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

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

The Immigration and Nationality Act (INA) permits United States citizens and lawful permanent resident aliens to petition for certain family members to obtain visas to immigrate to the United States or to adjust their status in the United States to that of a lawful permanent resident alien. The family member sponsored by the petitioner is known as the principal beneficiary. The principal beneficiary's "spouse or child" may be a derivative beneficiary of the petition, "entitled to the same status[] and the same order of consideration" as the principal beneficiary. 8 U.S.C. 1153(d). Section 203(h)(3) of the INA, 8 U.S.C. 1153(h)(3), grants relief to certain persons who reach age 21 ("age out"), and therefore lose "child" status, after the filing of visa petitions as to which they are beneficiaries.

The questions presented are:

1. Whether Section 1153(h)(3) unambiguously grants relief to all aliens who qualify as "child" derivative beneficiaries at the time a visa petition is filed but age out of qualification by the time the visa becomes available to the principal beneficiary.

2. Whether the Board of Immigration Appeals reasonably interpreted Section 1153(h)(3) to grant special priority status only to certain aliens.

PARTIES TO THE PROCEEDING

Petitioners, who were defendants in the district court and appellees in the court of appeals, are Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services; Janet Napolitano, Secretary of the Department of Homeland Security; Lynne Skeirik, Director, National Visa Center; Kathy A. Baran, Director, California Service Center, U.S. Citizenship and Immigration Services; and John Kerry, Secretary of State.

Respondents, who were plaintiffs in the district court and appellants in the court of appeals, are Rosalina Cuellar de Osorio, Elizabeth Magpantay, Evelyn Y. Santos, Maria Eloisa Liwag, Norma Uy, Ruth Uy, and Teresita G. Costelo and Lorenzo P. Ong, individually and on behalf of a class of others similarly situated.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-35a) is reported at 695 F.3d 1003. The vacated opinion of the court of appeals panel (Pet. App. 36a-60a) is reported at 656 F.3d 954. One opinion of the district court (Pet. App. 61a-78a) is reported at 663 F. Supp. 2d 913; the other (Pet. App. 79a-84a) is not published in the Federal Supplement, but is available at 2009 WL 4030516.

JURISDICTION

The judgment of the en banc court of appeals was entered on September 26, 2012. On December 18, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 25, 2013, and the petition was filed on that date. The

petition was granted on June 24, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-23a.

STATEMENT

This case concerns the proper interpretation of 8 U.S.C. 1153(h)(3), which addresses how to treat an alien who reaches age 21 ("ages out"), and therefore loses "child" status under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, after another person has filed a visa petition as to which the alien is a beneficiary.

1. a. Under the INA, United States citizens and lawful permanent resident aliens may petition for certain family members to obtain visas to immigrate to the United States or to adjust their status in the United States to that of an alien lawfully admitted for permanent residence. The INA limits the total number of family-sponsored immigrant visas issued each year, see 8 U.S.C. 1151(c); establishes various "preference" categories that classify and prioritize different types of family members, see 8 U.S.C. 1153(a); caps the number of visas that may be issued in each of those categories each year, see *ibid.*; and places annual limitations on the number of nationals of any single foreign state who can obtain visas in each category, see 8 U.S.C. 1152(a)(2).

The INA establishes the following "preference" categories for family-sponsored ("F") visas:

F1: unmarried sons or daughters (age 21 or older) of U.S. citizens

F2A: spouses or children (unmarried and under age 21) of lawful permanent resident aliens

F2B: unmarried sons or daughters (age 21 or older) of lawful permanent resident aliens

F3: married sons or daughters of U.S. citizens

F4: brothers or sisters of U.S. citizens

See 8 U.S.C. 1153(a)(1)-(4); see also 8 U.S.C. 1101(b)(1) (definition of "child").[1]

A citizen or lawful permanent resident alien seeking an immigrant visa for a family member in one of those categories must file a petition with U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security (DHS).[2] See 8 U.S.C. 1154(a)(1); 8 C.F.R. 204.1(a)(1); USCIS, Form I-130, *Petition for Alien Relative* (Dec. 18, 2012), http://www.uscis.gov/files/form/i-130.pdf. The family member sponsored by the petitioner is known as the principal (or primary) beneficiary.

When a petition is filed, USCIS assesses it and—if it meets applicable requirements—approves it. 8 U.S.C. 1154(b). That approval does not result in immediate issuance of a visa to the principal beneficiary, however.

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[1] Petitions by U.S. citizens on behalf of an "immediate relative"—that is, a spouse, child (unmarried and under age 21), or parent, see 8 U.S.C. 1151(b)(2)(A)(i)—are not considered "preference" petitions and are subject to fewer restrictions. The INA also permits the issuance of immigrant visas to aliens in employment-based categories, see 8 U.S.C. 1151(d), 1153(b), and aliens from countries with historically low immigration rates to the United States, see 8 U.S.C. 1153(c).

[2] Various functions formerly performed by the Immigration and Naturalization Service, or otherwise vested in the Attorney General, have been transferred to DHS. Some residual statutory references to the Attorney General pertaining to the transferred functions are now deemed to refer to the Secretary of Homeland Security. See 6 U.S.C. 251, 271(b), 557; 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

Rather, the principal beneficiary receives a place in line to wait for a visa number to become available. Within family-preference categories, the order of the line is determined by the petition's priority date—that is, the date when it was filed with the agency. See 8 U.S.C. 1153(e); 8 C.F.R. 204.1(b); 22 C.F.R. 42.53(a).

Every month, the Department of State publishes a visa bulletin with various cut-off dates for each family-preference category. See 8 C.F.R. 245.1(g)(1); 22 C.F.R. 42.51. When the applicable cut-off date is later than the petition's priority date, the priority date is "current," and a visa is available. In order to obtain the visa and become a lawful permanent resident alien, the principal beneficiary must submit an application, pay fees, demonstrate continued eligibility and admissibility, and complete consular processing (if abroad) or obtain adjustment of status (if present in the United States). See 8 U.S.C. 1153(g), 1201(a), 1255.

Given the annual limitation on the total number of visas that may be granted for a particular family-preference category (as well as separate limitations on the number of nationals of a single foreign country who may receive visas in any given year), the waiting line for visa availability is often quite long. For instance, Filipino F4 principal beneficiaries (brothers and sisters of U.S. citizens) whose priority dates are now current have been waiting for more than 20 years. See U.S. Dep't of State, *Visa Bulletin for Aug. 2013* (July 8, 2013), http://travel.state.gov/visa/bulletin/bulletin_6028.html (*Visa Bulletin for Aug. 2013*).

A principal beneficiary of a preference petition with a current priority date can also aid certain "derivative" beneficiaries—the principal beneficiary's spouse and

unmarried children under age 21.[3] Derivative beneficiaries are "entitled to the same status[] and the same order of consideration provided" to the principal beneficiary with respect to a pending petition. 8 U.S.C. 1153(d) (describing derivative beneficiaries as "accompanying or following to join[] the spouse or parent"). Accordingly, if a visa number is available to a principal beneficiary, it is available to a derivative beneficiary as well. See *ibid.*

By the time the principal beneficiary's priority date becomes current, however, an alien who qualified as a "child" derivative beneficiary when the petition was filed may have "aged out"—that is, reached or passed his or her twenty-first birthday. See 8 U.S.C. 1101(b)(1). If that happens, the aged-out alien cannot claim derivative-beneficiary status. See 8 U.S.C. 1153(d), 1154(e). A principal beneficiary of an F2A petition, which may be filed by a lawful permanent resident on behalf of a "child," can also age out in the same way.

b. In 2002, Congress enacted the Child Status Protection Act (CSPA or Act), Pub. L. No. 107-208, 116 Stat. 927. The CSPA contains a number of different provisions addressing the treatment of children (and adult sons and daughters) under the immigration laws. In Section 3 of the CSPA, 8 U.S.C. 1153(h), Congress modified the visa system to grant relief to certain aged-out aliens.

Section 1153(h)(1) addresses the passage of time between the filing of an immigrant visa petition and agency approval of the petition, while also eliminating from the age calculation any delay associated with the adjudication of the primary beneficiary's subsequent applica-

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[3] No derivative beneficiaries are permitted with respect to an immediate-relative petition filed by a U.S. citizen. See 8 U.S.C. 1153(d).

tion for permanent residency after a visa number becomes available. It provides that "a determination of whether an alien satisfies the age requirement * * * shall be made using * * * 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), * * * reduced by * * * the number of days in the period during which the applicable petition described in paragraph (2) was pending." 8 U.S.C. 1153(h)(1); see *ibid.* (conditioning the applicability of this provision on the alien having "sought to acquire the status of an alien lawfully admitted for permanent residence within one year of [visa] availability"); see also *Martinez* v. *DHS*, 502 F. Supp. 2d 631, 636 (E.D. Mich. 2007) (explaining that prior to enactment of Section 1153(h)(1), the relevant date for purposes of determining an alien's qualification for "child" status was the date of adjudication of an "application for permanent residency").

Section 1153(h)(2), to which Section 1153(h)(1) refers, describes a set of relevant petitions. It states that "[t]he petition described in this paragraph is" an F2A petition naming a child as a principal beneficiary, or any petition that includes a child as a derivative beneficiary and the child's parent as a principal beneficiary. 8 U.S.C. 1153(h)(2); see 8 U.S.C. 1153(a)(2)(A) (providing for F2A petitions); 8 U.S.C. 1153(d) (providing that a "child" may be a derivative beneficiary of various petitions).

Together, these provisions permit certain beneficiaries who have reached or passed the age of 21 to nevertheless retain "child" status for purposes of the priority date for visa availability. For example, if USCIS took three years to approve a visa petition filed when an alien

was age 18 and "an immigrant visa number became available" one year after approval, 8 U.S.C. 1153(h)(1), an alien who met the requirements of Section 1153(h)(1) would be treated for purposes of the visa eligibility as if he were 19 years old rather than 22 years old.

Section 1153(h)(3), which is the subject of this case, addresses the situation of an alien who no longer qualifies as a "child," even after application of Section 1153(h)(1)'s age-reduction formula. It provides that "[i]f 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." 8 U.S.C. 1153(h)(3).

c. The Board of Immigration Appeals (Board or BIA) interpreted Section 1153(h)(3) in its precedential decision in *Matter of Wang*, 25 I. & N. Dec. 28 (B.I.A. 2009), a case that helps illustrate how the visa preference system operates in practice. Wang was the principal beneficiary of an F4 petition filed by his sister, a U.S. citizen. See *id.* at 29; 8 U.S.C. 1153(a)(4). When the F4 petition was filed, Wang's daughter was a minor and thus qualified as a derivative beneficiary of the petition under 8 U.S.C. 1153(d). The petition was approved after a short while, and Wang waited for a visa number to become available. Approximately a decade later, Wang received a visa and was admitted to the United States as a lawful permanent resident. See *Wang*, 25 I. & N. Dec. at 29. By that time, however, his daughter was over 21 (even subtracting the small amount of time between the filing of the F4 petition and its approval), and she no longer qualified for derivative-beneficiary treatment. See *id.* at

32; see also 8 U.S.C. 1101(b)(1) (definition of "child"); 8 U.S.C. 1153(d) (identifying derivative beneficiaries to include the "child" of the principal beneficiary).

Wang then filed a new petition with USCIS on behalf of his daughter—an F2B petition, in the category that covers filings by lawful permanent residents on behalf of their unmarried sons and daughters who are age 21 or older. See 8 U.S.C. 1153(a)(2)(B). Immigration authorities approved the F2B petition filed by Wang on behalf of his daughter, but gave it a priority date corresponding to the date on which it was filed, not the date on which the earlier F4 petition had been filed by Wang's sister on behalf of Wang himself. See *Wang*, 25 I. & N. Dec. at 29.

The Board rejected the argument that Section 1153(h)(3) dictated that the priority date be the earlier date on which Wang's sister filed the visa petition. The Board explained that "the language of section [1153](h)(3) does not expressly state which petitions qualify for automatic conversion and retention of priority dates." *Wang*, 25 I. & N. Dec. at 33. The Board further explained that "[i]n immigration regulations, the phrase 'automatic conversion' has a recognized meaning," which includes a requirement that the petitioner be the same before and after conversion. *Id.* at 34 (citing, *inter alia*, 8 C.F.R. 204.2(i)); see *id.* at 35 ("Similarly, the concept of 'retention' of priority dates has always been limited to visa petitions filed by the same family member."). The Board concluded that Congress had enacted Section 1153(h) in 2002 consistent with the accepted understanding of that term, discerning nothing in the legislative history of the CSPA signaling an intent to give special priority status to derivative beneficiaries who age out of "child" status as a consequence of statu-

tory limits on the number of visas issued each year as opposed to administrative delays in USCIS's approval of the initial visa petition or in the subsequent adjudication of a visa application. *Id.* at 37-38.

The Board therefore held that Section 1153(h)(3) did not grant Wang's daughter a special benefit in the form of an advanced priority date. See *Wang*, 25 I. & N. Dec. at 38-39. The earlier F4 petition had been filed by Wang's sister, who had no relationship with Wang's adult daughter that would qualify her for a visa—that is, there is no family-preference category for nieces (or nephews) of U.S. citizens. Thus, the petition filed by the aunt could not automatically convert to an existing category for the benefit of Wang's adult daughter, and her original priority date could not be "retain[ed]" with respect to the new F2B petition filed by Wang rather than by the aunt. See *id.* at 35-36; see also *id.* at 36 (explaining that a broader reading would mean that "as long as a parent gains status under any preference category, all children who were derivative beneficiaries would gain favorable priority date status, even with regard to a new visa petition that is wholly independent of the original petition and that may be filed without any time limitation in the future").[4]

2. This case arises out of suits filed by two groups of plaintiffs in federal district court in 2008 claiming that immigration authorities incorrectly denied relief under Section 1153(h)(3) to aged-out derivative beneficiaries of F3 and F4 petitions. The first suit was brought by parents who were principal beneficiaries of F3 and F4 petitions filed in the 1980s and 1990s, and who sought to

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[4] The Board reaffirmed its conclusions in a decision denying a motion for reconsideration. See *Matter of Wang*, No. A 088 484 947, 2010 WL 9536039 (B.I.A. May 21, 2010).

retain the priority dates of those petitions with respect to F2B petitions they later filed on behalf of their adult sons and daughters. See Pet. App. 11a-12a, 68a-69a; see also *id.* at 68a-69a (noting that some of the sons and daughters also joined the suit as plaintiffs).

The second suit was brought by similarly situated parents seeking to benefit their aged-out sons and daughters by forcing the government to assign priority dates from decades-old F3 and F4 petitions to new F2B petitions. Pet. App. 11a-12a, 44a. In that case, the district court certified a class consisting of "[a]liens who became lawful permanent residents as primary beneficiaries of [F3 and F4] visa petitions listing their children as derivative beneficiaries, and who subsequently filed [F2B] petitions on behalf of their aged-out unmarried sons and daughters, for whom [petitioners] have not granted automatic conversion or the retention of priority dates pursuant to § [1153](h)(3)." *Id.* at 81a.

The district court granted summary judgment to the government in both cases. Noting that "[t]he factual circumstances of these cases are similar to those in *Wang*," the court concluded that Section 1153(h)(3) is ambiguous and held that the Board's interpretation of that provision in *Wang* was reasonable and entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. 68a, 72a, 83a.

3. The cases were consolidated for appeal, see Pet. App. 45a, and a Ninth Circuit panel unanimously affirmed the judgments in favor of the government, see *id.* at 60a. The panel found Section 1153(h) ambiguous and deferred to the Board's interpretation of the provision.

The panel rested its holding on a close reading of Section 1153(h)(3) and related provisions. The panel explained that Section 1153(h) could be read to apply to

all derivative beneficiaries, but also could be read to exclude some beneficiaries from its reach: those who aged out of derivative-beneficiary status with respect to petitions that cannot "automatically be converted" to a family-preference category that covers a person age 21 or older because in order to obtain such a preference it would be necessary for a different petitioner to file a new petition. Pet. App. 50a-54a; see *id.* at 54a-55a (explaining that it is "certainly possible" to read Section 1153(h)(3) as granting priority date retention only where automatic conversion is also available). The panel concluded that *Chevron* deference to the Board's interpretation was appropriate. In the panel's view, the Board's reading of Section 1153(h)(3) "accords with the ordinary usage of the word 'automatic' to describe something that occurs without requiring additional input, such as a different petitioner," and represents "a reasonable policy choice for the agency to make." *Id.* at 57a-60a (quoting *Chevron*, 467 U.S. at 845).

4. a. The court of appeals granted rehearing en banc, vacated the panel opinion, and reversed and remanded in a 6-5 decision. The majority concluded that "the plain language of the [Act] unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries" and that the Board's contrary interpretation "is not entitled to deference." Pet. App. 3a; see *id.* at 24a ("Automatic conversion and priority date retention are available to all visa petitions identified in [Section 1153](h)(2).").

The majority relied primarily on cross-references between the various paragraphs of Section 1153(h). Section 1153(h)(1) sets forth a formula that calculates whether an alien's age is 21 or older for purposes of the applicable "age requirement," and applies to petitions

described in Section 1153(h)(2); the "petition[s] described in [that] paragraph" are F2A petitions under 8 U.S.C. 1153(a)(2)(A) naming a child as a principal beneficiary and any petitions as to which a child is a derivative beneficiary under 8 U.S.C. 1153(d). 8 U.S.C. 1153(h)(1)-(2). While Section 1153(h)(3) does not refer to paragraph (h)(2), it does refer to paragraph (h)(1), because it applies only if "the age of an alien is determined under paragraph (1) to be 21 years of age or older." 8 U.S.C. 1153(h)(3). Because "[paragraph] (h)(3) * * * cannot function independently," and "[paragraph] (h)(1) explicitly applies to the visas described in [paragraph] (h)(2)," the majority concluded that Congress had clearly provided that paragraph (h)(2) defines which petitions are covered by paragraph (h)(3). Pet. App. 15a-16a. Accordingly, the majority continued, "both aged-out F2A beneficiaries and aged-out derivative visa beneficiaries may automatically convert to a new appropriate category (if one is available)" and "retain the priority date of the original petitions for which they were named beneficiaries." *Id.* at 16a.

Having determined that the statutory language was clear, the majority addressed what it identified as questions of "impracticability" concerning the availability of automatic conversion under its reading of Section 1153(h). Pet. App. 19a-23a (citing *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991)). The majority acknowledged that "[f]or an aged-out derivative beneficiary of an F3 or F4 petition, a subsequent petition will require a new petitioner"—the aged-out person's parent, assuming that after the parent's visa number becomes available she is granted lawful permanent resident status and thus becomes eligible to and chooses to file a petition for her adult son or daughter. *Id.* at 18a.

The majority also acknowledged that it could take some time for a new F2B petition to be filed, and indeed that such a petition might never be filed. See *id.* at 21a-22a & n.4. But the majority did not believe that those issues "render[ed] automatic conversion impracticable" and retention of the original priority date therefore unavailable as a statutory matter. *Id.* at 21a. Rather, the majority characterized those issues as merely "present[ing] administrative complexities that may inform USCIS's implementation." *Id.* at 22a; see *id.* at 21a-22a (stating that such complexities include "[t]he lag time while a parent receives his visa and adjusts status" to become a lawful permanent resident and "the possibility that conversion for an aged-out derivative is never possible"). Finally, the majority believed that its reading made more sense than the Board's narrower interpretation because, in the majority's view, Congress likely did not intend to benefit only a small category of aged-out persons and "barely modif[y] the regulatory regime that existed at the time the [Act] was enacted." *Id.* at 22a-23a (citing 8 C.F.R. 204.2(a)(4)).

The majority acknowledged that its ruling would have a substantial adverse effect on aliens who are not covered by Section 1153(h)(3). Thus, the majority noted, if aged-out beneficiaries are permitted to "retain their priority dates when they join new preference category lines," that "will necessarily impact the wait time for other aliens in the same line," who will suddenly find more people ahead of them in the quest for visas that are made available only in small, "statutorily fixed" numbers. Pet. App. 23a. The majority did not attempt to assess the significance of that result or to read the language of the statute in light of it. See *ibid.*

b. Five judges dissented in an opinion authored by Judge Milan Smith, Jr. The dissent agreed that Section 1153(h)(3) could be read to "include F3 and F4 derivative beneficiaries because this provision references the age-calculation formula in § 1153(h)(1), which covers derivative beneficiaries of F3 and F4 petitions through § 1153(h)(2)." Pet. App. 27a-28a. But in the dissent's view, such a reading could not be squared with three other aspects of Section 1153(h)(3): "(1) that a petition must be converted 'to the appropriate category;' (2) that only 'the alien's petition' may be converted; and (3) that the conversion process has to occur 'automatically.'" *Id.* at 28a. Automatic conversion is not possible, the dissent explained, because "[t]he children eligible to enter as derivative beneficiaries of their parents' visa petitions are the grandchildren, nieces, and nephews of United States citizens. When those children turn 21 and are no longer eligible to enter with their parents, there is no section 1153(a) category into which they fit on their own." *Id.* at 29a. The dissent further reasoned that although the majority relied on the assumption that the aged-out person's parent would become a lawful permanent resident and file a new F2B petition naming that person, such a filing may not happen for some time or at all, and "[a]n action cannot be 'automatic' if it depends on what a person *can* or *may* do, not what he or she definitely *will* do." *Id.* at 30a. The dissent thus criticized the majority for "ignoring statutory language contrary to its interpretation before finding the plain meaning clear." *Id.* at 28a, 31a-32a.

Finally, the dissent recognized the real-world implications of the majority's ruling, which would "shuffle the order in which individual aliens get to immigrate" and result in a substantial increase in many aliens' already

protracted wait times for visas. Pet. App. 34a-35a. "If F3 and F4 derivative beneficiaries can retain their parents' priority date," the dissent noted, "they will displace other aliens who themselves have endured lengthy waits for a visa. What's more, these derivative beneficiaries—who do not have one of the relationships in section 1153(a) that would independently qualify them for a visa—would bump aliens who *do* have such a qualifying relationship." *Id.* at 35a.[5]

SUMMARY OF ARGUMENT

The Ninth Circuit erred in ruling that Section 1153(h)(3) unambiguously extends a special priority status to aged-out former derivative beneficiaries of F3 and F4 immigrant-visa petitions and definitively forecloses the Board's narrower interpretation. Rather, as the Board recognized, Section 1153(h)(3) is sensibly read to grant a special priority only to aliens whose petitions can "automatically be converted" from one "appropriate" family-preference "category" to a different one without the need for a new petitioner and a new petition, 8 U.S.C. 1153(h)(3)—a group that does not include respondents' children (and others like them). The Board's reasonable construction of the provision merits *Chevron* deference, which is "especially appropriate in the immigration context." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

First, the Ninth Circuit's conclusion that Section 1153(h)(3) has an unambiguously broad scope cannot be reconciled with the provision's statement that "the alien's petition shall automatically be converted to the appropriate category." 8 U.S.C. 1153(h)(3). That state-

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[5] The court of appeals stayed its mandate pending this Court's disposition.

ment contains a number of discrete requirements: that the petition as to which the alien was a beneficiary prior to aging out is the only petition eligible for conversion; that the transformation of the petition is of a limited nature, consisting only of movement from one valid and appropriate category to another; and that the conversion must take place automatically, without gaps in time or external events like the intervention of a new petitioner.

All of those requirements are readily satisfied with respect to certain aliens covered by the statutory subsections to which Section 1153(h)(3) refers. But the requirements cannot be met with respect to the kind of petitions at issue in this case—F3 and F4 petitions as to which an aged-out alien was formerly entitled to derivative status as a child. No "appropriate category" exists under which the original F3 or F4 petitioner could petition for an aged-out former derivative beneficiary—that is, the petitioner's grandchild, niece, or nephew. And while the aged-out person's own parent might at some point qualify as a lawful permanent resident who could file an F2B petition for his or her adult son or daughter, the shift from an F3 or F4 petition to a new F2B petition that might possibly be filed at some later point by a different person, depending on how various contingencies are resolved, cannot reasonably be characterized as an "automatic[] * * * conver[sion]" of "the alien's petition."

That interpretation of the conversion language of Section 1153(h)(3) is bolstered by the limited way in which Congress used the term "converted" (or its variants) elsewhere in the CSPA itself, as well as by the way that the term "conversion" is used in regulations in place when the CSPA was enacted. In particular, the provision at issue in this case was sandwiched at enact-

ment between other CSPA provisions that use "converted" to describe recategorization of an existing petition based on changed circumstances, not the filing of a new petition or the replacement of the original petitioner with a different one.

Second, no other aspect of the text of Section 1153(h)(3) supports the Ninth Circuit's ruling. While the first half of that provision refers to Section 1153(h)(1), that reference does not indicate that all petitions covered by Section 1153(h)(1) are necessarily subject to automatic conversion under Section 1153(h)(3). Indeed, it is precisely the tension between the two halves of Section 1153(h)(3)'s single sentence that makes the provision ambiguous, and the Ninth Circuit erred by focusing on the first half and effectively ignoring the succeeding text. In addition, Section 1153(h)(3) cannot reasonably be read to make automatic conversion and priority-date retention separate and independent benefits. The provision applies only if automatic conversion is available, while also clarifying that a converted petition should be given its original priority date rather than a new priority date corresponding to the date of the conversion.

Third, the broad interpretation of Section 1153(h)(3) adopted by the Ninth Circuit is inconsistent with the overall statutory scheme because it would substantially disrupt the immigrant-visa system. That interpretation would "not permit more aliens to enter the country or keep more families together," Pet. App. 35a (dissenting opinion), but would negatively affect many aliens who have been waiting for a visa for a long time by pushing aliens such as respondents' sons and daughters—likely tens of thousands of people—to the front of the line. Because changing priority dates is a "zero-sum game,"

ibid., such reshuffling would substantially increase the wait times of others currently in line, with many resulting unfairnesses. The Board's narrower interpretation of Section 1153(h)(3), in contrast, does not create such difficulties. If Congress had intended the kind of far-reaching change that the Ninth Circuit's reading dictates, it would undoubtedly have said so far more clearly.

Finally, the legislative history of the CSPA does not support the view that Section 1153(h)(3) unambiguously applies in this case. The legislative history is of limited usefulness here; Congress did not specifically discuss Section 1153(h)(3), and the relevant history primarily consists of floor debate, which is weak evidence of congressional intent. Nevertheless, nothing in that debate suggests that Congress intended to create the striking disruption that the Ninth Circuit's reading of Section 1153(h)(3) would require. Rather, the debate suggests that Section 1153(h)(3), which was not directed at the administrative-delay problem on which Congress was focused, was intended to work only a limited change—one that modestly expanded the scope of an existing regulatory provision.

For all of these reasons, the Board's narrower interpretation of Section 1153(h)(3) is a reasonable one. And while the Ninth Circuit did not reach the question of whether the Board's interpretation of Section 1153(h)(3) is entitled to *Chevron* deference, such deference is appropriate. The Board applied its expertise to the whole statutory and regulatory scheme at issue, and chose a reading of Section 1153(h)(3) that works seamlessly with related provisions while also giving full force to the automatic-conversion language that Congress enacted. In addition, the Board made a sensible policy choice not

to interpret Section 1153(h)(3) to grant special priority status to independent adults at the expense of the aliens already patiently waiting in the visa line that those adults would join.

ARGUMENT

This Court has held that "principles of *Chevron* deference are applicable to [the] statutory scheme" of the INA. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999); see *Holder* v. *Martinez Gutierrez*, 132 S. Ct. 2011, 2017 (2012); see also 8 U.S.C. 1103(a)(1) and (g); 8 C.F.R. 1003.1(d)(1). Indeed, the Court has emphasized that "[j]udicial deference to the Executive Branch is especially appropriate in the immigration context," *Aguirre-Aguirre*, 526 U.S. at 425, where "executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations,'" *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009) (quoting *INS* v. *Abudu*, 485 U.S. 94, 110 (1988))—including decisions about whether to afford aliens the ability to immigrate to this country, see *Fiallo* v. *Bell*, 430 U.S. 787, 788, 791-793 (1977) (addressing definition of "child" and "parent" in provisions governing "special preference immigration status").

Under that framework, the Ninth Circuit erred in refusing to defer to the BIA's interpretation of Section 1153(h)(3). The provision cannot be read as an "unambiguously expressed" directive to grant special priority status to aliens who were once eligible for derivative-beneficiary status only because they were children but have since become independent adults with no qualifying relationship to the person who filed the visa petition. *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). Rather, Section 1153(h)(3) is sensibly read to grant a special priority to a more limited group of al-

iens—those who do have such a qualifying relationship and whose petitions therefore can "automatically be converted" from one "appropriate" family-preference "category" to a different one without the need for a new petitioner and a new petition. 8 U.S.C. 1153(h)(3). The provision's text, the larger statutory scheme governing immigrant visas, and the relevant legislative history all support reading Section 1153(h)(3) in this narrower manner. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). Because the Board gave the provision that "reasonable construction," the agency's position must "prevail[]," regardless of whether "it is the only possible interpretation or even the one a court might think best." *Martinez Gutierrez*, 132 S. Ct. at 2017.[6]

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[6] The ambiguity inherent in Section 1153(h)(3) is highlighted by the extensive judicial disagreement over its scope. Five of the 11 circuit judges who considered this case en banc deemed the provision ambiguous, as did all three of the other circuit judges who sat on the original panel. See Pet. App. 24a-25a, 37a, 60a; see also *Robles-Tenorio* v. *Holder*, 444 Fed. Appx. 646, 649-650 (4th Cir. 2011) ("Section 1153(h) is far from a model of clarity. It is unclear whether the text and structure of (h)(1) and (h)(3) can be reconciled in any coherent or reasonable fashion.") (footnote omitted). And a three-judge panel in the Second Circuit ruled unanimously that the Board's interpretation is the only reasonable reading of Section 1153(h)(3)—so that the provision unambiguously *excludes* aliens like respondents' sons and daughters from the relief that it affords to certain aged-out former derivative beneficiaries. See *Li* v. *Renaud*, 654 F.3d 376, 383-385 (2011). But see *Khalid* v. *Holder*, 655 F.3d 363, 370-371 (5th Cir. 2011) (finding provision unambiguous but reaching opposite conclusion from *Li*). Under these circumstances, it should not be difficult to conclude that reasonable people can "differ as to the[] construction" of Section 1153(h)(3). *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144 (1981) (per curiam); see also, *e.g.*, *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996).

A. Section 1153(h)(3) Does Not Unambiguously Foreclose the Board's Interpretation

1. The Ninth Circuit's conclusion that Section 1153(h)(3) unambiguously forecloses the Board's interpretation cannot be reconciled with the provision's statement that "the alien's petition shall automatically be converted to the appropriate category"

a. "As in all statutory construction cases, we begin with the language of the statute." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Section 1153(h)(3) provides that "[i]f 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." 8 U.S.C. 1153(h)(3).

That statutory language is not an unambiguous command to grant a priority to all aliens who have aged out of derivative-beneficiary status. Reading the provision as such a command is difficult to square with the part of the provision specifying that "the alien's petition shall automatically be converted to the appropriate category." That specification contains a number of discrete requirements, all of which support the Board's reading.

First, the petition that is relevant to the analysis is "the alien's petition"—that is, the petition as to which the alien was at one point a principal or derivative beneficiary with the status of a "child" under the age of 21. See 8 U.S.C. 1153(h)(1) and (3) (discussing the calculation of the age of "an alien"); see also 8 U.S.C. 1153(a)(2)(A) (creating family-preference category F2A, which includes "children" of lawful permanent residents); 8 U.S.C. 1153(d) (permitting a "child" to "accom-

pany[]" or "follow[] to join" a principal-beneficiary parent); 8 U.S.C. 1101(b) (defining "child" as a person under age 21). The statutory text does not make a different or subsequent petition eligible for conversion.

Second, the "alien's petition" is to be "converted to the appropriate category." The word "converted" signifies that the petition is to be transformed in some way, to "change from one form or function to another." *Merriam-Webster's Collegiate Dictionary* 273 (11th ed. 2005) (defining "convert"). It does not, however, suggest an alteration in the essential character of the petition—water may be "converted" to ice, and ice to water, see *ibid.*, but neither one can be "converted" into stone or wood. Moreover, Section 1153(h)(3) provides for only one kind of conversion: from one category to another one that is "appropriate." 8 U.S.C. 1153(h)(3); see 8 U.S.C. 1153(a). Each family-preference category is defined by reference to the identity of the U.S. citizen or lawful permanent resident petitioner, who must signify his or her desire to affirmatively aid a family member by filling out a Form I-130, supplying evidence of a bona fide relationship with the principal beneficiary or beneficiaries, and meeting a number of other substantial requirements. See, *e.g.*, 8 U.S.C. 1153(a), 1154. An "appropriate category" to which the alien's petition may be "converted" is best understood as a category in which the petitioner remains the same and therefore retains the same basic relationship to the now former "child"—not a category of a fundamentally different character.

Third, the statute provides that the conversion "shall" take place "automatically" if 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). As relevant here, "[a]utomatically" means "largely or wholly involuntary"

or "done spontaneously or unconsciously." *Merriam-Webster's Collegiate Dictionary* 84 (11th ed. 2005) (defining "automatic"); see *The American Heritage Dictionary* 143 (2d ed. 1982) (defining "automatic" as "[a]cting or operating in a manner essentially independent of external influence or control"); Pet. App. 30a. Accordingly, the automatic conversion that Section 1153(h)(3) envisions cannot involve the identification of a new petitioner or the filing of a new petition, both of which would require significant outside input and introduce new contingencies. It must, rather, consist of a smooth movement from one valid category to another without any intervening gap or steps and without the need for any change in the substance of the petition itself—as if, for example, the label "F2A" (signifying a petition by a lawful permanent resident for her child under age 21) were simply replaced with the label "F2B" (signifying a petition by a lawful permanent resident for her adult son or daughter).

b. With respect to certain aliens covered by the statutory subsections to which Section 1153(h)(3) refers—"subsections (a)(2)(A) and (d)," 8 U.S.C. 1153(h)(3)—all of the requirements of the automatic conversion language are readily met. But with respect to the kind of petitions at issue in this case—F3 and F4 petitions as to which the sons and daughters of respondents (and others like them) were formerly entitled to derivative status as children—those explicit statutory requirements simply cannot be satisfied. Accordingly, Section 1153(h)(3) does not unambiguously apply to all derivative beneficiaries. See *Negusie*, 555 U.S. at 524; see also Pet. App. 27a-33a; *Matter of Wang*, 25 I. & N. Dec. 28, 35-36, 38-39 (B.I.A. 2009).

There are two groups of aged-out persons whose petitions can be converted automatically from one valid category to another: those who qualified as a principal beneficiary of an F2A petition filed by a lawful permanent resident on behalf of a child, and those who qualified as a derivative beneficiary of an F2A petition filed by a lawful permanent resident on behalf of a spouse. See 8 U.S.C. 1153(a)(2)(A) and (h)(3); *Matter of Wang*, No. A 088 484 947, 2010 WL 9536039, at *4 n.3 (B.I.A. May 21, 2010). As to the first group, when a child who is the principal beneficiary of a petition filed under "subsection[] (a)(2)(A)" turns 21 and ages out of F2A eligibility, the petition can "automatically be converted" to an F2B petition for the petitioner's now-adult son or daughter. 8 U.S.C. 1153(h)(3). With respect to both the F2A and the F2B categories, the proper petitioner is the beneficiary's parent, so no new petition need be filed. In addition, no gap arises in the beneficiary's eligibility for a family-preference category: at the moment the F2A category is no longer an "appropriate" one, the F2B category becomes fully "appropriate." *Ibid.*; see Pet. App. 52a.

The second group includes some aliens covered by "subsection[] * * * (d)," which allows for derivative beneficiaries to "accompany[] or follow[] to join" a "parent." 8 U.S.C. 1153(d). A lawful permanent resident filing an F2A petition for her spouse may choose to name the spouse's child as a derivative beneficiary, rather than filing a separate F2A petition (with associated filing fees) naming the child as a principal beneficiary in his or her own right. See Pet. App. 57a n.6; see also 8 C.F.R. 204.2(a)(4). In that circumstance, when the child turns 21 and ages out of derivative status, the petition can likewise "automatically be converted" to an

F2B petition for an unmarried adult son or daughter. See Pet. App. 57a, 59a-60a. Again, the identity of the petitioner does not change, and the conversion can take place seamlessly, without any period of time during which the aged-out former "child" is ineligible for inclusion in any "appropriate category" at all. 8 U.S.C. 1153(h)(3).

There are serious problems, however, with any attempt to extend eligibility to an F3 or F4 petition as to which an alien was a derivative child beneficiary prior to aging out. 8 U.S.C. 1153(h)(3). There simply is no "appropriate category" to which "the alien's petition" can "automatically be converted." In the case of an F3 petition (for married sons and daughters of U.S. citizens), the petitioner is the U.S. citizen grandparent of the aged-out former derivative beneficiary, and Congress has not provided for a citizen to file a petition to obtain an immigrant visa on behalf of a grandson or granddaughter. See 8 U.S.C. 1153(a). In the case of an F4 petition (for a U.S. citizen's brother or sister), the petitioner is the U.S. citizen aunt or uncle of the aged-out former derivative beneficiary, and there likewise is no statutory category that allows a citizen to petition for a visa on behalf of a niece or nephew. See *ibid.*; see, *e.g.*, Pet. App. 29a; *Li*, 654 F.3d at 385.

The en banc majority suggested that an "appropriate category" here could be F2B, which covers the adult sons and daughters of lawful permanent residents (although the majority was uncertain as to how exactly such a conversion would work). Pet. App. 18a, 20a & n.3. But that is putting a square peg in a round hole. As the en banc dissent explained (*id.* at 29a-31a), the F2B category could come into play in this context only if the parent of an aged-out derivative beneficiary of an F3 or F4

petition received a visa as the principal beneficiary of a petition whose priority date became current, thereafter applied for and was granted lawful permanent resident status, and then chose at some still later point to file a new F2B petition naming the now-adult son or daughter as a principal beneficiary. See 8 U.S.C. 1153(a). Such a new petition, filed by a new petitioner, cannot be filed immediately when the derivative beneficiary ages out, see 8 U.S.C. 1153(h)(1); Pet. App. 21a n.4, because some time must necessarily elapse between the date when the visa becomes available to the parent and the date when he or she establishes eligibility (if the parent can meet all applicable requirements) and actually is granted lawful permanent resident status. See, *e.g.*, 8 U.S.C. 1153(g) (allowing up to one year for an alien to apply for a visa after notification that one is available); 8 U.S.C. 1201(a), 1255 (governing processes by which an alien who qualifies for a visa can attain the right to reside in the United States as a lawful permanent resident). Indeed, a new petition might never be filed at all; the aged-out person's parent might not submit an F2B petition even when capable of doing so. It is difficult to see how a shift from an F3 or F4 petition filed by one person to a new F2B petition that might or might not be filed later by a different person can reasonably be characterized as an "automatic[] * * * conver[sion]" of "the alien's petition." 8 U.S.C. 1153(h)(3); see Pet. App. 30a.[7]

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[7] The en banc majority stated that the reference in Section 1153(h)(3) to an "original petition" could be read to "suggest[] the possibility of a new petition," indicating that "automatic conversion could require more than just a change in visa category." Pet. App. 20a. But the phrase "original petition" is most naturally read as a way of referring to a single petition *prior to* its conversion. 8 U.S.C. 1153(h)(3). Section 1153(h)(3) thus provides that when "the alien's

Respondents have attempted to overcome that difficulty by arguing that an F3 or F4 petition could "automatically be converted" to the F2B category if the former derivative beneficiary's parent becomes a lawful permanent resident, regardless of whether that parent—who is the only rightful petitioner in that category—actually then files a petition of his or her own. See Br. in Opp. 28. But such a change in the fundamental character of the petition is hardly an "automatic[] * * * conver[sion]" to an "appropriate category." It would not account for the gap in the aged-out alien's eligibility prior to when the parent was granted lawful permanent resident status, and would entail at a minimum "editing the original petition" to eliminate the original petitioner's name and identifying information and substitute in the name and information of a brand-new petitioner. Pet. App. 20a.

That kind of "editing" would be at odds with a basic premise of the immigrant-visa system. Filing a petition manifests an affirmative intent to bring a family member to this country; the petitioner must provide a great deal of personal data, make various representations, and meet a number of different requirements. See, *e.g.*, 8 U.S.C. 1153(e) ("Immigrant visas * * * shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the [Secretary]"); 8 U.S.C. 1154(a)(1)(A)(i) (providing that a person who wants to seek classification of a family member "may file a petition with the [Secretary]"); 8 U.S.C. 1154(a)(1)(A)(viii) (restricting the filing of an F2A or F2B petition by a lawful permanent resident who has

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petition" is transformed through conversion, it nevertheless "retain[s]" the priority date that was "issued upon receipt" of the petition in its "original" state. *Ibid.*

committed certain kinds of offenses); 8 C.F.R. 204.2(d)(2) (requiring evidence of relationship between visa petitioner and principal beneficiary, including blood tests in certain circumstances); see also Richard D. Steel, *Steel on Immigration Law* § 5:30, at 5-55 (2d ed. 2010) (*Steel*). While many parents who become lawful permanent residents may be willing to sponsor their adult sons and daughters for immigrant visas of their own, not all parents will choose to take the necessary steps for all of their offspring. Cf. 8 C.F.R. 103.2(b)(6) (granting a petitioner the unilateral right to withdraw a petition).[8] There is simply no way to know for certain whether an F2B petition is proper unless the aged-out derivative beneficiary's parent actually applies for and is granted lawful permanent resident status and decides to file such a petition. See *Costello* v. *INS*, 376 U.S. 120, 127-128 (1964) ("We would hesitate long before adopting a construction * * * which would * * * completely nullify a procedure so intrinsic a part of the legislative scheme.").

c. For these reasons, Section 1153(h)(3) cannot be read to apply unambiguously to the now-adult sons and daughters of respondents. That conclusion is bolstered by the limited way in which Congress used the term "converted" (or its variants) elsewhere in the CSPA itself, as well as by the way that the term "conversion" is used in relevant regulations that were in place at the

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[8] A person claiming derivative-beneficiary status as a "child" need not have actually been named in the petition as to which his or her parent was a principal beneficiary, cf. 2 Shane Dizon and Nadine K. Wettstein, *Immigration Law Service* § 7:100, at 7-106 to 7-107 (2d ed. 2013)—and any decision to name the person would have been made (in the case of an F3 or F4 petition) by a grandparent, aunt, or uncle, and not by a parent.

time the CSPA was enacted. See *Li*, 654 F.3d at 384; *Wang*, 25 I. & N. Dec. at 34-35.

In the CSPA, Congress referred to conversion not only in Section 3, at issue in this case, but also in two other sections: Section 2, now codified at 8 U.S.C. 1151(f), and Section 6, now codified at 8 U.S.C. 1154(k). Section 2 contemplates that a petition "initially filed" by a lawful permanent resident to classify his or her child in the F2A category may be "converted" to an immediate-relative petition if the petitioner becomes a naturalized citizen. 8 U.S.C. 1151(f)(2) (providing that determination whether the alien qualifies as an immediate-relative "child" is "made using the age of the alien on the date of the parent's naturalization"); see 8 C.F.R. 204.2(i)(3). It also contemplates that a petition "initially filed" by a U.S. citizen to classify an alien as a married son or daughter in the F3 category may be "converted" to an appropriate U.S.-citizen-petitioner category when the alien's marriage terminates (that is, to an F1 petition, for the citizen's unmarried son or daughter, or to an immediate relative petition, for the citizen's unmarried child). 8 U.S.C. 1151(f)(3) (providing that determination whether the alien qualifies as an immediate-relative "child" is "made using the age of the alien on the date of the termination of the marriage"); see 8 C.F.R. 204.2(i)(1)(iii). Section 6 states that a petition filed by a lawful permanent resident to classify an alien as an unmarried son or daughter in the F2B category "shall be converted" to an F1 petition (for the unmarried son or daughter of a U.S. citizen) if the petitioner becomes a naturalized citizen. 8 U.S.C. 1154(k)(1); see 8 U.S.C. 1154(k)(2) (providing that alien may elect otherwise).

Each of the conversions addressed in Section 2 and Section 6 involves a single petitioner and the recategorization of an existing petition due to a change in the circumstances of the petitioner or the beneficiary. None of those conversions involves a new petition, a new petitioner, or a gap in the beneficiary's eligibility for a family-related visa category. Given that the language codified in Section 1153(h)(3) was "sandwiched between" these two provisions when Congress enacted the CSPA, it is reasonable to assume that Congress meant to use the term "converted" in the same way in all three provisions. *Kucana* v. *Holder*, 558 U.S. 233, 246 (2010); see, *e.g.*, *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-244 (1972).[9]

The regulatory backdrop against which Congress enacted the CSPA embodies the same understanding of what conversion means. At that time, as today, the

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[9] Congress has enacted one other provision that refers to the conversion of an immigrant visa petition. In the National Defense Authorization Act for Fiscal Year 2008 (NDAA of 2008), Pub. L. No. 110-181, 122 Stat. 3, later amended by the Act of June 3, 2008, Pub. L. No. 110-242, 122 Stat. 1567, which post-dated the CSPA by several years, Congress provided that the "Secretary of Homeland Security or the Secretary of State may convert an approved petition for special immigrant status" under the NDAA for Fiscal Year 2006 "with respect to which a visa * * * is not immediately available to an approved petition for special immigrant status" under the NDAA of 2008. § 2, 122 Stat. 1567 (8 U.S.C. 1101 note). That conversion provision permitted certain Iraqi and Afghan translators and interpreters working for the U.S. military who were entitled to special immigrant status under the NDAA of 2006 to obtain such status under the very similar NDAA of 2008, which allowed for a greater number of visas to be issued each year; the provision did not entail a change in the petitioner or the alien's loss of visa eligibility at any point along the way. See NDAA for Fiscal Year 2006, Pub. L. No. 109-163, § 1059, 119 Stat. 3443; § 1244, 122 Stat. 396.

relevant regulation provided for "[a]utomatic conversion of preference classification" to move petitions from one appropriate category to another under limited circumstances (for example, a change in the beneficiary's marital status or the naturalization of the petitioner) that do not require a new petitioner or a new petition. See 8 C.F.R. 204.2(i); 52 Fed. Reg. 33,797 (Sept. 8, 1987).[10] Congress plainly had that regulatory backdrop in mind when it enacted the CSPA, since the kinds of conversion contemplated by Section 2 and Section 6 of that Act are specifically authorized by 8 C.F.R. 204.2. See 8 U.S.C. 1151(f)(2) and (3); 8 U.S.C. 1154(k)(1); 8 C.F.R. 204.2(i)(1)(iii) and (3). Thus, while Congress is in any event presumed to be aware of pertinent regulations, see, *e.g.*, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988), in this case no such presumption is necessary. By effectively incorporating the existing regulatory meaning of conversion into the CSPA, Congress surely intended to use the term "convert" as the regulation does. See *Foti* v. *INS*, 375 U.S. 217, 223 (1963) ("It must be concluded that Congress knew of this familiar administrative practice and had it in mind * * * . These usages and procedures, which were actually followed when the provision was enacted, must reasonably be regarded as composing the context of the legislation."); see also *Agosto* v. *INS*, 436 U.S. 748, 754 (1978).

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[10] That regulatory understanding of conversion has been in place for decades. See, *e.g.*, 8 C.F.R. 205.8 (1965) ("Conversion of classification of third preference beneficiaries upon naturalization of petitioner"); 8 C.F.R. 204.5 (1976) ("Automatic conversion of classification of beneficiary," covering changes in beneficiary's marital status).

2. No other portion of Section 1153(h)(3)'s text supports the Ninth Circuit's conclusion that the provision unambiguously forecloses the Board's interpretation

Respondents have pointed to two other features of the text of Section 1153(h)(3) in support of their argument that the provision must be read to grant special priority status to their aged-out sons and daughters. Neither one establishes that Section 1153(h)(3) is unambiguous.

a. First, respondents have pointed (Br. in Opp. 15-16) to the conditional phrase with which Section 1153(h)(3) opens: "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." 8 U.S.C. 1153(h)(3). The en banc majority's decision rested entirely on that phrase. It reasoned that because paragraph (h)(3) cross-references paragraph (h)(1), which itself identifies the "applicable petition" as described in paragraph (h)(2), then paragraph (h)(3) must command special priority status with respect to all of the petitions described in paragraph (h)(2)—that is, all F2A petitions and all family-preference petitions as to which "an alien child * * * is a derivative beneficiary." 8 U.S.C. 1153(h)(1)-(3); see Pet. App. 15a-16a.

That trail of cross-references would be an exceedingly round-about way of defining the scope of Section 1153(h)(3). It would have been far more direct had Congress simply made Section 1153(h)(3) "applicable" to any "petition described in paragraph [(h)](2)," or if Congress had stated that paragraph (h)(2) described petitions for purposes of "this subsection" rather than simply for purposes of "this paragraph." 8 U.S.C. 1153(h)(1)-(3).

In any event, the mere fact that Section 1153(h)(3) cross-references Section 1153(h)(2)—at one remove—

does not dispel the ambiguity that exists as a result of the provision's automatic conversion language. It is clear that an aged-out former derivative beneficiary cannot qualify for special priority status under paragraph (h)(3) unless he or she has been subjected to the formula set out in paragraph (h)(1) and had his or her age computed as 21 or older. But it does not follow that *every* person whose age is computed under paragraph (1)—that is, every beneficiary of a petition identified in paragraph (2)—must also receive the distinct form of relief described in paragraph (3). By its own terms, paragraph (3) cannot aid aged-out persons whose petitions cannot automatically be converted to an appropriate category. Thus, Section 1153(h)(3) can reasonably be read to encompass only the qualifying subset of beneficiaries of the petitions described in paragraph (2), rather than the entire group.

In short, the tension between the first half of Section 1153(h)(3) and the automatic-conversion language is exactly what makes Section 1153(h)(3) ambiguous and deference to the Board's resolution of that tension appropriate. See *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 664-666 (2007). By treating the cross-references as dispositive, the en banc majority simply closed its eyes to the succeeding text that expressly points in the opposite direction. The majority was forced to acknowledge that "conversion" with respect to aged-out former derivative beneficiaries of F3 and F4 petitions would create "administrative complexities" and "unresolved procedural questions" in light of the uncertainty and "lag time" associated with the prospect of a new petitioner. Pet. App. 20a-22a. Indeed, the majority could not explain exactly how "conver[sion]" would work under those circumstances—

and, in particular, whether it envisioned a procedure that would require the filing of a new F2B petition. *Ibid.* But it nonetheless shunted any consideration of the statutory language requiring automatic conversion of an existing petition into a separate analysis of whether its broad interpretation of Section 1153(h)(3) was so unworkable or "so bizarre that Congress 'could not have intended' it." *Demarest* v. *Manspeaker*, 498 U.S. 184, 191 (1991) (citation omitted); see Pet. App. 19a-23a. That was error.

In order to determine whether a statute is unambiguous to begin with, a court must employ the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, including examination of *all* of a provision's language, see, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Because Congress included the automatic conversion language in the text of Section 1153(h)(3) itself, that language must be considered in determining whether the Board's interpretation is unambiguously foreclosed. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (stating that a statute should be construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant") (citation omitted). That language is not, as the en banc majority believed, simply a description of a difficulty that the agency might encounter in administering the statute as interpreted by the court and that the agency should be expected to cope with as best it may. Pet. App. 22a ("It is the agency's task to resolve these complications, not the court's."); see *id.* at 31a-32a.

b. Second, taking a position that the en banc majority did not espouse, respondents have argued (Br. in Opp. 21) that Section 1153(h)(3) provides that conversion of a petition and retention of a priority date are separate

statutory benefits, so that an alien may be entitled to "retain the original priority date" with respect to a new petition even if automatic conversion of an existing petition is not possible. But that is not the most natural reading of the provision. See *Crooks* v. *Harrelson*, 282 U.S. 55, 58 (1930) (explaining that the word "and" is ordinarily used in a conjunctive sense). Indeed, the Second Circuit concluded that respondents' proposed reading of Section 1153(h)(3) is unambiguously wrong. See *Li*, 654 F.3d at 383-384; see also Pet. App. 32a-33a (dissenting opinion). If the statute simply provided that "the alien's petition shall automatically be converted to the appropriate category," it would be unclear whether the converted petition should retain the original priority date or should be given a new priority date corresponding to the date of the conversion.[11] The last clause of Section 1153(h)(3) provides the needed clarification, rather than conferring an independent benefit—and Section 1153(h)(3) therefore is most naturally read to say that the priority date of the "original petition" shall be "retain[ed]" *when* the conversion takes place, assuming that an "appropriate category" exists and conversion is possible. 8 U.S.C. 1153(h)(3); see *Li*, 654 F.3d at 383 ("Congress could have, but did not, provide beneficiaries the option to select *either* conversion *or* retention *or* both. Instead, Congress specified both an automatic conversion to a different category and a retention of the original priority date."); see also Pet. App. 32a-33a, 54a-55a.

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[11] For this reason, provisions that contemplate conversion of a visa petition to a new family-related category specify whether the original priority date will continue to attach to the petition after the conversion is complete. See, *e.g.*, 8 U.S.C. 1154(k)(3) (codifying Section 6 of the CSPA); 8 C.F.R. 204.2(i).

Moreover, respondents' interpretation of Section 1153(h)(3) would give rise to odd results. A priority date is a feature of a petition. See 8 C.F.R. 204.1. If an alien could retain a priority date even if he or she were no longer the proper subject of any pending petition—simply holding onto it in the hope that a valid petition might someday be filed on his or her behalf—then the priority date could remain "live" for years or even decades after the original petition became defunct. And since derivative beneficiaries need not be named in any petition, see note 8, *supra*, even aliens whose names never appeared on any document submitted to the government could "retain" old priority dates in that open-ended manner. That would introduce considerable uncertainty into the workings of the immigrant-visa system, and Congress presumably would have provided for it much more directly had it been intended. See 8 U.S.C. 1153(g); *Wang*, 25 I. & N. Dec. at 38.[12]

Since conversion and retention are textually tied together, and the Board has reasonably construed Section 1153(h)(3)'s conversion language to exclude respondents' sons and daughters, there is no need to parse the mean-

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[12] Indeed, Congress has previously so provided with respect to a limited class of aliens, using clear language that it did not employ here. See Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2707 ("Any petition filed by, or in behalf of, * * * an alien [meeting certain requirements] to accord him a preference status * * * shall, upon approval, be deemed to have been filed as of the priority date previously established by such alien."); cf. 8 U.S.C. 1154(k) (codifying Section 6 of the CSPA, which provides for conversion of a petition from the F2B category to the F1 category under certain circumstances, and states that "[r]egardless of whether a petition is converted under this subsection or not" the beneficiary "may maintain" the priority date assigned when the petition was filed); *Li*, 654 F.3d at 384.

ing of Section 1153(h)(3)'s statement that "the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. 1153(h)(3); see Pet. App. 32a-33a. But even if Section 1153(h)(3) somehow were read to unambiguously treat retention as a separate benefit, it still could not be read to unambiguously extend that benefit to the circumstances of this case. As the Board explained, even where a new petition was to be filed, "the concept of 'retention' of priority dates has always been limited" to a situation in which the successive family-preference petition was filed by the same petitioner. *Wang*, 25 I. & N. Dec. at 35. That understanding of retention is consistent with the use of the term in the regulations in effect when the CSPA was enacted. See 8 C.F.R. 204.2(a)(4). For example, an alien who is the principal beneficiary of an F4 petition filed by her U.S. citizen brother and who later becomes the principal beneficiary of an F1 petition filed by her naturalized U.S. citizen mother cannot "retain" the F4 priority date for use in connection with the F1 petition. See *ibid.*; see also generally *Board of Trs. of the Leland Stanford Junior Univ.* v. *Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2197 (2011). By choosing a term with an existing meaning and limitation as a matter of immigration law, Congress ensured that aged-out persons would not be treated differently from other aliens who become the subject of a new family-preference petition filed by a new petitioner.

3. The Ninth Circuit's conclusion that Section 1153(h)(3) unambiguously covers aged-out former derivative beneficiaries of F3 and F4 petitions would disrupt the statutory scheme for immigrant visas

In determining whether Section 1153(h)(3) "specifically addresse[s] the question at issue" in this case, it is

also important to consider how the language of that provision fits into "the overall statutory scheme." *Brown & Williamson*, 529 U.S. at 132-133 (citation omitted); see *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994); *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991). Here, the broad interpretation adopted by the en banc majority would substantially disrupt the immigrant-visa system, which is defined by various statutory rules and numerical limits. It also would undermine the goal of family unity—a result that Congress surely would have provided for far more clearly if it had been intended. In contrast, the Board's narrower interpretation works smoothly with other relevant provisions and draws a reasonable line that essentially codifies an existing regulation and is consistent with the CSPA's purpose. For this reason, too, Section 1153(h)(3) cannot be read to unambiguously grant special priority status to aged-out former derivative beneficiaries of F3 and F4 petitions.

a. Implementation of the en banc majority's interpretation of Section 1153(h)(3) would destabilize the immigrant-visa system. See *Wang*, 25 I. & N. Dec. at 38-39. The number of aliens able to advance their priority dates under the Ninth Circuit's interpretation of Section 1153(h)(3) could be in the tens of thousands, or even higher. See generally U.S. Dep't of State, *Annual Report of Immigrant Visa Applications in the Family-Sponsored and Employment-Based Preferences Registered at the National Visa Center as of Nov. 1, 2012*, at 6-7, http://www.travel.state.gov/pdf/WaitingListItem.pdf (*Immigrant Waiting List*) (stating that approximately 90,000 aliens may immigrate in the F3 and F4 categories every year). No mechanism exists to track which pending petitions include derivative-beneficiary children who have since aged out, and there is no way of

knowing how many new visa petitions or applications naming them would be filed in the future. Indeed, one consequence of the Ninth Circuit's interpretation of Section 1153(h)(3) might be that there is no time limit on an aged-out former beneficiary's ability to claim an "original" priority date; in that event, years or even decades could pass between the time that the beneficiary aged out and the time that the claim is asserted. See Pet. App. 74a.

Almost all of the aged-out F3 and F4 derivative beneficiaries who would directly benefit from the Ninth Circuit's interpretation by obtaining an earlier priority date would undoubtedly do so via the F2B line, which covers petitions filed by lawful permanent residents on behalf of their unmarried adult sons and daughters. See 8 U.S.C. 1153(a)(2)(B). Some of those beneficiaries are already waiting in that line as a result of new F2B petitions filed on their behalf, but would now claim earlier priority dates than the ones they are currently accorded. Others would join the line for the first time and claim the old priority dates under which their parents obtained visas in the past, because some number of those new lawful permanent residents never filed at all for an F2B visa for their now-adult sons and daughters due to the length of the wait time. See generally *Immigrant Waiting List*.[13]

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[13] Other aged-out former derivative beneficiaries who would claim their parents' old priority dates are waiting in or would newly join the F1 line (for unmarried adult sons and daughters of U.S. citizens) or the F3 line (for married sons and daughters of U.S. citizens), see 8 U.S.C. 1153(a)(1) and (3), because their parents originally qualified as lawful permanent residents but subsequently became naturalized citizens, see 8 U.S.C. 1154(k), 1427; Pet. App. 82a n.1.

If a former derivative beneficiary of an F3 or F4 petition was 21 or older when "an immigrant visa number became available for the alien's parent," 8 U.S.C. 1153(h)(1)(A), and if such a person were then entitled under Section 1153(h)(3) to retain the priority date of the old F3 or F4 petition and use it in the F2B category, he or she would almost always vault ahead of other aliens already waiting in the F2B line. Pet. App. 8a ("The effect of this older priority date is that the beneficiary is placed at or near the front of the visa line, and a visa would likely be available immediately or soon."). That is because, for aliens chargeable to every country in the world except for Mexico, the F3 and F4 visa lines involve a longer wait for a visa number than the F2B line. See *Visa Bulletin for Aug. 2013*. If a visa number is available for a beneficiary in the F3 or F4 line using a particular priority date, an alien holding that priority date will necessarily have an earlier date than those aliens currently waiting in a shorter F2B line. See *ibid.*

The result would be that many aliens already in line would have their places pushed back. Changing priority dates is a "zero-sum game," Pet. App. 35a; for every person who would be inserted toward the front of the line as a result of the Ninth Circuit's decision, another person would be moved closer to the end. As of November 1, 2012, there were 486,597 F2B petitions designated for consular processing overseas for which beneficiaries are awaiting visa numbers—many of which would likely be subject to reordering. See *Immigrant Waiting List* 2; *ibid.* (noting that 288,705 F1 petitions and 830,906 F3 petitions designated for consular processing were likewise awaiting visa numbers). Additional petitions designated for processing in the United States (because

their beneficiaries are already present in this country) would be subject to the same treatment.

Aliens pushed back in the line might see their waiting times increase substantially. Congress has made a minimum of 226,000 family-sponsored visas available each year, of which only approximately 26,000 are F2B visas, and has imposed additional per-country limits for each category. See 8 U.S.C. 1151-1153; *Immigrant Waiting List* 6; see also 8 U.S.C. 1151(c) (explaining calculation governing available number of family-sponsored visas). As of August 2013, for instance, visas are not available to Filipino nationals in the F2B category unless they have a priority date of December 22, 2002, or earlier. See *Visa Bulletin for Aug. 2013*, at 2. If a large number of Filipino nationals who now have priority dates after December 2002 were suddenly entitled to earlier priority dates under the Ninth Circuit's reading of Section 1153(h)(3) because they aged out under some earlier petition, then the cut-off date would retrogress in order to allow those persons to be processed without exceeding the yearly limit on F2B visas. That means that an alien outside the scope of Section 1153(h)(3) with a priority date of January 2003, whose priority date was about to become "current" and who has already been waiting for more than a decade, would have to wait an additional (and likely significant) amount of time. And such an alien would have no way of knowing how many former derivative beneficiaries might continue to surface, and how many newly immigrating F3 and F4 beneficiaries might pass on older priority dates to their aged-out sons and daughters, thus continuing to block her path to the front of the line.

Such a reordering of the waiting lines would create significant unfairness. The displaced aliens would al-

most certainly have been separated from their parents for longer than the aliens moving ahead of them in line. See, *e.g.*, Christina A. Pryor, Note, *"Aging Out" of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act*, 80 Fordham L. Rev. 2199, 2233-2236 (2012) (setting out example in which application of the en banc majority's interpretation would mean that A's son gets a visa number before B's son, even though B became a lawful permanent resident years earlier than A and filed a petition naming her son earlier than A did, and even though B and her son have been separated longer than A and her son have). And the line-jumpers—who only obtained a relationship "that would independently qualify them for a visa" when their parent became a lawful permanent resident—would "bump aliens" who had such a "qualifying relationship" for a much greater period of time. Pet. App. 35a; see *id.* at 59a-60a (panel opinion) (refusing to "effectively treat an aged-out derivative beneficiary of an F3 or F4 petition as if he or she had been independently entitled to his or her own priority date based on his or her status as the grandchild, niece, or nephew of a citizen").

Respondents have urged (Br. in Opp. 33) that an aged-out former derivative beneficiary has already waited in line for a visa number along with the principal beneficiary, and should be given some sort of "credit" for that time. But that argument misconceives the role that the derivative beneficiary plays in the immigrant-visa scheme. Section 1153(d) permits the "child" of a principal beneficiary to accompany or follow to join the parent when the parent immigrates. It does so in order to ensure that at the moment the parent comes to this country he or she need not leave behind a child under

the age of 21, who cannot be expected to live independently. See 8 U.S.C. 1153(d), 1154(e); *Fiallo*, 430 U.S. at 796-798; *Santiago* v. *INS*, 526 F.2d 488, 490-491 (9th Cir. 1975), cert. denied, 425 U.S. 971 (1976). But a derivative beneficiary has no separate statutory rights. If the principal beneficiary dies abroad while waiting for a visa number, or decides not to immigrate after all, then the derivative beneficiary has no entitlement of any kind. See *Steel* § 5:44, at 5-73; 3 Charles Gordon et al., *Immigration Law and Procedure* § 37.05[2][a], at 37-16 (rev. ed. 2013). And a derivative beneficiary need not even have been in existence when the petition naming the principal beneficiary was filed; the derivative-beneficiary provision covers children born (or stepchildren acquired) during the period when the parent is waiting for a visa number to become available. See 8 U.S.C. 1101(b), 1153(d); see also note 8, *supra*. Accordingly, giving former derivative beneficiaries "credit for the years" in which they qualified as a "child" (Br. in Opp. 33)—a period during which they and their parents were not separated from each other—is not consistent with Section 1153(d). See Pet. App. 34a-35a, 59a-60a.[14]

In short, under the Ninth Circuit's interpretation, Section 1153(h)(3) would represent a significant altera-

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[14] The Ninth Circuit's contrary view of the statute would, for instance, permit an alien who became a principal beneficiary's stepchild at age 17, and then aged out of child status four years later, to get "credit" for all of the years the principal beneficiary waited in line prior to the marriage creating the stepchild relationship. It would also permit an alien who was 20 years old at the time a petition was filed naming her parent as principal beneficiary to retain the priority date associated with that petition, even if that date did not become current until she was 40 years old, but would deny the same special status to the alien's 41-year-old brother because he was 21 years old at the time of filing.

tion in the immigrant-visa system that would reshuffle the statutorily prescribed waiting lines, disrupt the settled expectations of a large number of intending immigrants and their families, introduce unwarranted tensions among the categories of aliens seeking to enter this country, and undermine the perception of fairness of the rules by which the United States welcomes new immigrants. Moreover, it would create these consequences solely to "solve" a "problem" caused by numerical limits that Congress itself set, and not by any administrative delay of the sort Section 1153(h) was primarily intended to address. Had Congress wanted to take such a step, surely it would "have said so clearly—not obliquely through an ambiguous" sentence in the CSPA "and an idiosyncratic use" of terms with a recognized meaning in the immigration context. *Stanford Univ.*, 131 S. Ct. at 2199; cf. *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."). Indeed, to ensure that aged-out derivative beneficiaries of family-preference petitions were entitled to priority dates along with the principal beneficiaries, Congress would have had to look no farther than language contained elsewhere in the CSPA itself, which contains several provisions that freeze the age of a child as of the date the relevant petition was filed. See 8 U.S.C. 1151(f) (freezing age of child of U.S. citizen to date petition filed); 8 U.S.C. 1158(b)(3)(B) (freezing age of child to ensure continued derivative classification under asylum petitions); see also 8 U.S.C. 1255(i) (assessing "child" status of certain individuals at particular past date for adjustment-of-status purposes). Section 1153(h)(3) is

reasonably interpreted to provide a more confined form of relief.

b. The narrower interpretation of Section 1153(h)(3) adopted by the Board, which includes aged-out principal and derivative beneficiaries of F2A petitions but not aliens like respondents' sons and daughters, does not suffer from those same difficulties. Indeed, under the Board's interpretation, Section 1153(h)(3) largely serves to codify a regulation that existed prior to its enactment. See 8 C.F.R. 204.2(a)(4) ("[I]f the [derivative beneficiary of an F2A petition] 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."); 57 Fed. Reg. 41,059 (Sept. 9, 1992); Pet. 22-23 & n.5 (discussing enforcement of regulation subsequent to CSPA's enactment); see also *Kucana*, 558 U.S. at 248-249; *Costello*, 376 U.S. at 129-130.

The Ninth Circuit thought that Congress could not have intended the narrower interpretation adopted by the Board because it does not make a significant change to the regulatory regime that existed when the provision was enacted. See Pet. App. 22a-23a. But there is no reason to believe that Congress wanted to make a major shift in policy, rather than to take the more modest step of giving statutory force to the agency's existing practices—including by use of terms with a recognized meaning in the immigration field. See pp. 47-49, *infra* (discussing legislative history). And the interpretation adopted by the Board in fact does modestly add to the benefits already expressly conferred by regulation. See 8 C.F.R. 204.2(a)(4). First, it makes conversion "automatic[]"—without requiring any additional petition (and

corresponding fee)—for aged-out derivative beneficiaries moving from the F2A category (which covers a lawful permanent resident's minor child (and spouse)) to the F2B category (which covers a lawful permanent resident's unmarried adult son or daughter). See 8 U.S.C. 1153(h)(3). Second, it covers aged-out principal beneficiaries of F2A petitions moving into the F2B category. See *ibid.*; Pet. App. 58a.[15]

It is perfectly rational for Congress to afford relief to only that limited group of aged-out persons. See *Fiallo*, 430 U.S. at 795 n.6 ("[L]imits and classifications as to who shall be admitted [as immigrants] are traditional and necessary elements of legislation in this area."); *id.* at 798 ("With respect to each of these legislative policy distinctions, it could be argued that the line should have been drawn at a different point and that the statutory definitions deny preferential status to parents and children who share strong family ties."); *INS* v. *Hector*, 479 U.S. 85, 89-91 (1986) (per curiam); *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972). Under the narrower reading of Section 1153(h)(3), conversion and priority-date

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[15] Moreover, contrary to the en banc majority's statement (Pet. App. 23a), a comparison between the language of the regulation and the language of the CSPA does not suggest that Congress meant Section 1153(h)(3) to cover new petitions filed by new petitioners. For the sake of clarity, the regulation specifies that "the original priority date will be retained *if the subsequent petition is filed by the same petitioner*," 8 C.F.R. 204.2(a)(4) (emphasis added), while Section 1153(h)(3) contains no similar language. But Section 1153(h)(3) provides relief only where automatic conversion of "the alien's petition" is possible—and with respect to a new petition filed by a new petitioner, the conversion requirement cannot be met. See pp. 25-28, *supra*. Having included the automatic-conversion language, Congress had no need to mirror the portion of the regulation to which the en banc majority pointed.

retention are available to aliens who were, or could have qualified as, principal beneficiaries in their own right all along—based on their own status—if they had been so designated by the citizen or lawful permanent resident who filed the original petition. In addition, under that reading, the aged-out derivative beneficiaries in the old categories would not leap to the front of a new (and typically longer) line in a new category and displace everyone else already patiently waiting a turn. See 8 U.S.C. 1153(a)(2) (providing that at least 77% of F2-category visas must be allocated to F2A); U.S. Dep't of State, *Visa Bulletin for July 2002* (June 7, 2002), http://www.travel.state.gov/visa/bulletin/bulletin_1353.html (showing F2A line as shorter than F2B line, with more recent priority dates, with respect to every country); U.S. Dep't of State, *Visa Bulletin for July 2013* (June 7, 2013), http://www.travel.state.gov/visa/bulletin/bulletin_5993.html (same); *Visa Bulletin for Aug. 2013*; see also § 6, 116 Stat. 929 (8 U.S.C. 1154(k) (demonstrating that Congress was aware of length of various visa-waiting lines).

4. The legislative history of the CSPA does not support the view that Section 1153(h)(3) unambiguously applies in this case

Nothing in the legislative history of the CSPA specifically discusses Section 1153(h)(3). But to the extent the relevant history—which primarily consists of floor debate, and is therefore weak evidence of congressional intent, see *Graham Cnty. Soil & Water Conservation Dist.* v. *United States*, 559 U.S. 280, 297 (2010)—sheds any light on the meaning of that provision, it undermines the broad interpretation adopted by the en banc majority.

The predominant focus of the CSPA's legislative history was on erasing delay caused by slow administrative processing. At the time the CSPA was enacted, processing of applications for adjustment of status took the Immigration and Naturalization Service several years, see H.R. Rep. No. 45, 107th Cong., 1st Sess. 1-3 (2001) (House Report); see also Pet. App. 59a; *Wang*, 25 I. & N. Dec. at 36-38, and an alien's age was calculated as of the date that such applications were adjudicated. Solving that problem was the stated reason for the introduction of the legislation, see House Report 3, as well as the main topic of congressional debate both before and after the language now codified as Section 1153(h)(3) was added by a Senate committee, see, *e.g.*, 148 Cong. Rec. H4991 (daily ed. July 22, 2002) (statement of Rep. Jackson-Lee); 147 Cong. Rec. E1095-E1096 (daily ed. June 13, 2001) (statement of Rep. Mink); 147 Cong. Rec. S3275 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein). In fact, it was the only issue to which the sponsors of the bill in the House of Representatives referred when they discussed the changes made by the Senate and introduced the version of the bill that was ultimately enacted. See, *e.g.*, 148 Cong. Rec. at H4990 (statement of Rep. Sensenbrenner) (noting that the Senate's amendments addressed "situations where alien children lose immigration benefits by 'aging out' as a result of INS processing delays").

While a number of CSPA provisions, including Section 1153(h)(1), do address the administrative delay problem, Section 1153(h)(3) addresses a distinct form of "delay" that results from Congress's own yearly limits on admission in each of the various family-preference categories. Had Congress intended Section 1153(h)(3) to have the far-reaching effects the Ninth Circuit as-

cribed to it, the legislative history would not likely have been so silent on the subject. See *Chisom* v. *Roemer*, 501 U.S. 380, 396 n.23 (1991). At no point in Congress's consideration of the provision was there any indication that it considered the possibility, let alone intended, that Section 1153(h)(3) would create the striking change in the immigrant-visa system that the Ninth Circuit's reading of that provision would require—that is, reordering of visa waiting lines and retrogressions in the State Department's cut-off dates that would increase the wait times for thousands and thousands of intending immigrants. See House Report 13 (reprinting statement of Rep. Jackson-Lee) (noting that the committee intended to "solve the age-out problem without displacing others who have been waiting patiently in other visa categories, which was one of the issues that disturbed us"); 148 Cong. Rec. at H4992 (statement of Rep. Jackson-Lee) (same). That makes it far more probable that Section 1153(h)(3) was intended to work only a modest change—one that did not merit debate because it largely codified an existing regulatory provision.[16]

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[16] That conclusion is not undermined by the single arguable mention on the floor of the kind of wait times that Section 1153(h)(3) addresses. See 147 Cong. Rec. at S3275 (statement of Sen. Feinstein that one aspect of aging-out problem to be addressed is "growing immigration backlogs in the immigration visa category"). The language codified in Section 1153(h)(3) was not yet part of the bill at the time the statement was made. See S. 672, 107th Cong. (introduced Apr. 2, 2001). In addition, the context of the statement is a discussion of a principal beneficiary who is a "'child' of a United States citizen or lawful permanent resident"—that is, an F2A principal beneficiary, who would be covered under the Board's interpretation of Section 1153(h)(3). See 147 Cong. Rec. at S3275 (statement of Sen. Feinstein); see also Pet. App. 59a; p. 24, *supra*.

B. The Agency's Interpretation of Section 1153(h)(3) Is Reasonable And Merits Deference

Because the en banc majority resolved the appeal at *Chevron* step one, it did not address whether the Board's interpretation of Section 1153(h)(3) in *Wang* is a reasonable one that is entitled to deference. See *Chevron*, 467 U.S. at 843-844; see also *Negusie*, 555 U.S. at 516-517; *Aguirre-Aguirre*, 526 U.S. at 424-425. Under *Chevron*, courts ordinarily defer to the Board's interpretation of immigration laws unless the interpretation is "clearly contrary to the plain and sensible meaning of the statute," *Mota* v. *Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008) (citation omitted), such that it is "not one that Congress would have sanctioned," *Chevron*, 467 U.S. at 845 (citation omitted).

For the reasons set out in Point A above—and as the en banc dissent (and the original Ninth Circuit panel) explained—the Board's decision is indeed a reasonable one. Pet. App. 34a-35a, 57a-60a; see *Wang*, 25 I. & N. Dec. at 39 (explaining that Section 1153(h)(3) affords relief to principal and derivative beneficiaries of F2A petitions who become eligible for F2B classification when they age out of "child" status). The Board gave Section 1153(h)(3) a close and careful reading, and applied its unique expertise to consideration of the whole statutory and regulatory scheme relevant to the interpretation of that provision. See *id.* at 30-39; *Wang*, 2010 WL 9536039, at *1-*4. The Board's conclusion that Section 1153(h)(3) does not encompass aged-out former derivative beneficiaries of F3 and F4 petitions gives meaning to the statutory requirement of automatic conversion, see *Negusie*, 555 U.S. at 524, and does so in a manner consistent with past practice in immigration

statutes and regulations, see *Wang*, 25 I. & N. Dec. at 39; *Wang*, 2010 WL 9536039, at *1-*4.

The Board's reading also makes a "reasonable policy choice," *Chevron*, 467 U.S. at 845, not to depart from past practice and disrupt visa administration in order to grant special priority dates and reduce the wait times for former derivative-beneficiary children who have become independent adults. The en banc majority's contrary reading of the statute, after all, would "not permit more aliens to enter the country or keep more families together," but would negatively affect many aliens who have been waiting in visa lines for long periods of time. Pet. App. 35a (dissenting opinion). In light of the text and purpose of Section 1153(h)(3), as well as Congress's choice not to provide any preference for grandchildren, nieces, or nephews of U.S. citizens, the Board reasonably concluded that adult sons and daughters of lawful permanent residents like those involved in this case—capable of carrying on lives apart from their parents—should not be entitled to jump ahead of others who have been waiting in line. See *Wang*, 25 I. & N. Dec. at 38-39. Instead, the Board properly limited the special benefits of the provision to the subset of aliens who were always eligible to be principal beneficiaries if the person who filed the original petition had chosen to designate them as such. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (explaining that "[f]illing" a statutory "gap[] * * * involves difficult policy choices that agencies are better equipped to make than courts"); *Chevron*, 467 U.S. at 843 n.11, 844.

Accordingly, as the en banc dissent stated, the Board's decision should have been accorded *Chevron* deference and sustained. See Pet. 23-24; Pet. App. 33a-

35a. There is no basis for respondents' contention (Br. in Opp. 29-33) that the Board's decision is arbitrary and capricious—a demanding standard as to which respondents bear a heavy burden. See *National Ass'n of Home Builders*, 551 U.S. at 658; *City of Olmsted Falls, Ohio* v. *FAA*, 292 F.3d 261, 271-272 (D.C. Cir. 2002). The Board's "path" can readily "be discerned," *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted); see *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 497 (2004), and the Board was not required to have "highlight[ed] the statute's gaps or ambiguity" or to have addressed every possible argument that respondents can now muster, *Martinez Gutierrez*, 132 S. Ct. at 2021; see *Aguirre-Aguirre*, 526 U.S. at 432. The Board's decision is, indeed, just as thorough and considered as "a multitude of agency interpretations" to which this Court "and other courts have routinely deferred." *Martinez Gutierrez*, 132 S. Ct. at 2021.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 1153 of Title 8 of the United States Code provides:

Allocation of immigrant visas

(a) Preference allocation for family-sponsored immigrants

Aliens subject to the worldwide level specified in section 1151(c) of this title for family-sponsored immigrants shall be allotted visas as follows:

(1) Unmarried sons and daughters of citizens

Qualified immigrants who are the unmarried sons or daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the class specified in paragraph (4).

(2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens

Qualified immigrants—

(A) who are the spouses or children of an alien lawfully admitted for permanent residence, or

(B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence,

shall be allocated visas in a number not to exceed 114,200, plus the number (if any) by which such worldwide level exceeds 226,000, plus any visas not required for the class specified in paragraph (1); ex-

cept that not less than 77 percent of such visa numbers shall be allocated to aliens described in subparagraph (A).

(3) Married sons and married daughters of citizens

Qualified immigrants who are the married sons or married daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the classes specified in paragraphs (1) and (2).

(4) Brothers and sisters of citizens

Qualified immigrants who are the brothers or sisters of citizens of the United States, if such citizens are at least 21 years of age, shall be allocated visas in a number not to exceed 65,000, plus any visas not required for the classes specified in paragraphs (1) through (3).

(b) Preference allocation for employment-based immigrants

Aliens subject to the worldwide level specified in section 1151(d) of this title for employment-based immigrants in a fiscal year shall be allotted visas as follows:

(1) Priority workers

Visas shall first be made available in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (4) and (5), to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability

An alien is described in this subparagraph if—

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

(B) Outstanding professors and researchers

An alien is described in this subparagraph if—

(i) the alien is recognized internationally as outstanding in a specific academic area,

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States—

(I) for a tenured position (or tenure-track position) within a university or

institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

(C) Certain multinational executives and managers

An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability

(A) In general

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer

(i) National interest waiver

Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

(ii) Physicians working in shortage areas or veterans facilities

(I) In general

The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if—

(aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and

(bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

(II) Prohibition

No permanent resident visa may be issued to an alien physician described in subclause (I) by the Secretary of State under section 1154(b) of this title, and the Attorney General may not adjust the status of such an alien physician from that of a nonimmigrant alien to

that of a permanent resident alien under section 1255 of this title, until such time as the alien has worked full time as a physician for an aggregate of 5 years (not including the time served in the status of an alien described in section 1101(a)(15)(J) of this title), in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs.

(III) Statutory construction

Nothing in this subparagraph may be construed to prevent the filing of a petition with the Attorney General for classification under section 1154(a) of this title, or the filing of an application for adjustment of status under section 1255 of this title, by an alien physician described in subclause (I) prior to the date by which such alien physician has completed the service described in subclause (II).

(IV) Effective date

The requirements of this subsection do not affect waivers on behalf of alien physicians approved under subsection (b)(2)(B) of this section before the enactment date of this subsection. In the case of a physician for whom an appli-

cation for a waiver was filed under subsection (b)(2)(B) of this section prior to November 1, 1998, the Attorney General shall grant a national interest waiver pursuant to subsection (b)(2)(B) of this section except that the alien is required to have worked full time as a physician for an aggregate of 3 years (not including time served in the status of an alien described in section 1101(a)(15)(J) of this title) before a visa can be issued to the alien under section 1154(b) of this title or the status of the alien is adjusted to permanent resident under section 1255 of this title.

(C) Determination of exceptional ability

In determining under subparagraph (A) whether an immigrant has exceptional ability, the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability.

(3) Skilled workers, professionals, and other workers

(A) In general

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the

classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers

Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals

Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

(iii) Other workers

Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(B) Limitation on other workers

Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for qualified immigrants described in subparagraph (A)(iii).

(C) Labor certification required

An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 1182(a)(5)(A) of this title.

(4) Certain special immigrants

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified special immigrants described in section 1101(a)(27) of this title (other than those described in subparagraph (A) or (B) thereof), of which not more than 5,000 may be made available in any fiscal year to special immigrants described in subclause (II) or (III) of section 1101(a)(27)(C)(ii) of this title, and not more than 100 may be made available in any fiscal year to special immigrants, excluding spouses and children, who are described in section 1101(a)(27)(M) of this title.

(5) Employment creation

(A) In general

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including a limited partnership)—

(i) in which such alien has invested (after November 29, 1990) or, is actively in the

process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

(B) Set-aside for targeted employment areas

(i) In general

Not less than 3,000 of the visas made available under this paragraph in each fiscal year shall be reserved for qualified immigrants who invest in a new commercial enterprise described in subparagraph (A) which will create employment in a targeted employment area.

(ii) "Targeted employment area" defined

In this paragraph, the term "targeted employment area" means, at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).

(iii) "Rural area" defined

In this paragraph, the term "rural area" means any area other than an area

within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).

(C) Amount of capital required

(i) In general

Except as otherwise provided in this subparagraph, the amount of capital required under subparagraph (A) shall be $1,000,000. The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

(ii) Adjustment for targeted employment areas

The Attorney General may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than 1/2 of) the amount specified in clause (i).

(iii) Adjustment for high employment areas

In the case of an investment made in a part of a metropolitan statistical area that at the time of the investment—

(I) is not a targeted employment area, and

(II) is an area with an unemployment rate significantly below the national average unemployment rate,

the Attorney General may specify an amount of capital required under subparagraph (A) that is greater than (but not greater than 3 times) the amount specified in clause (i).

(D) Full-time employment defined

In this paragraph, the term "full-time employment" means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

(6) Special rules for "K" special immigrants

(A) Not counted against numerical limitation in year involved

Subject to subparagraph (B), the number of immigrant visas made available to special immigrants under section 1101(a)(27)(K) of this title in a fiscal year shall not be subject to the numerical limitations of this subsection or of section 1152(a) of this title.

(B) Counted against numerical limitations in following year

(i) Reduction in employment-based immigrant classifications

The number of visas made available in any fiscal year under paragraphs (1), (2), and (3) shall each be reduced by 1/3 of the number of visas made available in the previous fiscal year to special immigrants described in section 1101(a)(27)(K) of this title.

(ii) Reduction in per country level

The number of visas made available in each fiscal year to natives of a foreign state under section 1152(a) of this title shall be reduced by the number of visas made available in the previous fiscal year to special immigrants described in section 1101(a)(27)(K) of this title who are natives of the foreign state.

(iii) Reduction in employment-based immigrant classifications within per country ceiling

In the case of a foreign state subject to section 1152(e) of this title in a fiscal year (and in the previous fiscal year), the number of visas made available and allocated to each of paragraphs (1) through (3) of this subsection in the fiscal year shall be reduced by 1/3 of the number of visas made available in the previous fiscal

year to special immigrants described in section 1101(a)(27)(K) of this title who are natives of the foreign state.

(c) Diversity immigrants

(1) In general

Except as provided in paragraph (2), aliens subject to the worldwide level specified in section 1151(e) of this title for diversity immigrants shall be allotted visas each fiscal year as follows:

(A) Determination of preference immigration

The Attorney General shall determine for the most recent previous 5-fiscal-year period for which data are available, the total number of aliens who are natives of each foreign state and who (i) were admitted or otherwise provided lawful permanent resident status (other than under this subsection) and (ii) were subject to the numerical limitations of section 1151(a) of this title (other than paragraph (3) thereof) or who were admitted or otherwise provided lawful permanent resident status as an immediate relative or other alien described in section 1151(b)(2) of this title.

(B) Identification of high-admission and low-admission regions and high-admission and low-admission states

The Attorney General—

(i) shall identify—

(I) each region (each in this paragraph referred to as a "high-admission region")

for which the total of the numbers determined under subparagraph (A) for states in the region is greater than 1/6 of the total of all such numbers, and

(II) each other region (each in this paragraph referred to as a "low-admission region"); and

(ii) shall identify—

(I) each foreign state for which the number determined under subparagraph (A) is greater than 50,000 (each such state in this paragraph referred to as a "high-admission state"), and

(II) each other foreign state (each such state in this paragraph referred to as a "low-admission state").

(C) Determination of percentage of worldwide immigration attributable to high-admission regions

The Attorney General shall determine the percentage of the total of the numbers determined under subparagraph (A) that are numbers for foreign states in high-admission regions.

(D) Determination of regional populations excluding high-admission states and ratios of populations of regions within low-admission regions and high-admission regions

The Attorney General shall determine—

(i) based on available estimates for each region, the total population of each region not including the population of any high-admission state;

(ii) for each low-admission region, the ratio of the population of the region determined under clause (i) to the total of the populations determined under such clause for all the low-admission regions; and

(iii) for each high-admission region, the ratio of the population of the region determined under clause (i) to the total of the populations determined under such clause for all the high-admission regions.

(E) Distribution of visas

(i) No visas for natives of high-admission states

The percentage of visas made available under this paragraph to natives of a high-admission state is 0.

(ii) For low-admission states in low-admission regions

Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of

a high-admission state) in a low-admission region is the product of—

(I) the percentage determined under subparagraph (C), and

(II) the population ratio for that region determined under subparagraph (D)(ii).

(iii) For low-admission states in high-admission regions

Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of a high-admission state) in a high-admission region is the product of—

(I) 100 percent minus the percentage determined under subparagraph (C), and

(II) the population ratio for that region determined under subparagraph (D)(iii).

(iv) Redistribution of unused visa numbers

If the Secretary of State estimates that the number of immigrant visas to be issued to natives in any region for a fiscal year under this paragraph is less than the number of immigrant visas made available to such natives under this paragraph for the fiscal year, subject to clause (v), the excess visa numbers shall be made available to natives (other than natives of a high-admission state) of the other regions

in proportion to the percentages otherwise specified in clauses (ii) and (iii).

(v) Limitation on visas for natives of a single foreign state

The percentage of visas made available under this paragraph to natives of any single foreign state for any fiscal year shall not exceed 7 percent.

(F) "Region" defined

Only for purposes of administering the diversity program under this subsection, Northern Ireland shall be treated as a separate foreign state, each colony or other component or dependent area of a foreign state overseas from the foreign state shall be treated as part of the foreign state, and the areas described in each of the following clauses shall be considered to be a separate region:

(i) Africa.

(ii) Asia.

(iii) Europe.

(iv) North America (other than Mexico).

(v) Oceania.

(vi) South America, Mexico, Central America, and the Caribbean.

(2) Requirement of education or work experience

An alien is not eligible for a visa under this subsection unless the alien—

(A) has at least a high school education or its equivalent, or

(B) has, within 5 years of the date of application for a visa under this subsection, at least 2 years of work experience in an occupation which requires at least 2 years of training or experience.

(3) Maintenance of information

The Secretary of State shall maintain information on the age, occupation, education level, and other relevant characteristics of immigrants issued visas under this subsection.

(d) Treatment of family members

A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 1101(b)(1) of this title shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, 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.

(e) Order of consideration

(1) Immigrant visas made available under subsection (a) or (b) of this section shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the

Attorney General (or in the case of special immigrants under section 1101(a)(27)(D) of this title, with the Secretary of State) as provided in section 1154(a) of this title.

(2) Immigrant visa numbers made available under subsection (c) of this section (relating to diversity immigrants) shall be issued to eligible qualified immigrants strictly in a random order established by the Secretary of State for the fiscal year involved.

(3) Waiting lists of applicants for visas under this section shall be maintained in accordance with regulations prescribed by the Secretary of State.

(f) Authorization for issuance

In the case of any alien claiming in his application for an immigrant visa to be described in section 1151(b)(2) of this title or in subsection (a), (b), or (c) of this section, the consular officer shall not grant such status until he has been authorized to do so as provided by section 1154 of this title.

(g) Lists

For purposes of carrying out the Secretary's responsibilities in the orderly administration of this section, the Secretary of State may make reasonable estimates of the anticipated numbers of visas to be issued during any quarter of any fiscal year within each of the categories under subsections (a), (b), and (c) of this section and to rely upon such estimates in authorizing the issuance of visas. The Secretary of State shall terminate the registration of any alien who fails to apply for an immigrant visa

within one year following notification to the alien of the availability of such visa, but the Secretary shall reinstate the registration of any such alien who establishes within 2 years following the date of notification of the availability of such visa that such failure to apply was due to circumstances beyond the alien's control.

(h) Rules for determining whether certain aliens are children

(1) In general

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.

(2) Petitions described

The petition described in this paragraph is—

(A) with respect to a relationship described in subsection (a)(2)(A) of this section, a petition filed under section 1154 of this title for classification of an alien child under subsection (a)(2)(A) of this section; or

(B) with respect to an alien child who is a derivative beneficiary under subsection (d) of this section, a petition filed under section 1154 of this title for classification of the alien's parent under subsection (a), (b), or (c) of this section.

(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) 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.

(4) Application to self-petitions

Paragraphs (1) through (3) shall apply to self-petitioners and derivatives of self-petitioners.