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David Froman on

De Osorio v. Mayorkas, 2012 U.S. App. LEXIS 20177 (9th Cir. Sept. 26, 2012) (en banc): Suggestions for Implementing Court's Ruling Upholding Child Status Protection Act Coverage for Over-Twenty-One Derivative Beneficiaries: An Emerging Perspective

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Introduction

Child Status Protection Act (CSPA)[1] supporters are cheering the recent en banc decision of the Court of Appeals for the Ninth Circuit, *De Osorio v. Mayorkas*.[2] By declaring that Congress unambiguously created a new regime for aged-out derivatives of family preference petitions, the Ninth Circuit reversed the lower court decisions, upholding the conversion and priority date retention provisions of the CSPA.[3] The court found the statute clear and unambiguous, as did the Second and Fifth Circuits, the only other appellate courts to consider the issue. Therefore, under the two-step analysis of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[4] the Ninth Circuit relegated *Matter of Wang*,[5] the obsessively restrictive BIA interpretation of the statute, to the dustbin. No court of appeals has agreed with *Wang*'s central holding that the statute is ambiguous. Without that central prop, *Wang* implodes.[6] Acknowledging that questions may remain concerning procedural implementation of the statute's mandate regarding over-twenty-one derivatives, the court properly left development of the policy and procedure to the USCIS.[7]

I will chart the progressive movement away from *Wang* as seen in the other two circuit court opinions that preceded *De Osorio* and show how the USCIS can immediately implement the court's holding consistent with the language of *all three* circuit court opinions, using existing procedures and regulations.

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1 Pub. L. No. 107-20, 116 Stat. 927 (2002). Section 3 is entitled "TREATMENT OF CERTAIN UNMARRIED SONS AND DAUGHTERS SEEKING STATUS AS FAMILY-SPONSORED, EMPLOYMENT-BASED, AND DIVERSITY IMMIGRANTS" (capitalization in original) and is codified at 8 U.S.C. § 1153(h), Immigration and Nationality Act (INA) §203(h).
2 2012 U.S. App. LEXIS 20177 (9th Cir. Sept. 26, 2012) (en banc).
3 INA § 203(h)(3), 8 U.S.C. § 1153(h)(3). Further references will follow the U.S. Code section numbers used by the court.
4 467 U.S. 837 (1984).
5 25 I. & N. Dec. 28 (BIA 2009).
6 For a detailed critique of *Matter of Wang*, see 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, 1149-52 (Aug. 15, 2010).
7 The United States Citizenship and Immigration Services, a bureau of the Department of Homeland Security.

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The Ninth Circuit Decision Against Its Backdrop

De Osorio comprises multiple plaintiffs in two actions, one with class designation. All are petitioners for family second preference petitions for adult sons or daughters who "aged out" as former derivative beneficiaries of family third and fourth preference petitions filed by a citizen parent or sibling. All came to the Ninth Circuit on denials of benefits under § 1153(h)(3).[8]

Through a logical, step-by-step approach, the court answered the question whether children over twenty-one years of age were entitled to relief under § 1153(h)(3): "We conclude that the plain language of the CSPA unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries."[9]

Like the Fifth Circuit in *Khalid v. Holder*,[10] the Ninth Circuit found that a two-petition approach acceptably gave effect to the clear wording of the statute.[11] The court wisely acknowledged that it was not the court's job to specify policy or procedures of

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8 *De Osorio*, 2012 U.S. App. LEXIS 20177, at *14-*15. Section 1153(h) provides as follows:

(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.

(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).

(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.

For a detailed description of the various family preferences (F1, F2A, F2B. etc.), see Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, and Ronald Wada, Immigration Law and Procedure §§ 38.01 to 38.05.

9 2012 U.S. App. LEXIS 20177, at *3-*4.

10 655 F.3d 363 (5th Cir. 2011).

11 *De Osorio*, 2012 U.S. App. LEXIS 20177, at *23.

implementation. Rather, its role was to declare that the law was clear and that it established a new benefit that the USCIS needs to implement.[12]

The Setting

To set the stage, the court systematically reviewed the essentials of family-based immigration, explained the features of and issues regarding the relevant provisions of the CSPA, and summarized the BIA's approach in *Wang.*[13] It also briefly summarized the Second Circuit and Fifth Circuit decisions in preparation for its discussion of the statutory ambiguity question.[14]

Before turning to that discussion, however, additional background will better acquaint the practitioner with the judicial landscape these prior opinions had begun to shape from the detritus of *Wang*.

What the Second Circuit Decided and Why it Is Important, or What's to Like About *Li*

Among those of us hoping for CSPA rationality, the decision in *Li v. Renaud*[15] was disappointing. Nevertheless, some aspects of the decision merit a closer look.

Family second preference derivative denied original priority date: After becoming a permanent resident as a result of her permanent resident father's petition for her, plaintiff Feimei Li filed a petition for her adult son Duo Cen, who had "aged out" as a derivative on the original petition. The USCIS denied Ms. Li's request to assign the original priority date to the second petition. The district court dismissed her complaint, and co-plaintiff Cen for lack of standing.

First, the court rejected the government's argument that the statute is ambiguous (as the BIA had found in *Wang*). In holding the statute unambiguous for its purposes, the Second Circuit observed, "an alleged ambiguity in some part of the statutory provision at issue does not end the inquiry. Even absent 'explicit[] articulat[ion]' of all components

12 The court invited the USCIS to determine "how our interpretation will affect different categories of visa petitioners and . . . which aliens most deserve the next available visas." *De Osorio*, 2012 U.S. App. LEXIS 20177, at *31. Quoting the Supreme Court, the court observed, "We 'are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments.'" *Id.* (internal citations omitted).
13 2012 U.S. App. LEXIS 20177, at *4-*14.
14 *Id.* at *15-*17.
15 654 F.3d 376 (2d Cir. 2011).

of a statutory provision, . . . a reviewing court must still ask whether Congress has spoken to 'the precise question at issue' in the case.[16]

The court went on to explain:

> Here, the "precise question at issue" is 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*.[] Applying the traditional tools of statutory construction, as explained below, we find that Congress's intent on this point was clear.[17]

Second, the court's finding of clear congressional intent allowed it to bypass deference to the agency's interpretation of the statute in *Wang* that the government had urged: "Section 1153(h)(3) does not entitle an alien to retain the priority date of an aged-out family preference petition *if the aged-out family preference petition cannot be 'converted to [an] appropriate category.'* Therefore, deference to the BIA's interpretation of Section 1153(h)(3) is not appropriate in this case."[18]

This holding eliminated the flawed *Wang* precedent from the analysis and arguably restored § 1153(d) to the statute after *Wang* had all but deleted it.[19] Moreover, the court conditioned retention of the priority date upon whether or not the family preference petition could be "converted to [an] appropriate category."

Third, the court focused its opinion narrowly. The court explicitly declined to opine concerning employment-based derivative petitions.[20] Rather, the court zoomed in on the narrow issue of whether an earlier family preference priority date could apply to a later family preference petition made by a different petitioner. Though yielding a similar result, the court's approach produced a cleaner, simpler, and more firmly grounded resolution than the *Wang* opinion.

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16 *Id.* at 382 (citing *Chevron*, 467 U.S. at 842) (brackets in original; internal citation omitted).
17 654 F.3d 376, 382 (footnote omitted, emphasis added).
18 *Id.* at 383 (emphasis added).
19 25 I. & N. Dec. at 38-39. INA § 203(d), 8 U.S.C. § 1153(d), provides as follows:

> A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of 101(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) provide, respectively, for family preference, employment preference, and diversity visa immigrants.
20 654 F.3d at 383 n.1.

Fourth, AND MOST IMPORTANTLY, the court rested its ultimate conclusion on the appellants' failure of argument: "Cen has not specified a category that would be appropriate."[21] The court implied that an argument based on statutes and regulations specifying "a category that would be appropriate" for a derivative beneficiary such as Cen would win its favor.

Such an argument exists. We will visit it below. Next, we turn to the Fifth Circuit.

The Fifth Circuit Restored the *Matter of Garcia* Approach That the BIA Discarded in *Wang*

Fourth preference derivative who attempted to adjust status. Mohammad Abubakar Khalid became a derivative child on the family fourth preference petition his aunt filed for his mother when he was eleven years old. Later the same year, he entered the United States as a visitor and stayed. By the time a visa became available to his mother, he was over twenty-one and was denied adjustment of status by the USCIS because he was no longer a "child." His mother, on obtaining her permanent residence, filed a family second preference petition for him. Because the USCIS accorded that petition a priority date as of the date of its filing, it again denied his adjustment of status and placed him in proceedings. On the basis of *Wang*, the immigration judge rejected Khalid's argument that he could retain his original priority date to adjust status under his mother's petition. The BIA dismissed the appeal, and Khalid petitioned for review.

Fifth Circuit dismantled BIA's ambiguity holding in Wang *piece-by-piece.* The BIA had held, "[T]he language of section [1153(h)(3)] does not expressly state which petitions qualify for automatic conversion and retention of priority dates."[22] Relying on the Supreme Court for guidance to read the statute as a whole,[23] the *Khalid* court traced the statutory link from subsection (h)(2), entitled "Petitions described," through the age calculation formula in subsection (h)(1), to the procedure prescribed in subsection (h)(3) "*If* the age of an alien is determined under paragraph (1) to be 21 years of age or older . . . ."[24] The court concluded:

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21 *Id*. at 385.
22 655 F.3d at 370 (quoting *Wang*, 25 I. & N. Dec. at 33).
23 Brown v. Gardner, 513 U.S. 115, 118 (1994) ("Ambiguity [in a statute] is a creature not of definitional possibilities but of statutory context.").
24 655 F.3d at 370 (quoting § 1153(h)(3)).

> Hence, (h)(3) must operate on this same set of petitions because the outcome that triggers the (h)(3) benefits can occur only if the formula applies. In light of the interrelated nature of the three provisions, reading the subsection as a whole confirms that Congress intended (h)(3) to apply to any alien who 'aged out' under the formula in (h)(1) with respect to the universe of petitions described in (h)(2). . . .
>
> . . . .
>
> In short, subsection (h)(2) directly answers the question that the BIA found that Congress left unanswered. . . . Hence, there is no ambiguity.[25]

Demolition Derby. Having shattered the central pillar supporting the *Wang* decision, the *Khalid* court continued to swing its wrecking ball: "Even in the face of this direct answer, however, the BIA attempted to create ambiguity by looking to the legislative history, and by assuming that Congress could not have intended such a break with prior practice regarding the concepts of conversion and retention".[26]

Concerning the first point, the court quoted legislative history from the Senate that showed not only a concern over administrative processing delays (*Wang*'s sole focus) but also an equal concern for "*growing immigration backlogs . . . caus[ing] the visa to be unavailable before the child reached his 21st birthday*."[27] This evidence totally undercuts the legislative history relied on by the BIA, which addressed only the House version of the bill (prior to the addition of (h)(3)). On the BIA's second pseudo-ambiguity basis, the court observed, "[W]here Congress has spoken with such clarity, the fact that carrying out the legislative will might require a break with past practices under the regulations does not make Congress's intent ambiguous."[28] "Even if the issues the BIA identified would create procedural difficulties, it is not this court's responsibility to resolve them."[29]

Simple "age-out" doesn't work any longer—how the Fifth Circuit solved the problem. Importantly, the court recognized that the (h)(1) calculation "cannot be made at the moment the child 'ages out,'" because it requires both the date on which an immigrant

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25 *Id*. at 371 (footnote omitted).
26 *Id*.
27 *Id*. at 371-72 (quoting statement of Sen. Feinstein, 147 Cong. Rec. S3275 (daily ed. Apr. 2, 2001), emphasis in opinion).
28 *Id*. at 372; *cf.* 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, 2011 Emerging Issues 5696 (LexisNexis 2011) (explaining "Class 2 Ambiguity: 'I don't see how that is going to work!'").
29 *Khalid*, 655 F.3d at 373.

visa becomes available to the principal alien and knowledge of whether "the alien has sought to acquire" permanent resident status within one year of visa availability.[30] An unpublished BIA decision, *Matter of Garcia*,[31] found that there would be another category to convert to at that time: "[W]here an [alien] was classified as a derivative beneficiary of the original petition, the 'appropriate category' for purposes of section [1153(h)(3)] is that which applies to the 'aged-out' derivative vis-a-vis the *principal beneficiary* of the original petition." Using maxims of statutory construction to give effect to all parts of a statute, the court held "that the 'automatic conversion' and 'priority date retention' benefits in (h)(3) unambiguously apply to the entire universe of petitions described in (h)(2)."[32]

Fifth Circuit distinguishes Li. The court assessed the effect of the *Li* holding as similar to *Wang*—to "exclude an entire class of derivative beneficiaries from subsection (h)(3)'s benefits by silent implication based on the unwritten assumption that the petitioner must remain the same." The court found it "unlikely that Congress would [make such an exclusion]. Rather, one would expect any such exclusion to be express, since it would effectively operate categorically."[33]

[N]othing in the statute requires that the petitioner remain the same. . . . Congress plainly made automatic conversion and priority date retention available to all petitions described in subsection (h)(2). Subsection (h)(2) expressly discusses derivative beneficiaries of all family-based petitions. Congress carved out no exception for fourth-preference petitions, like Khalid's, or for any other preference category. In light of the clarity of the text, legislative history and past agency practices are irrelevant. "The court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[34]

The court granted the petition for review and remanded Khalid's case to the BIA for further proceedings. Enter, the Ninth Circuit . . . .

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30 *Id.* at 372 & n.7. The sought-to-acquire condition applies only to the child determination under subsection (h)(1). It does not apply to the subsection (h)(3) population. Indeed, if a potential child fails the (h)(1) calculation by failing to seek to acquire permanent residency within the time prescribed, she will by default enter the (h)(3) population. (This insight occurred subsequent to my previous comments on sought-to-acquire in 2011 Emerging Issues 5696, *supra* note 28, at 9.)

31 No. A79 001 587, 33 Immigr. Rep. B198, 2006 Immig. Rptr. LEXIS 8193 (BIA June 16, 2006) (Immigration Non-Precedent Decisions: BIA, AAO/AAU database).

32 *Khalid*, 655 F.3d at 373.

33 *Id.* at 374.

34 *Id.* at 374-75 (quoting *Chevron*, 467 U.S. at 842-43, internal citation omitted).

How the Ninth Circuit Decision Carried the Momentum Forward

First, the Ninth Circuit's consolidated cases include a class action, giving the decision broader application than the previous individual decisions.

Second, as an en banc decision, it carries greater weight and power to persuade.

Third, although the court focused only on family derivative beneficiaries under 1153(d), it is clear that *the same logic applies equally to employment preference and diversity derivatives, as well*.[35]

Fourth, the court readily determined the plain meaning of the statute. The court divined the meaning of (h)(3) by applying the maxims of statutory construction and observing its plain meaning in its statutory context. It found the same interrelationship among the three paragraphs that the Fifth Circuit had found. Both the plain language of the statute and its repeated use of identical statutory references in each paragraph convinced the court of the statute's unambiguous purpose.[36]

The court then defused all the contrary arguments for ambiguity: the existence of a circuit split, the perceived impracticability of application to "certain" (most) derivative beneficiaries, the apparent necessity of a new petitioner, and the exception for "unreasonable or impracticable results."[37] Concerning this last argument the court admonished:

> Plainly, a change in policy announced by the statute's plain language cannot be impracticable just because it is a change or because it does not specify how exactly that change is to be implemented. . . . A statute that requires an agency to change its existing practices does not necessarily "lead to absurd or impracticable consequences."[38]

Fifth, the court focused on certain nuances to bolster its case for two petitions. Reference to the "original petition" in 1153(h)(3) "suggests the possibility of a new petition, obtained either by editing the original petition or 'automatically' requesting a

35 "Automatic conversion and priority date retention are available to all visa petitions identified in subsection (h)(2)." *De Osorio*, 2012 U.S. App. LEXIS 20177, at *32.
36 *Id*. at *18-*21.
37 *Id*. at *21-*28.
38 *Id*. at *25-*26 (citations omitted).

new petition that identifies a new petitioner and primary beneficiary."[39] The court further observed that even F2A *derivatives* need new petitions to progress to F2B as *principal* beneficiaries.[40] "These changes, which USCIS is apparently capable of handling, do not seem significantly less onerous or complicated than a visa conversion which entails a new petitioner."[41] The court further agreed with the Fifth Circuit that Congress intended a greater benefit through this legislation than that "meager benefit" to derivative F2A beneficiaries identified in *Wang* and still promoted by the government.[42] Finally, the court noted that, unlike the regulation governing priority date retention, the statute "contains no such requirement."[43]

This clear and well reasoned opinion strongly supports the rights of many long-denied derivative beneficiaries to finally immigrate to the United States. "We join the Fifth Circuit in 'giv[ing] effect to the unambiguously expressed intent of Congress."[44]

The age-out assumption. The decision leaves little to disparage. One area of concern, however—and this applies to all the decisions to date—is its uncritical acceptance of the "age-out" concept as absolute. This is particularly apparent in the weakest part of the opinion, where the court is "not convinced that any delay between the date a visa becomes available to the parent of an aged-out derivative beneficiary and the time when the parent obtains LPR status and can file an F2B petition renders automatic conversion impracticable."[45] This prefaces the court's next observation: "Until the parent of the aged-out son or daughter becomes an LPR, there is *no category* to which a petition for the son or daughter can immediately convert."[46] On one level—the level put forward by counsel for all parties—this statement is true. It describes the old system. But it does not reveal the whole truth. That is because *derivatives* do not convert to another category; they stay put, and the CSPA accommodates them, as I explain below. At this point, the court left "these unresolved procedural questions" to the USCIS to implement.[47]

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39 *Id.* at *26. The suggestion here of "*editing* the original petition" approaches the nature of "conversion" by transforming the status of the derivative described below.
40 *Id.* at *26.
41 *Id*.
42 *Id.* at *30.
43 *Id*.
44 *Id.* at *32 (citation omitted). The dissenting judges found Class 2 ambiguity (see note 28, *supra*) because of the two-petition solution and would have deferred to *Wang*. *Id.* at *32-*47.
45 *Id.* at *28. The dissent's analysis highlights the vulnerability of the two-petition solution. "An action cannot be 'automatic' if it depends on what a person *can* or *may* do, not what he or she definitely *will* do." *Id.* at *40.
46 *Id.* at *28-*29 (emphasis added).
47 *Id.*

Practice tip: *The practitioner must be cautioned that old habits die hard. The "age-out" concept is pervasive and durable. It will be hard to overcome. However, we may be heartened by the laudable success of the litigators in* Khalid *and* De Osorio*. We know now that the two-petition solution will work in the Fifth and Ninth Circuits. For those whose clients live elsewhere, I suggest the following approach, which is supported by existing statutes and regulations and is not limited to a particular jurisdiction. We now know that the law is clear. We just have to help the agencies determine the range of acceptable solutions that the declaration of clarity supports. In a word: Persist!*

How the USCIS Can Implement the Ninth Circuit and Fifth Circuit Decisions While Satisfying the Concerns of the Dissent, the Second Circuit, and the BIA

In a nutshell: Over-twenty-one derivatives "automatically convert" from "aged-out" derivative beneficiaries to CSPA-PROTECTED *derivative beneficiaries while remaining in the same preference category.*

How is this possible?

In addition to "retention of priority date"—the whole point of § 1153(h)(3)—there is also a provision for automatic conversion to the "appropriate category." The BIA clearly showed that it understood what this meant in the § 1153(a)(2)(A) principal beneficiary context, but it had no idea what it meant for § 1153(d) *derivative* beneficiaries, so it simply declared the statute ambiguous and threw the derivatives out. *Derivative* beneficiaries operate in a different environment from *principal* beneficiaries; thus, they require different implementation. The BIA missed this. The three elements of § 1153(h)(3)—*automatic conversion*, *appropriate category*, and *priority date retention*—work differently for the two different populations to whom they apply:

Section 1153(a)(2)(A) Family second preference *principal* beneficiaries:

Pre-existing regime: automatic conversion per regulation based on age, marital status, petitioner's status.

Statute: No real change regarding automatic conversion, appropriate category, and priority date retention. As before, F2A derivatives must have individual petitions filed for them prior to

turning age twenty-one to enjoy the continued benefits of conversion and retention in their *new* appropriate category.

Section1153(d) *derivative* beneficiaries of family, employment, and diversity visa petitions:

Pre-existing regime: "age-out" at age twenty-one if still waiting for priority date of petition for principal alien to become current; no automatic conversion or priority date retention.

Statute: Totally new regime: Priority date of original petition retained and "automatic conversion" to "appropriate category" permitted.

The Age-Out Problem

Since all of the appellate bodies to consider this question so far have assumed that derivative children "age-out," they have taken as a given that as of the child's twenty-first birthday he or she is no longer eligible as a derivative to immigrate based on the *original* petition. Apparently, none of these tribunals has considered the full extent of the available laws and regulations that permit following-to-join even after the age of twenty-one, so long as CSPA benefits are available to the derivative alien. Three Circuit courts have pronounced the statute unambiguous. There is thus no question that over-twenty-one derivatives receive the benefit under § 1153(h)(3) of the "original priority date . . . of the original petition." The hang-up comes in the "automatic conversion" language. As the Ninth Circuit put it, "In other words, subsection (h)(3) requires that when aliens age out of child status for purposes of their original petition[s], their applications be automatically converted to the new appropriate category for adults."[48]

Automatic Conversion and Appropriate Category

A lack of suggestions. To date, the only type of "automatic conversion" proposed to the courts for consideration has been a follow-on F2B petition filed for the "aged out" derivative by the principal alien upon becoming a permanent resident. This is because everyone has assumed the "aged-out" child has hit a dead end in his derivative category. Understandably, some jurists have had problems applying the concept of

48 *Id.* at *10.

"automatic conversion" to this approach. Witness those who joined in *Wang*, *Li*, and the dissent in *De Osorio*.

Verticality. Instead of conceptualizing "automatic conversion" narrowly in the traditional, *horizontal*, F2A way of shifting categories for *primary* beneficiaries, we need to consider a different mode of transformation appropriate to a different type of beneficiary, the *derivative*. This mode will not only occur automatically, but it will also cause the beneficiary to end up in an "appropriate category." Current statutes and regulations support a conversion from "aged-out" derivative beneficiary to *CSPA-protected* derivative beneficiary *remaining in the same preference category*. Thus, the derivative undergoes a *vertical* rather than a *horizontal* conversion.[49]

The Missing Link: Following-to-Join

U.S. law and procedures already provide for following-to-join derivatives.[50] In effect, the automatic conversion feature converts an "aged-out" derivative into one covered by the CSPA. There is no requirement for derivatives to change preference categories like the F2A beneficiaries who already enjoy a specific conversion scheme based on age, marital status, and petitioner's status. No such scheme exists for 1153(d) derivatives. Rather, with rare exceptions, they remain in their original categories no matter what their ages. The *magic* of the CSPA is that they now no longer age out. *Yes, that is the whole purpose of 1153(h): that over-twenty-one derivative beneficiaries no longer age*

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49 The Ninth Circuit's broad initial description of "a new category for adults" not only serves the two-petition approach, it could also encompass vertical transformation for a new category of *CSPA-protected*, adult, derivative beneficiaries. *Id.* at *3. The vertical approach also answers both the most vulnerable point of the court's decision (the delay between petitions) and the dissent's most compelling argument (that the majority has written the word "automatic" out of the statute). *Compare* *id.* at *28 *with* *id.* at *40.

50 9 Foreign Affairs Manual (FAM) §40.1 n.7.1 (emphasis added):

> The term "following to join," as used in [8 U.S.C. § 1153(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.

The cross-reference, 9 FAM §42.42 N.11, "Derivative Status for Spouse or Child," provides in part as follows:

> 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.

out![51] Instead, they are converted to *CSPA-protected beneficiaries* and can accompany or follow to join their principal aliens when visas become available REGARDLESS OF THEIR AGES.

Treat over-twenty-one derivatives like spouses.

Essentially the CSPA accords over-twenty-one derivatives whose immigration has been delayed by visa waits the same status as derivative spouses, who do not age out and who remain eligible for as long as it takes in the same preference category. This makes sense, has a viable existing model (derivative spouse), and does not even involve implementing regulations because of 1153(d) and the following-to-join FAM provision that specifically recognizes an exception for over-twenty-one beneficiaries who qualify under the CSPA.[52] We never question whether spouses "age out" or otherwise become disqualified. They are always eligible to accompany or to follow the principal alien *in their original preference category*. The CSPA in 1153(h)(3) created the same opportunity for over-twenty-one derivative sons and daughters. It automatically converted them from ineligible "age-outs" to perpetually-eligible CSPA derivative beneficiaries, under the *same* petition. No new petition is required.[53] This bypasses the objections that a second petition by a different petitioner offends the statute.

Reprise: Apples and Oranges

This type of conversion is best understood in the overall context of 1153(h), which seeks to prescribe a *common* regime for two entirely different populations. As I explained in a previous Emerging Issues Analysis concerning *Li,* comparing the *primary*

51 To date, the USCIS and DOS officials have tended to look at 1153(h) upside-down. They have taken (h)(1) as the operative paragraph and have focused on the steps necessary to identify a "child" under the prescribed calculations for the populations set forth in paragraph (h)(2). Upon identifying the under-twenty-one principals and derivatives, they then proceed to process them for immigrant visas. With regard to the over-twenty-one population, *Wang* describes the general approach to date: Convert the F2A beneficiaries to another appropriate category and grant them benefits, too, using their original priority dates. By contrast—still following their accustomed practices a decade after passage of the CSPA—the officials declare that the over-twenty-one derivative beneficiaries under 1153(d) have all "aged out."

This approach stands the statute on its head. Paragraphs (h)(1) & (h)(2) are merely *instrumental* to paragraph (h)(3), the *operative* portion of the statute. By filtering out those beneficiaries who still qualify under the "child" definition, the statute provides a heretofore unavailable benefit for over-twenty-one, derivative family, employment, and diversity beneficiaries: conversion of their status and preservation of their priority dates—resulting in a status similar to that of their derivative parents. This accords them equivalent treatment to those on the family preference ladder of conversion categories for over-twenty-one principal beneficiaries. Moreover, it preserves family unity despite the long visa availability delays that beset our current immigration system.

52 9 FAM § 40.1 n.7.1 ("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) . . . .").

53 Cf. 9 FAM § 42.42 N.11 ("A spouse or child . . . who is following-to-join the principal alien, should be accorded derivative status under INA 203(d). No second preference petition is required.").

beneficiaries of 1153(a)(2)(A) and the *derivative* beneficiaries of 1153(d) is like comparing apples and oranges.[54] The apples already have an "automatic conversion" scheme built into the regulations.[55] They get to age twenty-one and they get dumped automatically into another basket. The oranges do not. There is no provision for the oranges to change baskets. Heretofore, they just progressed until age twenty-one then fell over the side of the basket, never to be heard from again, or at least not for a long time. The CSPA changed that by protecting the oranges from both processing and visa availability delays. So for the orange *derivatives*, the automatic conversion, if you will, does not place them in a *new* basket like their apple cousins (as suggested to the court). Rather, it extends the sides vertically and *maintains* them in the *same* basket by keeping them from falling over the side to oblivion at age twenty-one. Therefore, an over-twenty-one derivative remains eligible to accompany or follow to join her principal alien on the *same* petition for as long as it takes for her visa to become available. She is "automatically converted" from "age-out" to *CSPA-protected* beneficiary.[56]

De Osorio Invites a Solution: Vertical Conversion and Following-to-Join Answer the Invitation

This simple solution of vertical conversion and following-to-join the principal alien in the same category bridges the objections of those who deny the possibility of two petitions from two different petitioners without undercutting the use of two petitions in the Fifth and Ninth Circuits. Rather, following-to-join provides a quicker, less expensive, less complicated approach that applies in *all* jurisdictions because it is based on existing statutes and regulations. Finally, following-to-join satisfies the procedural questions the Fifth Circuit and the Ninth Circuit left for the USCIS to resolve. It harmonizes all the cases and works immediately with existing statutes and regulations without any further promulgation of regulations. Indeed, the only work remaining will be re-educating the officers of the USCIS and the Department of State, after ten years of substantial misapplication, concerning the proper scope of this portion of the CSPA and its immediate application under existing regulations.

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54 D. Froman, 2011 Emerging Issues 5696, *supra* note 28, at 5-9.
55 E.g., 8 C.F.R. § 204.2(i)(3).
56 Adjacent CSPA sections support this inclusive understanding of vertical conversion under § 1153(h): Vertical conversion under this statute comprising CSPA § 3 yields the same result in the § 1153(d) context as its sister §§ 4 & 5 produce in the derivative asylee and refugee context, where each, dealing with a unitary group of derivatives, protects them from aging out by automatically converting all to under-twenty-one status. See 8 U.S.C. §§ 1158(b)(3) and 1157(c)(2). Again, two different groups of potential "age-outs" with their own unique statutory environments required a different solution—another type of vertical conversion—to protect them from being barred from immigrating by the strongly entrenched "age-out" custom.

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David Froman on
De Osorio v. Mayorkas, 2012 U.S. App. LEXIS 20177 (9th Cir. Sept. 26, 2012) (en banc): Suggestions for Implementing Court's Ruling Upholding Child Status Protection Act Coverage for Over-Twenty-One Derivative Beneficiaries: An Emerging Perspective

For more information on the CSPA, see Charles Gordon et al., Immigration Law and Procedure § 36.04.

Also check these EIAs: 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, 2011 Emerging Issues 5696 ; Kathrin S. Mautino on the Child Status Protection Act, 2008 Emerging Issues 1747.

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