April 2012

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Recommended Citation

Christina A. Pryor, *"Aging Out" of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act*, 80 Fordham L. Rev. 2199 (2012).
Available at: https://ir.lawnet.fordham.edu/flr/vol80/iss5/8

"AGING OUT" OF IMMIGRATION: ANALYZING FAMILY PREFERENCE VISA PETITIONS UNDER THE CHILD STATUS PROTECTION ACT

Christina A. Pryor*

In the late 1990s, extensive backlogs and delays by U.S. Citizenship and Immigration Services in processing family-based visa petitions caused many children to "age out" of immigration eligibility and face separation from their families. To rectify this problem, on August 6, 2002, Congress enacted the Child Status Protection Act (CSPA), which permits an applicant to retain classification as a "child" for immigration purposes, even if he or she has reached the age of twenty-one. The CSPA "freezes" the age of the applicant through a mathematical formula that allows the time that a visa petition was pending to be subtracted from his or her age.

In Matter of Wang*, the Board of Immigration Appeals (BIA) limited the applicability of section 203(h)(3) of the CSPA to certain family-based visa petitions. This Note focuses on the subsequent circuit split between the Second, Fifth, and Ninth Circuits over whether the BIA's decision in* Wang *should be given deference under the standard set forth in* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. *Ultimately, this Note endorses the Ninth Circuit's recent holding in* Cuellar de Osorio v. Mayorkas*. This Note contends that section 203(h)(3) is ambiguous under the first prong of* Chevron *analysis. Applying* Chevron*'s second prong, this Note argues that the BIA's construction of the statute represents a reasonable policy decision for the agency to make and thus merits deference.*

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INTRODUCTION

On May 5, 1998, Rosalina Cuellar de Osorio's mother, a U.S. citizen, filed an F3[1] family visa petition on her daughter's behalf.[2] Cuellar de Osorio's then-thirteen-year-old son was listed as a derivative beneficiary on the petition, which made him eligible to immigrate with his mother.[3] By the time Cuellar de Osorio's priority date became current[4] seven years later,

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    1. *See infra* Part I.B.1.
    2. Cuellar de Osorio v. Mayorkas, 656 F.3d 954, 957–58 (9th Cir. 2011).
    3. *See id.* at 958.
    4. Due to the limited number of visas, a "waiting list" system based on the date an individual's petition is properly filed—referred to as the priority date—is used to determine

on November 1, 2005, her son had "aged out" of derivative status.[5] At the age of twenty-one, he was no longer considered a child under American immigration law and could not accompany his mother to the United States.[6]

After Cuellar de Osorio became a legal permanent resident[7] (LPR) based on her mother's petition, she then filed a F2B visa petition (for adult sons or daughters of LPRs) listing her son as a beneficiary.[8] She requested retention of the original F3 petition's priority date for the new F2B petition, which would enable her son to immigrate years earlier than if he was assigned a more recent priority date based on the F2B petition's filing date.[9] When U.S. Citizenship and Immigration Services (USCIS) denied this request, Cuellar de Osorio and other similarly situated plaintiffs filed suit against the agency in the U.S. District Court for the Central District of California.[10]

Immigrants such as Rosalina Cuellar de Osorio have brought federal lawsuits alleging that USCIS has misinterpreted a provision of the Child Status Protection Act of 2002[11] (CSPA) by refusing to grant age-out protection for their alien[12] relatives. One immigration attorney has estimated that 20,000 immigrants in the United States face separation from their aged-out children.[13] Some immigrants, such as Cuellar de Osorio, have left their adult children in their home countries after years of waiting for visas because the children aged out of immigration eligibility.[14] In at

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each visa petitioner's place in line and to distribute the visas as they become available to the next person in line. *See Visa Availability & Priority Dates*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis (follow "Green Card (Permanent Residence)" hyperlink; then follow "Green Card Processes & Procedures" hyperlink) (last visited Mar. 23, 2012). A priority date "becomes current" when a visa becomes available to an immigrant, at which point he or she must submit a separate application in order to receive the visa. *See* Baruelo v. Comfort, No. 05 C 6659, 2006 WL 3883311, at *1 (N.D. Ill. Dec. 29, 2006). For a detailed account of this process, see *infra* Part I.B.

    5. *See Cuellar de Osorio*, 656 F.3d at 958.
    6. *See id.*
    7. An LPR is a person who has been granted lawful permanent residence in the United States. *See* Randall Monger & James Yankay, *U.S. Legal Permanent Residents: 2010*, U.S. DEP'T OF HOMELAND SECURITY 1 (2011), http://www.dhs.gov/xlibrary/assets/statistics/ publications/lpr_fr_2010.pdf. LPRs have the right to live and work anywhere in the United States, own property, attend public educational institutions, enlist in certain branches of the armed forces, and become U.S. citizens if they meet certain requirements. *See id.* LPRs are commonly known as "green card holders," a reference to the document a permanent resident carries to provide proof of his or her status. *See* RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW 189 (Stephanie L. Browning ed., 2006). This card is officially known as an I-551, and is no longer green. *Id.*
    8. *See Cuellar de Osorio*, 656 F.3d at 958.
    9. *Id.*
    10. *Id.*
    11. 8 U.S.C. § 1153(h)(3) (2006).
    12. While the term "alien" has a pejorative connotation, this Note uses it because virtually all federal government documents and legal opinions employ it to refer to foreign-born nationals who seek permanent residence in the United States. *See* ANNA O. LAW, THE IMMIGRATION BATTLE IN AMERICAN COURTS 1 n.1 (2010).
    13. *Immigrants Fight to Bring Adult Children to U.S.*, MSNBC (Aug. 25. 2009), http://www.msnbc.msn.com/id/32556526/ns/us_newslife/t/immigrants-fight-bring-adult-children-us/.
    14. *See, e.g.*, *Cuellar de Osorio*, 656 F.3d at 955–56.

least one case, however, the aged-out aliens are already within the United States and face deportation proceedings.[15]

The U.S. Courts of Appeals disagree as to whether the Board of Immigration Appeals's (BIA) interpretation of section 203(h)(3) of the CSPA was correct in *Matter of Wang*,[16] which prohibited the retention of visa priority dates for derivative beneficiaries of F2B, F3 and F4 visa petitions.[17] Each of the three circuit courts to consider this statutory issue thus far has based its analysis on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[18] evaluating whether deference to the BIA's decision is appropriate. The Second Circuit held that § 1153(h)(3), which codifies section 203(h)(3) of the CSPA, is unambiguous, and that no relief is available to aged-out aliens. The court reasoned that aged-out aliens cannot retain their priority date if the visas cannot be converted to an appropriate category.[19] In contrast, the Ninth Circuit concluded that the provision is ambiguous, and courts must therefore defer to the BIA's holding in *Wang*, which the court determined was a permissible construction of the statute.[20] Most recently, the Fifth Circuit considered the applicability of § 1153(h)(3), and agreed with the Second Circuit that the provision is unambiguous.[21] The court held, however, that the statute allows all beneficiaries and derivative beneficiaries of family-based visa petitions to change petitioners and obtain age-out protection under the CSPA.[22]

This Note analyzes the recent treatment of § 1153(h)(3) in the circuit courts following the BIA's decision in *Wang*. It focuses on whether F2B, F3, and F4 petitions are entitled to age-out protection under the CSPA. This Note contends that courts should defer to the BIA's interpretation of § 1153(h)(3) under *Chevron*. At *Chevron* Step One,[23] while the statute's plain language is clear, the statutory provision at issue is ambiguous because its operation is not workable. Therefore, it is necessary to proceed to *Chevron* Step Two. Because the BIA's decision in *Wang* is based on a permissible construction of the statute and is "a reasonable policy choice for the agency to make,"[24] the agency's interpretation is entitled to deference.

Part I of this Note explains the complicated framework of the immigration visa system, examines the enactment of the CSPA, and details the scope of judicial review of agency statutory interpretations, focusing on administrative deference under *Chevron*. Part II describes the BIA's

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15. *See* Khalid v. Holder, 655 F.3d 363, 365–66 (5th Cir. 2011).

16. 25 I. & N. Dec. 28 (B.I.A. 2009).

17. *See infra* Part II.B. While the BIA's decision expressly discusses F4 visa petitions, in practice it excludes F2B and F3 petitions as well. *See infra* notes 180–84 and accompanying text.

18. 467 U.S. 837 (1984).

19. Li v. Renaud, 654 F.3d 376, 382–85 (2d Cir. 2011).

20. Cuellar de Osorio v. Mayorkas, 656 F.3d 954, 965–66 (9th Cir. 2011).

21. Khalid v. Holder, 655 F.3d 363, 375 (5th Cir. 2011).

22. *Id.* at 374–75.

23. In *Chevron*, the Supreme Court established a two-step test to determine whether a court should defer to an agency's interpretation of a statute it administers. *Chevron*, 467 U.S. at 842–43; *see infra* Part I.D.2.

24. *Chevron*, 467 U.S. at 845.

position on the CSPA "age out" problem in *Wang*, before considering the three-way circuit split on the proper application of *Chevron* Step One analysis.   Part III first argues that the Ninth Circuit was correct in determining that the statutory language of the CSPA is ambiguous in practice.   It concludes that the BIA's decision to limit § 1153(h)(3) to derivative beneficiaries of F2A petitions is reasonable and should therefore be deferred to by courts.

I. THE "AGE OUT" PROBLEM IN PRACTICE

This part addresses the complex American immigration system and the relevance of the Child Status Protection Act to reserving minor aliens' places in the visa line.   First, this part provides an overview of the actors within the U.S. visa process and describes the mechanics of the distribution of family-preference visas in particular.   It then explores the CSPA, considering the development of the bill, its legislative history, and the text in detail.   Finally, this part explains the theory underlying judicial review of agency statutory interpretations, in particular the concept of *Chevron* deference.

A. An Introduction to Immigration: The Immigration and Nationality Act and U.S. Citizenship and Immigration Services

Until the nineteenth century, state and local laws were the principal sources of U.S. immigration regulation.[25]   Federal immigration laws took a piecemeal approach until 1952, when Congress enacted the Immigration and Nationality Act,[26] which combined all prior immigration laws into one comprehensive statute.[27]   Although the INA has subsequently been amended many times, it remains the foundation of immigration law.[28]

Congress has broadly delegated the power to enforce federal immigration provisions.[29]   This administrative authority has been transferred among numerous agencies over the past century.   The Treasury Department

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25. *See* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW & POLICY 2 (5th ed. 2009); HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 21–26 (2006) (describing the shift from state to federal immigration regulation); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1729 (2010) (explaining how federal immigration laws only began to displace state laws following the Civil War).

26. 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 (2006)).

27. *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION & CITIZENSHIP: PROCESS & POLICY 173 (6th ed. 2008).

28. *Id.* at 176–81 (describing extensive reforms in 1965 and 1976, new provisions on political asylum and refugees in 1980, the Immigration Reform and Control Act of 1986, the Immigration Act of 1990, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the USA Patriot Act, the Homeland Security Act, and the Real ID Act); CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 2.03(1) (2004) ("[The INA] is still the basic statute dealing with immigration and nationality. The amendments have been fitted into the structure of the parent statute . . . .").

29. *See* BOSWELL, *supra* note 7, at 1.

regulated federal immigration laws until 1903, at which point these responsibilities shifted to the Department of Commerce and Labor.[30] The Department of Labor maintained control of immigration functions until 1940, when the Immigration and Naturalization Service (INS) moved to the Department of Justice.[31] Following the terrorist attacks of September 11, 2001, Congress passed the Homeland Security Act,[32] which consolidated federal agencies with various national-security-related functions.[33] This legislation transferred the former responsibilities of the INS into three immigration-related bureaus: U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP).[34] Although the Act transferred the enforcement and service entities of the INS to the Department of Homeland Security (DHS), the Department of Justice retained the Executive Office for Immigration Review (EOIR), which focuses on adjudication.[35]

USCIS is responsible for the determination of immigration benefits such as naturalization, overseas adoptions, work-related visas, and the immigration of family members.[36] This Note focuses on USCIS's power to process Form I-130 (Petition for Alien Relative) for immigrants who are outside of the United States, as well as Form I-485 (Adjustment of Status), which must accompany Form I-130, for those aliens who are already in the country.[37]

B. The Visa Preference System

1. Immigration Categories and Quotas

To enter and remain in the United States lawfully, an alien must possess a valid visa conferring immigrant or non-immigrant status.[38] Aliens seeking permanent residence in the United States fall into one of four primary categories: (1) immigrants who have certain relatives who are U.S. citizens or LPRs (family-sponsored immigrants); (2) immigrants with desirable job skills and certain other qualifications (employment-based immigrants); (3) immigrants from countries with historically low immigration rates to the United States (diversity immigrants); and (4) those

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30. *See* ALEINKOFF ET AL., *supra* note 27, at 268–69.

31. *See id.* at 269.

32. Pub. L. No. 107-296, 116 Stat. 2135 (2002).

33. ALEINKOFF ET AL., *supra* note 27, at 269.

34. *See id.* at 269–75. This Note uses "USCIS" to refer to both the INS prior to March 1, 2003, when the Homeland Security Act took effect, and the current USCIS within DHS.

35. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 5.

36. *See What We Do*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/ portal/site/uscis (follow "About Us" hyperlink; then follow "What We Do" hyperlink) (last visited Mar. 23, 2012).

37. *See Green Card-Based Forms*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis (follow "Forms" hyperlink; then follow "Green Card-Based Forms" hyperlink) (last visited Mar. 23, 2012).

38. 8 U.S.C. § 1182(a)(7)(A)–(B) (2006).

with refugee or asylee status.[39] The family-sponsored immigration process allows a U.S. citizen or LPR to file a Form I-130 petition on behalf of an alien relative.[40] U.S. citizens may sponsor their immediate relatives,[41] who are defined as spouses, parents, or unmarried children under the age of twenty-one.[42] Such immediate relatives are exempt from the numeric limits that apply to other permanent resident visas.[43] For other qualifying relatives of U.S. citizens, however, such as adult or married children, and for all qualifying relatives of LPRs, the number of annual immigrant visas is capped.[44]

The Immigration Act of 1990 specifies an annual limit of 416,000 to 675,000 visas in the three preference categories: family-sponsored, employment-based, and diversity.[45] Each of these three categories has its own interior cap, and some categories are subject to per-country limits.[46] Apart from immediate relatives of citizens, there are four family-sponsored preference categories that must receive at least 226,000 immigrant visas each year within the overall family-sponsored cap.[47] The INA establishes the following family-based preference categories:

First Preference: unmarried adult sons and daughters of U.S. citizens and their children (23,400 visas per year);

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 plus any visas above the 226,000 minimum for the family-sponsored preferences that are unused by immediate relatives of citizens; at least seventy-seven percent of the second preference category must be allocated to F2A visas);

Third Preference: married sons and daughters of U.S. citizens (23,400);

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39. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 253–54.

40. *See* § 1153(a).

41. §§ 1153(a), 1154(a)(1)(A)(i).

42. A "child" is defined under the INA as an unmarried person under the age of twenty-one. After a child turns twenty-one, he or she is then considered a "son" or "daughter." § 1101(b).

43. § 1151(b)(2)(A)(i). The admittance of immediate relatives has increased significantly in recent decades, from nearly 80,000 in 1970 to over 480,000 in 2008. DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW & PROCEDURE IN A NUTSHELL 143 (6th ed. 2011).

44. § 1153(a).

45. *See* § 1153(a), (c).

46. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 253.

47. § 1151(c). In order to calculate the quota for the family-sponsored preference categories, the number of immediate relatives who immigrated in the previous fiscal year is subtracted from the total allocation of 480,000. The number of unused employment-based visas is then added to that amount. *Id.* Although this quota must be at least 226,000—due to high levels of immigration by immediate relatives—it is unusual for it to surpass the statutory minimum. WEISSBRODT & DANIELSON, *supra* note 43, at 153.

Fourth Preference: brothers and sisters of adult U.S. citizens (65,000).[48]

These numbers represent the worldwide ceilings for the family-sponsored preference program; however, this category is also subject to per-country limits.[49] For purposes of those limits, an immigrant is "charged" to the country in which he or she was born, with some exceptions.[50] In general, the combined numbers of family-sponsored and employment-based immigrants from a single country in each fiscal year may not exceed 7 percent of the combined worldwide limits for family-sponsored and employment-based immigrants.[51] Immediate relatives and others exempt from the worldwide limitations, as well as F2A immigrants, are also exempt from per-country limitations.[52]

Finally, the INA provides for the immigration of spouses and children who are either "accompanying" or "following to join" the primary immigrant under the same visa preference category.[53] These immigrants, the spouses and children of primary beneficiaries, are referred to as "derivative beneficiaries."[54] Derivative beneficiaries are entitled to the same place in the visa line as the primary beneficiary, without the need to file a separate visa petition.[55]

2. Moving Through the Visa Queue: A Step-by-Step Checklist for the Family-Sponsored Immigrant

The family visa preference process takes place in three steps. First, the immigrant enters the visa line after a petition is submitted on her behalf. If the petition is approved, the next step in the process is to determine where the immigrant may apply for the visa. Finally, the petitioner is issued a visa and exits the line if she is admitted to the United States.

The first step commences when the petitioner, a U.S. citizen or LPR, files a Form I-130 Petition for Alien Relative with USCIS on behalf of the

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48. *See* § 1153(a)(1)–(4). Grandparents, aunts, uncles, in-laws, and cousins cannot sponsor relatives for immigration. *Family-Based Immigrant Visas*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., http://travel.state.gov/visa/immigrants/types/types_1306.html (last visited Mar. 23, 2012). There are further limits on which family members LPRs may petition for—married sons and daughters, parents, and siblings are all excluded. *See* § 1153(a) (listing relationships recognized under the INA).

49. LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 254.

50. *Id.*; § 1152(a)(2).

51. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 254.

52. *See id.*

53. *See* Cuellar de Osorio v. Mayorkas, 656 F.3d 954, 957 (9th Cir. 2011); *see also* § 1153(d). A person is considered to be "accompanying" if he or she immigrates within six months of the primary beneficiary's immigration; otherwise, the individual is considered "following to join." 22 C.F.R. § 40.1(a)(1) (2011). Immigration-related statutes are found at 8 U.S.C. Regulations administering the functions of USCIS are found at 8 C.F.R.

54. 8 U.S.C. § 1153(d). There are no derivative beneficiaries for immediate relatives. *See* 8 C.F.R. § 204.2(a)(4) (2011).

55. 8 C.F.R. § 204.2(a)(4). The total number of visas issued for that family count against the annual quota. BOSWELL, *supra* note 7, at 129.

beneficiary.[56] The petitioner submits proof of her immigration status and requests that USCIS classify the beneficiary within one of the three immigrant relative categories recognized under the INA.[57] Once the Form I-130 petition is prepared, the papers are mailed to a USCIS service center that has jurisdiction over the place of residence of the petitioner.[58] USCIS then investigates the merits of the petition and determines the validity of the alleged familial relationship.[59]

If the petition is approved and the beneficiary is an immediate relative of a U.S. citizen, she may move to the next step in the process and be granted a visa.[60] Otherwise, if the I-130 petition establishes one of qualifying preference relationships, the beneficiary is granted a spot in line in the appropriate family-preference category. The beneficiary's place in line is determined by the "priority date," which is the date the I-130 petition was filed on her behalf.[61] Derivative beneficiaries are given the same priority date as the primary beneficiary.[62]

Because demand for family preference visas continuously surpasses the statutory ceiling in all categories, there are approximately 4.6 million pending visa applications.[63] The rate at which the line moves for each immigrant is contingent on numerous factors, including the visa category, the beneficiary's country of citizenship, and the number of immigrants with earlier priority dates.[64] Beneficiaries may wait a number of years before their priority dates become current and they may apply for visas.[65] For example, visas are currently available for Filipino F4 beneficiaries with priority dates before October 8, 1988—in other words, Filipino brothers and sisters of U.S. citizens who have been waiting for over twenty-three years.[66]

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56. *See I-130, Petition for Alien Relative*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis (follow "Forms" hyperlink; then follow "Petition for Alien Relative" hyperlink) (last visited Mar. 23, 2012).

57. *See* 8 U.S.C. §§ 1153(a), 1154(a)(1)(A)(i), (a)(1)(B)(i)(I); 8 C.F.R. § 204.1(a)(1).

58. 8 C.F.R. § 316.3. The statute states that the petition is filed with the "Attorney General." 8 U.S.C. § 1154(a)(1)(A)(i). However, the Homeland Security Act of 2002, Pub. L. No. 107-296, § 451(b), 116 Stat. 2135, 2196, transferred this authority to USCIS.

59. *See* 8 U.S.C. § 1154(b).

60. § 1204.

61. 8 C.F.R. § 204.1(c) ("The filing date of a petition shall be the date it is properly filed under paragraph (d) of this section and shall constitute the priority date.").

62. 8 U.S.C. § 1153(d).

63. *See Annual Report of Immigrant Visa Applicants in the Family-Sponsored and Employment-Based Preferences Registered at the National Visa Center as of November 1, 2011*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS 2 (Nov. 1, 2011), *available at* http://travel.state.gov/pdf/WaitingListItem.pdf.

64. *See* 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, 158 (2010).

65. *See* Ogbolumani v. U.S. Citizenship & Immigration Servs., 523 F. Supp. 2d 864, 869–70 (N.D. Ill. 2007) ("[D]ue to oversubscriptions in that visa preference category, visa numbers might not be immediately available for the alien relative . . . .").

66. *See Visa Bulletin for January 2012*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS 2 (Dec. 8, 2011), *available at* http://www.travel.state.gov/pdf/visabulletin/visabulletin_Jan2012.pdf.

The State Department is responsible for administering the distribution of visas under the preference quota system.[67] The State Department issues a Visa Bulletin each month, which reports cut-off dates that are currently being processed for each family preference category and country.[68] If there is too much demand, the category or foreign country with excessive demand is then designated "oversubscribed."[69] The cut-off date for an oversubscribed category is the priority date of the first qualified visa applicant who fell outside of the numerical limits.[70] Only a beneficiary with an approved visa petition with a priority date earlier than the cutoff date for her particular category and country is eligible for a visa number.[71]

Once the beneficiary's priority date has become current, the next step is to determine where she can apply for the visa.[72] In general, there are two paths to LPR status depending on whether the applicant is living in the United States or another country at the time of application.[73] If the beneficiary is in the United States and is eligible to adjust her status to that of an LPR, she may apply by submitting a Form I-485.[74] At the time of this filing, there must be a visa number "immediately available" to the immigrant under the applicable quota availability and preference category.[75] To qualify for adjustment of status, an applicant must have entered the United States lawfully, maintained lawful non-immigrant status, and refrained from engaging in unauthorized employment.[76] Applicants for adjustment of status become LPRs of the United States and receive green cards when their applications are approved.[77] USCIS has sole discretion to grant or deny an application for adjustment of status.[78]

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67. *See* 8 U.S.C. § 1153(g).

68. *See, e.g.*, *Visa Bulletin for January 2012*, *supra* note 66, at 1. The left side of the visa bulletin shows the preference category, and the top of the bulletin indicates the country in which the prospective immigrant is from. Only four individual countries are listed: China (mainland born), India, Mexico, and the Philippines. If the prospective immigrant is not from one of those four categories, she falls under the first column, which includes immigrants from "all chargeability areas except those listed." This allocation of visas by nationality is called "foreign state chargeability." *See* 8 U.S.C. § 1152(b); 22 C.F.R. § 42.12 (2011). As a general rule, the term "chargeability" refers to the country where the alien was born, and not his current nationality. *See* BOSWELL, *supra* note 7, at 129.

69. *Visa Bulletin for January 2012*, *supra* note 66, at 1. In order to prevent an oversubscribed country's immigration quota from being satisfied by immigrants in one preference category, the State Department divides that nation's visa numbers by category so that they are in line with worldwide levels of immigration in that particular category. WEISSBRODT & DANIELSON, *supra* note 43, at 151–52.

70. *See Visa Bulletin for January 2012*, *supra* note 66, at 1.

71. *Id.*

72. *See Visa Availability and Priority Dates*, *supra* note 4.

73. Ogbolumani v. U.S. Citizenship & Immigration Servs., 523 F. Supp. 2d 864, 868–71 (N.D. Ill. 2007).

74. 8 U.S.C. § 1255 (2006); 8 C.F.R. § 204.2(a)(iii) (2011); *id.* § 245.1.

75. 8 C.F.R. § 245.2(a)(2).

76. *See* 8 U.S.C. § 1255; BOSWELL, *supra* note 7, at 126. For a detailed analysis of adjustment of status, see generally Lauren E. Sasser, Note, *Waiting in Immigration Limbo: The Federal Court Split over Suits to Compel Action on Stalled Adjustment of Status Applications*, 76 FORDHAM L. REV. 2511 (2008).

77. *See* 8 C.F.R. § 245.2(a)(5)(ii).

78. 8 U.S.C. § 1255.

A person who does not qualify for adjustment of status in the United States must apply for an immigrant visa at the U.S. consulate in her country of origin, regardless of whether she resides in the United States.[79] Once she is issued a visa, she may enter the United States and potentially become an LPR if admitted at a port of entry.[80]

Finally, the beneficiary must establish that she is not inadmissible in order to receive a visa.[81] This applies to beneficiaries who seek adjustment of status as well as those who are outside of the United States.[82] When an application is complete, USCIS makes a decision whether to grant LPR status, and applicants receive notifications of these decisions by mail.[83] A successful immigrant visa applicant becomes an LPR of the United States.[84]

Immigration eligibility is determined on the date of admission to the United States or the date of adjudication of an application to adjust status.[85] A derivative beneficiary may lose her "following to join" status if the required relationship with the primary beneficiary is not preserved.[86] Thus, because the classification of the child of a primary beneficiary is dependent on his or her legal status as a "child," approval of the parent's visa petition does not guarantee that the derivative beneficiary will ultimately be permitted to immigrate to the United States.

3. Now What? Petition Denial, BIA Review, and the Road to Federal Court

If the initial I-130 petition is denied by USCIS, the petitioner may file an appeal to the Board of Immigration Appeals.[87] The BIA is the highest

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79. § 1201(a)(1); *see also* Ogbolumani v. U.S. Citizenship & Immigration Servs., 523 F. Supp. 2d 864, 868–69 (N.D. Ill. 2007). This path is also known as consular processing. *See Consular Processing*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis (follow "Green Card" hyperlink; then follow "Consular Processing" hyperlink) (last visited Mar. 23, 2012).

80. § 1255. After a visa is granted, a foreign national may travel to a port of entry and request permission to enter the United States; however, a visa does not guarantee entry. *See Family-Based Immigrant Visas*, *supra* note 48.

81. 8 U.S.C. § 1255(a)(2). Admission is defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." § 1101(a)(13)(A). Grounds for inadmissibility under § 1182 include immigration violations, national security grounds, criminal grounds, public health-related grounds, and others. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 420.

82. *See* 8 U.S.C. § 1182(a)(2).

83. 8 C.F.R. § 103.2(b)(19) (2011).

84. 8 U.S.C. § 1255(a).

85. §§ 1182, 1255.

86. *See* 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 40.1 N7.1 (2010), *available at* http://www.state.gov/documents/organization/86920.pdf. Examples of failures to maintain this relationship include the death of a parent, the parent's loss of status, or the derivative beneficiary's marrying or aging out. *Id.*; *see also* Ward v. Att'y Gen., 608 F.3d 1198, 1201–02 (11th Cir. 2010) (upholding the loss of derivative eligibility following the death of primary beneficiary parent); Khan, 14 I. & N. Dec. 122, 123–24 (B.I.A. 1972) (denying eligibility for derivative beneficiary wife and child due to death of primary beneficiary).

87. *See* Sano, 19 I. & N. Dec. 299 (B.I.A. 1985).

administrative body for decisions on immigration law.[88] The beneficiary or derivative beneficiary cannot apply directly for review of his or her case.[89] There is also no form of administrative appeal if USCIS denies an alien's Form I-485.[90] A beneficiary or derivative beneficiary who has filed to adjust her status may only raise the issue before an immigration judge if DHS initiates removal proceedings.[91] It is entirely within the discretion of DHS to commence these proceedings.[92]

The BIA hears appeals from immigration judges' decisions in removal proceedings as well as appeals from certain USCIS decisions.[93] The Board may then issue a final administrative decision that is binding on all immigration judges, DHS officers, and DHS employees involved in that particular case.[94] If the opinion is designated as precedential, it is binding in similar cases as well.[95]

There are two relevant avenues of review in the federal courts that immigrants have used to contest the BIA's decision in *Matter of Wang*, depending on whether the aged-out alien is inside or outside of the country. First, aliens who are already present in the United States and who have been ordered removed by the BIA have submitted petitions for judicial review of the removal orders in the circuit in which the removal hearing was held.[96] Second, parents who seek to be reunited with their aged-out children who have been left behind in their home country have filed suit in federal district court, alleging that the BIA has misinterpreted a provision of the Child Status Protection Act.[97] These cases have then been appealed to the circuit courts.[98]

C. The Child Status Protection Act

The CSPA may be described as tolling a statute of limitations, as it "freezes" a child's age when a visa petition is filed so that he or she does

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88. *Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/biainfo.htm (last visited Mar. 23, 2012). The U.S. Attorney General has delegated to the BIA the power to exercise its "independent judgment and discretion in considering and determining the cases coming before [it]." 8 C.F.R. § 1003.1(d)(1)(ii).

89. *See Sano*, 19 I. & N. Dec. at 299.

90. Taing v. Chertoff, 526 F. Supp. 2d 177, 180 (D. Mass. 2007); 8 C.F.R. § 245.2(a)(5)(ii).

91. For an in-depth discussion of removal (previously known as deportation) proceedings, see 8 C.F.R. § 240.

92. *See, e.g.*, Cortez-Felipe v. INS, 245 F.3d 1054, 1057 (9th Cir. 2001) ("The Attorney General has discretion regarding when and whether to initiate deportation proceedings.").

93. LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 4.

94. 8 C.F.R. § 1003.1(g).

95. *Id.*

96. *See* Khalid v. Holder, 655 F.3d 363, 366 (5th Cir. 2011). Section 242 of the INA allows jurisdiction over these proceedings. 8 U.S.C. § 1252(b)(2).

97. *See, e.g.*, Cuellar de Osorio v. Mayorkas, 656 F.3d 954, 958 (9th Cir. 2011). The district courts have subject matter jurisdiction to review Form I-130 petitions pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 702 (2006).

98. *See* 28 U.S.C. § 1291 (2006).

not lose his or her immigration eligibility.[99] Those challenging the BIA's interpretation of 8 U.S.C. § 1153(h)(3) have argued that the statutory provision not only freezes the ages of beneficiaries and derivative beneficiaries within the F2A category, but should also be extended to F2B, F3, and F4 petitions. In order to fully comprehend the interpretive question confronted by the courts, it is essential to look at the statute's enactment, legislative history, and text.

1. Enactment of the CSPA

On August 6, 2002, Congress enacted the CSPA[100] in order to preserve the immigration eligibility of children who have "aged out" of their derivative status.[101] Subsection (h)[102] of the CSPA amended 8 U.S.C. § 1153 by permitting children with timely filed family-based, employment-based, and diversity visas submitted before they turned twenty-one to

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

100. Pub. L. No. 107-208, 116 Stat. 927 (2002).

101. *See* H.R. REP. NO. 107-45, at 2–3 (2001), *reprinted in* 2002 U.S.C.C.A.N. 640, 641–642.

102. The specific language 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.

    (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.

8 U.S.C. § 1153(h).

remain eligible for the original visa until it became available.[103] In the House Report accompanying the first version of the CSPA, the Committee on the Judiciary stated that the bill's purpose was to modify the INA "by providing that the alien's status as a child is determined as of the date on which the petition to classify the alien as an immediate relative is filed."[104] The CSPA underwent subsequent changes as the bill was referred to the Senate, incorporating retention of child status for children of permanent residents, family and employer-sponsored immigrants, diversity lottery winners, and refugees and asylees.[105]

2. Legislative Intent: Administrative Delay, Visa Demand, and Displacement

One undisputed reason why Congress enacted the CSPA was because it recognized enormous backlogs in processing and adjudication of visa petitions and applications.[106] These delays resulted in the aging out of child beneficiaries of visa petitions, who would often turn twenty-one before their applications were processed.[107] Because these applicants had aged out of visa eligibility, they were forced to shift into a lower preference category and were placed at the bottom of the long visa waiting list.[108] The legislative history emphasized these administrative delays.[109]

Members of the House of Representatives and the Senate expressed concern that administrative delay and the ensuing age-out problem were separating families.[110] Senator Diane Feinstein, who introduced the bill in

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103. *See id.*

104. H.R. REP. NO. 107-45, at 1–2.

105. *See* 147 CONG. REC. 9954 (2001).

106. *See, e.g.*, 147 CONG. REC. 5239 (statement of Sen. Feinstein) (noting that the INS had faced a dramatic increase in the number of visa applications filed, and when combined with slow service and filing systems, current waits for adjudications ranged from three to five years).

107. *See* Bolvito v. Mukasey, 527 F.3d 428, 436 (5th Cir. 2008) ("[A] qualifying familial relationship that is terminated due to . . . 'aging out' . . . no longer entitles the derivative [beneficiary] to accompanying or following to join benefits.") (quoting 3 CHARLES GORDON ET AL., IMMIGRATION LAW & PROCEDURE § 37.05[2][a] (2004)).

108. *See id.* at 435–36; Cardoso v. Reno, 216 F.3d 512 (5th Cir. 2000) (prior to the enactment of the CSPA, alien aged out of eligibility while application to adjust status was pending adjudication). This also applied to derivative beneficiaries who married while their visa petitions were pending. *See* BOSWELL, *supra* note 7, at 136. The aging-out problem is at issue in the current litigation, however, and thus is the focus of this Note.

109. H.R. REP. NO. 107-45, at 1–2; 147 CONG. REC. 9955 (2001) (statement of Rep. Jackson-Lee) ("[S]ome sons and daughter 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."); *id.* at 9954 (statement of Rep. Sensbrenner) ("If 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.* at 9955 (statement of Rep. Smith) ("Children of citizens are penalized because it takes the INS an unacceptable length of time—often years—to process adjustment of status applications.").

110. *See* 147 CONG. REC. 9955 (statement of Rep. Jackson-Lee) ("We believe that this will reunite families."); 148 CONG. REC. 13,744 (2002) (statement of Rep. Sensbrenner) ("[The CSPA] facilitates and hastens the reuniting of legal immigrants' families.").

the Senate, observed that emigrating parents whose children's applications had been pending for years had to decide whether to come to the United States and leave a child behind, or "remain in their country of origin and lose out on their American dream in the United States."[111] She explained that LPRs who already lived in the United States faced a similar separation dilemma. They had to choose whether to send their child who had aged out of visa eligibility back to his or her country of origin, or to have their child remain in the United States in violation of U.S. immigration laws, and therefore vulnerable to removal.[112] Representative Sheila Jackson-Lee, the Act's co-sponsor, noted that the CSPA was intended to solve "the age out problem without displacing others who have been waiting patiently in other visa categories."[113]

Unlike the members of the House of Representatives, Senator Feinstein did acknowledge delays caused by visa demand as well as agency processing time. She observed that a child might be unable to immigrate "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."[114] Following the Senate amendment, there was additional discussion in the House about USCIS processing delays before the bill was passed.[115]

3. The CSPA Formula in Practice

Under the CSPA, the calculation for determining the age of the child beneficiary is done via a subtraction formula. The child's age freezes as of the date that the visa became available for the relevant petition, reduced by the number of days that the petition was pending, but only if the child applied for LPR status within one year of the date that the visa became available.[116] If the resulting number is less than twenty-one years, the person may proceed as if he or she were still a "child" under the INA.[117]

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111. 147 CONG. REC. 5239 (statement of Sen. Feinstein).

112. *Id.*

113. *Id.* at 9955 (statement of Rep. Jackson-Lee).

114. *Id.* at 5239 (statement of Sen. Feinstein).

115. *See* 148 CONG. REC. 13,743 (statement of Rep. Sensbrenner) ("The Senate bill addresses three other situations where alien children lose immigration benefits by 'aging out' as a result of INS processing delays."); *id.* at 13,744 (statement of Rep. Jackson-Lee) ("The Senate expanded this bill to cover other situations where alien children lose immigration benefits by aging out as a result of INS processing delays."); *id.* at 13,745 (statement of Rep. Gekas) ("The bill was modified in the Senate to provide relief to other children who lose out when the INS takes too long to process their adjustment of status applications . . . .").

116. 8 U.S.C. § 1153(h)(1)–(2) (2006). For example, suppose a U.S. citizen filed an I-130 for an alien relative on November 1, 2003. USCIS approved this petition on November 14, 2003, and a visa became available on November 14, 2011. The application would be "pending" with the agency for 14 days. Thus, to determine whether the beneficiary or derivative beneficiary was still a "child" by the terms of the CSPA would require subtracting 14 days from his age on November 14, 2011.

117. *See* Howard W. Gordon & Tina R. Niedzwiecki, *CSPA: Leaving No Child Behind?*, *in* 1 IMMIGRATION & NATIONALITY LAW HANDBOOK 289, 291 (2003–2004 ed.). A Department of State cable issued in 2003 includes a sample worksheet to calculate a child's

This formula differs from other sections of the CSPA, which freeze the age of minors at the petition's filing date.[118]

Subsection (h)(1) of the CSPA provides a formula for determining the age of a family-preference petition's beneficiary, referencing subsections (a)(2)(A) and (d) of § 1153, both of which concern children.[119] This formula reduces the beneficiary's biological age by "the number of days in the period during which the applicable petition" was pending[120]—that is, the number of days between when the beneficiary filed the petition with USCIS and when the agency approved it. In this way, subsection (h)(1) "ensures that an alien does not lose 'child' status solely because of administrative delays in the processing of an otherwise valid petition."[121] It does not address the more extensive delays that often occur between when a petition is approved by USCIS and when a visa becomes available.[122]

Subsection (h)(2), "Petitions described," highlights two sets of visa petitions to which subsection (h)(1)'s formula pertains. Subsection (2)(A) refers to F2A petitions for children of LPRs,[123] while subsection (2)(B) refers to any family-based, employment-based, or diversity-based visa petition for which a child is a derivative beneficiary.[124]

Subsection (h)(3), "Retention of priority date," refers to aliens who are twenty-one or over even after subsection (h)(1)'s subtraction formula is calculated. In this situation, "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."[125] This is notably distinct from the relief provided by subsection (h)(1), which permits an aged-out alien to retain visa eligibility as a "child" using the original petition filed on their behalf.[126] In contrast, relief under paragraph (3) allows the alien to move into a different visa category by automatically converting her petition, even as an adult.[127] She is also entitled to priority date retention for her original petition.[128]

In practice, the CSPA formula prevents a minor beneficiary from winding up at the end of the extensive visa waiting list, even after she has

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age under the CSPA. *See Child Status Protection Act: ALDAC 2*, U.S. Dep't of State (Jan. 17, 2003), http://travel.state.gov/visa/laws/telegrams/telegrams_1369.html.

118. 8 U.S.C. § 1151(f) (freezing the age of a child of a U.S. citizen to the filing date of the petition); § 1158(b)(3)(B) (preventing children listed on asylum petitions from aging out of derivative status).

119. § 1153(h)(1). Subsection (a)(2)(A) makes visas available to "children of an alien lawfully admitted for permanent residence." § 1152(a)(2)(A). Subsection (d) allows visas to be issued to "child[ren] . . . if accompanying or following to join, the . . . parent." § 1152(d).

120. § 1153(h)(1).

121. Cuellar de Osorio v. Mayorkas, 656 F.3d 954, 960 (9th Cir. 2011).

122. *Id*. In the example from note 116, *supra*, the beneficiary or derivative beneficiary's age would not be reduced to reflect the seven-year wait between November 15, 2003 and November 15, 2011.

123. § 1153(h)(2)(A).

124. § 1153(h)(2)(B).

125. § 1153(h)(3).

126*. § 1153(h)(1).

127. § 1153(h)(3).

128*. See id.

turned twenty-one. The beneficiary does not have to file a new petition, but rather, may retain her original priority date while moving into the queue for a lower preference category. The CSPA thus remedies "the often harsh and arbitrary effects of the age-out provisions under the previously existing statute."[129]

D. Judicial Review of Agency Action

The specific contention that the circuit courts have addressed is which family-preference categories § 1153(h)(3)'s priority date retention provision includes. The BIA, which administers the CSPA, has determined that this provision provides age-out protection only to F2A petitions.[130] If the agency's interpretation is entitled to deference, then the petitioners in the cases at issue would have no remedy in the courts. It is therefore imperative to provide an overview of the legal theory underlying judicial deference to agency action.

1. The Administrative Procedure Act

The Administrative Procedure Act[131] (APA) describes what procedures a court must employ in its review of agency decisions. The court's review follows different procedures depending on whether the questions are ones of law or fact.[132] In the relevant cases, the facts are not disputed by the parties. Rather, the statutory issue the courts have confronted is purely a question of law: the appropriate interpretation of 8 U.S.C. § 1153(h)(3). Under the APA, a final agency action can be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[133] A decision is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[134]

2. *Chevron* Deference and Its Scope

The seminal case on the scope of judicial review of agency statutory construction is the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[135] In *Chevron*, the Court articulated two inquiries that a court should perform in evaluating an

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129. Padash v. INS, 358 F.3d 1161, 1173 (9th Cir. 2004).
130. *See infra* notes 178–82 and accompanying text.
131. 5 U.S.C. §§ 551–559, 701–706 (2006).
132. *See* 5 U.S.C. § 706(2)(B)–(C) (describing questions of law); 5 U.S.C. § 706(2)(E)–(F) (describing questions of fact).
133. § 706(2)(A).
134. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
135. 467 U.S. 837 (1984).

agency's interpretation of a statute that it administers.[136] First, the court must ask whether "the statute is silent or ambiguous with respect to the specific issue."[137] If the statute addresses the issue and "the intent of Congress is clear," the court and the agency must give effect to that legislative intent.[138] But if Congress "has not directly addressed the precise question at issue," and consequently the statute is silent or ambiguous, then the court must proceed to the second step of analysis.[139] At that point, the court must give some deference to the agency's interpretation of the statute.[140] The critical inquiry then becomes whether "the agency's answer is based on a permissible construction of the statute."[141] If this construction is a "reasonable policy choice for the agency to make," then a court must defer to the agency's interpretation of the statute.[142]

Over the nearly two decades since the *Chevron* decision, judicial and academic discourse has presented many views of how and when such deference should apply. The broadest version, advocated by Justice Antonin Scalia, requires *Chevron* deference to all agency decisions that are "authoritative."[143] Deference is then accorded to all determinations that the agency makes, even those concerning the scope of its own "jurisdiction."[144]

Other understandings of *Chevron* may qualify this expansive view.[145] A prior inquiry may take place before the *Chevron* framework is applied at all. This stage, deemed "*Chevron* Step Zero,"[146] stipulates that the statute must affirmatively delegate the agency rule making authority in each case.[147] In

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136. *Id.* at 842.
137. *Id.* at 843.
138. *Id.* at 842–43.
139. *Id.* at 843.
140. *Id.*
141. *Id.*
142. *Id.* at 845. Step Two of *Chevron* analysis is generally concerned with the "arbitrary, capricious and abuse of discretion" test of the APA and an examination of reasonableness. *See* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 621 (2009) ("Courts and commentators have converged on an emerging consensus that the 'arbitrary, capricious, and abuse of discretion' standard set forth in [APA] Section 706(2)(A) supplies the metric for judicial oversight at Chevron's second step."); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006) (describing "permissible" as whether the agency's interpretation is "reasonable in light of the underlying law").

143. *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 343 (6th ed. 2006); United States v. Mead Corp. 533 U.S. 218, 257 (2001) (Scalia, J., dissenting). *See generally* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

144. BREYER ET AL., *supra* note 143, at 343.

145. *Id.*

146. Professors Thomas W. Merrill and Kristin E. Hickman introduced the term "Chevron Step Zero" as the initial inquiry to determine whether *Chevron* applies. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001). For an in-depth examination of *Chevron* Step Zero analysis, see Sunstein, *supra* note 142.

147. *See, e.g.*, *Mead Corp.*, 533 U.S. at 226–27 (holding that a tariff classification could not receive *Chevron* deference because there was no indication that Congress intended such a ruling to carry the force of law); Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (holding that opinion letters and "interpretations contained in policy statements, agency

addition, courts may use canons of statutory construction at the expense of true *Chevron* analysis.[148]   While courts in this situation claim to be adhering to the *Chevron* standard, sources such as legislative history, other statutes, and policy considerations are at the heart of these opinions.[149] The use of these "traditional tools of statutory construction,"[150] remains a matter of judicial debate.[151]

In the context of immigration, the Supreme Court has specifically recognized "that the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'"[152] Each of the federal district courts and circuit courts that have considered the statutory question that is the focus of this Note have quickly concluded that *Chevron* applies, and proceeded to use its two-prong test.[153]   At *Chevron* Step One, the circuits have first looked to § 1153's plain language, but have also employed canons of statutory interpretation including textual structure, other statutory provisions, and legislative history to determine whether Congress's intent was ambiguous or clear.[154] It is at this point, however, that the circuit courts have parted ways.

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manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference").

148. *See* BREYER ET AL., *supra* note 143, at 343.

149. *Id.*; *see also* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) ("[*Chevron*] deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."); Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 703 (1995) (discussing *Chevron* towards the conclusion of the opinion only to suggest that the Court owes "some degree of deference" to the agency's reasonable interpretation).

150. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

151. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 454 (1987) (Scalia, J., concurring) (noting that if courts substitute their interpretation of a statute for an agency's through the use of interpretive canons, "this approach would make deference a doctrine of desperation . . . . This is not an interpretation but an evisceration of *Chevron*.").

152. INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (quoting *Cardozo-Fonesca*, 480 U.S. at 448 (majority opinion)). The Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), however, creates uncertainty about whether all interpretations adopted in adjudication necessitate deference. *See* Merrill & Hickman, *supra* note 146, at 842–43; *see, e.g.*, Negusie v. Holder, 555 U.S. 511 (2009) (holding that because the BIA did not exercise its interpretative authority and fully consider a statutory question, *Chevron* deference was unwarranted).

153. *See* Khalid v. Holder, 655 F.3d 363, 366 (5th Cir. 2011) ("As to the BIA's interpretation of immigration statutes, we defer to the BIA to the extent prescribed by *Chevron*'s two-step analysis." (citing Singh v. Gonzales, 436 F.3d 484, 487 (5th Cir. 2006))); Cuellar de Osorio v. Mayorkas, 656 F.3d 954, 961 (9th Cir. 2011) ("The parties dispute whether aged-out derivative beneficiaries of F3 and F4 petitions are entitled to this relief. To answer this question, we undertake our *Chevron* analysis."); Li v. Renaud, 654 F.3d 376, 382 (2d Cir. 2011) ("Pursuant to its delegated authority, the BIA interpreted the INA in a formal adjudication. Therefore we evaluate the BIA's interpretation according to [*Chevron*]." (citing *Aguirre-Aguirre*, 526 U.S. at 424–25)).

154. *See infra* Part II.B.

II. THE CURRENT CSPA CIRCUIT SPLIT

Part II details the BIA's interpretation of § 1153(h)(3). In *Matter of Wang*, the BIA narrowly interpreted § 1153(h)(3) by holding that its priority date retention and automatic conversion provisions do not apply to a derivative beneficiary of a fourth preference family-based visa petition.[155] Subsequently, the Second, Ninth, and Fifth Circuits considered whether the provision applies to F3 and F4 petitions, and therefore grants age-out protection to derivative beneficiaries of these petitions. This part discusses the BIA's interpretation in *Wang* before addressing each circuit court's decision in turn.

A. *The BIA's Precedential Decision in* Matter of Wang

On March 25, 2008, the director of USCIS's California Service Center approved a F2B visa petition filed by an LPR on behalf of his unmarried daughter.[156] The director denied the petitioner's request, however, to assign an earlier priority date to this petition.[157] That earlier priority date came from a previous F4 petition of which his daughter was a derivative beneficiary.[158] By the time the petitioner was admitted to the United States using the F4 petition's priority date, his daughter had aged out of child status.[159] Although the director refused to approve the earlier priority date, because she was uncertain about the scope of age-out protection under the CSPA, she certified her decision to the BIA for review.[160]

In *Wang*, the BIA considered whether an aged-out derivative beneficiary of an F4 visa petition may automatically convert her status to the F2B category pursuant to CSPA section 203(h), while retaining the original petition's priority date.[161] While the BIA had previously evaluated this issue in a non-precedential opinion, *Garcia*,[162] here it examined the statute's language, regulatory framework, and legislative history.[163] The three-member panel ultimately concluded that the Act did not provide relief to Wang's daughter because she had been a derivative beneficiary of an F4 family-based visa petition.[164]

As a preliminary matter, the Board examined the structure of § 1153(h)(1) to (3). It determined that paragraphs (1) and (2) "when read in tandem clearly define the universe of petitions that qualify for the [CSPA formula]," in contrast to the text of paragraph (3), which "does not expressly state which petitions qualify for automatic conversion and

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155. Wang, 25 I. & N. Dec. 28, 39 (B.I.A. 2009).
156. *Id.*
157. *Id.*
158. *Id.* at 28–29.
159. *Id.* at 29.
160. *Id.* at 30.
161. *Id.*
162. A79 001 587, 2006 WL 2183654 (B.I.A. June 16, 2009).
163. *See Wang*, 25 I. & N. Dec. at 33 n.7.
164. *Id.* at 38–39. The BIA later denied a motion to reconsider its decision. *See* Wang, A088 484 947 (B.I.A. May 21, 2010).

retention of priority dates."[165]   After finding that the language of the provision was ambiguous, the BIA considered the usage of "conversion" and "retention" in other regulations.[166]   The Board observed that in immigration regulations the term "conversion" consistently refers to a visa petition that moves from one category to another.[167]   As a result, the beneficiary of that petition transfers her classification but does not need to file a new visa petition.[168] Similarly, the Board noted that the concept of "retention" of priority dates has always been limited to visa petitions filed by the same family member, whereas petitions filed by relatives receive their own priority dates.[169] The BIA assumed that when Congress enacted the CSPA, it was aware of how these regulatory terms were commonly used.[170]

The BIA then applied these concepts to the case at hand. The Board determined that when Wang's daughter aged out from her status as a derivative beneficiary on the F4 petition, there was no family preference category that her visa could be converted to because there is no category that applies to the niece of a U.S. citizen.[171]   In addition, the new F2B petition was filed on the beneficiary's behalf by a different petitioner—her father rather than her aunt.[172] The BIA determined that this could not be reconciled with the historical usage of the term "retention."[173] The Board found that the statutory text did not plainly indicate that as long as a parent became an LPR through any visa preference category, all children listed as derivative beneficiaries would receive superior priority date status, even for new visa petitions that might be filed at any future date.[174] Accordingly, 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."[175]

The Board observed that the CSPA was principally enacted due to concern about extensive administrative delays in the processing of visa petitions and applications, which resulted in the aging out of beneficiaries of petitions filed by U.S. citizens.[176]   The BIA noted that the Act's legislative history refers generally to the Senate amendment that added children of family and employment-based visas and diversity visas, but does not illuminate an intention behind these additions.[177]   The BIA emphasized that the historical record of the CSPA does not provide clear

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165. *Wang*, 25 I. & N. Dec. at 33.
166. *Id.* at 33–34.
167. *Id.* at 35.
168. *Id.*
169. *Id.*
170. *Id.*; *see also* Monreal, 23 I. & N. Dec. 56, 60 (B.I.A. 2001); Devison, 22 I. & N. Dec. 1362, 1369 (B.I.A. 2001).
171. *Wang*, 25 I. & N. Dec. at 35–36.
172. *Id.* at 36.
173. *Id.* at 38.
174. *Id.* at 36.
175. *Id.* at 36–38.
176. *Id.* at 36–37.
177. *Id.* at 37.

evidence that it aimed to address waits due to visa allocation issues, for example, the delay connected to priority dates.[178] The Board found that if automatic conversion and priority date retention for F4 visas were allowed, the beneficiary would "jump" to the front of the F2B visa category line, thus causing aliens who had been waiting for years to spend even more time on line.[179] The BIA thus declined to expand automatic conversion and priority date retention provisions. It found that the CSPA does not demonstrate "legislative intent to create an open-ended grandfathering of priority dates that allow[s] derivative beneficiaries to retain an earlier priority date set in the context of a different relationship, to be used at any time."[180]

The BIA's decision in *Wang*, while focused on F4 petitions, effectively limits the scope of § 1153(h)(3) to petitions in which the primary or derivative beneficiary is the son or daughter of an LPR: from F2A to F2B conversions.[181] This is the only type of petition that allows an aged-out beneficiary's petition to "automatically be converted" to an "appropriate category" without requiring a different petitioner.[182] In this situation, an aged-out primary beneficiary of an F2A petition filed by her LPR parent can become the beneficiary of a subsequent F2B petition filed by the same parent.[183] This is also possible for an aged-out derivative beneficiary of an F2A petition filed by an LPR parent on behalf of a spouse.[184] Aged-out derivative beneficiaries of F2B, F3, and F4 petitions, however, are not eligible to convert these petitions to a different category without obtaining a new petitioner.[185]

B. The Circuits Speak

Following the BIA's decision in *Wang*, three appellate courts have construed the scope of section 1153(h)(3) using the standard of administrative deference articulated in *Chevron*.[186] At *Chevron* Step One,

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178. *Id.* at 38.

179. *Id.*

180. *Id.* at 39.

181. Cuellar de Osorio v. Mayorkas, 656 F.3d 954, 958 (9th Cir. 2011).

182. *Id.* at 964 (quoting Wang, 25 I. & N. at 33).

183. *Id.*

184. *Id.* F2A petitions may list children as primary or derivative beneficiaries. *Id.* at 964 n.6. In order to reduce visa filing expenses, an LPR may opt to include a child as a derivative beneficiary on an F2A petition for a spouse rather than as a primary beneficiary on an additional F2A petition. *Id.*

185. *Id.*

186. These cases involved aged-out derivative beneficiaries of F3 and F4 visa petitions, with essentially similar facts to *Wang*. *Khalid v. Holder*, 655 F.3d 363, 365–66 (5th Cir. 2011), concerned an aged-out derivative beneficiary who had entered the U.S. on a visitor's visa as a young child. His application for adjustment of status was denied by USCIS, who subsequently initiated removal proceedings. *Id.* at 366. In contrast, the plaintiffs in *Cuellar de Osorio* and *Li v. Renaud* were parents whose children aged out of derivative status due to lengthy visa wait times and were no longer eligible to immigrate to the United States. *See Cuellar de Osorio*, 656 F.3d at 957–59; Li v. Renaud, 654 F.3d 376, 379 (2d Cir. 2011). The minor factual distinctions between these cases, however, have no impact on the interpretive question faced by the courts.

the courts have relied on tools of statutory interpretation after their examination of the plain text.[187] The Second and Fifth Circuits concluded that congressional intent is clear and thus no deference to the BIA is warranted.   While the Second Circuit found that there was not an appropriate category for petitions to convert to other than those in the F2A category, the Fifth Circuit held that all derivative beneficiaries of family-based petitions are entitled to relief under § 1153(h)(3). In contrast, the Ninth Circuit determined that § 1153(h)(3) was ambiguous, and proceeded to *Chevron* Step Two, where it found that the BIA's interpretation of the statute was permissible.

1. The Second Circuit

In *Li v. Renaud*,[188] the Second Circuit became the first appellate court to consider the reach of § 1153(h)(3) of the CSPA. The district court had found that § 1153(h)(3) was ambiguous because it did not explicitly define which petitions were eligible for automatic conversion and priority date retention.[189]   The Second Circuit contended that for *Chevron* purposes, however, "an alleged ambiguity in some part of the statutory provision at issue does not end the inquiry."[190]   Rather, at *Chevron* Step One, a reviewing court must ask whether Congress has addressed the "precise question at issue" in enacting the provision.[191]   The court found that Congress's intent clearly prohibits a derivative beneficiary who ages out of a family preference petition from retaining the priority date of that petition if it cannot be converted to an "appropriate category."[192] Accordingly, the Second Circuit concluded that deference to the BIA's interpretation of § 1153(h)(3) was not warranted.[193]

In evaluating whether the derivative beneficiary was entitled to age-out protection under the CSPA, the court first examined the provision's textual structure.[194]   The court construed § 1153(h)(3) as a straightforward sentence construction—"if X, [then] A *and* B."[195]   If the alien's age is calculated as twenty-one years or above without the USCIS processing delay, then "[A] the alien's petition shall automatically be converted to the appropriate category *and* [B] the alien shall retain the original priority date

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187. *See Cuellar de Osorio*, 656 F.3d at 961 ("Our first charge under *Chevron* is to ascertain, by 'employing traditional tools of statutory construction,' whether 'Congress had intention on the precise question at issue." (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984))); *see also Khalid*, 655 F.3d at 366 ("To determine whether a statute is ambiguous, we employ the 'traditional tools of statutory construction.'" (quoting *Chevron*, 467 U.S. at 843 n.9)); *Li*, 654 F.3d at 382–83 (also using "the traditional tools of statutory construction").

188. *Li*, 654 F.3d 376.

189. Li v. Renaud, 709 F. Supp. 2d 230, 237 (S.D.N.Y. 2010), *aff'd*, 654 F.3d 376.

190. *Li*, 654 F.3d at 382.

191. *Id.* (quoting *Chevron*, 467 U.S. at 842).

192. *Id.* at 383.

193. *Id.*

194. *See id.*

195. *Id.*

issued upon receipt of the original petition."[196] The Second Circuit explained that while in some circumstances it is possible that the word "and" means "or" in a statute, Congress deliberately constructed the provision at issue in order to prevent that outcome.[197] Congress could have allowed beneficiaries to seek (1) conversion, (2) retention, or (3) both conversion and retention, but had in fact specified automatic conversion to an appropriate category and retention of the initial priority date.[198]

The court pointed to section 6 of the CSPA, codified at 8 U.S.C. § 1154(k), which separates conversion and retention benefits so that a beneficiary may choose whether or not to convert the petition.[199] The court noted that this provision allows a beneficiary to avoid a conversion that would place them in a longer queue in another preference category.[200] Prior to the enactment of the CSPA, when a sponsoring parent of an adult son or daughter naturalized and became a U.S. citizen, the petition was converted from the F2B to the F1 category.[201] This conversion forced sons and daughters of Filipino immigrants to wait in a longer visa waiting line.[202] Under current law, if an LPR files a F2B visa, and the LPR then naturalizes before his or her unmarried son or daughter receives a visa, then the petition "shall be converted" to an F1 petition.[203] The following paragraph, however, plainly states that the beneficiary may "elect[] not to have such conversion occur (or if it has occurred, to have such conversion revoked)."[204] Finally, § 1155(k)(3) provides that "[r]egardless of whether a petition is converted under this subsection or not," the beneficiary can retain the original petition's priority date.[205]

The Second Circuit noted that these statutory provisions specify that conversion is elective, and that a beneficiary is entitled to maintain the priority date of the initial petition whether or not conversion occurs.[206] Conversion and retention thus represent "distinct and independent" benefits in § 1154(k)(3), but comprise joint benefits in § 1153(h)(3).[207] The court contended that because the two provisions were within the same statute, "Congress was aware of the possibility of making the benefits [in § 1153(h)(3)] 'distinct and independent' and we cannot assume that Congress unintentionally failed to do so."[208]

Because the Second Circuit concluded that congressional intent required automatic conversion and original priority date retention in § 1153(h)(3), it next considered whether automatic conversion was possible for a derivative

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196. *Id.* (quoting 8 U.S.C. § 1153(h)(3) (2006)).
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *See id.* (citing H.R. REP. NO. 107-807, at 55–56 (2003)).
202. *Id.*
203. *See* 8 U.S.C. § 1154(k)(1) (2006).
204. § 1154(k)(2).
205. *Li*, 654 F.3d at 383 (quoting § 1154(k)(3)).
206. *See id.* at 383–84.
207. *See id.* at 384.
208. *Id.*

beneficiary of an F3 petition.[209] Here, the court followed the lead of the BIA and looked to the historical usage of these terms. The court noted that in other immigration regulations, the phrase "automatically be 'converted to the appropriate category'" must refer to when the category of the petition is altered but where the identity of the petitioner is not.[210] For example, 8 C.F.R. § 204.2(i) specifies three examples where a petition converts from one category to another: the beneficiary's change in marital status, the beneficiary's attainment of age twenty-one, and the petitioner's naturalization.[211] In each of these situations, the petitioner is unchanged.[212] The Second Circuit concluded that this is also seen in various provisions in the CSPA; in every occurrence where the word "conversion" is used, it describes a change from one category to another, but this change does not include a new petition.[213] The court noted that § 1153(h)(3) in particular precisely states that conversion is "to the appropriate category" but not to an additional petition filed by a new relative.[214] Although the Second Circuit did not apply *Chevron* deference,[215] it agreed in effect with the BIA that there was no "appropriate category" to which to convert a derivative beneficiary's visa petition, and that therefore the CSPA does not extend to aged-out derivative beneficiaries of petitions not in the F2A category.[216]

2. The Ninth Circuit

The Ninth Circuit considered the applicability of § 1153(h)(3) to aged-out derivative beneficiaries of F3 and F4 petitions in *Cuellar de Osorio v. Mayorkas*.[217] In contrast to the Second Circuit, the Ninth Circuit found that congressional intent was unclear at *Chevron* Step One.[218] At *Chevron* Step Two, because the Ninth Circuit determined that the BIA's interpretation was reasonable, the court afforded deference to the BIA.[219]

At *Chevron* Step One, the court first addressed the statute's plain language. The Ninth Circuit rejected the government's argument that the word "petition" in paragraph (3) was ambiguous because it did not specify exactly which petitions it encompassed.[220] The court explained that this was not required because paragraph (3)'s initial clause is subject to the

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209. *See id.*
210. *See id.* (quoting § 1153(h)(3)).
211. 8 C.F.R. § 204.2(i)(1)–(3) (2011).
212. *Li*, 654 F.3d at 384.
213. *See id.* (citing 8 U.S.C. § 1151(f)(2) as providing "conversion from F2A to immediate relative petition," § 1151(f)(3) as providing "conversion from F3 to F1 or from F3 to immediate relative petition," and § 1154(k)(1) as providing "conversion from F2B to F1").
214. *Id.*
215. *See id.* at 383.
216. *See id.* at 385.
217. 656 F.3d 954 (9th Cir. 2011). This case consolidated two appeals from the Central District of California: Cuellar de Osorio's case and *Costelo v. Chertoff*, 258 F.R.D. 600 (C.D. Cal. 2009), a separate class action lawsuit. *See Cuellar de Osorio*, 656 F.3d at 958–59.
218. *Cuellar de Osorio*, 656 F.3d at 963.
219. *Id.* at 965.
220. *See id.* at 961.

activation of paragraph (1)'s subtraction formula.[221] In other words, only if the age-reduction calculation in paragraph (1) determines that an alien is twenty-one or above will paragraph (3) then be activated.[222] According to the court, "the alien" referenced in paragraph (3) must be the one described in paragraph (1).[223] Therefore, "the alien's petition" must relate to the "applicable petition" described in paragraph (1)(B).[224] The court reasoned that if the alien had a petition that was not an "applicable petition" as defined in paragraph (1), there would be no purpose in performing the paragraph (1) calculation.[225]

The court also observed that the "applicable petition" discussed in paragraph (1) is defined by referring to the following paragraph.[226] Paragraph (2) describes F2A petitions for a child as well as all family preference petitions that list a child as a derivative beneficiary.[227] Thus, paragraph (3) allows all of these petitions automatic conversions to the appropriate preference category and retention of the original priority date.[228]

Although the Ninth Circuit found that § 1153(h)'s language was clear, it still determined that paragraph (3)'s meaning was ambiguous because its plain language would lead to "unreasonable or impracticable results" if applied to some of the petitions included in paragraph (2).[229] First, the court observed that the phrase "the alien's petition shall automatically be converted to the appropriate category" implies that there is only one petition filed by one petitioner on behalf of one beneficiary, which then moves into a different category.[230] This reading not only corresponds with the ordinary meaning of the word "automatic," but also reflects existing regulatory procedure.[231] Like the Second Circuit, the Ninth Circuit cited to 8 C.F.R. § 204.2(i), contending that "automatic" reclassification occurs in these contexts with a change in definition of the parties relationship, but not with a change in their identities.[232]

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221. *See id.*

222. *See id.* The court used the example of Rosalina Cuellar de Osorio's case to illustrate its view of how paragraphs (1) and (3) relate to each other. *See supra* notes 1–10 and accompanying text. The F3 petition of which Cuellar de Osorio was a direct beneficiary was filed on May 5, 1998 and approved by USCIS on June 30, 1998. *Cuellar de Osorio*, 656 F.3d at 961 n.4. Therefore, it was pending adjudication by the agency for 56 days. *Id.* Cuellar de Osorio's son, who was listed as a derivative beneficiary on this petition, was born on July 18, 1984. *Id.* When Cuellar de Osorio's priority date became current on November 1, 2005, and a visa became available to her, her son was 26 years and 106 days old. *Id.* After subtracting the 56 days when his petition was "pending," his age was 21 years and 50 days. *Id.* Because he was above the age of 21, this triggered the paragraph (3) calculation. *Id.*

223. *Cuellar de Osorio*, 656 F.3d at 961 (citing 8 U.S.C. § 1153(h)(1)(B) (2006)).

224. *Id.* (citing § 1153(h)(1)(B)).

225. *See id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 961–62 (citing Valladolid v. Pac. Operations Offshore, LLP, 604 F.3d 1126, 1133 (9th Cir. 2010); Avendano-Ramirez v. Ashcroft, 365 F.3d 813, 816 (9th Cir. 2004)).

230. *Id.* at 962 (quoting 8 U.S.C. § 1153(h)(3) (2006)).

231. *Id.*

232. *See id.*

The court noted that in the context of F3 and F4 petitions, however, where a derivative beneficiary ages out, there is no "appropriate category" to which the petition may "automatically be converted" with the same petitioner.[233] For example, where a child is a derivative beneficiary of an F3 petition, the petitioner is his or her U.S. citizen grandparent.[234] When the derivative beneficiary turns twenty-one, he or she is no longer able to immigrate based on the grandparent's petition, because such a relationship is not recognized under U.S. immigration law.[235] Similarly, in the case of an F4 petition, the petitioner is the derivative beneficiary's U.S. citizen aunt or uncle.[236] After the derivative turns twenty-one, he or she is also ineligible to immigrate, because citizen aunts and uncles cannot file petitions on behalf of their nieces and nephews.[237] At the moment paragraph (3) is triggered, automatic conversion into an "appropriate category" may be possible for an aged-out F3 or F4 derivative beneficiary based on the derivative's relationship to the primary beneficiary.[238] "At that point, the derivative's parent may have obtained LPR status under the original . . . petition," and the aged-out derivative may qualify for the F2B category.[239] But while this is an accepted relationship, this conversion cannot automatically take place, because the LPR parent constitutes a new petitioner.[240] The court refused to allow aged-out F3 and F4 derivatives to convert their petitions to the F2B category, observing that this in effect would be to disregard the word "automatically."[241] Because the Ninth Circuit found that automatic conversion could not feasibly apply to F3 and F4 petitions, the court found that paragraph (3)'s meaning was ambiguous.[242]

Finally, regarding priority date retention, the Ninth Circuit determined that congressional intent was unclear on whether priority date retention and automatic conversion represented independent benefits.[243] The Ninth Circuit agreed with the Second Circuit that the text of paragraph (3), which contains two grammatically independent clauses, may grant automatic conversion and priority date retention as independent benefits.[244] Yet the court contended that this clause could also grant these two benefits jointly, as both terms often, although not always, are used in conjunction with one

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233. *Id.*
234. *Id.*
235. *Id.* (citing § 1153(a)).
236. *Id.*
237. *Id.* (citing § 1153(a)).
238. *Id.*
239. *Id.*
240. *See id.*
241. *Id.* at 962–63 (citing Miller v. United States, 363 F.3d 999, 1008 (9th Cir. 2004), for the proposition that "[c]ourts must aspire to give meaning to every word of a legislative enactment.").
242. *Id.* at 963.
243. *Id.*
244. *See id.*

another in family-sponsored immigration regulations.[245] Moreover, in section 6 of the CSPA, Congress specified that these terms should function independently.[246]

The Ninth Circuit observed that because paragraph (2) may be understood as conferring retention and conversion as independent or joint benefits, the provision is ambiguous.[247] Therefore, the court consulted the statute's legislative history for clear evidence of congressional intent.[248] Because the court determined that there was no record of which derivative beneficiaries of family preference petitions qualified for age-out protection under the CSPA, it proceeded to *Chevron* Step Two.[249]

At *Chevron* Step Two, the court found that the BIA's interpretation of paragraph (3), which restricted the statute's applicability to F2A petitions, was "permissible."[250] First, the court explained that the Board's reasoning is a plausible construction because it reflects how the word "automatic" is normally used, "to describe something that occurs without requiring additional input, such as a different petitioner."[251] In addition, the court observed that under the BIA's interpretation, § 1153(h)(3)'s citation to § 1153(d) does have a demonstrated effect.[252] Section 1153(d) entitles a beneficiary's child the same status as his or her parent.[253] According to the BIA's construction of § 1153(h)(3), derivative beneficiaries of F2A petitions are entitled to age-out protection.[254] The court noted that without this citation to subsection (d), § 1153(h)(3) would only cover primary beneficiaries of F2A petitions, because subsection (a)(2)(A) references only the spouses or children of LPRs.[255] Prior to the enactment of the CSPA, an aged-out derivative beneficiary of an F2A petition received priority date retention when an F2B petition was filed on his or her behalf.[256] The court noted, however, that this regulation does not confer automatic conversion or refer to primary beneficiaries of F2A petitions who have aged out.[257]

In addition, the court disagreed with the petitioner's argument that the BIA's interpretation in *Wang* conflicted with Congress's expressed intent,

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245. *See id.* (citing 8 C.F.R. § 204.2(i) (2011) as "providing priority date retention with automatic conversion" but distinguishing § 204.2(a)(4) as "granting priority date retention without automatic conversion").

246. *See* 8 U.S.C. § 1154(k)(3) (2006).

247. *Cuellar de Osorio*, 656 F.3d at 963.

248. *Id.* (citing United States v. Daas, 198 F.3d 1167, 1174 (9th Cir. 1999)).

249. *Id.* (citing H.R. REP. NO. 107-807, at 49–50 (2003)).

250. *See id.* at 964 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

251. *Id.*

252. *See id.* at 964–65; *see also* 8 U.S.C. § 1153(h)(3) (2006) (referring to "subsections (a)(2)(A) and (d)").

253. § 1153(d).

254. *See Cuellar de Osorio*, 656 F.3d at 964.

255. *Id.*

256. *See* 8 C.F.R. § 204.2(a)(4) (2011) ("[I]f the [derivative beneficiary of an F2A petition] reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required. In such a case, the original priority date will be retained if the subsequent petition is filed by the same petitioner.").

257. *Cuellar de Osorio*, 656 F.3d at 965.

noting that the Act's House sponsors only addressed age-out protection for derivative beneficiaries resulting from processing delays.[258] While Senator Feinstein had addressed oversubscription problems, she specifically referred to children of LPRs, who could be beneficiaries or derivative beneficiaries of F2A petitions.[259]

The Ninth Circuit therefore rejected petitioners' arguments that the BIA's interpretation was unreasonable because it did not create large scale change within the family preference system and went against congressional intent. The court advanced a theory of its own, that policy concerns supported the BIA's decision to limit those petitions to which § 1153(h)(3) should apply.[260]   The Ninth Circuit contended that limiting the statute's applicability to F2A petitions is a reasonable policy choice for the BIA to make.[261] The court explained that if the statute was applied to all derivative beneficiaries of family preference petitions, this "would result in a fundamental change to the family preference scheme," because any derivative beneficiary of an F3 or F4 petition would be eligible for his or her own priority date as the grandchild, niece, or nephew of a U.S. citizen.[262] American immigration law, however, has never accepted these relationships as qualifying under the statutory scheme.[263]   In contrast, derivatives of F2A petitions could also be primary beneficiaries of those petitions and therefore receive individual priority dates.[264]   The Ninth Circuit ultimately exercised *Chevron* deference because the court found that it is "not arbitrary or otherwise unreasonable for the BIA's interpretation . . . to draw the line where it does."[265]

3. The Fifth Circuit

Less than a week after the Ninth Circuit issued its decision in *Cuellar de Osorio*, the Fifth Circuit became the third appellate court to analyze the scope of § 1153(h)(3), in *Khalid v. Holder*.[266] The court held that this provision of the CSPA was unambiguous and that an aged-out derivative beneficiary of an F4 visa petition was entitled to relief.[267] Although the Fifth Circuit agreed with the BIA that the statute did not expressly define which petitions qualified for age-out protection,[268] the court determined that congressional intent clearly extended the benefits of § 1153(h)(3) to all petitions included in § 1153(h)(2).[269] The Fifth Circuit thus refused to defer to the BIA at *Chevron* Step One, holding that conversion was possible

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258. *See* 147 CONG. REC. 9954–55 (2001).
259. *Cuellar de Osorio*, 656 F.3d at 965; *see also supra* note 114 and accompanying text.
260. *See Cuellar de Osorio*, 656 F.3d at 964–65.
261. *Id.* at 965.
262. *Id.*
263. *Id.*
264. *See id.*
265. *Id.*
266. 655 F.3d 365 (5th Cir. 2011).
267. *See id.* at 375.
268. *Id.* at 370.
269. *See id.* at 373.

even with a change in petitioner for derivative beneficiaries of all family-based petitions.[270]

The court first considered whether the statute was ambiguous by examining the plain language of § 1153(h)(1) through (h)(3).[271] The Fifth Circuit contended that although paragraph (3) does not expressly define which petitions qualify for age-out protection, the statutory provisions, when taken together, clearly identify which petitions are included within § 1153(h)(3).[272] The BIA had discredited paragraph (2), the court found, because unlike paragraph (1), paragraph (3) does not directly cite paragraph (2).[273] However, the court noted that paragraph (3) explicitly refers to paragraph (1), and that paragraph (1) then directly cites paragraph (2).[274] The court observed that automatic conversion and priority date retention depend on the outcome from the paragraph (1) calculation, which utilizes the petitions included in paragraph (2).[275] Thus, paragraph (3) necessarily depends on the petitions included in paragraph (2), because paragraph (3) can only be activated by the operation of paragraph (1).[276] Because the three subsections are interdependent, they collectively confirm that Congress intended paragraph (3) to apply to any alien who "aged out" under the paragraph (1) formula and was the beneficiary or derivative beneficiary of a petition classified under paragraph (2).[277]

In addition to § 1153(h)'s overall structure, the Fifth Circuit also examined the textual parallels between its subsections. Paragraphs (1) and (3) both use the phrase "[f]or purposes of subsections (a)(2)(A) and (d)."[278] While the BIA had applied paragraph (1)'s formula to derivative beneficiaries of F4 petitions under § 1153(d), the court noted that the agency had refused to do the same for paragraph (3) even though that section had identical wording.[279] The Fifth Circuit contended that this interpretation conflicts with the canon of construction that "'identical words and phrases within the same statute should normally be given the same meaning.'"[280] The court therefore found that "[t]he traditional canons of statutory construction, and the interdependency between subsections (h)(1), (h)(2), and (h)(3) compel the conclusion that the '[p]etitions described' in h(2) apply with equal force to (h)(1) and (h)(3)."[281] As a result, the court disagreed with the BIA and determined that the statute, taken as a whole, directly answered the question at issue.[282]

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270. *Id.* at 374–75.
271. *Id.* at 370.
272. *See id.*
273. *Id.*
274. *Id.* at 370–71.
275. *See id.*
276. *Id.* at 371.
277. *Id.*
278. 8 U.S.C. § 1153(h)(1), (3) (2006).
279. *Khalid*, 655 F.3d at 371.
280. *Id.* (quoting Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007)).
281. *Id.* (alteration in original) (quoting § 1153(h)(2)).
282. *Id.*

The Fifth Circuit found that the BIA had ignored Congress's direct intent by reviewing the CSPA's legislative history and regulatory practice concerning conversion and priority date retention, but the court refuted responses to each of the BIA's arguments.[283]   First, the Fifth Circuit observed that the legislative history was inconclusive to support the BIA's position because "as is often the case with legislative history, statements can be pulled from the record to support the contrary proposition as well."[284]   The court noted that at least one member of Congress had referred to the age-out problem in terms of agency delay as well as visa demand.[285]

Second, although the court accorded greater weight to the BIA's arguments concerning the customary usage of conversion and retention in immigration regulations, it still found them unconvincing.[286]   The court noted that the plain language of paragraph (3) provides that conversion occurs only after the age-reducing calculation is performed under the paragraph (1) formula.[287]   This cannot be made precisely when the child ages out, because the paragraph (1) formula requires the age at which a visa becomes available to the alien.[288]   Only at this point does paragraph (1)'s formula become calculable, thereby triggering paragraph (3)'s automatic conversion.[289]   When the derivative beneficiary's priority date becomes current, there is another category available to which to convert the petition on the basis of the derivative's relationship to the primary beneficiary.[290]

Regarding priority date retention, the Fifth Circuit observed that while in the past this practice had required the same petitioner on both the original and new petitions, this practice is of "no impediment to Congress enacting a law which provides retention of priority dates even where the petitioner is different, as it appears to have done here."[291]   The court also noted that priority date retention is permitted in other immigration contexts that involve a change of petitioner, such as for beneficiaries of employment-based visa petitions, who may retain the original priority date for "'any subsequently filed petition for any classification' of a new job within three major employment categories, regardless of a change in the employer who files the petition."[292]

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283. *See id.* at 371–73.

284. *Id.* at 371.

285. *Id.* at 371–72; *see also supra* note 114 and accompanying text.

286. *See Khalid*, 655 F.3d at 372–73.

287. *Id.* at 372.

288. *Id.*

289. *See id.*

290. *Id.*   The Fifth Circuit noted that the BIA itself had suggested this in *Garcia*, an earlier non-precedential case on the same issue. *See* A79 001 587, 2006 WL 2183654, at *4 (B.I.A. June 16, 2006) ("We agree with the respondent that where an [alien] was classified as a *derivative* beneficiary of the original petition, the 'appropriate category' for purposes of section [1153(h)(3)] is that which applies to the 'aged-out' derivative vis-a-vis the *principal beneficiary* of the original petition.").

291. *Khalid*, 655 F.3d at 372.

292. *Id.* at 372–73; *see also* 8 C.F.R. § 204.5(e) (2011).

Finally, the Fifth Circuit observed that using the BIA's reasoning, the retention benefit would only apply to converted petitions.[293] The court noted, however, that if retention was permitted only for petitions that "'automatically . . . converted to the appropriate category,'" paragraph (3) would be devoid of meaning.[294] This is because there would always be a single petition, with the same priority date, and therefore no purpose for a clause entitling the alien to "'retain the date of the original priority date issued upon the receipt of the original petition.'"[295] Moreover, the court found that this language allows for the possibility of two separate petitions because it may imply that there is another petition involved that is not the original one.[296]

The Fifth Circuit acknowledged that its reading of § 1153(h)(3) could create "procedural difficulties" for USCIS, but it determined that this potential problem was not the judiciary's responsibility to resolve.[297] Because the court found that Congress had spoken directly to the interpretive problem at issue, it refused to defer to the BIA's decision in *Wang*.[298] The Fifth Circuit held that all derivative beneficiaries may convert their family-based visa petitions to an appropriate category, and consequently, they are entitled to age-out protection under the CSPA.[299]

III. IN DEFENSE OF DEFERENCE: ADOPTING THE *CUELLAR DE OSORIO* INTERPRETATION

Courts should defer to the BIA as the Ninth Circuit did in *Cuellar de Osorio*, and reject both the Second Circuit's holding in *Li* and the Fifth Circuit's holding in *Khalid*. As an initial matter, this Note agrees with each of the circuit courts that *Chevron* is the appropriate test for this issue of statutory interpretation. It is well settled that BIA decisions are formal adjudications that warrant *Chevron* deference.[300] This Note's analysis therefore begins at *Chevron* Step One, examining the plain language of § 1153(h)(3) and employing the traditional tools of statutory construction in order to ascertain congressional intent.[301] Part III first contends at *Chevron* Step One that the text of § 1153(h)(3) is unambiguous. It concludes, however, that the statute itself is ambiguous for three principal reasons: (1) automatic conversion is impracticable for certain petitions; (2) conversion and priority date retention may be construed as either joint or independent benefits; and (3) the legislative record of the CSPA is not instructive on congressional intent. This part then contends at *Chevron* Step Two that the

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293. *See Khalid*, 655 F.3d at 373 (citing *In re Crist*, 632 F.2d 1226, 1233 n.11 (5th Cir. 1980)) (stating that courts should give effect, whenever possible, "to all parts of a statute and avoid an interpretation which makes a part redundant or superfluous")).
294. *Id.* (quoting 8 U.S.C. § 1153(h)(3)(2006)).
295. *See id.* (quoting § 1153(h)(3)).
296. *See id.*
297. *Id.*
298. *See id.*
299. *See id.* at 373–74.
300. *See supra* note 153 and accompanying text.
301. *See supra* notes 186–87 and accompanying text.

BIA's interpretation of § 1153(h)(3) is permissible and that, consequently, courts should defer to the agency's decision.

A. Chevron *Step One: The Statute Is Ambiguous*

While the text of § 1153(h)(3) when considered in isolation is clear, the statutory provision is ambiguous in practice. First, it does not provide conversion automatically for all petitions. In addition, in spite of whether automatic conversion is possible, § 1153(h)(3) is also unclear on whether automatic conversion and priority date retention must be applied jointly or independently. Finally, the legislative history of § 1153(h)(3) does not demonstrate Congress's explicit intent to provide age-out protection to derivative beneficiaries of family preference petitions.

1. The Plain "Language" of § 1153(h)(3) Clearly Allows Conversion for All Petitions

While 8 U.S.C. § 1153(h)(3) does not specify which petitions it applies to, the statute's text is straightforward.[302] The calculation in paragraph (1) prompts the operation of paragraph (3).[303] Paragraph (3) cannot function independently at the moment the derivative beneficiary turns twenty-one.[304] This is because it is not triggered until paragraph (1)'s subtraction formula determines that he or she is over the age of twenty-one even after subtracting the pending time of the petition.[305] Following this calculation, paragraph (3) dictates that "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition."[306]

The "alien" described in paragraph (3) must be one within the scope of paragraph (1).[307]   Therefore, "the alien's petition" must indicate the "applicable petition" referenced in paragraph (1)(B).[308] If this language referred to a different petition, then the paragraph (1) calculation would never have been performed, and paragraph (3) would be meaningless.[309]

In defining the scope of its application, paragraph (1) refers explicitly to "the applicable petition described in paragraph (2)."[310] Paragraph (2)(A) describes F2A petitions for children of LPRs, while paragraph (2)(B) refers to family preference petitions for which a child is a derivative beneficiary.[311] Thus, the statutory construction of § 1153(h)(1)–(3) can be

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302. *See supra* notes 220–28 and accompanying text.
303. *See* 8 U.S.C. § 1153(h)(1), (3) (2006).
304. *See id.*
305. *See id.*
306. § 1153(h)(3).
307. *See supra* note 223 and accompanying text.
308. *See* § 1153(h)(1)(B), (3).
309. *See id.*
310. § 1153(h)(1)(B).
311. § 1153(h)(2).

read to encompass all petitions in paragraph (2) and to permit automatic conversion and priority date retention for all of these petitions.[312]

2. The Statute Does Not Permit Automatic Conversion for Petitions Other than F2A Petitions

Although § 1153's language is clear, the provision in practice is ambiguous because paragraph (3) does not make sense when read in context. It does not permit automatic conversion for all family-based visa petitions. The clause "the alien's petition shall automatically be converted to the appropriate category" is consistent with both the common understanding of the word "automatic" and with current immigration regulatory practice.[313] First, the term "automatic" suggests an involuntary, mechanized process, and not one that involves an entirely different document as well as a different petitioner and different beneficiary.[314] In similar family-preference situations, only the relationship between the parties change, not their identities, so the petition is merely reclassified into another category.[315] For F2B, F3, and F4 petitions, however, when a derivative beneficiary ages out, there is no "appropriate category" for the original petition to automatically convert to with the same petitioner.[316] Because automatic conversion is not feasible for these types of petitions, § 1153(h)(3)'s actual meaning must be ambiguous, although its "language"—when considering the structural construction only and not the lexical context—appears unambiguous. In short, a structural analysis of the statutory language points in one direction, while a contextual analysis of the same language points in the opposite direction, resulting in unavoidable ambiguity.

3. It Is Unclear Whether Automatic Conversion and Priority Date Retention Are Joint or Independent Benefits

Regardless of whether automatic conversion is permissible, the text of § 1153(h)(3) is also vague with respect to whether priority date retention can be applied independently. The Second Circuit erred in *Li* by holding that Congress clearly intended to make priority date retention and automatic conversion joint benefits.[317] It is certainly possible to understand paragraph (3) as signifying that *if* the calculation results in an age of twenty-one years or older, *then* "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."[318] It is equally reasonable, however, to read this paragraph as conferring the two benefits

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312. § 1153(h)(1)–(3).
313. *See supra* notes 231–32 and accompanying text.
314. *See supra* note 230 and accompanying text.
315. *See supra* note 232 and accompanying text.
316. *See supra* notes 233–40 and accompanying text.
317. *See supra* notes 197–98, 208 and accompanying text.
318. *See supra* notes 195–96 and accompanying text.

independently, an analysis that is supported by other family-related immigration statutes and also within another provision of the CSPA.[319] Even though section 6 of the CSPA, § 1154(k), was passed on the same day as § 1153(h) and specifically makes conversion and retention independent benefits, this analogy cannot resolve the unclear language of § 1153(h)(3), which must be ambiguous because it can be interpreted both ways.

4. The CSPA's Legislative History Does Not Reveal Congressional Intent

An examination of § 1153(h)(3)'s legislative history does not remedy the ambiguity of the statute, as demonstrated by its operation and relation to other statutory provisions. There was no specific discussion by Congress of particular age-out protections for derivative beneficiaries of family preference petitions.[320] The report of the House Committee on the Judiciary and statements by various members of the House of Representatives express concern over delays in the adjudication process, rather than the waiting times associated with numerical limitations.[321] While Senator Feinstein's remarks indicate her concern about visa demand as well as agency delay, she specifically addressed children of LPRs, who might be beneficiaries or derivative beneficiaries of F2A petitions.[322] In addition, the relatively meager legislative history of the Act does not reveal a clear congressional intent to increase the number of visas to be allocated each year.[323] Following the Senate amendment that Senator Feinstein sponsored, the Act was returned to the House before its enactment, where again there was no discussion of enlarging the number of visas available to family-preference immigrants.[324]

While § 1153(h)(3)'s text is clear, the provision's operation, statutory context, and legislative history are ambiguous. Therefore, it is appropriate to proceed to *Chevron* Step Two.

B. Chevron *Step Two: The BIA's Interpretation Is Not Arbitrary or Capricious*

The BIA's interpretation of § 1153(h)(3) in *Wang* is "based on a permissible construction of the statute."[325] The effect of *Wang* is to limit § 1153(h)(3) to only one petition type: F2A.[326] This is the only petition with an "appropriate category" to which an aged-out primary or derivative beneficiary may "automatically be converted" without a change in the petitioner's identity.[327] The BIA's construction of § 1153(h)(3) does restrict conversion and retention to aliens who convert from the F2A

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319. *See supra* notes 243–46 and accompanying text.
320. *See supra* notes 109–15 and accompanying text.
321. *See supra* notes 109–10, 113, 115 and accompanying text.
322. *See supra* notes 114, 259 and accompanying text.
323. *See supra* notes 109–15 and accompanying text.
324. *See supra* note 115 and accompanying text.
325. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).
326. *See supra* notes 181–84 and accompanying text.
327. *See supra* notes 181–84 and accompanying text.

category, which was already permitted under a preexisting regulation.[328] But this regulation says nothing about automatic conversion, nor does it refer to aged-out primary beneficiaries of F2A petitions.[329] Therefore, the BIA's interpretation of § 1153(h)(3) does result in some change.

In addition, as previously discussed, the BIA's reasoning corresponds with the usual practice of the word "automatic," which describes a process that occurs without requiring new components.[330] The BIA also construed "conversion" and "retention" in § 1153(h)(3) consistently with how those terms have been used in other immigration statutes and regulations related to family-based preferences.[331]

Importantly, the BIA's decision in *Wang* does not conflict with Congress's stated intent. The CSPA's legislative history demonstrates that Congress enacted the statute in order to provide some form of relief to aged-out derivative beneficiaries of family preference petitions.[332] All derivative beneficiaries receive age-out protection due to administrative delays under § 1153(h)(1).[333] As noted earlier, the Act's House sponsors referred solely to this protection when they addressed the provisions that the Senate had added.[334] As the *Cuellar de Osorio* court observed, "[W]e cannot say that the BIA's interpretation of § 1153(h)(3) is contrary to congressional intent simply because it affords *additional* relief only to children in the F2A category."[335]

While the legislative record does reflect general congressional statements about family unity,[336] Congress has in fact often limited preferential immigration status for aged-out children.[337] As the Supreme Court has noted on congressional policy decisions,

> it could be argued that the line should have been drawn at a different point and that the statutory definitions deny preferential status to parents and and children who share strong family ties. . . . But it is clear from our cases . . . that these are policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress.[338]

If Congress had intended to allow aged-out derivative beneficiaries to immigrate with or immediately following their parents, it could have eliminated the complicated formula of § 1153(h)(1) and thus the controversial conversion procedure of § 1153(h)(3). As an alternative,

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328. *See supra* note 256 and accompanying text.
329. *See supra* note 257 and accompanying text.
330. *See supra* note 251 and accompanying text.
331. *See supra* notes 166–69 and accompanying text.
332. *See supra* notes 106, 108–10, 115 and accompanying text.
333. *See supra* notes 119–22 and accompanying text.
334. *See supra* note 115 and accompanying text.
335. Cuellar de Osorio v. Mayorkas, 656 F.3d 954, 965 (9th Cir. 2011).
336. *See supra* note 110 and accompanying text.
337. For example, children cannot qualify for preferential status if they are married or twenty-one years of age or older. *See* 8 U.S.C. § 1101(b)(1) (2006); *see also supra* note 48 and accompanying text (describing the recognized family-based preference categories).
338. Fiallo v. Bell, 430 U.S. 787, 798 (1977).

Congress could have frozen the age of all derivative beneficiaries at a petition's filing date, as it did in other sections of the CSPA,[339] or allowed U.S. citizens and LPRs to directly petition on behalf of their grandchildren, nieces, and nephews.[340]

Limiting § 1153(h)(3)'s applicability to F2A petitions is not arbitrary or capricious but "a reasonable policy choice for the agency to make."[341] Applying § 1153(h)(3) to all aged-out derivative beneficiaries would significantly alter the family preference system.[342]   This change would effectively allow aged-out derivatives of F3 and F4 petitions to receive their own priority dates based on their status as grandchildren, nephews, and nieces of U.S. citizens.[343]   These beneficiaries, as new entrants in line, would then jump ahead of other aliens who had been waiting for visas for years.[344]   The example of "Rose" and "Alice" and their respective children demonstrates this potential unfairness.[345]

Imagine that "Rose" immigrated to the United States in 2000 as the primary beneficiary of an immediate relative petition. Her then-sixteen-year-old daughter was unable to accompany her because derivative beneficiary relationships do not apply to immediate relative petitions.[346] The following year, Rose filed an F2A petition for her daughter. When she turned twenty-one in 2005, this petition converted to an F2B petition. Rose's daughter is still waiting for her priority date to become current in order to apply for a visa.

In contrast, "Alice" immigrated to the United States in 1994 as the beneficiary of an F3 petition. Her then-nineteen-year-old son was listed as a derivative beneficiary on this petition. When Alice became an LPR thirteen years later in 2007, however, her son no longer qualified as a "child." That year, Alice filed an F2B petition for her then-thirty-two-year-old son. If the original 1994 priority date was applied to the more recent 2007 petition, Alice's son could immediately receive a visa number.

In 2007, Alice's thirty-two-year-old son and Rose's twenty-three-year old daughter were eligible for F2B visas as adult family members of LPRs. However, Rose achieved LPR status seven years before Alice and filed her F2B petition six years before Alice filed hers. Rose and her daughter have been apart since 2000, but Alice and her son have only been apart since 2007. Alice's son would effectively be jumping ahead of Rose's daughter in line, even though the daughter had been waiting in line in another category for many more years.

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339. *See supra* note 118 and accompanying text.

340. *See supra* note 48 and accompanying text (discussing the limits on which relatives U.S. citizens and LPRs may petition for under current immigration law).

341. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845 (1984).

342. *See supra* note 262 and accompanying text.

343. *See supra* note 262 and accompanying text.

344. *See supra* note 179 and accompanying text.

345. This example has been slightly modified from the government's brief in *Cuellar de Osorio*. *See* Brief for Defendants-Appellees at 63–64, Cuellar de Osorio v. Mayorkas, 956 F.3d 954 (9th Cir. 2011) (Nos. 09-56786, 09-56846).

346. *See supra* note 54.

In contrast, the F2A to F2B conversion permitted by the BIA does not displace other immigrants in each category's respective visa queue. Here, the primary or derivative beneficiary in fact transfers from a line with a reasonably short waiting time to one that is far longer. For example, as of January 2012, for all countries except Mexico, F2A visas were available for beneficiaries with priority dates before April 22, 2009, while F2B visas were available only for priority dates before September 8, 2003.[347] Thus, the wait time for F2B visas was five years longer than the wait time for F2A visas.[348] By permitting automatic conversion from F2A to F2B, § 1153(h)(3) in fact forces the primary and derivative beneficiaries to join a line with a longer wait time. The beneficiaries are not required to start at the end of this queue, however, because they are permitted to retain their original priority dates.

The BIA's construction of § 1153(h)(3) does not conflict with congressional intent, but rather preserves the goals of the family preference visa system. It is a practical and reasonable policy choice for the agency to make. Because the agency's interpretation represents a permissible construction of the statute at *Chevron* Step Two, it warrants *Chevron* deference.[349]

CONCLUSION

Although the plain language of § 1153(h)(3) is unambiguous, the statutory provision does not allow automatic conversion for F2B, F3, and F4 petitions. This ambiguity is not remedied through either an assessment of the statute's legislative history or whether priority date retention serves as an independent benefit. As it is impossible to discern congressional intent at *Chevron* Step One, it is therefore necessary to proceed to *Chevron* Step Two analysis. The BIA's interpretation of which family preference petitions are entitled to age-out protection under § 1153(h)(3) of the CSPA is permissible. Deferral to the BIA, as advocated by the Ninth Circuit in *Cuellar de Osorio*, is the correct position. Unless and until Congress revises the CSPA to clarify what petitions qualify for age-out protection, or allocates additional family preference visas, courts should follow the example of the Ninth Circuit and uphold the BIA's interpretation of § 1153(h)(3).

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347. *See Visa Bulletin for January 2012*, *supra* note 66, at 2. For Mexico and the Philippines, the difference between the F2A and F2B visa lines was even longer—seventeen years and eight years, respectively. *Id.* There is a difference in F2A and F2B waiting times because, under § 1153(a)(2), at least 77 percent of second preference visas must be allocated to the F2A category. *See supra* note 48 and accompanying text.

348. *See Visa Bulletin for January 2012*, *supra* note 66, at 2.

349. *See supra* note 265 and accompanying text.