UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SA08-00688-JVS (SHx)	Date	November 10, 2009
Title	Teresita G. Costelo, et al. v. Michael Chertoff, et al.		

Present: The Honorable	James V. Selna
Terri Steele	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order re Cross-Motions for Summary Judgment and Motion to Stay Discovery

Plaintiffs Teresita Costelo and Lorenzo Ong, appearing individually and on behalf of all others similarly situated (collectively, "Plaintiffs") and Defendants Janet Napolitano, et al. (collectively, "Defendants") have filed cross-motions for summary judgment under Federal Rule of Civil Procedure 56. Defendants have also filed a motion to stay discovery pending the decision on cross-motions for summary judgment.

I. Legal Standard

Summary judgment is appropriate where the record, read in the light most favorable to the nonmoving party, indicates that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); accord Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). The initial burden is on the moving party to demonstrate an absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. If the moving party meets its burden, then the nonmoving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. Id. at 322-23. If the nonmoving party meets this burden, then the motion will be denied. Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc., 210 F.3d 1099, 1103 (9th Cir. 2000).

Where the parties have made cross-motions for summary judgment, the Court must consider each motion on its own merits. Fair Hous. Council v. Riverside Two, 249 F.3d

1132, 1136 (9th Cir. 2001). The Court will consider each party's evidentiary showing, regardless of which motion the evidence was tendered under. See id. at 1137.

II. Discussion

The issue in this case is whether a provision of the Child Status Protection Act ("CSPA"), § 203(h)(3) of the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1153(h)(3), allows "aged-out" derivative beneficiaries of third- or fourth-preference ("F3" and "F4," respectively) visa petitions to automatically convert their derivative petitions to second-preference ("F2B") visa petitions, thereby retaining their original priority date. On July 19, 2009, the Court certified a class consisting of:

> Aliens who became lawful permanent residents as primary beneficiaries of third- and fourth-preference visa petitions listing their children as derivative beneficiaries, and who subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters, for whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to § 203(h)(3).

(Docket No. 74.)

This Court decided this exact issue in Zhang v. Napolitano, --- F. Supp. 2d ----, 2009 WL 3347345 (C.D. Cal. October 9, 2009), holding that the Board of Immigration Appeals's ("BIA") interpretation of § 203(h)(3) of the INA set forth in Matter of Wang, 25 I. & N. Dec. 28 (B.I.A. 2009) was entitled to deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The BIA in Wang held that "[t]he automatic conversion and priority date retention provisions of [§ 203(h)(3)] 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."

Plaintiffs have presented only one argument that was not explicitly considered in Zhang.[1] They argue that the Wang interpretation contradicts INA § 203(h)(4), which states that § 203(h)(1)-(3) "shall apply to self-petitioners and derivatives of self-petitioners." Plaintiffs argue that, under the BIA's interpretation, an aged-out derivative of a self-petitioner would have no appropriate category to automatically convert to, yet, § 203(h)(4) is explicit that § 203(h)(3) conversion applies to derivatives of self-petitioners.

Plaintiffs contention is simply incorrect. 8 U.S.C. §§ 1154(A)(1)(D)(i)(I) & (III) provide explicit statutory authority for automatic reclassification for a self-petitioner or derivative self-petitioner who ages-out prior to the priority date becoming current. Section 1154(A)(1)(D)(i)(I) states:

> Any child who attains 21 years of age who has filed a [self-petition] that was filed or approved before the date on which the child attained 21 years of age shall be considered (if the child has not been admitted or approved for lawful permanent residence by the date the child attained 21 years of age) a petitioner for preference status under paragraph (1), (2), or (3) of section 1153(a) of this title, whichever paragraph is applicable, with the same priority date assigned to the self-petition . . . . No new petition shall be required to be filed.

Section 1154(A)(1)(D)(i)(III) states:

> Any derivative child who attains 21 years of age who is included in a [self-petition] that was filed or approved before the date on which the child attained 21 years of age shall be considered (if the child has not been admitted or approved for lawful permanent residence by the date the child attained 21 years of age) a VAWA self-petitioner with the same priority date

[1] In their Reply Brief, Plaintiffs also argued that Congress could not have been intended to solely address administrative delay in the CSPA because of the "opt-out" provision of INA § 204(k)(2) was aimed at preventing injustice where a F2B petition converted to the F1 line, which, for certain countries, had a longer wait. The Court fails to see the relevance of § 203(k)(2) to the situation here. The "opt-out" provision was intended to prevent the unmarried sons or daughters of lawful permanent residents from being penalized by their parents attaining U.S. citizenship. 148 Cong. Rec. H4991 (daily ed. July 22, 2002) (statement of Rep. Sensenbrenner). It sought to prevent "naturalizing-out" and is unrelated to the "aging-out" provisions of CSPA.

as that assigned to the [self-petitioner]. No new petition shall be required to be filed.

Thus, there is no contradiction between Wang and INA § 203(h)(4). Self-petitioners or derivatives of self-petitioners are explicitly reclassified by statute when they age-out, leaving no gap of ineligibility, unlike the aged-out derivative beneficiaries of F3 or F4 petitions. Section 203(h)(4) supports, rather than contradicts, the Wang interpretation.

For the reasons laid out in Zhang, the Court finds that Section 203(h)(3) is ambiguous and that the BIA's interpretation is reasonable. See Zhang, 2009 WL 3347345, at *5-7. Accordingly, Defendants are entitled summary judgment.

III. Conclusion

For the foregoing reasons, the Court DENIES Plaintiffs' motion and GRANTS Defendants motion. Defendants motion to stay discovery is DENIED as moot.

IT IS SO ORDERED.

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