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David Froman on Current Litigation and How to Avoid Matter of Wang, 25 I. & N. Dec. 28 (BIA 2009), for "Aged Out" Derivative Beneficiaries Under the Child Status Protection Act (CSPA): An Emerging Perspective

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Recent arguments in Child Status Protection Act (CSPA)[1] litigation in the Court of Appeals for the Second Circuit highlight opposing views concerning the availability and mechanism for "aged out" derivative dependents of family, employment, or diversity visa petitions to immigrate following the successful immigration of the principal alien. Government allegations of statutory ambiguity and a misguided analysis by the BIA obscure the function of a unitary statutory design. The appellants' focus on "conversion" of categories overlooks a simpler approach. Immigration and Nationality Act § 203(h)(3) provides a means for derivative dependents to "follow to join" their principal aliens long after the dependents have reached twenty-one years of age. Their "appropriate category" remains the *same* category as the principal's. The function of the statute is clear and does not require *Chevron* deference. Moreover, it bypasses the roadblocks thrown up by the BIA's controversial decision in *Matter of Wang*.[2]

Introduction. On May 12, 2011, counsel in *Li v. Novak*[3] argued before the Court of Appeals for the Second Circuit whether the United States Citizenship and Immigration Services (USCIS) erred in denying an earlier priority date to Duo Cen based on his grandfather's 1994 petition for his mother, Feimei Li, on which he was a derivative, rather than the I-130 petition she filed for him in the F2B category in 2008 after she immigrated. The USCIS refused to accord the earlier priority date to the later petition. The plaintiffs sued, but lost in the District Court on a motion to dismiss.[4] The Second Circuit now is considering the case.

The appellants argued, *inter alia*, that the statute is clear and not ambiguous and that *Matter of Wang* ignored relevant legislative history, imposed a restrictive immigration

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1 Pub. L. No. 107-20, § 3, 116 Stat. 927 (2002), codified at 8 U.S.C. § 1153(h). References throughout will be to the familiar Immigration and Nationality Act (INA) designation, § 203(h). See U.S. Dep't of State Cable Unclas-163054, Child Status Protection Act of 2002: ALDAC # 1 (Aug. 26, 2002), *available at* http://travel.state.gov/visa/laws/telegrams /telegrams_1429.html (last visited June 13, 2011), *reprinted at* 7 Bender's Immigr. Bull. 1176 (Oct. 1, 2002), concerning the effective date and tentative implementation of the new law.

2 25 I. & N. Dec. 28 (BIA 2009).

3 Li v. Novak (or Renaud; the documents are inconsistent. Both Novak and Renaud have been Director of the USCIS Vermont Service Center), No. 10-2560 (2d Cir. June 25, 2010).

4 Brief of Appellants at 3-6, Li v. Novak, No. 10-2560 (2d Cir. Oct. 22, 2010). Unless otherwise stated, references to briefs will be to those in this case.

conversion regime ill-suited for derivatives, and erred in finding beneficiaries of second petitions would be jumping ahead of others in their new category.[5]

The government argued that the statute is ambiguous and the BIA's decision in *Wang* reasonable; therefore, *Chevron* analysis requires deference to *Wang*.[6]

Because the government's fortunes depend heavily upon demonstrating statutory ambiguity in both *Li* and the CSPA class action pending in the Court of Appeals for the Ninth Circuit,[7] I will highlight some of the important arguments in the case and in this particular area of developing law in general, focusing first on the question of statutory ambiguity, then on the emerging approach to using the statute to avoid the reach of *Wang*.

The Critical Issue: Ambiguity. Ambiguity, like Beauty, lies in the eye of the beholder. Particularly so when the seeker peers through the lens of familiar, preconceived notions of what she or he expects to see. Rather than analyzing what a statute *actually says*, the ambiguity seeker looks for what she or he thinks it *should say*. Rather than trying to understand unfamiliar terms or new concepts, the seeker of ambiguities casts about for familiar concepts to plug in to make the unfamiliar go away. Just so, the government and the BIA have approached CSPA § 3. They have looked through their ambiguity-seeker glasses and have found ambiguity where none exists.

Without the presence of ambiguity in the statute, the Court of Appeals can ignore *Wang*, the BIA's flawed attempt to shore up the floodgates against a worrisome, massive influx of wrongly denied potential beneficiaries of § 203(h). (But *Wang* stands on such precarious legal and logical ground that even if the court were to find ambiguity in the statute, the risk remains for the government that the court will find *Wang*'s holdings arbitrary, capricious, and therefore unworthy of deference.) We shall review various alleged ambiguities that the ambiguity-seekers have unearthed. They fall into two basic categories: "I don't like how they said that" and "I don't see how that is going to work!"

Class 1 Ambiguity: "I don't like how they said that.". Two arguments from the *Li* litigation top this list: the alleged ambiguity of using the word "paragraph" in paragraph

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5 Brief of Appellants; Reply Brief of Appellants (Mar. 10, 2011); Carl Shusterman, *CSPA: Oral Arguments in the 2nd Circuit*, Carl Shusterman's Immigration Update (May 20, 2011), http://blogs.ilw.com/carlshusterman/2011/05/cspa-oral-arguments-in-the-2nd-circuit-court-of-appeals.html (last visited May 26, 2011). *See generally* http://shusterman.com/childstatusprotectionact.html#6 (containing a wealth of resources on the Act, including pdf copies of court documents in pending CSPA cases).

6 Brief for Defendants-Appellees at 23 et seq. (Feb. 25, 2011).

7 Costello v. Napolitano and Cuellar de Osorio v. Mayorkas, Nos. 09-56846 & 09-56786 (9th Cir. consolidated July 7, 2010).

(2) of the statute, and the uncertainty, declared in *Wang* and *Li*, concerning the allegedly ambiguous scope of coverage of paragraph (3) as compared to the first two paragraphs of the statute.[8] This latter ambiguity depends in part on the presence of the former.

When "paragraph" means "paragraph". The government argued that INA § 203(h) is ambiguous because paragraph (2) should have said that it applies to the whole "subsection" not just to the "paragraph."[9] A careful reading of the statute, however, reveals no ambiguity.

Subsection 203(h) Statutory Structure Explained

Paragraph (1) establishes the "general" rule for determining whether a given applicant may still be treated as a "child" under the specified provisions of INA § 101(b).[10] It refers to "paragraph (2)" for the purpose of completing the age calculation, reducing the age of the beneficiary when visas first became available by "the number of days in the period during which the applicable petition described in paragraph (2) was pending." Paragraph (2) starts, "The petition described *in this paragraph* is—" (emphasis

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8 The *Wang* board was so uncertain, in fact, that it gutted the operative paragraph of the statute by effectively erasing from it the reference to § 203(d), and with it all derivative beneficiaries. *Wang,* 25 I. & N. Dec. at 39; *cf.* Brief for Defendants-Appellees at 28-30:

> Had Congress intended for the petitions described in subsection (h), paragraph (2), to apply to all of subsection (h), it would have so specified. For example, Congress easily could have said in § 1153(h)(3), as it did in § 1153(h)(1), that (h)(3) is "applicable" to the "petitions described in paragraph (h)(2)." Moreover, § 1153(h)(3) itself uses both "paragraph" and "subsection," making it highly unlikely that both words were intended to mean the same thing.

Id. at 29. Again the seeker prejudges what he sees based on his expectation that old, familiar patterns will govern new, seemingly similar concepts. In short, he quarrels with how the drafters worded the statute.

9 Here the seeker expects to see one thing, but finds something else:

> Congress's use of "paragraph" rather than "subsection" in § 1153(h)(2) is significant. The district court declined to "conclude that the petitions described in § 1153(h)(2) clarify the vagueness of those described in § 1153(h)(3)," because "the former specifically describe[s] only the "petition[s] described in this paragraph," and not "petitions described in this [subsection]" or "the petitions described in this paragraph [and the next paragraph]."

Id. at 28-29.

10 INA § 203(h)(1):

> (1) In general
> For purposes of subsections (a)(2)(A) and (d), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) 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), 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.

added).[11] The statutory structure requires that paragraph (2) be self-contained.[12] Therefore, the use of the word "paragraph" in paragraph (2) is both appropriate and intended.

When "[203](d)" means "203(d)". Having tied paragraphs (1) and (2) together by direct reference, we turn to paragraph (3): "If the age of an alien is determined under paragraph (1) to be 21 years of age or older. . . ."[13] Except as it participates in the age determination process of paragraph (1), *paragraph (2) plays no role in the functioning of paragraph (3)*. The alleged ambiguity of the word "paragraph" in paragraph (2) vanishes, for the sole function of paragraph (2) is to clearly identify the starting points for the age calculations to be made under paragraph (1).[14] The statutory references to subsections "(a)(2)(A)"[15] and "[203](d)"[16] in each paragraph of § 203(h) sufficiently identify these target statutes so as to remove any doubt concerning paragraph (3)'s *scope of coverage* as fully including all qualified derivative beneficiaries.

Back to basics

Paragraph (3)'s intended function leaps sharply into focus when introduced by the subsection's CSPA § 3 title, which proclaims the purpose in capital letters:

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11 (2) Petitions described

The petition described in this paragraph is--
(A) with respect to a relationship described in subsection (a)(2)(A), a petition filed under section 204 for classification of an alien child under subsection (a)(2)(A); or
(B) with respect to an alien child who is a derivative beneficiary under subsection (d), a petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c).

12 Indeed, including a self-contained reference paragraph when drafting a statute seems to be a legislative "best practice." This *passive* component of statutory construction avoids triggering unintended consequences by requiring the other parts of the statute to actively refer to it. A more recent example of this same usage that the government claims creates the statutory ambiguity necessitating *Chevron* analysis in *Li* (Brief for Defendants-Appellees at 29) appears in INA § 204(*l*), the 2009 statute that cured the deceased-petitioner problem. Paragraph (1), which sets forth the general rule, starts, "An alien described in paragraph (2) . . . ." Paragraph (2) is self-contained: "An alien described *in this paragraph* is an alien who . . . ." (Emphasis added.)

13 (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), 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.

14 Paragraph 2(B), for example, resolves the question of whether the calculation commences with the labor certification, which establishes the priority date in employment-based cases, or with the filing of the immigrant petition upon approval of the labor certification.

15 Covering spouses and children (under 21) of permanent residents.

16 A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of 101(b)(1) [8 U.S.C. § 1101(b)(1)] shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c), be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join the spouse or parent.

INA § 203(a), (b), & (c), referenced here, provide, respectively, for family preference, employment preference, and diversity immigrants.

"TREATMENT OF CERTAIN UNMARRIED SONS AND DAUGHTERS SEEKING STATUS AS FAMILY-SPONSORED, EMPLOYMENT-BASED, AND DIVERSITY IMMIGRANTS."[17] Bearing in mind that this section of the CSPA specifically focuses on the over-twenty-one population, it becomes easier to see that paragraphs (1) and (2) serve simply as instrumental adjuncts to the operative paragraph of the section—paragraph (3). No ambiguity lurks here. Paragraphs (1) and (2) merely provide the screening test to identify the qualified population to which paragraph (3) applies.

Therefore, two of the government's pet ambiguity arguments—use of the word "paragraph" versus "subsection" in paragraph (2) and the question of which categories of beneficiaries paragraph (3) covers[18]—fall at a single stroke.

Class 2 Ambiguity: "I don't see how that is going to work!". Paragraph (3) directs that the petitions of qualifying over-twenty-one beneficiaries "shall automatically be converted to the appropriate category . . . ." The government argues and *Wang* held that "automatic conversion" is clear with regard to the beneficiaries of family immigrant F2A and F2B petitions, owing to the familiar and well established hierarchy of avenues for conversion. But these same words appear unclear or "ambiguous" in relation to §203(d) derivatives.[19] This occurs for two reasons: administrators, judges, even litigators (1) focusing on the wrong concept and (2) forgetting that this law created a *new* regime for dealing with "aged out" derivatives, per its title.[20]

Automatic Conversion. First, the focus on "conversion" common to the F2A category analysis doesn't seem to fit § 203(d) derivatives. The BIA smelled ambiguity in this observation and proceeded to write § 203(d) right out of the statute. It was looking in the wrong place, focusing on the wrong concept for the § 203(d) part of the equation.

Mixing principals and derivatives, a.k.a. apples and oranges

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17 CSPA § 3.
18 Brief for Defendants-Appellees at 28-30.
19 *Wang*, 25 I. & N. Dec. at 33-39; Brief for Defendants-Appellees at 30-36.
20 What would be the point of a new statute targeting over-twenty-one derivatives merely to perpetuate the status quo of "aging out"? The Plaintiffs-Appellants pointed out important evidence from Senator Feinstein, who introduced the CSPA legislation in the Senate that later became this section. Succinctly summarizing the intended function of the legislation, she declared:

> The legislation I have introduced today would provide a child, whose timely filed application for a family-based, employment-based, or diversity visa was submitted before the child reached his or her 21st birthday, the opportunity to remain eligible for that visa until the visa becomes available.

Appellants' Reply Brief at 10-11 (Mar. 10, 2011); *see also* Appellants' Reply Brief, Costello & Cuellar de Osario, *supra* note 7, at 8-14, discussing Senator Feinstein's remarks and their importance in understanding the intent of the statute.

Congress combined two quite different populations in this statute. Both populations started as minor children petitioned for either directly by a permanent resident parent or indirectly as the derivative beneficiary of a family, employment, or diversity visa petition. The former population enjoys a well established hierarchy of steps that a beneficiary may progress through, depending upon the age and marital status of the beneficiary and the citizenship status of the petitioner. This category includes almost exclusively *principal* aliens (the "apples"). By contrast, the other category comprises exclusively *derivative* beneficiaries, who for the most part do not have access to an established hierarchy of conversion steps (the "oranges"). Rather, the regime in place prior to the CSPA held visas for them only until they reached age twenty-one. Once they "aged out," they were out of luck. The CSPA changed that.

CSPA § 3 Created a New Way of Treating "Aged Out" Derivative Beneficiaries. Section 3 of the Act, whose title we quoted in its original capitals above, signaled a *new* approach, not just a restatement of the *status quo ante*. If the intent of this section had been merely to continue treating § 203(d) derivatives as in the past by continuing to deny them immigrant visas once they passed their twenty-first birthdays and "aged out," Congress certainly didn't need this statute. Rather, Congress created a new scheme for these left-out beneficiaries—one that matches the family-conversion scheme in *result*, but through a different *procedure*. Instead of a establishing a new conversion scheme parallel to the family scheme for these beneficiaries, Congress relied on the already existing § 203(d) and the well established "follow-to-join" procedure to clear the way for these over-twenty-one derivatives to join their parents (or even to immigrate with them), despite their ages in excess of twenty-one. The fundamental structure was already there waiting in the statutes and regulations. It required only a "trigger" to make it happen; Congress supplied § 203(h). Thus, the "apples" have one processing scheme fitted to their apple-ness. The CSPA opened up a different processing method for the "oranges." But the BIA at the behest of the government failed to understand the new scheme—indeed, expressed incredulity that Congress could have intended to open up visas to the hordes of waiting over-twenty-one derivatives[21]—so it threw out the "oranges" and continued to process only the "apples."

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21 *Wang*, 25 I. & N. Dec. at 39:

> Absent clear legislative intent 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, which we do not find in the history of the CSPA, we decline to apply the automatic conversion and priority date retention provisions of section 203(h) beyond their current bounds.

See also id. at 38 n.11.

The Key Word: Appropriate. Everyone has focused so intently on the "conversion" concept that they have missed the other important word in that clause: "appropriate." The *appropriate* category for immigration of over-twenty-one *principal* aliens who start in the F2A category derives from the previously mentioned combination of factors that leads ultimately to a conversion of categories.[22] By contrast, § 203(d) fixes the *appropriate* category for *derivatives* at the outset, and it remains the same. Thus, § 203(d) derivatives already occupy their *appropriate* category. They do not need to convert. All they have to do is *follow to join* their principals. When viewed in this light, suddenly the perceived ambiguity of the statute has evaporated.

Oranges Have a Viable Processing Scheme, Too, Just Different from the Apples. As an accident of our legislative system, and perhaps in the interest of brevity, Congress combined these two different groups into one statute and described how to handle them in language broad enough to accommodate the two different treatments. The *Wang* board had no problem referring to familiar conversion schemes to validate the F2A "apple" portion of the equation. The Board failed, however, to read § 203(d) carefully enough to prompt it similarly to search the regulations for provisions to validate that statute's application to candidates occupying the second, "orange," portion of the equation. Had it looked, it would have found that the State Department's Foreign Affairs Manual provisions governing "following to join" make a special allowance for CSPA beneficiaries as an exception to the age-out rule.[23] This regulation meshes perfectly with § 203(d) and its reference in § 203(h)(3), with no ambiguity left over.

Therefore, the government's chief arguments concerning ambiguity all fail.

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22 This is so because, by definition, over-twenty-one principal beneficiaries who started as children cannot remain in category F2A. They *must* leave. Hence the well established family-conversion hierarchy.

23 Such a child may "follow to join" the principal alien according to 9 Foreign Affairs Manual (FAM) § 40.1 N.7.1 (emphasis added):

> The term "following to join," as used in . . . INA 203(d), permits an alien to obtain a[n] . . . immigrant visa (IV) and the priority date of the principal alien as long as the alien following to join has the required relationship with the principal alien. There is no statutory time period during which the following to join alien must apply for a visa and seek admission into the United States. However, if the principal has died or lost status, or the relationship between the principal and derivative has been terminated, there is no longer a basis to following to join. As an example, a person would no longer qualify as a child "following to join" upon reaching the age of 21 years (*unless they qualify for the benefits of the Child Status Protection Act*) or by entering into a marriage. There is no requirement that the "following to join" alien must take up residence with the principal alien in order to qualify for the visa. (See 9 FAM 42.42 N11.) The term "following to join," also applies to a spouse or child following to join a principal alien who has adjusted status in the United States.
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> The cross-reference, 9 FAM § 42.42 N.11, "Derivative Status for Spouse or Child," provides in part as follows:
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> a. A spouse or child acquired prior to the principal alien's admission to the United States or the alien's adjustment to legal permanent resident (LPR) status, or a child born of a marriage, which existed prior to the principal alien's admission, or adjustment, who is following-to-join the principal alien, should be accorded derivative status under INA 203(d). No second preference petition is required.

Practice Tip: *The practitioner must be cautioned that* by and large the USCIS and Department of State officers who will review your clients' applications for adjustment of status or immigrant visas remain thoroughly entrenched in the "conversion" mentality. In the absence of meaningful guidance, they will try to treat all over-twenty-one CSPA *derivative* applicants the same as they would treat *principal* beneficiaries of F2A or F2B family petitions. (With no category to "convert" to, they will be labeled "age-outs," and have their applications denied.) This misguided approach has relegated untold numbers of eligible derivative beneficiaries to the sidelines, unnecessarily separating them from their families for years. This fixation on "conversion" has spawned a number of court challenges and led to such absurd results as *Wang*'s reading INA § 203(d) right out of the CSPA. Therefore, whenever you handle one of these cases: Be alert. Be persistent. Keep it simple.

It Is Desirable to Avoid *Wang.* A full discussion of pending litigation lies beyond the scope of this article. Counsel for the appellants in each of these cases have made cogent arguments against ambiguity in the statute, listing the many defects of *Wang* and arguing for an expansive interpretation of the CSPA. Strong, forceful, well argued. One area of vulnerability appears. Each appellant must overcome *Wang* to win. But the main cases in litigation right now involve an arrangement that *Wang* overruled: a two-petitioner approach. Although that approach worked at one time with *Matter of Garcia*,[24] an unpublished BIA opinion, the BIA expressly declined to follow *Garcia* in *Wang*.[25] Prospects for reviving *Garcia* any time soon do not appear hopeful. Therefore, another, comprehensive approach that bypasses Wang is needed.

Looking Forward: The Emerging Approach to "Aged Out" Derivatives. What if there were a way to comply with the statute—indeed, to show that § 203(h) functions fully as part of a statutory and regulatory scheme to protect "aging out" children from missing the benefits of immigrating with their parents? What if this way differed from the appellants' position by only a minor, simpler procedure? What if this way avoided both statutory ambiguity and conflict with *Wang*? Would this be worth trying?

Success with the Emerging View. Using such an approach, an employment-based third-preference derivative beneficiary recently was able to get his wrongly denied I-485 application reinstated and a new employment authorization document issued after USCIS had *sua sponte* denied the pending I-485 when he turned twenty-one while

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24 33 Immigr. Rep. B1-98, 2006 Immig. Rptr. LEXIS 8193 (BIA June 16, 2006).
25 *Wang*, 25 I. & N. Dec. at 33 n.7.

waiting with his parents for immigrant-visa availability. His case was one of two that prompted a practice note last year in an effort to alert practitioners of potential pitfalls and to facilitate the development of this area of law.[26] The article details practical experiences dealing with USCIS and the Department of State concerning the lack of meaningful guidance available to assist adjudicating officers in this difficult area. A second article recounts the successful reinstatement of the I-485 following a motion ruling by an immigration judge approving the approach described here and USCIS acquiescence in reinstating the I-485 application and reopening and approving the denied I-765.[27] Thus, both an IJ and USCIS have acknowledged and applied this approach to the immigration of an existing over-twenty-one CSPA derivative beneficiary.

How to Handle the "Oranges". The regime for derivatives is simple: Their category remains the same as their principals'. It does not expire. Except for some rare family derivatives, it does not change. So long as they qualify for CSPA benefits, that is, they or their principals took steps within one year of visa eligibility, they may follow to join their principals.[28] There is no time limit. No new petition is required. Therefore *Wang* becomes irrelevant.

No ambiguity. No *Wang.* No further delay.

Practice Tip: Retaining the priority date in the *same* category has the virtue of simplicity and avoids unfavorable precedent. Therefore, it is recommended for your aged-out derivative clients.

For more complete discussions of the Child Status Protection Act, see Charles Gordon, Stanley Mailman, and Stephen Yale Loehr, Immigration Law & Procedure §§ 36.04, 38.03; Kathrin S. Mautino on the Child Status Protection Act, 2008 Emerging Issues 1747.

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26 David Froman, *Properly Applying INA §203(h) of the Child Status Protection Act: When the "Appropriate Category" Remains the Same Category*, 15 Bender's Immigr. Bull. 1145 (Aug. 15, 2010).

27 David Froman, *USCIS Gives De Facto Acceptance to Emerging View of CSPA Provisions in INA § 203(h)(3)*, Immigration Practice Pointers 105 (AILA 2011-12 ed.). This article also includes a flow chart to assist practitioners to visualize the way § 203(h) operates.

28 A more detailed discussion of the scope of the "sought to acquire" requirement appears in Froman, *supra* note 26, at 1150 n.20. If the BIA needs an existing family-based model for the treatment of over-twenty-one derivatives under § 203(h)(3), it should use *spouses* of permanent residents. They remain in the F2A category and are eligible indefinitely to follow to join their petitioning spouses. This is what § 203(h)(3) now does for their unmarried sons and daughters, regardless of whether the delay was caused by administrative delays or waiting for visas. *Id.* at 1153.

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Current Litigation and How to Avoid Matter of Wang, 25 I. & N. Dec. 28 (BIA 2009), for "Aged Out" Derivative Beneficiaries Under the Child Status Protection Act (CSPA): An Emerging Perspective

About the Author. David Froman has practiced immigration law for twenty-six years. He has taught at law schools in Chicago and San Diego and has written and lectured on various immigration topics. While in the U.S. Navy, he served three years in the Pentagon as the Navy's immigration attorney. He represented the petitioner in *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858 (8th Cir. 2002). He is the founder of the Froman Law Firm, whose website appears at http://www.getvisas.com. He is licensed in California, Missouri, and Arizona and is a member of the bar of the U.S. Supreme Court. His law studies include a J. D., cum laude, from the University of San Diego; a diploma from the USD Institute of International and Comparative Law in Paris, France; an LL.M. in international law from Harvard Law School; and postgraduate study in immigration law under Charles Gordon at Georgetown University Law School.