlier priority date. In this matter, the petitioner has only submitted evidence of an employment based visa petition, not a preexisting second preference relative visa petition. Moreover, the petitioner for the I-140 is not the same petitioner in the instant I-130 petition. Accordingly, 8 CFR 204.2(a)(4) does not apply to this case.

The petitioner argues that section 203(h)(3) of the Child Status Protection Act ("CSPA") provides that the instant I-130 shall retain the original priority date of the earlier I-140. However, USCIS does not agree with this proposed application of the CSPA. In fact, CSPA section 203(h)(3) provides no basis for allowing the aged-out derivative beneficiary of the earlier employment based adjustment to capture the priority date there and apply it to the instant I-130.

The approved I-130 petition will receive a priority date of February 24, 2006, which is the date that this Service received the petition.

The California Service Center will certify this decision to the BIA for resolution of the question of which priority date should be granted. The Service will retain this file until the board renders its decision on the certified appeal.



Christina Poulos
Director

cc: Margaret W. Wong

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Chief Counsel

24000 Avila Road, Room 2117
Laguna Niguel, CA 92677
June 12, 2008

Memorandum for Certification

Pursuant to Title 8, Code of Federal Regulations ("C.F.R.") § 1003.1(c), the Director of the California Service Center, United States Citizenship and Immigration Services (CIS), hereby submits to the Board of Immigration Appeals ("BIA"), her decision dated March 25, 2008. Jurisdiction by certification is proper since this decision arises under 8 C.F.R. § 1003.1(b)(5) and the decision relates to a petition filed in accordance with Immigration and Nationality Act § 204.

Executive Summary

CIS concludes that the Petition for Alien Relative (Form I-130) filed on behalf of Vishalkumar Patel in 2006 should not be able to retain/capture the visa "priority date" accorded to a Petition for Alien Worker previously filed in 2003 on behalf of his mother, Jyoti Patel. CIS reaches this conclusion because there is no provision of law supporting retention of the earlier priority date and that even when considering § 203(h) of the Child Status Protection Act ("CSPA"), only second preference (family-based) beneficiaries may retain earlier priority dates, not aged-out derivative beneficiaries of employment based visa petitions. In support of her argument, she cites to a single unpublished BIA case supporting her position to the contrary. *See In re: Maria T. Garcia*, 2006 WL 2183654 (BIA 2006 unpublished). Additionally, while not cited by Ms. Patel, CIS has become aware of three unpublished decision, each reaching a different conclusion. See *In re: (A88 124 902, Name Redacted),*[1] April 18, 2008 (where dicta indicates that the BIA disagrees with CIS's assessment of the law, denying on other grounds), See *In re: Elizabeth Francisca Garcia*, 2007 WL 2463913 (BIA 2007 unpublished)(initially denying the retention of priority date, but reconsidering the matter on account of *In re: Maria T. Garcia*), but Cf. *In re: (A79 638 092, Name Redacted),*[2] (BIA September 7, 2007) ("section 203(h)(3) of the Immigration and Nationality Act does not permit the respondent to retain the priority date from his father's immediate relative petition...").

As this brief sets forth, the CIS interpretation of CSPA § 203(h)(3) is both an accurate and reasonable interpretation of the statute. In effort to alleviate sporadic federal litigation on this nuanced immigration issue and to provide both briefing and an opportunity to the BIA to clarify its interpretation of the application of CSPA § 203(h)(3), CIS submits by way of certification, the decision of the Director of the California Service Center.

[1] Westlaw citation unavailable, redacted copy attached
[2] Westlaw citation unavailable, redacted copy attached

Statement of Facts

1. On January 16, 1998, Vimco Corporation ("Vimco"), doing business as Capital Motel ("Capital") filed an Application for Alien Employment Certification ("ETA-750") on behalf of Ms. Jyoti Patel ("Plaintiff"). A "Final Determination" (certification approval) of this application for employment certification was issued on August 14, 2000.

2. On June 2, 2003, Vimco filed an Immigrant Petition for Alien Worker ("I-140") on behalf of Plaintiff. This I-140 was accorded a priority date of January 16, 1998 based upon the filing date of the ETA-750. The I-140 was ultimately approved on November 19, 2003.

3. The Department of State Visa Bulletin for June of 2003 listed as current and immediately available, all employment visa categories, including Plaintiff's Third Preference employment based classification.

4. On June 2, 2003, Plaintiff filed an Application to Register Permanent Resident or Adjust Status ("I-485"). This I-485 listed Vishal Patel ("Vishalkumar") in "Part 3," section "B" and further indicated that Vishalkumar would apply for status with Plaintiff Jyoti.

5. On the date of filing, the Department of State Visa Bulletin ("Visa Bulletin") indicates that the employment based third preference visa immigrant was available.

6. On November 10, 2005, Vishalkumar turned 21 years of age.

7. Plaintiff's I-485 was approved on January 12, 2006.

8. Since Vishalkumar was over 21-years of age at the moment of approval, he was not able to benefit from derivative status to his mother's application, because he no longer satisfied the definition of "child" for the purposes of the Immigration and Nationality Act.

9. Plaintiffs have not challenged the determination that Vishalkumar cannot qualify for an immigrant visa as a derivative beneficiary.

10. On February 24, 2006, Plaintiff filed a Petition for Alien Relative ("I-130") on behalf of Vishalkumar as the unmarried son or daughter of a lawful permanent resident.

11. On June 4, 2008, CIS approved the I-130 filed by Plaintiff on behalf of Vishalkumar. CIS accorded the I-130 a priority date based upon the filing date of the petition, or February 24, 2006.

12. For the unmarried son or daughter (21 years of age or older) of a lawful permanent resident from India, the Department of State Visa Bulletin ("Visa Bulletin") for June 2008 indicates a visa priority date of August 1, 1999.

Legal Framework Governing the Immigrant Visa Petition Priority Date

INA § 203(b) – Preference Allocation for Employment Based Immigrants. Aliens subject to the worldwide level specified in section 201(d) for employment-based immigrants in a fiscal year shall be allotted visas as follows: (3) SKILLED WORKERS, PROFESSIONALS, AND OTHER WORKERS.— (A) IN GENERAL.—Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2): (i) SKILLED WORKERS.—Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

INA § 203(d) 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), 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.

INA § 203(h), CSPA § 203(h) – RULES FOR DETERMINING WHETHER CERTAIN ALIENS ARE CHILDREN- (3) [I]f the age of the alien is determined... to be 21 years of age or older for the purposes of subsection (a)(2)(A) and (d), the alien's petition shall automatically convert to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

Title 22 C.F.R. § 42.32(c)(2) Entitlement to Derivative Status. Pursuant to INA § 203(d), and whether or not named in the petition, the child or spouse of an employment-based third preference immigrant, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

Title 22 C.F.R. § 42.68(a) Preliminary determination of visa eligibility. If a principal applicant proposes to precede the family to the United States, the consular officer may arrange for an informal examination of the other members of the principal applicant's family in order to determine whether there exists at that time any mental, physical, or other ground of ineligibility on their part to receive a visa.

Title 22 C.F.R. § 42.68(b) When family member ineligible. In the event the consular officer finds that any member of such family would be ineligible to receive an immigrant visa, the principal applicant shall be informed and required to acknowledge receipt of this information in writing.

Title 8 C.F.R. § 204.1(c) – Filing date. The filing date of a petition shall be the date it is properly filed under paragraph (d) of this section and shall constitute the priority date.

Title 8 C.F.R. § 204.2(g)(4) – Derivative beneficiaries. A spouse or child accompanying or following to join a principal alien beneficiary under this section may be accorded the same preference and priority date as the principal alien without the necessity of a separate petition.

Title 8 C.F.R. § 204.2(h) – Validity of approved petitions. Unless terminated… the approval of a petition to classify an alien as a preference immigrant… shall remain valid for the duration of the relationship to the petitioner and of the petitioner's status as established in the petition.

Title 8 C.F.R. § 204.2(a)(4) – Derivative beneficiaries. (Provides that)… in the case of a child accompanying or following to join a principal alien under § 203(a)(2) of the Act may be included in the principal alien's second preference visa petition… the child will be accorded second preference classification and the same priority date as the principal alien. However, if the child reaches the age of 21 prior to the issuance of the visa to the primary alien parent, a separate petition will be required. In such case, the original priority date will be retained if the subsequent petition is filed by the same petitioner. *Such retention of priority date will be accorded only to a son or daughter* *__previously eligible__* *as a derivative beneficiary under a second preference spousal petition.* (emphasis supplied)

Analysis

On June 2, 2003, Vimco filed an I-140 on behalf of Plaintiff. Concurrently, Plaintiff filed her I-485 and supporting applications, which listed Vishalkumar as a derivative beneficiary. The I-140 was approved on November 19, 2003. Although Vishalkumar was still under twenty-one years of age when the I-140 was approved, Plaintiff failed to file an I-824 on his behalf within one-year of the approval of her I-140.[3] [4]

Seeking a second mechanism by which to assist her son, Plaintiff asserts that the I-130 she filed on behalf of Vishalkumar after her adjustment on January 12, 2006, is entitled to capture the January 16, 1998 priority date of her ETA-750 pursuant to CSPA § 203(h)(3). The section states:

> *[I]f the age of the alien is determined... to be 21 years of age or older for the purposes of subsection (a)(2)(A) and (d), the alien's petition shall automatically convert to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.*

The plain language of CSPA § 203(h)(3) requires several inquiries: First, the adjudicator must ascertain whether the alien beneficiary is over twenty-one years of age to determine if CSPA is even implicated. Second, the adjudicator must note what preference category applied to the alien beneficiary before aging out. Third, the adjudicator must determine what category exists at the

[3] INA § 203(d) – if at the time of Plaintiff's adjustment, Vishalkumar qualified as a child pursuant to INA § 101(b), he would, "be entitled to the same status… if accompanying or following to join."

[4] Department of State Guidance, Child Status Protection Act: ALDAC #2, Ref 02 State 163054, 123775 – in cases involving a derivative seeking to follow to join a principal who adjusted in the U.S., the derivative can benefit from the CSPA if the principal filed a Form I-824 for the beneficiary within one year of a visa becoming available (i.e., within one year of the case becoming current or petition approval, whichever is later).

moment the alien turns twenty-one years of age, which may give life to the language of "automatically convert to the appropriate category." Finally, after determining the "appropriate category" the adjudicator must observe and apply the original priority date which had been granted upon the initial receipt (filing) of the original petition.[5]

Addressing these inquiries in turn, first, Vishalkumar was determined to be over twenty-one years of age at the time he sought to immigrate on or about April 25, 2007.[6] Although he turned twenty-one on November 10, 2005, the I-140 through which he sought derivative status had been filed over two years earlier on June 2, 2003. Accordingly, the provisions of CSPA *may* apply.

Second, the Plaintiff's I-140 was approved on November 19, 2003, as a third-preference employment visa classification pursuant to INA § 203(b)(3)(A)(iii). Accordingly, so long as Vishalkumar remained a child a defined by the INA, he could enjoy derivative beneficiary status as provided by INA § 203(d). Here, Vishalkumar no longer satisfied the definition of child and could not remain a derivative beneficiary.

Since, Vishalkumar no longer satisfied the definition of child provided by INA § 101(b) an analysis of the "appropriate category" for "automatic conversion" is required. While CSPA § 203(h)(3) discusses an automatic conversion to an "appropriate category," a dispute between the parties exists as to the meaning of this phrase. It is in the third inquiry where Plaintiff's interpretation of CSPA §203(h)(3) falters.

The only petition in existence at the time Vishalkumar "aged-out" of his derivative beneficiary status was the I-140 filed by Vimco on behalf of Plaintiff. The "conversion" provided for by CSPA § 203(h)(3) is of the "original petition," which in this case is the I-140. The element being converted is the relationship between the petitioner and the beneficiary, a relationship reflected by the preference category assigned to the beneficiary. In this case, no preference category exists to reflect the privity between an employer, and the son or daughter of an employee – and only by operation of INA § 203(d) does an immigration benefit even extend to a qualifying derivative beneficiary.

On the other hand, Plaintiff argues an interpretation of the "automatic conversion" language in CSPA § 203(h)(3) which is inconsistent with both the "original petition" language of the statute and the very I-130 petition filed by Plaintiff on behalf of Vishalkumar. Plaintiff's interpretation of CSPA § 203(h)(3) calls for an automatic conversion upon age-out without more – it does not in any fashion call for the filing of the I-130; under Plaintiff's application of the statute, the I-130 filed for Vishalkumar is superfluous. Plaintiff's argument is both analytically incongruent with the language of the statute and her act of filing the I-130 on behalf of Vishalkumar.

The CSPA § 203(h)(3) states that the "alien's petition" shall automatically be converted. In this circumstance, there are two reasonable interpretations: (1) the language of the statute reflects the possessive relationship between the alien and the petition and accordingly, the I-140 at issue belongs to Plaintiff, and not Vishalkumar. In such an analysis the relationship between the petitioner (Vimco) and Plaintiff does not fall within INA § 203(a)(2) and accordingly, CSPA is

[5] Here, the I-140 has been assigned the January 16, 1998 priority date based upon the filing of the ETA-750.

[6] According to Plaintiff, Vishalkumar was refused his immigrant visa at his consulate interview in Mumbai, India.

not implicated; (2) under the theory that the petition may be treated as concurrently belonging to Vishalkumar by operation INA § 203(d), if an automatic conversion is to occur, it will relate to the relationship between Vimco and Vishalkumar.

Plaintiff argues that in the absence of a petition filed exclusively for Vishalkumar, his appropriate visa category for automatic conversion of the I-140 would be the second preference relative visa classification described by INA § 203(a)(2)(B). While such automatic action is the only mechanism to give meaning to the language of the statute which provides for "automatically convert[ing] to the appropriate category," Plaintiff's argument ignores her privity with Vimco as an employee, her subsequent act of filing the I-130 to classify Vishalkumar as a relative, and erroneously concludes that the employment classification is transformed into a relative classification based upon the relationship of Plaintiff and Vishalkumar.

As seen in Plaintiff's brief, she conflates the language of the CSPA calling for an "automatic conver[sion] to the appropriate category," with her subsequent action of filing an I-130 on behalf of Vishalkumar and arguing that such I-130 "should automatically retain the priority date of the original petition as an automatic conversion."[7] While the I-130 in this matter was filed only weeks after Plaintiff acquired lawful permanent resident status, such construction begs the following question: what if Plaintiff filed the I-130 years later, or never filed an I-130 whatsoever? The answer is simple. Because Vishalkumar had already been included as a potential derivative beneficiary on Plaintiff's applications, CIS would be required to review the documentation and determine the application of the CSPA. The CSPA analysis is required regardless of whether Plaintiff ever filed the I-130. The analysis is required because the language of the CSPA provides for the automatic conversion – not the *subsequent* conversion.

Reviewing the United States House proceedings of July 22, 2002, the record reflects that Representative Sensenbrenner specifically contemplated CSPA as addressing Plaintiff's situation:

> *The Senate passed H.R. 1209 with a few appropriate additions, and the motion today is to concur in those additions. The Senate bill addresses three other situations where alien children lose immigration benefits by "aging out" as a result of INS processing delays... Case number two: Children of family and employment-sponsored immigrants... Under current law, when an alien receives permanent residence as a preference visa recipient... a minor child receives permanent residence at the same time. After the child turns 21, the parent would have to apply for the child to be put on the second preference B waiting list.*

This record indicates some concern, as expressed by Representative Sensenbrenner, that, "when the child turns 21, the parent would have to apply for the child to be put on the second preference B waiting list." Representative Sensenbrenner appears to have been addressing the potential difficulty faced by the family members of an employment-sponsored immigrant. This concern, and the passage of CSPA, gave rise to guidance from the Department of State which provides:

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[7] Plaintiff's brief at 2.

[I]n cases involving a derivative seeking to follow to join a principal who adjusted in the U.S., the derivative can benefit from the CSPA if the principal filed a Form I-824 for the beneficiary within one year of a visa becoming available (i.e., within one year of the case becoming current or petition approval, whichever is later). Department of State Guidance, Child Status Protection Act: ALDAC #2, Ref 02 State 163054, 123775.

It is the position of CIS that the concern highlighted by Representative Sensenbrenner has been addressed by CSPA § 203(h)(1), which provides that the eligibility of an alien for an immigration benefit will be frozen, so long as, "the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability." This language directly relates to Plaintiff's belated efforts to file an I-824 on behalf of Vishalkumar, and Vishalkumar's subsequent immigrant visa refusal at the United States Consulate in Mumbai, India. It is only because of Plaintiff's unsuccessful attempts at the consulate abroad that she raises this creative application of CSPA § 203(h)(3).

Additional explanation of the Congressional intent behind CSPA can been seen in a technical amendment that Senator Feinstein offered to CSPA § 203(h)(3). In the proposed text, the provision read:

(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 subsection (a)(4) 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. Congressional Record – Senate, H4990-1, June 13, 2002.

Senator Feinstein offered an amendment clarifying that section "(a)(4)" should read as "(a)(2)(A)" which relates to spouses and children of an alien lawfully admitted for permanent residence. Her amendment was approved and survived to the enacted version of CSPA.

Still later in the Congressional record, Representative Jackson-Lee remarked:

The Senate expanded the bill to cover other situations where alien children lose immigration benefits by "aging out" as a result of INS processing delays. The Senate amendment expands age-out protection to cover: Children of Permanent Residents. Under current law, when a child of a permanent resident turns 21, he goes from the second preference "A" waiting list to the second preference "B" waiting list, which is much longer. Congressional Record – House, H4990-1, July 22, 2002.

From this review of the Congressional Record, CIS observes a direct concern by Congress for the welfare of the children of permanent resident aliens as it relates to immigrant visa preference. See INA § 203(a)(2)(A). The Congressional record also speaks to a direct concern by Congress for the treatment of family members and their entitlement to the same status and consideration afforded a primary beneficiary. See INA § 203(d), INA 101(b)(1). The Congressional Record does not however, speak to the application of CSPA § 203(h) that plaintiff urges.

Plaintiff continues to urge that "Vishalkumar... should automatically retain the priority date of the original petition as an automatic conversion." Plaintiff's brief at 2. Plaintiff's argument continues to conflate automatic conversion and retention with subsequent transference. Furthermore, Plaintiff's argument allows for a mix and match of petitions and priority dates not provided for by law. CSPA § 203(h)(3) provides that:

> *RETENTION OF PRIORITY DATE - [I]f the age of the alien is determined... to be 21 years of age or older for the purposes of subsection (a)(2)(A) and (d), the alien's petition shall automatically convert to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.*

INA § 203(a)(2)(A) specifically addresses spouses and children. Since the INA § 101(b) provides no age limitation upon the definition of spouse, CSPA § 203(h)(3) can only logically relate to the age and status of children and the impact of aging-out upon such individuals. Furthermore, as defined by INA 101(b)(1), such child must be unmarried. Accordingly, CSPA § 203(h)(3) may only been properly viewed as addressing the circumstances of unmarried children of lawful permanent residents that are under twenty-one years of age.

CSPA § 203(h)(3) also restricts the quantity and nature of the petition eligible for consideration. The statute provides that, "if the age of the alien is determined... to be 21 years of age or older... the alien's petition shall automatically convert...." First, the section presupposes the requirement that the petitioner is already a lawful permanent resident - it amends INA § 203(a)(2)(A), not INA § 203(b) or (c). Second, it presupposes that the beneficiary of the petition filed by the lawful permanent resident is determined to have "aged-out." Finally, CSPA § 203(h)(3) provides that in such circumstance, where the child ages out when petitioned by a lawful permanent resident parent, that the child without further action or request, will be automatically converted to the appropriate visa category and retain the original priority date of the petition that was originally filed by the lawful permanent resident parent. These restrictions are key to CIS' interpretation of the statute and are reflected by the sole relevant regulation.

Title 8 C.F.R. § 204.2(a)(4) contains language that "such retention of priority date will be accorded only to a son or daughter <u>previously eligible</u> as a derivative beneficiary under a second preference spousal petition." This regulation reflects the CIS position that priority date retention is only viable for second preference beneficiaries and not the derivative beneficiary of an employment based classification. In this case, Vishalkumar was previously classified as a derivative beneficiary under Plaintiff's employment based adjustment. Accordingly, he was not previously classified under the second preference of family based visa petition, and there is no provision of law or regulation providing for the retention of the earlier priority date.

CIS is aware that the BIA appears to reach a different conclusion in the unpublished case of *In re Maria T. Garcia (2006 WL 2183654)*. There, the BIA seems to conclude that the natural conversion (under section 203(h)(3) of an aged out child in a similar fourth preference relative visa petition would be to focus not upon the relationship of the original petitioner and the derivative beneficiary, but instead to focus upon the child's familial relationship with the primary

beneficiary. However, *In re Maria T. Garcia* is an unpublished case arising from removal proceedings as litigated by U.S. Immigration and Customs Enforcement ("ICE"), and in light of the foregoing discussion of both the priority classifications, the Congressional Record, and the applicable sections of CSPA § 203, CIS disagrees with the decision.

Furthermore, as the BIA has not articulated in such case, the analytical framework through which it applies CSPA § 203(h)(3) as such a catch-all provision, that it appears to swallow whole, CSPA § 203(h)(1). More precisely, it appears that the BIA's application of CSPA § 203(h)(3), or at least Plaintiff's proposed application of CSPA § 203(h)(3) renders CSPA § 203(h)(1) superfluous. Seeking to give meaning to each word in a federal statute, CIS respectfully disagrees with the decision in *Maria T. Garcia* and Plaintiff's attempts to utilize this unpublished case for the proposition that the I-130 filed on behalf of Vishalkumar should retain the priority date accorded Plaintiff's I-140.

Under the plain meaning rules for statutory construction, had CSPA § 203(h)(3) been written to achieve exactly the action that Plaintiff urges, the statute might have been drafted with the language of :

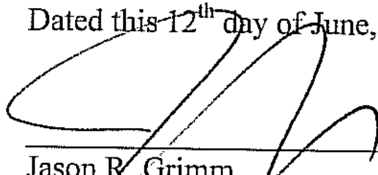
> *[I]f the age of the alien is determined... to be 21 years of age or older for the purposes of subsection (a)(2)(A) and (d), the alien shall retain the original priority date issued to the original petition, upon receipt of any subsequent petition.*

Such drafting might remove the clouded privity that Plaintiff seeks in support of his analysis. At present however, the CSPA § 203(h)(3) bears no such language, and has not benefited from any such clarification or modification. Accordingly, it is the position of CIS that applying Plaintiff's remedy is not supported by the existing statutory language and would be tantamount to an ultra vires application of CSPA § 203(h)(3). CIS declines to proceed in such a manner, and urges the BIA to clarify the state of this provision by upholding the decision of the Service Center Director, California Service Center.

Conclusion

On review by certification, CIS respectfully requests that the BIA uphold the decision of the Director of the California Service Center, denying retention of the earlier priority date.

Dated this 12th day of June, 2008



Jason R. Grimm
Service Center Counsel – Laguna Niguel
U.S. Citizenship and Immigration Services

Attachment to Form I-290C
WAC-06-121-52497
A89-726-558

Certificate of Service

I Jason R. Grimm, certify that a copy of this memorandum of certification and accompanying decision of the Service Center Director has been mailed to Plaintiff and his counsel of record on June 12, 2008 at the following addresses:

Ms. Jyoti Patel
730 Brookside Drive
Columbus, OH 43209

Mr. Scott Bratton, Esq.
c/o Margaret W. Wong & Associates. Co., LPA
3150 Chester Avenue
Cleveland, OH 44114

Dated this ~~12th day~~ of June, 2008

Jason R. Grimm
Service Center Counsel – Laguna Niguel
U.S. Citizenship and Immigration Services

Attachment to Form I-290C
WAC-06-121-52497
A89-726-558

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A88 124 902 - California Service Center

Date: APR 18 2008

In re: [redacted] Beneficiary of a visa petition filed by [redacted] Petitioner

IN VISA PETITION PROCEEDINGS

APPEAL

ON BEHALF OF PETITIONER: Suzanne E. Vazquez, Esquire

ON BEHALF OF DHS: (Illegible)
Associate Counsel

The petitioner has appealed from the decision of the U.S. Citizenship and Immigration Services ("CIS") Regional Service Center director, dated April 12, 2007, which approved the second preference visa petition submitted by the petitioner on behalf of the beneficiary, as the unmarried daughter of a lawful permanent resident, but declined to assign the priority date that the beneficiary enjoyed as a derivative beneficiary under an earlier visa petition approved on October 9, 1992. Instead CIS assigned a priority date of July 28, 2005, the date of filing of the new visa petition.

It appears that the earlier fourth-preference visa petition was filed by the beneficiary's maternal aunt on behalf of the respondent's mother, as the sister of a United States citizen. The instant petitioner states that at the time the original visa petition's priority date became current, the beneficiary had "aged out," *i.e.*, reached the age of 21 years, and was therefore unable to accompany her parents and sibling as a derivative beneficiary when they immigrated to the United States. The petitioner filed the instant visa petition for the beneficiary, but requested that CIS assign the petition the original visa petition's priority date. CIS declined, under the following reasoning: "There is no section of law in CIS statute or regulation that allows a first, third, or fourth preference beneficiary to retain a priority date if they reach the age of twenty-one years before the principal beneficiary immigrates by virtue of that approved relative petition." Although we disagree with CIS's assessment of the law, we must nevertheless dismiss the appeal.

Pursuant to section 203(h)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(h)(3), if an alien who is the child of a beneficiary of an approved visa petition is determined under section 203(h)(1) of the Act to be 21 years of age or older at the time that the visa petition's priority date becomes current, "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." The petitioner concedes that the beneficiary was 21 years of age or older at the time that the priority date

assigned to the original visa petition became current. Therefore it was necessary at that time for CIS to ascertain the appropriate category to which the first petition was automatically converted. Because the beneficiary was classified as a derivative beneficiary of the original petition, the "appropriate category" for purposes of section 203(h)(3) would be that which applied to her as the "aged-out" derivative vis-a-vis the principal beneficiary of the original petition.[1] The principal beneficiary of the original petition was the respondent's mother, and therefore the "appropriate category" to which the original visa petition may have automatically converted would be the second-preference category of family-based immigrants, *i.e.*, the unmarried sons and daughters of lawful permanent residents. If such provision applies, the beneficiary would be entitled to retain the October 9, 1992, priority date that applied to the original visa petition.

However, the Board has jurisdiction only over the appeal filed with regard to the instant visa petition, and we must dismiss the appeal. The original visa petition may have automatically converted to a second-preference visa petition and retained the priority date of October 9, 1992, but the instant visa petition, which was filed by the beneficiary's father on July 28, 2005, did not automatically qualify for the original priority date.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

[1] Where the aged-out beneficiary was the principal beneficiary of the original petition, the appropriate category is that which applies to the beneficiary vis-a-vis the original petitioner.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A79 638 092 - San Francisco, CA

Date: SEP - 7 2007

In re: [redacted]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Love M. Macione, Esquire

ON BEHALF OF DHS: Lowell C. Powell
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Adjustment

This matter was last before the board on April 10, 2007, when we dismissed the respondent's appeal from the Immigration Judge's April 14, 2006, decision denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture, and his request for a continuance of proceedings. The respondent now has filed a motion to reopen (MTR) alleging ineffective assistance by his former counsel. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) opposes reopening. The motion will be denied.

The record reflects that the respondent's aunt filed an immediate relative petition for the respondent's father on July 1, 1982, which was approved on November 2, 1982 (MTR, Tab A). The visa became available on November 1, 2004, and the respondent's father received his legal permanent resident (LPR) status on June 26, 2005 (MTR, Tabs B, D). The respondent argues on appeal that he was a "child" as defined in the Child Status Protection Act (CSPA) at the time that his father's visa became available,[1] he is entitled to retain the priority date of the petition filed by his aunt on behalf of his father, and his former attorney rendered ineffective assistance in failing to file an application for permanent residence within one year of his father's receipt of LPR status.

The record reflects that the respondent has substantially complied with the evidentiary requirements for asserting a claim of ineffective assistance of counsel outlined in *Matter of Lozada*,

[1] The record reflects that the respondent was born on August 30, 1983, thereby turning 21 years of age on August 30, 2004 (Exh. 6 to I-130).

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19 I&N Dec. 637, 639 (BIA 1988).[2] *See Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 824-25 (9th Cir. 2003). Even assuming that the performance of his former attorney was deficient, we nevertheless find that the respondent has failed to establish that he was prejudiced by counsel's representation. *See Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 859 (9th Cir. 2004) (an alien may prevail on a claim for ineffective assistance if he establishes that counsel's deficient performance "may have affected the proceedings"); *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999) (finding that prejudice must be shown for a due process challenge and that prejudice is found when the performance of counsel was so inadequate that it may have affected outcome); *Mohsseni Behbahani v. INS*, 796 F.2d 249, 251 (9th Cir. 1986). Regardless of whether the respondent was a child under the CSPA, section 203(h)(3) of the Immigration and Nationality Act does not permit the respondent to retain the priority date from his father's immediate relative petition. Pursuant to 8 C.F.R. § 204.2(a)(4), if a child reaches the age of 21 before a visa is issued to the principal alien parent, a separate petition must be filed and the original priority date is only retained *when the same petitioner* files the subsequent petition. In this case, the original petitioner was the respondent's aunt, and the subsequent petitioner is the respondent's father. Thus, even if former counsel's performance was deficient in failing to file a separate petition, the respondent has failed to establish that he is entitled to retain the original priority date, has a visa immediately available to him, and is eligible this time to adjust his status. Accordingly, the motion will be denied.

ORDER: The motion to reopen is denied.

FOR THE BOARD

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[2] Under *Matter of Lozada, supra*, a motion based upon a claim of ineffective assistance of counsel should be supported by an affidavit, reflect whether a complaint had been filed with the appropriate disciplinary authorities, and include a response to the allegations by former counsel or report counsel's failure or refusal to respond. *Matter of Lozada, supra*, at 639.