

Case No. 09-56786+

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

ROSALINA CUELLAR DE OSORIO; ET AL. ,
Plaintiffs-Appellants

v.

ALEJANDRO MAYORKAS, Director,
United States Citizenship and Immigration Services; et al.,
Defendants-Appellees.

Appeal from an Order of the United States District Court
for the Central District of California
EDCV 08-840 JVS (SHX)

**BRIEF OF AMICI CURIAE AMERICAN IMMIGRATION LAWYERS
ASSOCIATION AND THE CATHOLIC LEGAL IMMIGRATION NETWORK,
INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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INTRODUCTION AND STATEMENT OF INTEREST

The Child Status Protection Act (CSPA) was designed to preserve family unity by protecting children against the vagaries of the visa backlog and preference system. The Board of Immigration Appeals (BIA) has eviscerated that purpose through its erroneous interpretation. As a result, untold numbers of children are separated from U.S. citizen and legal resident family members solely because they "age-out," i.e. turn 21, and qualify under preference categories that the BIA has deemed ineligible for the protections of the CSPA.

Amici curiae, the American Immigration Lawyers Association (AILA) and the Catholic Legal Immigration Network, Inc. (CLINIC) respectfully submit this brief to (1) demonstrate the devastating consequences of the BIA's decision, to which the district court erroneously deferred, by providing details about the lives of individuals who have been denied the benefit of the CSPA by the BIA's ruling, and (2) explain more fully the working of the complex immigrant visa allocation system that the CSPA was intended to ameliorate. Under a proper interpretation of the CSPA, these individuals and many others would be immediately eligible for legal permanent resident status as Congress intended.

AILA is a national association with approximately 11,000 members nationwide, including lawyers and law school professors, who practice and teach in the field of immigration and nationality law. AILA seeks to advance the

administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

CLINIC is a non-profit organization established by the United States Conference of Catholic Bishops to advocate on behalf of immigrants and support a network of faith-based and community-based immigration programs. CLINIC's members include more than 200 diocesan and other immigration programs with 290 field offices in 47 states. The network employs approximately 1,200 attorneys and accredited paralegals and assists some 600,000 clients, parishioners, and community members with immigration matters annually. CLINIC is particularly concerned and involved with family-based immigration matters, and publishes books and provides training on this issue to attorneys and paralegals throughout the United States.

ARGUMENT

I. The BIA Has Disqualified Many Individuals from the Protection of the CSPA in Violation of Congress's Intent to Benefit Derivative Beneficiaries in All Family-Based Visa Categories.

The purpose of the CSPA, a remedial statute intended to facilitate and hasten the reunification of immigrants with their U.S. citizen and legal resident families,¹ has been distorted and misinterpreted by *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009). As exemplified by the individuals whose circumstances are described below, the erroneous interpretation of the CSPA causes the separation of families, the disruption of family life and the deportation of long-time residents of the U.S. who entered as children a decade or more ago. All the following are individuals who have been denied CSPA eligibility under *Matter of Wang* and who would qualify for an immigrant visa if the CSPA were interpreted consistent with Congress' intent, as the Fifth Circuit did in *Khalid v. Holder*, 655 F.3d 363 (5th Cir. 2011).²

1. H-S-Y. In the late 1970's, the family of H-S-Y fled Laos, as did several hundred thousand other Hmong who were escaping persecution on account of their ethnicity at the end of the Indochinese wars. Hmong families were split apart --

¹ 148 Cong. Rec. H4991 (Statement of Rep. Sensenbrenner).

² The following information is based on individual case files. The names are abbreviated to protect their privacy. All information is available from CLINIC files.

some found refuge in the United States while others found it in France, Australia, and other countries. H-S-Y's uncle was resettled in the United States, and ultimately became a U.S. citizen. H-S-Y's parents were granted refugee status in France. H-S-Y, though born in France, was not awarded or eligible for French citizenship.

On February 19, 1995, at age nine, H-S-Y, entered the U.S. without inspection. Five months later, on July 18, 1996, her U.S. citizen uncle filed a visa petition on behalf of H-S-Y's father. H-S-Y, her three siblings, and her mother were included in that petition as derivative beneficiaries.

Due to visa backlogs, the processing of the visa petition was delayed nearly 12 years. In 2008, H-S-Y's parents and siblings were able to adjust status and become legal permanent residents. But H-S-Y was over 21 and had "aged-out."

In April 2008, H-S-Y's father, now a legal permanent resident, filed a new visa petition, a F-2B petition,³ on her behalf and sought to retain the July 18, 1996 priority date pursuant to the CSPA, specifically 8 U.S.C. § 1153(h)(3). Retention of the July 18, 1996 priority date would have permitted H-S-Y to apply for

³ The F-2B visa preference category includes the unmarried sons and daughters (21 years of age or older) of legal permanent residents. The Department of State *Visa Bulletin* is available at http://travel.state.gov/visa/bulletin/bulletin_1360.html. The *Visa Bulletin* sets out the visa preference categories (Family-Sponsored, Employment-Based, and Diversity), and their respective priority dates. For family members, the priority date is based on the date that the visa petition was filed by the qualifying family member.

adjustment of status and to gain legal residency as her parents and three siblings had done. However, USCIS denied H-S-Y's application for permanent residency, based on a finding that *Matter of Wang* prevented the benefits of the CSPA from accruing to this case. Without the benefit of the CSPA, H-S-Y will not have an immigrant visa available for at least five more years.⁴

Although H-S-Y has lived in the United States for 16 years, without the benefit of the CSPA and an immediately available visa that the CSPA would ensure, she is deportable. On September 28, 2011 an immigration judge ordered H-S-Y deported (“removed”) to Laos, or in the alternative, to France.⁵ H-S-L has never lived in Laos and speaks only a few words of Laotian. She has no family in Laos; her large extended family all live in the U.S. She will be deported alone to a country she has never lived in or seen, where she has no relatives or friends, and where she is unable to communicate with the population. These are the consequences of the Board’s erroneous interpretation of the CSPA.

⁴ The Department of State *Visa Bulletin* for May 2012 indicates immigrant visas are available in the F-2B All Country category for individuals whose visa petitions were filed before February 22, 2004. Since the F-2B visa petition was filed in April 2008, without the retention of the July 18, 1996 priority date, it will be many years until a visa is available. (See discussion at Section II, *infra*.)

⁵ *Matter of H-S-Y*, Decision of the Immigration Judge, September 28, 2011 (on file in the CLINIC office). Because H-S-Y is not a French citizen, it is uncertain whether she could be deported to France. See 8 U.S.C. § 1231(b)(2)(specifying countries to which removal may be ordered and effectuated).

2. R-M-B. Despite (or perhaps because of) the deep historical and cultural links between the U.S. and the Philippines,⁶ Filipinos like R-M-B seeking to immigrate to the U.S. experience interminable waiting periods -- longer than the waiting period for immigrants from any other country in the world.⁷ In November 1989, when R-M-B was nine years old, his U.S. citizen grandfather filed a visa petition on behalf of R-M-B's mother. R-M-B, his three siblings and his father were derivative beneficiaries of that petition.

In January 2003, R-M-B's parents and three siblings obtained legal residency and immigrated to the U.S. based on the petition R-M-B's grandfather had filed 14 years earlier. R-M-B was not permitted to join the rest of his family because he had turned 21 in 2001. Instead R-M-B lived with his cousins in Manila waiting to immigrate to the U.S. through the new F-2B visa petition filed for him in January 2004 by his mother. During the time R-M-B stayed behind in the Philippines, he attended college, becoming a nurse.

⁶ Migration Policy Institute, "The Philippines' Culture of Migration," January 2006; Asian Pacific American Legal Center of Southern California, "A Devastating Wait: Family Unity and the Immigration Backlogs," 2008.

⁷ The May 2012 Department of State *Visa Bulletin* indicates that the waiting period for immigrant visas is longer for the Philippines in all preference categories with one exception. Mexican F-2B beneficiaries have a longer wait than Filipino F-2B beneficiaries. The May 2012 *Visa Bulletin* is available at http://travel.state.gov/visa/bulletin/bulletin_5692.html

R-M-B traveled to the U.S. on a visitor's visa in 2007. After living apart from his family for three years, R-M-B settled down with his family in the U.S. Relying on the November 1989 priority date his mother had established through the visa petition his grandfather filed, R-M-B filed for adjustment of status. Upon filing for adjustment of status and receiving employment authorization, R-M-B began working as a nurse in a hospital. On April 27, 2011 his application for adjustment was denied by the USCIS District Director for San Diego.⁸ The USCIS decision determined, in accord with *Matter of Wang*, that R-M-B was unable to retain the November 1989 priority date and therefore must continue to wait until a visa becomes available for the January 2004 petition filed by his mother. Although the approved visa petition filed by R-M-B's mother has been pending eight years, it likely will not be available for him for many years.⁹

3. C-S-L. C-S-L, a 27 year old citizen of St. Lucia, was the derivative beneficiary of a visa petition filed by his U.S. citizen aunt on behalf of his father in 1991, when C-S-L was 6 years old. At age 10, C-S-L, came to the U.S. on a tourist

⁸ Notice of Decision on I-485, USCIS District Director Paul M. Pierre (April 27, 2011) (on file in the CLINIC office).

⁹ According to the May 2012 Department of State *Visa Bulletin*, immigrant visas are available for F-2B beneficiaries from the Philippines who filed petitions before December 8, 2001. Although this would appear to indicate that the visa would be available in less than four years, this is not the case. (See discussion in Section II, *infra*.)

visa with his mother and overstayed. By the time that the 1991 priority date became current, C-S-L, had turned 21 and was ineligible to obtain his legal residency. C-S-L's legal permanent resident father filed a F-2B visa petition on C-S-L's behalf in December 2006 and requested retention of the 1991 priority date, which would have permitted C-S-L to adjust status to legal residency. That request was denied in April 2008.¹⁰

While C-S-L's parents, cousins, aunts and uncles are legal permanent residents, C-S-L remains an overstay tourist. The family home was destroyed in 2004 when Hurricane Ivan shattered St. Lucia. He attempted to enlist in the U.S. army and was rejected because he lacks legal status in the U.S. He is not authorized to work or drive. Without the benefit of the CSPA, and specifically 8 U.S.C. § 1153(h)(3), C-S-L lingers in limbo, unable to obtain legal residency and move forward with his life for at least four more years.¹¹

4. C-S-V. The special relationship between the U.S. and Mexico, forged by common history, geography and blood relationships, has also resulted in some of

¹⁰ Notice from the USCIS Vermont Service Center indicating that the 1991 priority date could not be retained. The Vermont Service Center assigned C-S-L a 2006 priority date, the date on which the visa petition was filed by C-S-L's legal permanent resident father (on file in the CLINIC office).

¹¹ The May 2012 Department of State *Visa Bulletin*, immigrant visas are available for F-2B beneficiaries in the Worldwide category who filed petitions before February 22, 2004. Although this would appear to indicate that the visa would be available in less than three years, this is not the case. (See discussion in Section II, *infra*.)

the highest demands for visas and the longest waiting periods for visa availability. C-S-V is a 29-year-old citizen of Mexico who has lived in the U.S. since he was 11 years of age. He was six years old in 1989 when his U.S. citizen uncle filed a visa petition on C-S-V's father's behalf. Although C-S-V was the derivative beneficiary of his uncle's visa petition, he was 22 years old in 2006 when the visa became current and had "aged-out." C-S-V's parents obtained legal resident status based on his uncle's petition in 2006 and his father filed a F-2B visa petition on his behalf. Seeking to retain the 1989 visa petition priority date, C-S-V filed an application for adjustment of status in August 2008. USCIS denied the adjustment application in August 2009 and found that C-S-V was not entitled to retain his priority date.¹²

C-S-V has resided in the U.S. since September 1999. He graduated from Woodland High School in California, attended Yuba Community College, and obtained his real estate broker's license. C-S-V's father is now a U.S. citizen, converting C-S-V's F-2B visa petition to a F-1¹³ petition. However, without the

¹² Notice of Decision on I-485, Field Office Director Michael Biggs (August 27, 2009) (on file in the CLINIC office).

¹³ The F-1 visa preference category includes the unmarried sons and daughters (21 years of age or older) of U.S. citizens.

benefit of CSPA, the possibility of obtaining legal residency for C-S-V remains many, many years in the future.¹⁴

5. C-N-D-D. In 1979, a decade before C-N-D-D was born, her grandparents, aunts, and uncles fled Vietnam and entered the U.S. as refugees. Of the entire extended family, only C-N-D-D's mother and great-grandmother remained in Vietnam. C-N-D-D's mother was very close to her great-grandmother and refused to leave her. The family accepted her decision but never gave up hope that C-N-D-D's mother would join them in the U.S. The family sent remittances to C-N-D-D's mother which she depended on to survive.

Living in a small cottage in the rural city of Ninh Hoa, C-N-D-D's mother married, gave birth to C-N-D-D in October 1989, and divorced. On December 7, 1998, when C-N-D-D was 10 years old, her grandfather filed a F-2B visa petition for C-N-D-D's mother. C-N-D-D was the derivative beneficiary of the visa petition her grandfather filed on behalf of her mother. In 2008, C-N-D-D's grandfather became a U.S. citizen.

In April 2011, C-N-D-D's mother became a legal resident of the U.S. However, C-N-D-D was over 21 at the time her mother immigrated and was no

¹⁴ According to the May 2012 Department of State *Visa Bulletin*, immigrant visas are available for F-1 beneficiaries from the Mexico who filed petitions before May 15, 1993. Although this would appear to indicate that the visa would be available in 15 years, this is not the case. (See discussion in Section II, *infra*.)

longer a derivative beneficiary of the 1998 visa petition filed by her grandfather. In August 2011, C-N-D-D's mother filed a F-2B petition for C-N-D-D.¹⁵ Under *Matter of Wang*, C-N-D-D is unable to retain the 1998 priority date established when her grandfather filed the visa petition; therefore she will be subject to an additional waiting period of more than eight years.¹⁶

The family of C-N-D-D has struggled to reunite in the U.S. after being separated for decades. Most of the family is composed of U.S. citizens, and one of C-N-D-D's uncles is an L.A. Deputy Sheriff, while another is an employee of the U.S. Postal Service. All planned to assist C-N-D-D integrate into U.S. life. The family found community college nursing and English classes for C-N-D-D to take in the U.S. C-N-D-D's mother is distraught and worried about her daughter who is isolated and alone in Vietnam.

II. The Complex Visa Allocation System Creates Devastating Backlogs for Children Who Turn 21.

The significance in being able to retain the original priority date as provided by the CSPA can only be appreciated through an understanding of how visas are allocated under the worldwide annual quota system. In order to determine whether

¹⁵ State Department Correspondence (on file at CLINIC office).

¹⁶ The May 2012 Department of State *Visa Bulletin* indicates that immigrant visas are available for F-2B beneficiaries in the World-Wide category whose visa petitions were filed before February 22, 2004. C-N-D-D's petition was filed in 2011. (See discussion in Section II, *infra*.)

a visa applicant in a family-based preference category is “current,” one must compare the priority date with the date listed in the monthly Department of State *Visa Bulletin*.

The priority date is the official date that the USCIS has determined that the petition was filed. In order to be current, the priority date must be earlier than the date listed on the *Visa Bulletin* that corresponds to the preference category and country of nationality.

The Department of State determines visa availability based on statutory limits for each preference category, per country caps, and estimated demand. For example, in the F-2A category, there is an annual limit of 87,900 visas that can be used in any fiscal year, but no per country caps. In contrast, the F-2B category has both a much smaller annual limit of 26,266 visas that can be used in any fiscal year, as well as a per country limit of 7 percent of this number.

It is impossible to gauge future visa availability by looking only at the *Visa Bulletin* for a specific month, because one must take into account the actual size of the backlog in each category. That is best determined by looking at the Department of State’s Annual Immigrant Visa Waiting List Report, as well as a history of visa advancement in that particular category.¹⁷ For example, looking

¹⁷ Department of State Immigrant Visa Waiting List Report is available on the Department of State website at <http://www.travel.state.gov/pdf/WaitingListItem.pdf>.

only at the *Visa Bulletin* for May 2012 would reveal that petitions in the F-2B category for countries other than Mexico and the Philippines are "current," i.e. currently being issued, if they were filed before February 22, 2004. But that eight-plus year period between that date and May 1, 2012 does not mean that petitions in the F-2B category filed today will become current in eight-plus years. Similarly, priority dates prior to December 1, 1992 are now current for Mexicans in the F-2B category, but that does not mean that those petitions filed today will be current in 20 years. In other words, the backlog does not progress in a straight line. In fact, the actual time delays are quite astounding.

There are only 26,266 visas available each year in the F-2B category and there are three oversubscribed countries – Mexico, Dominican Republic, and the Philippines – that are at or above the 7 percent per-country cap. To determine the number of visas available “worldwide” to non-oversubscribed countries in the F-2B category, one must first calculate those designated to the three over-subscribed countries. Each country is allowed a maximum of 7 percent of the total number of visas available in the F-2B category ($26,266 \times .07 = 1,838$). Thus, the number designated to the three over-subscribed countries is 5,514 ($3 \times 1,838$). Therefore, the number of visas available to these other countries is 20,752 ($26,266 - 5,514$). The total number of pending F-2B applicants worldwide as of November 1, 2011 was 517,119, according to the Annual Immigrant Visa Waiting List Report. The

number of pending F-2B applicants from the three oversubscribed countries was 322,829. Therefore the number of pending F-2B applicants from the non-oversubscribed countries is 194,290 ($517,119 - 322,829$). To arrive at an estimate of the length of time it will take for these pending applicants to become current, divide the number of applicants by the annual limit available to non-oversubscribed countries ($194,290 \div 20,752 = 9.4$ years). In other words, an F-2B applicant from a non-oversubscribed country who filed a petition today is likely to become current in September 2021.

This is a fairly accurate assessment of the length of time it will take to get through the present backlog in that category. While some F-2B visa applicants during that time will die, marry, withdraw their applications, or convert to a more advantageous category, this decrease will be offset to some extent by the number of children born to these applicants, who will be added to that backlog as after-acquired derivative beneficiaries.

The number of F-2B visas available to Mexico is 1,841. The number of pending F-2B applicants from Mexico is 212,621. The length of time it will take to clear up the current backlog is approximately 115.5 years ($212,621 \div 1,841$). In other words, a Mexican who files a petition today in the F-2B category can expect it to become current at the end of 2127.

The number of F-2B visas available to the Philippines is also 1,841. The number of pending F-2B applicants from the Philippines is 52,823. The length of time it will take to clear up the current backlog is approximately 28.7 years ($52,823 \div 1,841$). In other words, a Filipino who files a petition today in the F-2B category can expect it to become current at the end of 2040.

One might counter by pointing out that if the LPR petitioner naturalizes, the son or daughter would convert to the F-1 category and thus immigrate faster. But by applying the same formula and using current State Department numbers, one would realize that for practical purposes the first preference is backlogged almost as far as the F-2B. An applicant from a non-oversubscribed country can expect to wait approximately 8.7 years ($175,093 \div 20,124$) in the F-1 category instead of 9.3 years in the F-2B, so there is little benefit in the petitioner's naturalizing if the sole purpose is the child's converting to a better category.

For Mexicans, the date on the *Visa Bulletin* has progressed 2 years in the last 17 years.¹⁸ Today's Mexican applicant in the F-1 category can expect to wait approximately 55 years to become current ($90,546 \div 1,638$). For Filipinos it is not even an option. The first preference is backlogged farther than the F-2B for those

¹⁸ The May 2012 *Visa Bulletin* indicates that immigrant visas are available to F-1 beneficiaries whose priority dates are before May 15, 1993. The May 1995 *Visa Bulletin* indicated that immigrant visas were available F-1 to beneficiaries whose priority dates were before May 1, 1995.

from the Philippines, which caused Congress to add a special section to the CSPA allowing them to “opt out” of this automatic conversion when their parent naturalizes. *See* 8 U.S.C. § 1154(k).

After performing this necessary research and analysis, one is forced to conclude that based on current backlogs and anticipated demands, the worldwide category for the F-2B category is backlogged approximately 9 1/3 years. But for Filipinos, that category is backlogged almost 30 years. And for Mexicans, it is backlogged over 100 years. In other words, it is mathematically impossible for a Mexican child over 21 whose LPR parent files a petition in their behalf today to ever immigrate based on that petition.

But if that child were able to retain the original priority date for the petition filed on behalf of the LPR parent by a U.S. citizen parent or U.S. citizen sibling, he or she might be current now or at least stand a good chance of immigrating in the near future. Application of this analysis to the facts in the cases set forth in this brief supports these findings. The CSPA would address the reality of untenable backlogs if it were properly construed to be applicable to F-2B beneficiaries.

CONCLUSION

For all the reasons stated, *amici curiae* support appellants and respectfully urge the Court to reverse the decision of the district court.

Respectfully submitted,

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DATED: May 11, 2012

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed.R.App.Proc. 32(a)(7)(B), because it contains 4,034 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I certify further that this brief complies with the typeface requirements in Fed.R.App.Proc. 32(a)(5), and the type style requirements of Rule 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word, Version 11.5.5, in Times New Roman 14-point font.

May 11, 2012

s/ Deborah S. Smith

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I, Deborah S. Smith, certify that on May 11, 2012, I electronically filed the foregoing with the Clerk of 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.

s/ Deborah S. Smith
