NO CHILD LEFT BEHIND?: WHY THE SUPREME COURT ERRED IN INTERPRETING THE SCOPE OF § 1153(H)(3) OF THE CHILD STATUS PROTECTION ACT IN *SCIALABBA V. CUELLAR DE OSORIO*

Comment

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I. WAITING IN THE VISA LINE

Sophie, a United States Citizen (USC), filed a visa petition in January 2006 for her married daughter, Julia. As the direct beneficiary of the petition, Julia listed her thirteen-year-old son, John, on the petition as her child derivative beneficiary who would accompany her to the United States. Listing John as a child derivative beneficiary ensured that he would be eligible for a visa at the same time his mother became eligible for a visa. The United States Citizenship and Immigration Services (USCIS) approved the petition with a "priority date" of January 2006. The approval and priority date of the petition established John's "place" in a specific "visa waiting line" designated for child derivative beneficiaries of a petition filed by a USC on behalf of a married daughter. Though USCIS approved the petition in 2006, a visa was not immediately available for Julia and John until January 2013. By then, John was twenty-one years old and "aged out" of the immigration system because he no longer qualified as a child under United States immigration laws. Consequently, John became ineligible for a derivative visa.

To remedy John's situation, Julia, now a Lawful Permanent Resident (LPR), filed a petition in September 2013 that listed John as a direct beneficiary. USCIS approved the petition but determined that John could not retain his priority date, or place in line, of January 2006 and must, instead, wait at the end of a new visa line designated for beneficiaries of a petition filed by an LPR for a son who is over the age of twenty-one. Ultimately, USCIS refused to credit John for the seven years he had already waited in line for a visa, which forced John to start the waiting process all over again.

Similarly, Sam, an LPR, filed a petition for his unmarried daughter, Lina, in 2002. Lina listed her fourteen-year-old child, Anne, as a derivative beneficiary on the petition. The petition was approved with a priority date of February 2002. A visa, however, did not become available for Lina and Anne until March 2013. As a result, Anne no longer qualified for child status and aged out of her derivative-beneficiary status at twenty-six years of age. Thus, Anne could not obtain a visa through Lina based on the original petition. Lina, however, was now an LPR and filed a second petition for Anne that requested that USCIS provide Anne with the same priority date—same place in the visa waiting line—as the original petition of February 2002. USCIS refused to afford Anne the earlier priority date and instead, approved Anne's new petition sponsored by her mother, with a priority date of October 2013. USCIS declined to credit Anne for the eleven years she had already waited in line for a visa to become available. Had USCIS allowed Anne to maintain her original priority date, Anne would have immediately been eligible for a visa. Unfortunately, with her new priority date, it is estimated that the waiting time for Anne will be an additional nine years before a visa is available in her new waiting line.

Anne's and John's experiences are classic examples of the "aging out" dilemma within the United States immigration system, causing much controversy among courts and stirring frustration in those applicants whose lives remain in limbo due to long waiting periods in the visa line.[1] Often, extensive backlogs and processing delays of family-based visa petitions cause children, who have waited years for a visa to become available, to age out of the immigration system at the age of twenty-one, rendering them ineligible for a visa as "child" derivative beneficiaries of a visa petition.[2] As a result, aged-out children are kicked back to the end of the visa waiting line and must start the waiting period all over again as adults.[3]

In 2002, Congress passed the Child Status Protection Act (CSPA) to rectify the aging out dilemma.[4] Despite Congress's intent to unite families and assist all derivative beneficiaries, the Board of Immigration Appeals (BIA), the administrative agency charged with interpreting ambiguous immigration statutes, limited the scope of the CSPA in its holding in *Matter*

1. *See* de Osorio v. Mayorkas, 695 F.3d 1003, 1010 (9th Cir. 2012) (en banc), *rev'd sub nom.*, Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014); Khalid v. Holder, 655 F.3d 363, 365–66 (5th Cir. 2011), *abrogated by Cuellar de Osorio*, 134 S. Ct. 2191; Li v. Renaud, 654 F.3d 376, 379–80 (2d Cir. 2011); Matter of Wang, 25 I. & N. Dec. 28, 28–30 (B.I.A. 2009).

2. Christina A. Pryor, Note, *"Aging Out" of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act*, 80 FORDHAM L. REV. 2199, 2199 (2012).

3. *See de Osorio*, 695 F.3d at 1010; *Khalid*, 655 F.3d at 365–66; *Li*, 654 F.3d at 379–80; *Matter of Wang*, 25 I. & N. Dec. 28, at 28–30.

4. Dianne Milner, Note, *No Child Left Unprotected: Adopting the Ninth Circuit's Interpretation of the Child Status Protection Act in* de Osorio v. Mayorkas, 46 CORNELL INT'L L.J. 683, 689–90 (2013).

of Wang.[5] Specifically, the BIA determined that the benefits extended under § 1153(h)(3) of the CSPA—automatic conversion and priority date retention—apply only to F-2A derivative beneficiaries, as opposed to all derivative beneficiaries.[6] Consequently, under the BIA's interpretation of such a key provision of the CSPA, aged-out child derivative beneficiaries in the F-3 and F-4 categories, who have often waited over ten years in the visa waiting line, are left without a remedy at the age of twenty-one.[7]

Generally, if a statute is ambiguous, the reviewing court must give *Chevron* deference to the administrative agency's interpretation.[8] All three circuit courts that interpreted the applicability of § 1153(h)(3) of the CSPA prior to June 9, 2014, determined that the statute was unambiguous and declined to give deference to the BIA's interpretation of the statute.[9] A circuit split, however, still existed.[10] While the Second Circuit adopted the BIA's interpretation, the Fifth and Ninth Circuits held that § 1153(h)(3) of the CSPA allowed all child derivative beneficiaries who had aged out of the immigration system to benefit from automatic conversion and priority date retention in order to allow individuals to maintain their place in the visa waiting line by permitting them to retain their original priority date as they wait for a visa to become available in the new visa waiting line or preference category.[11]

The tension between the BIA and circuit courts regarding the applicability of § 1153(h)(3) is exemplified in *Scialabba v. Cuellar de Osorio*, a case recently decided by the Supreme Court involving a class action lawsuit against the Government by aggrieved LPRs whose children were denied CSPA benefits.[12] *Cuellar de Osorio* presents two issues regarding the applicability of § 1153(h)(3) of the CSPA.[13] The first issue is whether § 1153(h)(3) of the CSPA unambiguously establishes that derivative beneficiaries, who were children at the time their petition was filed, can maintain their child status after reaching twenty-one years of age.[14] The second issue is whether the BIA reasonably interpreted

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5. *See infra* Part V.A–B.

6. *See infra* Part V.A–B. In immigration law, F-2A is a preference category reserved for aliens who are spouses and children of LPRs. *See infra* Part II.B. Automatic conversion and priority date retention are the two benefits afforded under the CSPA to children who age out. *See infra* Part IV.C–D.

7. *See infra* Part V.B.

8. *See infra* Part V.C.

9. *See* de Osorio v. Mayorkas, 695 F.3d 1003, 1006 (9th Cir. 2012) (en banc), *rev'd sub nom.*, Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014); Khalid v. Holder, 655 F.3d 363, 373 (5th Cir. 2011), *abrogated by Cuellar de Osorio*, 134 S. Ct. 2191; Li v. Renaud, 654 F.3d 376, 383 (2d Cir. 2011).

10. *See infra* Part VI.

11. *See infra* Part VI.

12. *Cuellar de Osorio*, 134 S. Ct. at 2202.

13. *See id.* at 2203–04.

14. *See id.*

§ 1153(h)(3) of the CSPA.[15] On June 9, 2014, in a five to four decision, and with four separate opinions filed, the Supreme Court decided the case in favor of the Government.[16]

This Comment analyzes the legislative intent and plain language of the statute to establish that the Supreme Court erred in its recent decision in *Cuellar de Osorio*.[17] Part II provides an overview of the United States immigration system, the petitioning process, and the qualifying relationships that establish the different preference categories, or waiting lines, in the immigration field.[18] Part III discusses the aging out dilemma and the negative impact aging out has on an applicant who loses child status upon reaching twenty-one years of age.[19] Part IV introduces the CSPA and explains its key provisions.[20] To understand the controversy regarding the applicability of the CSPA, Part V discusses the competing views of the CSPA's benefits of automatic conversion and priority date retention, as well as the BIA's interpretation of the CSPA.[21] Part VI discusses the circuit split prior to the Supreme Court's decision in *Cuellar de Osorio* regarding the interpretation of § 1153(h)(3) of the CSPA, while Part VII elaborates on the reasoning behind the recent Supreme Court decision.[22]

This Comment takes the position that the Supreme Court ruled contrary to congressional intent and the very purpose for which the CSPA was passed. Part VIII argues that deference to the BIA is unwarranted because, as established by the legislative history and plain language of the statute, § 1153(h)(3) of the CSPA is not ambiguous.[23] As a precautionary measure, Part IX explains that even though the Court found the statute to be ambiguous and deference to the BIA appropriate, the Court should have held that the BIA's interpretation of § 1153(h)(3) is unreasonable as it goes against congressional intent and the very purpose for which the statute was enacted.[24] Finally, Parts X and XI conclude that Congress should consider the Fifth Circuit's interpretation of § 1153(h)(3) and use such interpretation as a model for drafting future legislation because the Fifth Circuit's interpretation comports closely with the legislative intent and purpose of the passage of the CSPA in 2002.[25] Essentially, this Comment urges Congress to pass legislation that specifically allows all derivative beneficiaries of all visa petitions to benefit from § 1153(h)(3)'s provisions regarding automatic

15. *See id.* at 2212.
16. *See infra* Part VII.
17. *See infra* Parts VII–VIII.
18. *See infra* Part II.
19. *See infra* Part III.
20. *See infra* Part IV.
21. *See infra* Part V.
22. *See infra* Parts VI–VII.
23. *See infra* Part VIII.
24. *See infra* Part IX.
25. *See infra* Parts X–XI.

conversion and priority date retention to allow individuals to maintain their child status as they wait in line for a visa to become available.[26]

II. IMMIGRATION OVERVIEW

The Immigration and Nationality Act (INA) governs the flow of immigration into the United States.[27] The INA sets forth four general categories under which an alien may be eligible for a United States visa.[28] Visas are allocated to immigrants who fall under one of the following categories: (1) family-sponsored immigrants, (2) employment-sponsored immigrants, (3) diversity immigrants, and (4) refugees or asylum seekers.[29] Family-sponsored immigrants are aliens who are sponsored by their USC relatives or LPR relatives to obtain a visa.[30] Aliens who are sponsored by their employers for their desirable job skills and qualifications are employment-sponsored immigrants.[31] Diversity immigrants, on the other hand, are individuals from countries that have low immigration rates to the United States and for whom the government reserves visas in an attempt to diversify the immigrant pool.[32] Finally, the category reserved for refugees and asylum seekers exemplifies the United States' humanitarian efforts to aid those individuals facing persecution or seeking protection from persecution.[33] Each of these broad-based categories has its own internal quota regarding the total amount of visas that may be issued each year.[34] Some categories even have per-country limits.[35] In fact, every category is intricate and complex, each having its own set of quotas, sub-quotas, and eligibility requirements.[36] Because of the overwhelming complexities, this Comment's focus will remain solely on the family-based immigration program.

A. Family-Based Immigration

Under the INA, the total amount of family-based visas issued each year is limited to 480,000; no more than 7% of the total amount of visas

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26. *See infra* Parts X–XI.

27. Pryor, *supra* note 2, at 2203 (citing Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1537 (2012))).

28. *See* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 253–54 (5th ed. 2009). Under the INA, aliens are defined as all individuals who are not United States nationals. *Id.* at 1.

29. *See id.* at 253–54, 871–72, 892–93.

30. *See id.* at 253–55.

31. *See id.* at 254, 304–07.

32. *See id.* at 254, 348–50.

33. *See id.* at 869, 871–72, 892–93.

34. *See id.* at 253.

35. *See id.* at 253–54.

36. *See id.*

may be issued to any single country.[37] The issuance of a family-based visa grants LPR status to individuals seeking admission into the United States.[38] Traditionally, United States immigration laws have promoted the core value of family unity.[39] Today, current immigration laws allow for USCs and LPRs to file a family-sponsored visa petition for their alien relatives.[40] Due to the high demand for visas, however, the number of visa applicants exceeds the statutory quota allowed by Congress.[41] To cope with the high demand for visas, the government uses a preference-based system and only allocates visas to aliens with a special qualified relationship to a USC or LPR.[42]

B. Preference Categories

To identify the qualifying relationships for the purpose of establishing priority as to who can obtain a visa, Congress subdivided the family-based program into four preference categories based on the relationship between the alien relative and USC or LPR.[43] The preference categories specify the relationships recognized under the INA.[44] To qualify for a family-based visa, an alien must be an immediate relative of a USC or fall under one of the preference categories.[45] Immediate relatives are given preferential

37. 8 U.S.C. §§ 1151(c), 1152(a)(2) (2012).

38. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 28, at 7–9.

39. *See id.* at 262. The INA contains several family reunification provisions. Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509, 509 (2010). For example, the INA allows USCs and LPRs to be joined with their families by allowing them to sponsor relatives, who live outside of the U.S., for a visa. *Id.* Also, when an individual is subject to deportation, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) takes into consideration whether deporting an alien would result in "exceptional and extremely unusual hardship to the alien's [U.S. citizen or resident] spouse, parent, or child." *Id.* at 509–10 (alteration in original) (quoting 8 U.S.C. § 1229b(b)(1)(D) (2006)). If exceptional and extreme hardship is caused to the USC or LPR, the alien may avoid deportation on the basis of family unity. *See* 8 U.S.C. § 1229b(b)(1)(D) (2012). On the other hand, the United States immigration system is often criticized for destroying families. *See, e.g.*, Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55, 55–56 (2007) (discussing the effects of deportation and the impact the proceedings have on families of LPRs who are deported). For example, the exceptional and extremely unusual hardship standard set out in IIRIRA is extremely difficult to meet, making it "virtually impossible to use it to prevent deportation on the basis of family unity." King, *supra*, at 510 n.4 (citing Jeffrey S. Lubbers, *Closing Remarks*, 59 ADMIN. L. REV. 621, 625 (2007)).

40. *See* 8 U.S.C. §§ 1151(a)–(b), 1153(a), (d) (2012). Despite the ability to petition alien relatives, family reunification is limited because not all aliens are eligible for a petition. *See, e.g.*, King, *supra* note 39, at 510–12 (arguing that U.S. immigration law takes on a narrow view of what constitutes a family and only provides benefits to traditional nuclear families, and disregards functional families in today's society).

41. LEGOMSKY & RODRÍGUEZ, *supra* note 28, at 252.

42. *See id.* at 252–56.

43. *Id.* at 255.

44. *See* 8 U.S.C. § 1153(a).

45. *See* Wim van Rooyen, Note, *Family Unity for Permanent Residents and Their Spouses and*

treatment and are not subject to the preference categories.[46] If an alien is not an immediate relative, the alien may still be eligible for a family-sponsored visa if the individual can establish a relationship to a USC or LPR in one of the following preference categories: (1) the F-1 category, which is for aliens who are unmarried sons and daughters of USCs; (2) the F-2 category, which is two-fold and is reserved for both aliens who are spouses and children of LPRs (F-2A), and for aliens who are unmarried sons and daughters of LPRs (F-2B); (3) the F-3 category, which is for aliens who are married sons and daughters of USCs; and (4) the F-4 category, which is for aliens who are brothers and sisters of USCs.[47] Not all alien relatives fit into a statutory preference category, and not all USCs or LPRs can file for alien relatives for immigration purposes.[48] Thus, not every alien relative is eligible for a visa petition under the INA.[49]

Minor Children: A Common Sense Argument for Revival of the "V" Visa, 15 TEX. WESLEYAN L. REV. 185, 188–89 (2008). Immediate relatives are defined as children, spouses, and parents of USCs. 8 U.S.C. § 1151(b)(2)(A)(i). Under the INA, "children" are distinguished from "sons and daughters" in that children are defined as unmarried individuals under the age of twenty-one, whereas sons and daughters are individuals over the age of twenty-one. 8 U.S.C. §§ 1101(b)(1), 1153(a) (2012); *see* van Rooyen, *supra*, at 189. Consequently, unmarried sons and daughters of USCs are not afforded the same benefits and preferential status as immediate relatives. *See* 8 U.S.C. § 1151(b)(2)(A)(i) (listing immediate relatives as a preferential group who are not subject to the annual visa quotas); *see also* 8 U.S.C. § 1153(a)(1) (showing that unmarried sons and daughters of USCs are subject to annual numerical limitations on immigrant visas). The argument in favor of granting preferential status to children, spouses, and parents of USCs is that the geographical separation and family separation is more severe on these individuals. van Rooyen, *supra*, at 192. In contrast, sons and daughters of USCs are at a more independent age—over the age of twenty-one—and not as vulnerable to the negative effects associated with family separation. *Id.* Similarly, a married son or daughter of a USC can rely on their spouse to mitigate hardship linked with family separation. *Id.*

46. *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a). Visas are always available without delay for immediate relatives of USCs because under the INA, immediate relatives are not subject to visa quotas. 8 U.S.C. § 1151(b)(2)(A)(i); de Osorio v. Mayorkas, 695 F.3d 1003, 1006–07 (9th Cir. 2012) (en banc), *rev'd sub nom.*, Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014).

47. 8 U.S.C. § 1153(a). The preference categories as a whole suggest that "[e]xtended periods of separation between parents and minor children, and between spouses, would likely result in even greater hardship and is even less desirable than separating adult children from their parents." van Rooyen, *supra* note 45, at 192 (citing *Shortfalls of the 1986 Immigration Reform Legislation: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 5 (2007) (statement of Stephen H. Legomsky, Professor, Washington University School of Law)). Likewise, the layout of the preference category suggests that the relationship between siblings is not as fundamentally important as the relationship between parents and minor children and spouses. *Id.* at 192–93.

48. *See* 8 U.S.C. § 1153(a). USC and LPR grandparents, aunts, cousins, uncles, and in-laws are not allowed to sponsor alien relatives for immigration purposes. *See id.* LPRs are further limited in that they are restricted from filing a family-sponsored visa petition on behalf of their alien parents, alien married sons and daughters, and alien siblings. *See id.*

49. *See id.*

C. Waiting Lines for Visas

The preference categories set out by the INA are best described as "waiting lines" for a visa.[50] Each preference category is capped at a set amount of visas that may be issued per year.[51] If all visas are exhausted for the year and the alien applies for a visa, the alien must wait until the next year or the year after until a visa finally becomes available.[52] The number of visa applicants far exceeds the yearly visa quotas, resulting in a substantial backlog in each of the preference categories.[53] For this reason, many aliens wait in line for long periods of time; in some cases, they wait up to twenty years before a visa is finally available.[54] The only aliens who are not subject to waiting lines, or categories, are those aliens who are immediate relatives of USCs because visas are always immediately available for them.[55] All other alien relatives, on the other hand, must wait in line in their respective categories.[56]

D. Petitioning an Alien Relative

When a USC or LPR files a petition for an alien relative, the visa petition alone does not guarantee a visa but rather reserves a place in line in the appropriate category for the alien relative to wait for a visa to become available.[57] A visa petition only establishes the relationship between the USC or LPR petitioner and the alien beneficiary.[58] Moreover, an alien's place in line is established by the priority date.[59] When a petition is filed, approval is granted after the reviewing agency, the USCIS, ensures a qualified relationship exists between the petitioner and the beneficiary.[60] Upon approval of the petition, USCIS lists the appropriate category and

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50. S*ee de Osorio*, 695 F.3d at 1007.
51. 8 U.S.C. § 1153(a).
52. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 28, at 255; van Rooyen, *supra* note 45, at 185.
53. van Rooyen, *supra* note 45, at 185. The U.S. Department of State keeps track of the visa backlogs through the monthly Visa Bulletin and provides a general idea as to how long the wait times are for a visa to become available for each preference category. *See* Pryor, *supra* note 2, at 2208. For example, the November 2013 Visa Bulletin shows that family-sponsored, first-preference Mexicans who filed a petition on September 22, 1993, will finally receive a visa in November 2013, after waiting twenty years for a visa to become available. *See* U.S. Dep't of State, *Immigrant Numbers for November 2013*, VISA BULLETIN (Bureau of Consular Affairs, Wash., D.C.), Oct. 9, 2013, at 2, *available at* http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_november2013.pdf (last visited Apr. 4, 2015).
54. *See de Osorio*, 695 F.3d at 1007.
55. *See* 8 U.S.C. § 1151(b)(2)(A)(i) (2012).
56. See 8 U.S.C. § 1153(a).
57. *See de Osorio*, 695 F.3d at 1007.
58. *Id.*
59. *Id.*
60. *Id.*

priority date on the approval notice of the petition.[61] USCIS issues the priority date based on the date the visa petition is filed with the government agency.[62] After the petition is approved, the beneficiary waits for the priority date to become current, or for a visa to become available.[63]

The waiting period, however, does not end once the beneficiary's priority date becomes current.[64] When a visa becomes available, the beneficiary is then eligible to submit a visa application for LPR status.[65] The application is processed and funneled to the appropriate administrative office, and eventually, the beneficiary is scheduled for an interview at either a USCIS office in the United States or at a United States consulate abroad.[66] At the interview, an officer will review the application and either approve or deny the visa application.[67] The administrative process, from the time the priority date becomes current to the time a beneficiary's visa application is approved, is lengthy and often creates major problems for visa applicants.[68]

Marriage, death of the petitioner, and aging out of an individual are common problems that naturally occur while waiting out the visa process and often jeopardize the alien's ability to obtain a visa.[69] In regards to marriage, many individuals hold off on getting married in order to maintain their place in the visa waiting line because unmarried sons and daughters of USCs and LPRs, as well as children of USCs and LPRs, get preferential treatment when they are single.[70] For example, if an unmarried son of an LPR with an F-2B petition decides to get married, he forfeits his petition because the United States government does not issue visas to married sons of LPRs.[71] In contrast, an unmarried son of a USC with an F-1 petition who chooses to marry will not forfeit his petition.[72] He will simply be kicked

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61. *Id.*

62. *Id.*

63. *Id.* The Visa Bulletin lists the petitions with priority dates that are currently being processed. *See* U.S. Dep't of State, *Immigrant Numbers for August 2014*, VISA BULLETIN (Bureau of Consular Affairs, Wash., D.C.), July 8, 2014 [hereinafter *Immigrant Numbers for August 2014*], *available at* http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_august2014.pdf (last visited Apr. 4, 2015) (showing the Visa Bulletin for August 2014). When an individual's priority date appears on the Visa Bulletin under the corresponding preference category, it is understood that an alien's priority date is current because a visa has become available for the alien. *See id.*

64. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 28, at 264.

65. *See id.*

66. *See id.*

67. *See id.* at 264, 484.

68. *See id.* at 264–65.

69. *See id.* (discussing the aging out dilemma); *see also* Evelyn H. Cruz, *Because You're Mine, I Walk the Line: The Trials and Tribulations of the Family Visa Program*, 38 FORDHAM URB. L.J. 155, 157 (2010) (discussing how U.S. immigration laws do not properly account for external factors such as marriage and death in the immigration equation).

70. *See* 8 U.S.C. § 1153(a) (2012).

71. *See id.*

72. *See id.*

down to the F-3 preference category for married sons of USCs.[73] The downside is that the now-married son of a USC in the F-3 category will be subject to longer waiting periods for a visa to become available.[74] As for situations in which the petitioner is deceased, the beneficiary may still be able to benefit from a pending or approved visa petition, but it is the responsibility of the beneficiary to satisfy all of the additional requirements outlined in the INA in order to move forward in the process.[75] Finally, the aging out dilemma, which is at the heart of this Comment, merits a more detailed discussion regarding the implications associated with aging out, as well as an explanation of the actions taken on behalf of Congress and the courts to address the issue.

III. DERIVATIVE BENEFICIARIES AND THE "AGING OUT" DILEMMA

On a visa petition, the USC or LPR petitioner may include the alien beneficiary's spouse or child as a derivative beneficiary accompanying or following to join the beneficiary.[76] As derivative beneficiaries, spouses and children are entitled to a visa at the same time the beneficiary receives a visa.[77] Under the INA, a child is defined as an unmarried individual under the age of twenty-one.[78] Once a child reaches the age of twenty-one, the child ages out of derivative-beneficiary status and is no longer eligible for a visa.[79] Due to long waiting periods, many children age out by the time their parents are eligible for a visa.[80] Consequently, individuals who age out cannot immigrate with their parent to the United States or obtain derivative status as an LPR.[81] In most cases, the only option available to aged-out children is to have their now-LPR parent file a new petition on their behalf, which places the aged-out child in a new preference category.[82] Ultimately, because the new petition receives a new—and often less favorable—

73. *See id.*

74. *See Immigrant Numbers for August 2014*, *supra* note 63 (showing an average difference of a forty-one month waiting period between aliens in the F-1 category compared to aliens in the F-3 category, with the exception of nationals from Mexico and the Philippines).

75. *See* 8 U.S.C. §§ 1154(1), 1183a(f)(5) (2012). Until recently, USCIS did not permit beneficiaries of a pending visa petition to move forward in the visa process when the petitioner was deceased. *See* Matter of Sano, 19 I. & N. Dec. 299, 300–01 (B.I.A. 1985); Matter of Varela, 13 I. & N. Dec. 453, 453–54 (B.I.A. 1970), *modified by Matter of Sano*, 19 I. & N. Dec. 299.

76. *See* 8 U.S.C. § 1153(d).

77. *See id.*

78. 8 U.S.C. § 1101(b)(1) (2012).

79. de Osorio v. Mayorkas, 695 F.3d 1003, 1007 (9th Cir. 2012) (en banc), *rev'd sub nom.*, Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014).

80. *Id.*

81. *Id.*

82. Lindsey Parsons, *Ninth Circuit Court of Appeals'* de Osorio v. Mayorkas *Decision Expands the Child Status Protection Act's Remedial Protections*, 26 GEO. IMMIGR. L.J. 453, 454 (2012).

priority date, the aged-out child must wait many more years at the end of the new visa line.[83]

IV. CHILD STATUS PROTECTION ACT: A SOLUTION FOR AGED-OUT CHILDREN

A. Enactment of the Child Status Protection Act

Congress believed children should not be punished for the administrative delays incurred while their visa petition is being processed.[84] To combat the demand for visas, the processing delays, and the aging out dilemma, Congress passed the CSPA in 2002.[85] The CSPA amended the INA by adding § 1153(h)[86] to protect alien children who were under the age

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83. *Id.*; *see de Osorio*, 695 F.3d at 1006. A common scenario is when a derivative beneficiary on an F-2A petition ages out and is kicked down to the F-2B category for unmarried sons and daughters of LPRs, in which case the waiting period is much longer. *See* U.S. Dep't of State, *Immigrant Numbers for January 2014*, VISA BULLETIN (Bureau of Consular Affairs, Wash., D.C.), Dec. 11, 2013, at 2, *available at* http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_january2014.pdf (last visited Apr. 4, 2015). As of January 2014, all F-2A petitions are current (a visa is immediately available) and the average difference in waiting periods for an individual with an F-2A petition compared to an individual with an F-2B petition is about six years. *See id.* If the alien's country of origin is Mexico, however, the current average waiting period for an individual with an F-2B petition is about twenty years. *See id.*

84. *See* 147 CONG. REC. S3275-01 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein); Brief for Current and Former Members of Congress as Amici Curiae Supporting Respondents, Mayorkas v. de Osorio, 133 S. Ct. 2853 (2013) (No. 12-930), 2013 WL 5935166, at *1 [hereinafter Brief for Members of Congress]; LEGOMSKY & RODRÍGUEZ, *supra* note 28, at 265.

85. Child Status Protection Act (CSPA), Pub. L. No. 107-208, 116 Stat. 927, 928–29 (2002) (codified as amended at 8 U.S.C. §§ 1151(f), 1153(h), 1154(a)(1)(D), (k), 1157(c)(2), 1158(b)(3) (2012)); Pryor, *supra* note 2, at 2211–12.

86. 8 U.S.C. § 1153(h). The statute reads:

> **(h) Rules for determining whether certain aliens are children**
>
> **(1) In general**
>
> For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 1101(b)(1) of this title shall be made using—
>
> **(A)** the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by
>
> **(B)** the number of days in the period during which the applicable petition described in paragraph (2) was pending.
>
> **(2) Petitions described**
>
> The petition described in this paragraph is—
>
> **(A)** with respect to a relationship described in subsection (a)(2)(A) of this section, a petition filed under section 1154 of this title for classification of an alien child under subsection (a)(2)(A) of this section; or
>
> **(B)** with respect to an alien child who is a derivative beneficiary under subsection (d) of this section, a petition filed under section 1154 of this title for classification of the alien's parent under subsection (a), (b), or (c) of this section.

of twenty-one at the time a visa petition was filed on their behalf.[87] The CSPA is best described as a formula for tolling the statute of limitations regarding a child's age for the purpose of immigration benefits.[88] While the CSPA does not freeze the child's age at the time the visa petition is filed or while the child is waiting for his priority date to become current, it does provide an age-reduction formula to avoid disadvantaging a child as a result of the administrative processing times.[89]

B. The CSPA's "Age-Reduction" Formula

Section 1153(h) of the CSPA consists of four provisions.[90] Section 1153(h)(1) provides a mathematical age-reduction formula that reduces the child's age, at the time a visa becomes available, by the number of days it took the administrative agency to process the child's visa petition.[91] The formula only subtracts the number of days that a child's petition is pending with USCIS for approval and does not take into account the number of days that a child waits for a visa to become available after USCIS approves the petition.[92] To illustrate the age-reduction formula in practice, consider an example set out by Stephen H. Legomsky and Cristina M. Rodríguez.[93] If an LPR files a visa petition on behalf of his seventeen-year-old daughter who is twenty-two by the time a visa becomes available, she will have aged out and become ineligible for a visa.[94] But, if USCIS took two years to process and approve the daughter's visa petition, § 1153(h)(1) allows the daughter to subtract two years from her age at the time a visa becomes available, thus reducing her age to twenty, allowing her to maintain her child status.[95]

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(3) Retention of priority date

If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) 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.

(4) Application to self-petitions

Paragraphs (1) through (3) shall apply to self-petitioners and derivatives of self-petitioners.

87. H.R. REP. NO. 107-45, at 2–3 (2001), *reprinted in* 2002 U.S.C.C.A.N. 640, 640–42.

88. *See* Shane Dizon, Note, *The Child Status Protection Act: Does Immigration Math Solve the Family Unity Equation?*, 16 HASTINGS WOMEN'S L.J. 117, 134 (2004).

89. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 28, at 265–66; Parsons, *supra* note 82, at 454.

90. *See* 8 U.S.C. § 1153(h)(1)–(4).

91. *See id.* § 1153(h)(1).

92. *See id.*

93. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 28, at 265–66; *see also* Pryor, *supra* note 2, at 2213 n.116 (illustrating the application of the age-reduction formula).

94. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 28, at 265–66.

95. *See id.* Though the entire visa process took a total of five years, the age-reduction formula only credits USCIS administrative delays, which in this case is a total of two years. *See* 8 U.S.C. § 1153(h)(1).

Next, § 1153(h)(2) describes all of the petitions that are eligible for the age-reduction formula outlined in § 1153(h)(1).[96] Under § 1153(h)(2)(A), any child listed as a beneficiary on an F-2A preference category petition is allowed to use the age-reduction formula.[97] Further, § 1153(h)(2)(B) also applies the age-reduction formula to children who are listed as derivative-beneficiaries on a petition.[98] Section 1153(h)(2)(B) states that the age-reduction formula is available to derivative beneficiary children listed on a petition for which their parent is eligible for a visa under § 1153(a)–(c).[99] With the exception of petitions for immediate relatives of USCs, § 1153(a) alone identifies all available family-sponsored visa petitions.[100] Therefore, § 1153(h)(2)(B) applies the formula to all derivative-beneficiary children, regardless of their preference category.[101]

C. What if the CSPA Formula Does Not Rectify the "Aging Out" Dilemma?

In some cases, even with the application of the CSPA's age-reduction formula, the child remains over the age of twenty-one and ages out of the immigration system.[102] Such instances occur because the age-reduction formula only allows the subtraction of days the visa petition was pending with USCIS and not the subtraction of days between the date USCIS approved the petition and the date a visa became available.[103] Aware that children could still age out even with the assistance of the age-reduction formula, Congress added § 1153(h)(3) to the CSPA as a second rescue provision.[104]

D. Section 1153(h)(3) of the CSPA: An Alternative to the "Age-Reduction" Formula

Congress provided § 1153(h)(3) as an alternative for aged-out children who are not able to benefit from the age-reduction formula provided under § 1153(h)(1).[105] Essentially, § 1153(h)(3) allows for automatic conversion

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96. *See* 8 U.S.C. § 1153(h)(1)–(2).
97. *See id.* § 1153(h)(2)(A).
98. *See id.* § 1153(h)(2)(B).
99. *See id.*
100. *See id.* § 1153(a); 8 U.S.C. § 1151(b)(2)(A)(i) (2012).
101. *See* 8 U.S.C. § 1153(h)(2)(B).
102. *See infra* Part VI (analyzing key cases in which children aged out of the immigration system even after applying the age-reduction formula).
103. *See* Pryor, *supra* note 2, at 2214 n.122 (explaining that a beneficiary whose petition was approved in November 2003 cannot subtract from his age the seven years he had to wait for a visa to become available between November 2003 to November 2011).
104. *See* 8 U.S.C. § 1153(h)(3); Khalid v. Holder, 655 F.3d 363, 368 (5th Cir. 2011), *abrogated by* Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014).
105. *See* 8 U.S.C. § 1153(h)(3); *Khalid*, 655 F.3d at 368.

of the aged-out child's petition to the appropriate new category while also allowing the aged-out child to "retain the original priority date issued upon receipt of the original petition."[106] Relief under § 1153(h)(3) differs from that of § 1153(h)(1).[107] Under subsection (h)(1), aged-out individuals maintain their status as a child through the age-reduction formula to keep their original petition along with their original priority date.[108] In contrast, subsection (h)(3) allows aged-out individuals, who cannot benefit from the age-reduction formula, to remain eligible for a visa as adults by converting their petition to a new preference category while allowing them to retain their original priority date.[109] For example, if an LPR filed an F-2A visa petition with a priority date of September 2007 on behalf of his seventeen-year-old daughter, who is twenty-three years of age by the time a visa becomes available, she will have aged out and become ineligible for a visa because she is no longer a child under the INA.[110] Assuming that the daughter can subtract two years from her age under § 1153(h)(1), due to the administrative delay, she still remains ineligible for a visa at her reduced age of twenty-one.[111] Although the daughter is not able to benefit from the age-reduction formula, the rescue provision under § 1153(h)(3) kicks in and automatically converts the daughter's F-2A petition to the new preference category of F-2B for unmarried daughters of LPRs.[112] Additionally, subsection (h)(3) allows her to maintain the original priority date of her original F-2A petition so that she does not have to wait at the end of the F-2B line.[113]

In practice, the CSPA addresses the aging out problem by allowing immigrants, who were children at the time a petition was filed on their behalf, to maintain their place in line as adults.[114] The CSPA not only permits aged-out children to wait in line without having to file a new petition, but also permits aged-out children to retain the original priority date from their original petition.[115] Ultimately, the CSPA remedies "the often harsh and arbitrary effects of the age-out provisions" that once existed under the previous statute.[116] In light of these broad remedies, the BIA saw fit to limit the scope of the CSPA.[117]

106. 8 U.S.C. § 1153(h)(3); *Khalid*, 655 F.3d at 368.
107. Pryor, *supra* note 2, at 2214 (citing 8 U.S.C. § 1153(h)(1)–(3) (2006)).
108. *Id.*
109. *Id.*
110. *See* 8 U.S.C. § 1101(b)(1) (2012).
111. *See id*.; 8 U.S.C. § 1153(h)(1).
112. *See* 8 U.S.C. § 1153(a), (h)(3).
113. *See id.* § 1153(h)(3).
114. *See* Pryor, *supra* note 2, at 2214–15.
115. *See id.*
116. Padash v. I.N.S., 358 F.3d 1161, 1173 (9th Cir. 2004).
117. *See infra* Part V.

V. THE BIA LIMITS THE SCOPE OF § 1153(H)(3) OF THE CSPA

A. Automatic Conversion and Priority Date Retention Under § 1153(h)(3) of the CSPA

Section 1153(h)(3) created much controversy throughout the nation in the field of immigration and among circuit courts.[118] Specifically, courts were divided as to what constitutes automatic conversion and whether Congress intended for automatic conversion and priority date retention to apply to all derivative beneficiaries.[119] Proponents of a narrow interpretation of § 1153(h)(3) of the CSPA, such as the BIA, argue that automatic conversion occurs when the relationship between the petitioner and the beneficiary changes—through marriage or naturalization—thus automatically classifying the visa petition into a new preference category.[120] Though the relationship of the parties change, the identities of the parties themselves do not.[121]

This narrow interpretation of § 1153 of the CSPA contends that automatic conversion only applies to derivative beneficiaries of F-2A preference petitions.[122] Recall that for F-2A petitions, an LPR can file a petition for his spouse.[123] In addition, the spouse can list all accompanying children to join as derivative beneficiaries on the petition.[124] If, however, the LPR becomes a USC, then the preference category relationship changes because the derivative-beneficiary child now has a USC parent.[125] This means that the derivative-beneficiary child is now an immediate relative of a USC.[126] As a result, the F-2A petition is automatically converted to an immediate relative petition.[127]

Under this view, derivative beneficiaries of F-2B, F-3, and F-4 petitions are not eligible for automatic conversion without obtaining a new petitioner because, in such preference categories, the relationship between the petitioner and the derivative beneficiary are that of grandparent and grandchild for the F-2B and F-3 preference categories and that of aunt and niece for the F-4 category.[128] Because none of the four preference categories are based on a grandparent–grandchild relationship or an aunt–

118. *See* Pryor, *supra* note 2, at 2202.
119. *See* Milner, *supra* note 4, at 691.
120. Parsons, *supra* note 82, at 455 (citing Matter of Wang, 25 I. & N. Dec. 28, 34 (B.I.A. 2009)).
121. *Id.* at 455–56.
122. *See* Pryor, *supra* note 2, at 2220.
123. *See* 8 U.S.C. § 1153(a)(2) (2012).
124. *See id.* § 1153(d).
125. *See id.* § 1153(a).
126. See 8 U.S.C. § 1151(b)(2)(A)(i) (2012).
127. *See id.*
128. *See* Li v. Renaud, 654 F.3d 376, 385 (2d Cir. 2011); Pryor, *supra* note 2, at 2220.

niece relationship, there is no preference category for the derivative beneficiary to convert to.[129]

On the other hand, proponents of the broad interpretation of § 1153(h)(3), such as the Fifth and Ninth Circuits, argue that automatic conversion applies to all derivative beneficiaries of all preference categories.[130] Proponents argue that Congress did not intend to discriminate between derivative beneficiaries of the F-2A category and derivative beneficiaries of F-2A, F-3, and F-4 preference categories.[131] Those who advocate for a broad interpretation of the statute argue that Congress enacted § 1153(h)(3) to remedy the aging-out problem.[132] Thus, Congress intended for all derivative beneficiaries to benefit from the provision.[133]

B. BIA's Interpretation of § 1153(h)(3) in Matter of Wang

In *Matter of Wang*, the BIA effectively limited the scope of § 1153(h)(3) of the CSPA to derivative beneficiaries of F-2 visa petitions.[134] As such, § 1153(h)(3) of the CSPA does not apply to derivative beneficiaries who age out in the F-4 preference category.[135] In *Matter of Wang*, a USC filed an F-4 petition on behalf of her brother, the beneficiary, on December 28, 1992.[136] The petition was approved with a priority date of December 28, 1992.[137] The beneficiary listed his ten-year-old daughter on the petition as a derivative beneficiary.[138] By the time visas became available in 2005 for Chinese nationals in the F-4 category, the daughter was twenty-two years old.[139] After waiting in line for twelve years, the daughter was one year past maintaining her status as a child and had aged out of the system.[140] As a result, the daughter became ineligible for a visa as a derivative beneficiary through her father.[141]

Once he received his visa and attained LPR status, the father filed an F-2 petition for his unmarried daughter on September 5, 2006.[142] The petition was approved with a priority date of September 5, 2006—the date

129. *See Li*, 654 F.3d at 385; Matter of Wang, 25 I. & N. Dec. 28, 35–36 (B.I.A. 2009).
130. *See* Khalid v. Holder, 655 F.3d 363, 374–75 (5th Cir. 2011), *abrogated by* Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014).
131. *See id.*
132. *See, e.g.*, *id.*
133. *See id.*; *see also* Pryor, *supra* note 2, at 2211–12 (stating that Congress enacted the CSPA to preserve the immigration eligibility of individuals who aged out of their derivative status).
134. Pryor, *supra* note 2, at 2220.
135. *See id.*
136. Matter of Wang, 25 I. & N. Dec. 28, 29 (B.I.A. 2009).
137. *Id.*
138. *Id.*
139. *See id.*
140. *See id.*
141. *See id.*
142. *See id.*

the petition was filed.[143] The father argued that, pursuant to § 1153(h)(3) of the CSPA, his daughter was entitled to the original priority date of December 28, 1992, from the first petition.[144] USCIS declined to give the daughter the earlier priority date and certified their decision to the BIA for review.[145] The BIA affirmed USCIS's decision.[146] Though the daughter was allowed to upgrade from the F-4 category to the F-2 category due to her now-LPR father, she was not allowed to retain her original priority date of December 28, 1992.[147] Instead, she was forced to wait at the end of the line in her new preference category with a new priority date of September 5, 2006.[148] Ultimately, the BIA determined that § 1153(h)(3) of the CSPA was ambiguous and reasoned that Congress intended for such a statute to apply only to derivatives who age out in the F-2 preference category.[149]

C. Chevron *Deference*

Immigration courts and circuit courts often have to address the question of whether deference should be given to the BIA's decision regarding the interpretation of § 1153(h)(3) of the CSPA.[150] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* acts as a guide because it establishes the deference a reviewing court owes to an administrative agency regarding the interpretation of a statute.[151] In *Chevron*, the Supreme Court created a two-prong analysis to assist the reviewing courts in determining whether they should give deference to the administrative agency's interpretation of the statute at issue.[152] The first prong requires the reviewing court to ask "whether Congress has directly spoken to the precise question at issue."[153] To answer such a question, the reviewing court determines the congressional "intent by examining the plain meaning of the statute" or by "employing traditional rules of statutory construction."[154] If the statute is not ambiguous, the court and the agency must give effect to Congress's clear intent.[155] In the event an agency

143. *Id.*
144. *See id.* at 28–29, 32–33.
145. *See id.* at 28–29.
146. *Id*.
147. *See id.* at 38–39.
148. *See id.*
149. *See id.* at 34–39; Pryor, *supra* note 2, at 2220.
150. *See* de Osorio v. Mayorkas, 695 F.3d 1003, 1006 (9th Cir. 2012) (en banc), *rev'd sub nom.*, Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014); Khalid v. Holder, 655 F.3d 363, 373 (5th Cir. 2011), *abrogated by Cuellar de Osorio*, 134 S. Ct. 2191; Li v. Renaud, 654 F.3d 376, 383 (2d Cir. 2011).
151. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 837–38 (1984).
152. *See id.* at 842–43.
153. *Id.* at 842.
154. Ortega-Marroquin v. Holder, 640 F.3d 814, 818 (8th Cir. 2011).
155. *Id.*

provides an interpretation contrary to clear congressional intent, the reviewing court must reject the agency's interpretation because "the courts are the final authorities on issues of statutory construction."[156]

On the other hand, if the reviewing court determines that a statute is silent or ambiguous as to the congressional intent, under the second prong, the reviewing court must ask whether the agency's interpretation is a permissible construction of the statute.[157] A permissible construction need not be the only possible interpretation that the agency could have adopted or that the reviewing court would have adopted.[158] Thus, where a statute is ambiguous, the reviewing court must follow the administrative agency's interpretation, so long as the interpretation is not "arbitrary, capricious, or manifestly contrary to the statute."[159]

VI. CIRCUIT SPLIT REGARDING THE INTERPRETATION OF § 1153(H)(3) OF THE CSPA

A. The Second Circuit Sides with the BIA

The Second Circuit declined to give deference to the BIA but ultimately adopted the BIA's interpretation of the applicability of § 1153(h)(3) of the CSPA.[160] In *Li v. Renaud*, the court held that derivative beneficiaries could not retain their original priority date after aging out of their preference category when the individual did not have an appropriate category for their petition to convert to.[161] On June 6, 1994, an LPR filed a petition for his unmarried daughter, Feimei Li.[162] Li's fourteen-year-old child, Duo Cen, was listed as a derivative beneficiary on the petition.[163] The petition was approved in 1995, at which time Cen was fifteen years of age and still considered a "child" for purposes of the INA.[164] A visa, however, did not become available for Li until March 2005.[165] As a result, Cen was no longer considered a child and aged out of his derivative-beneficiary status because he was twenty-six years of age.[166] Thus, Cen could not obtain a visa through Li.[167] Because Li was now an LPR, she filed a petition for Cen and requested that USCIS provide Cen with the

156. FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981).
157. *Chevron*, 467 U.S. at 843.
158. *See id.* at 843 n.11.
159. *Id.* at 843–45.
160. *See* Li v. Renaud, 654 F.3d 376, 383 (2d Cir. 2011).
161. *Id.* at 383, 385.
162. *Id.* at 379.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *See id.* at 379–80.

priority date of the 1994 petition.[168] USCIS declined to afford Cen the earlier priority date and, instead, approved Cen's new petition, sponsored by his mother, with a priority date of April 25, 2008.[169] Had USCIS allowed Cen to maintain his original priority date, Cen would have been immediately eligible for a visa.[170] Unfortunately, with his new priority date, the Department of State estimated that the waiting time for Cen would be about nine years before a visa would become available.[171]

Although the Second Circuit determined that § 1153(h)(3) was not ambiguous and declined to give *Chevron* deference to the BIA, the Second Circuit did not stray from the BIA's interpretation of the statute.[172] The court specifically analyzed the section of the statute stating that an "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."[173] The court reasoned that because Cen's new petition was filed on behalf of a new petitioner, his mother, he was not eligible to maintain his priority date because an appropriate category for his old petition did not exist.[174] The court stated that because Cen's grandfather was the sponsor in the first petition, and no category existed in which a grandfather could directly petition on behalf of his grandchild, there was no category for Cen's old petition to convert to, and therefore, Cen could not maintain his old priority date.[175] Consequently, Cen was required to wait in a new line with a new priority date for an estimated nine years in addition to the eleven years that he had already waited because he aged out of the system.[176] Under the court's interpretation of the CSPA, Cen was not covered by the Act because he was not able to retain his earlier priority date or lock in his age for purposes of immigration benefits.[177]

B. The Fifth Circuit Rejects the BIA's and the Second Circuit's Interpretation

Unlike the Second Circuit, the Fifth Circuit both declined to give *Chevron* deference to the BIA and refused to adopt the BIA's interpretation of the statute.[178] In *Khalid v. Holder*, the Fifth Circuit held that the

168. *Id.* at 379.
169. *Id.*
170. *Id.*
171. *Id.* at 379–80.
172. *Id.* at 380, 383.
173. *Id.* at 379 (quoting 8 U.S.C. § 1153(h)(3)).
174. *Id.* at 384.
175. *Id.* at 385.
176. *Id.* at 379–80.
177. *See id.* at 384–85.
178. *See* Khalid v. Holder, 655 F.3d 363, 373–75 (5th Cir. 2011), *abrogated by* Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014).

application and benefits associated with § 1153(h) of the INA applied to all derivative beneficiaries listed on a petition, regardless of the preference category.[179] Mohammad Abubakar Khalid's aunt, a USC, filed an F-4 petition on behalf of Khalid's mother and listed Khalid, then eleven years old, as a derivative beneficiary on the petition.[180] The petition had a priority date of January 12, 1996.[181] A visa became available for Khalid's mother in February 2007.[182] Though the Department of Homeland Security immedia-tely issued Khalid's mother her visa, the agency denied Khalid a visa as a derivative beneficiary because, as a twenty-two year old, Khalid had aged out of the system.[183] In November 2007, Khalid's mother filed an F-2 petition for Khalid.[184] After Khalid's visa denial, the Department of Homeland Security initiated removal proceedings—deportation—because Khalid had overstayed his tourist visa.[185] To prevent deportation, Khalid claimed he was eligible for a visa based on the petition his mother filed for him and the retention of the priority date of the original petition.[186] The Fifth Circuit agreed and reasoned that when read in its entirety, the statute clearly stated that the retention of a priority date applied to all petitions and that "Congress carved out no exception for [F-4] petitions."[187]

The Fifth Circuit declined to give the BIA *Chevron* deference and expressly rejected both the BIA's holding in *Wang* and the Second Circuit's holding in *Li*.[188] The court determined that the statute was unambiguous and that the BIA's holding contradicted the plain language of § 1153(h).[189] Thus, the BIA's holding went against what Congress intended when enacting the CSPA.[190] The court reasoned that reading the statute as a whole, instead of singling out provisions of the statute, addressed the ambiguity on which the BIA based its arguments.[191] Specifically, the court pointed to the BIA's argument that § 1153(h)(3) is ambiguous because the provision does not specify to which petitions the provision applies.[192] In solving the discrepancy, the Fifth Circuit stated that when read as whole, § 1153(h) identifies the types of petitions to which the statute applies.[193] The court highlighted that the BIA and Second Circuit ignored provision

179. *See id.* at 374–75.
180. *Id.* at 365–66.
181. *Id.* at 365.
182. *Id.* at 366.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 374–75.
188. *Id.* at 373–75.
189. *See id.* at 365.
190. *See id.* at 371–73.
191. *See id.* at 370–71.
192. *See id.*
193. *Id.*

(h)(2) and did not take into account that provisions (h)(1), (h)(2), and (h)(3) are all interdependent on one another.[194] Further, the court pointed out that provision (h)(2) explicitly speaks to the petitions for which the statute applies.[195] Specifically, (h)(2) "expressly discusses derivative beneficiaries of all family-based petitions."[196] Accordingly, the Fifth Circuit reasoned that because (h)(2) outlines all possible family-based petitions, (h)(3) applies to all petitions.[197] As such, the court reasoned that for the BIA to apply (h)(1) to derivative beneficiaries in the F-4 preference category, but not apply (h)(3), is inconsistent with the use of canons of construction.[198]

The court also attacked the BIA's argument that traditional practice does not allow for the conversion of petitions to a different category in which the petitioner is different by stating that tradition does not prevent Congress from enacting law that allows individuals to retain their original priority date.[199] Further, the court asserted that case precedent exists in which individuals in employment-based preference categories can retain their priority date when the petitioner is different.[200] The court reasoned that if Congress had intended for derivative beneficiaries of F-4 petitions to be excluded from (h)(3) provisions, and for derivative beneficiaries of F-2 petitions to receive special treatment, Congress would have expressly stated such an exception.[201] Moreover, the fact that the statutory language reads that the "alien shall retain the original priority date issued upon receipt of the *original* petition," allowed the court to conclude that Congress knew that there is a possibility that another petition would be filed on behalf of the derivative beneficiary.[202]

Finally, the court attacked the BIA's and the Second Circuit's interpretation of what constitutes proper automatic conversion and priority date retention under (h)(3).[203] Prior to the passage of the CSPA, priority date retention and automatic conversion were available under the 1987 regulations, expressly requiring "that the same petitioner file a new petition in order to qualify" for priority date retention.[204] Using the definition under the 1987 regulations, the BIA and the Second Circuit determined that to benefit from (h)(3), the petitioner from the original petition must be the same petitioner on the second petition, thus limiting the (h)(3) benefits

194. *Id.*
195. *Id.* at 371, 374.
196. *Id.* at 374.
197. *See id.*
198. *See id.* at 371.
199. *See id.* at 372.
200. *See id.* at 372–73.
201. *See id.* at 374.
202. *See id.* at 368, 373 (emphasis added) (quoting 8 U.S.C. § 1153(h)(3)).
203. *See id.* at 374.
204. *Id.* (citing 8 C.F.R. § 204.2(a)(4)).

solely to derivative beneficiaries of F-2 petitions.[205] The Fifth Circuit opposed this argument, finding it difficult to believe "that this meager benefit was all Congress meant to accomplish through subsection (h)(3), especially where nothing in the statute singles out derivative beneficiaries of [F-2] petitions for special treatment."[206] If Congress truly intended "to codify the regulation with this minor adjustment, one would expect that the statute would closely track the language of the regulation. Yet unlike the regulation, which explicitly states that the petitioner cannot change, nothing in the statute requires that the petitioner remain the same."[207] The court further acknowledged that extending benefits associated with (h)(3) of the statute to all preference-based categories opens the possibility of procedural difficulties.[208] The Fifth Circuit, however, disregarded the BIA's concern regarding the possibility of procedural difficulties, arguing that the court's and the BIA's duty was only to focus on "whether Congress has plainly spoken to the question at issue in the statute."[209]

C. The Ninth Circuit Joins the Fifth Circuit

In *de Osorio v. Mayorkas*, on rehearing en banc, the Ninth Circuit joined the Fifth Circuit in holding that § 1153(h) is not ambiguous and that the CSPA intended for the benefits associated with that section—automatic conversion and priority date retention—to extend to all aged-out children who are derivative beneficiaries of family-based visa petitions, regardless of preference category.[210] There, in a class action lawsuit, the court faced the question of "whether the automatic conversion and date retention benefits provided by subsection (h)(3) apply only to aged-out F2A petition beneficiaries, or whether they also apply to derivative beneficiaries of the other family visa categories."[211] Specifically, the court determined whether the CSPA extended relief to all derivative beneficiaries.[212] In the first case, a USC filed an F-3 family-based petition in May 1998 for her married daughter, Rosalina Cuellar de Osorio.[213] Cuellar de Osorio listed her thirteen-year-old son as a derivative beneficiary.[214] Though the petition was approved with a priority date of May 1998, a visa did not become

205. *See id.*
206. *Id.*
207. *Id*. (footnote omitted).
208. *See id.* at 373.
209. *Id.*
210. *See* de Osorio v. Mayorkas, 695 F.3d 1003, 1006 (9th Cir. 2012) (en banc), *rev'd sub nom.*, Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014).
211. *Id.* at 1009.
212. *See id.* at 1006.
213. *Id.* at 1010.
214. *Id.*

available until November 2005.[215] By then, Cuellar de Osorio's son was twenty-one years old, had aged out of the system, and was ineligible for a derivative visa.[216] Cuellar de Osorio immigrated to the United States as an LPR and filed an F-2 family petition for her son, which USCIS approved with a priority date of July 2007.[217] USCIS's refusal to allow Cuellar de Osorio's son to keep his original priority date of May 1998 resulted in the son having to wait at the end of the line in the new category for a visa to become available.[218]

In the second case, Teresita Costelo's USC mother filed a family-based petition on her behalf in 1990.[219] Costelo listed her ten- and thirteen-year-old daughters as derivative beneficiaries.[220] By the time a visa became available in 2004, both daughters had aged out of the system.[221] After acquiring LPR status, Costelo filed a petition on behalf of her daughters, requesting that USCIS allow the retention of the 1990 priority date.[222] Similarly, in 1981, Lorenzo Ong's USC sister filed a petition on Lorenzo's behalf.[223] Ong listed his two- and four-year-old daughters as derivative beneficiaries on the petition.[224] Although a visa became available for Ong in 2002, his daughters were not eligible to obtain a visa because they had aged out of derivative-beneficiary status.[225] In March 2005, Ong petitioned on behalf of his daughters as an LPR, requesting the 1981 priority date.[226] USCIS denied both Costelo and Ong's requests.[227] The denials suggested that despite the fourteen-year waiting period that Costelo's daughters endured, or in the case of Ong's daughters, who waited twenty-one years, the individuals who had aged out of derivative-beneficiary status needed to continue waiting at the end of the new line until a visa became available.[228]

The Ninth Circuit disagreed with the USCIS determination and, instead, concluded that "[t]he CSPA provides, among other things, that when certain aged-out aliens apply for visas under a new category for adults, they may retain the filing date of the visa petition for which they were listed as derivative beneficiaries when they were children."[229] The

215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *See id.*
229. *Id.* at 1006.

court determined that under the CSPA, individuals who were once derivative beneficiaries are "ensure[d] that visas are available quickly, rather than requiring the now-adult aliens to wait many more years in a new visa line."[230] Accordingly, the court afforded the derivative beneficiaries CSPA protection when it allowed them to benefit from automatic conversion and priority date retention.[231]

1. Derivative Beneficiaries Remain in Limbo

Despite the Ninth Circuit's decision in *de Osorio v. Mayorkas*, the future of derivative beneficiaries remained in limbo.[232] After the Ninth Circuit adopted the Fifth Circuit's interpretation, the Government successfully filed a petition for writ of certiorari with the Supreme Court on the grounds that the Ninth Circuit erroneously refused to grant *Chevron* deference when it declined to defer to the BIA's interpretation of the CSPA.[233] Specifically, the Government argued that *Chevron* deference to the BIA is warranted because § 1153(h)(3) is ambiguous.[234] The Government cited to the circuit split to support its argument.[235] In addition, the Government cautioned the Court that allowing the Ninth Circuit's interpretation to stand would create substantial complications for the administration of immigration laws.[236] Further, the Government argued that the Ninth Circuit's interpretation would likely have a negative effect on the availability of visas to other aliens who have been patiently waiting for a visa to become available.[237] According to the Government's argument, by extending automatic conversion and priority date retention to all derivative beneficiaries, regardless of which preference category the derivative beneficiaries fall under, many individuals would be displaced in the visa waiting line.[238]

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230. *Id.*

231. *Id.*

232. *See* Brief for the Petitioners at 1–2, Mayorkas v. de Osorio, 133 S. Ct. 2853 (2013) (No. 12-930), 2013 WL 4769429.

233. *See id.* at 15–18. The Government, or those arguing against the Ninth Circuit's decision, include USCIS, the Department of Homeland Security, the National Visa Center, and the California Service Center. *See id.* at II.

234. *See id.* at 15–18.

235. *See id.* at 35.

236. *See id.* at 37–44.

237. *See id.*

238. *See id.* Petitioners argue that "for every person who would be inserted toward the front of the line as a result of the Ninth Circuit's decision, another person would be moved closer to the end." *See id.* at 40.

VII. SUPREME COURT DECIDES *SCIALABBA V. CUELLAR DE OSORIO*

On June 9, 2014, the Supreme Court decided the fate of derivative beneficiaries in its holding in *Cuellar de Osorio*.[239] The Court addressed (1) whether § 1153(h)(3) of the CSPA unambiguously establishes that derivative beneficiaries, who were children at the time their petition was filed, can maintain their "child" status after reaching twenty-one years of age, and (2) whether the BIA reasonably interpreted § 1153(h)(3) of the CSPA.[240] In a five to four decision, the Court held that *Chevron* deference was owed to the BIA's reasonable interpretation of the statute because § 1153(h)(3) does not clearly identify the individuals who can benefit from that provision.[241] The Court also determined that the benefits afforded under § 1153(h)(3) can only apply to aged-out derivative beneficiaries who can, without finding a new sponsor, qualify or could qualify as principal beneficiaries.[242] Ultimately, the Court held that F-2 derivative beneficiaries are the only individuals who can benefit from automatic conversion and priority date retention.[243]

The majority reasoned that priority date retention is contingent on automatic conversion and that automatic conversion cannot exist when there is no appropriate preference category for a petition to fall into without having to change the petitioner.[244] Thus, "the Board's decision to so distinguish among aged-out beneficiaries" is permissible because those derivative beneficiaries in the F-2 preference categories are "aliens who naturally qualify for (and so can be 'automatically converted' to) a new preference classification when they age out."[245]

The sections that follow take into consideration the legislative intent and plain language of the statute to establish that the Supreme Court erred when it ruled contrary to congressional intent and the very purpose for which the CSPA was passed in holding that § 1153(h)(3) is ambiguous and that the benefits afforded under such provision are limited to F-2 derivative beneficiaries.[246]

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239. *See* Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2196–97 (2014).

240. Scialabba v. Cuellar de Osorio, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/mayorkas-v-cuellar-de-osorio/ (last visited Nov. 2, 2014); *see Cuellar de Osorio*, 134 S. Ct. at 2191, 2196–97.

241. *See Cuellar de Osorio*, 134 S. Ct. at 2213.

242. *Id.* at 2197.

243. *Id.* at 2206–07.

244. *See id.* at 2203–05.

245. *See id.* at 2207.

246. *See infra* Part VIII.

VIII. SECTION 1153(H)(3) OF THE CSPA IS UNAMBIGUOUS

A. The CSPA's Legislative History Reveals Congressional Intent

Congress drafted the CSPA to promote family unity and protect children from the negative implications associated with aging out.[247] In 2001, Senator Dianne Feinstein of California introduced the original version of the CSPA to the Senate floor.[248] Senator Feinstein described the bill as a response to immigration backlogs that separated immediate family members.[249] According to Senator Feinstein, no parent should be forced to decide between "sending their child who has 'aged-out' of visa eligibility back to their country of origin, or have the child stay in the United States out-of-status, in violation of our immigration laws, and thus, vulnerable to deportation."[250] Further, emigrating parents should not be forced to remain in their home country and lose out on the American dream to remain with their son or daughter who has aged out and cannot obtain lawful status.[251] In her statement, the Senator makes it very clear that the CSPA is intended to protect a child, whose petition for a family-based, employment-based, or diversity visa was properly filed when the child was under the age of twenty-one, from aging out.[252] More importantly, Senator Feinstein noted that a child ages out due to (1) administrative processing delays and (2) backlogs in the immigration system.[253] Contrary to the BIA's argument that the CSPA was only intended to combat administrative delays, Senator Feinstein's statement supports the assertion that the CSPA was intended to ameliorate the inequities associated with current visa backlogs.[254] The CSPA was met with overwhelming support and passed the House by a unanimous vote.[255] A year later, the Senate sponsored an amendment to the bill, which also received unanimous consent and a unanimous voice vote.[256]

During the House's discussion of the amendment, Representatives voiced strong support for the bill.[257] In particular, Representatives Jackson-Lee of Texas and Sensenbrenner of Wisconsin expressed similar sentiments to those of Senator Feinstein.[258] Representative Jackson-Lee emphasized that the Legislature drafted the CSPA during a period of two sessions to

247. Brief for Members of Congress, *supra* note 84, at *1.
248. 147 CONG. REC. S3275-01 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein).
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. Brief for Members of Congress, *supra* note 84, at *6.
256. *See id.* at *6–7.
257. *See id.* at *7.
258. *See* 148 CONG. REC. H4989-01 (daily ed. July 22, 2002) (statements of Reps. Jackson-Lee and Sensenbrenner).

produce bipartisan legislation to help reunite families.[259] According to Representative Sensenbrenner, the Committee on the Judiciary's primarily goal was to create "family-friendly legislation that is in keeping with [the United States'] proud traditions."[260] Representative Jackson-Lee further stated that the committee was "interested in and encouraged by the interest of immigrants in this country to access legalization, to become American citizens, to be part of the great values and the great beliefs of this Nation."[261] Representative Sensenbrenner echoed this sentiment and described the CSPA as a "fine example of how we and the other body can work together in a collaborative fashion" because uniting families is a "prime goal of our immigration system" and no child should be punished because of immigration delays.[262] Ultimately, the bill was very well received by the House of Representatives and also passed by a unanimous voice vote.[263]

B. Statutory Language Unambiguously Extends CSPA Protection to All Derivative Beneficiaries

1. CSPA Subsections Are All Interdependent on One Another

To understand the extent to which the CSPA provisions apply to derivative beneficiaries, all sections of the CSPA must be read in a holistic manner.[264] The CSPA is made up of four subsections: § 1153(h)(1), § 1153(h)(2), § 1153(h)(3), and § 1153(h)(4).[265] When interpreting the statute, both the Fifth and Ninth Circuits followed traditional canons of construction and read all four subsections together, finding that all four subsections are interdependent on one another.[266] In contrast, the interpretation of the majority and that of the BIA is based on reading each subsection in an isolated manner.[267] The BIA contends that subsection (h)(3) on its own does not identify the kinds of visa petitions that are eligible for automatic conversion and priority date retention.[268] This is because subsection (h)(3) is only one piece of the puzzle that "is explicitly

259. *Id.* (statement of Rep. Jackson-Lee).
260. *Id.* (statement of Rep. Sensenbrenner).
261. *Id.* (statement of Rep. Jackson-Lee).
262. *Id.* (statement of Rep. Sensenbrenner).
263. Brief for Members of Congress, *supra* note 84, at *7.
264. Brief for Respondents at 27, Mayorkas v. de Osorio, 133 S. Ct. 2853 (2013) (No. 12-930), 2013 WL 5835711.
265. *See* 8 U.S.C. § 1153(h)(1)–(4) (2012).
266. de Osorio v. Mayorkas, 695 F.3d 1003, 1012 (9th Cir. 2012) (en banc), *rev'd sub nom.*, Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014); Khalid v. Holder, 655 F.3d 363, 370–71 (5th Cir. 2011), *abrogated by Cuellar de Osorio*, 134 S. Ct. 2191.
267. *See Khalid*, 655 F.3d at 370–71.
268. *See id.*; *de Osorio*, 695 F.3d at 1011.

contingent upon the operation of subsection (h)(1)."[269] Subsection (h)(3) cannot function independently because "it is triggered only when an application of subsection (h)(1)'s" age-reduction formula does not benefit an alien who is over twenty-one.[270] Therefore, while subsection (h)(3) on its own does not identify the kinds of visa petitions to which it applies, subsections (h)(1) and (h)(2) of the CSPA operate together with subsection (h)(3) to identify which visa petitions are eligible for the CSPA benefits of automatic conversion and priority date retention.[271]

2. The Plain Language of the CSPA Extends Benefits to All Visa Petitions

The plain language found in the statute reads that if an alien cannot benefit under the age-reduction formula, "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."[272] Subsection (a)(2)(A) refers to all beneficiaries under all family-based, employment-based, and diversity-based visa petitions.[273] Further, subsection (d) refers to all derivative beneficiaries.[274] Therefore, the plain language of the statute ensures that all derivative beneficiaries, regardless of whether they have an F-1, F-2A, F-2B, F-3, or F-4 petition, are afforded automatic conversion and priority date retention.[275] Moreover, Congress's repeated references to subsections (a)(2)(A) and (d) should be given the same meaning throughout the statute.[276] The majority, the Government, and the BIA, on the other hand, attempt to give different meanings to the references made to subsections (a)(2)(A) and (d) depending on where the references are found in the statute.[277] Essentially, the Government's argument, which the majority supports, goes against the congressional intent to extend automatic conversion and priority date retention to all family-sponsored derivative beneficiaries.[278] In light of the above, the Supreme Court should have held that § 1153(h)(3) allows all derivative beneficiaries to maintain their child

269. *de Osorio*, 695 F.3d at 1012; *Khalid*, 655 F.3d at 370–71.
270. *de Osorio*, 695 F.3d at 1012.
271. *See id.*
272. 8 U.S.C. § 1153(h)(3) (2012).
273. *See id.* § 1153(a)(2)(A).
274. *See id.* § 1153(d).
275. *See de Osorio*, 695 F.3d at 1012.
276. *Id.*
277. *Id.* at 1012–13. According to the Government, "the CSPA becomes ambiguous when its terms are applied to certain derivative beneficiaries" and differentiates between derivative beneficiaries without referring to a section in the statute that explicitly allows for differentiating between derivative beneficiaries. *Id.* at 1013.
278. *See id.* at 1012.

status by allowing them to benefit from automatic conversion and priority date retention.[279]

An analysis of the statute at issue in *Cuellar de Osorio* reveals the congressional intent behind the drafting of the CSPA and the extent to which the CSPA provisions apply to derivative beneficiaries.[280] Because § 1153(h)(3) of the CSPA is not ambiguous, as established by the legislative history and plain language of the statute, deference to the BIA is unwarranted.[281] Additionally, the Supreme Court did not need to address the second question of whether the BIA reasonably interpreted the statute because, under *Chevron*, the question is only triggered if a statute is ambiguous.[282]

IX. EVEN IF THE LANGUAGE OF THE STATUTE WERE TO BE CONSIDERED AMBIGUOUS, THE BIA'S INTERPRETATION IS NOT REASONABLE

The Supreme Court decision in *Cuellar de Osorio* supports the BIA's interpretation of § 1153(h)(3) and limits the scope of the CSPA, arguing that automatic conversion and priority date retention is limited to derivative beneficiaries of F-2A petitions.[283] The BIA's logic suggests that Congress intended to differentiate between derivative beneficiaries by excluding derivative beneficiaries of F-3 and F-4 petitions from receiving CSPA protection.[284] The foundation of the BIA's argument is that F-3 and F-4 derivative beneficiaries cannot benefit from automatic conversion when they age out because they cannot convert to a different category without having to change petitioners.[285] According to the BIA, the petitioner must be the same at all times for automatic conversion to kick in.[286] The BIA's argument is unreasonable because there is nothing in the language of the CSPA or in the legislative history to conclude that the identity of the petitioner is relevant to benefit from automatic conversion.[287] Further, there is nothing in the CSPA that expressly limits the benefits of automatic conversion and priority date retention to F-2A derivative beneficiaries.[288] On the contrary, the CSPA "suggests the possibility of a new petition,

279. *See supra* Part VI.B.
280. *See supra* Part VIII.
281. *See supra* Part VIII.A–B.
282. *See supra* Part V.C.
283. *See supra* Part V.A–B.
284. *See supra* Part V.A–B.
285. *See supra* Part V.A–B.
286. *See* de Osorio v. Mayorkas, 695 F.3d 1003, 1013 (9th Cir. 2012) (en banc), *rev'd sub nom.*, Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014).
287. *See id.*
288. *See id.*

obtained either by editing the original petition or 'automatically' requesting a new petition that identifies a new petitioner and primary beneficiary."[289]

In its decision, the BIA took into account the Senate amendment that extended CSPA benefits to all children of family-based, employment-based, and diversity petitions due to concerns regarding extensive waiting periods.[290] The BIA, however, declined to interpret the statute broadly, arguing that the legislative history "does not illuminate an intention behind these additions."[291] The BIA's interpretation is not convincing because it is not reasonable to think that Congress would amend the INA to provide relief that already existed.[292] Also, it is not likely that the only benefit Congress intended by amending the CSPA was to eliminate the actual filing of a new petition by making the conversion automatic, as the BIA suggests.[293] Had Congress intended for the CSPA protections to be limited, different language would have been used.[294]

X. THE FIFTH CIRCUIT'S INTERPRETATION OF THE CSPA COMPORTS WITH THE LEGISLATIVE HISTORY AND PLAIN LANGUAGE OF THE STATUTE

It would take an act of Congress to override the recent Supreme Court decision in *Cuellar de Osorio* so as to assist those derivative beneficiaries who, as a result of aging out, must wait longer periods to obtain their visa. For this reason, Congress should amend the CSPA and specifically extend automatic conversion and priority date retention to all derivative beneficiaries, instead of limiting such benefits to F-2 derivative beneficiaries as the Supreme Court did.[295] In fact, the majority fails to address why the approach taken by the Fifth Circuit, to extend CSPA benefits to all derivative beneficiaries, cannot be the proper approach to interpreting § 1153(h)(3).[296] The Fifth Circuit's broad interpretation of the CSPA's key provisions in *Khalid* promotes the values of family unity and fairness, as Congress intended.[297] Moreover, the Fifth Circuit's interpretation does not go beyond the confines of the plain statutory language and allows for many individuals to benefit from the CSPA.[298] Extending CSPA

289. *Id.* at 1014.

290. Pryor, *supra* note 2, at 2219.

291. *See id.*

292. *See de Osorio*, 695 F.3d at 1015. Under the INA, 8 C.F.R. § 204.2(a)(4) pre-dated the CSPA and allowed for "an LPR . . . to file an F2B petition on behalf of an aged-out son or daughter and retain the original priority date from the LPR's original F2A petition." *Id.*

293. *See id.*

294. *See id.*

295. *See supra* Part VIII.

296. *See* Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2225 (2014) (Sotomayor, J., dissenting) (stating that the majority wrongly dismissed the simpler approach of allowing all derivative beneficiaries to benefit from § 1153(h)(3)).

297. *See supra* Part VI.B.

298. *See supra* Part VI.B.

protection in the form of automatic conversion and priority date retention to all derivative beneficiaries so as to give credit to those individuals who have patiently waited in line for a visa to become available is one of the main goals the drafters of the CSPA sought to accomplish.[299]

XI. CONCLUSION

Congress passed the CSPA to ameliorate the harsh consequences associated with a child aging out.[300] During the drafting of the legislation, Congress made it clear that the CSPA was intended to help with family reunification and to give credit to individuals who had endured years of waiting for a visa.[301] Though the Supreme Court determined that F-2 derivative beneficiaries are the only group eligible to benefit from the CSPA's provisions regarding automatic conversion and priority date retention, careful analysis of the legislative history and plain language of the statute clearly establishes that the CSPA is applicable to all derivative beneficiaries of all visa petitions.[302] The Supreme Court's recent decision in *Cuellar de Osorio* overlooks the congressional intent and the very reason for which the CSPA was passed: to unite families and assist all derivative beneficiaries who properly filed a petition but aged out of the system while waiting for a visa.[303] To remedy the negative repercussions resulting from the Supreme Court's interpretation of § 1153(h)(3) of the CSPA, Congress should take action and amend the CSPA to specifically extend automatic conversion and priority date retention to all derivative beneficiaries.[304] Such a solution would serve the very intent for which the CSPA was passed, allowing aged-out individuals to maintain their child status through the retention of their original priority date from their original petition as they wait in line for a visa to become available under their new preference category.[305]

299. Brief for Members of Congress, *supra* note 84, at *6.
300. *See supra* Parts III–IV.
301. *See supra* Part VIII.
302. *See supra* Part VIII.
303. *See supra* Part VII.
304. *See supra* Parts X–XI.
305. *See supra* Parts X–XI.