12-3810

To Be Argued By
MEREDYTHE M. RYAN

United States Court of Appeals for the Second Circuit

Docket No. 12-3810

ABDO HIZAM,

Plaintiff-Appellee,

–v.–

HILLARY RODHAM CLINTON, Secretary of State, United States Department of State; UNITED STATES DEPARTMENT OF STATE; UNITED STATES OF AMERICA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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I. PRELIMINARY STATEMENT

Defendant-appellants Hillary Clinton, United States Secretary of State, the Department of State, and the United States of America (together, the "government" or "State Department") appeal from a judgment entered on July 27, 2012 (the "Judgment"), in the United States District Court for the Southern District of New York. In granting Plaintiff-appellee Abdo Hizam's motion for summary judgment and denying the government's cross-motion, the district court found that the government did not have the authority to revoke the Consular Report of Birth Abroad ("CRBA") legitimately issued to Appellee Mr. Hizam in 1990 even if the government can now show it erred in issuing it.[1] As the district court found (and as the government did not contest below), 8 U.S.C. §1504, a provision enacted four years after the issuance of Mr. Hizam's CRBA, does not provide retroactive authority for stripping past recipients of CRBAs of their documents. The district court also correctly held that the State Department lacked any inherent authority to revoke Mr. Hizam's CRBA, even if it was originally issued based on the government's own error.

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[1] On January 5, 2012, upon consent of the parties, United States District Judge P. Kevin Castel ordered that this case be referred to United States Magistrate Judge, the Honorable James C. Francis IV, to conduct all proceedings and order the entry of a final judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. (Joint Appendix ("JA") 210).

With this case, the State Department seeks a rule that would allow it to revoke a decades old citizenship adjudication based solely on the government's own mistake at the time the CRBA was issued. However, basic principles of administrative finality together with express provisions of the United States Code do not allow such free-wheeling reevaluation of past decisions, as the government cannot create a power that does not exist.

Throughout its brief, the government asks this Court to decide this case as though the State Department had never adjudicated and issued a CRBA to Mr. Hizam or issued him a passport and two renewals. But these facts cannot be ignored. First, Mr. Hizam properly relied upon this CRBA as conclusive proof that he was an American citizen and lived his life for the past twenty years as a proud American citizen. Equally important, Mr. Hizam lost the opportunity to obtain citizenship through numerous other means that had been available to him before reaching adulthood.[2] For these reasons, as well as the others set forth below, the district court's decision should be affirmed.

[2] For instance, the State Department did not process Mr. Hizam for a permanent resident visa when he was nine, which would have easily allowed him to immigrate and later become a citizen. It also meant that Mr. Hizam did not seek a certificate of citizenship to which he would have been entitled at the age of thirteen.

II. ISSUES PRESENTED FOR REVIEW

A. Whether the State Department's Adjudication and Issuance of a Consular Report of Birth Abroad to Mr. Hizam in 1990 is Conclusive Proof of His United States Citizenship.

B. Whether the State Department has the Authority to Cancel Mr. Hizam's Previously Issued CRBA Solely Due to Agency Error.

III. STATEMENT OF FACTS

A. Mr. Hizam's Birth and CRBA Adjudication

Mr. Hizam was born in Al Mahaqirah, Yemen on October 27, 1980. (JA 104). Hizam's father, Ali Yahya Hizam, was a naturalized U.S. citizen who had lived in the United States for approximately seven years prior to Mr. Hizam's birth. (JA 111).

In 1990, when Mr. Hizam was just nine years old, his father submitted an application to the United States Embassy in Yemen to obtain CRBAs for Mr. Hizam and his brothers. (JA 112, 141). Along with his completed application, Mr. Hizam's father submitted a copy of the marriage license for him and Mr. Hizam's mother, Mr. Hizam's birth certificate, Ali Hizam's certificate of naturalization and U.S. passport, evidence that Ali Hizam's blood type matched that of Mr. Hizam, and proof of Ali Hizam's physical presence in the United States. (JA 112, 141). Ali Hizam truthfully indicated on the face of his application that he had arrived in the United States in 1973, and had been physically present for approximately seven years at the time of Mr. Hizam's birth in October 1980. (JA 112). Following an

examination of his submission by a consular official, the State Department granted Mr. Hizam's application and issued him a CRBA and United States passport.

At the time of Mr. Hizam's birth, a child of a U.S. citizen born outside of the United States was eligible for citizenship if the U.S. citizen parent had been present in the United States for at least ten years at the time of the child's birth. 8 U.S.C. § 1401(g) (Supp. III 1980). However, at the time Mr. Hizam's father submitted the CRBA application, the law had changed to require the U.S. citizen parent to be present in the United States for only five years. 8 U.S.C. § 1401(g). The consular officer adjudicating the application appears to have applied the five-year rule in Mr. Hizam's case.[3]

B. Mr. Hizam's Life in the United States

Following the State Department's 1990 finding that Mr. Hizam was a citizen, and based on the citizenship documents issued by the government, Mr.

[3] At the time of Mr. Hizam's CRBA application, as the minor child of a U.S. citizen, he was eligible for an I-130 Immediate Relative Petition and visa. It was common practice for consular officials to suggest ways for minor children of U.S. citizens who did not acquire U.S. citizenship at birth to move to the United States. (JA 110). This typically involved directing parents to apply for an I-130 petition and approving a visa. (JA 110). Mr. Hizam submitted evidence to the district court showing that, in accordance with routine consular procedures, the same official would have been able to suggest, adjudicate, and approve an I-130 petition. (JA 113, 120). The government did not provide any evidence to the contrary. (JA 155). Had Mr. Hizam immigrated to the United States on an immigrant visa, he would have been eligible for naturalization at the age of eighteen, and would therefore have had an alternative route to United States citizenship. (JA 121); 8 C.F.R. § 316.2(a)(1).

Hizam moved to Dearborn, Michigan at the age of nine, where he was raised by his United States citizen grandparents. (JA 113-14). Mr. Hizam's grandfather, Hamood Abdullah, worked for years as a seaman for various U.S. companies, including Ford Motor Company and Cleveland Tankers. (JA 114). Mr. Hizam went on to attend elementary, middle, and high school in Dearborn, where he was a successful student, and quickly became fluent in English. (JA 115). While he was in school, Mr. Hizam was a member of his high school swim team, worked at a local restaurant, Bill Knapp's, and looked out for his brother, helping him to learn English and acclimate to life in Michigan. (JA 115-16).

After graduating from high school, Mr. Hizam attended Henry Ford Community College, and soon transferred to Davenport University in Dearborn. He received his Bachelor's degree in Business Administration in December 2003. (JA 117-18). He also continued to work at Bill Knapp's, working his way up to becoming an Assistant Manager. (JA 116). Mr. Hizam continued to work steadily throughout college, and often put in as many as ten hours a day while taking classes. (JA 118). Since 1996, he also has been contributing to Social Security. (JA 116).

Upon graduation from college, Mr. Hizam continued to work consistently. He ultimately moved to the Bronx, New York, to live with his brothers, where he currently resides. (JA 118). In 2002, Mr. Hizam visited Yemen, where he married

Kifah Almehebshy, a Yemeni national. Since that time, Mr. Hizam and his wife have had two children, who reside in Yemen with their mother. (JA 117). In the years since 2002, Mr. Hizam has lived and worked in the United States while paying visits to his family in Yemen in 2003, 2006, 2008, and 2009. (JA 6-7). The family intends to settle in the United States after Mr. Hizam is financially settled and establishes a home for them to share in this Country, although their plans have been delayed by the uncertainty caused by the government's revocation of Mr. Hizam's citizenship documents. (Decl. of Abdo Hizam dated Aug. 24, 2013, 2, Ex. 1 to Plaintiff's Opposition to Motion for Stay, Doc. 28).

Mr. Hizam lives with his three younger brothers in the Bronx, all of whom are U.S. citizens. Together, they own and operate Moe's Deli, at 2424 East Tremont Ave., Bronx, NY 10461. He is also the primary caretaker for his eleven year-old U.S. citizen brother, B.H. (JA 119). In short, Mr. Hizam lives an exemplary life here in the United States.

During the course of Mr. Hizam's life in the United States, the State Department has twice renewed his U.S. passport since its initial adjudication of citizenship in 1990. The first time came in January 1996, after Mr. Hizam's

grandfather filed the renewal application on his behalf, (JA 116), and the second occurred in May 2001. [4] (JA 117).

C. The Government's Cancellation of Mr. Hizam's Citizenship Documents and the Commencement of the Instant Action.

In 2009, Mr. Hizam traveled to Yemen and applied for CRBAs for his two young children at the U.S. Embassy in Sana'a. (JA 118). During this visit to the embassy, U.S. officials suggested that there may be a problem with Mr. Hizam's passport, and retained his passport for approximately three weeks. After Mr. Hizam returned to the United States, the State Department notified him that his passport and CRBA were improperly issued due to its own error in processing his 1990 application. (JA 119-20). In April 2011, Mr. Hizam received a letter asserting the State Department's belief that the CRBA had been issued in error, though the government conceded that "there is no indication that [his] father fraudulently obtained citizenship documentation for [him … and] there is no evidence of fraud on [Mr. Hizam's] part." (JA 99-100). The State Department followed with two additional letters: one revoking his passport under 22 C.F.R.

[4] At the time of Mr. Hizam's first passport renewal, Mr. Hizam was a minor and would have been independently eligible for a certificate of U.S. citizenship through 8 U.S.C. § 1433 (which provided a means for a minor child of a United States citizen to obtain citizenship based on a U.S. citizen parent having five years of residence in the United States). Had the State Department sought to revoke Mr. Hizam's CRBA when he applied to renew his passport in 1996, Mr. Hizam's family could have arranged to immediately return him to his father's home in Yemen and obtained a certificate of citizenship under § 1433.

§ 51.62(b), and the other revoking his CRBA under 22 C.F.R. § 50.7(d). (JA 102-6). The final two letters instructed him to surrender his documents. Mr. Hizam immediately complied by surrendering his U.S. passport and CRBA to the State Department.

In October 2011, Mr. Hizam filed suit in the United States District Court for the Southern District of New York under 8 U.S.C. § 1503, seeking a declaration that he is a citizen of the United States and that the State Department's revocation of his CRBA and passport was unlawful. (JA 1). Mr. Hizam moved for summary judgment, and the government opposed his motion and cross-moved for summary judgment.[5] In July 2012, the district court issued a memorandum and order granting Mr. Hizam's motion and denying the government's cross-motion. (JA 158-79). The district court held that the government did not have the authority to cancel the CRBA issued to Mr. Hizam in 1990, that the CRBA was conclusive proof of Mr. Hizam's U.S. citizenship, and that the State Department must return the improperly revoked document.

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[5] In the Defendants' Response to Plaintiff's Statement of Undisputed Material Facts, the Defendant did not contest the availability of other avenues to citizenship for Mr. Hizam, including availability of an I-130 petition for an immigrant visa that could have been adjudicated by a consular officer or a certificate of citizenship under § 1433. The government only "objected in part," claiming that Mr. Hizam's own eligibility was "hypothetical" or a "legal conclusion." (JA 146, 151, 155).

The government filed a notice of appeal, and sought a stay of the Judgment pending appeal. The district court denied the government's motion for a stay. (JA 186-87). Thereafter, the State Department reissued Mr. Hizam's CRBA, and he was able to obtain a U.S. passport.

IV. SUMMARY OF ARGUMENT

Mr. Hizam's U.S. citizenship was settled at the time the State Department issued him a CRBA. Under 22 U.S.C. § 2705, his CRBA operates as conclusive proof of Mr. Hizam's citizenship. As the district court found, the State Department lacks either statutory or inherent authority to cancel Mr. Hizam's CRBA after issuing it to him in 1990. Moreover, the government is prevented from reopening Mr. Hizam's CRBA determination now after an undue delay based on the principle of laches.

V. ARGUMENT

A. The District Court Had Jurisdiction Under 8 U.S.C. § 1503 to Determine Whether Mr. Hizam's CRBA Served as Conclusive Proof of His Citizenship and Whether it Had Been Improperly Revoked

The district court acted properly within 8 U.S.C. § 1503 by evaluating the continued validity of Mr. Hizam's CRBA in considering his claim of citizenship. Section 1503 is designed to provide a direct route to district court review when any person has been denied a right or privilege of citizenship. The only exceptions to this grant of jurisdiction relate to situations where the issue of nationality has

arisen in connection with removal proceedings. Those exceptions do not apply and have never been an issue in this case.

There is no question that Mr. Hizam is a person as contemplated by §1503 who seeks a district court declaration of his rights as a United States citizen. If, as the district court determined, the State Department illegally revoked Mr. Hizam's CRBA, then his CRBA serves as conclusive proof of United States citizenship under 22 U.S.C. § 2705 (A CRBA "shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction"). The district court therefore properly considered the legality of the administrative revocation of Mr. Hizam's CRBA.

The government suggests that this is a case in which the district court sought to "make someone a citizen." (Government Brief ("Govt. Br.") 18 (citing *INS v. Pangilinan*, 486 U.S. 875, 884 (1988))). This is simply not the case. The district court made clear in its decision that it was ruling solely on the implications of the State Department's past action finding Mr. Hizam to be a citizen and providing him with a CRBA. In contrast, *INS v. Pangilinan*, the case cited by the government, concerned an applicant for citizenship who had never been

adjudicated a citizen and was no longer eligible for citizenship under the law.[6] *Pangilinan*, 486 U.S. at 880-81. The issue here, unlike in *Pangilinan*, is whether the State Department has open-ended authority to revisit its 1990 citizenship determination.

The government also argues that the district court exceeded its authority by requiring the State Department to "issue" or "provide" a CRBA. (Govt. Br. 11, 17). But this claim ignores the fact that the district court was not ordering the issuance of a CRBA to Mr. Hizam, but rather ordering the return of the previously granted CRBA. (JA 178, 199-200); s*ee, e.g.*, *Friend v. Reno*, 172 F.3d 638 (9th Cir. 1999) (exercising jurisdiction under § 1503, and concluding that cancellation of certificate of citizenship in that case was valid due to express statutory authority under 8 U.S.C. § 1453). It is undisputed that the State Department issued Mr. Hizam a CRBA in 1990, and as the district court concluded, "Mr. Hizam's CRBA 'has the same force and effect as proof of United States citizenship as would a

[6] *Pangilinan* is further distinguishable from Mr. Hizam's case, because the changed law cited in *Pangilinan* made clear that Congress did not intend to provide citizenship to individuals such as Pangilinan. *See Pangilinan*, 486 U.S. at 884 ("The congressional command here could not be more manifest … Congress in 1948 [] adopted a new liberalized citizenship program that excluded Filipino servicemen…") (emphasis added). On the contrary, in Mr. Hizam's case, Congress showed its preference for the expansion of citizenship opportunities for children of U.S. citizens born abroad by changing § 1401(g) to require only five years of residency for U.S. citizen parents rather than ten, and creating a parallel administrative process through § 1433 for those unable to take advantage of the change in § 1401(g).

certificate of citizenship,'" (JA 178 (quoting 22 U.S.C. § 2705)). It "binds the State Department as to Mr. Hizam's citizenship status." (JA 200). The district court simply ordered that that proof of his previously adjudicated status be returned to Mr. Hizam.

B. The State Department Issued Mr. Hizam's CRBA Pursuant to Its Authority to Determine Citizenship of Persons Abroad and is Bound by Its Findings Absent Authority to Revoke the CRBA

The State Department issued Mr. Hizam his CRBA pursuant to its authority to determine whether children born abroad are United States citizens. The government essentially argues that this adjudication of Mr. Hizam's citizenship and issuance of a CRBA are of no moment. Under their view, the CRBA is simply a piece of paper and does not serve as ongoing proof of citizenship. This argument ignores the statutory and regulatory treatment of the CRBA as a document that is based on agency determination and entitled, by statute, to conclusive effect.

1. The State Department had Clear Authority to Adjudicate Mr. Hizam's Application for a CRBA in 1990

The State Department is charged with "the determination of nationality of a person not in the United States." 8 U.S.C. § 1104(a); *see Murarka v. Bachrack Bros.*, 215 F.2d 547, 553 (2d Cir. 1954). Further, 22 U.S.C. § 2705 provides that both a passport or a CRBA shall have the "same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction." It is therefore

clear that "Congress has vested the power in the Secretary of State to decide who is a United States citizen." *Magnuson v. Baker*, 911 F.2d 330, 333 (9th Cir. 1990) (referring to the consequences of the enactment of § 22 U.S.C. 2705). Thus, in an individual's application for a CRBA, it is the consular officer, as a designated employee of the State Department, who makes the determination as to whether applicants for CRBAs meet the requirements for U.S. citizenship. 22. C.F.R. § 50.2.

In Mr. Hizam's case, his father submitted all of the required documents and materials to allow the consular officer to determine whether Abdo Hizam met the requirements for citizenship. The officer reviewed that information and issued Mr. Hizam's CRBA, in accordance with 22 C.F.R. § 50.7(a) (1990). While this decision now appears to have been an honest mistake on the part of the consular officer, it does not change the fact that the consular office had the authority to evaluate the claim of citizenship, proclaimed Mr. Hizam to be a citizen, and provided him with a CRBA to prove his status.

2. 22 U.S.C. § 2705 Provides that Mr. Hizam's CRBA is Conclusive Proof of his U.S. Citizenship

Having been adjudicated a United States citizen in 1990, Mr. Hizam was provided a CRBA as proof of his status. Not surprisingly, Congress has mandated that a CRBA have the same "force and effect" as a certificate of naturalization or of citizenship. 22 U.S.C. § 2705. This language could not be clearer. It makes the

CRBA dispositive and equally reliable as a statement of citizenship as those obtained through any other means. *See Magnuson*, 911 F. 2d at 335.

The legislative history supports the plain reading of § 2705 as conclusive proof of citizenship. All of the discussion of the predecessor provisions in prior legislation, including those cited by the government in its brief, emphasize that the purpose of § 2705 is to make the citizenship of persons with CRBAs dispositive as to citizenship and to make it unnecessary for them to obtain any other proof of their citizenship status. As the Senate Report on the predecessor bill stated, it is "especially troublesome" to treat the CRBA differently from a certificate of citizenship or naturalization given that the "procedural safeguards to the integrity of each document are similar." S. Rep. No. 96-859, 96th Cong., 2d Sess. 17.[7] The

[7] Section 2705 is based on two proposals in the prior Congress, one directed to CRBAs and one directed to passports. The CRBA provision was reported out of the Senate committee in S. Rep. No. 96-859. The passport provision was proposed by the state department in the letter quoted by the government and was not reported out of committee. All of this legislative history emphasizes the need to assure holders that State Department documents are treated as equally dispositive of citizenship. *See also* 125 Cong. Rec. 25268 (Sept. 19, 1979) ("[E]nactment of the proposal would eliminate duplication of effort by the Departments of State and Justice. Each year, the Immigration and Naturalization Service receives a number of requests for certificates of citizenship from citizens who are already documented with passports. These requests often are made because of the uncertain legal status of the passport as proof of citizenship. Enactment of the proposal would substantially reduce such requests and thereby reduce the workload of the Immigration and Naturalization Service ...") (commenting on predecessor bill on passport revocation); H.R. Rep. No. 97-102 (May 19, 1981) (any presumption that a CRBA or passport was a lesser authority resulted from "an inconsistency in the law which has created serious problems over the years for Americans who were

government argues that this legislative history serves to minimize the import of a CRBA as merely authorizing travel. (Govt. Br. 26-7). On the contrary, the legislative history surrounding § 2705 confirms that a CRBA is conclusive on the issue of its holder's citizenship. The rule the government seeks would require the exact opposite of Congress's intent, leading holders of CRBAs to seek out other documents of their status. Indeed, had Mr. Hizam been on notice that a CRBA was not conclusive proof of his citizenship, he could have obtained a certificate of citizenship.[8] But Mr. Hizam had no reason to seek that alternative certificate of citizenship because he had been conclusively deemed a U.S. citizen already through the issuance of the CRBA. 22 U.S.C. § 2705.

The government's argument that § 2705 is only about the right to use a document, not "the right to have the document in the first place," (Govt. Br. 26), misses the point of the district court's decision. The district court was not focused on whether it had the authority to grant citizenship to Hizam but rather, whether the State Department had the authority to revoke a CRBA legitimately issued in 1990. The district court correctly decided that no such authority exists and,

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born abroad or who have lived overseas."). Pre-section 2705 regulations from the Defense Department provide background on the problems that CRBA holders faced before the enactment of § 2705. *See* 32 C.F.R. § 138.4(d), (f) (1962) (noting that Reports of Birth Abroad are not "given the same effect as a certificate of naturalization.").

[8] In 1996, when his grandfather renewed Mr. Hizam's passport, Mr. Hizam was eligible for a certificate of citizenship under 8 U.S.C. § 1433 based on his father's five years of residence in the United States.

therefore, entered an order requiring the State Department to return the previously issued CRBA.

C. Having Issued Mr. Hizam's CRBA in 1990, the Government Does Not Have the Authority to Cancel his Valid Citizenship Documents

The district court correctly determined that the government had neither statutory nor inherent authority to revoke Mr. Hizam's previously issued CRBA. While 8 U.S.C. § 1504 does permit revocation of CRBAs under certain circumstances, this is not one of them; the statute was passed four years after the issuance of Mr. Hizam's CRBA and is not retroactively applicable to his case. Undoubtedly recognizing this fact, the government abandoned this statutory argument before the district court and only resurrected it on appeal. (JA 197). As the district court correctly pointed out in its denial of the government's stay request, "[t]he State Department's second argument – that Section 1504 may operate retroactively because it does not affect a 'vested right' – was expressly abandoned in its motion for summary judgment." (JA 197). Notwithstanding this waiver, the government is wrong that Section 1504 can be applied retroactively to this case. Further, the government's claim of inherent authority ignores well established limitations on the ability of agencies to revisit past decisions.

1. Section 1504 Does Not Permit the Revocation of Mr. Hizam's CRBA

(a) The Government Waived the Applicability of § 1504 at the District Court

"It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994) (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1996)); *see also In re Nortel Networks Corp.*, 539 F.3d 129, 132-133 (2d Cir. 2008); *see also Vintero Corp. v. Corporacion Venezolana de Fomento*, 675 F.2d 513, 515 (2d Cir. 1982) ("A party who has not raised an issue below is 'precluded from raising it from the first time on appeal.'") (citations omitted). In particular, after a party has expressly waived reliance on a statutory provision, as the government did here, it cannot rely on that provision. *See Helvering v. Wood*, 309 U.S. 344, 348 (1940) ("[W]e do not think that petitioner should be allowed to add here for the first time another string to his bow.").

There is no question that the government abandoned its Section 1504 argument. (JA 174; 197). Having done so, it cannot now raise this claim. (JA 197). Therefore, the Court here need not consider the government's argument that § 1504 permits revocation of Mr. Hizam's CRBA.

(b) Section 1504 Does Not Provide for Retroactive Application

Section § 1504 still provides no basis for relief, even if this Court considers the argument, because the statute provides no power to the State Department to

retroactively revoke CRBAs, such as Mr. Hizam's, issued before the statute's enactment in 1994.

It is long settled in American jurisprudence that there is a strong presumption against retroactively applying new legislation. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994) ("'[R]etroactivity is not favored in the law' and […] 'congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.'" (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)); *Vartelas v. Holder*, 132 S.Ct. 1479, 1486 (2012); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997). In order to properly determine whether a law should be applied retroactively, *Landgraf* established a two-part test to aid in the determination of the retroactive authority of a given statute. *Landgraf*, 511 U.S. at 280.

The first step of the analysis is to determine "whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." *Id.* Here, the district court found, and the government has agreed, that Congress did not provide explicit authority for retroactive application of § 1504. (JA 170-71). Section 1504 was passed as part of Title I of the Immigration and Nationality Technical Corrections Act ("INTCA"). Certain sections of the INTCA included explicit instruction for

retroactive application, *see, e.g.*, 8 U.S.C. § 1401; in other sections, Congress was explicit about those provisions being non-retroactive. *See, e.g.*, INCTA §§ 104, 108. As Mr. Hizam argued below, INTCA is best read as being expressly prospective in application.[9] No one has argued that it clearly applied to previously issued CRBAs. Therefore, the government cannot prevail at step one.

The second step under *Landgraf* is to consider whether application of the new law creates a genuine retroactive effect and, if so, whether Congress clearly intended that result. *INS v. St. Cyr*, 533 U.S. 289, 323 (2001); *Landgraf*, 511 U.S. at 280. Courts exercise a "commonsense, functional judgment about whether a new provision attaches new legal consequences to events completed before its enactment." *St. Cyr*, 533 U.S. at 321 (quotation marks omitted). Courts take into account "familiar considerations of fair notice, reasonable reliance, and settled expectations" in making their determinations. *St. Cyr* at 321. (quotation marks

[9] As Mr. Hizam argued to the district court, § 1504 is most naturally understood as having solely prospective application. Section 1504 appears in the first of the two INTCA titles, "Nationality and Naturalization." In Title I, Congress specified that only one provision should be applied retroactively, extending citizenship to a new group. 8 U.S.C. § 1401 (allowing U.S. citizens to confer citizenship on their children born abroad). The sections in Title I explicitly limited to prospective application did not affect any individual whose status had already been adjudicated, but only impacted requirements for future applicants of immigration benefits. INTCA § 104. Therefore, it is clear that Congressional intent in passing Title I of INTCA was to open more opportunities for immigrants, and would not serve to limit or disturb any earlier adjudications of citizenship. Section 1504 can therefore be properly understood as being prospective only based on Congressional intent, and therefore the *Landgraf* inquiry need not go into the second step.

omitted). These requirements serve to "ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness" in applying the law retroactively. *Landgraf*, 511 U.S. at 268; *see also Hughes Aircraft Co.*, 520 U.S. at 947 (courts are not limited to specific categories of effects but should apply a functional concept of retroactive effects).

Until the passage of INTCA in 1994, there was no statutory or regulatory authority for cancelling a CRBA. *See* Nationality Procedures – Report of Birth Regulation; Passport Procedures—Revocation or Restriction of Passports Regulation, 64 Fed. Reg. 19,713 (Apr. 22, 1999) (State Department acknowledgement that "[t]he INTCA added *new grounds* for denying, revoking, or canceling a passport, and for cancelling a Consular Report of Birth.") (emphasis added).[10] Therefore, Mr. Hizam was living with a CRBA in the United States as a U.S. citizen for four years before the passage of the act the government now claims provides for the document's cancellation. As noted by the district court, Mr.

[10] The government faults the district court for citing to the preliminary statement of the Federal Register notice, even though the government cited to this same text below. Defendants' Opposition to Plaintiff's Motion for Summary Judgment and In Support of Defendants' Cross Motion for Summary Judgment, Doc. 18, 19. In any event, the regulations prior to the enactment of § 1504 contained no provision for revoking a CRBA. *See, e.g.*, C.F.R. Title 22, Chapter I, Department of State, Subchapter F, Nationality and Passports (1962) (regulations regarding the revocation of passports, with no analogous regulation addressing revocation of Reports of Birth Abroad).

Hizam would have had no prior notice of the possibility of losing his CRBA. (JA 173).

Mr. Hizam clearly would suffer new injury should § 1504 be applied retroactively to his CRBA. Had Mr. Hizam been aware that his CRBA was subject to readjudication at any time, he would have pursued alternative routes to lawful residence and/or U.S. citizenship available to him before turning 18 years old. *See* notes 3, 4 *supra*.

Mr. Hizam's over twenty years of residence in the United States, attending American schools and colleges, owning businesses, and contributing positively to American communities demonstrate his reliance on his U.S. citizenship. Citizenship status is accorded consummate significance once bestowed due to the expectations it creates about how people shape their lives, contribute to their communities, pay into Social Security, and overall identify as American. *See Schneiderman v. United States.*, 320 U.S. 118, 122 (1943) ("[The consequences of depriving an individual of citizenship are] more serious than a taking of one's property, or the imposition of a fine or other penalty … nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country."); 8 U.S.C. § 1481 (2006) (setting highly specific requirements for loss of nationality among native born and naturalized citizens); 8 U.S.C. § 1451 (2006) (stating the processes for denaturalization, including a required hearing in a district

court of the United States). The courts have further held that even lawful permanent residence status creates settled expectations that cannot be retroactively disturbed. *See St. Cyr*, 533 U.S. at 289.[11]

The government's argument that § 1504 "merely confirms preexisting authority," and that it therefore does not "impose an additional or unforeseeable obligation" is without merit. (Govt. Br. 30 (citing *Landgraf*, 511 U.S. at 277-78) (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 721 (1974)) (quotation marks omitted)). As the district court found, the government has failed to identify any preexisting authority permitting revocation in the governing statute or regulations. (JA 195); *cf. Haig v. Agee*, 453 U.S. 280 (1981) (relying on the longstanding existence of passport revocation regulations to infer a power to revoke a passport under limited circumstances).[12]

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[11] Applying § 1504 retroactively disturbs the settled expectations of an entire class of persons who received CRBAs prior to the passage of INTCA nineteen years ago. Like Mr. Hizam, those individuals who relied on their adjudicated citizenship status made social, financial, and emotional investments into their lives in the United States, which, with retroactive applicability of §1504, could be forfeited at any time. *See, e.g.*, 42 U.S.C. §§ 402(t), (y) (1995) (providing for the suspension of Social Security benefit payments to individuals who are not citizens or nationals of the United States and who are outside of the country); 8 U.S.C. § 1612 (2008) (limiting eligibility for specified federal programs, including Social Security, for certain "qualified" noncitizens, including certain permanent residents). Retroactive application of statutes stripping individuals of their status must be recognized as having serious corrosive effects, due to the significant investments individuals have made in their lives, families, and futures.

[12] Further, the government improperly relies on *Bradley*, as it is inapposite. In *Bradley*, the preexisting authority was the "common-law availability" of attorneys'

Cancellation of previously issued CRBAs would frustrate the legislative intent behind § 1504, as evidenced by its legislative history. As discussed *supra*, Congress passed Section 1504 as part of INCTA, which was intended to facilitate and expand access to citizenship, including that for children of U.S. citizens abroad, in part by reducing the physical presence requirement for U.S. citizen parents. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. no. 103-415, 108 Stat. 4305 (1994). The bill's sponsor, Representative Romano Mazzoli, described the "core" of the INTCA as "correct[ing] problems in current immigration law which impose unnecessary burdens on persons who wish to become citizens, and on the transmission of citizenship from parent to child." H. Res. 533, 103d Cong., 140 Cong. Rec. H9272-02 (1994).

The government further argues that §1504 does not "affect substantive rights or impose burdens," arguing that Mr. Hizam's underlying status is not affected, but only the State Department's power is changed. (Govt. Br. 31). This claim, too, is without merit.[13] In *Hughes Aircraft*, for example, a new statute did not affect the

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fees; the court found that an additional statutory attorneys' fee requirement did not add a new burden, but simply further grounds for the same obligation. *Bradley*, 416 U.S. at 721. Here, the government has not identified a prior common law or other form of authority.

[13] The case relied upon by the government, *Thorpe v. Housing Auth. of Durham*, does not echo the considerations in Mr. Hizam's case. 393 U.S. 268 (1968). In *Thorpe*, the new hearing procedures that were ultimately applied retroactively "did not affect either party's obligations under the lease agreement between the housing authority and the petitioner." *Landgraf*, 511 U.S. at 276 (citing *Thorpe*, 393 U.S.

liability of the party but only changed the identity of the parties who could file suit, and the Court concluded that applying this change retroactively would have a retroactive effect and was not permissible absent clear direction from Congress. 520 U.S. at 948.

Furthermore, the government cannot ignore the retroactive application of a law simply because the triggering event – here, the government's attempt to revoke Mr. Hizam's CRBA – occurs after the statute's enactment. *See Vartelas v. Holder*, 132 S. Ct. 1479, 1489 (2012) (holding that, in considering whether a statute attaching new consequences to traveling abroad to an individual with a conviction for a crime involving moral turpitude is impermissibly retroactive, the reason for the new disability was not the recent, post-enactment, travel abroad, but the past event of the conviction). The language the government itself cites makes clear that retroactive application should occur when the new rule "'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Landgraf*, 511 U.S. at 274 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Here, not only is the 'tribunal' new, so is the possibility of readjudication of the CRBA. Mr. Hizam's U.S. citizenship was settled through the adjudication of his CRBA in 1990, and the government's reconsideration of that adjudication now, over twenty

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at 279). Further, *Thorpe* retroactively applied a law *protecting* individual rights and reliance (here, on housing), and did not increase the power of the government to limit individual rights and expectations.

years later, swiftly unravels the life in the United States that Mr. Hizam has worked to create. Thus, claims that the retroactive application of § 1504 will only affect the current powers of the government are misplaced.

The government argues that Mr. Hizam is "subject to precisely the same obligations as a non-citizen before and after the State Department" sought to readjudicate his CRBA. (Govt. Br. 32). However, this greatly mischaracterizes the significance (and the very fact) of the adjudication of his CRBA in 1990. Regardless of the government's assertions, Mr. Hizam possessed a valid CRBA since 1990, and the State Department has three times accepted it as proof of his citizenship to obtain or renew a U.S. passport. Relying on the government's repeated confirmation of his status as a U.S. citizen, Mr. Hizam thoughtfully and determinedly created a full life for himself in the United States, investing in an American education, building a business, contributing to his community, and supporting his United States citizen brother. (JA 115, 117, 119). The government's argument that this measure of investment in Mr. Hizam's rights as a U.S. citizen does not implicate "fair notice, reasonable reliance, and settled expectations" cannot be reasonably considered a "commonsense, functional judgment" as required in determining a statute's retroactive application. *St. Cyr*, 533 U.S. at 323 (2001).

(c) Section 1504 Must be Read to Avoid the Possibility of Statelessness, in Accordance with the *Charming Betsy* Canon of Statutory Construction

Reading 8 U.S.C. § 1504 as authorizing retroactive revocation of CRBAs for agency error risks the possibility of statelessness for the class of individuals in the same position as Mr. Hizam. The *Charming Betsy* canon of statutory construction requires that federal statutes be read in accordance with international law. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (Marshall, C.J.) (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains…"). Therefore, the scope of § 1504 must be determined in light of the international norm against policies that lead to statelessness. *See* UN General Assembly, *Convention Relating to the Status of Stateless Persons*, Sept. 28, 1954, 360 U.N.T.S. 117.

Constructing § 1504 to allow for the government to reach back in time and readjudicate CRBAs due only to agency error risks statelessness for many individuals dependent on their CRBA to determine their citizenship status, as the criteria for citizenship for the children of U.S. citizens varies by country. Certain countries will not provide citizenship to the children of U.S. citizens. *See Immigration and Naturalization Housekeeping Amendments Act of 1992: Hearing Before Subcomm. on International Law, Immigration and Refugees of the H. Comm. on the Judiciary*, 102d Cong. 60, 63 (1992) (statement of Hon. Bill

Alexander) (describing scenarios where the children of U.S. citizens could be rendered stateless absent citizenship law reform). Still other countries consider individuals who acquire foreign citizenship to have abandoned any prior citizenship. *See* United Nations High Commissioner for Refugees, *Nationality and Statelessness: A Handbook for Parliamentarians*, 33-34 (Oct. 20, 2005), www.unhcr.org/refworld/docid/436608b24.html (discussing automatic loss of original nationality in some cases where an individual leaves his or her country of origin).

The U.S. government has acknowledged statelessness as an "important government objective" in interpreting citizenship statutes before the Supreme Court. *See* Brief for United States at 22-30, *Flores-Villar v. U.S.*, 131 S. Ct. 2312 (2011) (No. 09-5801) (discussing the reduction of statelessness as a government objective). In passing INTCA, the act containing § 1504, Congress indicated that the possibility of statelessness was a concern, and that statutes should be drawn to avoid that result. *See* H.R. Rep. 103-387, at 6 (1993) (discussing the dangers of statelessness); 139 Cong. Rec. S 8553 (1993) (same). Therefore, the temporal scope of § 1504 must be read narrowly to avoid violating the long held principle of construing statutes in accordance with international law.

2. The State Department Has No Inherent Authority to Revoke Mr. Hizam's CRBA

The district court correctly found that the State Department also lacks inherent authority to revoke the documents that it issues. (JA 175). "There is no general principle that what one can do, one can undo." *Gorbach v. Reno*, 219 F.3d 1087, 1095 (9th Cir. 2000). As the *Gorbach* court analogizes, even the federal courts require statutory permission to vacate their own judgments; to presume that any other agency would require less authority (in particular, "silence") with respect to as significant a matter as one's citizenship is simply "too much." *Gorbach*, 219 F.3d at 1095. There has to be "some statutory authority to have the power to take away an individual's American citizenship" and this Court must begin its inquiry by "seeking in the relevant statutes some express or implied delegation of authority to…revoke…citizenship." *Gorbach*, 219 F.3d at 1094; *see also Magnuson v. Baker*, 911 F.2d 330, 334 (9th Cir. 1990) (concluding that 22 U.S.C. § 2705 does not grant revocation power to the Secretary of State, and that any inherent power to revoke is limited to "exceptional ground[s].").

The government nonetheless claims that "agencies have inherent authority to correct their own errors." (Govt. Br. 21 (citations omitted)). The government cites various cases as supporting a broad swath of power bestowed upon all agencies. (Govt. Br. 21-22). However, examination of the cases cited by the government reveal that they do not provide the kind of open-ended non-statutory based authority that the government claims here. *See Tokyo Kikai Seisakusho, Ltd. v.*

United States, 529 F.3d. 1352, 1361 (Fed. Cir. 2008) (finding and discussing limitations on the power of agencies to reconsider its decisions).

Some of the cases cited by the government are based on an express statutory grant of authority to revisit past decisions. These are plainly inapposite. The government relies on *Friend v. Reno* to argue that courts have found that the State Department possesses the authority to cancel certificates of citizenship for agency error. 172 F.3d 638 (9th Cir. 1999). However, *Friend* concerned an express grant of authority to cancel a document and addressed an individual whose passport was revoked within less than two years of its issuance.[14] Similarly, in *Federenko v. United States*, the Court permitted revocation of a certificate of citizenship in accordance with the explicit statutory authority of 8 U.S.C. § 1451(a). 449 U.S. 490, 518 (1981). Having no such express authority here, the government has no authority to revoke Mr. Hizam's previously issued CRBA. [15]

In the absence of a statutory basis for reconsidering past decisions, this Circuit has made clear that agency action to reconsider must be exercised in a

[14] Further, Friend was on notice that his citizenship claim would be subject to scrutiny as he acted deceptively in reapplying *knowing* he did not qualify for U.S. citizenship. *Friend*, 172 F.3d at 640.

[15] *See also Auto. Club of Michigan v. Comm'r*, 353 U.S. 180, 184 (1957) (allowing for retroactive action by IRS Commissioner based on explicit authority, provided the action survives abuse of discretion review); *see also Dixon v. United States*, 381 U.S. 68, 72-3 (1965) (allowing retroactive correction of mistakes of law in application of tax laws by the Commissioner of the IRS based on explicit statutory authority).

reasonable amount of time. *See Dun & Bradstreet Corp. Found. v. U.S. Postal Service*, 946 F.2d 189, 194-5 (2d Cir. 1991) (holding that agency determinations can only be reconsidered within a reasonable amount of time as "[t]his policy balances the desirability of finality against the general public interest in attaining the correct result in administrative cases") (citations omitted); *see also Tokyo Kikai Seisakusho, Ltd*, 529 F.3d at 1361; *NRDC v. Abraham*, 355 F.3d 179, 202-03 (2d Cir. 2004) (noting that some agency exercises of "quasi-judicial powers" may be reconsidered and citing *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977), which limited correction of mistakes to those pursued within a reasonable period of time). The key in these cases is respect for the prior adjudication on which the parties have relied. *See Am. Trucking Ass'ns v. Frisco Transp. Co*, 358 U.S. 133, 146 (1958) (allowing correction of certificate to reflect prior adjudication for which the parties had timely notice).[16]

The revocation of Mr. Hizam's CRBA cannot be justified under these standards for inherent agency authority. With respect to Mr. Hizam, the State

[16] The government also cites to cases where an agency has been permitted to overturn its past actions based on particular statutory circumstances. *See Last Best Beef, LLC v. Dudas*, 506 F.3d 333, 341 (4th Cir. 2007) (finding the new statute to clearly intend repeal of the earlier law); *see also Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134-35 (1936) (holding that the original regulation to be overturned was out of step with the statute, and therefore could not have been applied regardless of amended regulation); *see also Dixon*, 381 U.S. at 74 (allowing retroactive correction of mistakes of law in application of tax laws by the Commissioner of the IRS based on explicit statutory authority).

Department did not act in a timely way. It did not commence an action to revoke Mr. Hizam's CRBA until nineteen years had passed since the issuance of his original citizenship documents. By that time, Mr. Hizam was an adult and was ineligible for an alternative certificate of citizenship. The government did not act when it reviewed Mr. Hizam's documentation when Mr. Hizam's grandfather first renewed his passport or when Mr. Hizam renewed it at age twenty. Instead, it waited until 2011. Thus, the extraordinary lapse of time, standing alone, forecloses the State Department's claim of inherent authority.

There is simply no precedent for the broad, unlimited authority sought by the government for canceling previously issued CRBAs. The government cites to *Haig v. Agee*, 453 U.S. 280 (1981), as supporting its claim that the State Department possesses this open-ended power. The government fails, however, to acknowledge the basis of the Court's analysis in *Agee*. (Govt. Br. 20). In *Agee*, the Court considered a far narrower revocation power than the government seeks here, holding that the government could revoke Mr. Agee's passport on the grounds that his current activities in foreign countries were causing or were likely to cause serious damage to the national security or foreign policy of the United States. *Agee*, 453 U.S. at 301-02. Further, *Agee* only held that the Secretary was

authorized to revoke passports in accordance with specific regulations[17] challenged by Mr. Agee, and did not reach the conclusion that the government holds a broad inherent authority to revoke such documents. *Id.* at 303.

Most importantly, *Agee* relied on the longstanding existence of passport revocation regulations to infer a power to revoke a passport under limited circumstances. *Id.* at 306 (validating 22 C.F.R. §§ 51.70(b)(4), 51.71(a) (1980)). In contrast, as the district court found, "the State Department has not made a similar showing of a consistent administrative construction of a policy to revoke erroneously issued CRBAs …" (JA 195); *see, e.g.*, C.F.R. Title 22, Chapter I, Department of State, Subchapter F, Nationality and Passports (1962) (regulations regarding the revocation of passports, with no analogous regulation addressing revocation of Reports of Birth Abroad).

Any additional circumstances that "might qualify as exceptional … such that the State Department might have authority," as the district court suggested may exist (though it did not reach this question) do not apply here. (JA 178). The government makes no allegations of fraud, noting that the erroneous issuance of Mr. Hizam's CRBA was through no fault of Mr. Hizam or his family. In fact, the government acknowledges that Mr. Hizam and his father fully and honestly submitted the application. The government made the error, and having done so,

[17] The government sought to revoke Mr. Agee's passport according to 22 C.F.R. §§ 51.70(b)(4), 51.71(a) (1980).

they cannot now seek to revoke Mr. Hizam's CRBA. (JA 100 ("[T]here is no evidence of fraud on your part")); (Govt. Br. 33 ("[T]he State Department's mistake in issuing a CRBA and U.S. passport to Mr. Hizam occurred through no fault of Mr. Hizam or his father, and may have caused him to lose an opportunity to obtain lawful permanent resident status and possibly U.S. citizenship.")).

The government further argues that policy arguments merit a rule that places no limit on the State Department's authority to revisit past CRBAs. (Govt. Br. 27-28). It speculates that it is easier to reprove citizenship at birth than it is to reprove citizenship for a certificate of citizenship or through naturalization. This speculation, of course, is nowhere found in the text of § 2705, and fails to recognize that determining eligibility for a CRBA may not be straightforward, and that the passage of time can complicate the ability of an applicant to compile the required information. Nor does it accord with the prime motivation for passing § 2705, which was to recognize that all of these documents stem from procedures with similar safeguards and that individuals with CRBAs as proof of their U.S. citizenship should be as secure in their proof of citizenship. Section 2705 protects these citizenship interests. *Magnuson*, 911 F.2d at 336. *Cf. Kelso v. U.S. Dep't of State*, 13 F. Supp. 2d 1, 4-5 (D.D.C. 1998) (*Magnuson*'s concerns come into play where revocation of a passport is based on a suspicion of non-citizenship).

The passage of § 1504 itself, authorizing cancellation of citizenship documents, demonstrates that Congress did not understand the State Department to have the power to revoke previously issued CRBAs. Further, such an interpretation is, as the district court holds, "at odds with the basic rules of statutory interpretation, [as a] 'statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" (JA 176 (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quotations omitted))). To understand the government to have inherent authority to revoke CRBAs, through § 1104 or otherwise, would render § 1504 superfluous, and would not fulfill its stated purpose of "adding new grounds for denying, revoking, or canceling a passport, and for cancelling a [CRBA]," as conceded by the government. (Defendants' Opposition to Plaintiff's Motion for Summary Judgment and In Support of Defendants' Cross Motion for Summary Judgment, Doc. 18, 19).

D. The Principle of Laches Prevents the Revocation of Mr. Hizam's Citizenship Documents Due to the Government's Extreme Delay in Correcting its Error

Finally, the government should be precluded from seeking to revoke Mr. Hizam's CRBA under a laches theory because it engaged in an unreasonable delay in pursuing its claim to revoke Mr. Hizam's CRBA, clearly prejudicing him. The government argues repeatedly that its authority to revoke the CRBA has existed for

over twenty years; yet, it took no action until 2011. Additionally, the State Department twice renewed Mr. Hizam's U.S. passport during this period. [18]

In assessing whether this delay merits a claim of laches, the claim must show: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *Costello v. United States*, 365 U.S. 265, 282 (1961). The United States does not have sovereign immunity from a defense of laches. *See Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 278-79 (2d Cir. 2005) (applying laches against the federal government); *United States v. Admin. Enters., Inc.*, 46 F.3d 670, 672-73 (7th Cir. 1995) (discussing case law on laches against the federal government); *see also Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60-61 (1984) (leaving open the possibility of estoppel against the government). Further, the doctrine of laches is permissible against the government in the context of immigration and citizenship. *See Thom v. Ashcroft*, 369 F.3d 158, 166-67 (2d Cir. 2004) (affirming two-part test in *Costello*); *United States v. Lemos*, 2010 WL 1192095 (S.D.N.Y. Mar. 26, 2010) (laches is available against the government in denaturalization proceedings); s*ee also United States v. Oddo*, 314 F.2d 115, 118 (2d Cir. 1963) (stating that "the

[18] As the district court ruled that § 1504 did not have retroactive application, it did not reach the issue of laches. However, the principle of laches does provide an alternative ground to uphold the district court decision.

most favorable view [of *Costello*] is that laches is not foreclosed in a denaturalization proceeding").

Mr. Hizam should not be punished for the State Department's error, and properly asserts the doctrine of laches against the government here, as there has been substantial prejudice from the unexcused 20-year delay in taking action. With that delay, Mr. Hizam has accrued two decades of residency in the United States, in which he has relied on his citizenship status. The course of Mr. Hizam's life to this point has been predicated upon the understanding that he was a United States citizen. He established a life for himself first in Michigan, and then in New York. (JA 118). He pursued his education in U.S. schools, and studied with the aim of conducting business in the United States. (JA 117-19). He has become the responsible guardian for his youngest U.S. citizen brother, and has entered into business arrangements with his other U.S. citizen brothers. (JA 119).

Most significantly, Mr. Hizam did not pursue other means of obtaining citizenship during this period because of his understanding that he had achieved such status already. After his adjudication, two additional avenues of citizenship were still available to Mr. Hizam, and had he pursued them, he would have retained the opportunity to continue to build his life in the United States. At the time of his CRBA application, Mr. Hizam would have been immediately eligible for permanent residency as the minor child of a U.S. citizen. (JA 110); 8 U.S.C. §

1151(b)(2) (2006); 8 U.S.C. § 1101(b)(1). Thereafter, he would have been eligible to naturalize at the age of eighteen. 8 U.S.C. § 1427 (2006). Further, INTCA's passage in 1994 made Mr. Hizam eligible to apply for a certificate of citizenship under 8 U.S.C. § 1433. This provision was intended specifically to apply to minor children of U.S. citizen parents whose parents had five years of residence, but were born too early to satisfy the requirements of 8 U.S.C. § 1401 (2006), thus expanding opportunities for citizenship.

By waiting until Mr. Hizam was an adult and no longer eligible for alternative paths to U.S. citizenship, the State Department clearly demonstrates a lack of diligence that satisfies the first prong of the *Costello* test. The government claims that it had sufficient authority to cancel Mr. Hizam's document from the day it was issued; however, despite Mr. Hizam renewing his passport twice in 1996 and in 2001, at which time the government would have reviewed his documentation, the State Department did not commence any action to cancel his CRBA until 2011. *See Southern Pac. Co. v. Bogart*, 250 U.S. 483, 488-89 (1919) ("[T]he essence of laches is not merely lapse of time. It is essential that there be also acquiescence in the alleged wrong or lack of diligence in seeking a remedy"). The delay was through no fault of Mr. Hizam or his family, as the government concedes that the length of his father's physical presence in the United States was clearly evident on the face of his original application. (JA 141; Govt. Br. 7).

Further satisfying the test for a claim of laches, Mr. Hizam has clearly suffered prejudice as a result of this delay, which was caused through no fault of his own. *Cf. Costello*, 365 U.S. 265 (denying laches claim when status was obtained through applicant's fraud). To establish the prejudice required to satisfy the *Costello* test and make a valid claim of laches, courts require a showing of either a change in the claimant's position in a way that would not have occurred but for the respondent's delay, *see Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 192 (2d Cir. 1996), or that the passage of time has impaired his ability to defend himself against the action. *See Stone v. Williams*, 873 F.2d 620, 625 (2d Cir. 1989), *vacated on other grounds*, 891 F.2d 401 (2d Cir. 1989)). Here, but for the government's delay in seeking to readjudicate Mr. Hizam's CRBA, Mr. Hizam would have been able to take advantage of the other routes to legal status and citizenship in the United States. If the government had even attempted to revoke his CRBA at the first instance of Mr. Hizam's passport renewal – or even later, through 1998 – he would have been eligible to apply for a certificate of citizenship under § 1433. Counter to the government's argument, Mr. Hizam has demonstrated that he meets Congressional objectives for citizenship. However, because the State Department erred in 1990, and failed to attempt to correct itself for almost twenty years, Mr. Hizam's window to receive citizenship has since closed, an outcome that the government itself admits is an "inequity." (Govt. Br.

33 (noting that the government's mistake "may have caused him to lose an opportunity to obtain lawful permanent resident status and possible U.S. citizenship.")).

E. The Government's Proposals to Resolve Mr. Hizam's Status Are Not Adequate Alternatives to the Recognition of the Conclusive Force of His CRBA

The government acknowledges that to revoke Mr. Hizam's CRBA would have a significant detrimental affect on his life, and makes some attempt to remedy the great loss it would cause, suggesting that Mr. Hizam's situation could be resolved through a Private Bill or with the assistance of the Department of Homeland Security ("DHS"). However, these suggestions do not offer a real solution.

A Private Bill is a difficult and uncertain mechanism. The government has not introduced such a bill for Mr. Hizam and certainly cannot provide assurance that Congress would enact it into law, or what relief it could provide. Similarly, although the government suggests that it would support a remedy at DHS, it has failed to identify any remedy. As the government acknowledges, Mr. Hizam can no longer obtain a quick immigrant visa as the minor child of a United States citizen because he is now an adult. *See* 8 U.S.C. § 1151(b)(2)(A)(i) ("immediate relatives" of U.S. citizens (defined as spouses, children under 21, and parents of children over 21) are not subject to any numerical limitations on immigrant visa

issuance and therefore are eligible to become lawful permanent residents immediately upon approval of a petition). Instead he would face the same lengthy process he would have faced had he spent the last twenty-three years outside the United States and had never received a CRBA.[19] The only proper resolution of this case is to uphold the district court's judgment and prevent the late revocation of Mr. Hizam's proof of citizenship.

[19] As the government acknowledges, Mr. Hizam's only "potential path to future lawful permanent resident status" would be an immigrant visa petition under § 1153(a)(3), which would involve "a substantial wait." (Defendants' Opposition to Plaintiff's Motion for Summary Judgment and In Support of Defendants' Cross Motion for Summary Judgment, Doc. 18, 11, n.4 (estimating wait time for an immigrant visa to be about 13 years)).

VI. CONCLUSION

For the reasons set forth above, the judgment of the district court should be upheld, and the government should not be permitted to rescind Mr. Hizam's Consular Report of Birth Abroad.

Dated: April 23, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10170 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Date: April 23, 2013

Respectfully submitted,

/s/ Meredythe M. Ryan
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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2013, I caused a true and correct copy of the foregoing document to be served upon all counsel of record via the ECF system.

s\ Meredythe M. Ryan
Meredythe M. Ryan