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BIA REJECTS *MATTER OF MARIA T. GARCIA* IN PRECEDENT DECISION INTERPRETING THE CHILD STATUS PROTECTION ACT

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By

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On June 16, 2009, a three-member panel of the Board of Immigration Appeals ("BIA") issued a precedent decision in *Matter of Wang*[1] interpreting the Child Status Protection Act ("CSPA") that rejected the more generous interpretation previously offered by the BIA's unpublished decision in *Matter of Maria T. Garcia*.[2] The BIA has now held that the CSPA does not allow aged-out children of many visa petition beneficiaries to retain the original beneficiary's priority date in the way that the unpublished opinion in *Garcia* had interpreted the statute to permit. A child whose CSPA-adjusted age is over 21 will now, in most cases, have to wait just as long to obtain the status of a lawful permanent resident as one who had never been a derivative beneficiary.

As explained in a previous article by this author on this website (http://cyrusmehta.com/perseus/News.aspx?SubIdx=ocyrus20081212205145), 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.[3]

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 hwith respect to which he or she was a derivative. The question addressed by INA §203(h)(3), *Matter of Wang*, and *Matter of Maria T. Garcia*, is what happens if the CSPA-adjusted age calculated under INA § 203(h)(1) is over 21.[4]

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.[5]

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 had 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.[6] 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."[7]

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 .[8]

Therefore, Ms. Garcia was permitted to apply for adjustment of status.[9]

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.[10] 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.[11]

The opinion in *Maria T. Garcia* was not published by the BIA as a precedent decision,[12] however, and the BIA panel that decided *Matter of Wang* has now rejected the *Garcia* approach and published its own decision as a precedent. Instead of following *Maria T. Garcia*, *Matter of Wang* follows in the footsteps of the letter from Vermont Service Center ("VSC") Counsel Thomas F. McCarthy discussed in the above-mentioned article (http://cyrusmehta.com/perseus/News.aspx?SubIdx=ocyrus20081212205145), and holds that conversion under § 203(h)(3) only applies to derivative beneficiaries in a specific situation already addressed by regulation prior to the enactment of the CSPA, having to do with the derivative children of a LPR's spouse who is the subject of a 2A preference petition filed by that LPR.

Matter of Wang came to the BIA from the California Service Center, where Zhuomin Wang had filed an I-130 petition on behalf of Xiuyi Wang. Zhuomin Wang's U.S. citizen sister had filed a fourth preference petition on his behalf in December of 1992, when the then-derivative beneficiary, Xiuyi Wang, was 10 years old. The fourth preference petition was approved in February 1993. Visas finally became available for that priority date in February 2005, and the petitioner, Zhuomin Wang, was admitted for permanent residence in October 2005. By that time, however, his daughter Xiuyi Wang was 22 years old, and could not qualify as a derivative beneficiary even with the aid of INA § 203(h)(1): subtracting the approximately two months that the petition had been pending, her adjusted age was still over 21. In 2006, Zhuomin Wang filed the new I-130 petition for his daughter that was at issue in the BIA's decision, and requested that it be assigned the old 1992 priority date of his sister's petition for him—as the petition in *Maria T. Garcia* had been. The CSC director rejected this request, but certified her decision to the BIA. In its newly published decision, the BIA rejected this request as well.

The BIA reasoned that "the language of section 203(h)(3) does not expressly state which petitions qualify for automatic conversion and retention of priority dates.
Given this ambiguity, we must look to the legislative intent behind section 203(h)(3)."[13] According to the BIA, the concepts of petition "conversion" and priority date "retention" that are invoked in section 203(h)(3) have historically fixed meanings: they apply, respectively, to a single petition converting from one preference category to another, and to the ability to transfer a priority date from one petition to a second petition when both petitions are filed by the same petitioner for the same beneficiary.

The only permissible instance of priority-date retention by a derivative beneficiary when a petition is converted due to that derivative beneficiary aging out, according to USCIS and the BIA in *Wang*, involves the derivative children of a second-preference spousal beneficiary. Specifically, as the BIA explained:

at the time Congress enacted the CSPA, the regulations at 8 C.F.R. § 204.2(a)(4) provided for "retention" of a priority date for an aged-out child who was accompanying or following to join a principal beneficiary on a second-preference spousal petition. Under 8 C.F.R. § 204.2(a)(4), if a child ages out prior to the issuance of a visa to the principal beneficiary, a separate petition for that son or daughter is then required, but the original priority date is retained if the subsequent petition is filed by the same petitioner. In other words, the retention provision of 8 C.F.R. § 204.2(a)(4) is limited to a lawful permanent resident's son or daughter who was previously eligible as a derivative beneficiary under a second-preference spousal petition filed by that same lawful permanent resident.[14]

This second-preference example was the same one given by VSC counsel, Mr. McCarthy, in his previously-discussed letter. The BIA in *Matter of Wang* also noted other examples, outside the derivative-beneficiary context, in which a petition converts and a priority date is retained, such as when the beneficiary of a first-preference petition marries and the petition is automatically converted to third preference; here, too, the identity of the petitioner and the beneficiary remain the same.

Because the new petition filed on behalf of Xiuyi Wang was filed by a different petitioner, her father rather than her aunt, and the original case had not been a

spousal second-preference case, the BIA held in *Matter of Wang* that Zhuomin Wang's new petition for his daughter could not retain the original priority date. The BIA examined the legislative history of the CSPA, but could "find no indication in the legislative record that Congress was attempting to expand on the historical application of automatic conversion and retention of priority dates for visa petitions," and "therefore decline to read such an expansion into the statute."[15]

The BIA's decision in *Matter of Wang*, like Mr. McCarthy's previous letter, never really explains how an interpretation of INA § 203(h)(3) that covers derivative beneficiaries only in the situation described by 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)."[16] There is no distinction in INA §203(h)(2)(B) between derivative beneficiaries of petitions filed under section 204 for classification of the alien's parent under INA §203(a)(2)(A), the 2A preference, and derivative beneficiaries of 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 *Matter of Wang*, like the McCarthy letter before it, appears to elevate the text of 8 CFR § 204.2(a)(4), which predates the enactment of the CSPA,[17] above the actual text of the CSPA-enacted statutory provision. Ambiguous legislative history cannot justify ignoring the statutory text in this fashion.

Furthermore, it is not as though the result prescribed by *Matter of Wang* is particularly attractive from a policy point of view. The BIA panel claimed in its decision that "f we interpret section 203(h) as the petitioner advocates, the beneficiary, as a new entrant in the second-preference visa category line, would displace other aliens who have already been in that line for years before her."[18] But based on the facts as described by the BIA, Xiuyi Wang has been waiting to immigrate to the United States since the year 1992, when she was 10 years old. It takes a particularly twisted sort of formalism to describe her father's desire to save her place in line in front of those who started their immigration process much later – perhaps more than 10 years later (say, in 2003 or 2004) – as an attempt to "displace other aliens who have already been in . . . line for years before her", just

because the line that Xiuyi Wang is now waiting in is technically different from the line she waited in, to no avail, for more then twelve years.

Hopefully, either the BIA acting *en banc* or the federal courts will, in the future, overturn *Matter of Wang* and adopt, in a precedential opinion, the interpretation of INA §203(h)(3) previously put forward in the unpublished *Maria T. Garcia* opinion. 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.[19] In the meantime, the only way for aliens to attempt to obtain the benefit of "*Garcia* conversion" with respect to petitions not originally filed under the 2A preference would be to file their own actions in federal court themselves.

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[1] 25 I&N Dec. 28 (BIA 2009), http://www.usdoj.gov/eoir/vll/intdec/vol25/3646.pdf .

[2] The decision in *Maria T. Garcia,* 2006 WL 2183654 (BIA June 16, 2006), is available at http://www.bibdaily.com/pdfs/Garcia%20web1034.pdf.

[3] INA § 203(h), 8 U.S.C. § 1153(h).

[4] 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.

[5] 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.

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

[7] *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.

[8] *Id.*

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

[10] For sample cutoff dates, see the latest Visa Bulletin as of this article's publication, the July 2009 Visa Bulletin available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4512.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 more than three

years before the Mexican fourth-preference cutoff (June 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.

[11] 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.

[12] 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.

[13] *Matter of Wang*, 25 I&N Dec. at 33.

[14] *Id.* at 34.

[15] *Id.* at 38.

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

[17] *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.

[18] *Matter of Wang*, 25 I&N Dec. at 38.

[19] *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.