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## Finding Hope for "Aged Out" Derivative Beneficiaries: Re-Examining the Child Status Protection Act in the Wake of *Scialabba v. Cuellar de Osorio*, 47 J. Marshall L. Rev. 1319 (2014)

Jihan Hassan

Hannah Kubica

Christina Corbaci

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**FINDING HOPE FOR “AGED OUT”  
 DERIVATIVE BENEFICIARIES:  
 RE-EXAMINING THE CHILD STATUS  
 PROTECTION ACT  
 IN THE WAKE OF SCIALABBA V. CUELLAR  
 DE OSORIO**

JIHAN M. HASSAN, HANNAH B. KUBICA & CHRISTINA A. CORBACI<sup>1</sup>

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<sup>1</sup> Jihan M. Hassan is an attorney with the Chicago office of Fragomen, Del Rey, Bernsen, & Loewy LLP, a global corporate immigration law firm. Hannah B. Kubica and Christina A. Corbaci are attorneys with Joyce & Associates, Boston, Massachusetts, a firm specializing in immigration law.

## I. INTRODUCTION

On June 9, 2014, a divided Supreme Court issued its decision in *Scialabba v. Cuellar de Osorio*, resolving a circuit split over the statutory construction of our nation's complex immigration laws.<sup>2</sup> The plurality held that most children who are listed as derivative beneficiaries<sup>3</sup> on their parents' family-based immigrant petitions, but who turn twenty-one years old and "age out" while waiting for visas to become available, will not be able to retain their original priority dates and immigrate<sup>4</sup> or adjust status<sup>5</sup> along with their parents. Rather, they will need to start the process anew by having their parents file a new immigrant petition once they become lawful permanent residents.

The ruling impacts the futures of thousands of "aged out" children and threatens the separation of families and the deportation of children who have lived in the United States for most of their lives.<sup>6</sup> These "aged out" children sometimes wait decades for a visa to become available only to lose their place in line upon turning twenty-one years old.

Congress has already acted to help avoid the harsh consequences caused by government backlogs on "aged out" children. In 2002, Congress enacted the Child Status Protection Act ("CSPA" or "the Act"), amending the Immigration and

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<sup>2</sup> *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014).

<sup>3</sup> A "principal beneficiary" is an individual who has a qualifying relationship with a U.S. citizen or Lawful Permanent Resident ("LPR") petitioner, who files a visa petition on behalf of the principal beneficiary. Derivative beneficiaries, defined as the spouse or minor child of the principal beneficiary, may also be named in the principal beneficiary's visa petition, and are entitled to the same preference status, and the same priority date, as the principal alien. US DEPT OF STATE, FOREIGN AFFAIRS MANUAL, 9 FAM 42.31 n. 2.

<sup>4</sup> See THE MERRIAM-WEBSTER DICTIONARY (1994) (defining the word immigrate as "to come into a country of which one is not a native for permanent residence"). For purposes of this article, the word may be used interchangeably with the term, "consular processing."

<sup>5</sup> There are two different processes for obtaining an immigrant visa: consular processing and adjustment of status. During consular processing, applicants apply for and process an immigrant visa at a U.S. Department of State consulate abroad, most often in their home country. Adjustment of status is the process by which a person already in the U.S. has their immigration status adjusted to that of a permanent resident. See *Consular Processing*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, available at <<<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=62280a5659083210VgnVCM100000082ca60aRCRD&vgnextchannel=62280a5659083210VgnVCM100000082ca60aRCRD>>> (last updated Feb. 12, 2014).

<sup>6</sup> See Brief for Plaintiffs-Appellants by American Immigration Lawyers Association and Catholic Legal Immigration Network, Inc., as Amicus Curiae, at 11, *De Osorio v. Mayorkas*, 695 F.3d 1003 (9th Cir. 2012) (No. 09-56786) ("AILA Amicus Brief").

Nationality Act (“INA”) to protect derivative child beneficiaries and keep families intact despite long visa waiting times.

Among its main protective measures, the Act creates a mathematical formula that subtracts the amount of time that a visa petition was pending from a child’s age. If the child “ages out” despite the CSPA formula, the Act provides relief in the form of an “automatic conversion” provision, to permit an “aged out” child to keep her place in line and convert her petition into the appropriate adult category.

However, circuit courts have recently disagreed over whether “automatic conversion” applies to “aged out” derivative beneficiaries in all family-based categories or only to a narrow subset of F-2A petitions. In particular, courts disagreed over whether CSPA’s “automatic conversion” provision, INA § 203(h)(3), was ambiguous. If not, what was the proper interpretation of this provision? If so, was the agency’s interpretation reasonable, and therefore entitled to deference? This debate resulted in a three-way circuit split which was finally settled in the Supreme Court case, *Scialabba v. Cuellar de Osorio*.<sup>7</sup>

CSPA’s “automatic conversion” clause, INA § 203(h)(3), is codified as follows:

If the age of an alien is determined [under the CSPA formula] to be 21 years of age or older for the purposes of [INA § 203(a)(2)(A)<sup>8</sup> and (d)<sup>9</sup>], the alien’s petition shall be automatically converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.<sup>10</sup>

To summarize how the agency and circuit courts have weighed in this issue, the Board of Immigration Appeals (“BIA”) in *Matter of Wang*<sup>11</sup> held that automatic conversion and priority date retention applied to some family-based visa categories but did not apply to individuals who “age out” of eligibility as the derivative beneficiary of a fourth-preference family petition.<sup>12</sup> Subsequently,

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<sup>7</sup> *Cuellar de Osorio*, 134 S. Ct. at 2191.

<sup>8</sup> Immigration and Nationality Act, INA § 203(a)(2)(A) (2013) (codified as 8 U.S.C. § 1153(a)(2)(A) (2012)) (“spouses or children of an alien lawfully admitted for permanent residence”).

<sup>9</sup> INA § 203(d) (“A spouse or child [ . . . ] shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under [a family-based, employment-based, or diversity category], be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.”)

<sup>10</sup> INA § 203(h)(3).

<sup>11</sup> *Matter of Xiuyi Wang*, 25 I. & N. Dec. 28 (BIA 2009).

<sup>12</sup> As described in a chart on page six of this article, the INA establishes the following family-based preference categories: (1) First Preference: unmarried adult sons and daughters of U.S. citizens and their children (23,400

the Second Circuit<sup>13</sup> interpreted “automatic conversion” narrowly to apply only to aged-out beneficiaries in one strictly defined preference category and not to derivative beneficiaries of other family-based visa categories. Thus, when a derivative child beneficiary of her parent’s third- or fourth-preference family visa petition turns twenty-one, she is not entitled to retain the priority date of that initial petition upon the parent’s filing of a new second-preference (F-2B) petition on behalf of the now “adult” child.<sup>14</sup> Conversely, the Ninth<sup>15</sup> and Fifth<sup>16</sup> circuits came to the opposite conclusion, reasoning that Congress plainly made automatic conversion and priority date retention available to all petitions described in the CSPA’s “automatic conversion” clause, INA § 203(h).<sup>17</sup> The Supreme Court resolved the circuit split on June 9, 2014, finding the statute ambiguous, and deferring to the BIA’s narrow interpretation of “automatic conversion,”<sup>18</sup> thereby excluding most aged-out derivative beneficiaries from the priority date retention benefits of the CSPA.

The Supreme Court decision is clearly disappointing for many “aged out” immigrant children who had hoped to retain the priority dates of their earlier petitions. However, there may still be some kernels of hope for reversal of this restrictive rule in the future through judicial, legislative, or administrative action.

One possibility, albeit an unlikely one, is that the Supreme Court could agree to re-hear the case on the basis that the previous decision was based on a mistake. Specifically, the crux of the plurality’s decision erroneously assumes that “immigration law nowhere [...] allows an alien to keep in his pocket a priority date untethered to any existing valid petition,”<sup>19</sup> when in fact, the Western Hemisphere Savings Clause grants exactly this sort of entitlement.<sup>20</sup> This argument was recently made by the respondents in *De Osorio* upon filing a petition for rehearing in July 2014.<sup>21</sup>

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visas per year); (2) Second Preference: spouses and unmarried minor children of LPRs (2A) and unmarried adult sons and daughters of LPRs (2B) (114,200 total for this category); (3) Third Preference: married sons and daughters of U.S. citizens (23,400); (4) Fourth Preference: brothers and sisters of adult U.S. citizens (65,000). INA §§ 203(a)(1)-(4).

<sup>13</sup> *Li v. Renaud*, 654 F.3d 376, 380 (2d Cir. 2011).

<sup>14</sup> Gerald Seipp, *Ninth Circuit Rejects Matter of Wang; Finds CSPA Applies to All Derivatives*, 89 NO. 39 INTERPRETER RELEASES 1901 (Oct. 8, 2012).

<sup>15</sup> *De Osorio v. Mayorkas*, 695 F.3d 1003, 1012 (9th Cir. 2012), *reversed by* *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014).

<sup>16</sup> *Khalid v. Holder*, 655 F.3d 363, 275 (5th Cir. 2011), *abrogated by* *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014).

<sup>17</sup> *See* Austin T. Fragomen, Jr., Careen Shannon, and Daniel Montalvo, IMMIGR. LEGIS. HANDBOOK § 6:17 (April 2012).

<sup>18</sup> *Cuellar de Osorio*, 134 S. Ct. at 2191.

<sup>19</sup> *Id.* at \* 30.

<sup>20</sup> *See* 9 Foreign Affairs Manual, ch. 42.53 & n. 4.1.

<sup>21</sup> *See* Respondents’ Petition for Rehearing at 1-2, *Scialabba v. Cuellar de*

A second possibility is that Congress could redraft the CSPA to clarify that all “aged out” derivative beneficiaries are entitled to priority date retention. In fact, this was part of the comprehensive immigration reform bill passed by the Senate,<sup>22</sup> however the prospects of immigration legislation remain unclear as of this writing.<sup>23</sup> The current impasse over comprehensive immigration reform also complicates any prospect of remedying the Supreme Court decision through legislation.<sup>24</sup>

A final option is that the current rule may be reversed through administrative action. The plurality in *De Osorio* agreed that a narrow reading of INA § 203(h) was not compelled by the statute, but rather that its meaning was ambiguous and therefore subject to administrative deference.<sup>25</sup> Therefore, the BIA may change course and reverse its position in *Matter of Wang*.<sup>26</sup> Moreover, since the BIA acts on behalf of the Attorney General, the Attorney General may push back against *Matter of Wang* and adopt a broader interpretation of INA § 203(h).<sup>27</sup>

Part I provides an overview of the family-based immigration scheme, the quota system, and the concept of “priority dates.” The article then addresses the crisis facing children who “age out” of visa eligibility and Congress’s response in enacting the CSPA. An examination of the legislative history behind CSPA reveals that it was motivated by Congress’s concern over both the separation of families resulting from lengthy visa-category backlogs and adjudicative delays. Part II traces the BIA’s controversial ruling in *Matter of Wang*, and the ensuing split between the Second, Fifth, and Ninth circuits over the proper scope of CSPA protection for aged-out derivative beneficiaries of various family-based visa

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Osorio, 134 S. Ct. 2191 (2014).

<sup>22</sup> S. 744, 113th Congress, 1st Sess. § 2305(d)(5)(C) (2013).

<sup>23</sup> Austin T. Fragomen, Jr., Careen Shannon, and Daniel Montalvo, “Prospects for Immigration Reform in 2014,” IMMIGR. LEGIS. HANDBOOK § 1:1 (April 2014).

<sup>24</sup> Robert Barnes, *Court sends immigrants’ adult children to back of the line*, WASHINGTON POST (June 9, 2014), available at [http://www.washingtonpost.com/politics/court-sends-immigrants-adult-children-to-back-of-the-line/2014/06/09/62f1f656-f006-11e3-914c-1fbd0614e2d4\\_story.html](http://www.washingtonpost.com/politics/court-sends-immigrants-adult-children-to-back-of-the-line/2014/06/09/62f1f656-f006-11e3-914c-1fbd0614e2d4_story.html).

<sup>25</sup> See Cuellar de Osorio, 134 S. Ct. at 2206 (noting that “we hold only that §1153(h)(3) permits – not that it requires – the Board’s decision to so distinguish among aged out beneficiaries”).

<sup>26</sup> Cyrus D. Mehta and David A. Isaacson, *Scialabba v. Cuellar De Osorio: Does The Dark Cloud Have a Silver Lining?* ILW.COM (June 10, 2014), available at <http://discuss.ilw.com/content.php?3214-Article-Scialabba-V-Cuellar-De-Osorio-Does-The-Dark-Cloud-Have-a-Silver-Lining-By-Cyrus-D-Mehta-and-David-A-Isaacson>, citing *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005) (finding that where a statute is ambiguous and entitled to *Chevron* deference, the agency may reconsider its interpretation even after the courts have approved of it).

<sup>27</sup> See *id.*

categories. Part II also briefly describes and critiques the Supreme Court's decision in *Scialabba v. Cuellar de Osorio*. Part III re-examines the CSPA in the wake of the Supreme Court ruling in *De Osorio*. This section concludes by discussing the relative strengths and weaknesses of potential judicial, legislative, and administrative strategies for upholding CSPA protection for all derivative child beneficiaries.

## II. BACKGROUND

### A. *The Child Status Protection Act*

In 2002, Congress enacted the Child Status Protection Act.<sup>28</sup> At its most fundamental level, the legislation was designed to preserve family unity within the confines of the existing immigration framework.<sup>29</sup> Further, an examination of the CSPA's legislative history reveals that its proponents in both chambers of Congress expressed concern not only about adjudicative delays,<sup>30</sup> the sole concern recognized in *Matter of Wang*, but also an equal concern over "growing immigration backlogs [...] caus[ing] the visa to be unavailable before the child reached his 21st birthday."<sup>31</sup>

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<sup>28</sup> Pub. L. No. 107-20, § 3, 116 Stat. 927 (2002); *see also* INA § 203(h).

<sup>29</sup> *See* 147 CONG. REC. H2901-01 (June 6, 2001) (statement of Rep. Jackson-Lee) (stating "We believe that this will reunite families. This is what our immigration laws are all about, to unite families."); *see also id.* (statement of Rep. Gekas) (explaining "These injustices were perpetrated in this particular set of circumstances inadvertently by the way that the original law was fashioned. What we do here today is adjust, through the use of common sense, a bad situation."); *see also* 148 CONG. REC. H4989-01 (July 22, 2002) (statement of Rep. Sensenbrenner) (describing that "[b]ringing families together is a prime goal of our immigration system. [The CSPA] facilitates and hastens the reuniting of legal immigrants' families.").

<sup>30</sup> *See* 147 CONG. REC. H2901-01 (June 6, 2001) (statement of Rep. Jackson-Lee) (asserting that "some sons and daughters of citizens. . . have to stay on a waiting list from 2 to 13 years entirely because the INS did not in a timely manner process the applications for adjustment of status on their behalf."); *see also id.* (statement of Rep. Sensenbrenner) (declaring "[i]f a U.S. citizen parent petitions for a green card for a child before that child turns 21, but the INS does not get around to processing the adjustment of status application until after the child turns 21, the family is out of luck."); *Id.* (statement of Rep. Smith) (explaining that "[c]hildren of citizens are penalized because it takes the INS an unacceptable length of time – often years – to process adjustment of status applications."); Christina A. Pryor, *'Aging Out' of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act*, 80 FORDHAM L. REV. 2199, 2212 (2012).

<sup>31</sup> 147 CONG. REC. S3275-01 (Apr. 2, 2001) (statement of Sen. Feinstein) ("[A] family [. . .] may be forced to leave that child behind either because the INS was unable to adjudicate the application before the child's 21st birthday, or because growing immigration backlogs in the immigration visa category caused the visa to be unavailable before the child reached his 21st birthday."); 147 CONG. REC. H2901-01 (June 6, 2001) (statement of Rep. Jackson-Lee) ("H.R. 1209 addresses the predicament of these immigrants.] [. . .] [I]nstead of

The CSPA amended the INA to permit an applicant for certain immigration benefits to retain classification as a child under the Act, even if he or she has reached the age of twenty-one.<sup>32</sup> The CSPA amendments fall under INA § 203(h), entitled "Rules for determining whether certain aliens are children."<sup>33</sup>

Among its protective measures, the CSPA created a complex mathematical formula that helps to allow applicants to maintain "child" status despite delays in adjudicating their visa petitions. The formula essentially subtracts the number of days the alien's petition was pending from the alien's age at the time a visa becomes available.<sup>34</sup> For example, where an applicant's petition was pending for 365 days prior to its approval, and she was twenty-one years old when a visa became available in her preference category, her age for immigration purposes is determined to be 20 years old under the CSPA formula. For aliens who "age out" of "child" status despite the CSPA's mathematical formula, the CSPA provides protection in the form of an "automatic conversion" clause, INA § 203(h), to allow the now-adult alien to convert her application to an appropriate visa category while letting her retain the priority date from the original visa petition. Whether automatic conversion and priority date retention apply to "aged out" derivative beneficiaries in all family-based visa categories is the subject of the recent legal battle before the Supreme Court and the focus of this article.

### B. *The Problem of Immigration Backlogs*

A central animating force behind the CSPA involves concerns over the effect of immigration backlogs on families and children. In particular, legislators described two kinds of backlogs: (1) the administrative backlog due to an immigration agency's lack of sufficient resources to handle its workload; and (2) the more serious problem which has developed because the annual number of statutorily available visas is less than the number of applicants getting in line each year to wait for a visa.<sup>35</sup> In order to

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being entitled to admission without numerical limitation, the U.S. citizens' sons and daughters are placed in the back of the line of one of the INS backlog family-preference categories of immigrants.")

<sup>32</sup> See Donald Neufeld, Acting Associate Director of Domestic Operations, INS, *AFM Update: Chapter 21.2(e) The Child Status Protection Act of 2002 (CSPA) (AD07-04)*, 2008 WL 1963663, at \*1 (Apr. 30, 2008).

<sup>33</sup> INA § 203(h).

<sup>34</sup> As illustrated in a chart on page 10, under the CSPA's formula, the alien's age for immigration purposes is determined to be his or her age at the time a visa becomes available reduced by the number of days in which the visa petition was pending. INA § 203(h)(1).

<sup>35</sup> *Immigration Backlogs are Separating American Families*, NATIONAL IMMIGRATION FORUM, 2 (Aug. 2012), available at <http://immigrationforum.org/images/uploads/FamilyBacklogBackgrounder.pdf>.



understand the “aging out” problem fully, one must examine our country’s family-sponsored immigration scheme and the visa allocation system.<sup>36</sup>

Under the current immigration system, a U.S. citizen or Lawful Permanent Resident (“LPR”) may file a Form I-130 petition on behalf of an alien relative.<sup>37</sup> This petition forms the basis for a later filed visa application. Petitions may be filed in different family-based categories depending on such factors as the relationship between the beneficiary and petitioner, the beneficiary’s age and marital status, and whether the petitioner is a lawful permanent resident or U.S. citizen. Immediate relatives, defined as spouses, parents, or unmarried children of U.S. citizens under the age of twenty-one, are exempt from the numeric limits that apply to other permanent resident visas.<sup>38</sup> However, for adult children of U.S. citizens and all qualifying relatives of LPRs, the number of annual immigrant visas is statutorily capped.<sup>39</sup> The chart below illustrates the various family-based preference categories established by the INA:

<b>Preference category</b>	<b>Description</b>	<b>Visas allocated per year</b>
First Preference (F-1)	Unmarried adult sons and daughters of U.S. citizens and their children	23,400 visas per year <sup>40</sup>
Second Preference:	F-2A: Spouses and unmarried minor	114,200 visas per year <sup>41</sup>

<sup>36</sup> See AILA Amicus Brief, *supra* note 7, at 11 (illustrating the circumstances that cause a child to “age out”).

<sup>37</sup> See INA § 203(a), 8 U.S.C. § 1153(a) (stating the preference allocation for family-sponsored immigrants).

<sup>38</sup> INA §§ 203(a)(1), (b)(2)(A), 8 U.S.C. § 203(a)(1), (b)(2)(A) (2012). The INA defines a “child” as an unmarried person under the age of twenty-one. Once a child turns twenty-one, he or she is no longer deemed an immediate relative but rather a “son” or “daughter.” 8 U.S.C. § 1101(a)(15)(T)(ii)(I) (2012).

<sup>39</sup> See INA § 203(a)(1)-(4), 8 U.S.C. § 1153(a)(1)-(4) (2012) (listing number of visas allocated).

<sup>40</sup> “[F-1 immigrants] shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the [F-4 category.]” INA § 203(a)(1), 8 U.S.C. § 1153(a)(1) (2012).

<sup>41</sup> See INA §§ 203(a)(2)(A)-(B), 8 U.S.C. § 1153(a)(2)(A)-(B) (2012) (stating “[F-2A and F-2B immigrants] shall be allocated visas in a number not to exceed 114,200, plus the number (if any) by which such worldwide level exceeds 226,000, plus any visas not required for the [F-1 category]; except that not less than 77 percent of such visa numbers shall be allocated to [F-2A immigrants].”)

(F-2A and F-2B)	children of LPRs F-2B: Unmarried adult sons and daughters of LPRs	
Third Preference (F-3)	Married sons and daughters of U.S. citizens	23,400 visas per year <sup>42</sup>
Fourth Preference (F-4)	Brothers and sisters of adult U.S. citizens	65,000 visas per year <sup>43</sup>

In order for an applicant to determine whether a visa is available in her family-based preference category, she must compare her priority date with the date listed in the monthly U.S. Department of State *Visa Bulletin*.<sup>44</sup> The “priority date” is the date the petition is filed, which essentially holds the applicant’s place in line. The applicant’s visa is available when her priority date becomes “current,” meaning that her priority date is earlier than that listed on the *Visa Bulletin* under the corresponding preference category and country of nationality.<sup>45</sup>

Visa backlogs arise in part because of differences in supply and demand within the visa allocation system. Specifically, each year, the number of available visas in family-based preference categories is vastly exceeded by the number of applicants.<sup>46</sup>

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<sup>42</sup> “[F-3 immigrants] shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the [F-1, F-2A, and F-2B categories].” INA § 203(a)(3), 8 U.S.C. § 1153(a)(3) (2012).

<sup>43</sup> “[F-4 immigrants] shall be allocated visas in a number not to exceed 65,000, plus any visas not required for the [F-1 and F-3 categories].” INA § 203(a)(4), 8 U.S.C. § 1153(a)(4) (2012).

<sup>44</sup> David N. Simmons, *Immigrating to the United States Based on Family Status*, 40 COLO. LAW. 45, 46 (June 2011). The *Visa Bulletin* is available in both print and electronic formats. See *Visa Bulletin*, U.S. Dep’t of State [hereinafter U.S. Dept. of State *Visa Bulletin*], available at <[http://travel.state.gov/visa/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/bulletin/bulletin_1360.html)> (providing archived, current, and upcoming bulletins); see also NATIONAL IMMIGRATION FORUM, *supra* note 25, at 2-3 (explaining what priority dates are and describing the purpose of the *Visa Bulletin*).

<sup>45</sup> AILA Amicus Brief, *supra* note 7, at 11-12.

<sup>46</sup> To arrive at the quota for these categories, the number of immediate relatives who immigrated in the previous fiscal year is subtracted from the total allocation of 480,000, and the number of unused employment-based visas is then added to that amount. See Pryor, *supra* note 20, at 2205 (calculating the standard apportionment of available visas among the different preference categories); see also NATIONAL IMMIGRATION FORUM, *supra* note 38, at 2-3 (stating, “In recent years . . . the number of visas available in our family immigration system has not met the demand.”).

<sup>46</sup> NATIONAL IMMIGRATION FORUM, *supra* note 25, at 3; see also AILA Amicus Brief, *supra* note 4, at 14-15 (stating that “[t]he number of F-2B visas available to Mexico is 1,841. The number of pending F-2B applicants from Mexico is 212,621. The length of time it will take to clear up the current

Accordingly, applicants in family-based preference categories must wait, sometimes indefinitely, for a visa in their category to become available. The result is that families are often kept apart for many years.<sup>47</sup>

### C. *The Problem of “Aging Out” of Visa Eligibility*

A derivative beneficiary “ages out” and becomes ineligible for an immigration benefit when she reaches twenty-one years of age, and thus loses her qualifying “child” status, before her application is processed or a visa becomes available in her preference category.<sup>48</sup> Prior to the enactment of the CSPA in 2002, in order for a “child” derivative beneficiary to be granted a visa, the government needed to adjudicate her petition and grant immigration status before she “aged out,” or turned twenty-one years of age.<sup>49</sup> Under this regime, the child had to remain a “child” under immigration law up to and including the date that the final benefit was granted.<sup>50</sup> Due to adjudicative delays and limited visa availability, countless children who applied as dependents of their parents lost eligibility and had to switch into an adult visa category when they reached their 21st birthday, at which point they were no longer considered “child” dependents under immigration law.<sup>51</sup> Upon switching into an adult visa category, these “aged out” beneficiaries also lost their place in line under the quota system.<sup>52</sup>

### D. *Legislative Concerns over the Effect of Backlogs on “Aged Out” Children*

Due to current backlogs and anticipated demands, “aging out” carries a devastating price for children who are derivatives on a parent’s visa petition. Generally, they must wait for their parent

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backlog is approximately 115.5 years (212,621 ÷ 1,841). [ . . . ] The number of F-2B visas available to the Philippines is also 1,841. The number of pending F-2B applicants from the Philippines is 52,823. The length of time it will take to clear up the current backlog is approximately 28.7 years (52,823 ÷ 1,841”).

<sup>47</sup> NATIONAL IMMIGRATION FORUM, *supra* note 38, at 2; *see also* AILA Amicus Brief, *supra* note 7, at 14-15 (“The number of F-2B visas available to Mexico is 1,841. The number of pending F-2B applicants from Mexico is 212,621. The length of time it will take to clear up the current backlog is approximately 115.5 years (212,621 ÷ 1,841). [...] The number of F-2B visas available to the Philippines is also 1,841. The number of pending F-2B applicants from the Philippines is 52,823. The length of time it will take to clear up the current backlog is approximately 28.7 years (52,823 ÷ 1,841”).

<sup>48</sup> Seipp, *supra* note 17, at 1902.

<sup>49</sup> AUSTIN T. FRAGOMEN, JR., CAREEN SHANNON & DANIEL MONTALVO, IMMIGRATION PROCEDURES HANDBOOK § 12:26 (May 2014).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Seipp, *supra* note 17, at 1902.

to become a lawful permanent resident so that their parent can file a new petition on their behalf in the F-2B category, accorded to adult sons and daughters of lawful permanent residents. For many "aged out" derivative beneficiaries who lose their place in line and must wait for a new F-2B petition to be filed on their behalf by their parents, it becomes mathematically impossible for them to ever immigrate based on these new petitions.<sup>53</sup> Many aged out derivative beneficiaries have already been waiting for decades for a visa to become available in the category in which they "aged out," and unless they can be credited with the time that they have already been waiting for a visa, they will have to wait an additional decade or more for a visa to become available.<sup>54</sup> Given current visa wait times, the worldwide F-2B category is backlogged approximately seven years according to the August 2014 Visa Bulletin.<sup>55</sup>

Senator Diane Feinstein illuminated the tragic consequences of "aging out" upon families when she introduced a version of the CSPA to the Senate in 2001:

[A] family whose child's application for admission to the United States has been pending for years may be forced to leave that child behind either because the INS was unable to adjudicate the application before the child's 21st birthday, or because growing immigration backlogs in the immigration visa category caused the visa to be unavailable before the child reached his 21st birthday. [...] Situations like these leave both the family and the child in a difficult dilemma. [...] Emigrating parents must decide to either come to the United States and leave their child behind, or remain in their country of origin and lose out on their American dream in the United States. [...] For lawful permanent residents who already live in the United States, their dilemma is different. They must make the difficult choice of either 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.

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<sup>53</sup> AILA Amicus Brief, *supra* note 7, at 16.

<sup>54</sup> *Id.*

<sup>55</sup> For Filipinos, the F-2B category is backlogged about 11 years. And for Mexicans, the category is backlogged about 21 years. *See* Visa Bulletin, *supra* note 47. Also, since backlogs are subject to continual change, in some months the estimated wait time for Mexicans in the F-2B category has come close to 100 years. AILA Amicus Brief, *supra* note 7, at 16. Under such circumstances, it would be mathematically unfeasible for a Mexican child who turns 21 and whose LPR parent files an I-130 petition on her behalf today to ever immigrate or adjust status based on that petition. *Id.*

No law should encourage this course of action.<sup>56</sup>

Senator Feinstein's statement highlights the main legislative concerns behind the CSPA. In enacting the CSPA, Congress sought to preserve family unity in situations where children "age out" of visa eligibility. More importantly for this article's discussion, her statement memorializes the legislature's concern over "aging out" situations caused by both adjudicative delays and immigration backlogs within the visa allocation system. Legislative concerns over "aging out" situations caused by immigration backlogs were raised by the CSPA's proponents in both the House of Representatives and Senate. U.S. Representative Sheila Jackson Lee stated that the CSPA "addresses the predicament of [...] immigrants" who have "aged out" of immediate relative status and "are placed in the back of the line of one of the INS backlogged family-preference categories of immigrants."<sup>57</sup>

As discussed in Parts II and III of this article, the legislative intent behind the CSPA has become a focal point in the current circuit split over the applicability of "automatic conversion" for "aged out" derivative beneficiaries.

#### *E. How the Child Status Protection Act Works for Derivative Beneficiaries*

The CSPA seeks to address the problem of derivative beneficiaries "aging out" of immigration benefits due to immigration backlogs and adjudicative delays in two basic ways. First, the CSPA applies a complex mathematical formula to determine whether an applicant may retain status as a "child" for immigration purposes despite having turned 21 before a visa becomes available.<sup>58</sup> If the mathematical formula determines that the applicant does not retain status as a "child" for immigration purposes, the CSPA attempts to preserve her place in the visa line by automatically converting her petition to the "appropriate" category. This allows the applicant to retain the priority date of the original petition, rather than assigning her a new priority date.

#### 1. Step #1: CSPA's Complex Mathematical Formula

The CSPA provides for the following mathematical formula to help prevent aliens from losing "child" status due to

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<sup>56</sup> 147 CONG. REC. S3275-01 (Apr. 2, 2001) (statement of Sen. Feinstein).

<sup>57</sup> 147 CONG. REC. H2901-01 (June 6, 2001) (statement of Rep. Jackson-Lee).

<sup>58</sup> INA § 203(h)(1), 8 U.S.C. § 1153(h)(1) (2012).

administrative delays in adjudicating their I-130 petitions. For derivative applicants seeking to adjust under a preference category, an applicant’s adjusted age under the CSPA, or “CSPA age” is determined by taking her age on the date a visa becomes available and subtracting the number of days that the petition was pending.<sup>59</sup> If the applicant is under 21 using this formula, she satisfies the age requirement for that visa.<sup>60</sup> If the applicant’s CSPA age is 21 or over, she must look to “Step 2.”

### Calculating “CSPA Age”

<b>Mathematical Formula for Determining CSPA Age</b>	“[T]he age of the alien on the date on which an immigrant visa number becomes available for such alien [...] reduced by [...] the number of days in the period during which the applicable petition [...] was pending. <sup>61</sup>
<b>Sample Application #1:</b>	Age on date visa number available = 22 Time I-130 petition pending = 2 years CSPA Age = [22 years] – [2 years] = <b>20 years (not aged out)</b>
<b>Sample Application #2:</b>	Age on date visa number available = 22 Time I-130 petition pending = 6 months CSPA Age = [22 years]– [6 months] <sup>62</sup> = <b>21 years (aged out)</b>

Significantly, the CSPA formula allows an applicant to retain “child” status for immigration purposes where she would not have “aged out” but for the administrative delay in adjudicating her visa application. However, the CSPA formula does not allow retention of “child” status where she “aged out” as a result of immigration backlogs associated with limited visa availability. To address this second type of backlog, the CSPA offers a different ameliorative measure: the “automatic conversion” clause under INA § 203(h)(3), as discussed below in “Step #2.”

<sup>59</sup> INA § 203(h)(1), 8 U.S.C. § 1153(h)(1) (2012).

<sup>60</sup> INA § 203(h)(1), 8 U.S.C. § 1153(h)(1) (2012).

<sup>61</sup> INA §§ 203(h)(1)(A)-(B), 8 U.S.C. § 1153(h)(1)(A)-(B) (2012).

<sup>62</sup> As illustrated in the sample cases above, adjudicative delays become ironically beneficial to applicants who turn 21 while waiting for a visa number to become available. The applicants were the same age when a visa became available, and the only reason for the different outcomes under the CSPA is that it took Sample Application #1’s petition significantly longer to process. See INA § 203(h)(1) (setting forth the formula for calculating an applicant’s age).

## 2. Step #2: If the Applicant's "CSPA age" Is 21 or Above, Automatic Conversion and Priority Date Retention

If the applicant's adjusted age is 21 or over, then the applicant has "aged out." She will no longer qualify as a "minor child" based on her relationship to her parents, so she will have to pursue status as an "adult son or daughter" of her parents. However, the CSPA's automatic conversion and retention provisions allow her to switch to a new category while maintaining the same priority date from the original petition.

Under INA § 203(h), the "automatic conversion" provision of the CSPA, "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."<sup>63</sup> Thus, if the son or daughter has a CSPA age of 21 or older, his or her case will automatically be switched to a petition in the appropriate family-based category, i.e., a second-preference petition for an adult son or daughter of a permanent resident or a first-preference petition for an unmarried adult son or daughter of a U.S. citizen.<sup>64</sup> Additionally, the applicant is able to retain the priority date associated with the original petition.<sup>65</sup>

Automatic conversion seems relatively straight-forward, for instance, where the applicant is the *direct* beneficiary of a petition filed in the F-2A category by her LPR parent. In these cases, if the applicant "ages out" and loses "minor child" status, her case can convert to the appropriate F-2B category, for unmarried adult sons and daughters of LPRs. Thus, there clearly exists an "appropriate category" to which her petition may automatically convert, as provided under INA §203(h), the CSPA's "automatic conversion" provision.

However, a different and less clear situation arises where the applicant is a *derivative beneficiary*<sup>66</sup> on her parent's petition filed by the parent's mother, father, brother or sister. The problem is that once the derivative applicant "ages out" and loses her "minor

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<sup>63</sup> INA § 203(h)(3).

<sup>64</sup> FRAGOMEN, ET AL., *supra* note 52.

<sup>65</sup> *Id.*; see also H.R. Rep. No. 107-45, at 2-3 (2001), reprinted in 2002 U.S.C.C.A.N. 640, 641-642 (stating that the Child Status Protection Act provides that the determination of whether an unmarried daughter or son of a citizen is a child is made using the age that the time the application was filed); Johnny N. Williams, OFFICE OF THE EXECUTIVE ASSOCIATE COMMISSIONER, *The Child Status Protection Act, Memorandum Number 2*, 1 (Feb. 14, 2003) (stating that the provisions of the CSPA are not retroactive).

<sup>66</sup> A "principal beneficiary" is an individual who has a qualifying relationship with a U.S. citizen or LPR petitioner. Derivative beneficiaries are spouses or minor children of principal beneficiaries, may also be named in the principal beneficiary's visa petition, and are entitled to the same preference status, and the same priority date, as the principal alien. US DEP'T OF STATE, FOREIGN AFFAIRS MANUAL 9 FAM 42.31 n. 2 (1999).

child” status, there is no “appropriate category” to which her petition can immediately convert. She can no longer be a derivative on her parent’s petition, nor does she qualify for a visa based on her relationship to the petitioner, as one can see from the preference category chart above, no visa category exists for grandchildren, nieces or nephews of U.S. citizens or LPRs. Once the parent, the principal beneficiary, becomes an LPR, the parent can file a petition for the “adult son or daughter.” The question that has vexed courts is whether the applicant can retain the priority date from the original petition for a petition subsequently filed by the parent. The controversy surrounding this question involves a question of statutory interpretation, specifically how courts have interpreted the automatic conversion and retention language of the CSPA.

### III. THE BIA’S DECISION, THE ENSUING CIRCUIT SPLIT, AND THE SUPREME COURT BATTLE

#### A. *The BIA’s Precedential Ruling in Matter of Wang*

The CSPA, a statute created to facilitate and hasten the reunification of immigrants with their U.S. citizen and LPR families,<sup>67</sup> has been narrowly interpreted by the BIA in *Matter of Wang* to limit the applicability of the automatic conversion provision to a narrow subset of family-based visa petitions.<sup>68</sup>

In *Matter of Wang*, a U.S. citizen filed a fourth preference (F-4) petition on behalf of a brother in 1992. The brother’s wife and three children were listed as derivative beneficiaries. By the time the principal immigrant was admitted as an LPR in October 2005, one of his three children aged out. In September 2006, the brother filed a second-preference (F-2B) petition on behalf of his now adult, unmarried daughter, requesting that she be assigned the priority date of December 28, 1992 given to the F-4 visa petition that had been filed on his behalf by his U.S. citizen sister, the beneficiary’s aunt. After examining the issue of whether an aged-out beneficiary of an F-2B petition could retain the priority date from the earlier F-4 petition, the BIA denied the request.<sup>69</sup>

The BIA arrived at its conclusion by examining the CSPA’s language, regulatory framework, and legislative history.<sup>70</sup> First, with regard to the statute’s text, it determined that the language of the “automatic conversion” provision under INA § 203(h)(3) was ambiguous, holding that it “does not expressly state which petitions qualify for automatic conversion and retention of priority

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<sup>67</sup> 148 CONG. REC. H4989-91 (July 22, 2002) (statement of Rep. Sensbrenner).

<sup>68</sup> *Matter of Wang*, 25 I. & N. Dec. at 39.

<sup>69</sup> *Id.* at 38-39.

<sup>70</sup> *Id.* at 33 n.7.



dates.”<sup>71</sup>

Second, after finding ambiguity in the language of the “automatic conversion” provision, INA § 203(h)(3), the BIA considered the usage of “conversion” and “retention” in other regulations in order to determine the legislative intent behind the “automatic conversion” clause.<sup>72</sup> The BIA reasoned that because the term “conversion” consistently refers to a visa petition that moves from one category to another in immigration regulations, the beneficiary of that petition transfers her classification but does not need to file a new visa petition.<sup>73</sup> Moreover, the BIA asserted that the concept of “retention” of priority dates has historically been limited to visa petitions filed by the *same* family member, whereas petitions filed by relatives received their own priority dates.<sup>74</sup> Therefore, when the beneficiary’s daughter “aged out” from her eligibility for derivative status on the F-4 petition, there was no family preference category that her visa could be converted to because no visa category recognizes the niece of a U.S. citizen.<sup>75</sup> Also, the BIA found that because the new F-2B petition was filed by a *different* petitioner, her father, allowing her to retain the priority date of the original petition filed by her aunt would conflict with the historic usage of the term “retention.”<sup>76</sup>

Third, the BIA examined the statute’s legislative history for clear evidence of congressional intent to expand historical use of the terms “automatic conversion” and “priority date retention.”<sup>77</sup> The BIA, citing statements from members of the House of Representatives, observed that the CSPA was principally focused on extensive administrative delays in the processing of visa petitions and applications.<sup>78</sup> The BIA contended that the legislative record of the CSPA does not provide “clear evidence” that it aimed to address waits due to visa allocation issues, such as long waits associated with priority dates.<sup>79</sup> The Board found that if automatic conversion and priority date retention for F-4 visas were allowed, the beneficiary would displace other applicants who had been waiting longer in that category.<sup>80</sup> The BIA then concluded that the “automatic conversion” clause does not apply broadly to all “aged out” derivative beneficiaries, finding that “there is no indication in the statutory language or legislative history of the CSPA that Congress intended to create a mechanism

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<sup>71</sup> *Id.* at 33 (interpreting INA §§ 203(h)(1)-(3)).

<sup>72</sup> *Id.* at 33-34.

<sup>73</sup> *Id.* at 35.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 35-36.

<sup>76</sup> *Id.* at 34-36.

<sup>77</sup> *Id.* at 36-38.

<sup>78</sup> *Id.* at 36-38, *citing* 147 CONG. REC. H2901 (daily ed. June 6, 2001) (statements of Reps. Sensenbrenner, Jackson-Lee, and Smith).

<sup>79</sup> *Id.* at 38.

<sup>80</sup> *Id.*

to avoid the natural consequence of a child aging out of a visa category because of the length of the visa line.”<sup>81</sup> In its ruling, the BIA acknowledged in a footnote that it was disregarding its prior unpublished opinion in *Matter of Garcia*,<sup>82</sup> which came to the opposite conclusion on a similar set of facts.

The practical result of the *Matter of Wang* decision is that the priority date established by the earlier fourth-preference petition cannot be applied to the later-filed second-preference petition, causing the beneficiary to lose her place in line within the visa allocation system. Rather, the applicant is assigned a new priority date and is not credited with the time she has spent waiting under the earlier petition for a visa to become available.<sup>83</sup>

### B. The Circuits Weigh In

A split among circuit courts has developed concerning the scope of protection afforded by the CSPA for applicants who “aged out” of eligibility as derivative beneficiaries and upon whose behalf a second-preference petition is later filed. The Second Circuit<sup>84</sup> found the statute unambiguous but ultimately came to the same conclusion as the BIA in *Matter of Wang*,<sup>85</sup> while the Fifth<sup>86</sup> and Ninth<sup>87</sup> circuits wholly rejected the BIA’s interpretation, adopting a view favoring family unification.<sup>88</sup> Specifically, the Fifth and Ninth circuits permitted aged-out derivative beneficiaries to retain the priority dates associated with their earlier F-4 petitions where a subsequent F-2B petition was filed on their behalf by permanent resident parents.

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<sup>81</sup> *Id.* at 38.

<sup>82</sup> *Matter of Garcia*, 2006 WL 2183654 (BIA June 16, 2006).

<sup>83</sup> AILA Amicus Brief, *supra* note 7, at 3.

<sup>84</sup> *Li*, 654 F.3d at 385.

<sup>85</sup> *Matter of Wang*, 25 I. & N. Dec. at 38-39.

<sup>86</sup> *Khalid*, 655 F.3d at 363.

<sup>87</sup> *De Osorio*, 695 F.3d at 1003.

<sup>88</sup> All three circuit courts applied a two-part analysis set forth in a seminal Supreme Court decision, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 853 (1984). First, the reviewing court determines whether the statutory language is clear on its face based on traditional rules of statutory construction. If Congress has spoken directly to the precise question at issue, the analysis ends there. If, on the other hand, the language or congressional intent is ambiguous, a reviewing court proceeds to the second step of analysis and defers to the agency’s interpretation, assuming it is reasonable. Charles Wheeler, *Automatic Conversion and Retention of Priority Date for Aged-Out Derivatives: Circuit Courts Only Add to the Confusion*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (CLINIC), available at <http://cliniclegal.org/sites/default/files/Automatic%20Conversion%20and%20Retention%20of%20Priority%20Date%20for%20Aged.pdf> (last visited June 27, 2014).

## 1. The Second Circuit

In the 2011 case, *Li v. Renaud*, the Second Circuit found the CSPA's "automatic conversion" clause was unambiguous but came to the same ultimate conclusion as the BIA in *Matter of Wang*.<sup>89</sup>

The case concerned Duo Cen, who "aged out" of eligibility as a derivative beneficiary on the F-2B petition filed in 1994 on behalf of his mother, Feimei Li, by Li's father, who was Cen's grandfather.<sup>90</sup> Because of visa backlogs, Cen's mother did not receive a visa until 2005, when Cen was 26 years old.<sup>91</sup> In 2008, Cen's mother, who had become a lawful permanent resident, filed a new F-2B petition for her son and USCIS established the priority date as 2008 rather than 1994, the priority date of the original petition.<sup>92</sup> Li argued that her son's 1994 petition should "automatically convert" and that he should be allowed to retain the 1994 priority date.<sup>93</sup>

As an initial matter, the court found no ambiguity because Congress's intent was clear on the "precise question at issue" – whether a derivative beneficiary who ages out of one family preference petition may retain the priority date of that petition to use for a different family preference petition *filed by a different petitioner*.<sup>94</sup> Because the court found clear congressional intent, it did not need to defer to the BIA's interpretation.<sup>95</sup> Next, the court based its analysis of the issue of priority date retention on whether or not the family preference petition could be "converted to [an] appropriate category."<sup>96</sup> Focusing its opinion narrowly, the court concluded that an earlier family preference priority date could not apply to a later family preference petition made by a different petitioner.<sup>97</sup>

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<sup>89</sup> *Li*, 654 F.3d at 382 ("an alleged ambiguity in some part of the statutory provision at issue does not end the inquiry. Even absent "explicit[] articulat[ion]" of all components of a statutory provision, [. . .] a reviewing court must still ask whether Congress has spoken to "the precise question at issue" in the case."), *citing Chevron*, 467 U.S. at 842 (internal citation omitted).

<sup>90</sup> *Li*, 654 F.3d at 379.

<sup>91</sup> *Id.*

<sup>92</sup> If USCIS had given the petition a 1994 priority date, Cen would have received a visa immediately. However, because the petition was given a 2008 priority date, the Department of State estimates that based on current processing times Cen will have to wait until 2017 for a visa. *Id.* at 379-380.

<sup>93</sup> *Id.* at 381.

<sup>94</sup> *Id.* at 382 (footnote omitted, emphasis added).

<sup>95</sup> *Id.* at 383.

<sup>96</sup> *Id.* at 384-85.

<sup>97</sup> *Id.* at 385; *see also* David Froman, De Osorio v. Mayorkas, 2012 U.S. App. LEXIS 20177 (9th Cir. Sept. 26, 2012) (*en banc*): *Suggestions for Implementing Court's Ruling Upholding Child Status Protection Act Coverage for Over-Twenty-One Derivative Beneficiaries: An Emerging Perspective*, 2012 EMERGING ISSUES 6736, 6738-39 (Nov. 16, 2012).

## 2. The Fifth Circuit

In 2011, the Fifth Circuit in *Khalid v. Holder* stepped in, adopting a position favoring a broad interpretation of the automatic conversion provision and rejecting the conclusions of the BIA and *Li*.<sup>98</sup> According to the Fifth Circuit, Congress plainly made automatic conversion and priority date retention available to all petitions described in INA § 203(h)(2).

In *Khalid*, the Fifth Circuit vacated a removal order by the BIA against an alien, Mr. Khalid, who had “aged out” as a derivative on his mother’s fourth-preference petition filed by her sister, and held that he was entitled to utilize the priority date of the original petition in connection with a subsequent second preference petition filed on his behalf by his mother.

Like the Second Circuit, the Fifth Circuit rejected *Matter of Wang*’s notion that INA § 203(h)(3) was ambiguous.<sup>99</sup> Although the court agreed with *Wang* that the “automatic conversion clause” under INA § 203(h)(3) does not explicitly delineate which petitions qualify for automatic conversion and priority date retention, it found that “read as a whole,” the statute clarifies the meaning of the otherwise-ambiguous “automatic conversion clause.”<sup>100</sup> The Fifth Circuit looked at the interrelatedness between the “automatic conversion” clause of INA § 203(h)(3) and the CSPA’s other provisions, the CSPA’s age formula clause of INA § 203(h)(1) and the “Petitions described” clause of INA 203(h)(2), suggesting that the three provisions cannot fully operate unless read in tandem. For instance, the benefits of priority date retention under the “automatic conversion” clause, INA § 203(h)(3), are “explicitly conditioned on a particular outcome” from CSPA’s age formula, INA § 203(h)(1) – that the alien’s “age” is at least 21.<sup>101</sup> Therefore, “[the ‘automatic conversion’ clause of INA § 203(h)(3)] must operate on this same set of petitions because the outcome that triggers the [‘automatic conversion’ clause’s] benefits can occur only if the formula applies.”<sup>102</sup>

The Fifth Circuit held that

[i]n light of the interrelated nature of the three

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<sup>98</sup> *Khalid*, 655 F.3d at 375; *Li*, 654 F.3d at 376.

<sup>99</sup> *Khalid*, 655 F.3d at 370, quoting *Matter of Wang*, 25 I. & N. Dec. at 33 (“[T]he language of [INA § 203(h)(3)] does not expressly state which petitions qualify for automatic conversion and retention of priority dates.”).

<sup>100</sup> *Id.*, quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (“Ambiguity [in a statute] is a creature not of definitional possibilities but of statutory context.”).

<sup>101</sup> *Id.*, citing INA § 203(h)(3) (“If the age of an alien is determined under paragraph (1) to be 21 years of age or older”).

<sup>102</sup> *Id.* at 371.

provisions, reading the subsection as a whole confirms that Congress intended [the “automatic conversion” clause of INA § 203(h)(3)] to apply to any alien who “aged out” under [the CSPA’s age adjustment formula, INA § 203(h)(1)] with respect to the universe of petitions described in [INA § 203(h)(2), the ‘[p]etitions described’ clause].<sup>103</sup>

After shattering this central point of ambiguity relied on by the BIA in *Matter of Wang*, the *Khalid* court moved on to the issue of Congress’s intent. The Court referenced legislative history from the Senate that revealed not only a concern over adjudicative delays but also an equal concern for “growing immigration backlogs” relating to the non-availability of visas.<sup>104</sup> This evidence directly undercut the BIA’s argument in *Matter of Wang* that Congress was concerned solely with adjudicative delay.

Notably, the *Khalid* court recognized that the necessary calculation of an alien’s “CSPA age” under the complex mathematical formula described in INA § 203(h)(1) “cannot be made at the moment the child ‘ages out,’” because it requires the date on which a visa becomes available to the alien.<sup>105</sup> In short, automatic conversation cannot be triggered until the principal’s visa becomes available, since only then can the CSPA age adjustment formula be computed. Looking to guidance from the BIA’s unpublished decision in *Matter of Garcia*, the court found that there would be another category to convert to at that time: “the ‘appropriate category’ for purposes of [the “automatic conversion” clause, INA § 203(h)(3)] is that which applies to the ‘aged-out’ derivative vis-à-vis the *principal beneficiary* of the original petition.”<sup>106</sup>

Additionally, the *Khalid* court found that the effect of the *Li* decision was to “exclude an entire class of derivative beneficiaries from the ‘automatic conversion’ clause’s benefits by silent implication based on the unwritten assumption that the petitioner must remain the same” and held that it was “unlikely that Congress would [make this exclusion]. Rather, one would expect any such exclusion to be express, since it would effectively operate categorically.”<sup>107</sup> Accordingly, the Fifth Circuit held that the petitioner was entitled to utilize the priority date of an F-4 petition in connection with a subsequent F-2B petition filed on his behalf

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<sup>103</sup> *Id.* at 371.

<sup>104</sup> *Id.* at 371-72, quoting 147 CONG. REC. S3275 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein).

<sup>105</sup> *Id.* at 372.

<sup>106</sup> *Id.* at 372, citing *Matter of Garcia*, 2006 WL 2183654 (BIA July 16, 2006).

<sup>107</sup> *Id.* at 374.

by his mother.<sup>108</sup>

The Fifth Circuit concluded that Congress plainly made automatic conversion and priority date retention available to derivative beneficiaries in all family-based preference categories.<sup>109</sup>

### 3. The Ninth Circuit

On September 26, 2012, an *en banc* decision by the Ninth Circuit in *De Osorio v. Mayorkas* reversed an earlier Ninth Circuit ruling<sup>110</sup> and held that the plain language of the CSPA unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries in all family visa categories.<sup>111</sup>

The Ninth Circuit in *De Osorio* rebutted all conceivable arguments concerning ambiguity: the existence of a circuit split; the perceived impracticability of application to certain derivative beneficiaries; the requirement for a new petitioner; and the exception for “unreasonable or impracticable results.”<sup>112</sup> Concerning this last point, the court stated:

Plainly, a change in policy announced by the statute’s plain language cannot be impracticable just because it is a change or because it does not specify how exactly that change is to be implemented. [...] A statute that requires an agency to change its existing practices does not necessarily “lead to absurd or impracticable consequences.”<sup>113</sup>

The court agreed with the Fifth Circuit that Congress intended a greater benefit through this legislation than that “meager benefit” to derivative F-2A beneficiaries set forth in *Matter of Wang* and touted by the government.<sup>114</sup> The court concluded that under the clear wording of the CSPA, priority-date retention and automatic-conversion are available to all visa petitions identified in subsection (2).<sup>115</sup>

The *De Osorio* ruling signaled tempered hope for aged-out derivative beneficiaries. However, that hope proved short-lived, since the government proceeded to request an appeal of the Ninth

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<sup>108</sup> *Id.* at 375.

<sup>109</sup> *Id.* at 373.

<sup>110</sup> *Cuellar de Osorio v. Mayorkas*, 656 F.3d 954, 965-66 (9th Cir. 2011).

<sup>111</sup> *De Osorio*, 695 F.3d at 1016; *see also* INTERPRETER RELEASES, *supra* note 14, at 1901-02.

<sup>112</sup> *De Osorio*, 695 F.3d. at 1011-14.

<sup>113</sup> *Id.* at 1014.

<sup>114</sup> *Id.* at 1015.

<sup>115</sup> *Id.* at 1015.

Circuit decision with the Supreme Court.<sup>116</sup>

*C. The Supreme Court Resolves the Circuit Split: A Discussion and Critique of Scialabba v. Cuellar de Osorio*

1. Discussion

On June 9, 2014, a deeply divided Supreme Court issued its decision in *Scialabba v. Cuellar de Osorio*,<sup>117</sup> deferring to the BIA's restrictive interpretation set forth in *Matter of Wang*. Justice Elena Kagan, in a plurality opinion joined by Justices Anthony M. Kennedy and Ruth Bader Ginsberg, found INA § 203(h)(3) to be ambiguous and that therefore, the BIA's interpretation of the provision was entitled to deference.<sup>118</sup> The other six Justices found the language of INA § 203(h)(3) clear but came to opposite conclusions regarding its meaning. Chief Justice Roberts and Justice Scalia concurred in the judgment, finding that the plain language of the statute supported the BIA's decision.<sup>119</sup> On the other hand, Justices Alito filed a dissenting opinion,<sup>120</sup> and Justice Sotomayor filed a separate dissenting opinion,<sup>121</sup> joined by Justices Breyer and Thomas (Justice Thomas joining with the exception of a footnote), all finding that the clear meaning supported the Ninth Circuit's decision. Notably, none of the opinions mention the amicus briefs filed by a bipartisan group of former Senators who were serving in Congress when the CSPA was passed.

2. Critique

Rather than applying a restrictive interpretation of the CSPA's "automatic conversion" clause, the Supreme Court should have adopted the reasoning of the Fifth and Ninth circuit rulings – also articulated in Justice Sotomayor's dissent – and come to a more humane result: that priority date retention benefits apply to derivative beneficiaries of visa petitions in all five family preference categories, rather than to derivative beneficiaries in only one category. The Fifth and Ninth circuit decisions are attractive for a number of reasons.

Like the Second Circuit, the Fifth Circuit and the Ninth Circuit found the plain language of the CSPA unambiguous. Thus,

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<sup>116</sup> See Carl Shusterman, *Child Status Protection Act (CSPA) Victory!*, IMMIGRATION UPDATE (Sept. 27, 2012), <http://blogs.ilw.com/carlshusterman/2012/09/child-status-protection-act-cspa-victory.html> (explaining the importance of the Court's ruling).

<sup>117</sup> See 695 F.3d. at 2191.

<sup>118</sup> *Id.* at 2203.

<sup>119</sup> *Id.* at 2214.

<sup>120</sup> *Id.* at 2216.

<sup>121</sup> *Id.*

all three circuits agree that deference to the BIA in *Matter of Wang* is inappropriate. The Ninth Circuit reaffirmed the Fifth Circuit’s determination that under the clear wording of the CSPA, priority date retention and automatic conversion are available to “aged out” derivative beneficiaries in all family-based categories.<sup>122</sup> Both the Fifth and Ninth circuits’ decisions are more recent than the rulings by the BIA and the Second Circuit. Additionally, the Ninth Circuit’s decision covers consolidated cases including a class action and as such the decision has broader application than prior individual decisions.<sup>123</sup> As an *en banc* ruling, the Ninth Circuit decision carries greater weight and force of persuasion.

The Fifth and Ninth circuit rulings are also in line with Congress’s intent in enacting the CSPA to preserve family unity. Unlike the holdings in *Matter of Wang* and *Li*, which force families to separate or live apart for years, the Fifth and Ninth circuit cases represent a breakthrough for tens of thousands “aged-out” sons and daughters who have waited for years as a parent sought a visa in the United States.

In addition, the *Khalid* and *De Osorio* rulings are appealing in their logic, simplicity, and focus on reading the language of the CSPA “as a whole” without having to read out certain clauses, rely on prior agency practices, create exceptions, or imply congressional intent when none was specifically stated. Together, the Fifth and Ninth circuit cases provide clear, well-reasoned and highly persuasive support for the rights of countless derivative beneficiaries who waited for years to immigrate to the United States only to lose their place in line upon turning 21.

Even if the Supreme Court had chosen not to adopt the reasoning of the Fifth and Ninth circuits, it should have still come to the same conclusion as these courts just by looking at the plain meaning of the CSPA “automatic conversion” provision. The CSPA’s “automatic conversion” clause provides:

If the age of an alien is determined [under the CSPA age adjustment formula] to be 21 years of age or older for the purposes of [INA § 203(a)(2)(A)<sup>124</sup> and (d)<sup>125</sup>], the alien’s petition shall be automatically converted to the appropriate category and the alien shall retain the

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<sup>122</sup> *De Osorio*, 695 F.3d at 1015-16.

<sup>123</sup> Froman, *supra* note 99.

<sup>124</sup> INA § 203(a)(2)(A) (“spouses or children of an alien lawfully admitted for permanent residence”).

<sup>125</sup> INA § 203(d) (“A spouse or child [...] shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under [a family-based, employment-based, or diversity category], be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.”).



original priority date issued upon receipt of the original petition.<sup>126</sup>

In other words, automatic conversion and priority date retention apply where the following circumstances are met: an alien's "CSPA age" is twenty-one or above, and she "ages out" of eligibility for a visa "for purposes of [INA §§ 203(a)(2)(A) and (d)]," referring to principal beneficiaries in the F-2A category (spouses or children of LPRs) and derivative beneficiaries in *all family-based visa categories*. Given that the "automatic conversion" clause itself references INA § 203(a)(2)(d), which sets out the INA's definition for derivative status, it clearly intended to allow "aged out" derivative beneficiaries to avail themselves of the same protections undisputedly accorded to "aged out" F-2A principal beneficiaries.

Justice Sotomayor, joined by Justices Breyer and Thomas, summed up this argument succinctly in the opening lines of her dissent:

Although the workings of our Nation's immigration system are often complex, the narrow question of statutory interpretation at the heart of this case is straightforward. Which aged-out children are entitled to retain their priority dates: derivative beneficiaries of visa petitions in all five family-preference categories, or derivative beneficiaries of petitions in only one category? The initial clause of [INA § 203](h)(3) provides a clear answer: Aged-out children may retain their priority dates so long as they meet a single condition—they must be "determined [. . .] to be 21 years of age or older for purposes of" derivative beneficiary status." Because all five categories of aged-out children satisfy this condition, all are entitled to relief.<sup>127</sup>

#### IV. FINDING HOPE FOR "AGED OUT" DERIVATIVE BENEFICIARIES

Is there any hope for most "aged out" derivative beneficiaries in the aftermath of *Cuellar de Osorio*? The following is a discussion of the relative strengths and weaknesses of potential judicial, legislative, and administrative strategies for upholding CSPA protection for all derivative child beneficiaries.

##### A. *Judicial Remedy*

One possibility, albeit an improbable one, is that the Supreme Court will agree to rehear the case. According to a petition for

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<sup>126</sup> INA § 203(h)(3).

<sup>127</sup> *Cuellar de Osorio*, 134 S. Ct. at 2216-17.

rehearing filed by the respondents in *Cuellar de Osorio* in July 2014, “[t]he plurality decision [...] was based on a mistake that cuts to the heart of its analysis.”<sup>128</sup> Specifically, the respondents argue that the plurality incorrectly assumed that “context compels” the conclusion that priority date retention and automatic conversion “work in tandem.”<sup>129</sup> The respondents also point to the plurality’s assumption that, “[a]s far as we know, immigration law nowhere else allows an alien to keep in his pocket a priority date untethered to any existing valid petition.”<sup>130</sup> However, the respondents’ merit brief cited a major statutory provision that allows exactly that kind of entitlement.<sup>131</sup> In particular, the Western Hemisphere Savings Clause allows an alien formerly categorized as a Western Hemisphere immigrant to retain her “previously established” priority date for use with “[a]ny petition” later filed on her behalf.<sup>132</sup>

Despite the merits of respondents’ argument, the petition for a rehearing is unlikely to succeed. Although the Supreme Court may reverse a decision in a case that it has already heard, it rarely does.<sup>133</sup>

### B. Legislative Remedy

A second option is that Congress may resolve the problem facing “aged out” derivatives by redrafting the CSPA statute. New legislation would make it clear that “aged out” derivative beneficiaries in all categories are entitled to priority date retention protections. In fact, the comprehensive immigration reform bill, S. 744, passed by the Senate already included a measure to clearly extend “age out” protections to all derivative beneficiaries. Unfortunately, it is unclear whether Congress will ultimately pass this piece of legislation, as S. 744 is currently stalled in the House

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<sup>128</sup> See Respondents’ Petition for Rehearing at 1-2, *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (U.S. 2014).

<sup>129</sup> *Id.*, citing *Cuellar de Osorio*, 134 S. Ct. at 2194.

<sup>130</sup> *Id.*, citing *Cuellar de Osorio*, 134 S. Ct. at 2212.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*, citing Immigrant and Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 9(b), 90 Stat. 2703, 2707 (emphasis added), cited and quoted in Resp. Br. 45; see also U.S. Department of State, 9 Foreign Affairs Manual, ch. 42.53 n.4.1 (a Western Hemisphere immigrant “retains” his priority date and “may use that priority date for the purpose of any preference petition subsequently filed in his or her behalf.”).

<sup>133</sup> Cases have only occasionally been reheard and their original decision reversed due to the Court’s error. *City of New York*, 147 U.S. 72 (1893) (reversed because incorrect rules for supervision of city inspectors had been applied); *City of New Orleans v. Warner*, 176 U.S. 385 (1899) (reversed because Court overlooked a central fact in the case); *Whitney v. California*, 274 U.S. 357 (1927) (originally dismissed for lack of jurisdiction since Court was previously unable to find records documenting case contained preserved federal question).

of Representatives. Moreover, the stalemate over comprehensive immigration reform may hamper efforts to make changes through piece-meal legislation.

### C. Administrative Remedy

If legislative reform fails, a remedy by the executive branch, either through the BIA or the Attorney General, may become the best hope for many “aged out” derivatives. The executive branch may remedy the problem in two possible ways: the BIA may reconsider its position and reverse its position in *Matter of Wang*, or the Attorney General may recognize that *Matter of Wang* is not desirable as a policy matter.

Fortunately, the Supreme Court provided for some latitude to allow the executive branch to reconsider its position. According to Justice Kagan’s plurality opinion, the Court has only held “that [INA §203](h)(3) permits – not that it requires – the Board’s decision to so distinguish among aged out beneficiaries.”<sup>134</sup> Where a statute is ambiguous, the Supreme Court has made clear that the agency may reconsider its interpretation even if the Court has already approved it. *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005). As the holding in *Cuellar de Osorio* rests on the assumption that the language of INA § 203(h)(3) is ambiguous, it appears that the BIA could still reverse its position in *Matter of Wang*.

The BIA has already reversed its position several times before. For example, in *Matter of Silva*,<sup>16</sup> I & N Dec. 26 (BIA 1976), the BIA reversed its earlier contrary holdings [*Matter of Francis* and *Matter of Arias-Uribe*, 13 I & N Dec. 696 (BIA 1971)] in order to allow INA § 212(c) relief for LPRs in deportation proceedings who had not previously departed and returned.

Alternatively, the Attorney General may disagree with *Matter of Wang* and act to broaden the interpretation of INA 203(h)(3). The INA indicates that “determination and ruling by the Attorney General with respect to all questions of law shall be controlling.” INA § 103(a)(1). In other words, Attorney General Eric H. Holder – on whose behalf the BIA ultimately acts – has the power to remedy the harshness of *Matter of Wang* and adopt a more humane approach for “aged out” derivative beneficiaries who have been forced to the back of the visa quota line. A broader interpretation of INA § 203(h)(3) would also be consistent with the Obama administration’s recent administrative reform measures, such as the provisional waiver rule and Deferred Action for Childhood Arrivals (“DACA”).<sup>135</sup>

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<sup>134</sup> *Cuellar de Osorio*, 134 S. Ct. at 2207.

<sup>135</sup> The provisional unlawful presence waiver process allows individuals, who only need a waiver of inadmissibility for unlawful presence, to apply for a

## V. CONCLUSION

In conclusion, the Supreme Court decision in *Cuellar de Osorio* signifies a tremendous setback for many “aged out” derivative beneficiaries, their families, and proponents of a more humane immigration system. However, in the wake of the Supreme Court ruling, there remain some prospects for a better outcome in the future, either through judicial, legislative, or administrative action.

A broader reading of INA § 203(h)(3) would uphold traditional notions of fairness and family unity, while offering hope to thousands of derivative child beneficiaries who, due to devastating immigration backlogs, lose their visa eligibility and face separation from their families when they turn twenty-one.<sup>136</sup> Absent comprehensive immigration reform, ameliorative measures by the executive branch may offer the best chance of hope for these over-21 derivative beneficiaries.

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waiver in the United States and before they depart for their immigrant visa interviews at a U.S. embassy or consulate abroad. See “Provisional Unlawful Presence Waiver,” USCIS website *available at* <http://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers>. Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period of time. See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, USCIS, *available at* <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>.

<sup>136</sup> See AILA Amicus Brief, *supra* note 7, at 11.

## VI. APPENDIX

### How CSPA Treats “Aged Out” Derivative Beneficiaries in Different Family-Based Categories in Various Jurisdictions

	Facts	Adjusted Age under CSPA	Automatic conversion and priority date retention under <i>Matter of Wang</i>	Practical consequences under <i>Matter of Wang</i> . When will visa be available?
<b>F-2A derivative → F-2B principal</b>	John, a native and citizen of Germany, is 19 years old when he becomes a derivative beneficiary on an F-2A visa petition (spouse or minor child of LPRs) filed by John’s father, an LPR, on behalf of his mother. The F-2A visa petition is filed in October 2010. The petition is approved in October 2011, and a visa number becomes available in February 2013, <sup>137</sup> when John is 22 years old.	22 - 1 = 21 (aged out)	John’s father will need to file a new petition on John’s behalf, since John is no longer a minor child and can no longer be a derivative. John will convert to the F-2B category and will be able to retain the priority date from the original October 2010 petition filed by John’s father on behalf of his mother.	Based on current backlogs, visa wait time estimate is 8 years, but John is credited with the 3 years he has already waited. Visa available in about 5 years, 2018, when John is 27 years old.
<b>F-4 derivative → F-2B principal</b>	Jane, a native and citizen of Germany, is 10 years old when she becomes the derivative beneficiary on her mother’s F-4 visa petition filed by her mother’s U.S. citizen sister, her aunt, in April 2001. The petition is approved in April 2002, and a visa number becomes available in February 2013, when Jane is 22 years old.	22 - 1 = 21 (aged out)	Jane is no longer considered a minor child, so she can’t adjust status at the same time as her mother as a derivative F-4 beneficiary. But since a visa is now available for her mother, once her mother is an LPR, she can file an F-2B petition (for unmarried adult sons/daughters of LPRs) on behalf of her daughter. Jane’s mother becomes an LPR and files an F-2B petition for her daughter in 2013. Under <i>Matter of Wang</i> , Jane will not be able to retain the earlier 2001 priority date but rather will be given a new 2013 priority date. <sup>138</sup>	Jane is not credited with the 12 years that she has already been waiting under the F-4 petition. Given the 8-year backlog in the F-2B category, a visa will not be available for Jane until 2021, when

<sup>137</sup> See U.S. Dept. of State Visa Bulletin, *supra* note 47 (describing the Visa petition process).

<sup>138</sup> Under *Matter of Wang*, Jane cannot avail herself of the automatic

				Jane is 30 years old. In the meantime, she must wait in Germany and will be unable to join her mother in the U.S.
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	<b>Second Circuit:</b>	<b>Fifth Circuit:</b>	<b>Ninth Circuit:</b>
<b>F-2A derivative → F-2B principal</b>	Same as under <i>Matter of Wang</i> . Visa converts to F-2B category and he retains original 2010 priority date.	Same as under <i>Matter of Wang</i> . Visa converts to F-2B category and he retains original 2010 priority date.	Same as under <i>Matter of Wang</i> . Visa converts to F-2B category and he retains original 2010 priority date.
<b>F-4 derivative → F-2B principal</b>	Same as under <i>Matter of Wang</i> . Automatic conversion not recognized for Jane.	Jane is credited with the 12 years that she has already been waiting and retains the 2001 priority date. A visa number is immediately available to her and she can join her mom in the U.S.	Jane is credited with the 12 years that she has already been waiting and retains the 2001 priority date. A visa number is immediately available to her and she can join her mom in the U.S.

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conversion and retention language under (h)(3) of CSPA because at the time she aged out, there was no “appropriate category” in which she could convert, since no visa category exists for adult nieces/nephews of U.S. citizens. See *Matter of Wang*, 25 I. & N. Dec at 38-39 (determining there not to be a appropriate conversion category).