

# No Child Left Unprotected: Adopting the Ninth Circuit’s Interpretation of the Child Status Protection Act in *De Osorio v. Mayorkas*

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## Introduction

Government officials and scholars agree that family reunification is a “cornerstone” of U.S. immigration law.<sup>1</sup> Many aliens immigrate legally to

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1. Monique Lee Hawthorne, *Family Unity in Immigration Law: Broadening the Scope of “Family,”* 11 LEWIS & CLARK L. REV. 809, 810 (2007); Patricia Hatch, U.S. *Immigration* 46 CORNELL INT’L L.J. 683 (2013)

the United States each year; however, the current system for reunifying U.S. citizens and lawful permanent residents (LPRs) with their alien relatives through family-sponsored visas is anything but swift.<sup>2</sup> Under the Immigration and Nationality Act (INA),<sup>3</sup> passed in 1952, U.S. citizens and LPRs can file visa petitions on behalf of certain “qualifying alien relatives”<sup>4</sup> to enable their family member’s immigration to the United States.<sup>5</sup> The United States permits an unlimited number of visas for the children, spouses, and parents of adult U.S. citizens, but subjects the remaining qualifying alien relatives to a quota system.<sup>6</sup> Under the INA, an alien seeking to immigrate to the United States on the basis of a family-sponsored visa petition may also obtain a visa for his or her child if the child is accompanying or “following to join” the alien.<sup>7</sup> The INA designates such a child as a “derivative beneficiary” of the alien parent’s visa petition.<sup>8</sup>

Aliens seeking to immigrate to the United States are further restricted because “no more than seven percent of the worldwide allotments for visas . . . may be made available during any fiscal year to the natives of a single foreign state.”<sup>9</sup> The United States does not adjust these per-country limits to take into account countries with large populations, countries that are geographically adjacent to the United States, or countries that historically send large numbers of immigrants to the United States.<sup>10</sup> As a result, countries with these characteristics have extremely long waiting times.<sup>11</sup> Each month, the U.S. State Department Bureau of Consular Affairs issues a Visa Bulletin listing the cut-off dates that govern family-sponsored visa

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*Policy: Family Reunification*, LEAGUE OF WOMEN VOTERS (Jan. 14, 2013), [http://www.lwv.org/files/ImmigrationStudy\\_FamilyReunification\\_Hatch.pdf](http://www.lwv.org/files/ImmigrationStudy_FamilyReunification_Hatch.pdf); *Three Decades of Mass Immigration: The Legacy of the 1965 Immigration Act*, CENTER FOR IMMIGR. STUDIES (Sept. 1995), <http://www.cis.org/1965ImmigrationAct-MassImmigration>.

2. See *infra* note 11.

3. Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2006).

4. *De Osorio v. Mayorkas*, 695 F.3d 1003, 1006 (9th Cir. 2012). (en banc), *rev’g on reh’g*, 656 F.3d 954 (9th Cir. 2011).

5. See 8 U.S.C. § 1153(a).

6. See Amber J. Tafoya, *Family-Based Immigration: Answers to Frequently Asked Questions*, 35 COLO. LAW. 47, 49 (2006).

7. 8 U.S.C. § 1153(d).

8. *De Osorio*, 695 F.3d at 1008 (citing 8 U.S.C. § 1153(h)(2)(B)).

9. CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 31.02[3][a] (Matthew Bender ed., 2012) (citing 8 U.S.C. § 1152(a)(2), as amended by the Immigration Act of 1990, Pub. L. No. 101-649, § 102, 104 Stat. 4978). The original language of the INA called for a national origins quota system, but concerns about discrimination on the basis of race, sex, nationality, place of birth, and place of residence led Congress to repeal this quota system in 1965. GORDON, *supra*, § 2.04[3].

10. Bernard Trujillo, *Immigrant Visa Distribution: The Case of Mexico*, 2000 WIS. L. REV. 713, 715 (2000) (noting that Luxembourg has the same visa ceiling as China and Mexico).

11. See U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, VISA BULLETIN, 1–2 (2013), available at [http://travel.state.gov/visa/bulletin/bulletin\\_5993.html](http://travel.state.gov/visa/bulletin/bulletin_5993.html). Visa demand exceeds the per-country limits for China (Mainland), India, Mexico, and the Philippines; as a result, these countries have separate, individualized priority dates for each of the five family-sponsored visa categories. *Id.* As of July 2013, Filipino siblings of U.S. citizens experience the largest backlog; they are only eligible for immigrant numbers if they have priority dates earlier than December 15, 1989. *Id.*

availability for various countries.<sup>12</sup> Only applicants with priority dates earlier than the cut-off date are given a number for an available visa.<sup>13</sup> With cut-off dates that span from the years 1989 to 2011, even aliens who fulfill all the requirements of a family-sponsored visa petition face extremely long wait times.<sup>14</sup> Unfortunately, these wait times may prove to be even longer for certain children who were originally listed as derivative beneficiaries of their parents' family-sponsored visa petitions. According to the INA, a child can only be a derivative beneficiary of a visa petition if he or she is under the age of twenty-one.<sup>15</sup> If this child turns twenty-one before his or her parent's visa petition is granted, the child is considered to have "aged out" of derivative beneficiary status.<sup>16</sup> As a result, the twenty-one-year-old child would have to find a new preference category that applies to him or her.<sup>17</sup>

In an attempt to aid children facing this dilemma, Congress passed the Child Status Protection Act (CSPA)<sup>18</sup> in 2002 to enable aged-out derivative beneficiaries to retain the priority date of their parent's original application.<sup>19</sup> Despite this legislation, aging out continues to be a controversial issue.<sup>20</sup> On September 26, 2012, the U.S. Court of Appeals for the Ninth Circuit, on a rehearing en banc, in *De Osorio v. Mayorkas*, reversed a decision rendered just one year earlier by its own three-judge panel.<sup>21</sup> The original panel denied priority date retention to a young man who had already waited seven years in line for a visa before aging out of derivative beneficiary status the same year that his mother's visa petition was granted.<sup>22</sup> Other U.S. courts, most notably the U.S. Court of Appeals for the Second Circuit, have also denied priority date retention to similarly situated individuals.<sup>23</sup>

On June 24, 2013, the Supreme Court of the United States granted certiorari in *De Osorio v. Mayorkas*, signaling that a resolution of this circuit split is likely near.<sup>24</sup> The Court's grant of certiorari came just after the Executive and Legislative branches also publicly committed to reforming

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12. *Id.*

13. *Id.* at 1.

14. *Id.* at 1-2.

15. Tafoya, *supra* note 6, at 48 (citing 8 U.S.C. § 1101(2006)).

16. *Id.*

17. *See id.*

18. Child Status Protection Act, 8 U.S.C. § 1153 (2006).

19. *See infra* pp. 689-692.

20. Scott Graham, *Judges Split 6-5 Over Meaning of Immigration Provision*, RECORDER (Sept. 26, 2012, 3:02 PM), <http://www.law.com/jsp/ca/PubArticleFriendlyCA.jsp?id=1202572784891>.

21. *Id.* (noting that the majority was completely composed of Democratic judges, three of whom had at least one parent who was born in Mexico).

22. *See infra* pp. 701-702.

23. *Li v. Renaud*, 654 F.3d 376, 385 (2d Cir. 2011).

24. Order of the Supreme Court of the United States of June 24, 2013, at 6, *available at* [http://www.supremecourt.gov/orders/courtorders/062413zor\\_n7ip.pdf](http://www.supremecourt.gov/orders/courtorders/062413zor_n7ip.pdf) (granting cert. in *De Osorio v. Mayorkas*, 695 F.3d 1003 (9th Cir. 2012)).

the immigration system in the United States.<sup>25</sup> Earlier in June, President Obama endorsed the “Border Security, Economic Opportunity, and Immigration Modernization Act” (also known as the Comprehensive Immigration Reform (CIR) bill), which was introduced in the Senate in April 2013.<sup>26</sup> The Senate subsequently passed the CIR bill “with a strong majority” on June 27, 2013.<sup>27</sup> If the House of Representatives passes the bill in its current form, it would, among other things, “make significant changes [to] the existing family-based immigration preference system.”<sup>28</sup> In particular, it would amend the INA and CSPA to ensure that children who age out of derivative beneficiary status maintain the priority date of the original petition filed on their behalf.<sup>29</sup>

From an international perspective, a resolution of this split is necessary to inform potential immigrants around the world about what they can expect if they apply for a U.S. visa. The United States is currently in a unique position among developed countries with large numbers of immigrants, especially when compared to those in Europe. This is true for two reasons. First, the United States has the largest number of immigrants of any developed nation.<sup>30</sup> Second, unlike a majority of such developed nations, it is not a member of the European Union (EU).<sup>31</sup> As a supranational organization, the EU sets baseline requirements for all policies, including family reunification policies, which immigrants to the EU can fall back on if the legislation of the particular country to which they are immigrating is unclear.<sup>32</sup> In the United States, the lack of such a fallback

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25. See Elise Foley, *Obama on Immigration Bill: This is the Vehicle to Fix Broken System*, HUFFINGTON POST (June 11, 2013), [http://www.huffingtonpost.com/2013/06/11/obama-immigration\\_n\\_3421342.html](http://www.huffingtonpost.com/2013/06/11/obama-immigration_n_3421342.html).

26. *Id.*; Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (as passed by Senate, June 27, 2013); Carl Shusterman, *CIR Bill Would Create New Family-Based System*, CARL SHUSTERMAN'S IMMIGR. UPDATE (Apr. 22, 2013, 1:58 PM), <http://blogs.ilw.com/carlshusterman/2013/04/cir-bill-would-create-new-family-based-system.html>.

27. Elise Foley, *Senate Immigration Reform Bill Passes with Strong Majority*, HUFFINGTON POST (June 27, 2013, 4:22 PM), [http://www.huffingtonpost.com/2013/06/27/senate-immigration-reform-bill\\_n\\_3511664.html](http://www.huffingtonpost.com/2013/06/27/senate-immigration-reform-bill_n_3511664.html).

28. Shusterman, *supra* note 26.

29. See S. 744, § 2305(d).

30. *Immigrants by Citizenship and Age*, OECD, <http://stats.oecd.org/index.aspx?r=866020> (last visited June 14, 2013). The Organization for Economic Cooperation and Development (OECD) is traditionally considered to be an organization of developed countries, as evidenced by its founding instrument, which states, “believing that the economically more advanced nations should co-operate in assisting to the best of their ability the countries in process of economic development.” Convention on the Organisation for Economic Co-operation and Development, Dec. 14, 1960, 12 U.S.T. 1728, 1729, 1961 WL 62596.

31. See *Members and Partners*, OECD, <http://www.oecd.org/about/membersandpartners/> (last visited Mar. 29, 2013) (listing the 34 current member countries of the OECD, 22 of which are EU member states).

32. See *Application of EU Law*, EUR. COMMISSION (June 25, 2012), [http://ec.europa.eu/eu\\_law/introduction/what\\_directive\\_en.htm](http://ec.europa.eu/eu_law/introduction/what_directive_en.htm) (describing EU directives as instruments that lay out the end results each Member State is required to achieve, but that allow national authorities discretion to decide how to adapt laws to achieve those end results).

provision means that the future of family reunification will hang in the balance until the current circuit split is resolved.

This Note analyzes the recent decisions of three U.S. Circuit Courts of Appeals, which have split over the interpretation of the language of the CSPA. In particular, it focuses on whether the priority date retention and automatic conversion benefits mentioned in the CSPA extend to aged-out derivative beneficiaries of all family visa petitions described in subsection (h)(2) of the CSPA, even if there is a change in the petitioner who sponsors the derivative beneficiary after he or she ages out. This Note contends that in deciding *De Osorio v. Mayorkas*, the Supreme Court should adopt the Fifth and Ninth Circuits' interpretation, permitting automatic conversion and priority date retention to extend to aged-out derivative beneficiaries of all family visa petitions because the statute is unambiguous and because its plain language demands this result. The Supreme Court should not adopt the Second Circuit's interpretation because it leads to absurd results, particularly when analyzed in conjunction with the new immigration policy of Deferred Action for Childhood Arrivals (DACA) enacted by the Obama administration.

Part I of this Note explains the relevant statutes and case law involved in the current circuit split. It begins with explanations of the INA, the basic body of law governing U.S. immigration law, and the CSPA, an amendment that clarified certain INA provisions, followed by summaries of the judicial decisions that produced the split. Part II suggests how the Supreme Court should resolve the split. Part III compares the family-sponsored immigration policies and procedures of the United States and the European Union, particularly as they pertain to unmarried children over a certain age.

## I. Background

The U.S. Constitution vests in Congress the power to establish rules for naturalization,<sup>33</sup> the process by which foreign-born individuals can acquire U.S. citizenship.<sup>34</sup> The first naturalization statute, passed in 1790, established the fundamental substantive qualifications for naturalization, and is, for the most part, still in effect.<sup>35</sup> Since then, Congress has modified and adapted naturalization laws with numerous statutes and amendments.<sup>36</sup> This Part summarizes the two major statutes governing family-sponsored immigration in the United States today as well as the three cases that have produced a circuit split over the interpretation of these statutes.

### A. Family-Sponsored Immigration Policies & Procedures

#### 1. *Immigration and Nationality Act*

The INA provides the basic structure for U.S. immigration law,<sup>37</sup>

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33. GORDON, ET AL., *supra* note 9, § 94.01[1] (citing U.S. Const. art. I, § 8, cl. 4).

34. *Id.*; BLACK'S LAW DICTIONARY 1126 (9th ed. 2009).

35. GORDON, ET AL., *supra* note 9, § 94.01, ¶ 2(a).

36. *Id.*

37. *Li v. Renaud*, 654 F.3d 376, 377 (2d Cir. 2011).

including (1) “a worldwide limitation on the total number of family-sponsored immigrant visas issued each year,”<sup>38</sup> (2) “preference categories for certain types of family members of citizens and LPRs,”<sup>39</sup> (3) “numerical limitations on the number of family-sponsored immigrant visas to be issued in each family preference category,”<sup>40</sup> and (4) a limitation that natives of any single country shall “not constitute more than 7% of the visas granted to family-sponsored immigrants.”<sup>41</sup> In order to qualify for naturalization under the INA, a person must be at least eighteen years old, attain LPR status, and reside continuously in the United States for five years after becoming an LPR.<sup>42</sup> Despite this age requirement, the INA provides that a child whose parents naturalize will also naturalize.<sup>43</sup> Obtaining LPR status requires an immigrant to have a “qualifying family relationship,” meaning that he or she must have a family member who is either a U.S. citizen or an LPR of the United States.<sup>44</sup> To initiate the process of obtaining LPR status, the citizen or LPR family member in the United States (the petitioner) must file a petition with the U.S. Citizenship and Immigration Services (USCIS) on behalf of the intending immigrant family member (the beneficiary) to establish that the qualifying relationship exists.<sup>45</sup>

There are five recognized categories of qualifying family relationships: (1) spouse; (2) child; (3) son or daughter;<sup>46</sup> (4) parent; and (5) brother or sister.<sup>47</sup> However, only spouses, children, and parents of U.S. citizens are considered to be “immediate relatives.”<sup>48</sup> This is relevant because petitions by U.S. citizens on behalf of their immediate relatives are not subject to the quota system; therefore, individuals falling into this category do not have to wait to obtain an immigrant visa.<sup>49</sup> However, all non-immediate relatives of U.S. citizens, as well as spouses, children, and parents of LPRs, are subject to the quota system, and visa wait times for these individuals are determined by preference category.<sup>50</sup> Subsections (a)(1)-(4) of the INA describe the four preference categories of family-sponsored immigrants.<sup>51</sup> The first preference category (F1) consists of unmarried sons and daughters of U.S. citizens.<sup>52</sup> The second preference category consists of two sub-categories: spouses and children of LPRs (F2A) and unmarried sons and

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38. *Id.* (citing 8 U.S.C. § 1151(c) (2006)).

39. *Id.* (citing 8 U.S.C. § 1153(a)).

40. *Id.*

41. *Id.* (citing 8 U.S.C. § 1152(a)(2)).

42. Tafoya, *supra* note 6, at 47 (citing 8 U.S.C. § 1427 (2006)).

43. *Id.* at 52 n.5 (citing 8 U.S.C. § 1431).

44. *Id.* at 47.

45. *Id.* at 48.

46. *Id.* (“Once a child turns 21 or gets married, he or she becomes a ‘son’ or ‘daughter’ and is no longer a ‘child’ for immigration purposes.”)

47. *Id.* 48-49.

48. *Id.* at 49.

49. *Id.*

50. *Id.*

51. 8 U.S.C. § 1153(a)(1-4).

52. *Id.* (citing 8 U.S.C. § 1153(a)(1)).

daughters of LPRs (F2B).<sup>53</sup> The third preference category (F3) consists of married sons and daughters of U.S. citizens.<sup>54</sup> Finally, the fourth preference category (F4) consists of brothers and sisters of U.S. citizens.<sup>55</sup> According to subsection (d) of the INA, once the primary beneficiary has established his or her relationship with the petitioner, the spouses and children of the primary beneficiary can immigrate under the same preference category as derivative beneficiaries.<sup>56</sup> The INA defines a “child” for this purpose as an unmarried person under the age of twenty-one.<sup>57</sup>

If USCIS determines that a qualifying relationship exists between the petitioner and the primary beneficiary, USCIS puts the beneficiary “in line” based on the date the petition was filed (the “priority date”) in the appropriate preference category.<sup>58</sup> When a visa becomes available for the beneficiary named in the petition, the petition’s priority date becomes “current.”<sup>59</sup> If a parent lists his or her child as a derivative beneficiary, but the child reaches the age of twenty-one before the petition becomes current, the child will no longer qualify for derivative beneficiary status.<sup>60</sup> This phenomenon is known as aging out.<sup>61</sup> Aging out can impede an individual’s ability to obtain a visa because an individual who has aged out will have to adjust the beneficiary status of his or her application to reflect the new qualifying relationship that applies, and in some cases, no such qualifying relationship exists.<sup>62</sup> The original INA did not account for this phenomenon.<sup>63</sup>

## 2. *Child Status Protection Act*

In 2002, Congress filled this gap in the INA by passing the CSPA.<sup>64</sup> Congress recognized that administrative delays were causing backlogs in the processing and adjudication of visa petitions and applications, which resulted in the aging out of child beneficiaries.<sup>65</sup> Introducing the bill in the Senate, Senator Dianne Feinstein advocated for the bill’s passage to alleviate the dilemma faced by immigrant parents whose aged-out children were being forced to shift to a lower preference category and wait at the bottom

53. *Id.* (citing 8 U.S.C. § 1153(a)(2)(A) and (B)).

54. *Id.* (citing 8 U.S.C. § 1153(a)(3)).

55. *Id.* (citing 8 U.S.C. § 1153(a)(4)).

56. *Id.* (citing 8 U.S.C. § 1153(d)).

57. 8 U.S.C. § 1101(b) (2006).

58. *De Osorio v. Mayorkas*, 695 F.3d 1003, 1007 (9th Cir. 2012). (en banc), *rev’g on reh’g*, 656 F.3d 954 (9th Cir. 2011).

59. *Id.*

60. Tafoya, *supra* note 6, at 48.

61. *Id.*

62. See Brief of the American Immigration Council and American Immigration Lawyers Assn. as Amicus Curiae in Support of the Plaintiffs-Appellants at 1, *Li v. Renaud* 654 F.3d 376 (2d Cir.2011) (No. 10-2560-cv).

63. See H.R. REP. NO. 107-45, at 1-2 (2001), *reprinted in* 2002 U.S.C.C.A.N. 640, 640-41.

64. Christina A. Pryor, Note, “Aging Out” of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act, 80 *FORDHAM L. REV.* 2199, 2211 (2012).

65. *Id.* at 2212.

of a long waiting list.<sup>66</sup> The Senator expressed concern that these parents would have to decide to either leave their children behind or “remain in their country of origin and lose out on their American dream in the United States.”<sup>67</sup> The Act’s co-sponsor, Representative Sheila Jackson-Lee, stated that the purpose of the CSPA was to solve “the age out problem without displacing others who have been waiting patiently in other visa categories.”<sup>68</sup>

Subsections (h)(1)-(3) of the CSPA specify when an alien will be considered a child for the purpose of a family-sponsored visa petition, and specify what happens to a child’s petition if he or she reaches age twenty-one before his or her parent’s priority date becomes current.<sup>69</sup> Subsection (h)(1) lays out the formula for calculating a child’s age under the INA.<sup>70</sup> If the formula is employed and the resulting number is less than twenty-one, the alien will be considered a child for INA purposes.<sup>71</sup> Subsection (h)(1) states:

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.<sup>72</sup>

In other words, an alien’s age is determined by taking the age of the alien on the date on which an immigrant visa number first became available for that alien or for his alien parent, and reducing that age by the number of days between when the petition was filed with USCIS and when USCIS approved the petition.<sup>73</sup> However, this formula for age determination only applies if the alien seeks to acquire LPR status within one year of the date when the relevant visa became available.<sup>74</sup> As previously mentioned, subsection (a)(2)(A) of the INA describes F2A petitions for spouses and children of LPRs and subsection (d) entitles spouses and children of immigrants to be included on the petition as derivative beneficiaries.<sup>75</sup> Because subsection (h)(1) begins with the words “for the purposes of sub-

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66. *Id.* at 2212-13.

67. *Id.* at 2213 (quoting 147 CONG. REC. 5239 (statement of Sen. Feinstein)).

68. Pryor, *supra* note 64, at 2213.

69. 8 U.S.C. § 1153(h) (2006).

70. *De Osorio v. Mayorkas*, 695 F.3d 1003, 1008 (9th Cir. 2012) (en banc), *rev’g on reh’g*, 656 F.3d 954 (9th Cir. 2011).

71. Pryor, *supra* note 64, at 2213.

72. 8 U.S.C. § 1153(h)(1).

73. See Pryor, *supra* note 64, at 2213.

74. See *id.*

75. See *supra* pp. 684-685.



sections (a)(2)(A) and (d),” the formula described therein should apply to F2A visa petitions for children of LPRs and to any other family preference petition on which a child is listed as a derivative beneficiary.<sup>76</sup> Subsection (h)(2) further clarifies that the formula in the previous subsection applies to such petitions by stating:

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.<sup>77</sup>

Subsection (h)(3) addresses petitions of individuals who are calculated to be twenty-one or over under the formula in subsection (h)(1).<sup>78</sup> It states:

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.<sup>79</sup>

In other words, even if an alien described in this subsection ages out of child status for purposes of his original petition, he will be able to use the priority date from his original petition on his new petition.<sup>80</sup> The effect of this provision is to enable the beneficiary to be placed at, or close to, the front of the visa line for the new category, rather than at the back of the line, which is where he would be if he started a new visa petition application.<sup>81</sup>

Differing interpretations of subsection (h)(3) have led to disagreement among U.S. courts regarding which beneficiaries under the various types of family visa petitions are entitled to automatic conversion and date retention.<sup>82</sup> In particular, U.S. courts have reached different conclusions as to whether the benefits of subsection (h)(3) apply to aliens who have aged out and who are therefore forced to have a new petitioner file for a visa on their behalf.<sup>83</sup> A new petitioner is required for those aged-out aliens who no longer possess a qualifying family relationship with the original petitioner.<sup>84</sup> To illustrate, a U.S. citizen may file an F1 petition on behalf of his unmarried daughter and list his daughter’s child as a derivative beneficiary

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76. See 8 U.S.C. § 1153(h)(1).

77. 8 U.S.C. § 1153(h)(2).

78. 8 U.S.C. § 1153(h)(3).

79. *Id.*

80. See *id.*

81. See *id.*

82. See discussion *infra* Part I.B.

83. *Id.*

84. See *Li v. Renaud*, 654 F.3d 376, 379, 381 (2d Cir. 2011).

of the petition.<sup>85</sup> However, if the child turns twenty-one before the priority date of the petition becomes current, the child's grandfather can no longer directly file a petition on the child's behalf.<sup>86</sup> This is because there is no preference category for the grandchildren of U.S. citizens (i.e. no qualifying relationship exists).<sup>87</sup>

## B. The Split Among the U.S. Circuit Courts of Appeals

### 1. Board of Immigration Appeals Decision

The first court to rule on this matter was the Board of Immigration Appeals (BIA).<sup>88</sup> In *Matter of Wang*, the BIA reviewed the director of the California Service Center's decision approving an F2B visa petition filed by petitioner Xiuyi Wang on behalf of his unmarried daughter, but denying Wang's request to assign an earlier priority date to the petition.<sup>89</sup> The case reached the BIA after the director elected to have her decision certified due to the "absence of established precedent on the applicability of the CSPA in this situation."<sup>90</sup> Petitioner Wang became an LPR after his citizen sister filed an F4 visa petition on his behalf on December 28, 1992, pursuant to subsection (a)(4) of the INA, in which she listed petitioner Wang as the primary beneficiary and listed his daughter, who was ten years old at the time, as a derivative beneficiary.<sup>91</sup> A visa became available for the petitioner in February of 2005, but by that time, his daughter was twenty-two years old and no longer qualified as a "child" for purposes of derivative beneficiary status.<sup>92</sup> As no preference category existed for nieces and nephews of U.S. citizens or LPRs, petitioner Wang was forced to file a new petition on his daughter's behalf.<sup>93</sup> Petitioner Wang filed an F2B visa petition on September 5, 2006 pursuant to subsection (a)(2)(B) of the INA and sought to have his daughter assigned the priority date that was given to the original F4 petition (December 28, 1992).<sup>94</sup>

The director approved the F2B visa petition on March 25, 2008, but refused to assign it the 1992 priority date, instead assigning it the date on which the petition was filed (September 5, 2006).<sup>95</sup> As a result, petitioner Wang's daughter was placed at the end of the visa waitlist, even though she

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85. See, e.g., *id.* at 379.

86. See, e.g., *id.* at 381.

87. See, e.g., *id.*

88. *Board of Immigration Appeals*, U.S. DEP'T JUSTICE (Nov. 2011), <http://www.justice.gov/eoir/biainfo.htm>. The BIA is an administrative body with nationwide jurisdiction to hear appeals from decisions rendered by immigration judges and district directors of the Department of Homeland Security (DHS). *Id.* In all cases before the BIA, the United States is one party and the other party is an alien, a citizen, or a business firm. *Id.*

89. *Matter of Wang*, 25 I. & N. Dec. 28, 28 (BIA 2009). Xixui Wang was an LPR of the United States and a native citizen of China. *Id.* at 28-29.

90. *Id.* at 30.

91. *Id.* at 29.

92. *Id.*

93. *Id.* at 29, 35-36.

94. *Id.* at 29.

95. *Id.* at 29.

had already waited fourteen years as a derivative beneficiary of the F4 petition filed by her citizen aunt.<sup>96</sup> On appeal, the BIA noted that there was no evidence that petitioner Wang's daughter had sought LPR status within a year of the visa petition becoming available, as required by subsection (h)(1).<sup>97</sup> However, the BIA did not address whether this defect barred petitioner Wang's daughter from using subsection (h)(3).<sup>98</sup> Instead, the BIA sought to determine whether subsection (h)(3) "permits an automatic conversion from a fourth-preference visa petition to a second-preference visa petition with retention of the priority date of the fourth-preference petition."<sup>99</sup>

The BIA found that the language of the CSPA was ambiguous; therefore, a determination on the matter required the BIA to look to legislative intent.<sup>100</sup> According to the BIA, prior usage of the concept of "conversion" in immigration regulations had consistently applied to situations where a visa petition converted from one category to another and the beneficiary of that petition fell into a new category without filing a new petition.<sup>101</sup> Additionally, prior usage of priority date retention had applied to petitions filed by the same family member.<sup>102</sup> On this basis, the BIA upheld the director's decision not to apply automatic conversion and priority date retention to the beneficiary's new petition filed by a different family member.<sup>103</sup> The BIA stated that "absent clear legislative intent," it was reluctant to "create an open-ended grandfathering of priority dates that allow derivative beneficiaries to retain an earlier priority date set in the context of a different relationship, to be used at any time."<sup>104</sup>

## 2. *Second Circuit Decision*

In June 2011, the U.S. Court of Appeals for the Second Circuit ruled on a different case presenting this same issue.<sup>105</sup> In *Li v. Renaud*, the Second Circuit reviewed a decision by the U.S. District Court for the Southern District of New York dismissing for failure to state a claim the complaint filed by petitioner Feimei Li, an LPR of the United States and a native citizen of China.<sup>106</sup> The district court had held that because the CSPA was ambiguous, the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* required the district court to defer to the BIA's construction of the statute.<sup>107</sup> On appeal, the petitioner, a mother,

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96. *See id.*

97. *Id.* at 33.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 35

102. *Id.*

103. *Id.* at 39.

104. *Id.*

105. *Li v. Renaud*, 654 F.3d 376, 376-77, 379 (2d Cir. 2011), *aff'g* *Li v. Renaud*, 709 F. Supp. 2d 230 (S.D.N.Y. 2010).

106. *Id.*

107. *Li*, 654 F.3d at 380 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

argued that the unambiguous terms of the CSPA (in particular, subsection (h)(3)) entitled her son to retain the priority date of his grandfather's petition, even though he had aged out of eligibility for a visa as a derivative beneficiary to his grandfather's petition.<sup>108</sup>

The facts of *Li* are as follows. On June 6, 1994, petitioner's father, an LPR of the United States, filed an F2B visa petition on behalf of his unmarried daughter (the primary beneficiary and also the petitioner in *Li*) and her fourteen-year-old son (the derivative beneficiary).<sup>109</sup> The INS approved the petition on April 4, 1995, but petitioner did not receive a visa until March 2005, at which point, her son was twenty-six.<sup>110</sup> Three years later, on April 25, 2008, petitioner filed a new F2B visa petition as an LPR on behalf of her unmarried adult son (now the primary beneficiary of the new visa petition) and requested that he be assigned the original priority date of June 6, 1994.<sup>111</sup> USCIS approved the 2008 petition on August 7, 2008, but rejected petitioner's request to maintain the 1994 priority date and instead, set the date as April 25, 2008.<sup>112</sup> Petitioner acknowledged that her son was no longer eligible as a derivative beneficiary to the 1994 petition because there was no family preference category for grandchildren, but she argued that subsection (h)(3) permitted automatic conversion and date retention for aged-out beneficiaries, even if the petitioner for the two visa petitions was not the same.<sup>113</sup>

To decide this case, the Second Circuit first had to determine whether deference to the BIA's interpretation of subsection (h)(3) was appropriate.<sup>114</sup> According to the Supreme Court in *Chevron*, the first step in this analysis is to determine "whether Congress has directly spoken to the precise question at issue" because if it has, "that is the end of the matter" and the court "must give effect to the unambiguously expressed intent of Congress."<sup>115</sup> The Second Circuit found that Congress was clear as to "whether a derivative beneficiary who ages out of one family preference petition may retain the priority date of that petition to use for a different family preference petition filed by a different petitioner" and therefore, the Second Circuit did not defer to the BIA's interpretation.<sup>116</sup> The Second Circuit instead looked to the "If X, [then] A and B" structure of the text in subsection (h)(3) and concluded that in subsection (h)(3), Congress intended to require "both an automatic conversion to a different category and a retention of the original priority date," unlike in other subsections where Congress made conversion and retention "distinct and independent

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108. *Id.* at 377.

109. *Id.* at 379.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 381.

114. *Id.* at 382.

115. *Id.* (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

116. *Id.* at 382-83.

benefits.”<sup>117</sup>

The court then determined that it was impossible for the petition to be converted to the appropriate category because “conversion to the appropriate category,” as used in the CSPA, refers only to petitions in which the category has changed, but not the petitioner.<sup>118</sup> The court concluded that because subsection (h)(3) required both automatic conversion and retention, and because it was not possible for petitioner’s son to be converted to an appropriate category with respect to his grandfather’s petition, petitioner’s son was not eligible to retain the 1994 priority date of his grandfather’s petition.<sup>119</sup> The Second Circuit therefore affirmed the district court’s decision to dismiss petitioner’s complaint for failure to state a claim.<sup>120</sup>

### 3. *Fifth Circuit Decision*

In *Khalid v. Holder*, the U.S. Court of Appeals for the Fifth Circuit reviewed a BIA order dismissing a petitioner’s appeal from an Immigration Judge’s (IJ’s) decision ordering the petitioner removed from the United States.<sup>121</sup> Petitioner Mohammad Abubakar Khalid, a citizen of Pakistan, was admitted into the United States in 1996 at the age of eleven on a visitor’s visa.<sup>122</sup> Petitioner’s aunt, a U.S. citizen, had already filed an F4 petition on January 12, 1996 on behalf of petitioner’s mother, listing petitioner as a derivative beneficiary.<sup>123</sup> The petition was assigned a January 1996 priority date, but did not become current until February 2007, when petitioner was twenty-two years old.<sup>124</sup> Petitioner attempted to adjust his status so that he could remain a derivative beneficiary of his aunt’s petition, but the Department of Homeland Security (DHS) denied his application, reasoning that immigration law no longer considered petitioner a child.<sup>125</sup> Later that year, petitioner’s mother filed a new F2B petition as an LPR on petitioner’s behalf, which was assigned a priority date of November 23, 2007.<sup>126</sup>

After DHS denied petitioner’s application, it commenced removal proceedings against him for overstaying his visa in violation of 8 U.S.C. § 1227(a)(1)(B).<sup>127</sup> In March 2008, at the immigration court hearing, petitioner argued that he should be allowed to adjust his immigration status by assigning the new F2B petition the January 1996 priority date from the original F4 petition, making him immediately eligible for a visa.<sup>128</sup> Rely-

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117. *Id.* at 383.

118. *Id.* at 384.

119. *Id.* at 385.

120. *Id.*

121. *Khalid v. Holder*, 655 F.3d 363, 365 (5th Cir. 2011).

122. *Id.*

123. *Id.*

124. *Id.* at 366.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

ing on the BIA's decision in *Matter of Wang*, the IJ rejected petitioner's argument and denied his application for a status adjustment.<sup>129</sup> On appeal to the BIA, the court was not persuaded by petitioner's argument and declined to reconsider its decision in *Matter of Wang*.<sup>130</sup>

On appeal to the Fifth Circuit, the court determined, as the Second Circuit had done, that the language of the CSPA was not ambiguous.<sup>131</sup> It found that although subsection (h)(3) did not explicitly describe which petitions qualified for automatic conversion and priority date retention, subsection (h)(3) was not ambiguous, given the language in the rest of subsection (h).<sup>132</sup> The Fifth Circuit then proceeded to analyze the language of subsection (h)(3) and rejected the BIA's conclusion that subsection (h)(2) applies only to subsection (h)(1) and not to subsection (h)(3).<sup>133</sup> The Fifth Circuit determined that the BIA's analysis "ignores the fact that (h)(3) expressly references (h)(1), which in turn expressly references (h)(2)."<sup>134</sup> The Fifth Circuit held that the provisions' interrelatedness indicated Congress' intent that subsection (h)(3) apply to any alien whose age was calculated to be twenty-one or over by the formula in (h)(1) and who was listed as a derivative beneficiary under any of the petitions described in (h)(2).<sup>135</sup> The court further noted that nothing in the text of subsection (h)(3) implied that automatic conversion would not apply if a different person filed each petition.<sup>136</sup>

The court explicitly recognized that its conclusion was irreconcilable with the decision of the Second Circuit in *Li v. Renaud*, but it respectfully disagreed with its sister court.<sup>137</sup> The Fifth Circuit stated that "under the *Li* court's restrictive reading," the benefits under subsection (h)(3) would only be available to derivative beneficiaries of second preference visa petitions.<sup>138</sup> The Fifth Circuit provided a hypothetical example of a child joining on the petition of a parent who was named as a primary beneficiary on an F2A petition filed by the parent's LPR spouse (i.e. the child's other parent).<sup>139</sup> Even if a child in this situation aged out before his or her immigrant parent was granted LPR status, his or her petition could simply be converted to an F2B petition for an unmarried son or daughter of an LPR because the parent who filed the original petition could equally file the new petition.<sup>140</sup> The court conceded that this was a benefit for some aged-out beneficiaries, but it pointed out that priority date retention had already been available for individuals in such situations since 1987 under 8 C.F.R.

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129. *Id.*

130. *Id.*

131. *Id.* at 370.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 371.

136. *See id.* at 373.

137. *Id.* at 373.

138. *Id.* at 374.

139. *Id.*

140. *Id.*

§ 204.2(a)(4).<sup>141</sup> The Fifth Circuit stated, “the only difference between the regulation and the *Li* court’s reading of subsection (h)(3) is that the statute would relieve the spouse of the burden of filing a new petition, since the conversion would now be automatic” and concluded, “[w]e are skeptical that this meager benefit was all Congress meant to accomplish through subsection (h)(3), especially where nothing in the statute singles out derivative beneficiaries of second-preference petitions for special treatment.”<sup>142</sup>

Therefore, the Fifth Circuit held that the benefits of subsection (h)(3) applied to all petitions described in subsection (h)(2), including the petitioner’s original F4 petition, and it remanded the case to the BIA for further proceedings.<sup>143</sup> As of September 11, 2012, the BIA has denied DHS’ motion to administratively close the proceedings pending the outcome of the Ninth’s Circuit’s decision in *De Osorio v. Mayorkas* and has remanded the record to the IJ for further proceedings.<sup>144</sup>

#### 4. Ninth Circuit Decision

In *De Osorio v. Mayorkas*, the U.S. Court of Appeals for the Ninth Circuit reversed a decision rendered one year earlier by its own three-judge panel.<sup>145</sup> The Ninth Circuit had previously affirmed the Central District of California’s decision granting summary judgment to USCIS on the basis of the BIA’s decision in *Matter of Wang*.<sup>146</sup> In May 1998, petitioner’s citizen mother filed an F3 visa petition (for a married daughter of a U.S. citizen) on petitioner’s behalf, listing petitioner as the primary beneficiary and listing petitioner’s then thirteen-year-old son as the derivative beneficiary.<sup>147</sup> The F3 visa was approved in June 1998, but it did not become current until November 2005, when petitioner’s son was twenty-one years old.<sup>148</sup> In August 2006, petitioner immigrated to the United States as an LPR and, in July 2007, filed a new F2B petition on her son’s behalf.<sup>149</sup> Petitioner requested that USCIS retain the May 1998 priority date from the original F3 petition for the new F2B petition.<sup>150</sup> USCIS refused, placing petitioner’s son at the back of the line for an F2B visa.<sup>151</sup> In response, petitioner and other similarly situated immigrants sued USCIS in federal district court.<sup>152</sup>

On rehearing, the Ninth Circuit performed the same analysis that the Fifth Circuit performed in *Khalid v. Holder* and reached the same conclu-

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141. *Id.*

142. *Id.*

143. *Id.* at 375.

144. In Re: Mohammad Abubakar Khalid, 2012 WL 5178831, at \*1 (BIA Sept. 11, 2012).

145. Graham, *supra* note 20.

146. *De Osorio v. Mayorkas*, 695 F.3d 1003, 1004, 1010 (9th Cir. 2012) (en banc).

147. *Id.* at 1010.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

sion.<sup>153</sup> The Ninth Circuit first determined that the language of the CSPA was unambiguous and then interpreted the language of the statute.<sup>154</sup> The Ninth Circuit stated that it “read Congress’s repeated references to ‘subsections (a)(2)(A) and (d)’ as expressions of its intent to extend automatic conversion and priority date retention to all family-sponsored derivative beneficiaries.”<sup>155</sup> The court determined that the reference in subsection (h)(3) to the “original petition” was evidence that Congress contemplated the possibility of immigrants obtaining new petitions “either by editing the original petition or ‘automatically’ requesting a new petition that identifies a new petitioner and primary beneficiary.”<sup>156</sup> Additionally, the Court stated that if Congress intended to limit automatic conversion to petitions in which the petitioner remained the same, it should have used language similar to that used in 8 C.F.R. § 204.2(a)(4), the statute that predated the CSPA, which explicitly required the identity of the petitioner to remain the same in order for an immigrant to qualify for priority date retention.<sup>157</sup> The Ninth Circuit ultimately reversed the district court’s grant of summary judgment and remanded the case for further proceedings, stating, “[w]e join the Fifth Circuit in ‘giv[ing] effect to the unambiguously expressed intent of Congress.’”<sup>158</sup>

## II. The Supreme Court Should Adopt the Fifth and Ninth Circuits’ Interpretation

This Part contends that the Supreme Court should resolve the current circuit split by adopting the Fifth and Ninth Circuits’ interpretation of the CSPA when it decides *De Osorio v. Mayorkas*. First, this Part analyzes the outcome if the Supreme Court adopts the Second Circuit’s interpretation, arguing that such a holding would lead to absurd results. Next, this Part provides the reasons why the Supreme Court should adopt the Fifth and Ninth Circuits’ interpretation that automatic conversion and priority date retention under subsection (h)(3) apply to all family-sponsored visa petitions. Finally, it argues that policy considerations favor the adoption of the Fifth and Ninth Circuits’ interpretation of the CSPA.

### A. The Second Circuit’s Interpretation Leads to Absurd Results

The Second Circuit’s interpretation of the CSPA leads to at least two categories of absurd results. The first category involves what will happen if the Supreme Court adopts the Second Circuit’s interpretation in deciding *De Osorio v. Mayorkas* at the same time as the Obama Administration’s current DACA immigration policy remains in effect. Under DACA, illegal immigrants who came to the United States as children are given temporary

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153. See *id.* at 1011-16.

154. See *id.* at 1012.

155. *Id.*

156. *Id.* at 1014.

157. *Id.* at 1015.

158. *Id.* at 1016 (alteration in original).



legal status to remain in the United States, provided that they satisfy certain requirements.<sup>159</sup> Janet Napolitano, the Secretary of Homeland Security at the time, issued a Memorandum outlining the criteria that an illegal immigrant must satisfy in order to have his or her case considered for this exercise of prosecutorial discretion and to prevent his or her removal from the United States.<sup>160</sup> The criteria are that the individual:

- Came to the United States under the age of sixteen;
- Has continuously resided in the United States for a [sic] least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- Is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- Has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- Is not above the age of thirty.<sup>161</sup>

To request consideration for deferred action, an individual who satisfies all of the criteria and is at least fifteen years old (unless he is currently in removal proceedings or has a final removal or voluntary departure order) must mail USCIS (1) documentary proof establishing that the criteria are met, (2) a Consideration of Deferred Action for Childhood Arrivals form, (3) an Application for Employment Authorization, and (4) a worksheet to establish economic need for employment.<sup>162</sup> If USCIS decides to defer action against a particular individual, the individual can remain in the United States for a period of two years, subject to renewal, and the individual will become eligible for work authorization.<sup>163</sup> Although DACA does not guarantee that all eligible individuals will become LPRs,<sup>164</sup> it does allow the individual to bide time by obtaining temporary legal status until a pending visa petition becomes current.<sup>165</sup> By granting work authorization for these individuals, the policy also might make it more likely for an illegal immigrant to become an LPR through an employment-based visa petition pursuant to the INA.<sup>166</sup>

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159. See Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 1 (Jun. 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

160. *Id.*

161. *Id.*

162. *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <http://www.uscis.gov/childhoodarrivals> (last updated Jan. 18, 2013).

163. See Lyndsey Marcelino, *DACA Brings Hope and Caution for Undocumented Young People*, CORNELL J.L. & PUB. POL'Y BLOG (Oct. 4, 2012, 1:54 AM), <http://www.jlpp.org/2012/10/04/daca-brings-hope-and-caution-for-undocumented-young-people>.

164. *Id.*

165. See *id.*

166. See 8 U.S.C. 1153(b)(3) (2006).

A Supreme Court decision favoring the Second Circuit's interpretation of the CSPA would lead to absurd results when considered in conjunction with DACA. In *Public Citizen v. U.S. Department of Justice*,<sup>167</sup> Justice Kennedy articulated the rule that "[w]here the plain language of the statute would lead to 'patently absurd consequences,' that 'Congress could not possibly have intended,' we need not apply the language in such a fashion."<sup>168</sup> This rule can be applied to the Second Circuit's decision in *Li v. Renaud*, where the court held that an individual is not entitled to priority date retention when the identity of his petitioner changes because such petitions "cannot be converted to an appropriate category" and because the text of the provision requires automatic conversion and priority date retention to occur together.<sup>169</sup> The court determined that automatic conversion and priority date retention were to occur together due to the "if X, [then] A and B" structure of subsection (h)(3), reasoning that if Congress had intended to give beneficiaries the option to select *either* conversion *or* retention *or* both, it would have done so.<sup>170</sup>

It is true, as the Second Circuit notes, that subsection (h)(3) possesses an "If X, [then] A and B" structure with respect to automatic conversion and priority date retention because it states, "[i]f the age of an alien is determined under paragraph (1) to be 21 years of age or older . . . the alien's petition shall automatically be converted to the appropriate category *and* the alien shall retain the original priority date issued upon receipt of the original petition."<sup>171</sup> However, reading this statutory language as the Second Circuit does (to mean that if a petition cannot be converted to an appropriate category, it also cannot retain its original priority date) would result in the singling out of a particular class of aged-out derivative beneficiaries. Congress could not have intended to leave an entire subset of aged-out individuals in exactly the same position that they were in before the passage of the CSPA. Doing so would, in effect, cause the CSPA to fail at its main purpose of fixing the aging out problem. This consequence is particularly absurd because at no point in the legislative history of the CSPA did Congress indicate an intention to subdivide aged-out derivative beneficiaries into distinct classes in order to treat these classes unequally.<sup>172</sup>

This absurdity is confirmed if one examines the Second Circuit's interpretation together with DACA. With both of these policies in place, certain individuals who attempted to immigrate to the United States *legally* as chil-

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167. 491 U.S. 440, (1989).

168. *Id.* at 440 (Kennedy, J., concurring) (citing *United States v. Brown*, 333 U.S. 18, 27 (1948) and *FBI v. Abramson*, 456 U.S. 615, 640 (1982) (O'Connor, J., dissenting)). The "absurd result principle" enjoys wide acceptance in the U.S. legal system, but the cases in which it is used and referred to neither define absurdity, nor specify the situations in which the principle should be applied. Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 128-29 (1994).

169. *Li v. Renaud*, 654 F.3d 376, 383, 385 (2d Cir. 2011); *see also supra* text accompanying notes 117-119.

170. *Li*, 654 F.3d at 383.

171. 8 U.S.C. § 1153(h)(3) (emphasis added).

172. H.R. REP. NO. 107-45, at 2 (2001), *reprinted in* 2002 U.S.C.C.A.N. 640, 640-41.

dren will continue to have to wait on multiple waitlists, perhaps for a decade or longer, while concurrently, DACA will permit individuals who immigrated *illegally* as children to stay for extended periods of time. Such a policy will inevitably discourage potential adult immigrants from listing their children as derivative beneficiaries on visa petitions. Instead, adult immigrants will be encouraged to obtain LPR status for themselves and thereafter bring their children (under the age of sixteen) into the United States illegally, relying on DACA to provide a more reliable and potentially quicker path to permanent residency for such children. The fact that the Second Circuit's construction of the language of the CSPA would ultimately lead to this patently absurd consequence means, according to *Public Citizen*, that the Supreme Court need not apply the CSPA's language in such a fashion.

Carl Shusterman, a former Immigration and Naturalization Services (INS) attorney,<sup>173</sup> has identified a second category of absurd results that will occur if the Supreme Court adopts the Second Circuit's interpretation of the CSPA.<sup>174</sup> Shusterman poses additional hypothetical facts to the facts of *De Osorio v. Mayorkas* and analyzes the facts under the Second Circuit's framework, in which subsection (h)(3) benefits only apply to aged-out derivative beneficiaries whose petitions can convert to another preference category without a change in petitioner.<sup>175</sup> Under this framework, De Osorio's twenty-one-year-old son will not be able to retain the priority date of his mother's visa petition filed by his U.S. citizen grandmother.<sup>176</sup> However, according to the calculation in subsection (h)(1) (which reduces a child's age by "the number of days . . . [the] petition described in paragraph (2) was pending"<sup>177</sup>), it would be possible for De Osorio and her hypothetical twenty-four-year-old nephew to immigrate at the same time.<sup>178</sup>

This outcome would be possible if De Osorio's mother simultaneously filed F3 visa petitions for De Osorio and her sister, Suerte, and listed Suerte's son (who is three years older than De Osorio's son) as a derivative beneficiary, but Suerte's application was lost and, as a result, was not approved until four years later.<sup>179</sup> According to the text of subsection (h)(1), Suerte's son would be twenty years old for INA purposes because his application was pending for four years (between 1998 and 2002) before it was approved in 2005, when he was twenty-four years old.<sup>180</sup> Shusterman points out that in this "not-so-far-fetched scenario, Suerte's [twenty-

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173. *Our Immigration Attorneys*, LAW OFFICES OF CARL SHUSTERMAN, <http://shusterman.com/ourimmigrationattorneys.html> (last visited July 7, 2013).

174. See Carl Shusterman, *Supreme Court Agrees to Review CSPA Victory in the Court of Appeals*, CARL SHUSTERMAN'S IMMIGR. UPDATE (June 26, 2013, 9:26 AM), <http://blogs.ilw.com/carlshusterman/2013/06/supreme-court-agrees-to-review-cspa-victory-in-the-court-of-appeals.html>.

175. *Id.*

176. *Id.*

177. 8 U.S.C. § 1153(h)(1) (2006).

178. Shusterman, *supra* note 174.

179. *Id.*

180. *Id.*

four]-year-old son is able to immigrate together with his mother while his [twenty-one]-year-old cousin remains separated from his mother for almost a decade with no end in sight.”<sup>181</sup> He adds that Congress likely intended the benefits under subsection (h)(3) to apply to those individuals who did not qualify under subsection (h)(1).<sup>182</sup> This second category of absurd results is further proof that the proper interpretation of the CSPA is that of the Fifth and Ninth Circuits, in which the benefits of subsection (h)(3) apply to derivative beneficiaries of all family preference categories.

## B. Subsection (h)(3) Benefits Apply to All Family-Sponsored Visa Petitions

### 1. *Chevron Deference Does Not Apply*

Although the Second, Fifth, and Ninth Circuits have all concluded that the BIA’s decision in *Matter of Wang* is not entitled to *Chevron* deference, a *Chevron* analysis is worthwhile because it will shed light on both the clarity of the CSPA’s text and Congress’s intent in passing the statute. In *Chevron*, the Supreme Court established a two-prong test for determining when U.S. courts should defer to a government agency’s interpretation of a statute.<sup>183</sup> The first question a reviewing court must ask is whether Congress has spoken to the precise question at issue, i.e., whether the particular provision of the statute is unambiguous.<sup>184</sup> If there is an unambiguous statutory provision on point, the *Chevron* inquiry ends, and the court can proceed with its own interpretation of the statute.<sup>185</sup> If the statute is ambiguous, however, the court must proceed to the second *Chevron* step, which is a determination of whether the agency’s interpretation is based on a reasonable policy choice.<sup>186</sup> If the reviewing court deems the agency interpretation to be unreasonable, it may proceed with its own interpretation of the statute.<sup>187</sup>

In a Note about the issue of aging out of family-sponsored visa petitions, Christina Pryor argues that although the plain language of subsection (h)(3) is clear, the provision is ambiguous when applied because, she claims, when read in context, it “does not make sense.”<sup>188</sup> Pryor argues that on its face, the statute appears unambiguous because it states that an alien’s petition shall “automatically convert;” she asserts that in practice, however, the statute is ambiguous because automatic conversion is only possible for certain visa petitions (F1, F2A) and is not possible for others (F2B, F3 and F4).<sup>189</sup> Pryor also argues that the statute is ambiguous because the text does not explicitly state whether priority date retention

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181. *Id.*

182. *Id.*

183. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see also *De Osorio v. Mayorkas*, 695 F.3d 1003, 1011 (9th Cir. 2012) (en banc).

184. *Chevron*, 467 U.S. at 842–43; *De Osorio*, 695 F.3d at 1011.

185. *Chevron*, 467 U.S. at 842–43; *De Osorio*, 695 F.3d at 1011.

186. *Chevron*, 467 U.S. at 843; *De Osorio*, 695 F.3d at 1011.

187. See *Chevron*, 467 U.S. at 845; *De Osorio*, 695 F.3d at 1020 (Smith, J., dissenting).

188. Pryor, *supra* note 64, at 2232.

189. See *id.*

and automatic conversion can be applied independently of one another.<sup>190</sup>

Pryor's argument is problematic because it does not comport with Supreme Court precedent.<sup>191</sup> The Supreme Court, in *Dole v. United Steelworkers of America*, articulated the rule that a court may decide not to defer to an agency's interpretation of a statute if the statute "as a whole, clearly expresses Congress' intention."<sup>192</sup> *Dole* indicates that there can be more than one valid interpretation of a single statute.<sup>193</sup> Congress's clear intention in passing the CSPA was to help young adult aliens avoid the excessive wait times that result when such aliens age out of derivative beneficiary status.<sup>194</sup> This intention has been communicated by members of Congress who were influential in writing the legislation, such as Senator Feinstein and Senator Jackson-Lee, and is also made clear by the language of the statute.<sup>195</sup> In particular, subsection (h)(3) states that those petitioners who have aged out according to the calculation in subsection (h)(1) are permitted to convert their original petition to a new petition and are permitted to preserve the date from the original petition without having to re-file.<sup>196</sup> This provision inevitably achieves the aim of the CSPA—preventing excessive delays for those who, as derivative beneficiaries, have already waited for visas.

It is important to note that just because the Fifth and Ninth Circuits have split with the Second Circuit over whether the text of subsection (h)(3) affords automatic conversion and priority date retention to beneficiaries of all family petitions, this split does not establish that the statute is ambiguous. The Supreme Court has held that the existence of a circuit split does not itself render a statute ambiguous.<sup>197</sup> Pryor's main argument is that although the plain language of subsection (h)(3) is clear, it is ambiguous in practice because there are alternate ways to interpret the statutory language to determine which beneficiaries are subject to the benefits of subsection (h)(3).<sup>198</sup> This argument amounts to a claim that the statute is ambiguous simply because the Ninth Circuit and Second Circuit have drawn different interpretations of the beneficiaries to which the subsection applies. However, this claim ignores the Supreme Court's rule in *Dole*—that circuit courts are permitted to draw different interpretations of a statute's text. Therefore, because the statute is not ambiguous, *Chevron* deference should not apply.

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190. *Id.*

191. *See, e.g., Dole v. United Steelworkers of Am.*, 494 U.S. 26, 42 (1990).

192. *Khalid v. Holder*, 655 F.3d 363, 367 (5th Cir. 2011) (citing *Dole*, 494 U.S. at 42).

193. *See Dole*, 494 U.S. at 42.

194. Pryor, *supra* note 64, at 2212.

195. *See supra* text accompanying notes 64–68.

196. *See* 8 U.S.C. § 1153(h)(3) (2006).

197. *See De Osorio v. Mayorkas*, 695 F.3d 1003, 1012 (9th Cir. 2012) (en banc) (citing, for example, *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350 (2012)).

198. *See* Pryor, *supra* note 64, at 2232.

## 2. *The Plain Language of the Statute Dictates the Proper Result*

The Supreme Court should adopt the interpretation of the Fifth and Ninth Circuits because the plain, unambiguous language of the CSPA dictates that aged-out derivative beneficiaries of all family-sponsored visa petitions are entitled to automatic conversion and to priority date retention under subsection (h)(3). The Second Circuit has concluded that the benefits in subsection (h)(3) do not apply to an alien who files with a new petitioner after aging out because the benefits only apply to those petitions that can automatically convert, and a conversion cannot happen automatically if an applicant is forced to change petitioners.<sup>199</sup> The Second Circuit concludes that according to subsection (h)(3), only automatically converting petitions are entitled to benefits because the text of subsection (h)(3) does not explicitly refer to petitions other than those that automatically convert.<sup>200</sup> This argument is flawed because, as the Fifth Circuit stated in *Khalid*, subsection (h)(3) expressly references (h)(1), which expressly references (h)(2), meaning that subsection (h)(3) applies to all of the petitions described in (h)(2).<sup>201</sup> Subsection (h)(2) sets forth the petitions to which the formula in (h)(1) for calculating age under the INA applies, including F2A petitions and all petitions on which children are listed as derivative beneficiaries pursuant to subsection (d).<sup>202</sup> Therefore, the benefits of subsection (h)(3) apply to any alien whose age was calculated to be twenty-one or over by the formula in (h)(1) and who was listed as a derivative beneficiary under any of the petitions described in (h)(2).

Additionally, as previously mentioned in this Part, there is disagreement over whether the “if X, [then] A and B” structure of subsection (h)(3) means that Congress intended for the automatic conversion and priority date retention benefits to always occur together, or whether they may occur independently of one another. Aside from the potential for absurd consequences by construing this language to mean that they must occur together, there is a persuasive argument that the plain language of the provision dictates that they may occur independently. The American Immigration Council (AIC) and American Immigration Lawyers Association (AILA) argue that “Congress intended for the word ‘and’ as used here to operate simply as a means to connect two independent phrases—the automatic conversion phrase and the retention of priority date phrase.”<sup>203</sup> The AIC and AILA note that Congress frequently uses “and” as a method to connect more than one alternative and that Congress even used this method in the same subsection when it stated, “for the purposes of subsections (a)(2)(A) and (d).”<sup>204</sup> A person cannot simultaneously be a benefi-

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199. *Li v. Renaud*, 654 F.3d 376, 384 (2d Cir. 2011).

200. *Id.* at 384-85. Subsection (h)(2) encompasses petitions other than those that automatically convert. 8 U.S.C. § 1153(h)(2).

201. See *supra* text accompanying notes 131-136.

202. 8 U.S.C. § 1153(h)(2) (2006).

203. Brief for the Am. Immigr. Council & Am. Immigr. Lawyers Ass’n as Amici Curiae Supporting Plaintiffs-Appellants at 16, *Li v. Renaud* 654 F.3d 376 (2d Cir.2011) (No. 10-2560-cv).

204. *Id.* at 17.

ary of both of these subsections, so Congress must have been using “and” to refer to beneficiaries of either category.<sup>205</sup> If, as the AIC and AILA argue, the benefits are distinct and independent, a beneficiary who is forced to change petitioners after he ages out will still be entitled to priority date retention, even though the original petition does not convert automatically.

### C. Policy Considerations

Apart from proper statutory interpretation, there are significant policy reasons for allowing family members in all of the four preference categories to immigrate sooner rather than later under the CSPA. For example, family reunification policies for immigrants can provide benefits to U.S. society, including facilitating the integration of immigrants into a new country, a major concern for countries that allow immigration.<sup>206</sup> Countries with large numbers of immigrants likely want to maintain their national identity and promote assimilation, but these goals arguably can be achieved by allowing immigrants to start a complete and normal life in the new country with their families. If parents are forced to leave their children behind when they immigrate, they may not establish the same connections with their community as they would if they had their children with them. Similarly, common sense dictates that it is likely easier for children and young adults to assimilate than it is for older individuals, given that older individuals have a greater degree of exposure to the country they leave behind. In addition to the promotion of integration, family reunification can arguably increase the productivity of immigrants who come to the United States to work because they will be happier overall and more likely to stay in the country longer to develop their skills. Above all, if family reunification is truly a cornerstone of U.S. immigration law, there is no better policy to promote than the speedy reunification of immigrant parents with the children they have been forced to leave behind.

## III. EU Family-Sponsored Immigration Policies and Procedures: A Comparative

A comparison of EU and U.S. immigration policies and procedures is both interesting and valuable in the context of this Note. According to law professor Lori Nessel, “EU [immigration] initiatives are often justified as being in keeping with the American immigration regime” and, similar to

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205. *Id.*

206. Stephen Yale-Loehr & Christoph Hoashi-Erhardt, *A Comparative Look at Immigration and Human Capital Assessment*, 16 *GEO. IMMIGR. L.J.* 99, 106 (2001) (“It seems likely that the presence of a family sponsor would aid the migrant in assimilating to the host country and lower the risk that the migrant would become an economic burden on the host country in the event of financial hardship.”). See Lori A. Nessel, *Families At Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 *HOFSTRA L. REV.* 1271, 1274 (2008) (“I also examine the global move toward restricting family-based immigration and argue that such restrictions undermine, rather than advance, true integration . . .”).

the United States, “in the EU, calls to restrict immigration are often centered on the family.”<sup>207</sup> Both the United States and the EU have recently elaborated upon their existing family reunification policies as they relate to children over the age of majority.<sup>208</sup> On September 22, 2003, one year after the passage of the CSPA in the United States, the Council of the EU passed a Directive on the Right to Family Reunification (the “Directive”), which laid out the “conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.”<sup>209</sup> The EU’s stated purpose of the Directive is to “protect the family unit and to facilitate the integration of nationals of non-member countries.”<sup>210</sup> Similar to U.S. family reunification policies, EU policies differ depending on whether the person seeking to sponsor a family member is a Member State citizen or a third-country national residing legally in the Member State.<sup>211</sup> Although the Directive applies only to third-country nationals, its provisions are analogous to those of the INA that allow LPRs to sponsor a visa petition for a foreign family member and that family member’s children.<sup>212</sup> But unlike in the United States, each EU Member State has discretion to craft its own national legislation to govern the reunification of citizens with their family members.<sup>213</sup> Thus, a Member State can even enact immigration laws that are more favorable to immigrants than the terms supplied by the Directive.<sup>214</sup>

Under the terms of the Directive, third-country nationals may apply for family reunification if they hold a “residence permit issued by a Member State for a period of validity of one year or more” and if they have “reasonable prospects of obtaining the right of permanent residence” in the future.<sup>215</sup> Family members who are eligible to immigrate for family reunification under the Directive include (1) “the sponsor’s spouse” and (2) “the minor children of the couple (i.e. unmarried children below the legal age of majority in the Member State concerned) or of one member of

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207. Nessel, *supra* note 206, at 1273-74.

208. See 8 U.S.C. § 1153 (2006); see also Council Directive 2003/86/EC, 2003 O.J. (L 251) para. 12.

209. Council Directive 2003/86/EC, *supra* note 208, art. 1.

210. *Summaries of EU Legislation: Family Reunification*, EUROPA.EU, [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/133118\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133118_en.htm) (last updated Oct. 27, 2011) [hereinafter *Summaries of EU Legislation*].

211. See KEES GROENENDIJK ET AL., *THE FAMILY REUNIFICATION DIRECTIVE IN EU MEMBER STATES: FIRST YEAR OF IMPLEMENTATION 11* (2007) available at <http://cmr.jur.ru.nl/cmr/docs/family.RD.EU.pdf>. “[T]he Directive confines its scope of application to family members of third-country nationals who are not Union citizens. . . . [E]xcluding dual nationals from the scope of the Directive implies that third-country nationals lose their right to family reunification under the Directive upon acquisition of the nationality of the Member State of residence.” *Id.*

212. See *Summaries of EU Legislation*, *supra* note 210.

213. See GROENENDIJK ET AL., *supra* note 211, at 11, 13. Member State legislation can be more favorable than the Directive, but it cannot be inconsistent with the Directive. See *id.*

214. See *id.*

215. Council Directive 2003/86/EC, *supra* note 208, art. 3.



the couple, where he or she has custody and the children are dependent on him or her.”<sup>216</sup> The Directive also gives Member States the option, subject to certain conditions, to grant eligibility for family reunification to the third-country national’s (1) father and mother, (2) unmarried children above the age of majority, and (3) unmarried partner.<sup>217</sup>

The EU does not typically face the same issue as the United States of immigrant children aging out between the time their visa application is filed and the time it is granted. The EU avoids this problem because it does not have as extensive backlogs as the United States has<sup>218</sup> and because, under Article 8 of the Directive, “the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.”<sup>219</sup> However, the EU’s judicial branch has nonetheless been tasked with assessing conflicting interpretations of provisions of the Directive that would allow countries to admit immigrant children above the age of the majority.<sup>220</sup>

After the Council passed the Directive, the European Parliament decided to exercise its power to “start legal action for annulment of a measure of secondary [EU] law.”<sup>221</sup> The European Parliament asked the European Court of Justice (ECJ) to annul all or part of Articles 4(1), 4(6), and 8 of the Directive because it found these provisions to be in violation of Articles 8 and 14 of the European Convention on Human Rights (ECHR).<sup>222</sup> Article 4(1) of the Directive provides that when a child over the age of twelve arrives independently from the rest of his family, the Member State may require the child to meet a condition for integration before it authorizes the child’s entry and residence.<sup>223</sup> Article 4(6) provides that “member states *may* request that the applications concerning family reunification of minor children have to be submitted before the age of 15.”<sup>224</sup> The Article continues, “if the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification.”<sup>225</sup> Finally, Article 8 lays out the aforementioned three-year maximum waiting period between the time an application for family reunification is submitted and the time a residence permit is

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216. *Summaries of EU Legislation*, *supra* note 210.

217. *Id.*

218. See Thomas Huddleston, *U.S. Losing Immigrant Talent with Longest Backlogs for Families*, MIGRANT INTEGRATION POL’Y INDEX (MIPEX) BLOG (July 29, 2011, 1:51 PM), <http://www.mipex.eu/blog/us-losing-immigrant-talent-with-longest-backlogs-for-families>.

219. Council Directive 2003/86/EC, *supra* note 208, art. 8.

220. See Case C-540/03, *Parliament v. Council*, 2006 E.C.R. I-5769.

221. GROENENDIJK ET AL., *supra* note 211, at 8.

222. See *id.*

223. Council Directive 2003/86/EC, *supra* note 208, art 4(1). Under Article 4(1) of the Directive, a “condition for integration” is only enforceable if it was defined in Member State legislation that existed at the time the Directive was implemented. See *id.*

224. *Id.* art. 4(6) (emphasis added).

225. *Id.*

granted.<sup>226</sup> The ECJ's judgment in *Parliament v. Council*,<sup>227</sup> dismissed the European Parliament's action, but used the opportunity to clarify what it believed were important issues regarding the meaning of these three provisions of the Directive.<sup>228</sup>

Article 4(6) of the Directive is the provision that is most similar to the INA requirement that children be under the age of twenty-one to qualify for derivative beneficiary status.<sup>229</sup> Although Article 4(1) of the Directive has an age requirement as well, it addresses only children who immigrate to the EU without their family.<sup>230</sup> It would not be appropriate to compare the children to whom Article 4(1) of the Directive applies with aged-out derivative beneficiaries of U.S. visa petitions because the latter immigrate with their parents on the same visa petition. Article 4(6), on the other hand, provides a general age requirement that Member States may impose.<sup>231</sup> In its opinion in *Parliament v. Council*, the ECJ clarified that Article 4(6) cannot be interpreted as "prohibiting the Member States from taking account of an application relating to a child over 15 years of age or as authorising them not to do so."<sup>232</sup> In addition, the court stated that use of the term "family reunification" in the final sentence in Article 4(6) of the Directive, "cannot be interpreted as prohibiting a Member State which has applied the derogation from authorising the entry and residence of a child in order to enable the child to join his or her parents."<sup>233</sup> Finally, the court stated that even though Article 4(6) allows a Member State to require that a child be under the age of fifteen when his or her application is submitted, the provision must be read in light of Articles 5(5) and 17 of the Directive, which require the Member State to "examine the [child's] application in [light of] the interests of the child and with a view to promoting family life."<sup>234</sup>

In sum, despite the age requirements laid out in the Directive, the ECJ has ensured that the Directive will not necessarily preclude the admittance of child immigrants who submit their applications when they are over the prescribed age. The INA, on the other hand, sets forth an absolute requirement that a child must be under the age of twenty-one in order to immigrate to the United States with his or her parent on the same family-sponsored visa petition. A possible reason why the United States has upheld such an absolute requirement, while the EU has not, is because courts in the United States frame the issue differently from courts in the EU. EU courts frame family reunification as an issue of international

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226. *Id.* art. 8.

227. Case C-540/03, *Parliament v. Council*, 2006 E.C.R. I-5769.

228. GROENENDIJK ET AL., *supra* note 211, at 8.

229. See Council Directive 2003/86/EC, *supra* note 208, art 4(6). Article 4(6) permits children to immigrate on the basis of family reunification until they reach the age of fifteen, after which time they age out of eligibility. *Id.*

230. *Id.* art 4(1). Article 4(1) of the Directive applies to any child who is "aged over 12 years and arrives independently from the rest of his/her family." *Id.*

231. *Id.* art 4(6).

232. *Parliament*, 2006 E.C.R. ¶ 85.

233. *Id.* ¶ 86.

234. *Id.* ¶¶ 87-88.

human rights, and they cite to international conventions, treaties, covenants, and declarations in their judicial decisions interpreting family reunification legislation.<sup>235</sup>

U.S. courts do not typically mention these principles in their decisions because the United States is bound by relatively few applicable international human rights instruments.<sup>236</sup> EU Member States are bound by numerous international human rights treaties and conventions, including the European Community Treaty, the ECHR, the United Nations Convention on the Rights of the Child, the International Covenant on Civil and Political Rights (ICCPR), and the EU Charter of Fundamental Rights (EU Charter), all of which provide a basis for challenging unjust immigration policies.<sup>237</sup> In contrast, the only binding international human rights treaties that could potentially apply in the United States are the United Nations Refugee and Torture Conventions.<sup>238</sup>

In *Parliament v. Council*, the ECJ took the United Nations Convention on the Rights of the Child into account in applying the principles of the Directive, and it also explicitly referenced the EU Charter.<sup>239</sup> The ECJ drew upon these international instruments when it referenced such principles as “respect for family life” and “interests of the child” in its analysis.<sup>240</sup> The example set by the ECJ in this decision suggests that the circuit split in the United States could be resolved if the Supreme Court looked to principles of international law within treaties or conventions that the United States has ratified, and justified its decision on that basis. Unfortunately, this approach is unlikely to occur because the Supreme Court has “shown great deference to Congress when immigration regulation is at issue.”<sup>241</sup>

## Conclusion

Upon introducing the CSPA in the Senate, Senator Feinstein called the public’s attention to the consequences of not protecting the immigration status of children by stating:

Under current law, lawful permanent residents who are outside of the United States face a difficult choice when their child “ages-out” of eligibility for a first preference visa. . . . [They] must decide to either come to the

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235. See, e.g., *id.* ¶ 57; see also Nessel, *supra* note 206, at 1300.

236. Nessel, *supra* note 206, at 1300–01.

237. *Id.* at 1300.

238. The United States has not ratified the Convention on the Rights of the Child. *Id.* at 1300–01.

239. GROENENDIJK ET AL., *supra* note 211, at 9; *Parliament*, 2006 E.C.R. ¶ 37 (“[T]he International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law. That is also true of the Convention on the Rights of the Child referred to above which, like the Covenant, binds each of the Member States.”) (citations omitted). *Parliament v. Council* was the first case in which the ECJ explicitly referenced the EU Charter of Fundamental rights. GROENENDIJK ET AL., *supra* note 211, at 9.

240. See *Parliament*, 2006 E.C.R. ¶¶ 57, 88.

241. Nessel, *supra* note 206, at 1301.

United States and leave their child behind, or remain in their country of origin and lose out on their American dream in the United States. . . . [L]awful permanent residents who already live in the United States . . . must make the difficult choice of either sending their child who has “aged-out” of visa eligibility back to their country of origin, or have the child stay in the United States out-of-status, in violation of our immigration laws, and thus, vulnerable to deportation. No law should encourage this course of action.<sup>242</sup>

The purpose of the CSPA, therefore, was to prevent immigrant parents from facing the heartbreaking dilemma of having to choose between a life with their children and a life in the United States. The only way for the Supreme Court to ensure that this purpose is achieved is by adopting the Fifth and Ninth Circuits’ interpretation of the CSPA. Under this interpretation, derivative beneficiaries of all family preference categories will be able to retain the original priority date from their parent’s visa petition even after they age out of derivative beneficiary status. If the Court were to adopt the Second Circuit’s interpretation, only derivative beneficiaries of certain preference categories would be entitled to this benefit, and as a result, the families of beneficiaries of the remaining preference categories would be faced with the unfortunate dilemma discussed above.

Not only would adopting the Second Circuit’s interpretation go against congressional intent, but also it would lead to absurd results. With both DACA and the Second Circuit’s interpretation in place, potential immigrants from countries with extensive backlogs will be discouraged from listing their children as derivative beneficiaries on certain visa petitions. Instead, they will be encouraged to obtain LPR status for themselves and to bring their young children to the United States illegally, because doing so will allow the family to remain together and ensure at least temporary legal residency for the children under DACA. To avoid this absurd result, the Supreme Court should not apply the statutory language in the manner prescribed by the Second Circuit.

The Supreme Court can resolve the current circuit split in this way because the unambiguous nature of the CSPA enables it to disregard the BIA’s decision in *Matter of Wang* under a *Chevron* analysis. In the case of the CSPA, Congress’s intent—to fill the gap left by the INA regarding what happens to derivative beneficiaries after they age out—is clear when the subsections of the statute are read as a whole. In addition, the plain language of subsection (h)(3) clearly states that priority date retention will apply for beneficiaries of any of the petitions described in subsection (h)(2), which includes petitions of all family preference categories.

If family reunification is truly a cornerstone of U.S. immigration policy, the Supreme Court must affirm the Ninth Circuit’s decision in *De Osorio v. Mayorkas*. If it does not, immigrants to this country will be faced with increased uncertainty and unfairness stemming from a disjointed federal system. But potential immigrants should not be the only ones concerned with promoting consistency in the enforcement of immigration

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242. 147 CONG. REC. 5239 (2001) (statement of Sen. Dianne Feinstein).

laws in U.S. courts; the Supreme Court should have an interest in consistent immigration enforcement as well. Unlike the Court of Justice in the EU, the U.S. Supreme Court has limited tools of international law upon which to base its interpretations of domestic legislation.<sup>243</sup> Instead, it is up to Congress to clearly articulate the aims of the policies it proposes and the procedures by which to implement such policies so that the Supreme Court may properly interpret them. When it comes to the CSPA, Congress has spoken clearly.

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243. Nessel, *supra* note 206, at 1300-01.

