No. 12-930

In the Supreme Court of the United States

ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL., PETITIONERS

v.

ROSALINA CUELLAR DE OSORIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The BIA's reasonable interpretation of 8 U.S.C. 1153(h) is entitled to *Chevron* deference. That provision makes "automatic[]" conversion of an existing petition "to the appropriate category" a prerequisite for the special protection it affords. But for aged-out former derivative beneficiaries of F3 and F4 petitions, no such category exists for automatic conversion. Although the parent of such an aged-out person might eventually become a lawful permanent resident (LPR) and be entitled to file an F2B petition naming the aged-out person as a principal beneficiary, reliance on a brand-new petition filed by a brand-new petitioner is outside the scope of the statutory language. In addition, such an aged-out person's parent cannot have attained LPR status at the moment when the new category must be "appropriate": the date when a visa

number becomes available to the parent. The BIA therefore sensibly read Section 1153(h)(3) to extend only to aged-out beneficiaries of F2A petitions, who either were or could have been *principal* beneficiaries in their own right in the first instance, and for whom an "appropriate" category is "automatically" available without a new petition and change in the petitioner. That reading—which interprets the provision to essentially codify a preexisting regulation—avoids the disruption and conflict in the immigrant-visa system that respondents' sweeping new rule would create.

A. The Board's Interpretation Of The Automatic-Conversion Language In Section 1153(h)(3) Is Reasonable

To justify their contention that Section 1153(h)(3) unambiguously forecloses the BIA's interpretation, respondents assert that one of the provision's operative clauses—that "the alien's petition shall automatically be converted to the appropriate category"—is actually irrelevant to a proper understanding of that provision. They also advance a timing argument never previously made in this case and never mentioned by a single court to have addressed Section 1153(h)(3). Those arguments suffer from numerous flaws.

1. As an initial matter, respondents attempt (*e.g.*, Br. 25) to avoid the automatic-conversion language entirely by arguing that Section 1153(h)(3) unambiguously covers all of the derivative beneficiaries that Section 1153(h)(1) covers. That argument lacks merit.

First, neither Section 1153(h)(3)'s cross-reference to Section 1153(h)(1) (see Gov't Br. 32-33) nor the use of the phrase "purposes of subsections (a)(2)(A) and (d)" in each signifies that both sections have the same scope. Resp. Br. 18-21. In Section 1153(h)(3), the

"purposes" phrase is used in the course of referring back to the age calculation set forth in Section 1153(h)(1)—and that age calculation is indisputably *one* of the things that is necessary to obtain relief under Section 1153(h)(3). But the existence of that condition does not negate the reasonableness of the Board's conclusion that Section 1153(h)(3) contains an additional condition: that there must be an "appropriate" statutory category to which a petition can "automatically be converted." Some aliens covered by Subsection (a)(2)(A) (F2A) and Subsection (d) (derivative beneficiaries) satisfy that additional condition, and some—like respondents' sons and daughters—do not.[1]

Second, a comparison with the regulation that Section 1153(h)(3) modestly expanded (Resp. Br. 22-23) does not aid respondents. While the regulation specified that an F2A derivative beneficiary could retain a priority date when a subsequent petition was "filed by the same petitioner," 8 C.F.R. 204.2(a)(4), it would have been superfluous to repeat that language in Section 1153(h)(3) in light of the requirement of automatic conversion, which is not contained in the regulation. See Gov't Br. 46 n.15.

Third, the legislative history (Resp. Br. 24) does not support respondents. They suggest that their

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[1] The heading of the relevant CSPA section (Resp. Br. 23-24) adds nothing to the analysis. The BIA's interpretation does not render meaningless any part of the heading, which is relevant only in case of an ambiguity in any event. See *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947). The heading applies to the whole of Section 1153(h), not just to Section 1153(h)(3), see 116 Stat. 928, and employment-based immigrants benefit from Section 1153(h)(1) under any party's reading.

reading fits within a purpose to protect a child whose "*application* for a * * * visa was submitted before the child" turned 21. 147 Cong. Rec. S3275 (daily ed. Apr. 2, 2001) (emphasis added), quoted in Br. 24. But a visa *application* is submitted only after a visa number becomes available, and the protection referred to is found in Section 1153(h)(1), which addresses administrative delays in adjudicating such applications, not in Section 1153(h)(3). See Gov't Br. 5-6. Respondents also imply (Br. 24 n.7) that the House sponsor recognized a "broaden[ing]" of Section 1153(h)(3) to address delays caused by annual visa limits, but the cited statement refers solely to modifications that "provide[d] relief * * * when the INS takes too long to process * * * adjustment of status applications." 148 Cong. Rec. H4992 (daily ed. July 22, 2002); see Gov't Br. 49 n.16. And respondents ignore repeated floor statements that the CSPA was not intended to displace aliens already waiting in visa lines, see, *e.g.*, *id.* at 49—exactly the disruption respondents' reading would create, see pp. 17-20, *infra*. Read in full, the legislative history gives no indication that Congress intended Section 1153(h)(3) to work as respondents posit. See *Matter of Wang*, 25 I. & N. Dec. 28, 36-38 & n.10 (B.I.A. 2009).

Fourth, respondents err in relying (Br. 25-26) on a handful of lower-level or non-precedential pre-*Wang* adjudications. Allowing aliens to resurrect defunct priority dates is not literally impossible. See Gov't Br. 36 n.12. But *Wang* reasonably interpreted Section 1153(h)(3) to confer a more limited benefit, and earlier non-authoritative decisions reaching a different conclusion do not undermine *Wang*'s fully reasoned anal-

ysis. See *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 659 (2007).[2]

2. Respondents next attempt (Br. 28-38) to show that aged-out former beneficiaries of F3 and F4 petitions unambiguously fall within the scope of Section 1153(h)(3)'s automatic-conversion language. In respondents' view, Section 1153(h)(3) functions like this: if, at the moment an aged-out former derivative beneficiary's visa or adjustment-of-status application is adjudicated, the aged-out person's parent (the principal beneficiary of the petition as to which the aged-out person was once a derivative) has become an LPR, the F2B category is "appropriate" and automatic conversion is available. That argument depends on the premise that an F3 or F4 petition filed by one person can automatically be converted into an F2B petition filed by an entirely different person—even where the only possible F2B petitioner has never actually submitted a petition or otherwise formally sought to sponsor the family member.

Respondents' premise is fundamentally flawed. It does not comport with the plain language of Section 1153(h)(3), which contemplates that the existing petition will "convert[] to the appropriate category," not become an entirely new petition with a brand-new petitioner and a brand-new principal beneficiary. Nor can it be reconciled with Section 1154, which provides that an LPR seeking classification of a family member should "file a petition." 8 U.S.C. 1154(a)(1)(B). It also cannot be reconciled with related requirements that a

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[2] Respondents cite the *Garcia* decision (*e.g.*, Br. 13, 25, 44 n.15) without noting that it is non-precedential and not binding with respect to non-parties. See *Wang*, 25 I. & N. Dec. at 33 n.7; 8 C.F.R. 103.3(c); *BIA Practice Manual*, Chap. 1.4(d)(ii) (2013).

petitioner must satisfy either when a petition is filed and approved, see, *e.g.*, 8 U.S.C. 1154(a)(1)(B)(i) (providing that LPR may not file petition if she "has been convicted of a specified offense against a minor"), or at some later point, see, *e.g.*, 8 U.S.C. 1182(a)(4)(C) (requiring that petitioner file affidavit promising financial support, except as to petitions benefiting abused persons, widows, or widowers).[3]

Respondents' defense largely depends on ignoring the prerequisite that the petition be converted "to the appropriate category." That language dictates that the existing petition move into a new category where it fits, because the relationship on which the petition is based remains the same. See 8 U.S.C. 1153(h)(3).

Respondents assert (Br. 34-36) that the BIA's reading of Section 1153(h)(3) requires just as great a change to "the alien's petition" as theirs does. That is wrong. When an F2A petition as to which a former child has aged out is automatically converted to an F2B petition, the petitioner remains the same, and the family relationship between the petitioner and the aged-out person—a parent/child relationship—remains the same. If aged-out former derivative beneficiaries of F3 and F4 petitions were also covered, then the identity of the petitioner would change entirely (from the aged-out person's grandparent, aunt, or uncle to the person's parent), as would the relationship between the petitioner and the beneficiary. Con-

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[3] Respondents themselves filed, or are the subjects of, new F2B petitions. See Gov't Br. 9-10. Nevertheless, parting ways from the en banc court of appeals (Pet. App. 18a, 20a), respondents appear to agree (*e.g.*, Br. 31 n.8) that aged-out former derivative beneficiaries do not qualify for automatic conversion if a new F2B petition must be filed to make the F2B category "appropriate."

trary to respondents' contention, that is a "radical change" (Br. 34); it cannot be characterized as mere automatic conversion of an existing petition "to the appropriate category."

Finally, respondents ignore the fact that every use of "converted" in the CSPA, as well as in the regulations in place when that law was enacted, supports the BIA's understanding of the word as excluding a petition requiring a brand-new petitioner. Respondents argue (Br. 36-37) for a far broader interpretation by pointing to a handful of provisions involving one unique circumstance: a self-petition, in which an abused person or widow can prosecute her own petition because the U.S. citizen or LPR with whom she has a qualifying relationship is an abuser or has died. But those narrow examples do not support respondents' sweeping rule. Family-preference self-petitions are *sui generis* and do not require consideration of a new relationship, with a different person, in order to identify a new "appropriate" visa category for a beneficiary. For instance, 8 C.F.R. 204.2(i)(1)(iv)—one of the two provisions to which respondents point—did not go into effect until years after the CSPA, 71 Fed. Reg. 35,732, 35,749 (June 21, 2006); see *Wang*, 25 I. & N. Dec. at 34 (focusing on regulations in effect "at the time Congress enacted the CSPA"), and addresses a situation in which a self-petition by a widow is based on the exact same spousal relationship with a U.S. citizen as the petition the citizen previously filed. Thus, the citizen effectively continues to play a notional "petitioner" role in this context.

Indeed, respondents' primary self-petitioner example undermines their position. Section 1154(a)(1)(D)(i)(III), which preexisted the CSPA,

gives the aged-out derivative beneficiary of an abused self-petitioner the ability to become a self-petitioner in his own right without "requir[ing]" the filing of a "new petition." 8 U.S.C. 1154(a)(1)(D)(i)(III) (providing that benefit without using any variant of "converted"). The CSPA referenced that provision, stating in Section 7 that "[n]othing in the amendments made by the [CSPA] shall be construed to limit or deny any right or benefit provided under" Section 1154(a)(1)(D)(i)(III). CSPA § 7, 116 Stat. 930. That reference evinces a recognition that Section 1153(h)(3) is reasonably read to forbid moving an existing petition to a category that would be available only if a new petitioner stepped in; if the CSPA were unambiguously broad enough to permit such a change, Congress would have had no basis for concern that the CSPA would "limit" rights under Section 1154(a)(1)(D)(i)(III).[4]

3. Because the prerequisite that the alien's petition "automatically be converted to the appropriate category" does not encompass the metamorphosis of an F3 or F4 petition by one person into an F2B petition by another person, respondents' further argument concerning the timing of determinations under Section

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[4] Section 1153(h)(4)—enacted several years after the CSPA—does not suggest otherwise. See Pub. L. No. 109-162, § 805(b)(2), 119 Stat. 2960 ("Paragraphs (1) through (3) [of Section 1153(h)] shall apply to self-petitioners and derivatives of self-petitioners"). The age-related protection in Section 1154(a)(1)(D)(i)(III) does not operate through the medium of Section 1153(h); it operates independently. Section 1153(h)(4) therefore does not "necessarily envision[] conversions with a change in petitioner" (Resp. Br. 36). And even if it did, that would suggest that Congress decided to enact that provision precisely because Section 1153(h)(3), standing alone, would not apply where a new petitioner was required.

1153(h) is irrelevant. In any event, that argument—which attempts to place the moment for ascertaining the existence of an "appropriate category" in or even beyond the final stages of the immigrant-visa process—suffers from numerous difficulties.

The statute is most naturally read to set out expressly the moment at which an "appropriate category" must exist in order for automatic conversion to benefit an aged-out derivative beneficiary who has undergone the Section 1153(h)(1) calculation: "the date on which an immigrant visa number became available for the alien's parent." 8 U.S.C. 1153(h)(1)(A); see 8 U.S.C. 1153(h)(3) (referring to "paragraph (1)" determination).[5] See Pet. App. 21a n.4 (en banc majority). That is the moment when the derivative beneficiary is either under 21 pursuant to the calculation (and therefore continues to qualify as a child for the rest of the visa process) or over 21 pursuant to the calculation (rendering automatic conversion proper if such conversion is possible, see Gov't Br. 24-26).[6] It is also a moment when the principal-beneficiary parent of an aged-out F3 or F4 derivative beneficiary cannot have already attained LPR status, because that would require an additional application,

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[5] Whether and how to apply Section 1153(h)(3) if the aged-out alien does not meet the Section 1153(h)(1) requirement to seek "to acquire the status of an alien lawfully admitted for permanent residence" within one year of the visa number becoming available to his parent, 8 U.S.C. 1153(h)(1)(A), is another potential area of ambiguity—one *Wang* specifically reserved, see 25 I. & N. Dec. at 32-33.

[6] Respondents suggest (*e.g.*, Br. 28-29, 32) that the BIA ruled, and the government argues, that automatic conversion must be "appropriate" when the alien passes the biological age of 21. That is incorrect. *Wang*, 25 I. & N. Dec. at 35-36; Gov't Br. 26.

additional approval, and—for aliens outside the United States—admission at the border. See *id.* at 26.

Respondents ignore the statutory language in favor of a later "trigger" found nowhere in the provision's text: the date when an aged-out person's adjustment-of-status application is adjudicated or he is interviewed by a consular officer. Indeed, respondents suggest that the adjudication or interview is merely the "*earliest*" possible time for automatic conversion, and someone whose visa application is denied at an interview can simply come back to try again. Br. 29-30. In short, respondents' timing argument is designed to push the assessment of whether an "appropriate category" for automatic conversion exists as late as possible, in the hope that the aged-out person's parent will eventually become an LPR and the F2B category might then be deemed "appropriate." 8 U.S.C. 1153(h)(3).

None of respondents' asserted justifications for such a delayed trigger is sound. First, respondents point (Br. 29) to the fact that Section 1153(h)(3) opens with the phrase "[i]f the age of the alien is determined under paragraph (1) to be 21 years of age or older." 8 U.S.C. 1153(h)(3); see 8 U.S.C. 1153(h)(1) (referring to "a determination of whether an alien satisfies the age requirement"). But that language does not state that whether automatic conversion is "appropriate" is to be examined as of the date when an immigration official ultimately performs the calculation. The statute says "[i]f," not "when," and it is worded passively. Moreover, the conversion is to be "automatic"—without intervention of a third party. Those textual features support the conclusion that the key point in time is the date when the purported derivative benefi-

ciary exceeded 21 years of age pursuant to *operation of the statute*—that is, the "date on which an immigrant visa number became available for the alien's parent," 8 U.S.C. 1153(h)(1)(A)—and not when a retrospective calculation happens to be carried out.[7] See *Wang*, 25 I. & N. Dec. at 35.

That conclusion is further bolstered by the fact that other automatic-conversion provisions—including the regulations on which Congress drew when it enacted the CSPA, see Gov't Br. 29-30—function in just that way. Employing an "automatic[]" process, conversion occurs under those provisions as of the date when an existing category stopped being appropriate and a new one became appropriate, not as of the date when an agency official happened to be notified of the marriage, naturalization, or other event that prompted the category change. See 8 C.F.R. 204.2(i).[8]

Second, respondents' argument depends on agency practices not commanded by any statute or regulation. See Br. 29 (citing manuals). Even assuming that an immigration official's performance of the calculation could dictate the moment when a new "appropriate"

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[7] To be sure, whether an alien qualifies under Section 1153(h)(1) for "using" his "age * * * on the date" of a parent's visa-number availability depends on whether "the alien has sought to acquire" LPR status "within one year of such availability." 8 U.S.C. 1153(h)(1). But that condition subsequent is fully consistent with the requirement that "the alien's petition" is to be "automatically * * * converted to the appropriate category" (if any) *as of* the qualifying date of visa-number availability.

[8] That is not because "automatically" has the inherent meaning of "immediately." Resp. Br. 33; see Gov't Br. 22-23. As respondents at times accept (Br. 33-34), when an action is to take place "automatically" as of the occurrence of a particular event, there is no room for additional delay or outside input.

category must be available, the official could undertake an age calculation as soon as the aged-out alien seeks to "acquire * * * status," 8 U.S.C. 1153(h)(1)(A))—something that includes the filing of adjustment-of-status or immigrant-visa application papers, as well as certain actions that fall short of such a formal request. See *Matter of Vazquez*, 25 I. & N. Dec. 817 (B.I.A. 2012). Nothing prevents the agencies from assessing age under Section 1153(h)(1) at that time, in which case (under respondents' approach) the trigger point would be long before any ruling on an application. See, *e.g.*, 8 C.F.R. 245.2(a)(2)(i)(A) and (B).[9]

In any event, even the delayed trigger that respondents envision does not guarantee that the aged-out derivative beneficiary's parent will have attained LPR status at the relevant moment. If a principal-beneficiary parent and her aged-out son have a consular interview together, the parent will not be an LPR on that date, regardless of whether her visa application is approved at the interview. See 8 U.S.C. 1154(e), 1201(h); USCIS, *Consular Processing*, http://www.uscis.gov/green-card/green-card-processes-and-procedures/consular-processing. And even if the aged-out son is interviewed on a date subsequent to the parent's interview, the parent still may not have become an LPR at that time (for example, because she has not been admitted at a U.S. port of entry). Whether a parent *ultimately* gained LPR status would not change the fact that the aged-out person was over 21, and had no "appropriate category" avail-

[9] While a visa applicant could conceivably ask that a consular officer revisit such a calculation, see 22 C.F.R. 42.62, a calculation would nevertheless already have taken place.

able, when the very "determination" to which respondents point was made. Respondents labor (Br. 30) to show that if conditions were just right, and various special steps were taken, an aged-out person's interview could possibly be delayed until after the parent becomes an LPR. But the very need for such elaborate choreography is hardly consistent with the concept of "automatic[]" conversion, something that in every other context happens without special intervention. See, *e.g.*, 8 C.F.R. 204.2(i).

B. Section 1153(h)(3) Does Not Permit Retention Of A Priority Date Independent Of Automatic Conversion

Respondents' fallback argument is that priority-date retention is available under Section 1153(h)(3) even when automatic conversion is not. That is not the most natural reading of the provision, and certainly it is not compelled.[10]

Respondents primarily rely (Br. 39-40) on an invented example intended to show that when two instructions are separated by "and," the second one should be fulfilled even if the first one cannot be. But such abstractions are of no help in interpreting Section 1153(h)(3). It is simple to construct counter-examples in which the final instruction in a sentence is

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[10] Contrary to respondents' assertion (Br. 38 n.12), *Wang* does indicate that conversion and priority-date retention must go hand-in-hand. The only relief requested in *Wang* was retention, but the Board described the issue as whether an aged-out derivative beneficiary "may automatically convert her status to that of a beneficiary of a second-preference category." *Wang*, 25 I. & N. Dec. at 30; see *id.* at 33-34, 36; Pet. App. 56a (panel op.) ("[t]he BIA also concluded that priority date retention could *not* operate separately from automatic conversion"); Am. Immigr. Council C.A. Amicus Br. 14-15.

conditional on carrying out a prior instruction—for example, "if you get a perfect score, then you shall apply for the Smith scholarship and you shall answer the committee's questions about your submission." Whether "and" is being used to suggest that one idea is sequential to or conditional on another is, like many questions of usage, dependent on context. See, *e.g.*, *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk A/S*, 132 S. Ct. 1670, 1681-1682 (2012).

Here, the context of Section 1153(h)(3) shows that automatic conversion is a prerequisite. The upshot of respondents' position would be to create a free-floating priority date, untethered to any existing petition, that could be used at any time in the future in connection with any petition filed by anyone. On respondents' view, for instance, an aged-out former F3 derivative beneficiary—someone who was once, however briefly, under age 21 while his parent was awaiting an F3 visa number—could use the priority date of the F3 petition many years later in connection with a petition newly filed on his behalf by his sister or brother. Section 1153(h)(3) cannot be read in that improbable way, especially in light of the historical meaning of "retain" and "retention" in immigration law. See *Wang*, 25 I. & N. Dec. at 35-36. That conclusion is confirmed by a comparison with other automatic-conversion provisions, which are similarly written to clarify that conversion does not wipe out the petition's existing priority date. See Gov't Br. 35 n.11.

The "textual features" to which respondents point (Br. 40-42) do not suggest otherwise. In stating that a converted petition "shall retain the original priority date issued upon receipt of the original petition," Section 1153(h)(3) does not suggest the existence of

multiple filings; it merely refers in a commonsense way to the date when the single petition at issue was first ("original[ly]") filed. And the fact that it is the "alien" who retains the priority date (while "the alien's petition" is automatically converted) underscores that Congress envisioned retention only in connection with automatic conversion of the petition. A priority date is a filing date, nothing more or less. It is natural to refer to a priority date in shorthand terms as belonging to the alien who is the beneficiary of the petition filed on that date (*id.* at 41), but that does not suggest that an alien can somehow own or hold a priority date, like a token, separate from any existing valid petition. In Section 1153(h)(3), Congress specified which petition a retained priority date attaches to—an automatically converted petition, not a new, later-filed one.

Respondents' arguments about practices in other contexts—almost none of which involve the terms of art "retain" or "retention"—are also unconvincing. There are provisions that speak of a priority date as a benefit distinct from conversion of a petition. But they do so clearly, in carefully cabined language making reference to the petition that will bear that priority date, and in limited circumstances that do not indefinitely apply across all family-preference and employment-based categories. For example, Section 6 of the CSPA (8 U.S.C. 1154(k)) permits an alien waiting in the F2B line whose parent naturalizes to "maintain" a priority date in the absence of conversion—and it explains how in that circumstance the priority date continues to attach to an operative petition, rather than remaining available for perpetual re-usage, see, *e.g.*, 8 U.S.C. 1154(k)(2)-(3); see also *Li* v. *Renaud*, 654 F.3d 376, 383 (2d Cir. 2011). The comparison of that

CSPA language to Section 1153(h)(3) shows that no similar "decoupl[ing]" (Resp. Br. 42) was intended here. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).[11]

Finally, respondents' contention that their sons and daughters would be entitled to retention even with respect to a new petition filed by a different petitioner is incorrect. Respondents misportray (Br. 44) the government's brief, which (like *Wang*) correctly states that use of "retention" in "family-preference" circumstances has always been limited to a successive petition filed by the same petitioner. Gov't Br. 37 (citing *Wang*, 25 I. & N. Dec. at 35). Respondents (Br. 45) do not identify any family-preference-related provision using the terms "retain" or "retention" providing otherwise. Indeed, only one of their examples uses those terms in its text: it is a specialized regulation in the employment-based context governing successive petitions filed by interchangeable employers that both have the same relationship with a physician seeking to work in an underserved area. See 8 C.F.R. 204.12(f)(1) (requiring that first petition remain valid); see also 8 C.F.R. 204.5(e) (referring to "[r]etention" in heading and "accord[ing]" priority date to new em-

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[11] The government's "implementation of paragraph (h)(3)" (Resp. Br. 42-43) does not support respondents' position. As the petition explained, Pet. 22 & n.5, implementation has not always been consistent. But the government recently issued formal guidance making clear that aged-out F2A derivative beneficiaries are entitled to automatic conversion pursuant to Section 1153(h)(3), without a new petition. See USCIS Policy Memorandum No. PM-602-0094 (Nov. 21, 2013). Moreover, the regulation addressing aged-out F2A derivatives in place when the CSPA was enacted (8 C.F.R. 204.2(a)(4)) did not allow the open-ended retention that respondents seek, as *Wang* emphasized. *Wang*, 25 I. & N. Dec at 34-36.

ployment petition filed while earlier one remains valid).

C. The Board's Interpretation Is Most Consistent With The Statutory Immigrant-Visa Framework

1. Respondents characterize the destabilizing effect of their interpretation as presenting merely an issue of "policy" (Br. 46). But it is fundamentally an issue of statutory interpretation. The variety of statutory restrictions and requirements that make up the complex immigrant-visa system constitute the context in which Section 1153(h)(3) must be integrated and assessed. See Gov't Br. 38.[12]

No one can say with complete certainty how many aged-out former derivatives—from both the family-sponsored and employment-based categories—would pour into (and advance to the front of) the F2B line under respondents' expansive interpretation, since derivative beneficiaries need not be listed on a petition and since some aged-out former derivative beneficiaries may have died, immigrated to the United States through other means, or lost interest in immigrating. The government's statement that the number "could be in the tens of thousands, or even higher" (Gov't Br. 38) was therefore deliberately conservative.[13] The consequence of such an influx into the F2B

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[12] Respondents incorrectly assume (*e.g.*, Br. 44 n.15) that their approach has been implemented in the Fifth Circuit. When *Khalid* was decided, the government had prevailed on the Section 1153(h)(3) issue in a nationwide class action. Pet. App. 79a-84a. When the en banc Ninth Circuit overruled the panel decision affirming that judgment, the mandate was stayed, and the government sought certiorari.

[13] For instance, data furnished by the State Department show the following numbers of aged-out family-preference derivative

line—which admits only a total of approximately 26,250 people per year, with an annual per-country limit of approximately 1,838 people, see 8 U.S.C. 1152(a)(2), 1153; *Annual Report of Immigrant Visa Applicants in the Family-Sponsored and Employment-Based Preferences Registered at the National Visa Center as of November 1, 2012*, at 6 (*Annual Report*)—would be stark. Because aged-out former F3 and F4 derivatives from every country except Mexico would jump to the front of the line (and other former beneficiaries would be inserted at various spots), those currently waiting for an F2B visa to become available—hundreds of thousands of people, see Gov't Br. 40-41—could in many cases face additional delays of years.

Respondents challenge (Br. 51-52) the government's estimate. But the impossibility of deriving a precise figure is hardly reason to assume no impact at all. After all, on respondents' view, derivative beneficiaries who age out apparently could revive old priori-

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applicants for fiscal years 2004 through 2013 (the first number in each parenthetical represents aged-out derivatives in the F2A category, and the second number represents aged-out derivatives in all family-preference categories including F2A): 2004 (5645; 18,234); 2005 (4634; 20,985); 2006 (2124; 22,051); 2007 (15,652; 33,794); 2008 (4494; 22,302); 2009 (5524; 29,578); 2010 (9178; 111,683); 2011 (2841; 27,438); 2012 (2750; 8065); 2013 (1497; 12,987). Some of these aged-out persons sought to acquire status within one year of the date a visa number became available for a parent and some did not. These numbers do not include aged-out derivatives in any employment-based category or aged-out derivatives whose applications were processed by USCIS (which does not keep comparable records). Not all aged-out former derivatives would seek to join or change places in the F2B line if respondents' interpretation were adopted, but the number who would is likely in the tens of thousands or higher.

ty dates whenever they like, now or in the future. See, *e.g.*, Br. 45.[14] Even when the CSPA was enacted, the influx would have been disruptive; at that time, too, there were large numbers of aged-out former derivative beneficiaries who could make some claim in relation to petitions filed long ago, and new aged-out persons constantly surfacing as their parents' visa numbers became available. See 8 U.S.C. 1151 note (CSPA effective date).

Respondents are also wrong (Br. 50) about the equities. In respondents' view, an aged-out former derivative beneficiary of an F3 or F4 petition should receive a visa quickly via the F2B line when her parent becomes an LPR, without any meaningful period of separation. But unlike an aged-out derivative beneficiary of an F2A petition, such an aged-out person previously had no relationship with *any* citizen or LPR that would qualify her for family-sponsored immigration. Indeed, she might not yet have been born, or qualified as a derivative, for part or even most of the time her principal-beneficiary parent spent in the F3 or F4 line. Still, respondents would have her displace many thousands of people waiting in the F2B line, even though those people have had a qualifying relationship for as long as their F2B petitions have been pending and have likely been separat-

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[14] Respondents' figure of 5,000 aged-out former derivative beneficiaries (Br. 52) is hypothetical. And respondents' calculation of the delay associated with inserting 5,000 people at the front of the F2B line is far too rosy. If, for instance, 1,900 of those people were from the Philippines due to historical immigration patterns, then everyone waiting in that line from that country—currently at least 50,000 people, see *Annual Report* 3—would be delayed by at least a full year.

ed from their parents for that entire time. There is nothing "idiosyncratic" about that situation (*ibid.*); it is the inevitable result of respondents' position.[15]

Respondents insist (Br. 54-55) that all of the consequences that attend their reading of the statute also attend the BIA's reading. That, too, is incorrect. Gov't Br. 45-47. The BIA has reasonably interpreted Section 1153(h)(3) to grant special treatment to aliens who either always were or always qualified as principal beneficiaries and therefore could readily be found by Congress to deserve some credit for their wait—even as they move from a higher priority category to a lower one (the opposite of what respondents urge for aged-out former derivative beneficiaries of F3 and F4 petitions). The BIA's interpretation also inserts far fewer people into the F2B line to displace others waiting, and does not insert them at the front of the F2B line, since the cut-off dates in the F2A category are more recent than those in the F2B category. See, *e.g.*, U.S. Dep't of State, *Visa Bulletin* 2 (Dec. 2013). And because under the BIA's reading Section 1153(h)(3) essentially codified (while expanding modestly) the scope of a preexisting regulation (see Gov't Br. 45-46), there was no reason for Congress to believe that substantial disruption would ensue—as indeed it has not.

2. Respondents' remaining objections to the BIA's interpretation (see Br. 48-49) largely repeat their

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[15] The wait faced by an aged-out former derivative beneficiary of an F3 or F4 petition depends on the country to which that beneficiary is "chargeable" and when a new F2B petition is filed (if at all). For instance, the F2B petition for Melvin Osorio Cuellar—filed later than it could have been—is likely about a year away from becoming current. Resp. Br. 10; U.S. Dep't of State, *Visa Bulletin* 2 (Dec. 2013).

other flawed arguments. As an initial matter, respondents' suggestion (Br. 47) that the BIA's interpretation inappropriately favors relatives of LPRs over relatives of U.S. citizens has no basis. The relationship between respondents' adult offspring and U.S. citizens is in every case one that Congress has decided *not to recognize* as a basis for immigration to this country: the relationship between a grandchild and grandparent, or between a niece and an aunt. Respondents' contention that such a relationship should confer on them an entitlement to special priority status under Section 1153(h)(3) is therefore contrary to basic statutory premises of the visa program. Moreover, in the very statutory provision setting forth the family-preference categories, Congress prioritized the children and unmarried adult sons or daughters of LPRs (the F2A and F2B categories) over the married sons or daughters and the siblings of U.S. citizens (the F3 and F4 categories). 8 U.S.C. 1153(a). The BIA's interpretation of Section 1153(h)(3) is consistent with that order of priority, because it affords protection to persons who had, during the pendency of the "alien's petition," 8 U.S.C. 1153(h)(3), a relationship to an LPR that qualified them to be a principal beneficiary in an F2 category.

A general congressional purpose of facilitating "family unity" (Resp. Br. 48) says nothing about the scope of Section 1153(h)(3) or the reasonableness of *Wang*. The immigration laws do not "pursue" the "goal[]" of family unity "to the *n*th degree." *Holder* v. *Martinez Gutierrez*, 132 S. Ct. 2011, 2019 (2012).[16]

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[16] Indeed, were it Congress's goal to "allow *all* derivative beneficiaries to immigrate close in time to their families" (Resp. Br. 48), the multi-part structure of Section 1153(h) would be a "surpassing-

Congress has drawn lines, and the Board has reasonably construed those lines in light of the text, structure, and purposes of Section 1153(h) and the broader immigration framework of which it is a part. Section 1153(h)(3) cannot sensibly be read in the far different way that respondents urge, which departs from the text, structure, and purposes in a number of respects, just because "that rule would be family-friendly." *Ibid.*

In short, Section 1153(h)(3) readily admits of a reasonable reading that benefits certain aged-out persons —consistent with a preexisting regulation that Congress codified in various CSPA sections, Gov't Br. 31—but avoids disruption and conflict within the immigrant-visa system. The BIA's decision to adopt that reasonable reading, and to find aged-out former derivative beneficiaries of F3 and F4 petitions ineligible for "special preference immigration status" at the expense of other families, *Fiallo* v. *Bell*, 430 U.S. 787, 788, 791-793 (1977), is entitled to the deference that is "especially appropriate" in this context. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

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ly strange" way to proceed, *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2072 (2012); if all those who age out could nevertheless immigrate in short order under Section 1153(h)(3), preserving child status (in Section 1153(h)(1)) would be of little significance.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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