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VERMONT SERVICE CENTER INDICATES THAT IT WILL NOT FOLLOW MATTER OF MARIA T. GARCIA IN INTERPRETING THE CHILD STATUS PROTECTION ACT

Posted on December 12, 2008 by Cyrus Mehta

by
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On November 3, 2008, Vermont Service Center ("VSC") Counsel Thomas F. McCarthy sent a letter to attorney Alan Lee indicating that the VSC will not follow the unpublished decision of the Board of Immigration Appeals in *Maria T. Garcia*, A# 79 001 587, interpreting the Child Status Protection Act ("CSPA").[1] That is, VSC will not provide aged-out children of certain visa petition beneficiaries with the protection that the BIA in *Garcia* interpreted the statute to require.

The provision of the CSPA at issue here was added to the Immigration and Nationality Act ("INA") as section 203(h)(3). Section 203(h) of the INA provides, in its entirety, as follows:

(h) 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 satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using-

(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), 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) APPLICATION TO SELF-PETITIONS- Paragraphs (1) through (3) shall apply to self-petitioners and derivatives of self-petitioners.[2]

To understand the meaning of this section, it is necessary to know that subsection 203(a)(2)(A) refers to a petition filed by a Lawful Permanent Resident ("LPR") on behalf of his or her spouse or child, and that 203(d) provides for " spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 101(b)(1) . . . 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." In the context of both a "2A" preference petition for one's child under 203(a)(2)(A), and an application by a derivative child under 203(d), it becomes necessary to determine whether the applicant for an immigrant visa or for adjustment of status still qualifies as a "child" by the time that it is otherwise possible for him or her to obtain an immigrant visa or adjust status.

Pursuant to INA § 101(b)(1), one necessary qualification to be a "child" is an age of less than 21 years. Thus, there is the possibility of "aging out"—of losing one's status as a child by reaching too high an age. INA § 203(h)(1) provides that, as long as the son or daughter seeking to be classified as a child has sought to acquire LPR status within one year of visa availability, that alien's age for these purposes is calculated by taking the age at the time of visa availability, and subtracting the length of time that the I-130 or I-140 petition was pending.

In effect, it is as if the child stopped aging at the time the petition was filed, did not start again until the petition was approved, and then stopped once more on the day that a visa number became available.

If the CSPA-adjusted age calculated under INA § 203(h)(1) is under 21 years, then the son or daughter (assuming that he or she otherwise qualifies as a "child", such as by remaining unmarried) may adjust status or obtain an immigrant visa under the original 2A preference petition, or by accompanying or following-to-join on the original petition with respect to which he or she was a derivative. The question addressed by INA §203(h)(3), *Maria T. Garcia*, and the recent letter from VSC Counsel McCarthy is what happens if the CSPA-adjusted age calculated under INA § 203(h)(1) is over 21.[3]

Section 203(h)(3) provides that in such a situation, "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." Retention of an original priority date is important because an older priority date will become current, allowing the alien to obtain an immigrant visa or adjust status, sooner than a newer priority date. Preference visas operate on a "first-come first-served" system, with what amounts to a waiting line, so one's precise place in that line is quite significant.[4]

When an alien is the beneficiary of a 2A preference petition, the meaning of INA § 203(h)(3) is quite clear: the alien becomes the beneficiary of a 2B preference petition instead, the "appropriate category" for an over-21-year-old unmarried son or daughter of an LPR, but that 2B preference petition retains the priority date of the original 2A preference petition. Section 203(h)(3), however, explicitly applies not only to the beneficiary of a 2A preference petition under §203(a)(2)(A), but also to a derivative beneficiary under §203(d). The question is what it means for "the alien's petition" to be "converted to the appropriate category" in a context in which the alien in question is not the direct beneficiary of any petition, but is instead a derivative beneficiary of a petition that was originally filed on behalf of someone else.

In *Matter of Maria T. Garcia*, the BIA answered this question in a manner consistent with the statutory text and favorable to the alien. Ms. Garcia's aunt, a U.S. citizen, had filed a visa petition on behalf of her sister, Ms. Garcia's mother, in 1983, to classify Ms. Garcia's mother, under the family fourth

preference.[5] Ms. Garcia was 9 years old at the time. The petition was approved the same day that it was filed, and Ms. Garcia was 22 years old by the time a visa number became available to her mother, so §203(h)(1) provided no help to Ms. Garcia because her CSPA-adjusted age was 22. Ms. Garcia's age having been determined to be over 21 for purposes of § 203(h)(1), the BIA was then required to apply § 203(h)(3) and determine the "appropriate category" for conversion. It held that "where an alien was classified as a *derivative* beneficiary of the original petition, the 'appropriate category' for purpose of section 203(h)(3) is that which applies to the 'aged-out' derivative vis-à-vis the *principal beneficiary* of the original petition."[6]

Thus, Ms. Garcia effectively became the beneficiary of a 2B preference petition deemed to have been filed on her behalf by her mother back in 1983. And because of the long lapse of time since then, a 2B petition was immediately current. As the BIA explained:

> In this instance, the principal beneficiary of the original petition was mother, who became a lawful permanent resident of the United States once a visa number became available to her in 1996. was (and remains) her mother's unmarried daughter, and therefore the "appropriate category" to which her petition was converted is the second-preference category of family-based immigrants, i.e., the unmarried sons and daughters of lawful permanent residents. Furthermore, is entitled to retain the January 13, 1983 priority date that applied to the original fourth-preference petition, and therefore a visa number under the second-preference category is immediately available to .[7]

Therefore, Ms. Garcia was permitted to apply for adjustment of status.[8]

Most derivative beneficiaries of current fourth-preference petitions would, like Ms. Garcia, have a visa number immediately available to them on this interpretation of §203(h)(3), because for most countries the cut-off date for a 2B preference petition is actually later than that for a fourth-preference petition.[9] Thus, in most cases, any fourth-preference petition with a current priority date will produce a 2B petition with a current priority date when subjected to "*Garcia* conversion". Derivative beneficiaries of first- or third-preference petitions may not have visas immediately available upon

conversion, but they will still have a substantial advantage relative to the situation in which their priority date was given by a 2B petition newly filed by the primary beneficiary upon becoming an LPR.[10]

The opinion in *Maria T. Garcia* was not published by the BIA as binding precedent,[11] however, and VSC Counsel McCarthy has now indicated that USCIS (or at least the VSC) rejects the interpretation of § 203(h)(3) given in the unpublished *Maria T. Garcia* opinion. According to Mr. McCarthy's letter, conversion under § 203(h)(3) only applies to derivative beneficiaries in a specific situation set out by regulation, having to do with the derivative children of a spouse who is the subject of a 2A preference petition by an LPR. As he wrote:

> Specifically, 8 CFR §204.2(a)(4) restricts the retention of an earlier priority date to the derivative beneficiaries of a second preference spousal petition. When the derivative turns 21, they become ineligible for a visa based on the initial petition. In some situations, the same petitioner who filed the initial petition can file a new petition for the previously included derivative. However, this provision is specifically limited to petitions filed by the same petitioner within the second preference visa category. There is no provision for the 3rd or 4th preference categories.[12]

Therefore, according to Mr. McCarthy, the VSC will not apply INA § 203(h)(3) conversion to 3rd or 4th preference petitions (or, presumably, to 1st preference petitions in the event that the unmarried son or daughter of a U.S. citizen who is the beneficiary of such a petition has a child).

The description of 8 CFR § 204.2(a)(4) in Mr. McCarthy's letter is correct as far as it goes, but it does not explain how an interpretation of INA § 203(h)(3) limited to only the situation described in 8 CFR § 204.2(a)(4) would be consistent with the text of the statute. INA § 203(h)(2)(B) makes clear that "with respect to an alien child who is a derivative beneficiary under subsection (d)," all of INA § 203(h) ("this paragraph") applies to any "petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c)."[13] There is no distinction between petitions filed for classification of the alien's parent under INA § 203(a)(2)(A), the 2A preference, and petitions filed under other preferences. Nor is there any such distinction in the text of INA § 203(h)(3) itself, which explicitly references subsection (d). Thus, Mr. McCarthy's letter appears

to elevate the text of the regulation, which predates the enactment of the CSPA,[14] above the text of the CSPA-enacted statutory provision itself.

According to VSC Counsel McCarthy, USCIS has certified two cases to the BIA in an attempt to obtain a published decision on the issue: Matter of Wang, A 88 484 947, and Matter of Patel, A 89 726 558. In addition, although not mentioned by Mr. McCarthy in his letter, there are currently at least two lawsuits pending in United States District Court (specifically, the Central District of California, where the California Service Center is located) regarding the proper interpretation of § 203(h)(3), one seeking certification as a class action.[15]

Hopefully, either the BIA or the federal courts will soon definitively adopt, in a precedential opinion, the interpretation of § 203(h)(3) put forward in the unpublished *Maria T. Garcia* opinion. In the interim, it appears that the VSC will not follow that interpretation, and aliens wishing to obtain the benefit of "*Garcia* conversion" with respect to petitions not originally filed under the 2A preference may need to seek relief in federal court themselves.

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[1] A copy of the letter from Vermont Service Center Counsel McCarthy to attorney Alan Lee is available at

http://www.bibdaily.com/pdfs/VSC%20CSPA%2011-3-08.pdf. The decision in *Maria T. Garcia,* 2006 WL 2183654 (BIA June 16, 2006), is available at http://www.bibdaily.com/pdfs/Garcia%20web1034.pdf.

[2] INA § 203(h), 8 U.S.C. § 1153(h).

[3] For petitions filed before September 11, 2001, the relevant question is arguably not whether the CSPA-adjusted age is over 21 years, but whether the CSPA-adjusted age is over 21 years and 45 days. Pursuant to Section 424 of the USA PATRIOT Act of 2001, a child whose 21st birthday was after September 30, 2001 and who is the beneficiary of such a pre-September-11 petition is considered to remain a child for 45 days after such birthday. A State Department cable regarding this and other immigration benefits contained in the USA PATRIOT Act is available at http://travel.state.gov/visa/laws/telegrams/telegrams_1438.html. The issue of whether this 45 days can be added on to CSPA protection has not been definitively resolved by a regulation or published case, but from a policy perspective it is sensible to allow such cumulative protection, and success has been reported in doing so.

[4] One precondition to obtain an immigrant visa or adjustment of status based upon a preference petition is that the priority date of that petition be earlier than the "cutoff date" for the appropriate visa category and country as published in the then-applicable State Department Visa Bulletin. For links to the past several years of Visa Bulletins, see http://travel.state.gov/visa/frvi/bulletin/bulletin_1770.html.

[5] *See* INA § 203(a)(4), 8 U.S.C. § 1153(a)(4).

[6] *Maria T. Garcia*, A# 79 001 587, at 4, 2006 WL 2183654 (BIA June 16, 2006), *available at* http://www.bibdaily.com/pdfs/Garcia%20web1034.pdf, at 5.

[7] *Id.*

[8] *Maria T. Garcia* has also been followed in another unpublished BIA decision, *Elizabeth Garcia*, A# 77 806 733, 2007 WL 2463913 (BIA July 24, 2007).

[9] For sample cutoff dates, see the latest Visa Bulletin as of this article's publication, the December 2008 Visa Bulletin available at

http://travel.state.gov/visa/frvi/bulletin/bulletin_4384.html. With respect to all countries except Mexico, the fourth preference cutoff date is earlier than the 2B cutoff date. The Mexican 2B cutoff (May 1, 1992) is slightly less than three years before the Mexican fourth-preference cutoff (February 15, 1995), so that someone in the position of Ms. Garcia herself would not have a current 2B priority date for some time after the priority date of the primary fourth-preference beneficiary became current. In Ms. Garcia's case, the question did not arise until a number of years after the fourth-preference petition for her mother had become current.

[10] As a practical matter, the primary beneficiary of a first-, third- or fourth-preference petition will often file a new I-130 petition for any aged-out derivative beneficiary upon becoming an LPR even when seeking to take advantage of the *Garcia* interpretation, because the logistics of seeking conversion in the absence of another approved petition can become problematic. The key question is whether this new I-130 petition is assigned the priority date of the day that it is filed or the priority date of the original petition on behalf of the original primary beneficiary.

[11] It appears that a copy of the decision was kindly provided to Bender's Immigration Bulletin, and perhaps other sources, by counsel for Ms. Garcia.

[12] http://www.bibdaily.com/pdfs/VSC%20CSPA%2011-3-08.pdf at 2.

[13] INA § 203(h)(2)(B), 8 U.S.C. § 1153(h)(2)(B).

[14] *See* http://edocket.access.gpo.gov/cfr_2002/janqtr/8cfr204.2.htm (providing the 2002 version of 8 CFR §204.2, with a last revision date in 1997). The CSPA took effect in August 2002.

[15] *See* http://www.ailf.org/lac/litclearinghouse/litclr_newsletter_071108.pdf; *Cuellar de Osorio v. Scharfen*, SACV 08-cv-00840-JVS-SH (C.D. Cal.); *Costelo v. Chertoff*, SACV 08-688-JVS-SH (C.D. Cal.). *Costelo* is the lawsuit that was filed as a class action, although class certification has not been granted. Copies of many of the court papers in these cases, and a number of other useful CSPA resources, are available at http://shusterman.com/cspa.html.