PROPERLY APPLYING INA §203(h) OF THE CHILD STATUS PROTECTION ACT: WHEN THE "APPROPRIATE CATEGORY" REMAINS THE SAME CATEGORY

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The Child Status Protection Act (CSPA) became law in August 2002 to unite families separated by processing delays and immigrant visa waiting lines.[1] It offers a variety of protections to the immediate-relative children of U.S. citizens, children of asylees and refugees, children of permanent residents, and derivative children of the principal beneficiaries of family and employment-preference petitions and diversity visa applications. This article focuses on the latter two categories provided for in section 3 of the CSPA, entitled "TREATMENT OF CERTAIN UNMARRIED SONS AND DAUGHTERS SEEKING STATUS AS FAMILY-SPONSORED, EMPLOYMENT-BASED, AND DIVERSITY IMMIGRANTS," now better known as Immigration and Nationality Act (INA) §203(h).[2] Blending practical examples, criticism concerning the principal case in the area, and acknowledgment of current efforts to achieve clarity and uniform application in this important and potentially far-reaching corner of the law, I offer an alternative approach that both fits the applicable statutes and regulations and avoids the ill effects of current Board of Immigration Appeals (BIA) precedent.

Several recent examples from my practice illustrate the fundamental misunderstanding that prevails in both U.S. Citizenship and Immigration Services (USCIS or Service) and consular circles concerning section 3 of the CSPA. This faulty perception of the role and function of the statute appears to arise from the false assumption that the statute exclusively follows the well-known automatic conversion procedures dealing with petitions for immediate-relative and family second-preference children. Indeed, the Service and the BIA, at the Service's behest, seem to fixate on this point. In order to understand the proper application of the statute to over-twenty-one derivative beneficiaries of immigrant petitions and to right the injustices they are currently suffering, it is necessary first to review the applicable statutes and regulations.

The CSPA provides, in relevant part[3]:

> (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
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> (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
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> (B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.
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> (2) *Petitions described.* — The petition described in this paragraph is —
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> (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
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> (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).*
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> (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*

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[1] Pub. L. No. 107-208, 116 Stat. 927 (2002). See U.S. Department of State Cable No. 02-State-163054 (Child Status Protection Act of 2002: ALDAC #1, Aug. 26, 2002), *reprinted at* 7 Bender's Immigr. Bull. 1180 (Oct. 1, 2002) and located on the State Department website at http://travel.state.gov/visa/laws/telegrams/telegrams_1429.html, concerning the effective date and tentative implementation of the new law.

[2] 8 U.S.C. §1153(h). References throughout this article will be to the INA.

[3] INA §203(h)(1)-(3) (emphasis added).

> *the original priority date issued upon receipt of the original petition.*

Under INA §203(d), "subsection (d)" cited in each paragraph above:

> 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.[4]

For the purposes of INA §203(d),"The term 'child' means an unmarried person *under twenty-one years of age* who is — . . . a child born in wedlock; a stepchild . . . ; a child legitimated . . . ; a child born out of wedlock . . . ; a child adopted . . . ."[5] Such a child may "follow to join" the principal alien per 9 Foreign Affairs Manual (FAM) §40.1 n.7.1:

> The term "following to join," as used in . . . INA 203(d), permits an alien to obtain a[n] . . . immigrant visa (IV) and the priority date of the principal alien as long as the alien following to join has the required relationship with the principal alien. There is no statutory time period during which the following to join alien must apply for a visa and seek admission into the United States. However, if the principal has died or lost status, or the relationship between the principal and derivative has been terminated, there is no longer a basis to following to join. As an example, a person would no longer qualify as a child "following to join" upon reaching the age of 21 years (*unless they qualify for the benefits of the Child Status Protection Act*) or by entering into a marriage. There is no requirement that the "following to join" alien must take up residence with the principal alien in order to qualify for the visa. (See 9 FAM 42.42 N11.) The term "following to join," also applies to a spouse or child following to join a principal alien who has adjusted status in the United States.

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.

One may already sense the shape of the argument from these references. The following examples illustrate the type of responses a practitioner may expect from Service and consular officials when pursuing adjustment of status or immigrant-visa processing for qualified family, employment, or diversity derivatives. The narrative discusses the government's unsupported approach to aged-out derivatives against the backdrop of a clear statutory and regulatory framework that establishes a new paradigm for the granting of immigrant visas to heretofore "aged-out" (hence, out-of-luck) derivative children. Following the discussion of these examples, we will examine other sources of authority and arguments concerning §203(h).

I. Practical Application of INA §203(h)

Example 1: Adjustment Application Denied for Aged-out Son While Awaiting Immigrant Visas: EB-3 Derivative

The Service denied the adjustment-of-status application of an over-twenty-one derivative of an EB-3 I-140 petition while the principal alien parent and her spouse were awaiting visas based on their priority date. He was eighteen years old when his mother's priority date was established by labor certification and still under twenty-one when the I-140 was filed. The denial contained no analysis or calculation, only a conclusory statement that the applicant did not qualify for benefits under the CSPA. Our August 2009 reconsideration request supplied calculations and analysis and demonstrated the statutory basis for the son's continued eligibility for adjustment as explained in this article.[6] The Service responded negatively

[4] INA §203(a), (b), & (c) provide, respectively, for family-based preference, employment-based preference, and diversity visa immigrants.

[5] INA §101(b)(1)(A)-(E), emphasis added. The list does not include adopted orphans or children adopted under the Hague Convention per INA §101(b)(1)(F) & (G).

[6] After completing the basic calculations, we checked them to see whether the applicant "sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability." They showed that he and his parents had filed their I-485s within six weeks of initial

again, based this time on the Adjudicator's Field Manual (AFM). However, the AFM provision explaining automatic conversion of adjustment applications, upon which the Service relied to justify its legally erroneous denial of the son's I-485, insufficiently explained the function of §203(h).

Indeed, the Service fixated on the "automatic conversion" language of §203(h)(3), declaring: "[Y]ou refer to section 203(h)(3) of the Immigration and Nationality Act, and assert that [the applicant] should be entitled to an automatic conversion." (Then most of the rest of the letter explained why the applicant did not qualify for conversion.) To the contrary, we *did not* "assert" or even suggest that the applicant was entitled to conversion *to another category*. He was not. Rather, he was entitled to remain in his *original* category as a dependent of the principal alien beneficiary of an employment-based immigrant visa petition (I-140).[7] All the talk about conversion was irrelevant to the statutory scheme that applied to this applicant.[8] And the AFM proves itself incomplete, because it fails adequately to reflect the full breadth of INA §203(h).

The Service erroneously lumped together "sections 204(a)(2)(A) and [203](d)" and assumed that their respective functions under §203(h)(3) mirror each other — much as it did in the *Wang* case.[9] However, these provisions have very different functions. Subparagraph 204(a)(2)(A) provides for family petitions for the spouse or child of a permanent resident with a pre-established and familiar "automatic conversion" scheme based, variously, upon the age and/or marital status of the child and the subsequent immigration status of the parent when visas become available. Section 203(d) — referred to in each numbered paragraph of §203(h) and quoted in full above — declares that the derivative child shall "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."[10]

Following this tangent, the Service relied on AFM chapter 23.2(l), entitled "Transferring an Adjustment of Status Application from One Underlying Eligibility Basis to Another," a matter of no relevance to this applicant's situation. Closer on point would have been AFM 21.2(e)(1)(ii), "Adjustment Under a Preference Category":[11]

> The beneficiary's CSPA age is determined using the formula below. If the petition is approved and the priority date becomes current before the alien's CSPA age reaches 21, then a one-year period begins during which the alien must apply for

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eligibility, so he cleared the initial hurdle. Next, we calculated his age for purposes of the definition of "child":

> Age of Applicant on July 1, 2007, (initial eligibility date) under 203(h)(1)(A): 22 years, 103 days
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> Number of days I-140 petition was pending: 200 days
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> Age determined under §203(h)(1)(B): 21 years, 268 days.

Since this calculation yielded an age in excess of twenty-one years, the analysis next considered §203(h)(3), explaining it to the Service, as follows:

> This section of the statute preserves "the original priority date issued upon receipt of the original petition" for *all* who fall within its scope. Section (2) clearly describes two types of petitions governed by this statute, original petitions under the second family preference and derivative beneficiaries of family, employment or diversity visa lottery petitions for or by their parents. In the family case, the application of 203(h)(3) is clear: children pass from F2A to F2B and thence to other possible preference categories they may automatically qualify for such as F1 or F3. Such movement may also be possible for some family derivatives, such as children of unmarried children or unmarried sons and daughters. However, since employment and diversity visa beneficiaries have no such mobility among various preference categories or countries, when their petitions "shall automatically be converted to the appropriate category," they remain in the *same* category. . . .

[7] The recent BIA ruling in *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009), discussed in more detail below, which held that §203(h)(3) did not support automatic conversion from an employment preference category to a family preference category, dealt with different facts. Moreover, it veered away from considering the most important function of §203(h)(3), that of preserving the ability of "aged out" children immigrating with or "following to join" their parents in each of the enumerated family, employment, and diversity categories.

[8] Because the Service focused on the wrong application, the I-485, instead of the approved I-140, its conclusion that §203(h) does not give "authority to convert the basis of [the applicant]'s adjustment of status application," while technically true, rested on faulty premises, totally irrelevant to the portions of the statute that applied to the case.

[9] See note 23, *infra*.

[10] Emphasis added.

[11] Find (e) under the Child Status Protection Act provision of 21.2, "Factors Common to the Adjudication of All Relative Visa Petitions." Emphasis added.

permanent residence in order for CSPA coverage to continue.

> *It does not matter if the alien aged out before or after the enactment date of the CSPA, so long as the petition is filed before the child reaches the age of 21 provided the alien did not have a final decision prior to August 6, 2002 on an application for permanent residence based on the immigrant visa petition upon which the alien claims to be a child.*

This provision mentions §203(h)(3) generally in the introduction. No separate CSPA discussion exists under the employment-based portion of the AFM. Thus, in the AFM's only guidance on the subject of over-twenty-one derivative beneficiaries, it advises that so long as the petition was filed before the child turned twenty-one, the alien remains eligible for CSPA benefits over age twenty-one "based on the immigrant visa petition upon which the alien claims to be a child." This guidance from the AFM tracks consistently with the above-quoted statutes and regulations.

Applying the CSPA to immediate-relative applications, where the under-twenty-one status is perpetuated indefinitely, and to family-preference applications, where derivative beneficiaries may automatically convert to various categories based on their age or the changed status of the petitioner, has blinded us to the third scheme established by statute. This is for non-converting derivatives of family-based, employment-based, and diversity petitions who turned twenty-one while awaiting processing or visa availability. INA §203(d) accords these derivatives the "same status and the same order of consideration" for visa availability as their principal alien parents or spouses and specifically contemplates that they may be "following to join the spouse or parent." We are familiar with this procedure for derivative spouses. Now a combination of statutes and regulations permits the same procedure for adult sons and daughters of permanent residents who would formerly have "aged out." The State Department's "following to join" regulation quoted above specifically allows for over-twenty-one derivatives whose status is protected by the CSPA. And §203(h)(3) preserves that status for over-twenty-one beneficiaries under §203(d), that is, nonconverting derivative beneficiaries of family-based (in categories F-1, F-2B, F-3, and F-4), employment-based, and diversity visa petitions.[12] Final confirmation comes from the FAM provision cited in the "following-to-join" regulation: "No second preference petition is required" for derivatives following to join under INA §203(d).[13]

These statutes and regulations fit easily together without conflict to show that the applicant in this example is still an authorized derivative beneficiary under his mother's EB-3 petition and is therefore entitled to maintain his I-485 adjustment of status application to accompany or follow to join his parents when immigrant visas finally become available. His *"appropriate category"* under INA §203(h)(3) remains the category he started in: *EB-3.*

Example 2: "Aged Out" Derivative Child Denied Consular Processing with His Parents: F-4 Derivative

It was heartening to see CSPA calculations from the consulate after having to provide them for the Service. The consular calculations based on the prescribed table[14] proved correct — as far as they went. Since the calculations yielded an age in excess of twenty-one years, the consular analysis ended with an "age-out" conclusion, without considering the application of §203(h)(3). Consular resources apparently proved insufficient to provide the obviously conscientious consular officer meaningful guidance concerning application of INA §203(h)(3) in this situation. He lamely suggested that the parent file an F-2B I-130

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[12] Following this view, the "conversion" language of §203(h)(3) applies only to §204(a)(2)(A) family beneficiaries, where a well-established statutory automatic conversion scheme already exists. Where no statutory conversion scheme exists, the derivative beneficiary remains eligible in the original preference category with the original priority date. Conversion "to the appropriate category" does *not* mean that if no other category exists to convert to then the alien gets knocked out of the original category. No. However, this scenario appears to summarize current U.S.C.IS thinking on this point. *The original category for certain family and all employment and diversity derivatives always remains the "appropriate category" for them.* That cannot be taken away simply because Service officers are more accustomed to dealing with the family-preference automatic-conversion scheme.

[13] 9 FAM §42.42 n.11. Although technically not regulations, as agency interpretations, the FAM notes provide detailed practical guidance in implementing statutes and regulatory provisions.

[14] The CSPA Formula Worksheet appears at paragraph 33 of U.S. Dep't of State Cable No. 03-State-015049 (Child Status Protection Act: ALDAC #2, Jan. 17, 2003), *reprinted at* 8 Bender's Immigr. Bull. 492 (Mar. 15, 2003).

and ask the Service to accord to it the original fourth-preference priority date — the same suggestion made four years ago when the parents immigrated and the consulate refused to process their aged-out son. This approach has an attractive familiarity about it, has worked for some in the past, and forms the core of current arguments for a more liberal interpretation of §203(h)(3).[15]

Again we checked to see whether the prerequisite of §203(h)(1)(A), that the applicant "sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability," had been satisfied. Here, the applicant made the attempt when he appeared with his parents within one year of visa availability to immigrate to the United States, even though he was denied that opportunity. So he, too, cleared the initial hurdle for CSPA protection. Next, we considered the application of §203(h)(3) to his age that the consular officer calculated for purposes of the definition of "child": "Age [determined under §203(h)(1)(B)] for CSPA purposes: 25 Years, 1 Months, 22 Days."

Having determined an age in excess of twenty-one years, we applied the same analysis as explained above. Continuing that analysis in the context of this example, since F-4 derivatives, like the derivatives of employment-based and diversity visa beneficiaries, have no pre-ordained mobility among various preference categories — when their petitions "shall automatically be converted to the appropriate category" — under §203(h)(3) they also remain in the *same* category. The statute continues to make them eligible in the same preference category because there are no "over-twenty-one" categories for them to transfer to, as in certain other portions of the family-preference scheme. This understanding is consistent with the "following to join" exception for over-twenty-one beneficiaries of the CSPA.[16]

Thus, a combination of §203(h)(3), which preserves priority dates for derivative children over twenty-one; §203(d), giving derivatives the same status as the principal alien; and 9 FAM §40.1 n.7, regulating "following to join" cases, makes this applicant eligible to follow the principal alien despite his age. The regulation places no time limit on when the child can follow; moreover, it excepts those over twenty-one who "qualify for the benefits of the Child Status Protection Act." Section 203(h)(3) specifically provides for derivatives whose age exceeds twenty-one. This means the applicant "qualifies for benefits." When following to join, "automatic conversion" is unnecessary, for the "appropriate category" is the same as that of the principal alien for derivatives "following to join" in any of the categories enumerated in §203(h)(2)(B). In this example, the "appropriate category" remains that of his parent, F-4. Again, contrary to consular advice, no additional family second-preference petition was necessary.[17]

II. The Board of Immigration Appeals Steered the Wrong Course in *Matter of Wang*

The BIA failed to follow the course of clear statutory language to its logical destination in its June 16, 2009, decision in *Matter of Wang*.[18] The factual pattern in *Wang* parallels that of Example 2 above, a family fourth-preference petition that included a derivative child, followed by the family second-preference petition of her principal alien father seeking to apply his fourth-preference priority date by virtue of INA §203(h)(3).

Viewing these facts through the lens of traditional "petition conversion" and "priority date retention" analysis, the Board declared:

> The issue in this case is whether a derivative beneficiary who has aged out of a fourth-preference visa petition may automatically convert her status to that of a beneficiary of a second-preference category pursuant to section 203(h) of the Act. To answer this question, we must examine whether the CSPA intended for the beneficiary of a second-preference visa petition filed by her father to retain the priority date previously accorded to her as the derivative beneficiary of a fourth-preference visa petition filed by her aunt.[19]

As shown above, based on the applicable statutes and regulations, the Board should instead have considered the following issue:

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[15] Here, the parents filed an F-2B I-130 petition at the consul's suggestion in 2006. We subsequently tried to get both USCIS and the National Visa Center to recognize the original priority date for the later petition. Both refused. *Matter of Wang* held that §203(h)(3) did not support automatic conversion from a family fourth-preference category to a family second-preference category. USCIS would surely cite this case as a reason to deny any further effort to apply the 1994 F-4 priority date to the 2006 F-2B petition.

[16] See 9 FAM §§40.1 n.7.1 and 42.42 n.11(a), quoted above.

[17] 9 FAM §42.42 n.11(a).

[18] 25 I. & N. Dec 28 (BIA 2009).

[19] *Id.* at 30.

> whether a derivative beneficiary who has aged out of a fourth-preference visa petition may nevertheless immigrate with or follow to join the principal alien in the same preference category pursuant to section 203(h) of the Act. To answer this question, we must examine the language of the statute and the applicable regulations to determine whether the CSPA intended for the beneficiary to retain the same status and priority date previously accorded to her as the derivative beneficiary of a fourth-preference visa petition filed by her aunt.

The answer to this question, as properly framed, is a resounding "Yes" based upon the plain language of the relevant statutes and regulations — without having to resort to other sources of lesser authority.

Having charted the course in error, little wonder the BIA arrived at the wrong port.[20] Applying this principle to two F-2A derivative children in our practice, we successfully argued that their principal alien mother's obtaining an immigration physical, presenting her I-130 Approval Notice to an immigration attorney, and scheduling a consultation within the one-year period were sufficient actions for herself and her derivative children where the consultation occurred and they subsequently filed their adjustment of status applications within thirteen months of initial visa availability.

The decision purportedly rested on a lack of statutory guidance in §203(h)(3) to show congressional intent to extend the protection of the CSPA to derivative children of immigrants whose computed age at the time visas became available equals or exceeds twenty-one years.[21]

Through tortured reasoning, after quoting the applicable statutory provision, the Board proceeded to ignore it and instead turned to the *House* version of the legislative history while acknowledging that the *Senate* added the specific language of §203(h)(3).[22]

Rather than reading the plain language of the statute, the Board — at the obfuscating behest of the Service[23] — launched into an analysis of the *heretofore* common meanings of "petition conversion" and "priority date retention" language. These were not part of the legislative record, per se; rather, they described existing conditions when the Congress decided

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[20] As for the question the BIA chose not to address (*Id.* at 33):

> The record before us contains no evidence that the beneficiary sought to acquire lawful permanent resident status under the 1992 visa petition within a year of the visa petition becoming available, that is, by February 2006. However, we need not address the question whether this bars the beneficiary from using the terms of section 203(h)(3) of the Act, as we have alternatively examined whether section 203(h)(3) permits an automatic conversion from a fourth-preference visa petition to a second-preference visa petition with retention of the priority date of the fourth-preference petition, and we resolve the matter on that basis.

The language of §203(h)(3) subjects §203(d) derivatives to the one-year qualification, but according to the statute's wording the *parent*, not the derivative child, must have "sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability." INA §203(h)(1)(A), defining "such alien . . . in the case of subsection (d), the date on which an immigrant visa number became available for the alien's *parent* . . . ."

The Board has previously recognized that taking steps toward filing the adjustment of status, such as consulting an immigration attorney during the one-year period, satisfies the *sought to acquire* standard: "[W]e conclude that Congress intended the term 'sought to acquire' lawful permanent residence . . . to be broadly interpreted within the context of the statute, and not limited to the filing of the application." *Matter of Kim*, A77 828 503 (BIA Dec. 20, 2004), available on Lexis.com in Immigration Non-Precedent Decisions: BIA, AAO/AAU, and *summarized* at 10 Bender's Immigr. Bull. 1426 (Sept. 15, 2003); *see also* Padash v. INS, 358 F.3d 1161 (9th Cir. 2004) (holding the CSPA should be interpreted expansively.)

[21] Apparently the Board failed to note the title of section 3 of the CSPA quoted at the outset of this article. Could there be any doubt that Congress intended for section 3 to provide for more than F-2A beneficiaries?

[22] *Wang*, 25 I. & N. Dec. at 36-38.

[23] *Id.* at 34:

> USCIS urges a much narrower interpretation of the CSPA, arguing that section 203(h)(3) mirrors the language of 8 C.F.R. §204.2(a)(4) [dealing with derivatives of second preference family petitions] and essentially codifies "established regulatory practice," which requires that the original priority date will be retained only if the second visa petition is filed by the same petitioner. Thus, the U.S.C.IS maintains that in order to effect an "automatic conversion" under the CSPA, the petitioner also must have been the petitioner on the 1992 visa petition. According to the USCIS, such an interpretation of the statute avoids open-ended petitions with no timeliness considerations.

The Service suggested — and the BIA agreed — that in this instance an existing *regulation* overrules a new *statute*. Apparently the Service and the Board have never seen the following-to-join regulation. Moreover, to take this position they both had to ignore §203(d) and particularly Congress's specific reference to it in §203(h)(3).

radically to change the scheme to ameliorate the family-unity problems arising when previously qualified "children" "aged out" owing to delays inherent in the system.

The Board made an artificial distinction between "administrative delays" and those "resulting from visa allocation issues."[24] This distinction finds no support in the statute. "Administrative delays" figure in the calculation of the child's age under §203(h)(1)(B) at the time visas become available. But delays "resulting from visa allocation" comprise the critical purpose of §203(h)(3), which by its reference to §203(d) clearly incorporates visa delay ("if not otherwise entitled to . . . the *immediate* issuance of a visa") and provides that "the alien *shall retain* the original priority date."[25] Thus, §203(h)(3) actually focuses on the timing of availability of immigrant visas, not delays in petition approval — a mere prerequisite to inclusion in the over-twenty-one category. Indeed, §203(h)(3) makes sense only in the context of visa-processing delays. By missing this central purpose, the Board betrayed its fundamental misunderstanding of §203(h)(3).

Nor does the concept that §203(h)(3) beneficiaries would "jump" to the head of the line in another category make sense as a reason to reject the statute.[26]

All beneficiaries who now "automatically convert" from one preference category to another "jump" the line in their *new* category. We excuse this, however, because they have spent a long time waiting for an immigrant visa in *another* preference-category line. This is equally true for the derivative beneficiaries to whom the Board erroneously denies benefits for this bogus reason. These derivative §203(h)(3) beneficiaries, too, are entitled to the same status as their parents in categories 203(a), (b) and (c).[27] Therefore, they *all* have a right to retain the priority date of the principal alien *in the same preference category*.

How much clearer do the statutory references have to be for the Board to discern the new paradigm?[28]

> (2) Petitions described. – The petition described in this paragraph is . . . 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 subsections (a), (b), or (c).
> (3) Retention of priority date. – If the age of an alien is determined 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.

The Board's decision effectively negates the statutory references to sections 204(a)-(c) and 203(d) and the remainder of the language italicized above.

Although the statutory language is clear, thereby precluding reference to the "legislative history" and background material that the Board relied on, the Board critically omitted consideration of the key agency guidance that governs children "following to join" their parents, as contemplated by §203(d): 9 FAM §40.1 n.7.1, quoted above. This regulatory provision makes it clear that following-to-join beneficiaries have no time limit to immigrate and

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[24] "While the CSPA was enacted to alleviate the consequences of administrative delays, there is no clear evidence that it was intended to address delays resulting from visa allocation issues, such as the long wait associated with priority dates." *Wang*, 25 I. & N. Dec. at 38.

This distinction likely arose from the errant focus solely upon the family second preference and automatic conversion per existing regulations, for which visa delays pose few problems because the original priority date is retained in each new category.

[25] Emphasis added.

[26] *Wang*, 25 I. & N. Dec. at 38 & n.11.

> If we interpret section 203(h) as the petitioner advocates, the beneficiary, as a new entrant in the second-preference visa category line, would displace other aliens who have already been in that line for years before her. Although her visa petition was filed in 2006, the beneficiary would "jump" to the front of the line by retaining a 1992 priority date, thereby causing all the individuals behind her to fall further behind in the queue.[11]
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> [11] The petitioner's argument is rather similar in nature to one seeking to "grandfather" a priority date. However, Congress did not write the statute in such a manner, although it clearly has the capability of doing so. *See* section 245(i) of the Act, 8 U.S.C. §1255(i) (2006).

Wrong! That is the precise function of §203(h)(3). Nor did Congress omit references to section 203(d) — which the Board ignored — "although it clearly ha[d] the capability of doing so." *Id.*

[27] INA §203(d). The Board dodges this statutory mandate by claiming, "The language of section 203(h) does not expressly state which options qualify for automatic conversion and retention of priority dates. Given this ambiguity we must look to the legislative intent behind section 203(h)(3)."

[28] INA §203(h)(2) and (3) (emphasis added).

partake of the same status as their parents. Therefore, a section 203(h)(3) beneficiary does not need a new petition in category F-2B. Rather, she can directly file her visa petition or adjustment application based on the original petition.[29] Alternatively, she may be petitioned for by the principal alien, her "parent," in the "appropriate category" specified in §203(h)(3), but this is not required.[30]

If Congress had intended the result the Board reached in *Wang*, it could easily have omitted its references throughout the statute to §203(d). Instead, all of these references to derivative beneficiaries of family, employment, and diversity immigrants (coupled with the cross-references to the CSPA and over-twenty-one beneficiaries in the following-to-join regulation and the AFM and the broad language of conversion to "the *appropriate* category") — even the title of the entire section of the Act that inserted §203(h) into the INA — show an unmistakable intent to be as inclusive as possible in uniting children — even adult children — with their parents, without time limit, by permitting them to remain as derivatives in the *same* category as their parents.

Indeed, contrary to the conclusion of the Board, Congress "create[d] an open-ended grandfathering of priority dates that allow [*sic*] derivative beneficiaries to retain an earlier priority date set in the context of [the same] relationship, to be used at any time . . . ."[31]

The Board lost its compass. Let us hope that subsequent voyagers on these seas will set right the injustices that have followed in the Board's wake.

III. Calls for INA §203(h) Clarity

Many strong voices currently advocate a more expansive application of §203(h). These advocates include counsel and amici curiae in several CSPA lawsuits as well as experienced immigration practitioners.[32] For a comprehensive listing of CSPA resources, see http://shusterman.com/childstatus protectionact.htm#5A.[33] These commentators and litigators have attacked the vulnerabilities of the *Wang* decision and have forcefully pursued a more rational implementation of this statute — but from a stance still within the existing paradigm of "automatic conversion." While they recognize the errors of *Wang*, their common approach still assumes a change of category, like either the previous nonprecedent BIA decision *Matter of Garcia*[34] or other examples they cite in their briefs and articles. Nevertheless, their several approaches seek to arrive at the same destination as the route this article advocates: an expansive interpretation of the statute that will permit adult sons and daughters of the described immigrants

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[29] For consular processing of the following-to-join derivative, an I-824 Application for Action on an Approved Application or Petition may be unnecessary. See note to Step 1, par. 1C of the I-824 Instructions: "This notification is not available if you have been issued an immigrant visa at a U.S. Embassy or consulate and have been admitted to the United States as a lawful permanent resident. You may contact the NVC for information on how to request following-to-join benefits for your dependent(s)." After contacting the National Visa Center, we determined that the appropriate approach in such cases is to apply directly with the consulate that processed the principal alien parent.

[30] *See* 9 FAM §42.42 n.11.

[31] *Wang*, 25 I. & N. Dec. at 39 (changing "a different" to "[the same]").

[32] A comprehensive review exceeds the scope of this article. Representative articles include: Royal F. Berg & Ronald H. Ng, *Fighting for Families: How the Child Status Protection Act Lets Kids Stay Kids*, in Immigration & Nationality Law Handbook, 2008-09, at 489 (AILA 2008); David A. Isaacson, *BIA Rejects* Matter of Maria Garcia *in Precedent Decision Interpreting the Child Status Protection Act*, Cyrus D. Mehta Assoc. News & Articles, June 22, 2009, http://www.cyrusmehta.com/News.aspx?SubIdx=ocyrus200 96221176; Carl Shusterman, *Update On The CSPA Lawsuit*, Immigration Daily (June 24, 2010), http://www.ilw.com/articles/2010,0624-shusterman.shtm (explains that the Court of Appeals for the Ninth Circuit is in the process of consolidating *Costelo v. Napolitano*, No. 09-56846 (9th Cir.) and *Cuellar de Osorio v. Mayorkas*, No. 09-56786 (9th Cir.)). A promising argument appears in the amici curiae brief in the latter case, which reads the "automatic conversion" and the "retention of priority date" clauses of §203(h)(3) in the disjunctive, as providing two distinct benefits. Brief of the American Immigration Council and the American Immigration Lawyers Association as Amici Curiae in Support of The Plaintiffs-Appellants at 13-25 (Apr. 28, 2010). This important distinction is wholly consistent with the new paradigm advocated here.

[33] Another extensive supply is in Kathrin S. Mautino on the Child Status Protection Act, 2008 Emerging Issues 1747 (LexisNexis 2008). *See generally* Charles Gordon, Stanley Mailman, and Stephen Yale-Loehr, Immigration Law and Procedure §36.04; Daniel Kowalski, Immigration Law and Procedure: Desk Edition §11.12.

[34] Matter of Garcia, 33 Immigr. Rep. B1-98 (BIA June 16, 2006) (also available on Lexis.com in Immigration Non-Precedent Decisions: BIA, AAO/AAU (search for A79 001 587)). In *Garcia* "the BIA held that the 'appropriate category' related to the principal beneficiary of the earlier petition, not the prior petitioner. *Matter of Wang* does not explain why this analysis in *Matter of Garcia* is in error." *Costelo v. Napolitano*, Brief of the American Immigration Law Foundation and American Immigration Lawyers Association as Amici Curiae in Support of the Plaintiffs at 8, No. SACV 08-688 JVS (SHx) (C.D. Cal., Jul. 1, 2009). For a detailed discussion of *Garcia*, see Isaacson, *supra* note 32.

to immigrate with their family members regardless of the length of the wait for visas. This new paradigm for the over-twenty-one generation of derivatives offers the advantages of certainty and simplicity: avoiding adverse precedent while making the allocation of priority dates easier to understand (and therefore easier to obtain when dealing with a variety of governmental workers and officials).

Think of how derivative spouses are treated when they present themselves for immigration with their principal alien spouse or file for adjustment of status based on the spouse's approved immigrant petition. Section 203(h)(3) treats formerly aged-out children just like the accompanying or following-to-join spouse. No additional petition is needed. Provided they were under twenty-one years old when the principal alien parent was originally filed for, they will qualify, like their other parent, indefinitely, until visas are available, and they may immigrate with, or following, their parents. This simple approach finds support in the statutes, regulations, and USCIS Adjudicator's Field Manual. It effectuates the acknowledged purpose of Congress to unite families. It does not offend the principles of automatic conversion to a category having a different petitioner or of "jumping" the line in a new category. Moreover, it stands unscathed by *Wang*, for the BIA decided a different question, wholly inapplicable to this approach.

IV. Conclusion

Through practical examples and critical review of the current USCIS, consular, and BIA paradigm we can discern the shape of a new way of thinking about INA §203(h). This new understanding encompasses all specified derivative beneficiaries, shows off-course BIA precedent unworthy of deference, and simplifies administration of the statute. Statutory and regulatory analysis supports it. More, this new view makes sense. Leaving the non-F-2A, over-twenty-one, derivative beneficiary in the original preference category accomplishes the goals concerned practitioners all seek: maximum inclusion, certainty, and ease of application.

The key to understanding the application of this new paradigm lies in focusing on the "*appropriate category*," not on the automatic-conversion language. The appropriate category for §203(d) derivatives will with few exceptions continue as the *same category*. The prescribed automatic-conversion procedure, finding no other category to convert to, completes its work by leaving the derivative in the same category he or she has been entitled to all along by virtue of §203(d). Thus, the inclusive destination description, "the *appropriate* category," overrides the procedural prescription of §203(h)(3), to allow, *but not require*, a change of category.[35]

Therefore, for derivative beneficiaries under §203(d), the real "appropriate category" under section 3 of the CSPA, devoted to preserving the status of "CERTAIN UNMARRIED SONS AND DAUGHTERS SEEKING STATUS AS FAMILY-SPONSORED, EMPLOYMENT-BASED, AND DIVERSITY IMMIGRANTS," will remain the *same* familiar category in which the beneficiary started and has been waiting all along.

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REMINDER:

The correct citation form for the BIB is Author, *Title*, 15 Bender's Immigr. Bull. 1143 (Aug. 15, 2010).

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[35] 9 FAM §42.42 n.11 (emphasis added).