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THE CHILDREN BANNED FROM NEVERLAND: THE CHILD STATUS PROTECTION ACT POST *SCIALABBA V. CUELLAR DE OSORIO*

Natalie Maust*

On December 28, 1992, Zhuomin Wang's U.S. citizen sister filed a family visa petition for him, including Zhuomin Wang's wife and three children who all resided in China.¹ One of Mr. Wang's children, a daughter named Xiuyi Wang, was ten years old at the time of the petition.² It was not until February 2005 that visas became available for Chinese nationals who were beneficiaries of a sibling family-based petition with a filing date of 1992.³ By this time, Xiuyi was twenty-two years old and no longer qualified as a child who could be included for immigration benefits on the 1992 petition.⁴ Mr. Wang was admitted to the United States as a lawful permanent resident on October 3, 2005 and then filed a separate petition for his daughter Xiuyi with the request to recapture the 1992 priority date that was denied, separating Mr. Wang from his daughter.⁵

Antonio was born in 1987 in Mexico.⁶ His family moved to Chicago, Illinois when he was five years old, in 1993, and in 1995, his U.S. citizen uncle petitioned for the family under the F4 category.⁷ Unfortunately, in September 2008, at age twenty-one, he no longer qualified as a child in the immigration petition.⁸ Antonio's parents obtained lawful permanent status in 2010.⁹ Antonio studied in community college and then graduated from the University of Illinois in Chicago in 2012, but was crushed by the fact that he could not obtain work authorization upon graduation.¹⁰ Antonio's parents filed a new petition on his behalf, requesting to recapture the 1995 priority date, which was denied.¹¹ Now, given the backlogs for visas for Mexican nationals, Antonio will likely never receive a visa.¹²

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¹ Wang, 25 I&N Dec. 28, 29 (B.I.A. 2009).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *See id.*

⁶ Brief of Active Dreams LLC ("Dreamactivist") as Amicus Curiae in Support of the Plaintiffs-Appellants at 14, *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (No. 12-930).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 15.

¹⁰ *Id.* at 14-15.

¹¹ *Id.*

¹² *See infra* Part IV.

Immigrants like Xiuyi and Antonio, through no fault of their own, lost the opportunity to obtain a family-based visa before reaching twenty-one years of age despite years of waiting and despite the fact that their closest family members had been granted lawful permanent residency. U.S. Department of State reports demonstrate the exorbitant waiting periods for immigrants in family preference categories.¹³ There are roughly 4.3 million people waiting for family-based visas as of November 2014.¹⁴ For Mexico, it would take approximately 115.5 years to clear the current backlog for those in the F2B category.¹⁵

The Child Status Protection Act of 2001 (CSPA)¹⁶ intended to protect child beneficiaries and respond to the family separation caused by immigration visa delays.¹⁷ However, following the passage of the CSPA, the Board of Immigration Appeals (BIA) interpreted the statute to apply CSPA benefits to only a narrow category of immigrants, excluding immigrants like Xiuyi and Antonio.¹⁸

In *Scialabba v. Cuellar de Osorio*, the U.S. Supreme Court analyzed 8 U.S.C. § 1153(h)(3) to decide which children of principal beneficiaries (also called “derivatives”) of family-based petitions may be protected under the Child Status Protection Act provision at 8 U.S.C. § 1153(h)(3).¹⁹ Under the two-step *Chevron* framework that governs the judicial review of administrative agency decisions, the Court’s plurality concluded under the first step that the statute was ambiguous,²⁰ and under the second step, that the BIA reasonably interpreted the statute to exclude all but one category of beneficiaries from CSPA protection.²¹ The plurality and dissenting Justices’ approach in deferring to agency interpretation only when statutory provisions are irreconcilable²² best serves legislative economy.

However, in this case, it was the dissent that correctly applied that principle: it found the provisions at 8 U.S.C. § 1153(h)(3) to be harmonious given the purpose of the CSPA to afford protection to all aged-out derivatives.²³ Accordingly, the Court should

¹³ See U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFF., ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS IN THE FAMILY-SPONSORED AND EMPLOYMENT-BASED PREFERENCES REGISTERED AT THE NATIONAL VISA CENTER AS OF NOVEMBER 1, 2014 [hereinafter ANNUAL REPORT], available at <http://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingListItem.pdf>.

¹⁴ *Id.* at 3.

¹⁵ “The number of F-2B visas available to Mexico is 1,841. The number of pending F-2B applicants from Mexico is 212,621. The length of time it will take to clear up the current backlog is approximately 115.5 years (212,621 ÷ 1,841).” Motion for Leave to File Amicus Brief in Support of Plaintiffs-Appellants by American Immigration Lawyers Ass’n and Catholic Legal Immigration Network, Inc. at 14, *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (No. 09-56786); see also ANNUAL REPORT, *supra* note 13.

¹⁶ Child Status Protection Act of 2001, 8 U.S.C. § 1101 (2011).

¹⁷ See Brief of Current and Former Members of Congress as Amici Curiae for Respondents at 8, *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (No. 12-930) (“When she introduced the original version of the CSPA in the Senate, Senator Feinstein stated that ‘a family whose child’s application for admission to the United States has been pending for years may be forced to leave that child behind’ simply because of the ‘growing immigration backlogs [that] caused the visa to be unavailable before the child reached his 21st birthday.’”).

¹⁸ See Wang, 25 I&N Dec. 28, 31–32 (B.I.A. 2009).

¹⁹ *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2196–2202 (2014).

²⁰ *Id.* at 2203–07.

²¹ *Id.*

²² *Id.* at 2203, 2217.

²³ *Id.* at 2217–228.

have held that the CSPA was intended to protect all aged-out beneficiaries, including those like Xiuyi and Antonio.

Parts I and II of this Note lay out the immigration law and procedural background to *Scialabba v. Cuellar de Osorio*, including a discussion of the three decisions of U.S. Circuit Courts of Appeals that split in their interpretation of 8 U.S.C. § 1153(h)(3). Part III analyzes the *Scialabba v. Cuellar de Osorio* decision at *Chevron* step one as to whether a self-contradictory statute is ambiguous, and at *Chevron* step two as to the reasonableness of the BIA's interpretation of the statute. Part IV explores three avenues that would allow all aged-out derivatives to obtain CPSA protection despite the narrow category of derivatives currently recognized by the BIA's interpretation and upheld by *Scialabba v. Cuellar de Osorio*. The avenues discussed include a change of interpretation by the BIA, a "one-petition" method for immigration practitioners, and pending immigration legislation to amend 8 U.S.C. § 1153(h)(3).

I. FAMILY-BASED IMMIGRATION BACKGROUND

The family-based immigration process by which an individual may seek lawful status based on a familial relationship is both lengthy and complex. The statutory scheme recognizes only certain family relationships for eligibility, and backlogs due to annual visa caps and administrative processing delays results in immigration wait times of years and even decades.²⁴ Child beneficiaries often reach adulthood before receiving an immigration benefit, which inspired the creation of the Child Status Protection Act.²⁵

A hallmark of the immigration system is the preservation of family unity.²⁶ The family-based immigration system allows U.S. citizens or lawful permanent residents (LPRs) to file a petition to initiate the immigration process for certain family members. The family petition constitutes the first step in the family-based immigration process.²⁷ The purpose of the family petition is to establish that a legal family relationship exists between the U.S. citizen or LPR petitioner and the intending immigrant beneficiary.²⁸

The Immigration and Nationality Act (INA) recognizes limited categories of familial relationships for purposes of the family petition and assigns each of these relationships a different priority for immigration.²⁹ The spouse and minor, unmarried children³⁰ of a U.S. citizen are "immediate relatives," allowing them to immediately proceed to the second step of the immigration application process upon approval of the

²⁴ See *infra* Part I.

²⁵ *Id.*

²⁶ See H.R. Rep. No. 82-1365, at 29 (1952), *reprinted* in 1952 U.S.C.C.A.N. 1653, 1681 (describing the "preservation of the family unit"); H.R. Rep. No. 101-723(I), at 40 (1990), *reprinted* in 1990 U.S.C.C.A.N. 6710, 6717 (referring to "family reunification" as "the cornerstone of U.S. immigration policy"); S. Rep. No. 89-748, at 13 (1965), *reprinted* in 1965 U.S.C.C.A.N. 3328, 3332 (describing "[r]eunification of families" as "the foremost consideration").

²⁷ "Filing and approval of an I-130 is only the first step in helping a relative immigrate to the United States." See I-130 Petition for Alien Relative, *Purpose of Form*, U.S. CITIZENSHIP & IMMIGR. SERVS., available at <http://www.uscis.gov/i-130>.

²⁸ See 8 U.S.C. § 1154(b) (2006).

²⁹ 8 U.S.C. § 1153(a)(1)–(4) (2006).

³⁰ The term "child" in the INA refers to an "unmarried person under twenty-one years of age," which is distinct from "son or daughter" that refers to persons over the age of twenty-one for purposes of the family preference categories. See 8 U.S.C. § 1101(b)(1) (2006); 8 U.S.C. § 1153(a)(1)–(3) (2006).

family petition.³¹ However, the process is extremely delayed for the remaining family preference categories:

(F1) Unmarried Sons and Daughters (twenty-one years of age or older) of U.S. Citizens

(F2A) Spouses and Children of Lawful Permanent Residents³²

(F2B) Unmarried Sons and Daughters (twenty-one years of age or older) of Lawful Permanent Residents

(F3) Married Sons and Daughters of U.S. Citizens

(F4) Brothers and Sisters of adult U.S. Citizens³³

The family preference categories³⁴ allow the principal beneficiary to include her spouse and children (under twenty-one years old) on the family petition as derivative beneficiaries.³⁵ For example, if a U.S. citizen petitions for a sister in the F4 category, the sister may include her spouse and children on the family petition as derivative beneficiaries to immigrate with her to the United States.³⁶

Once the family petition is approved by the U.S. Department of Homeland Security, the intending immigrant receives a “priority date,” which is the filing date of the family petition.³⁷ The priority date gives the beneficiary a place in line until an immigrant visa becomes available.³⁸ The U.S. Department of State monitors the visa numbers and publishes a monthly visa bulletin.³⁹ Every year, the number of visas issued to each category is capped.⁴⁰ The demand for visas far exceeds the supply and thus, a significant backlog of years—and in some cases decades—exists.⁴¹

³¹ 8 U.S.C. § 1204 (2006).

³² Note that children who are primary beneficiaries of an F2A petition and children who are derivative beneficiaries of an F2A petition have different protections under the CSPA as discussed *infra* at Part I.

³³ 8 U.S.C. § 1151(a)(1) (2006); 8 U.S.C. § 1153(a)(1)–(4) (2006).

³⁴ This Note frequently refers to these priority categories. See *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2197 (2014) (“A word to the wise: Dog-ear this page [that lists the family preference categories] for easy reference, because these categories crop up regularly throughout this opinion.”).

³⁵ 8 U.S.C. § 1153(d) (2006).

³⁶ See U.S. CITIZENSHIP & IMMIGR. SERVS., I-130, PETITION FOR ALIEN RELATIVE, *available at* <http://www.uscis.gov/sites/default/files/files/form/i-130.pdf>.

³⁷ 8 C.F.R. § 204.1(b) (“The filing date of a petition is the date it is properly filed and received by USCIS. That date will constitute the priority date.”).

³⁸ See 8 U.S.C. §§ 1255–1255a (2006). There is an alternative to the Department of State immigrant visa application process for certain beneficiaries who are within the United States and qualify for adjustment of status to that of a lawful permanent resident. These beneficiaries still need to wait for an available visa number.

³⁹ See 8 U.S.C. § 1153(g) (2006); Visa Bulletin, U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFF., *available at* <https://travel.state.gov/content/visas/en/law-and-policy/bulletin.html>.

⁴⁰ The statute allots a complicated mathematical rubric of allotting a limited amount of visas. For example, the statute allots up to 65,000 visa numbers to F4 beneficiaries plus any numbers not required for the F1, F2A, F2B, and F3 categories. 8 U.S.C. § 1153(a)(4) (2006).

⁴¹ As of November 2013, there were 4.2 million people waiting for a family-based visa number to become available. See ANNUAL REPORT, *supra* note 13. As of November 2014, visa numbers are now available for F4 petitions for Filipino beneficiaries with a priority date (date of the receipt of the family petition) of May 1, 1991 or earlier. This represents an approximately twenty-three year-long wait for eligibility to file an immigrant visa application. See U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFF., VISA BULLETIN FOR NOVEMBER 2014, *available at* http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_November2014.pdf.

Given the lengthy waiting period,⁴² many derivative children turn twenty-one years of age while waiting for their priority date, and upon reaching twenty-one years of age, child beneficiaries “age out” of an F2A preference category or “age out” of derivative beneficiary status.

In 2002, Congress enacted the Child Status Protection Act (CSPA) to protect children from aging out.⁴³ One section of the CSPA eliminates the “aging out” problem for unmarried children of U.S. citizens seeking to immigrate as “immediate relatives.”⁴⁴ This section freezes the age of the immediate relative beneficiary, preserving the beneficiary’s status of a child for immigration purposes in a “Peter Pan-like” fashion.⁴⁵

The CSPA also creates two important protections for F2A beneficiaries and derivative beneficiaries.⁴⁶ First, the CSPA seeks to prevent a child from aging-out due to the administrative delays in adjudication of the family petition. 8 U.S.C. § 1153(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.⁴⁷

This mathematical formula allows F2A principal beneficiary children and derivative beneficiary children to determine their CSPA age by subtracting the time that the family petition was pending from their actual age on the date that the immigrant visa number became available.⁴⁸

Second, the CSPA provides guidance as to the “automatic conversion” and “recapture” of priority dates for principal beneficiary children in the F2A category and derivative beneficiary children in all categories. 8 U.S.C. § 1153(h)(3) 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.⁴⁹

⁴² See, e.g., VISA BULLETIN FOR NOVEMBER 2014, *supra* note 41.

⁴³ 8 U.S.C. § 1101 (2011).

⁴⁴ 8 U.S.C. § 1151(f)(1) (2006).

⁴⁵ See *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2199-220 (2014) (“If an alien was young when a U.S. citizen sponsored his entry, then Peter Pan-like, he remains young throughout the immigration process.”).

⁴⁶ 8 U.S.C. § 1153(h)(1)–(3) (2006).

⁴⁷ 8 U.S.C. § 1153(h)(1) (2006).

⁴⁸ *Id.*

⁴⁹ 8 U.S.C. § 1153(h)(3) (2006).

The meaning of 8 U.S.C. § 1153(h)(3) is the subject of this note.

In sum, the current family-based immigration system—with delays primarily caused by visa cap limits, but also by procedural adjudicative delays—puts certain immigrant children at high risk of aging-out of their child status as principal F2A beneficiaries or derivative beneficiaries after years or decades of waiting for a visa number to become available. Once the child ages out of a petition, a new petition may be filed by a qualifying relative, but the child will not benefit from having waited as a beneficiary with the former petition unless the CSPA’s protections apply. The applicability of the CSPA to this population—particularly in its provision at 8 U.S.C. § 1153(h)(3)—is the only possible statutory recourse.

II. EARLY INTERPRETATIONS OF 8 U.S.C. § 1153(H)(3) PRIOR TO *SCIALLABBA V. CUELLAR DE OSORIO*

Since the congressional enactment of the Child Status Protection Act, the federal agencies with the primary responsibility of applying the CSPA, the U.S. Department of Homeland Security and the U.S. Department of State, have issued over fifteen memoranda interpreting the application of the CSPA.⁵⁰ The Department of Justice also applies the CSPA in the context of administrative court proceedings, rather than affirmative benefit applications, in both Immigration Court and appeals to the Board of Immigration Appeals.⁵¹ To date, no agency has promulgated regulations to interpret the application of the CSPA.

This section will provide a history of the interpretation of the CSPA at 8 U.S.C. § 1153(h)(3), which provides protections for aged-out child beneficiaries seeking to retain their original priority date and automatically convert to the appropriate category. First, the administrative agency interpreted the statute through its formal adjudication process. Second, the Ninth, Fifth and Second Circuit Courts of Appeals reviewed the administrative agency’s statutory interpretation. All Circuits refused to give deference to the agency’s statutory interpretation, each for different reasons.

A. *The Board of Immigration Appeals’ interpretation of 8 U.S.C. § 1153(h)(3)*

The Department of Justice’s Board of Immigration Appeals (BIA) is “an appellate body charged with the review of those administrative adjudications under the [Immigration and Nationality] Act that the Attorney General may by regulation assign to it.”⁵² The BIA reviewed CSPA-related matters on administrative appeal and gave its interpretation of the application of 8 U.S.C. § 1153(h)(3) in the precedential decision, *Matter of Wang*.⁵³

Matter of Wang involved an F2A petition filed by a lawful permanent resident father on September 5, 2006 on behalf of his unmarried daughter.⁵⁴ His daughter had

⁵⁰ See CHARLES WHEELER, AILA’S FOCUS ON THE CHILD STATUS PROTECTION ACT 193–282 (2008); see also SHANE DIZON, OFFICE MEMOS OR OPINIONS? TAKE-HOME LESSONS FROM AGENCY GUIDANCE AND FEDERAL COURT JURISPRUDENCE ON THE CHILD STATUS PROTECTION ACT, 09-10 Immigr. Briefings 1 (2009).

⁵¹ See Dizon, *supra* note 50; see also 8 U.S.C. § 1229(a) (2006); 8 C.F.R. § 1003.1(b).

⁵² 8 C.F.R. § 1003.1(d)(1) (2006).

⁵³ See Wang, 25 I&N Dec. 28 (B.I.A. 2009).

⁵⁴ *Id.* at 28.

aged-out as a derivative beneficiary of an F4 petition filed on December 28, 1992 by her aunt for her father.⁵⁵ She was ten years old at the time of the filing of the 1992 petition, but reached twenty-one years of age while waiting for a visa number to become available and lost the ability to immigrate with her father.⁵⁶ Thus, once her father immigrated to the United States on the 1992 F4 petition, he filed a new petition as the lawful permanent resident father of his unmarried daughter, an F2B petition.⁵⁷ The father requested that the priority date from the 1992 F4 family petition be retained for purposes of the new 2006 F2B family petition to reduce the delay in waiting for a visa number to become available in the F2B category.⁵⁸

The BIA held that the original priority date may only be retained if the petitioner remains the same in both the first family petition and the second family petition.⁵⁹ The BIA analyzed the use of the terms “conversion” and “retention” in other regulations to support its holding.⁶⁰ The BIA noted that the use of “conversion” in the regulations at 8 C.F.R. § 204.2(i), which had been in effect since 1987, allowed for “automatic conversion of preference classification” upon triggering events such as change in beneficiary’s marital status or the petitioner’s naturalization.⁶¹ This “conversion” did not require a separate family petition filing given the petitioner remained the same.⁶² The BIA noted the use of “retention” in the regulations at 8 C.F.R. § 204.2 allowed a derivative beneficiary of an F2A petition who aged-out to retain the original priority date in a separate petition filed by the petitioner as an F2B petition.⁶³ Here, again, the BIA emphasized that the petitioner did not change in the “retention” process.⁶⁴

In its statutory interpretation, the BIA stated that upon the beneficiary’s aging-out, the F4 petition could not automatically convert to a separate category given that no category exists that recognizes a niece of a U.S. citizen as a qualifying relationship for immigration purposes.⁶⁵ As to “retention,” the BIA held that since the second family petition was filed by a different petitioner, the original priority date from the first petition could not be retained.⁶⁶

The BIA then analyzed the legislative history of the CSPA, finding two specific themes.⁶⁷ First, the purpose of the CSPA was to alleviate the negative effects of administrative delays in the adjudication of family petitions.⁶⁸ Second, the CSPA sought to alleviate the delays while preventing children from “cutting in line ahead of others awaiting visas in other preference categories.”⁶⁹ The BIA held that the legislative history of the CSPA did not clearly state a purpose of alleviating the effects of delays in waiting

⁵⁵ *Id.* at 29–30.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 34.

⁶⁰ *Id.* at 33–36.

⁶¹ *See id.* at 34.

⁶² *Id.* at 35.

⁶³ *Id.* at 34.

⁶⁴ *Id.* at 34–36.

⁶⁵ *Id.* at 39.

⁶⁶ *Id.*

⁶⁷ *See id.* at 36–38.

⁶⁸ *Id.* at 36–37.

⁶⁹ *Id.* at 38.

for visa numbers to become available because of the numerical limits of visas accorded in each category.⁷⁰ Thus, the BIA did not find any clear legislative intent for the CSPA to broadly grandfather all derivative beneficiaries of any category upon aging out.⁷¹

B. The Circuit Split on the Interpretation of 8 U.S.C. § 1153(h)(3)

The Administrative Procedure Act⁷² allows for judicial review of a final agency resolution of a question of law, such as an agency's interpretation of a statute that it administers: the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁷³ Courts will generally defer to the agency's statutory interpretation.⁷⁴ A court may give less deference to the agency when its interpretation of a statute has been inconsistent.⁷⁵

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁷⁶ the U.S. Supreme Court created a two-step inquiry for judicial review of agency interpretations of statutes.⁷⁷ First, the reviewing court must apply traditional tools of statutory construction, including the plain language, to determine whether the meaning of the statute is clear.⁷⁸ If so, this is the end of the inquiry, and the plain meaning governs, whether or not it matches the agency's interpretation. If the court determines that the statutory language is ambiguous, the court will go to step two and determine whether the agency interpretation of the statute is reasonable.⁷⁹ The reviewing court must reject an administrative statutory interpretation contrary to the statute's congressional intent.⁸⁰

1. The Ninth Circuit decision in *Cuellar de Osorio v. Mayorkas*

The Ninth Circuit *en banc* decision reversed a three-judge panel,⁸¹ finding that 8 U.S.C. § 1153(h)(3) was clear under *Chevron* step one and applied to all the beneficiaries

⁷⁰ *Id.* at 38–39.

⁷¹ *Id.*

⁷² 5 U.S.C. §§ 551–559, 701–706 (2006).

⁷³ 5 U.S.C. § 706(2)(A).

⁷⁴ *See generally* *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

⁷⁵ *See* *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 699 (1991).

⁷⁶ *See generally* *Chevron*, 467 U.S. 837 (1984).

⁷⁷ *Id.* at 842.

⁷⁸ *Id.*

⁷⁹ *Id.* at 843.

⁸⁰ *Id.* at 845.

⁸¹ *Cuellar de Osorio v. Mayorkas*, 695 F.3d 1003 (9th Cir. 2012). The Ninth Circuit three-judge panel held that 8 U.S.C. § 1153(h)(3) was ambiguous under *Chevron* step one and that the BIA's interpretation in *Matter of Wang* was reasonable as applied in this case which would exclude F3 and F4 derivative beneficiaries from automatic conversion and retention of the original priority dates.

Under *Chevron* step one, the Ninth Circuit's three-judge panel found subsection (h)(3) unclear given that the word "petition" in this section can encompass all petitions mentioned in subsection (h)(2), but that "automatic conversion" could not practically apply to F3 and F4 petitions. The Court focused on the ordinary meaning of the word "automatically" in subsection (h)(3) and held that it implies that the same petition filed by the same petitioner for the same beneficiary may convert to a new category since "automatic" suggests a conversion without any "outside input, such as a new petitioner." This application of "automatic conversion," however, creates a tension with the meaning of "petition" in subsection (h)(3) if taken to mean any of the categories of petitions listed in subsection (h)(2) including F3 and F4 petitions.

given the context of subsections (h)(1) and (h)(2).⁸² Thus, the Ninth Circuit did not defer to the BIA's interpretation.⁸³

The case involved two consolidated cases with multiple plaintiffs.⁸⁴ The first case involved an F3 aged-out derivative beneficiary whose mother, the principal beneficiary on the F3 petition, filed a separate F2B petition after obtaining lawful permanent resident status.⁸⁵ The derivative beneficiary was thirteen years old at the time of the original petition.⁸⁶ In the second petition, the mother requested retention of the original priority date, which would enable her son to immigrate much sooner than if he used the priority date from the second petition. Another case involved F4 derivative beneficiaries who were two and four years old at the time of the filing in 1981, but who aged-out after a twenty-one-year wait for the visa number to become current.⁸⁷ The derivative beneficiaries' lawful permanent resident father filed F2B petitions on their behalf in 2005, requesting retention of the original priority date.⁸⁸

The Ninth Circuit's *en banc* decision found the statute unambiguous at *Chevron* step one, concluding that the parallel language between (h)(3) and (h)(1), which stated "for the purposes of subsections (a)(2)(A) and (d)," indicated that both sections meant to apply to "both F2A petitions for children (established by 8 U.S.C. § 1153(a)(2)(A)) and derivative visas for the children of primary beneficiaries of all visa categories (established by 8 U.S.C. § 1153(d))."⁸⁹ The *en banc* majority emphasized its obligation to interpret the statute in context.⁹⁰ Further, the use of the words "original petition" in subsection (h)(3) implied the possibility of a second petition filed on behalf of aged-out derivative beneficiaries who would retain the priority date of the original petition.⁹¹ The statute did not indicate the identity of the petitioner as relevant to the application of subsection (h)(3).⁹²

Aged-out derivative beneficiaries of F3 and F4 petitions would not be able to convert to a new petition category with the same petitioner given that the relationship between U.S. citizen and niece, nephew or grandchild is not recognized. The plaintiffs argued that subsection (h)(3) allows for two independent benefits of "automatic conversion" and "retention" and that the F3 and F4 derivatives could solely benefit from retention, but the Court rejected this interpretation based on inconclusive evidence of congressional intent and therefore, simply concluded that the statute is ambiguous. *Id.* at 1011–1016.

Under *Chevron* step two, the Ninth Circuit's three-judge panel upheld the BIA's interpretation that "automatic conversion" and "retention" do not operate separately and thus, that subsection (h)(3) solely benefits one type of petition (F2A). The interpretation does not contravene the purposes of the CSPA to remedy administrative delays and address oversubscription delays because subsection (h)(1) allows all aged-out derivatives to reduce their age accounting for administrative delays and provides a limited remedy for aged-out derivatives in F2A petitions to automatically convert to the F2B category. *Id.*

⁸² *Id.* at 1012.

⁸³ *Id.* at 1015.

⁸⁴ *Id.* at 1010.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 1012.

⁹⁰ *Id.* at 1012 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)).

⁹¹ *Id.* at 1014.

⁹² *Id.* at 1013 ("The language of the CSPA contains no indication that Congress intended the identity of the petitioner to be relevant.").

2. The Fifth Circuit decision in *Khalid v. Holder*

The Fifth Circuit declined to follow *Matter of Wang*, holding that the plain language of 8 U.S.C. § 1153(h)(3) is unambiguous about whether an aged-out F4 derivative beneficiary could retain the original priority date for purposes of a subsequent visa petition.⁹³ The court further held that the BIA statutory interpretation contravened the statute.⁹⁴

The case involved an F4 derivative beneficiary who was eleven years old when the original petition was filed, but who was twenty-two years old at the time the priority date became current.⁹⁵ The derivative's mother, who was the principal beneficiary, obtained lawful permanent resident status in 2007 and filed a new petition on behalf of her son, which was assigned a priority date of November 23, 2007.⁹⁶

The court explained that 8 U.S.C. § 1153(h)(3) does not explicitly delineate which petitions qualify for automatic conversion or priority date retention, but the term “petition” in subsection (h)(3) is meant to be read in context of subsection (h)(1) and subsection (h)(2), which refer to the “petition” to include a beneficiary of an F2A petition pursuant to 8 U.S.C. § 1153(a)(2)(A) and a derivative beneficiary in any of the recognized preference categories pursuant to § 1153(d).⁹⁷ The court supported this contextual understanding of “petition” explaining that all three provisions ((h)(1-3)) have a parallel structure: “Subsection (h)(1) and (h)(3) both employ the phrase ‘for purposes of subsections (a)(2)(A) and (d),’ while (h)(2) contains two subparts—one discussing subsection (a)(2)(A) and one discussing subsection (d).”⁹⁸ The court further noted that subsection (h)(3) explicitly cross-referenced subsection (h)(1) (that speaks of the application of the mathematical CSPA formula), which in turn references (h)(2) (the petitions to which the mathematical formula applies).⁹⁹ Thus, subsections (h)(1-3) are interdependent and all the petitions listed in (h)(2) apply to both (h)(1) and (h)(3).¹⁰⁰

The court rejected the notion that subsection (h)(3) only allowed automatic conversion of priority dates where the petitioner remained the same person.¹⁰¹ Such a conclusion categorically bars all petitions except for two types: 1) F2A petitions for a child of the parent who was named as the principal beneficiary on a petition filed by the parent's lawful permanent resident spouse and 2) F2A petitions for a child as the principal beneficiary of a petition filed by her lawful permanent resident parent.¹⁰² The plain language of the statute does not explicitly require that the petitioner of the aged-out derivative remain the same for purposes of automatic conversion and retention.¹⁰³ What is more, subsection (h)(2) “expressly speaks of derivative beneficiaries of *all* family-

⁹³ *Khalid v. Holder*, 655 F.3d 363, 365 (5th Cir. 2011).

⁹⁴ *Id.* at 365–66.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 370–71.

⁹⁸ *Id.* at 371.

⁹⁹ *Id.* at 370–71.

¹⁰⁰ *Id.* at 371.

¹⁰¹ *Id.* at 372–73.

¹⁰² *Id.* at 374.

¹⁰³ *Id.* at 373.

based petitions.”¹⁰⁴ Given that subsection (h)(3) “expressly refers to derivative petitions by use of the phrase ‘for purposes of subsections (a)(2)(A) and (d),’” it is unlikely that Congress meant to categorically ban all derivatives from the benefits of subsection (h)(3) apart from F2A petitions.¹⁰⁵ If Congress’ intent was to include such a wide exclusion, the exclusion would have been likely expressly stated in the statute.¹⁰⁶

3. The Second Circuit decision in *Li v. Renaud*

The Second Circuit held that 8 U.S.C. § 1153(h)(3) was unambiguous and that upon applying the traditional tools of statutory construction, the congressional intent was clear on the issue of whether an aged-out F2B derivative could retain her original priority date in a subsequent petition.¹⁰⁷ Thus, the court did not apply the BIA’s interpretation per *Matter of Wang*.

This case involved an F2B petition filed in 1994 by a lawful permanent resident for his unmarried adult daughter as the principal beneficiary, including the adult daughter’s fourteen-year-old son, Cen, on the petition as a derivative beneficiary.¹⁰⁸ The F2B visa number did not become current until 2005, at which time Cen was twenty-six years old.¹⁰⁹ Cen, therefore, had aged out of the derivative beneficiary status of the 1994 F2B petition.¹¹⁰ In 2008, Cen’s mother, who had immigrated based on the original petition, filed a new F2A petition on Cen’s behalf, requesting retention of the 1994 priority date.¹¹¹

The court decided that clear congressional intent hinged on the term “conversion” in 8 U.S.C. § 1153(h)(3).¹¹² First, the court held that Congress intentionally coupled “conversion” and “retention” in 8 U.S.C. § 1153(h)(3) as concurrent benefits rather than independent benefits.¹¹³ The court stated that Congress could have connected these terms with “or” rather than “and” to indicate separate benefits.¹¹⁴ Thus, the court rejected the applicant’s argument that retention of the priority date alone provided an independent path for a visa.¹¹⁵ Second, the court traced the use of “conversion” throughout the Immigration and Nationality Act to show that when conversion applies, there is no need for an additional petition.¹¹⁶ The court further explained that 8 U.S.C. § 1153(h)(3) speaks of conversion in terms of “conversion to the appropriate category,” which indicates solely a change in category and not in petitioner.¹¹⁷

¹⁰⁴ *Id.* at 374 (emphasis in original).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Li v. Renaud*, 654 F.3d 376, 382–83 (2nd Cir. 2011).

¹⁰⁸ *Id.* at 379.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 383.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 384 (citing 8 U.S.C. § 1151(f)(2) (2006) (addressing conversion from F2A to immediate relative petition); 8 U.S.C. § 1151(f)(3) (2006) (addressing conversion from F3 to F1 or F3 to immediate relative petition); 8 U.S.C. § 1154(k)(1) (2006) (addressing conversion from F2B to F1)).

¹¹⁷ *Id.*

In applying the statutory interpretation to the facts in the case, the court held that upon aging-out, Cen could not convert to another category because no category existed that recognized his relationship to the initial petitioner.¹¹⁸ The 1994 F2B petition was filed by Cen's grandfather for Cen's mother and Cen was included as a derivative beneficiary child.¹¹⁹ Upon reaching twenty-one years of age, Cen was no longer recognized as a child for immigration purposes (excluding him as an F2B derivative child beneficiary), and Cen could not convert his category given that no family preference category existed for a relationship between a grandparent and grandchild.¹²⁰ Since the court held that conversion and retention were concurrent benefits that may be accessed only when the petitioner is the same throughout the process, the court held that Cen was not eligible to retain the 1994 priority date.¹²¹

* * *

All the Circuit courts were in agreement that under *Chevron* step one 8 U.S.C. § 1153(h)(3) was unambiguous, but reached different conclusions on what it unambiguously meant. The Circuit split primarily encompassed two issues: 1) whether "conversion" and "retention" are independent or joint benefits and 2) whether only F2A derivative beneficiaries are protected under 8 U.S.C. § 1153(h)(3) or whether all family preference category derivative beneficiaries are protected. Notwithstanding the Circuit courts' agreement on the clarity of 8 U.S.C. § 1153(h)(3), the U.S. Supreme Court revisited whether or not 8 U.S.C. § 1153(h)(3) was clear or ambiguous under *Chevron* step one.¹²²

III. JUDICIAL DEFERENCE TO AGENCY INTERPRETATION OF A STATUTE WITH CONFLICTING PROVISIONS

Scialabba v. Cuellar de Osorio expanded a "special pocket of *Chevron* jurisprudence in which it sa[id] [the Court] must defer to an agency's decision to ignore a clear statutory command due to a conflict between that command and another statutory provision."¹²³ At *Chevron* step one, the plurality established a rule for judicial review of a self-contradictory statute that required a court to find a statute ambiguous if it had internal conflict.

This rule arguably best serves principles of legislative economy. The rule, however, should not apply to the case at hand given that the Court could have harmonized the potentially conflicting statutory phrases in Section 1153(h)(3). The harmonizing approach best preserves the intent of Congress to offer age-out protection to all derivative children. Even if the Court should find the statute ambiguous for the statute's self-contradictions, at *Chevron* step two, the BIA's statutory interpretation should have been found unreasonable. The BIA's interpretation of Section 1153(h)(3)

¹¹⁸ *Id.* at 385.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2202 (2014) ("We granted certiorari to resolve a Circuit split on the meaning of [8 U.S.C.] § 1153(h)(3)").

¹²³ *Id.* at 2219 (Sotomayor, J., dissenting).

makes the effect of the language defunct and contradicts the intention of the CSPA to ensure family unity.

A. Chevron Step One: Statutory Self-Contradiction as a Basis for Finding Ambiguity

The Court’s task at *Chevron* step one is to determine whether the language of the statute at issue clearly expresses congressional intent.¹²⁴ To determine linguistic clarity, the Court applies traditional methods of statutory construction.¹²⁵ To determine congressional intent behind the statute, the Court has referred to the legislative history behind the statutory provisions and comprehensive regulatory scheme.¹²⁶

In a fractured decision¹²⁷, the U.S. Supreme Court Justices disagreed as to whether finding a statute self-contradictory makes the statute ambiguous under the *Chevron* step one analysis. The Justices implicitly accepted that statutes may contain direct conflicts of two otherwise clear provisions,¹²⁸ but disagreed over whether to accord deference to an agency interpretation of the self-contradictory statute.

Justice Kagan’s plurality opinion (joined by Justices Kennedy and Ginsburg) concluded that 8 U.S.C. § 1153(h)(3) was ambiguous because it was “Janus-faced” where “the first half looks in one direction, toward the sweeping relief the respondents propose, which would reach every aged-out beneficiary of a family preference petition. But . . . the section’s second half looks another way, toward a remedy that can apply to only a subset of those beneficiaries. . . .”¹²⁹ Justice Kagan’s plurality opinion further described the statute as one with “ill-fitting clauses,”¹³⁰ “internal tension,”¹³¹ and internal

¹²⁴ *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984) (“The Judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”)

¹²⁵ *Id.* (“If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”)

¹²⁶ *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33, (2000) (“In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a ‘symmetrical and coherent regulatory scheme,’ and ‘fit, if possible, all parts into a harmonious whole.’ Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.”) [internal citations omitted].

¹²⁷ Justice Kagan announced the plurality opinion, joined by Justice Kennedy and Justice Ginsburg. Justice Roberts filed a concurring opinion, joined by Justice Scalia. Justice Alito filed a dissenting opinion. Justice Sotomayor filed a dissenting opinion, joined by Justice Breyer and Justice Thomas (Justice Thomas did not join as to footnote 3). *Scialabba*, 134 S. Ct. at 2195–96.

¹²⁸ The Justices speak of direct conflicts or self-contradictions in a statute presuming that such conflicts exist. *See id.* at 2203 (Kagan, J.) (“And when [two faces of the statute do not easily cohere with each other], *Chevron* dictates that a court defer to the agency’s choice”); *Id.* at 2214 (Roberts, J., concurring) (“Direct conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice.”); *Id.* at 2220 (Sotomayor, J., dissenting) (“We do not lightly presume that Congress has legislated in self-contradicting terms.”).

¹²⁹ *Id.* at 2203.

¹³⁰ *Id.* at 2194.

¹³¹ *Id.* at 2203.

“divergen[ce].”¹³² Given the statutory self-contradiction, the plurality argued that the BIA may reasonably choose whether to apply the statute with wider scope of the first command or the narrower scope of the second command.¹³³

The concurring opinion authored by Chief Justice Roberts (joined by Justice Scalia) sharply disagreed, arguing that a statute’s internal tension or conflict was never the basis for finding a statute ambiguous.¹³⁴ The concurring Justices argued that to find a statute ambiguous, the Court presumes congressional intent to delegate authority to an agency.¹³⁵ Here, however, when the statute sent conflicting messages about whether a particular group of people should get relief, the concurring Justices refused to acknowledge congressional intent to delegate authority to an agency.¹³⁶

The concurring Justices did not provide a solution to the problem of self-contradictory statutory provisions, since they concluded that the statutory provision at issue in this case did not have any conflict or internal tension.¹³⁷ The concurrence found no internal conflict between the two clauses in subsection (h)(3) because the first clause stated a condition, “defin[ing] the persons potentially affected by this provision,” and the second clause was the operative clause, offering the remedial benefit.¹³⁸ Even though the concurrence did not find tension in the statute, it held that the statute is ambiguous as to which petitions can “automatically be converted.”¹³⁹ It held that the BIA’s interpretation to only allow the second clause of subsection (h)(3) to apply to F2A petitions was a reasonable interpretation that avoided alternative interpretations as to whether automatic conversion and retention were separate benefits.¹⁴⁰

Justice Alito’s dissent affirmed the rule expressed by the concurring Justices that direct conflict in a statute did not constitute ambiguity.¹⁴¹ However, he found the statute clearly answered whether there is an “appropriate category” to which petitions for F3 and F4 age-out derivatives may be converted.¹⁴² At the time the lawful permanent resident parents filed a second petition, an appropriate category, the F2B category, existed for conversion to take place pursuant to the mandate of subsection (h)(3).¹⁴³ Justice Alito

¹³² *Id.* at 2203.

¹³³ *Id.* at 2193 (referring to *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007)).

¹³⁴ *Id.* at 2214 (“Direct conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice.”).

¹³⁵ *Id.* at 2214 (“Courts defer to an agency’s reasonable construction of an ambiguous statute because we presume that Congress intended to assign responsibility to resolve the ambiguity to the agency.”).

¹³⁶ *Id.* (“But when Congress assigns to an agency the responsibility for deciding whether a particular group should get relief, it does not do so by simultaneously saying that the group should and it should not.”).

¹³⁷ *Id.* (“I see no conflict, or even ‘internal tension’ in section 1153 (h)(3).”) (internal citations omitted).

¹³⁸ *Id.* at 2214–15.

¹³⁹ *Id.* at 2215 (quoting 8 U.S.C. § 1153(h) (2011)).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2216.

¹⁴² Justice Alito acknowledges that 8 U.S.C. § 1153(h)(3) is brief and cryptic and may contain ambiguity, but on at least one point the statute is clear: “If the age of an alien is determined under 8 U.S.C. § 1153(h)(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.” *Id.*

¹⁴³ *Id.*

emphasized the word “shall” in the statute to conclude that the statute expressed a “clear statutory command.”¹⁴⁴

Justice Sotomayor’s dissent (joined by Justices Breyer and Thomas) critiqued the plurality’s finding of ambiguity at *Chevron* step one based on its assertion that the statute was self-contradictory with diametrically opposing positions.¹⁴⁵ Justice Sotomayor stated that the Court should “interpret the statute as a . . . coherent regulatory scheme and fit, if possible, all parts into [a] harmonious whole[.]” instead of finding a statute self-contradictory.¹⁴⁶ Justice Sotomayor stated that the Court should “try to give effect to a statute’s clear text before concluding that Congress has legislated in conflicting and unintelligible terms.”¹⁴⁷ Rather than self-contradictory, Justice Sotomayor found the clauses in Section 1153(h)(3) compatible.¹⁴⁸

The plurality’s rule—that courts should accord *Chevron* deference to an agency when a statute internally conflicts—best serves legislative economy. This rule’s legislative economy is best observed by comparing the negative results that follow from the rule in the concurring decision. The concurring Justices stated: “[D]irect conflict is not ambiguity, and the resolution of such conflict is not statutory construction but legislative choice.”¹⁴⁹ The concurring Justices would require Congress to remedy self-contradicting statutes without the interpretive intervention of the courts or an administrative agency.¹⁵⁰

The origin of a self-contradictory statute may be explained in a few possible ways. A self-contradictory statute may result from drafting errors in which Congress’ use of statutory language does not clearly communicate its intent.¹⁵¹ A statute may be passed that (potentially unintentionally) contradicts a different existing statute.¹⁵² A self-contradictory statute may also result from Congress’ political disagreement and attempts to make concessions across party lines in the drafting of a statute.¹⁵³

It logically follows that Congress would likely not have intended to delegate interpretive authority to the agency with self-contradictory language. However, the legislative resources required for Congress to correct self-contradictory statutes would be great. If the Court (as the concurrence suggests) finds statutory provisions in conflict and holds that only Congress may remedy the conflict, the question arises as to what would

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 2219.

¹⁴⁶ *Scialabba*, 134 S. Ct. at 2217 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000)).

¹⁴⁷ *Id.* at 2228.

¹⁴⁸ *Id.* at 2220 (Sotomayor, J., dissenting) (“But far from it being unworkable (or even difficult) for the agency to obey both clauses, traditional tools of statutory construction reveal that Section 1153(h)’s clauses are entirely compatible.”).

¹⁴⁹ *Id.* at 2214.

¹⁵⁰ *Id.*

¹⁵¹ The Court has acknowledged drafting errors and held that that the judiciary should not remedy drafting errors through statutory interpretation. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) (“It is beyond [judicial] province to rescue Congress from its drafting errors, and to provide for what we might think. . . is the preferred result.’ This allows both of our branches to adhere to our respected, and respective, constitutional roles.”) (internal citations omitted).

¹⁵² *See Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *See also* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 249 (2000).

¹⁵³ *See McNollgast, Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992).

be the effect of the statutory provisions while they await a congressional remedy. Would the statute effectively become defunct until Congress amends the statute? The concurring Justices avoided this question in this case by finding no conflict in the statute, but the concern remains regarding the underlying principle that a finding of conflict in a statute could completely abrogate its effect while it awaits a congressional remedy.

Thus, the plurality's reasoning makes more sense through a legislative economy lens. The plurality held that direct conflict in the statute made the statute ambiguous, which in turn allowed an agency to adopt a reasonable interpretation of the statute despite the ambiguity.¹⁵⁴ Allowing the agency to adopt a reasonable interpretation to harmonize the statute prevents the statutory language from being defunct while awaiting a congressional fix. The agency's interpretation and application of the statute would also not prevent Congress from remedying the statutory conflict through the legislative process.

However, while deference to an agency makes pragmatic sense when there is irreconcilable direct conflict in the statute, the first question of the *Chevron* analysis remains whether the intent of Congress is clear.¹⁵⁵ Before a court finds direct conflict in a statute, it should interpret the statute as a "coherent regulatory scheme," harmonizing the statutory sections into a "harmonious whole."¹⁵⁶ Again, this judicial review principle makes sense from the legislative economy perspective because if Congress has spent its limited legislative resources to create a complex, harmonious regulatory scheme, this scheme should be preserved.¹⁵⁷

In this case, as explained by the dissent, the congressional intent to accord age-out protection to children in all derivative categories was clear given the clarity and compatibility of the two phrases of Section 1153(h)(3). First, none of the Justices disagreed that the first phrase of Section 1153(h)(3)¹⁵⁸ unambiguously afforded age-out relief to all derivative children.¹⁵⁹ Second, the second phrase of Section 1153(h)(3)¹⁶⁰ may be harmonized with the first by reading the second phrase to accord two separate forms of relief (automatic conversion and priority date retention).¹⁶¹ This natural reading of the statute not only demonstrated that the statute was internally consistent, but accorded with the larger scheme and intent of the Child Status Protection Act. Notably, in

¹⁵⁴ Scialabba, 134 S. Ct. at 2203.

¹⁵⁵ *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

¹⁵⁶ *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

¹⁵⁷ *See id.*

¹⁵⁸ 8 U.S.C. § 1153(h)(3) (2006) ("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) . . .").

¹⁵⁹ Scialabba, 134 S. Ct. at 2203 (Kagan, J.) ("Section 1153(h)(3)'s first clause...states a condition that every aged-out beneficiary of a preference petition satisfies.").

¹⁶⁰ 8 U.S.C. § 1153(h)(3) (2006) ("[T]he 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.").

¹⁶¹ Scialabba, 134 S. Ct. at 2221 (Sotomayor, J., dissenting) ("1153(h)(3) is naturally read to confer priority date retention as an independent form of relief to all aged-out children, regardless of whether automatic conversion is separately available.").

this case, the legislators who crafted the language of Section 1153(h)(3) filed an amicus brief stating that the intent of the statute was to protect all aged-out derivatives.¹⁶²

When evaluating the clarity of one statute whose provisions were drafted contemporaneously, the intent of Congress¹⁶³ may be easier to discern.¹⁶⁴ In this case, the Court's plurality improperly relied on *National Association of Home Builders v. Defenders of Wildlife* to hold that Section 1153(h) was self-contradictory. *National Association of Home Builders v. Defenders of Wildlife* involved two different statutory sections: 1) Section 402(b) of the Clean Water Act (CWA), mandating that the federal Environmental Protection Agency transfer permit administration to States as long as nine criteria were satisfied and 2) Section 7(a)(2) of the Endangered Species Act (ESA), mandating that federal agency action not jeopardize endangered species.¹⁶⁵

Since the nine CWA criteria were an exclusive and mandatory list, a tension existed as to whether the ESA's mandate represented a tenth criterion for federal agencies to comply with before the permit transfer.¹⁶⁶ The Court found the statutes ambiguous per *Chevron* because ambiguity existed as to which command the agency must obey.¹⁶⁷ At *Chevron* step two, the Court held that the agency regulation, 50 C.F.R. § 402.03, harmonized the statutes by only applying Section 7(a)(2) of the ESA to *discretionary* agency action, which did not include the *mandatory* action prescribed at Section 402(b) of the CWA.¹⁶⁸

Scialabba v. Cuellar de Osorio's plurality argued that similar to *National Association of Home Builders v. Defenders of Wildlife*, where the statutory scheme contained a "fundamental ambiguity" that opened the door to the agency's interpretation to harmonize the statute, the CSPA statute at subsection (h)(3) had a fundamental ambiguity as to which class of beneficiaries may benefit, and opened the door to agency interpretation to reconcile the commands.¹⁶⁹ However, the Court's plurality erred in relying on *National Association of Home Builders v. Defenders of Wildlife* because the conflict identified by the Court in subsection (h)(3) involved two clauses of one statutory

¹⁶² See Brief of Current and Former Members of Congress as Amici Curiae in Support of Respondents, *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (No. 12-930) ("Only through the broad coverage of *all* derivative beneficiaries could the CSPA effectively protect family unity and award credit for the years that families had already waited. . . . The language and structure that Congress used to draft the CSPA leaves no room for interpretation as to its scope. All three paragraphs of 8 U.S.C. § 1153(h) should be read together 'as a symmetrical and coherent regulatory scheme'. . . Paragraph (3) contains only one condition for a child to receive the paragraph's benefits: his age must be determined under paragraph (1) to be 21 years or older. Once this condition is satisfied, automatic conversion and priority-date retention are mandatory. . . . the automatic-conversion and priority-date-retention provisions of paragraph (3) unambiguously apply to *any* derivative-beneficiary child whose age is calculated to be over 21.") (internal citations omitted).

¹⁶³ *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue.").

¹⁶⁴ See SUTHERLAND STATUTORY CONSTRUCTION § 23:18 (7th ed. 2014) ("If the same legislative session enacts two or more acts on the same subject they are presumed to embody the same policy and have been intended to have effect together.").

¹⁶⁵ *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665–66 (2007).

¹⁶⁶ *Id.* at 666.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 667.

¹⁶⁹ *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2207 (2014) (citing *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007)).

section drafted concurrently while the *National Association of Home Builders v. Defenders of Wildlife* involved two completely separate statutes drafted at different times.¹⁷⁰ The concurring Justices agreed that the reasoning of *National Association of Home Builders v. Defenders of Wildlife* did not apply to this case since it dealt with “two different statutes enacted to address different problems” and “did not address the consequences of a single statutory provision that appear[ed] to give divergent commands.”¹⁷¹

In sum, at *Chevron* step one, the plurality established a judicial review standard in cases of self-contradictory statutes that best accords with legislative economy principles. However, this standard need not apply to this case given that the Section 1153(h)(3) is not self-contradictory, but rather reconcilable and harmonious. Analysis of the statutory language according to the dissent reveals that Section 1153(h)’s provisions may be harmoniously read and applied to accord with the congressional intent of the CSPA.

B. Chevron step two: the reasonableness of the BIA’s interpretation of Section 1153(h)(3)

The ultimate result of the plurality’s opinion to uphold the BIA’s interpretation in *Matter of Wang* to limit the benefits of subsection (h)(3) to only F2A beneficiaries is not reasonable because it cripples the effect of the statute and it hinders the overarching purpose of the CSPA.

First, the narrowing of the benefits to only F2A beneficiaries effectively erases subsection (h)(3) from existence.¹⁷² The priority date retention for aged-out F2A beneficiaries already existed at 8 C.F.R. § 204.2(a)(4) before CSPA was enacted.¹⁷³ While it may be argued that subsection (h)(3) provides aged-out F2A beneficiaries an additional benefit that they need not file a new petition for their priority date to be retained (a new petition is required by 8 C.F.R. § 204.2(a)(4)), this subsection as construed is largely duplicative of the preexisting regulations.¹⁷⁴ The limitation of the benefit to aged-out F2A beneficiaries also makes the first clause of subsection (h)(3) irrelevant given that it plainly casts a broad net to include children with petitions pursuant to “subsections (a)(2)(A) and (d)” of the section.¹⁷⁵ Such an interpretation violates “the

¹⁷⁰ *Id.* at 2220 (“There can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously. That is especially true where, as here, the conflict that Congress supposedly created is not between two different statutes or even two separate provisions with a single statute but between two clauses in the same sentence” (internal citations omitted) (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012)).

¹⁷¹ *Id.* at 2214 n.1.

¹⁷² See Margaret W. Wong, et al., *Why Immigration Reform is Critical*, 3 ALB. GOV’T L. REV. 57, 81 (2010) (“The BIA’s interpretation ignores a portion of the subsection, divides the subsection so as to provide no weight to the language relating to 203(d), and rewrites the subsection as if 203(d) were not part of it.”)

¹⁷³ 8 C.F.R. §204.2(a)(iii)(F)(4) (2006) states in relevant part: “[I]f the child [accompanying or following to join a principal alien under section 203(a)(2) of the Act] reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required. In such a case, the original priority date will be retained if the subsequent petition is filed by the same petitioner. Such retention of priority date will be accorded only to a son or daughter previously eligible as a derivative beneficiary under a second preference spousal petition.”

¹⁷⁴ *See id.*

¹⁷⁵ 8 U.S.C. § 1153(h)(3) (2006).

cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute.”¹⁷⁶

Second, the narrowing of the benefits to only F2A beneficiaries in subsection (h)(3) contradicts the purpose of the CSPA. The CSPA meant to extend age-out protection to beneficiaries who both suffered administrative delays and delays in waiting for visa availability.¹⁷⁷ Nowhere in the legislative history of the CSPA does it limit the age-out benefits to F2A beneficiaries. Representative Sensenbrenner, for example, noted that the CSPA “addresses . . . situations where alien children lose immigration benefits by ‘aging out’” and mentioned one of those situations to include “[c]hildren of family[-]sponsored immigrants” (or, derivative beneficiaries) who pre-CSPA “would have to apply for [the child] to be put on the second preference [F2]B waiting list” if the child aged out.¹⁷⁸ The broad protection extended to F2A beneficiaries and all derivatives in every family petition category is clearly stated in the first clause of subsection (h)(3). Furthermore, the enactment of the CSPA comes against the backdrop of the overarching federal immigration policy of family unity and reunification.¹⁷⁹

IV. PENDING AVENUES AFTER *SCIALABBA V. CUELLAR DE OSORIO* TO PROVIDE CSPA AGE-OUT PROTECTION TO ALL DERIVATIVE CHILDREN

Scialabba v. Cuellar de Osorio precludes all future derivative beneficiaries except those in the F2A category from automatic conversion and priority date retention pursuant to the BIA’s interpretation in *Matter of Wang*.¹⁸⁰ Thus, the children of unmarried sons and daughters of U.S. citizens (F1), the children of unmarried sons and daughters of lawful permanent residents (2B), the children of married sons and daughters of U.S. citizens (F3), and the children of siblings of U.S. citizens (F4) will lose their eligibility to immigrate with the original priority date if they age out. These beneficiaries will require a new family petition to begin the family-based immigration process again. In effect, *Scialabba v. Cuellar de Osorio* eliminates the possibility that derivative children for preference-based categories with waiting periods of twenty-one years or longer will immigrate.¹⁸¹ Department of State reports demonstrate the exorbitant waiting periods for

¹⁷⁶ *Williams v. Taylor*, 529 U.S. 362, 364 (2000).

¹⁷⁷ See 147 CONG. REC. S3275 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein) (“As a consequence, a family whose child’s application for admission to the United States has been pending for years may be forced to leave that child behind either because the INS was unable to adjudicate the application before the child’s 21st birthday or because growing immigration backlogs in the immigration visa category caused the visa to be unavailable before the child reached his 21st birthday.”).

¹⁷⁸ 148 CONG. REC. H4989—H992 (2002).

¹⁷⁹ 148 CONG. REC. 4987 (daily ed. Jul. 22, 2002) (statement of Rep. Sensenbrenner) (“This bill is a fine example of how we and the other body can work together in a collaborative fashion. Bringing families together is a prime goal of our immigration system. [The CSPA] facilitates and hastens the reuniting of legal immigrants’ families”); see H.R. REP. NO. 82-1365, at 29 (1952), *reprinted* in 1952 U.S.C.C.A.N. 1653, 1681 (describing the “preservation of the family unit”); see H.R. REP. NO. 101-723(I), at 38 (1990), *reprinted* in 1990 U.S.C.C.A.N. 6710, 6717 (referring to “family reunification” as “the cornerstone of U.S. immigration policy”); see S. REP. NO. 89-748, at 13 (1965), *reprinted* in 1965 U.S.C.C.A.N. 3328, 3332 (describing “[r]eunification of families” as “the foremost consideration”).

¹⁸⁰ See *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2213 (2014).

¹⁸¹ See VISA BULLETIN FOR NOVEMBER 2014, *supra* note 41.

immigrants in family preference categories.¹⁸² There are approximately 4.3 million people waiting for family-based visas as of November 2014.¹⁸³ The length of time it would take to clear the current backlog for the F2B category for Mexico is approximately 115.5 years; in other words, a Mexican who files an F2B petition in 2016 can expect the priority date to become current in the year 2131.¹⁸⁴ As another example, visas are only currently available for Filipino F4 beneficiaries with priority dates before September 22, 1991 (or Filipino brothers and sisters of U.S. citizens who have been waiting for over twenty-four years).¹⁸⁵

Following *Scialabba v. Cuellar de Osorio*, there are three avenues to seek age-out protection for F1, F2B, F3, and F4 derivatives. First, while *Scialabba v. Cuellar de Osorio* affirmed the BIA's interpretation of the statute as expressed in *Matter of Wang*, the BIA can change its interpretation. The BIA can recognize its current unreasonable interpretation of the statute as discussed in Part II-A and expand the age-out protections to all derivative categories. Second, immigration practitioners can adopt a "one petition" approach to advocate that age-out beneficiaries remain in an "appropriate category" and follow-to-join their principal beneficiary relatives. Third, a legislative revision of Section 1153(h)(3) is pending as a part of proposed comprehensive immigration reform.¹⁸⁶

A. The "one petition" approach for immigration practitioners

Immigration practitioners¹⁸⁷ representing an aged-out F1, F3, or F4 derivative may advocate with the BIA for alternative statutory interpretation of Section 1153(h)(3) that the Court did not weigh, in which derivatives remain in the "appropriate category" as stated in subsection (h)(3) without the need to file a second petition.¹⁸⁸ At the time of their age-out, conversion of immigrant status (conversion to "CSPA-protected status") rather than category occurs.¹⁸⁹ This interpretation accords with the Foreign Affairs Manual (FAM) regulations (used by the U.S. Department of State in adjudicating immigrant visas) which recognizes derivatives as children who "follow-to-join" the principal beneficiary.¹⁹⁰ These children who age out receive CSPA status in order to

¹⁸² See ANNUAL REPORT, *supra* note 13.

¹⁸³ *Id.*

¹⁸⁴ "The number of F-2B visas available to Mexico is 1,841. The number of pending F-2B applicants from Mexico is 212,621. The length of time it will take to clear up the current backlog is approximately 115.5 years (212,621 ÷ 1,841)." Motion for Leave to File Amicus Brief in Support of Plaintiffs-Appellants by American Immigration Lawyers Association and Catholic Legal Immigration Network, Inc. at 14, *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (No. 09-56786); see also ANNUAL REPORT, *supra* note 13.

¹⁸⁵ See U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., VISA BULLETIN FOR APRIL 2015, available at <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-april-2015.html>.

¹⁸⁶ Border Security, Economic Opportunity, and Immigration Act of 2013, S. 744, 113th Cong. § 1153(h)(3) (2013).

¹⁸⁷ The current best practice advice for immigration practitioners following *Scialabba v. Cuellar de Osorio* is to follow *Matter of Wang* as the authoritative interpretation of Section 1153(h)(3). See Lourdes Martinez, *The Child Status Protection Act (CSPA) & Derivative Beneficiaries Recapturing Priority Dates after Scialabba Practice Advisory*, Immigr. Legal Resource Ctr. (October 2014), http://www.ilrc.org/files/documents/cspapracticeadvisory_oct2014.pdf.

¹⁸⁸ David Froman, *Scialabba v. Cuellar de Osorio: Supremes Deny Young Adults Protection Under CSPA, Overlook Solution*, 7202 EMERGING ISSUES ANALYSIS 1, 1-9 (LexisNexis June 2014).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

continue with the original petition and follow-to-join the principal beneficiary.¹⁹¹ The Foreign Affairs Manual (FAM) states in relevant part:

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. . . . [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*).¹⁹²

The cross-referenced FAM provision, titled “Derivative Status for Spouse or Child,” provides as follows in relevant part:

A spouse or child acquired prior to the principal alien’s admission to the United States or the alien’s adjustment of status to that of a Lawful Permanent Resident (LPR), or a child born of a marriage that which existed prior to the principal alien’s admission to the United States as an immigrant or adjustment of status, who is following to join the principal alien, should be accorded derivative status under INA 203(d).¹⁹³

This type of relief for CSPA protected individuals would function similarly to 8 U.S.C. § 1151(f)(1), which establishes that the age of a child of a U.S. citizen is locked-in for CSPA purposes as the filing date of the family petition.¹⁹⁴ Allowing derivative beneficiaries to maintain their “appropriate category” (the initial category in which the petition was filed) would avoid the procedural difficulties the plurality mentioned.¹⁹⁵ This would also allow the beneficiary to maintain a legal relationship to a statutorily recognized petitioner as the “follow-to-join” immigrant of a principal beneficiary.¹⁹⁶ This approach would fit with the view of the first clause of subsection (h)(3) to benefit all derivative beneficiaries while fitting with the second clause of subsection (h)(3) to belong to the “appropriate category” and retain the original priority date.¹⁹⁷ However, the statutory term of “conversion” to a category would be lost in this one-petition scheme. Justice Alito’s dissent also focused on the term “appropriate category,” but stated that upon age-out, the derivative beneficiary should convert to the F2B category. In the proposed one-petition schema, “the conversion is one of status, not category.”¹⁹⁸

¹⁹¹ *Id.* at 9.

¹⁹² *Id.* at n.43 (quoting U.S. DEPARTMENT OF STATE, 9 FOREIGN AFF. MANUAL 40.1 N7.1, *available at* <http://www.state.gov/documents/organization/86920.pdf>).

¹⁹³ U.S. DEP’T OF STATE, 9 FOREIGN AFF. MANUAL 502.1-1 (C)(2), *available at* <https://fam.state.gov/fam/09FAM/09FAM050201.html> (previously 9 FOREIGN AFF. MANUAL 42.42 N11).

¹⁹⁴ See 8 U.S.C. § 1151(f)(1) (2006); *see also* Froman, *supra* note 188, at 9.

¹⁹⁵ See David Froman, *supra* note 188, at 11.

¹⁹⁶ See *id.*

¹⁹⁷ 8 U.S.C. § 1153(h)(3) (2006).

¹⁹⁸ David Froman, *supra* note 188, at 12.

B. Adoption of new Subsection 1153(h)(3)(A) as presented in the Border Security, Economic Opportunity, and Immigration Modernization Act

On June 27, 2013, the U.S. Senate passed S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act.¹⁹⁹ However, S. 744 did not move forward in the U.S. House of Representatives. On October 2, 2013 in the U.S. House of Representatives, Representative Joe Garcia introduced a new bill, H.R. 15 Border Security, Economic Opportunity, and Immigration Modernization Act, largely based on S.744 though containing some different provisions.²⁰⁰ Garcia initiated a petition to discharge H.R. 15 from the House committees assigned to consider the bill so that it might be brought to the House for a vote. However, to date, the petition has failed to acquire an absolute majority of signatories to compel a vote in the House.²⁰¹ The two bills, S. 744 and H.R. 15, differed in some areas, but they contained identical proposed amendments to the statutory language at 8 U.S.C. § 1153(h)(3).²⁰² An analysis of this proposed language demonstrates that the contemplated language would nullify the BIA's interpretation in *Matter of Wang*.

The identical language proposed in both S. 744 and H.R. 15 would amend 8 U.S.C. § 1153(h)(3) to read as follows:

3) RETENTION OF PRIORITY DATE.—
 (A) PETITIONS FILED FOR CHILDREN.— For a petition originally filed to classify a child under subsection (d), if the age of the alien is determined under paragraph (1) to be 21 years of age or older on the date that a visa number becomes available to the alien's parent who was the principal beneficiary of the petition, then, upon the parent's admission to lawful permanent residence in the United States, *the petition shall automatically be converted to a petition filed by the parent for classification of the alien under subsection (a)(2) and the petition shall retain the priority date established by the original petition.*²⁰³ (emphasis added).

The amended language in subsection (3)(A) specifically addresses both automatic conversion and retention for aged-out derivative beneficiaries. First, the original petition shall automatically convert to an F2B petition "upon the parent's admission to lawful permanent residence in the United States."²⁰⁴ This suggests that no new petition needs to be filed on behalf of the derivative beneficiary. Second, the F2B petition "shall retain the priority date established by the original petition."²⁰⁵ This proposed statutory language

¹⁹⁹ Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2014).

²⁰⁰ Border Security, Economic Opportunity, and Immigration Modernization Act, H.R. 15, 113th Cong. (2014).

²⁰¹ See *All Actions, Including Floor Amendments: H.R.15 — 113th Congress (2013-2014)*, available at <https://www.congress.gov/bill/113th-congress/house-bill/15/all-actions-with-amendments> (last visited Nov. 9, 2014).

²⁰² 8 U.S.C. § 1153(h)(3) (2006); S.744, 113th Congress (2013-2014), available at <https://www.congress.gov/bill/113th-congress/senate-bill/744/text> (last visited Nov. 9, 2014); H.R.15, 113th Congress (2013-2014), available at <https://www.congress.gov/bill/113th-congress/house-bill/15/text> (last visited Nov. 9, 2014).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

clarifies that both the benefit of automatic conversion and priority date retention be granted to derivative beneficiaries of any family-based category. Should this statutory language pass, the Agency would be required to abandon its administrative adjudication per *Matter of Wang*, which restricts conversion and retention to F2A beneficiaries.

The question of retroactive application will arise if this statutory amendment is adopted. First, subsection (3)(A) does not explicitly indicate whether it applies retroactively to aged-out derivative beneficiaries (in all categories besides F2A) who were excluded from seeking an immigrant visa based on their age-out status. Even if subsection (3)(A) applies retroactively, the statute has other time limitations that would restrict its application. For example, the statute requires that an intending immigrant “sought to acquire” an immigrant visa within one year of the priority date becoming current.²⁰⁶ While the phrase “sought to acquire” has become a term of art, the most recent BIA precedent holds that the “sought to acquire” requirement is satisfied by filing an application for lawful permanent residency²⁰⁷ once the visa number is available. Many of the aged-out derivatives may not have filed an application, knowing that they lost eligibility upon aging out, and thus, for many, the one year may have lapsed without meeting the “sought to acquire” requirement.

It is possible that these derivative beneficiaries outside the one-year deadline could argue that extraordinary circumstances prevented them from filing an application for lawful permanent residency. The U.S. Department of Homeland Security issued a memorandum in June 2014 explaining the extraordinary circumstances it will recognize to overcome the “sought to acquire” requirement.²⁰⁸ Although the memorandum does not contemplate this scenario involving a statutory amendment to the CSPA, it generally allows adjudicative officers to take into account the totality of the circumstances on a case-by-case basis to show extraordinary circumstances.²⁰⁹ The memorandum also represents a possible means the Agency could use to guide adjudicative officers as to the one-year filing deadline for beneficiaries of the amended CSPA who have not otherwise “sought to acquire.”

²⁰⁶ INA § 203(h)(1)(A); 8 U.S.C. § 1153(h)(1)(A) (2006) (The CSPA mathematical calculation applies “only if the alien has *sought to acquire* the status of an alien lawfully admitted for permanent residence within one year of such availability”) (emphasis added).

²⁰⁷ Such application may include filing Form I-485, Application to Register Permanent Residence or Adjust Status with the U.S. Department of Homeland Security; Form DS-230, Application for Immigrant Visa and Alien Registration with the U.S. Department of State; or Form I-824, Application for Action on an Approved Application or Petition with the U.S. Department of Homeland Security. *See* Vasquez, 25 I&N Dec. 817 (B.I.A. 2012).

²⁰⁸ U.S. CITIZENSHIP & IMMIGR. SERVS., GUIDANCE ON EVALUATING CLAIMS OF “EXTRAORDINARY CIRCUMSTANCES” FOR LATE FILINGS WHEN THE APPLICANT MUST HAVE SOUGHT TO ACQUIRE LAWFUL PERMANENT RESIDENCE WITHIN ONE YEAR OF VISA AVAILABILITY PURSUANT TO THE CHILD STATUS PROTECTION ACT (June 6, 2014), *available at* https://www.uscis.gov/sites/default/files/USCIS/Outreach/Interim%20Guidance%20for%20Comment/PM-602-0097_Extraordinary_Circumstances.pdf (last visited May 11, 2016).

²⁰⁹ *Id.* (“Determining whether an alien demonstrates that extraordinary circumstances prevented meeting the ‘sought to acquire’ requirement must be made on a case by case basis and officers must consider the totality of the circumstances.”).

V. CONCLUSION

The Court created a judicial review standard for self-contradictory statutes that it misapplied to the interpretation of 8 U.S.C § 1153(h)(3). Instead of finding the statute internally conflicted, the Court should have harmonized the statutory provisions in accordance with CSPA's intent. By affirming the BIA's unreasonable statutory interpretation, the Court erased 8 U.S.C § 1153(h)(3)'s application to all derivative beneficiaries as explicitly allowed by the statute, excluding the aged-out children of unmarried sons and daughters of U.S. citizens (F1), the children of unmarried sons and daughters of lawful permanent residents (2B), the children of married sons and daughters of U.S. citizens (F3), and the children of siblings of U.S. citizens (F4). While these derivatives are permanently excluded from CSPA protection, protection may still be available if the BIA changes its interpretation of 8 U.S.C § 1153(h)(3). Another avenue to broaden the category of derivatives included for CSPA protection involves a one-petition statutory interpretation to be advanced by immigration practitioners.

Child beneficiaries like Xiuyi and Antonio should have been afforded protection by the statute, but now, their prospects at being united with their families seem grim. Ultimately, an amendment to 8 U.S.C § 1153(h)(3), as included in two proposed comprehensive immigration bills, may be the only way to preserve the CSPA protections for the many beneficiaries in a difficult situation.