CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

SCIALABBA V. CUELLAR DE OSORIO: DOES THE DARK CLOUD HAVE A SILVER LINING?

Posted on June 10, 2014 by Cyrus Mehta

By Cyrus D. Mehta and David A. Isaacson

On June 9, 2014, the Supreme Court issued its ruling in *Scialabba v. Cuellar de Osorio*. (The case had previously been known as *Mayorkas v. Cuellar de Osorio* before Lori Scialabba was appointed as Acting Director of USCIS, replacing former Director Alejandro Mayorkas.) The Court ruled in *Cuellar de Osorio* that the BIA's previous interpretation of the Child Status Protection Act (CSPA), as set out in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), was a reasonable interpretation of an ambiguous statute. In particular, the Court deferred to the BIA's narrow interpretation of INA §203(h)(3), 8 U.S.C. §1153(h)(3), severely limiting which derivative beneficiaries of visa petitions could retain their parents' priority dates. This is a disappointing decision, but the details of the opinions in *Cuellar de Osorio* do leave room for some hope.

As discussed in several severalpreviousposts onthis blog, INA §203(h)(3) provides for "automatic conversion" in the cases of certain beneficiaries of preference visa petitions whose age, even as adjusted under the CSPA to account for the time taken to process the visa petition, is determined to be above 21. Some principal and derivative beneficiaries, according to the statute, will under these circumstances have their petitions automatically converted to the appropriate category, and retain the original priority date. The question in *Cuellar de Osorio* and *Matter of Wang* was who gets to benefit from this automatic conversation. The en banc Court of Appeals for the Ninth Circuit in *Cuellar de Osorio*, as well as the Court of Appeals for the Fifth Circuit in *Khalid v. Holder*, had argued for a broad interpretation which allowed all derivative beneficiaries to benefit, as at least some of the language of the statute seemed to suggest. The BIA in *Matter of Wang*, as well as the Court of Appeals for the

Second Circuit in *Li v. Renaud* and an earlier Ninth Circuit panel decision in *Cuellar de Osorio*, had chosen narrower approaches, which in effect allowed automatic conversion and priority date retention only for the principal and derivative beneficiaries of family 2A preference petitions, not the derivative beneficiaries of other categories of preference petitions. The Supreme Court took the *Cuellar de Osorio* case to resolve this disagreement.

There was no single Supreme Court majority opinion in *Cuellar de Osorio*, but a total of five justices accepted the BIA's narrow interpretation of the statute as set out in *Matter of Wang*, for two different sets of reasons. The plurality opinion was written by Justice Kagan, and supported by Justices Kennedy and Ginsburg. Chief Justice Roberts, joined by Justice Scalia, authored an opinion concurring in the judgment, but for somewhat different reasons. Justices Sotomayor and Alito authored dissenting opinions; Justice Sotomayor's dissent was joined by Justice Breyer in its entirety and by Justice Thomas except with regard to one footnote.

To appreciate the different opinions in *Cuellar de Osorio*, it is helpful to review the text of §1153(h)(3), quoted in the opinion of the Chief Justice and in a footnote to the plurality opinion. It states:

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) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

The different opinions in *Cuellar de Osorio*took different views of what Congress may have meant in prescribing that "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."

Justice Kagan's plurality opinion described §1153(h)(3) as "Janus-faced". Kagan slip op. at 14. The first half of the provision, she said, looks toward a broader interpretation of the sort supported by the Ninth Circuit, but the second half describes a remedy, automatic conversion, which Justice Kagan and the plurality saw as most naturally applying only when the new petition to which automatic conversion would occur would have the same petitioner and same beneficiary. Given this "internal tension", Justice Kagan said, the BIA was entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense*

Council, Inc., 467 U.S. 837 (1984)—often abbreviated as "*Chevron* deference". As Justice Kagan and the plurality saw it, there are "alternative reasonable constructions" of §1153(h)(3), "bringing into correspondence in one way or another the section's different parts. And when that is so, *Chevron* dictates that a court defer to the agency's choice—here, to the Board's expert judgment about which interpretation fits best with, and makes most sense of, the statutory scheme." Kagan slip op. at 14. As the plurality opinion explained in its conclusion:

This is the kind of case *Chevron* was built for. Whatever Congress might have meant in enacting §1153(h)(3), it failed to speak clearly. Confronted with a self-contradictory, ambiguous provision in a complex statutory scheme, the Board chose a textually reasonable construction consonant with its view of the purposes and policies underlying immigration law. Were we to overturn the Board in that circumstance, we would assume as our own the responsible and expert agency's role. We decline that path, and defer to the Board.

Kagan slip op. at 33.

Chief Justice Roberts, joined by Justice Scalia, reached essentially the same conclusion as the three-Justice plurality led by Justice Kagan, but for different reasons. Concurring in the judgment, the Chief Justice wrote that he did not see "conflict, or even internal tension . . . in section 1153(h)(3)." Roberts slip op. at 2. Rather, he "d not think the first clause points to any relief at all." *Id.*at 3. Instead, he described the second clause of §1153(h)(3) as "the only operative provision." *Id.*at 3-4. In that only operative provision, he took the view that beyond certain basic requirements, "Congress did not speak clearly to which petitions can "automatically be converted." *Id.* at 4.

The dissenting Justices, in contrast, were of the view that even if there was some ambiguity in the statute, it was not sufficient to justify the interpretation that the Board adopted in *Matter of Wang*. While "Section 1153(h)(3) is brief and cryptic" and "may well contain a great deal of ambiguity, which the is free to resolve," Justice Alito wrote, it was at least clear that "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." Alito slip op. at 2 (emphasis added in original). The BIA, he contended, was "not free to disregard this clear statutory command." *Id.* Justice Sotomayor, as well, argued in her dissent that because a reading of the statute was possible that

gave effect to both the automatic conversion language and the statute's broad description of who was eligible for automatic conversion, that reading should have been followed. Because there were potential interpretations that "would treat §1153(h)(3) as a coherent whole," she said, "the BIA's construction was impermissible." Sotomayor slip op. at 9

On the surface, the Supreme Court's decision in *Cuellar de Osorio* is obviously disappointing for a great many immigrants who were hoping to recapture priority dates of petitions initially filed for their parents through automatic conversion. Aged-out children who have waited patiently for many years for their parent's priority date to become current are told that they must now go back to the beginning of the line on a new petition filed by their parent under the Family 2B preference—which for most of the world has a backlog of more than seven years as of the June 2014 Visa Bulletin, and is backlogged many years more for those chargeable to Mexico or the Philippines. While it is an unfortunate decision from that perspective, however, *Cuellar de Osorio* does contain some seeds of hope for better outcomes in the future.

The first seed of hope, with respect to §1153(h)(3) itself, is the latitude which the Court has provided for the executive branch to reconsider its decision. Justice Kagan's plurality opinion is careful to state that "we hold only that §1153(h)(3) permits—not that it requires—the Board's decision to so distinguish among aged out beneficiaries." *Cuellar de Osorio* slip op. of Kagan, J., at 21. The concurring opinion of Chief Justice Roberts and Justice Scalia is not as explicit in this respect, but it describes its disagreement with the plurality as involving "a different view of what makes this provision ambiguous under *Chevron*" rather than going to the question whether the provision is ambiguous at all. Indeed, the Chief Justice criticized Justice Kagan's "Janus-faced" metaphor of §1153(h)(3). "But when Congress assigns to an agency the responsibility for deciding whether a particular group should get relief, it does not do so by simultaneously saying that the group should and that it should not. Direct conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice." *Id*. at 2. Thus, a majority of the Court agrees that the meaning of §1153(h)(3) is an ambiguity subject to *Chevron* deference, rather than suggesting, as the Second Circuit had done in *Li v. Renaud*, that a narrow reading of §1153(h)(3) is compelled by the statute.

When a statute is ambiguous in this way, the Supreme Court has made clear in National Cable & Telecommunications Assn. v. Brand X Internet Services, 545

U.S. 967 (2005), the agency may reconsider its interpretation even after the courts have approved of it. Thus, the Court's description of §1153(h)(3) as an ambiguous statute subject to *Chevron*deference to the BIA's interpretation implies that the BIA could, even after *Cuellar de Osorio*, reverse its position in *Matter of Wang.* So too could the Attorney General, on whose behalf the BIA ultimately acts, go against *Matter of Wang* and adopt a broader interpretation of §1153(h)(3). As the INA provides, within the executive branch, "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." INA §103(a)(1), 8 U.S.C. §1103(a)(1). Ultimately, it is within the power of Attorney General Holder to save those beneficiaries who have waited in line for many years, and now find themselves pushed to the back of a new line that may be decades long. Whether or not these results of the *Wang* interpretation affirmed in *Cuellar de Osorio* may be legally permissible, they are not desirable as a policy matter, and the Supreme Court has left the Attorney General the power to recognize this. In light of the Obama Administration's many noteworthy administrative reform measures in the face of Congressional inaction, the provisional waiver rule and Deferred Action for Childhood Arrivals being such examples, a broader interpretation of §1153(h)(3) would be consistent with these efforts.

Of course, Congress too could fix the problem, by redrafting the statute to make it clearer that all derivative beneficiaries whose adjusted age is over 21 can retain the principal beneficiary's priority date. This was done in section 2305(d)(5)(C) of S. 744, the comprehensive immigration reform bill passed by the Senate, which unfortunately has not been brought to a vote in the House of Representatives. But if Congress continues not to act, the executive branch has the power to remediate the unfairness of requiring those who have waited in line with their parents for many years to go to the back of a new line and start over from the beginning.

Another policy argument in favor of such a reversal of *Matter of Wang* which would be worth the consideration of the BIA or the Attorney General, or for that matter Congress, is that the *Matter of Wang* interpretation of §1153(h)(3), now affirmed in *Cuellar de Osorio*, reintroduces some of the arbitrariness which the enactment of the CSPA had sought to avoid. The age-adjustment process under INA §203(h)(1), 8 U.S.C. §1153(h)(1), in effect subtracts from the adjusted age of a visa applicant the time during which a visa petition was pending. If the adjusted age of a derivative applicant is under 21, the CSPA as interpreted in

Wang and *Cuellar de Osorio* will allow the applicant to utilize a principal beneficiary parent's priority date; otherwise, the benefit of the priority date will be lost entirely. But that means that children whose parents were petitioned for on the same date, and whose parents' priority dates become current simultaneously, may be treated in dramatically different fashion depending on how long it happened to take USCIS to process the petition on behalf of their parents during the time that no visa number was available. The broader interpretation of §1153(h)(3) rejected by the BIA in *Matter of Wang* would have reduced this arbitrariness, by enabling even a child whose parent's petition happens to be processed relatively quickly, and whose CSPA-adjusted age is therefore over 21 when the priority date becomes current, to enjoy some benefit from that petition and its priority date.

The potential positive implications of *Cuellar de Osorio* beyond the CSPA context are also worth considering. As previously discussed in postsonthis blog and articles by co-author Cyrus D. Mehta and Gary Endelman regarding "The Tyranny of Priority Dates" and "Comprehensive Immigration Reform Through Executive Fiat", the executive branch's authority under *Brand X* can potentially be used as a force for good in the immigration context. This occurred for example in *Matter of Douglas*, 26 I&N Dec. 197 (BIA 2013), where, as discussed in one of the aforementioned blog posts, the BIA chose not to follow an unfavorable decision by the Court of Appeals for the Third Circuit regarding procedures for acquisition of citizenship under former section 321(a) of the Immigration and Nationality Act. If, as the plurality in *Cuellar de Osorio*indicates, tension between the apparent meaning of different statutory provisions is sufficient to activate the *Chevron*and *Brand X* authority of the executive branch even if one could conceive of a potential interpretation which could harmonize the different provisions (at the cost of some awkwardness), this will expand the power that the executive branch may have to use *Chevron* and *Brand X* for pro-immigration ends.

Take, for example, the proposal in "The Tyranny of Priority Dates" that the executive branch re-interpret INA §203(d) so that derivative family members do not consume additional visa numbers beyond those taken up by the principal beneficiaries of visa petitions, thus freeing up a greater quantity of visa numbers for use by others. As discussed in that article, there are admittedly some statutory provisions which might be read as pointing against such an interpretation. But there are also statutory provisions which pull in favor of

such an interpretation, most notably the text of INA §203(d) itself when it states that a derivative family member is "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), 8 U.S.C. §1153(d). If family members must be provided with separate visa numbers, then how can one fulfill this command for the family members of the principal immigrant who receives the last available visa number in a fiscal year for a particular category—will they not inevitably be subject to a delay in their "order of consideration" that is inconsistent with §203(d)? This tension, interpreted in line with the version of *Chevron* deference implemented by the *Cuellar de Osorio*plurality, would provide sufficient authority to reinterpret the priority-date system in a way that could significantly reduce the current backlogs in the visa preference categories.

Remarkably, *Cuellar de Osorio* was not decided on the usual conservative-liberal ideological lines as with many Supreme Court decisions. The pairings of justices who decided one way or the other are rather odd much like combining a full-bodied red Malbec with a delicate white fish – Ginsburg and Scalia were part of the plurality that denied relief to children while Sotomayor and Thomas vigorously dissented. The outcome in this case is neither a liberal nor a conservative victory. This could potentially give President Obama through his Attorney General some political cover if they decided to use *Brand X* as a force for good by reversing *Matter of Wang*. Of course, the government caused this in the first place by litigating all the way to the Supreme Court. Sceptics will rightly question why the government would change course after having gone so far. However, the Attorney General, through the BIA, has reversed course before. For example, in *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976), the BIA acquiesced to *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), and allowed 212(c) relief for LPRs in deportation proceedings who had not previously departed and returned, despite its earlier contrary holdings in *Matter of Francis* and *Matter of Arias-Uribe*, 13 I&N Dec. 696 (BIA 1971). If Congress fails to enact Congressional reform, it is likely that the Administration will endeavor to provide relief through further administrative measures. Our blog provides the Administration with a way to do so for children who were left out of the American Dream solely because they were unlucky to have aged out.