
No. 09-56846

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

TERESITA G. COSTELO, and LORENZO P. ONG, Individually And On
Behalf Of All Others Similarly Situated,

Plaintiffs - Appellants

v.

JANET NAPOLITANO, Secretary Of The Department Of Homeland
Security; *et. al.*

Defendants - Appellees.

APPEAL OF DECISION OF THE U.S. DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

OPENING BRIEF

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CERTIFICATE REQUIRED BY CIRCUIT RULE 28-2.1

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OPENING BRIEF

The undersigned counsel of record for the Plaintiffs hereby certifies upon
information and belief that the interested parties in this case are the

Plaintiffs and the Defendants.

/s/ Nancy E. Miller

Nancy E. Miller
Attorney for Plaintiffs

STATEMENT OF DETENTION STATUS

Plaintiffs are not currently detained.

Dated: May 18, 2010

REEVES AND ASSOCIATES, APLC

/s/Nancy E. Miller

Nancy E. Miller
Robert L. Reeves
Jeremiah Johnson
Anthony J. Favero
Attorneys for Plaintiffs

STATEMENT OF PENDENCY OF OTHER RELATED PROCEEDINGS WITH THE BIA OR OTHER DISTRICT DIRECTOR

No motions to reopen or any other motions have been filed with either the BIA or any District Director on behalf of Plaintiffs.

No other related proceedings are pending with either the BIA or District Director on behalf of Plaintiffs.

No motions or other related proceedings are contemplated on behalf of Plaintiffs.

Dated: May 18, 2010

REEVES AND ASSOCIATES, APLC

/s/Nancy E. Miller

Nancy E. Miller
Robert L. Reeves
Jeremiah Johnson
Anthony J. Favero
Attorneys for Plaintiffs

I. INTRODUCTION

Appellant Lorenzo Ong and his family began their journey to United States legally in 1981 when his sister filed a petition for him based on their family relationship. His daughters, Vernilee and Lucheevette, were 4 and 2 years old, respectively. However, by the time Ong's priority date became current in 2002, his daughters had turned 21 and had aged-out. Consequently, they were no longer eligible to immigrate to the United States as derivatives of their father. Instead, Vernilee and Lucheevette have to wait until the petition filed for them by their father after he obtained his lawful permanent residence becomes current. That means another 10 – 15 year wait, only this time, without their father. Ong cannot live with them outside the United States without abandoning his permanent resident status ("green card"). His daughters cannot join him because they have no legal status. Moreover, because they have immigrant visa petitions pending, they cannot obtain visitors' visas to come to the United States because they are presumed to have immigrant intent.

Ong filed immigrant visa petitions for his daughters pursuant to the recently passed Child Status Protection Act ("CSPA"). Under that law, his daughters should be able to retain the priority date of the petition filed by their aunt for their father. Ong asked the Department of Homeland Security

(“DHS”) to assign the original priority date to his petitions he filed for his daughters in 2005.

Appellant Teresita Costelo and her daughters began their U.S. immigration journey in 1990 when Costelo ’s mother filed a petition for her. Her daughters, Angelyn and Anne Theresa, were then 10 and 13, respectively. When Costelo’s priority date became current, her daughters, too, were over 21 and had aged-out. Costelo filed new petitions for her daughters in 2004 and asked that, under CSPA, they be assigned the original priority date from her mother’s petition. In 2008, DHS approved the retention of the original priority date for Angelyn but denied retention for Anne Theresa.

On June 20, 2008, Appellants, (collectively “the Parents”) by and through their undersigned counsel, filed a civil action against Appellees Janet Napolitano, *et. al.* (collectively, “the Government”) seeking declaratory, mandamus, and injunctive relief on behalf of themselves and all others similarly situated concerning the correct interpretation of CSPA. Excerpt Vol. IV, p. 835–892. On July 16, 2009, the United States District Court for the Central District of California granted the Parents’ Motion to Certify Class pursuant to Federal Rule of Civil Procedure 23(b)(2). Excerpt Vol. I, p. 25–44. After the Parents were certified as a class, both parties filed cross-motions for summary judgment. Excerpt Vol. II, p. 178–249,

290–323. Both motions dealt with the issue of whether Congress intended to protect all derivative children of family based visa petitions when it passed the Child Status Protection Act. Ultimately, the District Court granted the Government’s motion. Excerpt Vol. I, p. 3–6. On November 18, 2009, the Parents timely filed the present appeal. Excerpt Vol. I, p. 1–2.

II. STATEMENT OF JURISDICTION

The District Court exercised subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 8 U.S.C. § 1361 (the Mandamus and Venue Act to compel an officer to perform a duty owed to plaintiffs). The District Court also retained jurisdiction under the Fifth Amendment to the United States Constitution and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, to issue Orders regarding the construction and application of Section 3 of the Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002) (“CSPA”), codified at INA § 203(h), 8 U.S.C. § 1153(h).

The Administrative Procedure Act, 5 U.S.C. §§ 702–706, provides additional legal authority for the courts to review, hold unlawful, and set aside actions of administrative agencies that are unconstitutional; that exceed statutory jurisdiction or authority; that fail to abide by statutory or regulatory procedures; and that are arbitrary, capricious, an abuse of discretion, or are otherwise not in accordance with the applicable law. *See* 5 U.S.C. § 706.

This appeal is from the final judgment of the District Court entered in this case on November 12, 2009 and all interlocutory orders that gave rise to that judgment. It was timely filed on November 18, 2009.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issue before the Court is the proper interpretation of a provision of the Child Status Protection Act (“CSPA”) codified at 8 U.S.C. § 1153(h)(3), § 203(h)(3) of the Immigration and Nationality Act (“INA”). (hereinafter, “§ 203(h)(3)”). Specifically, this Court must decide whether Congress intended to protect all derivative children of family-based preference visa petitions when they passed the Child Status Protection Act, or whether Congress only sought to protect a limited group of children that were already protected under preexisting federal regulations.

IV. PRELIMINARY STATEMENT OF LAW

A. Family-Based Visa Petitions.

Family-based immigration is one of the primary avenues used by foreign nationals interested in immigrating to the United States. In order for an individual to immigrate to the United States through family-based immigration, he or she must first become the beneficiary of an approved visa petition filed by a U.S. citizen or permanent resident family member.

Section 204 of the INA defines who may file a petition to classify a family member as a beneficiary. *See* INA § 204(a), 8 U.S.C. § 1154(a).

Once an alien is the beneficiary of an approved visa petition, he or she is eligible to immigrate to the United States. However, pursuant to the INA, family-sponsored immigration is limited to a maximum of 480,000 visas every year. *See* INA § 201(c)(1), 8 U.S.C. § 1151(c)(1). This limitation, coupled with the inadequate number of visas available, creates a large backlog of approved visa petitions. Immigrants who are the children of U.S. citizens, spouses of U.S. citizens, or parents of U.S. citizen children over twenty-one years old are considered “immediate relatives” and are not subject to the numerical quota. *See* INA § 201(b)(2)(A)(i), 8 U.S.C. 1151(b)(2)(A)(i). This allows them to immigrate quickly. However, those immigrants who do not qualify as “immediate relatives” are subject to the numerical quotas of the four family-sponsored immigrant visa preference categories. *See* INA § 203(a), 8 U.S.C. § 1153(a).

The four preference categories for family-sponsored aliens are:

- 1) First Preference (F-1) – Unmarried adult sons and daughters of U.S. citizens. *See* INA § 203(a)(1), 8 U.S.C. § 1153(a)(1).

2) Second Preference –

(F-2A) - Spouses and children (under 21 years old) of lawful permanent residents *See* INA § 203(a)(2)(A), 8 U.S.C. § 1153(a)(2)(A), and

(F-2B) - Unmarried adult sons and daughters of lawful permanent residents. *See* INA § 203(a)(2)(B), 8 U.S.C. § 1153(a)(2)(B).

3) Third Preference (F-3) – Married sons and daughters of U.S. citizens. *See* INA § 203(a)(3), 8 U.S.C. § 1153 (a)(3).

4) Fourth Preference (F-4) – Brothers and sisters of adult U.S. citizens. *See* INA § 203(a)(4), 8 U.S.C. § 1153 (a)(4).

The spouse or child of a beneficiary of a family sponsored visa petition is entitled to the same classification and priority date as the principal beneficiary. *See* INA § 203(d), 8 U.S.C. § 1153(d). The spouse or child is considered a “derivative beneficiary” of the approved visa petition and is eligible to immigrate with the principal beneficiary.

The allocation of immigrant visas for family-sponsored immigrants is governed by INA § 203(e)(1), 8 U.S.C. § 1153(e)(1). *See also* 22 C.F.R. §§ 42.53(a), 42.54(a)(1). Under this section, visas for family based immigrants are made available in the order they were received for filing. Each family-based immigrant is provided with a “priority date” identical to the filing date of the approved petition that accorded him or her preference status. *See* 22

C.F.R. § 42.53(a) (stating that “[t]he priority date of a preference visa applicant under INA 203(a) or (b) shall be the filing date of the approved petition that accorded preference status.”); *see also* 22 C.F.R. § 42.54(a)(1) (applying the same formula to consular officers).

Because approved visa petitions are considered in the order they are received, the priority date becomes an indicator of the principal beneficiary’s and the derivative beneficiary’s place in the long line of individuals waiting to immigrate to the United States. *See id.*

B. Aging-Out And Protection Under Preexisting Federal Regulations.

As indicated above, the child of a beneficiary of an approved family sponsored visa petition is a “derivative beneficiary” and is entitled to the same classification and the same priority date as the principle beneficiary. See also INA § 203(d), 8 U.S.C. § 1153 (d). However, derivative beneficiary children can only maintain the same classification as long as they remain under the age of twenty-one. If a derivative beneficiary turns twenty-one while waiting in line for their priority date to become current, the child loses derivative beneficiary status. This is commonly known as “aging-out.”

Ten years before Congress turned its attention to the age-out problem, federal regulations provided age-out relief to a limited group of derivative

beneficiaries.¹ When a lawful permanent resident files a visa petition for his spouse under the F-2A category, his under-twenty-one year old children qualify as derivative beneficiaries under this same category. It is not uncommon for children to turn twenty-one while waiting for the priority date to become current. Under 8 C.F.R. § 204.2(a)(4) (1992), when the child ages-out of the F-2A category, his parent can file a petition for him under the F-2B category that retains the original priority date he had as the derivative beneficiary of his parent's petition.

C. The Child Status Protection Act.

As indicated above, preexisting federal regulations only protected derivative beneficiaries of second preference F-2A visa petitions. Thus, large numbers of derivative children in the other preference categories were still aging-out through no fault of their own. To remedy this inequity and preserve family unity, in 2002, Congress enacted the Child Status Protection Act. The relevant sections of CSPA at issue before this Court are found in INA § 203(h) which reads as follows:

Rules for determining whether certain aliens are children -

(1) In general – For purposes of subsections (a)(2)(A) and (d), a determination of whether an alien satisfied the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using –

¹ See 8 C.F.R. § 204.2(a)(4) enacted on or about September 9, 1992.

- (A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by
 - (B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.
- (2) Petitions described – The petition described in this paragraph is –
- (A) with respect to a relationship described in subsection (a)(2)(A), a petition filed under section 204 for classification of an alien child under subsection (a)(2)(A); or
 - (B) with respect to an alien child who is a derivative beneficiary under subsection (d), a petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c).
- (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.
- (4) Applications to self-petitions. – Paragraphs (1) through (3) shall apply to self-petitions and derivatives of self-petitions.

Under the first subsection, 203(h)(1), a child's age is adjusted by subtracting the amount of time the Government took to adjudicate the visa petition from the child's age on the date he or she becomes eligible to immigrate to the United States. *See* INA § 203(h)(1), 8 U.S.C. § 1153

(h)(1). If the adjusted age is under twenty-one, that child is not considered to have aged-out and may immigrate with his or her parent.

The next section, 203(h)(2)(A) and (B), defines which petitions are covered by the provisions of CSPA. Subsection (2)(A) refers to alien children under subsection 203(a)(2)(A) [under twenty-one year old children of lawful permanent residents]. Subsection (2)(B) refers to children who are derivative beneficiaries of parents in the (a) [family-based category], (b) [employment-based category], and (c) [diversity category]. *See* INA § 203(h)(2), 8 U.S.C. § 1153 (h)(2).

The third subsection, 203(h)(3), provides for automatic conversion and retention of priority dates. When an individual's age is determined to be twenty-one or older even after subtracting the Government's adjudication time, his or her petition shall "automatically be converted to the appropriate category and [he or she] shall retain the original priority date issued upon receipt of the original petition." INA § 203(h)(3), 8 U.S.C. § 1153 (h)(3).

Because each subsection of INA § 203(h) references "subsections (a)(2)(A) and (d)" of INA § 203, it is necessary to read and understand both these provisions as well.

Section 203(a)(2)(A) of the INA reads as follows:

(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.

INA § 203(a)(2)(A) refers to the spouses and children of lawful permanent residents who are petitioned under the second preference F-2A family based category.

INA § 203(d), 8 USC § 1153(d), reads, in relevant part, as follows:

Treatment of family members –

A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E)² of section 101(b)(1) shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a) [family-based], (b)[employment-based], or (c) [diversity-based]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.

INA § 203(d) refers to all derivative beneficiaries. As such, each and every subsection of INA § 203(h) applies to beneficiaries under the second preference F-2A family-based categories and to all derivative beneficiaries.

V. STATEMENT OF FACTS

On July 22, 2004, Teresita G. Costelo obtained lawful permanent resident status through an approved petition for alien relative (“I-130”) filed

² As described in INA § 101(b)(1), the term child means an unmarried person under twenty-one years of age who is (A) born in wedlock, (B) stepchild, (C) legitimated, (D) born out of wedlock, or (E) adopted.

by her United States citizen mother on January 5, 1990. Costelo's two daughters, Angelyn G. Costelo and Anne Theresa G. Costelo, were included in the visa petition as derivative beneficiaries. When Costelo's mother filed the petition in 1990, Angelyn was 10 years old and Anne Theresa was 13 years old. When Costelo's priority date became current in 2004, Angelyn and Anne Theresa were over 21 years old, and had aged-out of their derivative status. Costelo filed new immigrant visa petitions for her daughters on or about September 23, 2004. On or about August 2, 2007, Costelo requested these petitions retain her original January 5, 1990, priority date. On February 12, 2008, the Government approved retention of the original priority date for Angelyn, but denied retention of the original priority date for Anne Theresa without any explanation for the denial or the contradictory treatment of both petitions.

Lorenzo P. Ong obtained lawful permanent resident status on June 16, 2004, through an immigrant visa petition filed by his United States citizen sister on May 7, 1981. When Ong's sister filed the petition for him in 1981, Ong's two daughters, Vernilee M. Ong and Lucheevette M. Ong, qualified as derivative beneficiaries of their aunt's petition. Vernilee was 4 years old and Lucheevette was 2 years old. By the time Ong's priority date became current in July 2002, both Vernilee and Lucheevette had aged-out. Ong filed new immigrant visa petitions for his daughters on March 8, 2005. On

October 20, 2005, he also requested retention of his original May 7, 1981 priority date for his daughter's petitions pursuant to §203(h)(3) of the INA. The Government approved the Immigrant Visa Petition but never responded to Ong's request for the original priority date.

VI. STATEMENT OF THE CASE

On June 20, 2008, Costelo and Ong filed a class action complaint in the United States District Court for the Central District of California against the Government seeking declaratory, mandamus, and injunctive relief for themselves and all others similarly situated. Excerpt Vol. IV, p. 835–892. On July 16, 2009, the District Court certified the Parents as a class pursuant to rule 23(b)(2) of the Federal Rules of Civil Procedure. Excerpt Vol. I, p. 25–44. At that time, the Parents sought an order from the Court declaring that the Government's failure to retain original priority dates for aged-out derivative beneficiaries of approved visa petitions violates CSPA. The Parents also asked the Court to order the Government to timely adjudicate visa petitions for all class members pursuant to CSPA.

On November 12, 2009, the District Court granted the Government's motion for summary judgment. Excerpt Vol. I, p. 3–6. On November 18, 2009, the Parents timely filed the appeal now before this Court. Excerpt Vol. I, p. 1–2.

The Government's Position And Matter of Wang.

When the Parents initially filed their complaint with the District Court, the issue at hand had not been addressed in any precedent decision at either the administrative or federal court level.³ Rather than going forward on the merits of the case, the Government requested that the District Court hold the matter in abeyance because a precedent decision was “imminent.” Excerpt Vol. III, p. 594–595. The District Court agreed and, on August 25, 2008, ordered a stay of proceedings. Excerpt Vol. I, p. 45–46. On March 18, 2009, the District Court determined that further delay was inappropriate because there was no indication of a forthcoming precedent decision. Although the District Court ordered the case to go forward, the Government continued to seek a delay in the hearings and continued to communicate with the Board of Immigration Appeals regarding the need for a precedent decision in this matter. Excerpt Vol. I, p. 74.

Once back on track, the parties appeared before the District Court on June 15, 2009, regarding the Parent's motion to certify the case as a class action. Excerpt Vol. I, p. 47–71. Coincidentally, on the very next day, the Board published a precedent decision, *Matter of Wang*, 25 I&N Dec. 28

³ Prior to *Matter of Wang*, the Board had previously held in an unpublished decision that § 203(h)(3) applies to all derivate beneficiaries as now argued by the Parents. See *Matter of Maria T. Garcia*, 079–001–587, 2006 WL 2183654 (BIA June 16, 2006).

(BIA 2009), merely adopting the same arguments the Government made in District Court and holding that “the automatic conversion and priority date retention provisions of the CSPA do not apply to an alien who ages out of eligibility for an immigrant visa as the derivative beneficiary of a fourth-preference visa petition, and on whose behalf a second-preference petition is later filed by a different petitioner.” *Id.* at 28.

In analyzing the issue, the Board first found that the statute was ambiguous and did not “expressly state which petitions qualify for automatic conversion and retention of priority dates” even though each subsection of INA § 203(h) references “subsections (a)(2)(A) and (d)” of INA § 203. *Id.* at 33. The Board then moved on to consider statutory provisions other than those enacted by Congress under CSPA dealing with automatic conversion and priority date retention, concluding that:

[T]he term “conversion” has consistently been used to mean that a visa petition converts from one visa category to another, and the beneficiary of that petition then falls within a new classification without the need to file a new visa petition. Similarly, the concept of “retention” of priority dates has always been limited to visa petitions filed by the same family member. *Id.* at 34–35.

The Board went on to examine the legislative history and found that Congress was focused on the “issue of children aging out of visa availability as a result of administrative delays, without cutting in line ahead of others awaiting visas in other preference categories.” *Id.* at 38. The Board found no “evidence that it was intended to address delays resulting from visa

allocation issues, such as the long wait associated with priority dates.” *Id.* For these reasons, the Board declined to apply INA § 203(h)(3) to the petition in *Wang*. *Id.*

VII. SUMMARY OF ARGUMENT

INA § 203(h)(3) cannot be read in a vacuum. It must be read in conjunction with INA § 203(h)(1). In reading these sections together, it is clear that the petitions referred to in 203(h)(1) and 203(h)(3) are the same. It is also clear that they both provide relief to all family-based, employment-based, and diversity-based categories.

Under the plain language of the statute, INA § 203(h)(3) provides that derivative beneficiary children in all categories retain the original priority dates from the petitions filed on behalf of their parents. Because the language of the statute is unambiguous, the Court should follow its plain meaning. Moreover, because both the Board and the Government’s interpretations ignore the plain language of the statute, neither is entitled to deference.

Automatic conversion and priority date retention are independent benefits provided by § 203(h)(3). The language of the statute providing priority date retention refers to all family-based, employment-based, and diversity-based adult children derivative beneficiaries. The Parents assert that the automatic conversion language is unambiguous. Even if the Court

finds the language providing for automatic conversion does not provide clear instructions, it should deal with automatic conversion and priority date retention separately. It should find that priority date retention refers to adult children derivative beneficiaries in all categories.

Finally, it is undisputed that CSPA was designed to keep families together. The Government's interpretation singles out a limited subset of families for protection. This interpretation frustrates the policy that Congress sought to implement. It is illogical and serves no reasonable public policy by merely reiterating a long-standing regulation and singling out F-2A derivative beneficiaries for relief.

VIII. STANDARD OF REVIEW

This Court reviews an entry of summary judgment *de novo*. See *Family Inc. v. United States Citizenship & Immigration Services*, 469 F.3d 1313, 1315 (9th Cir. 2006); *Universal Health Services, Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). An agency's interpretation of a statute is a question of law reviewed *de novo*. See *Halaim v. INS*, 358 F.3d 1128, 1131 (9th Cir. 2004).

“In reviewing an agency's statutory construction, we must reject those constructions that are contrary to clear congressional intent or that frustrate the policy that Congress sought to implement.” See *Schneider v. Chertoff*,

450 F.3d 944, 952 (9th Cir. 2006) *citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

A court interpreting a statute must first look to the language of the statute for evidence of its meaning. *Estate of Cowart v. Nicholas Drilling Co.*, 205 U.S. 469, 474 (1992); *Robinson v. Shell Oil*, 519 U.S. 337, 340 (1997). If the language is clear, the court must give effect to the plain meaning of the statute. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (“The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”). If the statute is silent or ambiguous, then the reviewing court will defer to the agency so long as the agency’s interpretation is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843.

IX. ARGUMENT

A. Because The Statute Is Clear, The District Court Erred In Deferring To The Board’s Interpretation.

This Court reviews the entry of summary judgment and the Government’s interpretation of a statute *de novo*. *See Halaim*, 358 F.3d at 1131. Therefore, this Court is not bound by the District Court’s erroneous holding that § 203(h)(3) was ambiguous because the statute did not

expressly state which petitions qualify for automatic conversion and retention of priority dates. Excerpt Vol. I, p. 6.

As set forth in *Chevron*, there is a two-step process for reviewing the Government's interpretation of a statute it administers. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. The Court, as well as the Government, must give effect to the unambiguously expressed intent of Congress. To determine if Congress has directly spoken to the issue of whether § 203(h)(3) applies to all derivative beneficiary children, this Court must "employ the traditional tools of statutory construction; if Congress had an intent on this issue, that intent is the law and must be given effect." *Student Loan Fund of Idaho, Inc. v. U.S. Dep't of Educ.*, 272 F.3d 1155, 1165 (9th Cir. 2001) (internal quotations omitted).

Statutory construction and interpretation begin with the ordinary and natural meaning of a statute's words. *Bailey v. United States*, 516 U.S. 137, 144–45 (1995); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). In addition, courts should give effect to every word of a statute. *Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983) (recognizing the "settled principle of statutory construction that we must give effect, if possible, to every word of the statute."); *see also United States v. Wenner*, 351 F.3d 969, 975 (9th Cir. 2003 (noting the fundamental principal of statutory construction that a

statute should not be construed to render certain words or phrases mere surplusage). These tools of construction require the Court first engage in a textual analysis of the relevant statutory provisions and to read the words of statutes in context and with a view to their place in the overall statutory scheme.

Here, using the traditional rules of statutory construction, the intent of Congress is clear: all derivative beneficiaries are entitled to relief under § 203(h)(3). Specifically, Congress has spoken directly to the precise question “who is entitled to relief under § 203(h)(3)” by using the phrase “(a)(2)(A) and (d).” As discussed above, Congress used these words because it had already defined “(a)(2)(A)” as the spouses and children of lawful permanent residents who are petitioned under the second preference family-based category (commonly known as F-2A). *See* INA § 203 (a)(2)(A), 8 U.S.C. § 1153 (a)(2)(A). Congress had already defined the term “(d)” as all derivative beneficiaries. It included natural, adopted, step, and out of wedlock children of parents entitled to obtain visas in the family-based, employment-based and diversity-based categories. *See* INA § 203(d), 8 U.S.C. § 1153 (d). As such, Congress no longer limited the retention of priority dates to only F-2A derivative beneficiaries as provided for since 1992; rather Congress enacted CSPA to protect all derivative beneficiaries by adding the term “and (d).”

When this Court compares 8 C.F.R. § 204.2 with INA § 203(h), it is important to ask why Congress included the language “(a)(2)(A) and (d).” Why did they not simply say (d)? Because Congress was not starting from scratch; rather Congress was adding to the class of children already protected under federal regulations. 8 C.F.R. § 204.2 already provided for retention of priority dates for aged-out children in the F-2A category. CSPA was enlarging the pool of derivative adult children beneficiaries who would be able to retain the original priority date from their parents’ petitions. Therefore, it was necessary to add “and (d).”

After understanding who Congress intended to include in § 203(h)(3), the next logical step is to see what type of relief the statute provides. When applying the principles of traditional statutory construction to § 203(h)(3), the statute is clear — 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), 8 U.S.C. § 1153 (h)(3).

That means when a derivative beneficiary child ages out of the original petition, the appropriate category for automatic conversion under § 203(h)(3) is based on the child’s relationship with the principal parent beneficiary. The derivative beneficiary child is entitled to retain the original priority date that applied to the original preference petition. The aged-out

derivative beneficiary child moves from the category under which their parent obtained lawful permanent resident status to the F-2B category of adult children of lawful permanent residents. The aged-out derivative beneficiary child may need to wait until the parent becomes a lawful permanent resident, as is the case in other follow to join categories.

Tools of statutory construction require this Court to read the words of statutes in context and with a view to their place in the overall statutory scheme. As such, this Court should read the words of § 203(h)(3) in context and with a view to their place in INA § 203(h) as a whole. Under the first subsection, 203(h)(1), a child's age is adjusted by subtracting the amount of time the Government took to adjudicate the visa petition from the child's age on the date he or she becomes eligible to immigrate to the United States. *See* INA § 203(h)(1), 8 U.S.C. § 1153 (h)(1). If the adjusted age is under twenty-one, that child is not considered to have "aged-out" and may immigrate with his or her parent. It is undisputed that § 203(h)(1) applies to all derivative beneficiary children. Indeed, § 203(h)(1) references the second subsection which in turn references petitions filed under all family-based preference categories, as well as employment-based and diversity visa categories. *See* INA § 203(h)(2), 8 U.S.C. § 1153 (h)(2). If the child's age in § 203(h)(1) is determined to be twenty-one years old or older after subtracting the Government's adjudication time, then the third subsection

applies. *See* INA § 203(h)(3), 8 U.S.C. § 1153 (h)(3) (“If the age of an alien is determined under paragraph (1) to be 21 years of age or older ...”) Because each of the three subsections reference each other, the three subsections should be read together as a whole and the same words and phrases used in each subsection should be given the same meaning.

Because INA § 203(d) unequivocally refers to derivative beneficiaries in all of the family-based preference categories, it is clear that Congress intended to include all family-based derivative beneficiaries under all preference categories in § 203(h)(3) as well as in § 203(h)(1). Moreover, because Congress used the same phrase “(a)(2)(A) and (d)” to describe petitions in both § 203(h)(1) and § 203(h)(3), Congress meant for the phrase to have the same meaning in both subsections. The same phrase (“(a)(2)(A) and (d)”) used in the same statute (INA § 203(h)) enacted by Congress at the same time (August 6, 2002) must have the same meaning. Therefore, the language of the statute includes all derivative beneficiary children from first, second, third, and fourth preference family petitions.

B. Even If This Court Finds That The Statute Is Unclear, The Government’s Position Is Not A Permissible Construction Of The Statute.

If the Court finds that the language of the statute is not clear, the inquiry progresses to the second step of the *Chevron* analysis. Under this step, the Court considers whether the Government’s interpretation is a

permissible construction of the statute. This Court need only defer to the Government's interpretation and application of the immigration laws if the Government's interpretation is not "contrary to the plain and sensible meaning of the statute" or does not frustrate the policy that Congress sought to implement. *Simeonov v. Ashcroft*, 371 F.3d 532, 535 (9th Cir. 2004); *Randhawa v. Ashcroft*, 298 F.3d 1148, 1151 (9th Cir. 2002).

The District Court wrongly deferred to the Board's analysis in *Matter of Wang* and erroneously found that the Board's decision to limit the availability of § 203(h) only to second preference F-2A beneficiaries was permissible. Excerpt Vol. I, p. 3–6.

1. Because The Government's Interpretation Ignores Specific Words In The Statute, It Is Contrary To The Plain And Sensible Meaning Of The Statute.
 - a. The Government's Interpretation Ignores Congress' Reference To "and (d)."

Generally, courts will not allow the Government to ignore any word of a statute. *Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983); *see also United States v. Wenner*, 351 F.3d 969, 975 (9th Cir. 2003) (noting the fundamental principal of statutory construction that a statute should not be construed to render certain words or phrases mere surplusage).

Section 203(h)(3) of the Act provides for the automatic conversion and retention of priority dates to petitions for children of principal

beneficiaries of family-based petitions arising under “subsections (a)(2)(A) and (d).” INA § 203(h)(3), 8 U.S.C. § 1153(h)(3). It is undisputed that § 203(d) of the Act refers to derivatives in all family-based preference categories. The Government’s selective reading of § 203(h)(3) ignores family-based derivative beneficiary children under the third and fourth preference categories despite their inclusion in § 203(d).

The Government contends that because derivative beneficiary children of F-2A petitions are one of the many categories included under § 203(d), its interpretation of the statute does not ignore “and (d).” But, if its interpretation does not ignore “and (d),” it does render “and (d)” superfluous. Webster’s Dictionary defines “superfluous” as “exceeding what is sufficient or necessary.” *Webster’s Ninth New Collegiate Dictionary* 1184 (9th Ed. 1988). If, as argued by the Government, § 203(h)(3) applies only to beneficiaries of F-2A petitions, “and (d)” would not be necessary because § 203(h)(3)’s reference to “subsections (a)(2)(A)” alone would suffice. But that is not what Congress wrote; rather, Congress wrote “and (d)” in the statute, thereby including all derivative beneficiary children. This Court must construe these words to give them more than a redundant meaning.

The Government’s interpretation of “and (d)” does, indeed, exceed what is sufficient or necessary. Under the Government’s interpretation, “and

(d)” is superfluous. The Government goes to great lengths to avoid well established jurisprudence by simply saying that their position falls within the jurisprudence. But simply saying so does not make it so.

Because courts must avoid interpreting statutes in a way that renders any portion of the statute redundant or unnecessary, this Court should adopt the Parents’ statutory interpretation that gives full effect to the reference “and (d).” Any other reading requires the Court to ignore “and (d)” or render it mere surplusage. As noted above, established jurisprudence cautions against this approach.

b. The Government’s Interpretation Also Ignores The Initial Clause Of INA § 203(h)(3).

The ultimate issue for this Court to resolve is who Congress intended to protect under § 203(h). To determine who is protected by § 203(h)(3), reason and statutory construction dictate that one must start at the beginning of that subsection. Here, the initial clause includes all aliens mentioned in § 203(h)(1) (“[i]f the age of the alien is determined under paragraph (1)...”). Section 203(h)(3) then narrows the included aliens to those who have “aged-out” despite § 203(h)(1)’s protection against agency delay (“...to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)...”). At that point, Congress stopped narrowing the inclusion of aliens under § 203(h)(3). Specifically, Congress inserted a comma, indicating that the statute had sufficiently identified eligible aliens. Congress then spelled out what relief

these aliens were entitled to by writing: “the alien’s petition shall be automatically converted to the appropriate category and the alien shall retain the original priority date issued upon the original petition.” INA § 203(h)(3).

To further limit the class of aliens eligible for relief would require this Court to not only ignore the fundamental tenets of statutory construction, but also basic rules of English usage. Unfortunately the Government’s interpretation does just that and, therefore, deserves no deference.

As discussed above, the Government’s position ignores § 203(h)(3)’s reference to § 203(d) and the inclusion of derivative beneficiary children in all family-based preference categories. As shown here, it also unreasonably interprets CSPA by ignoring the initial clause of § 203(h)(3). Interestingly, the Board also failed to discuss or even address the initial clause of § 203(h)(3) in *Matter of Wang*. This interpretation of a statute that ignores the initial phrase is irrational, unreasonable, and not entitled to deference.

2. Relevance of INA § 203(h)(2).

Section 203(h)(2)(B) of the Act defines the petitions described in § 203(h) “with respect to an alien child who is a derivative beneficiary under subsection (d), a petition filed under section 204 for classification of the alien’s parent under subsection (a) [family-based petitions], (b) [employment-based petitions], or (c) [diversity lottery-based petitions].” INA § 203(h)(2)(B), 8 U.S.C. § 1153(h)(2)(B). As such, all of § 203(h)

applies to all derivative beneficiary children under family based, employment based, or diversity petitions. There is neither a distinction in § 203(h)(2)(B) between derivative beneficiaries of petitions filed under family-based second preference or any other preference; nor any such distinction in § 203(h)(3) itself, which specifically references § 203(d).

As such, if § 203(h)(1) applies to all derivative beneficiary children because § 203(h)(2) references § 203(d) (which the Government must concede), then the same derivative beneficiary child should be included under § 203(h)(3) because § 203(h)(3) references the same derivative beneficiary children referenced in both § 203(h)(1) and § 203(d).

The beneficiary parents urge this Court to read § 203(h) as a whole and find that § 203(h)(3) applies to their children. Congress would not choose the same phrase to cover two different groups of people.

3. Relevance Of INA § 203(h)(4).

Section 203(h)(4) of the Act establishes that § 203(h)(3) applies to self-petitioners and derivatives of self-petitioners. *See* INA § 203(h)(4), 8 U.S.C. § 1153(h)(4). Here again, the Government's assertion that § 203(h)(3) applies "only" to F-2A petitions is inconsistent with the plain meaning of the statute and is without merit.

If the Court were to apply the approach set forth by the Board and endorsed by the Government to self-petitioners and derivatives of self-

petitioners as proscribed under § 203(h)(3), the arbitrary nature of their position would become even more apparent. Consider the following: a derivative beneficiary of a self-petitioner ages-out while the self-petitioner himself waits to obtain lawful permanent resident status. The Government would argue that because the automatic conversion set forth in § 203(h)(3) occurs at the time the derivative child ages out, the derivative beneficiary's petition cannot convert to an appropriate category because there is no category for unmarried sons and daughters of self-petitioners. According to the Board, "Congress never provided for 'delayed' conversions where an alien was 'temporarily' ineligible for classification under INA." *See Matter of Wang*, 25 I&N Dec. at 35–38. Simply put, this is not true. Indeed, an aged-out derivative of a self-petitioner has no appropriate category to convert to, yet, § 203(h)(4) makes clear that § 203(h)(3) shall apply in that situation.

The Government relies heavily on the erroneous premise that in order for a beneficiary to retain the original priority date, the subsequent petitioner must be the same person who filed the original petition. *See Matter of Wang*, 25 I&N Dec. at 35 ("[T]he concept of 'retention' of priority dates has always been limited to visa petitions filed by the same family member."). However, applying § 203(h)(3) to self-petitioners and derivatives of self-petitioners again demonstrates the legal error in the Government's

interpretation. Under § 203(h)(3), the automatic conversion and retention of original priority dates would create a new and separate petitioner for a derivative of a self-petition. The derivative beneficiary of a self-petitioner becomes his or her own self-petitioner. See INA § 204(a)(1)(D)(III), 8 U.S.C. §1154(a)(1)(D)(III). Undoubtedly, this situation involves the creation of a new petitioner who is not “the same family member.” This is just one example of the creation of a new petitioner that demonstrates the Government’s interpretation is arbitrary and capricious.

C. Automatic Conversion And Priority Date Retention Are Independent Benefits Offered By INA § 203(h)(3). As Such, A Beneficiary Can Be Eligible For One Without Having To Be Eligible For The Other.

In *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Supreme Court held that Courts must strictly interpret portions of a statute in which Congress made its intent clear, even if ambiguity exists in other portions of the statute. Thus, if the Court were to find ambiguity in one portion of § 203(h)(3), but no ambiguity in the other, it must give effect to the unambiguous portion.

INA § 203(h)(3) enacts two separate and distinct benefits for aged-out beneficiaries. First, automatic conversion of the original visa petition into the appropriate visa category, and, second, retention of the priority date from the original visa petition. The Parents assert that § 203(h)(3) is plain as a

whole. However, if the Court were to find ambiguity in one provision, it should still rule in the Parents' favor with regard to the other.

In the present case, as well as in *Matter of Wang*, none of the named plaintiffs sought to take advantage § 203(h)(3)'s automatic conversion provision because they had all filed new petitions that already classified their children in an appropriate category. *See* discussion *supra* at 13–14, *Matter of Wang*, 25 I&N Dec. at 29–30. Yet, the Board in *Matter of Wang* framed the issue before it as “whether a derivative beneficiary who has aged out of a fourth-preference visa petition may automatically convert her status to that of a beneficiary of a second-preference category” under INA § 203(h)(3). *Matter of Wang*, 25 I&N Dec. at 30. The Board then confused two separate issues. It muddled automatic conversion with priority date retention. This occurred despite the fact that, at the time CSPA was enacted, there were numerous precedents permitting beneficiaries to retain earlier priority dates independent of any automatic conversion. *See* discussion *supra* at 30–32. In fact, the Board never considered if a beneficiary could simply retain his or her original priority date pursuant to § 203(h)(3) without automatically converting to a new category. Thus, the Board's decision was unreasonable and not entitled to deference. As a result, the Court is free to hold that the Parents are entitled to priority date retention pursuant to § 203(h)(3) while

still deferring to the Government’s interpretation of automatic conversion, or *vice versa*.

D. The Government’s Interpretation Frustrates The Policy That Congress Sought To Implement

1. CSPA Addresses More Than Administrative Delays.

The Government’s interpretation of CSPA narrowly frames the law’s purpose to solely address administrative delays. This is not the case. In fact, this approach wholly ignores portions of CSPA designed to reduce delays based upon over-subscription of visa categories. These portions of the statute clearly show that CSPA was designed to keep children together with their parents.

Section 204(k) of the INA, 8 U.S.C. § 1154(k), provides the best example of CSPA’s broad protective measures that address more than administrative delays. Section 204(k)(2) of the Act, in relevant, part states:

Paragraph (1) [providing for the automatic conversion from F2B to F1 upon the naturalization of the parent] does not apply if the son or daughter files with the Attorney General a written statement that he or she elects not to have such a conversion occur (or, if it has occurred, to have such conversion revoked). Where such an election has been made, any determination with respect to the son or daughter’s eligibility for admission as a family-sponsored immigrant shall be made as if such naturalization had not taken place.

This provision, more commonly known as “the CSPA opt-out provision,” allows certain second preference beneficiaries (unmarried sons

and daughters of permanent residents, “F-2B”) to elect not to automatically move to the first preference category (unmarried sons and daughters of United States citizens, “F-1”) upon the Parent’s naturalization. While this may initially appear counterintuitive, the wait for a visa proves much shorter for F-2B beneficiaries in certain over-subscribed countries such as the Philippines.⁴ As a result of CSPA’s passage, adult children of lawful permanent residents are permitted to keep their position in the F-2B line despite their petitioning parent moving to a less advantageous (more oversubscribed) category. Accordingly, § 204(k)(2) was enacted by Congress with the specific intent of alleviating a wait caused by over-subscription in visas, not administrative delay.

Given that Congress enacted § 204(k)(2) to address delays caused by over-subscription in certain visa categories, the Board’s approach to CSPA is fundamentally flawed. The Board states “[t]he CSPA was essentially enacted to provide relief to children who might ‘age out’ of their beneficiary status because of administrative delays in visa processing or adjustment application adjudication.” *Matter of Wang*, 25 I&N Dec. at 31. The Board

⁴ For example, the April 2010 visa bulletin lists the current priority date for F1 petitions from the Philippines as March 1, 1994, while the current priority date for F2B petitions from the Philippines is September 15, 1998. Thus, a Filipino immigrant in the F2B category has approximately four years and six months less to wait than a Filipino immigrant in the F1 category. Visa Bulletin for April 2010, *available at* http://travel.state.gov/visa/frvi/bulletin/bulletin_4747.html (last visited May 17, 2010).

also states “[w]hile the CSPA was enacted to alleviate the consequences of administrative delays, there is no clear evidence that it was intended to address delays resulting from visa allocation issues, such as the long wait associated with priority dates.” *Id.* at 38. The Government’s wholesale reliance upon this language in *Matter of Wang* demonstrates a failure to contemplate the entirety of CSPA.

2. Section 203(h)(3) Was Not Enacted To Save Immigrants’ Filing Fees Or To Preserve Government Resources.

The Government’s contention that § 203(h)(3) was passed to save lawful permanent residents filing fees or to preserve Government resources is contrived. Excerpt Vol. I, p. 112. Nowhere in the Congressional record is there mention of § 203(h)(3) saving taxpayer dollars, conserving Government resources, or saving lawful permanent residents filing fees. This is because Congress was not concerned with those issues when passing CSPA. Moreover, the Board in *Matter of Wang* also fails to mention any of those concerns.

3. The Government’s Interpretation Of INA § 203(h)(3) Does Not Provide New Relief.

The Government claims that CSPA provides relief beyond that already afforded by the federal regulations. Excerpt Vol. I, p. 112–113. More specifically, the Government contends that, under § 203(h)(3), lawful

permanent resident parents are no longer required to file separate visa petitions once their beneficiary children age out, thereby saving permanent residents hundreds of dollars in filing fees. The Government claims this relief was not provided by the preexisting regulation, 8 C.F.R. § 204.2(a)(4), and, therefore, § 203(h)(3) provides new relief to principal and derivative beneficiaries of F-2A petitions.

First, any assertion that the Government's interpretation of § 203(h)(3) provides new relief that was not already provided for under preexisting federal regulations is patently untrue. The Government alleges that the preexisting regulation, 8 C.F.R. § 204.2(a)(4), required lawful permanent resident petitioners who directly petitioned a child to file a new visa petition for the child if he or she aged out.⁵ However, in reality a new visa petition was necessary only when the parent was a F-2A beneficiary and the child was listed as a derivative beneficiary of the parent's petition. This remains the case today, and neither CSPA nor the Government's interpretation changes this fact. The actual implementation of 8 C.F.R. § 204.2(a)(4) is identical to what the Government now claims is relief beyond that already afforded under preexisting regulations.

Likewise, in *Matter of Wang*, the Board states that § 203(h)(3) simply “. . . mirrors the language of 8 C.F.R. § 204.2(a)(4) and essentially codifies

⁵ 8 C.F.R. § 204.2(a)(3) was last revised in 1997, well before CSPA's passage and the Board's decision in *Wang*.

‘established regulatory practice’ [. . .].” *Matter of Wang*, 25 I&N Dec. at 34.

Why would Congress enact a statute that provided the same relief that was already provided for under “established regulatory practice?” The answer: Congress did not simply codify preexisting regulations, but rather Congress enacted broad relief for children who, through no fault of their own, aged-out and are separated from their families.

4. Derivative Beneficiary Children Are Not “Line Jumpers.”

The Government contends that derivative beneficiary children waiting for a visa with their parents were never “in line” for a visa and as such § 203(h)(3) does not apply to them because Congress was concerned with displacing others who have been waiting patiently in line. *See Matter of Wang* 25 I&N Dec. at 38; Excerpt Vol. II, p. 312. Under the Government’s approach, aged-out derivative beneficiary children who wish to reunite with their family as quickly as possible should now be considered “line jumpers.” Not only is this argument contrary to the law, it requires a perverse interpretation of what it means to wait 15 years or more for the opportunity to immigrate to the United States as a family. The Government would have Xiuyi Wang, who waited in the immigrant visa line with her father for nearly seventeen years, wait another decade or more in order to legally immigrate to the United States to join her father simply because she is now too old for the “line” they claim she was never in. *See Matter of Wang*, 25

I&N Dec. at 38–39. This unjust result severely punishes those who attempt to legally immigrate to the United States, but, through no fault of their own, age-out of their original visa preference category. This result is unreasonable, capricious, and stands in stark contrast to Congress’ ameliorative intent in passing the Child Status Protection Act.

Moreover, the Government’s interpretation stands completely against logic. Derivative children are obviously “in line” because they are statutorily eligible for permanent resident status pursuant to § 203(d) and are usually listed on the original visa petition. *See* INA § 203(d), 8 U.S.C. § 1153(d). This fact is evidenced by every derivative beneficiary who has gained lawful permanent resident status through family-based immigration. If, as the Government suggests, derivative beneficiary children are not waiting in the visa line with their parents, it would be impossible for them to gain permanent resident status. However, derivative beneficiary children do gain permanent resident status based on their many years of waiting in line with their parent. As such, the Government’s interpretation of § 203(h)(3), which relies upon this argument, is not entitled to deference.

All in all, the reality of the case at hand is that Xiuyi Wang, Anne Theresa Costello, Vernilee Ong, Lucheevette M. Ong, and all other derivative beneficiary children wait years with their parents for the opportunity to become permanent residents of the United States. Yet, when

the children inevitably turn twenty-one years old and are left behind, the Government portrays them as callous “line jumpers” who are trying to steal visas from other intending immigrants. Because of this erroneous portrayal, the Government believes it is justified in separating families who have complied with U.S. immigration law and forcing them to begin their long wait anew.

However, Congress saw it differently. As Representative Jackson Lee said on April 4, 2001, “[The Child Status Protection Act] supports the underlying premise of the immigration policy in this country, which is the reunification of families.” 107th CONG. REC. H1209 (daily ed. Apr. 4, 2001) (statement of Rep. Jackson Lee). The Government’s interpretation of § 203(h)(3) in no way supports the reunification of families; rather the Government’s position causes the breakup of families and years of unnecessary suffering due to unlawful separation. This result is not only contrary to CSPA’s purpose, it is contrary to the fundamental tenets of U.S. immigration law.

This Court has already found that CSPA “was intended to address the often harsh and arbitrary effects of the age out provisions under the previously existing statute.” *Padash v. INS*, 358 F.3d 1161, 1173 (9th Cir. 2004). This Court adheres to the general canon of construction that “a rule intended to extend benefits should be ‘interpreted and applied in an

ameliorative fashion.”” *Id.* (quoting *Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003)). As such, this Court should recognize the law’s emphasis on family unity, adopt the Parents’ interpretation of CSPA, and vacate the District Court’s decision.

E. The Government’s Interpretation Of INA § 203(h)(3) Is Illogical And Serves No Reasonable Public Policy.

The Government’s interpretation of § 203(h)(3) limits relief to a very small subset of intending immigrants. Pursuant to the Government’s reading, automatic conversion requires a beneficiary or derivative beneficiary’s petition to move from one valid visa preference category to another. In addition, the Government states that priority date retention requires both the original petition and the subsequent petition be filed by the same petitioner. Thus, to take advantage of § 203(h)(3), an aged-out beneficiary must move from one valid visa category to another while, at the same time, remaining eligible to be petitioned by the same family member who filed his or her original petition. This can occur in only one circumstance — where the beneficiary is petitioned under the F-2A category.⁶

⁶ In the F-1, F-2B, and F-3 preference categories, primary beneficiaries are already over 21 years old, and aged-out derivative beneficiaries cannot subsequently be petitioned by the original petitioners, their grandparents. In the F-4 category, primary beneficiaries are also already over 21 years old, and aged-out derivative beneficiaries cannot subsequently be petitioned by the original petitioners, their

Yet, neither the Government nor the Board in *Wang* provide any logical rationale for why Congress would enact § 203(h)(3) to protect such a limited subsection of parents and children. Why would Congress single out such a limited group for protection? This question is especially poignant when derivative beneficiaries from all visa categories suffer exactly the same harm from aging-out — continued separation from family members and a greatly extended wait to immigrate to the United States. Moreover, why would Congress prioritize protecting the families of lawful permanent residents while, at the same time, turning a blind eye to the plight of U.S. citizens' families? All in all, the Government's interpretation of § 203(h)(3) leads to an illogical, irrational public policy. For this reason, the Court should give it no deference.

X. CONCLUSION

A statute must be read in its entirety and no word should be treated as superfluous. Read in its entirety and giving meaning to each word, the language of INA § 203(h)(3) is plain and clearly allows aged-out derivative children to retain the original priority date assigned to the petitions filed for their parents in family-based, employment-based, and diversity-based categories.

aunts or uncles. Thus, the Government's interpretation can only be satisfied by individuals petitioned under the F-2A category.

The Government's argument that § 203(h)(3) only provides relief for those adult children who were originally petitioned as F-2A is irrational, unreasonable, and flies in the face of logic. Regulations providing for that exact relief were in existence for ten years prior to the passage of CSPA. Congress need not have addressed the issue at all if it only sought to be redundant.

The phrase "and (d)" undisputedly refers to derivatives in all categories. To reach any other conclusion requires that one treat the phrase as surplusage. Since that would violate the rules of statutory construction, the plain meaning of the phrase must be acknowledged. Because the Government's position fails to do this, it is invalid and not entitled to deference.

Even if the Court finds that the automatic conversion provision is ambiguous, it is self-evident that the retention of priority date provision is not. The unavoidable conclusion from a reading of the plain language of that provision is that the retention provision applies to all aged-out derivative beneficiaries in all categories. Therefore, the Court should find that the Parents' position regarding retention is correct and vacate the District Court's decision.

The United States' immigration policy is now, and has always been, to promote family unity. Thus, Congress' intent in passing CSPA was to

further implement that policy. Congress did not intend to pass meaningless legislation. Nor did it intend to save immigrants filing fees while, at the same time, doubling and tripling them for those attempting to naturalize or adjust status. Congress sought to correct the problem of family separation brought about by both over-subscription and administrative delays. Read in its entirety, the statute accomplishes its purpose. The Government's interpretation can only be supported by ignoring Congressional intent and twisting the language of the statute beyond recognition.

The plain language of the statute and the Parents' position is that CSPA provides for retention of the original priority date for aged-out derivative children beneficiaries in family, employment, and diversity based categories. This is not only what the statute says; it is a logical action.

The Government asserts that CSPA only provides priority date retention for aged-out children derivative beneficiaries from the F-2A category. There is no reason that Congress would have needed to pass legislation accomplishing that relief since the regulations already provided for it. More importantly, why would Congress pass legislation that treated relatives of lawful permanent residents more favorably than those of United States citizens? Under the Government's position, aged-out derivative beneficiary children of unmarried (single, widowed, or divorced) sons or daughters or married sons or daughters of United States citizens would have

to get out of the line they have been waiting in for many years and move to a new line. This would result in longer family separation of the original parent beneficiaries from their children. There are many ways to describe this result, but family unity is not among them.

Unless this Court adopts the beneficiary Parents' interpretation of the Child Status Protection Act, it will be impossible for the law to do what Congress intended it to do — preserve family unity in the face of external factors for which the affected children were not responsible.

Because both the Government's interpretation of § 203(h)(3) and their argument in its support are without merit, this Court should grant this appeal and vacate the decision below.

Dated: May 18, 2010

Respectfully submitted,
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STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the rules of this Court, counsel for the Plaintiffs is aware of one case pending in this court involving similar factual and /or legal issues as the instant case.

Case Name: Rosalina De Osorio, et al v. Jonathan Scharfen, et al

Case No.: 09-56786

Dated: May 18, 2010

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BRIEF FORMAT CERTIFICATION

Pursuant to Federal Rules of Appellate Procedure, Rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionally spaced, has a typeface of 14 points or more and contains 9,884 words .

Dated: May 18, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: May 18, 2010

Signature: /s/Nancy E. Miller

CERTIFICATE OF SERVICE

I hereby certify that on _____, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Date: _____

Signature: _____