WHY IMMIGRATION REFORM IS CRITICAL

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This article is a short summary of views on what immigration policies need to be changed after having practiced in the field of immigration law for a cumulative of sixty-plus years. People born outside of the United States view this country as a "Golden Mountain" and envision a land of freedom and opportunity. After entering the United States, however, they often encounter difficulties navigating through the nation's complex immigration laws. The U.S. immigration system identifies four distinct categories of people in the United States: citizens; lawful permanent residents (green card holders); temporary visa holders; and unauthorized aliens. These distinctions become blurred for those who have become mired in the technicalities of the legal process—from those waiting for the opportunity to apply for permanent residence, to those struggling to avoid detention and deportation. This country must find a way to balance, on one hand, the need for ensuring the safety and security of our borders, and the structuring of an efficient system that allows the highly skilled and the best and brightest people to contribute to our economic system, allowing families, defined as parents, siblings, children, and grandchildren, to join together.

Throughout the country's 200 years, U.S. immigration policy has been highly influenced by the nation's ever-changing economic and social landscape. Liberalization of immigration law led to increased diversification of the foreign-born population in the latter half of the twentieth century.[1] The Refugee Act of 1980[2] reformed refugee eligibility by incorporating the United Nations Convention relating to the Status of Refugees, focusing on the persecution rather than Cold War geopolitical policies.[3] Illegal immigration dominated—the Immigration Reform and

[1] *See* ROGER DANIELS, COMING TO AMERICA 328–49 (2d ed. 2002). For example, the Filipino population doubled from 1980 to 1990, growing from 774,652 to 1,419,711. *Id.* at 359. Furthermore, in 1960, 75% of the foreign-born population was of European origin. U.S. CENSUS BUREAU, PROFILE OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2000, at 11 (2001), http://www.census.gov/prod/2002pubs/p23-206.pdf. That number shrank to 39% in 1980 and 15.3% in 2000 and was surpassed by immigration from Latin America and Asia, which grew (as a percentage of the foreign-born population) from 9.4% to 33.1% to 51%, and from 5.1% to 19.3% to 25.5% in those years, respectively. *Id.*

[2] Pub. L. No. 96-212, 94 Stat. 102.

[3] DANIELS, *supra* note 1, at 346. The Refugee Act set an aggregate cap of 270,000 immigrants per year. *See* Refugee Act of 1980 §§ 201(a), 203(a).

Control Act of 1986 (IRCA)[4] imposed harsh sanctions on employers who hired foreign nationals without employment authorization and granted amnesty to qualifying illegal immigrants who had entered the United States prior to January 1, 1982.[5]

The Immigration Act of 1990 (IMMACT90)[6] provided far-reaching reform, increasing the annual quota for immigrants,[7] separating quotas for family-sponsored and employment-based immigration,[8] instituting a "diversity lottery" of 55,000 people (not families) to increase immigration from countries underrepresented in the United States,[9] modified nonimmigrant worker classifications,[10] and restricted relief for foreign nationals convicted of aggravated felonies,[11] amongst various other minor provisions. Throughout the years, immigration law became more country specific. IMMACT90 established a procedure for certain foreign-born aliens in the United States to apply for Temporary Protected Status (TPS) if they are temporarily unable to return to their home country safely because of ongoing armed conflict, environmental disaster, or other extraordinary and temporary conditions.[12] The Nicaraguan Adjustment and Central American

[4] Pub. L. No. 99-603, 100 Stat. 3359.

[5] *Id.* sec. 201, § 245A(a)(2)(A). The IRCA proved controversial with some opponents arguing that granting amnesty would further encourage illegal immigration while others argued harsher penalties against employers would lead to discrimination against lawful foreign workers. *See* Trent R. Hightower, Comment, *Give Me Your Tired, Your Poor, Your Huddled Masses Yearning to Breathe Free . . . as Long as They Have the Proper Visas: An Analysis of the Current State of United States Immigration Law, and Possible Changes on the Horizon*, 39 TEX. TECH L. REV. 133, 153–54 (2006).

[6] Pub. L. No. 101-649, 104 Stat. 4978.

[7] *See id.* sec. 101, § 201(c)–(e).

[8] *Id.* secs. 111–121, § 203.

[9] *Id.* sec. 131, § 203(c).

[10] *See, e.g.*, *id.* §§ 201–303.

[11] *Id.* § 501.

[12] *See* Immigration & Nationality Act (INA) § 244(b)(1)(A)–(C), 8 U.S.C. § 1254a(b)(1)(A)–(C) (2006). Countries currently designated for TPS are: El Salvador, Honduras, Nicaragua, Somalia, and Sudan. *See* U.S. Citizenship and Immigration Services, Temporary Protected Status, http://www.uscis.gov (follow "TOPICS" hyperlink; then follow "Humanitarian" hyperlink; then follow "Temporary Protected Status & Deferred Enforcement Departure Temporary Protected Status" hyperlink; then follow "Temporary Protected Status" hyperlink) (last visited Dec. 23, 2009).

Relief Act (NACARA)[13] provided immigration benefits to certain foreign nationals from El Salvador, Guatemala, Nicaragua, Cuba, and former Soviet bloc[14] countries.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[15] was enacted to further curb illegal immigration by expanding grounds for removal, establishing three year and ten year bars to admissibility, tightening border security, and further limiting relief available from deportation.[16]

The Child Citizenship Act of 2000[17] allowed certain foreign-born children of U.S. citizens to acquire citizenship automatically.[18]

The Legal Immigration Family Equity Act (LIFE)[19] amended section 245(i) of the Immigration & Nationality Act (INA) to allow certain foreign nationals[20] physically present in the United States

[13] Pub. L. No. 105-100, 111 Stat. 2193 (1997), *modified by* Pub. L. No. 105-139, 111 Stat. 2644 (1997). The Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1510, 114 Stat. 1464, amended NACARA to allow suspension of a deportation or the cancellation of the removal of an alien if "at the time at which an alien filed for adjustment . . . the spouse or child of an alien whose status is adjusted to that of an alien lawfully admitted for permanent residence . . . has been battered or subjected to extreme cruelty by the alien . . . ."

[14] Eligible countries include "the Soviet Union (USSR), Russia, any Republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, and Yugoslavia (including Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, Slovenia, and Serbia)." U.S. CITIZENSHIP & IMMIGRATION SERVS., FORM I-881, APPLICATION FOR SUSPENSION OF DEPORTATION OR SPECIAL RULE CANCELLATION OF REMOVAL 1 (2009), http://www.uscis.gov/files/form/I-881.pdf.

[15] Pub. L. No. 104-208, 110 Stat. 3009-546.

[16] *See id.* §§ 101–106, 304, 306. For example, IIRIRA limited the ability to grant relief of voluntary departure to a maximum of 120 days if prior to completion of proceedings (sixty days at the completion of proceedings); instituted mandatory detention for foreign nationals who have committed certain crimes even if they are eligible for relief; and expanded the definition of aggravated felony by reducing the term of imprisonment from five years to one year. *See id.*

[17] Pub. L. No. 106-395, 114 Stat. 1631.

[18] *Id.* sec. 101, § 320(a).

[19] Pub. L. No. 106-553 app., 114 Stat. 2762A-142 (2000).

[20] Eligibility under INA § 245(i) requires that the applicant be the beneficiary of an immigrant petition or application for labor certification filed on or before April 30, 2001. INA § 245(i)(1), 8 U.S.C. § 1255(i)(1) (2006). However, if the immigrant petition or application for labor certification was filed on or before

on the date of enactment, December 21, 2000, to adjust status to lawful permanent residency despite immigration status violations.[21]

The Child Status Protection Act (CSPA)[22] was enacted in 2002 to allow families to remain intact during the lengthy process of applying for lawful permanent residence by permitting the ageing-out children of certain applicants to retain classification as a "child" even though he or she has reached the age of twenty-one.[23] CSPA was one of several pieces of legislation enacted in the twenty-first century to protect women and children.[24] Events of September 11, 2001 altered the scope of immigration policy for the next several years by prioritizing enhanced security. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) permitted the government to detain suspected terrorists indefinitely.[25] The Homeland Security Act of 2002[26] transformed the whole Immigration and Naturalization Service (INS), and its functions were taken over by the Department of Homeland Security (DHS)[27] on March 1, 2003. The Rearing and Empowering America for Longevity Against Acts of International Destruction Act of 2005 (REAL ID Act)[28] amended eligibility requirements for asylum, withholding of

January 14, 1998, the applicant is not subject to the physical presence requirement. INA § 245(i)(1)(C), 8 U.S.C. § 1255(i)(1)(C).

[21] Legal Immigration Family Equity Act (LIFE), sec. 1102(c), § 245, 144 Stat. 2762A-143 (2000).

[22] Pub. L. No. 107-208, 116 Stat. 927 (2002).

[23] *Id.* sec. 4, § 208(b)(3); *id.* sec. 5, § 207(c)(2).

[24] *See, e.g.*, *id.* §§ 207–208; *see also* LIFE, § 245; Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631; Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

[25] Pub. L. No. 107-56, sec. 412, § 236A, 115 Stat. 272, 350–51.

[26] Pub. L. No. 107-296, 116 Stat. 2135.

[27] *Id.* § 441. DHS consists of: U.S. Citizenship and Immigration Services (USCIS), which oversees lawful immigration to the United States, including immigrant visa petitions, naturalization applications, and asylum and refugee applications; the Customs and Border Patrol (CBP), which oversees border security and inspection of goods arriving into the United States; and Immigration and Customs Enforcement (ICE), which oversees detention, removal and litigation. *See* U.S. Department of Homeland Security, Department Subcomponents and Agencies, http://www.dhs.gov/xabout/structure (last visited Dec. 23, 2009).

[28] Pub. L. No. 109-13, 119 Stat. 302.

removal, and Convention Against Torture (CAT) claims, expanded grounds for deportation, and limited the state's ability to issue driver licenses and state identification documents.[29]

The following immigration issues, as the law currently stands, must be recognized and addressed immediately:

- The insufficiency of Congress' annual numerical limitations on the issuance of immigrant visas (especially for employment-based immigration and family-sponsored immigration), as evidenced by severe backlogs;[30]
- The Board of Immigration Appeals' (BIA) erroneous interpretation of provisions of the Child Status Protection Act in *In re Wang*[31] of the intent of Congress, thus preventing benefits from reaching intended classification of aged out children;[32]
- The REAL ID Act's changes to the adjudication of asylum, withholding of removal, and CAT claims, making it harder for legitimate asylum seekers to be granted relief;[33]
- The Executive Office for Immigration Review (EOIR)'s new regulations for automatic termination of voluntary departure, which forces foreign nationals to choose between a rock and a hard place, i.e., voluntary departure or other forms of desired relief.[34]

I. RECOGNIZING THE NEED FOR AN INCREASE IN CONGRESSIONAL NUMERICAL LIMITATIONS FOR IMMIGRANT VISAS

In order to file an application for permanent residence (i.e., for a "green card"), an immigrant visa number must be available for the applicant's family-sponsored or employment-based preference category and country of birth.[35] Congress places numerical limits

[29] *See id.* §§ 101, 105, 106, 202.

[30] *See infra* Part I.

[31] 25 I. & N. Dec. 28 (B.I.A. 2009).

[32] *See infra* Part II.

[33] *See infra* Part III.

[34] *See infra* Part IV.

[35] *See* U.S. Citizenship and Immigration Services, Visa Availability & Priority Dates, http://www.uscis.gov (follow "Green Card" hyperlink; then follow "Green Card Process and Procedures" hyperlink; then follow "Visa Availability

on annual immigrant visa number availability, causing severe backlogs for applicants whose underlying immigrant petitions may already have been approved, especially for the employment-based, second (EB-2) and third-preference (EB-3) categories.[36] The backlog results in a potential wait of eight years or more, especially for nationals of countries with high demand for immigrant visas (i.e., India, China, Philippines and Mexico), before a sponsored foreign national can apply for permanent residence. This serves as a disincentive for the best and brightest foreign nationals to come to the United States, and prevents U.S. employers from filling jobs for which the Department of Labor has certified that no U.S. workers are available. Even those who have been recognized as working in the "national interest" have to wait eight or more years if they happen to be from a highly subscribed country of birth (i.e., India or China).

Congress should increase the number of immigrant visas issued per fiscal year to meet the EB-2 and EB-3 preference category demand. They should also permit the concurrent filing of employment-based immigrant petitions and permanent residence applications to at least allow applicants to obtain work permits and travel authorization while waiting in line for visa number availability.

A. The Permanent Residence Application Process

A lawful permanent resident is a foreign national who has been permitted to live and work permanently in the United States.[37] His or her "green card" is issued by the USCIS and serves as evidence of lawful immigration status, identity, and employment authorization.[38]

Permanent residency is most commonly obtained through

& Priority Dates" hyperlink) (last visited Dec. 23, 2009).

[36] INA § 203(b)(2)–(3), 8 U.S.C. § 1153(b)(2)–(3) (2006); *see, e.g.*, Lindsey M. Baldwin, Note, *When Goon's Goal is a Green Card: NHL Players and the Alien of Extraordinary Ability Immigrant Visa Category*, 22 GEO. IMMIGR. L.J. 715, 731, 732 n.117 (2008) (citing AUSTIN T. FRAGOMEN, JR., ET AL., IMMIGRATION LAW AND BUSINESS § 4:59 (2007)).

[37] *See* 8 C.F.R. § 1.1(p) (2009).

[38] U.S. CITIZENSHIP & IMMIGRATION SERVS., WELCOME TO THE UNITED STATES: A GUIDE FOR NEW IMMIGRANTS 9 (2007), http://www.uscis.gov/files/nativedocuments/M-618.pdf.

employment-based or family-sponsored processes. USCIS first must approve an immigrant petition for the foreign national, usually filed by an employer or a qualifying relative.[39] Once an immigrant visa number becomes available for that foreign national, he or she may either apply for permanent resident status through USCIS if legally in the United States, or through an overseas U.S. Embassy or Consulate if living outside the United States.[40]

1. Immigrant Visa Numbers

Congress limits the number of immigrant visas available each year by statute.[41] The U.S. Department of State controls the issuance of immigrant visa numbers according to its annual determination of the worldwide numerical limitations. It tracks the number of immigrant visas granted each year by USCIS and by U.S. consular officers, and allots immigrant visa numbers to eligible foreign nationals upon availability. Immigrant visas in both the family and employment are limited by separate visa priority systems, called preference categories.[42] The availability of immigrant visas is also limited by country.[43]

The Department of State publishes a monthly Visa Bulletin that summarizes the availability of immigrant numbers for each month.[44] Visa numbers are allocated in chronological order according to the foreign national's "priority date," which is

[39] *See* 8 C.F.R. §§ 204.1(a)(5), 204.5(c).

[40] U.S. CITIZENSHIP & IMMIGRATION SERVS., INSTRUCTIONS FOR I-130, PETITION FOR ALIEN RELIEF 1 (2008), www.uscis.gov/files/form/I-130instr.pdf. It becomes more complicated when the foreign national needs to travel outside of the United States frequently for his or her work; after an application to adjust status to permanent residence is filed with USCIS, the applicant is not permitted to travel outside the United States without prior approval of advance parole by USCIS. If he or she travels without it, then the application is considered to be abandoned. 8 C.F.R. § 245.2(a)(4)(ii).

[41] INA § 201(c)–(e), 8 U.S.C. § 1151(c)–(e) (2006) (stating the annual numerical limits on family-sponsored, employment-based, and diversity immigrants).

[42] INA § 203, 8 U.S.C. § 1153.

[43] INA § 202(a)(2), 8 U.S.C. § 1152(a)(2) (setting the per-country limit for preference immigrants at 7% of the total annual family-sponsored and employment-based preference limits).

[44] U.S. Department of State, Visa Bulletin, http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html (last visited Dec. 23, 2009).

usually the date on which the immigrant petition was filed.[45] If demand for immigrant visa numbers in a particular category exceeds the statutory limits, then that immigrant category is deemed to be oversubscribed. An applicant may be allotted a visa number for an oversubscribed category, and therefore be eligible for a green card, only if he or she has a priority date that is earlier than the cut-off date listed for his or her category on the current Visa Bulletin.[46]

If an immigrant category is not oversubscribed, then a "C" (for "current") is listed for that category on the Bulletin, indicating that visa numbers are available for all qualified applicants.[47] If no immigrant visas are available at all, then a "U" (for "unavailable") is listed for that category.[48] For example, for the month of September 2009, no visa numbers were available for the employment-based, third-preference (EB-3) category of any country.[49]

2. Family-Sponsored Petitions

United States citizens and lawful permanent residents may sponsor their qualifying relatives to become lawful permanent residents.[50] Some family-sponsored petitions require an available

[45] *See* INA § 203(e), 8 U.S.C. § 1153(e). As indicated below, the "priority date" is very important when it comes to CSPA issues. The labor certification filing date is the priority date for the EB-2 and EB-3 categories; the immigrant petition filing date is the priority date for EB-1 and NIW (National Interest Waiver) applications, for which the labor certification process is waived. *See infra* notes 97–101 and accompanying text.

[46] *See, e.g.*, U.S. Department of State, Visa Bulletin for September 2009, http://travel.state.gov/visa/frvi/bulletin/bulletin_4558.html (last visited Dec. 23, 2009).

[47] *See id.*

[48] *See id.*

[49] *See id.*

[50] Whether the sponsor is a U.S. citizen or permanent resident, and whether a beneficiary child is married or older than twenty-one, are important factors in determining visa eligibility. For example, an unmarried child under age twenty-one, sponsored by a U.S. citizen parent, is in the F-1 category; however if the child was married, he or she would be in the F-3 category. INA § 203(a)(1), (3), 8 U.S.C. § 1153(a)(1), (3). Similarly, a child under age twenty-one who is sponsored by a permanent resident parent is in the F-2A category, while an adult unmarried child is in the F-2B category. INA § 203(a)(2)(A)–(B), 8 U.S.C. § 1153(a)(2)(A)–(B).

immigrant visa while others do not.

An immigrant visa is always available to a U.S. citizen's "immediate relatives," which include the citizen's spouse, parents, and unmarried children under the age of twenty-one.[51] They do not require an immigrant visa number to apply, and there is no oversubscription or backlog for these visas other than processing delays if the relative is not in the United States. Other family relatives need to have an available immigrant visa to apply for permanent residence.

There are four preference categories for family-sponsored petitions that require an immigrant visa: unmarried adult children of U.S. citizens;[52] spouses and children of lawful permanent residents;[53] and unmarried adult children of lawful permanent residents;[54] married adult children of U.S. citizens;[55] and brothers and sisters of adult U.S. citizens.[56]

The priority date is the date on which the family-sponsored immigrant petition (Form I-130) is filed with USCIS.[57]

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[51] INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). In addition, a U.S. citizen who sponsors his or her parents must be at least twenty-one years old. *Id.*

[52] INA § 203(a)(1), 8 U.S.C. § 1153(a)(1) (describing the F-1 category).

[53] INA § 203(a)(2)(A), 8 U.S.C. § 1153(a)(2)(A) (describing the F-2A category).

[54] INA § 203(a)(2)(B), 8 U.S.C. § 1153(a)(2)(B) (describing the F-2B category).

[55] INA § 203(a)(3), 8 U.S.C. § 1153(a)(3) (describing the F-3 category).

[56] INA § 203(a)(4), 8 U.S.C. § 1153(a)(4) (describing the F-4 category).

[57] INA § 203(e)(1), 8 U.S.C. § 1153(e)(1). A few case examples:

Example 1: Parent A becomes a permanent resident after her oldest U.S. citizen Child B sponsors her as an "immediate relative" (for which no immigrant visa number is required). Parent A then files an I-130 family-based petition on January 2, 1998 for Child C, who was born in India, when C is eighteen years old. This is an F-2A petition. Child C turns twenty-one in 2001, and her petition becomes an F-2B. Parent A becomes a U.S. citizen in September of 2003, taking five years to become a permanent resident. The January 2, 1998 priority date of Child C becomes an F-1 priority date. Child C marries in December of 2003, and gives birth to a baby in December of 2004. The January 2, 1998 priority date now becomes an F-3 priority date. When this priority date becomes current for India, Child C and her husband and child can all immigrate to the United States as a family.

Example 2: Child B, who is a U.S. citizen, in addition to filing an immigrant petition for her Parent A, also files a petition for her sibling Child C in December of 1997. The petition for C is in the F-4 category.

Example 3: Child C, who was born in India, marries a foreign national from Sri Lanka. Now the priority date for Child B's petition on behalf of C or Parent A's petition on behalf of C can be used for either the India or Sri Lanka visa number quotas, because of the cross-chargeability rules in 22 C.F.R. § 42.12(c). Child C

3. Employment-Based Petitions

Most employment-based immigrant petitions involve an employer who wishes to sponsor a foreign worker for permanent residency. By sponsoring a worker, the employer indicates the intent to hire that worker in a full time position upon completion of the green card process, and at a salary equal to or greater than the "prevailing wage" for the occupation in the area of intended employment.

All five main preference categories for employment-based petitions require immigrant visa availability. However, not all categories require an employer to petition on the foreign national's behalf. The five categories are as follows: (1) aliens with extraordinary abilities in the sciences, arts, education, business, or athletics;[58] outstanding professors and researchers;[59] and certain multinational executives and managers transferring to the United States;[60] (2) positions that require advanced degrees and persons of exceptional ability in the sciences, arts, or business;[61] (3) professionals,[62] skilled workers,[63] and other

can be charged to whichever country has an immigrant visa available faster.

Example 4: Child C is living with, but did not end up marrying, her boyfriend. They have Child D together, born in India. Child D could immigrate with Child C when a visa number become available for the January 2, 1998 priority date in the F-1 category; however, the boyfriend, as the unmarried, natural parent, would not be able to join them.

Example 5: Parent A is living with, but never legally married, Parent E during wartime. Parent E is the father of her five children. This was a common scenario during the Vietnam War and the civil war years in China. Parent A enters the United States as a permanent resident and returns to India to marry Parent E. Parent A then reenters the United States and files a petition for Parent E in December of 2002. Six years later, immigrant visa numbers became available, and Parent E and three children under twenty-one came to the United States with green cards. The other two children had aged-out, and could not "join and follow" Parent E as beneficiaries. Now, Parent E has to file new immigrant petitions for each of the two children in January of 2009. The new immigrant petitions can use the prior priority date of December 2002, so they do not have to wait for visa numbers based on the new priority dates. This problem could have been avoided if Parent A had filed immigrant petitions in December 2002 for each child so that they would not need to be derivatives of the principal beneficiary Parent E.

[58] INA § 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A).

[59] INA § 203(b)(1)(B), 8 U.S.C. § 1153(b)(1)(B).

[60] INA § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C).

[61] INA § 203(b)(2), 8 U.S.C. § 1153(b)(2). This category includes qualified

unskilled workers;[64] (4) religious workers and other special immigrants;[65] and (5) entrepreneurs who make qualifying investments in the United States.[66]

For petitions that require an employer sponsor, the typical route to permanent residence begins with labor certification, which is issued by the U.S. Department of Labor's Employment and Training Administration.[67] The labor certification process, also known as Program Electronic Review Management system (PERM), is a Department of Labor program that began in March of 2005 to review a market test, comprised of a series of recruitment activities by the employer to evidence that the employer has not overlooked a minimally qualified U.S. worker.[68]

There are two standards used by the Department of Labor to

foreign national physicians who will practice medicine in an area of the United States that has been certified as underserved by the U.S. Department of Health and Human Services. INA § 203(b)(2)(B)(ii), 8 U.S.C. § 1153(b)(2)(B)(ii).

[62] INA § 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). A professional is one who works in a specialty occupation, which is defined in 8 C.F.R. § 214.2(h)(4)(ii) (2009) as:

> an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

To qualify as a specialty occupation, the position must meet one of the four criteria listed in 8 C.F.R. § 214.2(h)(4)(iii)(A).

[63] INA § 203(b)(3)(A)(i), 8 U.S.C. § 1153 (b)(3)(A)(i) (defining a skilled worker as one who works in a skilled labor position requiring at least two years of training or experience).

[64] INA § 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).

[65] INA § 203(b)(4), 8 U.S.C. § 1153(b)(4); *see* INA § 201(a)(27), 8 U.S.C. § 1101(a)(27) (defining "special immigrant").

[66] INA § 203(b)(5)(A), 8 U.S.C. § 1153(b)(5)(A).

[67] INA § 203(b)(3)(C), 8 U.S.C. § 1153(b)(3)(c); *see* INA § 212(a)(5)(A)(i), 8 U.S.C. § 1182(a)(5)(A)(i); 20 C.F.R. § 656.2(c) (2009) (defining the labor certification process); 8 C.F.R. § 204.12 (establishing that some positions, such as a qualified alien physician who will practice medicine in an area of the United States which has been certified as underserved, are relieved from this requirement).

[68] *See* 20 C.F.R. § 656.2(c); *see also* U.S. Department of Labor, Permanent Labor Certification, http://www.foreignlaborcert.doleta.gov/perm.cfm (last visited Dec. 23, 2009).

either approve or deny an application for labor certification. First, the Department of Labor will not approve an application if any minimally qualified U.S. worker, who is available and willing to accept the job, has responded to the employer's recruitment.[69] Secondly, the labor certification may be denied if the conditions of the job would tend to have an adverse affect upon workers in the United States performing similar jobs.[70] Only when the employer is able to prove to the Department of Labor that U.S. workers are not available to fill the position will the foreign worker's application be certified.

Upon approval of the labor certification application, the employer submits an immigrant petition (Form I-140) on behalf of the foreign worker beneficiary to USCIS. The foreign worker's priority date for immigrant visa eligibility is the date on which the labor certification application was accepted for processing by the Department of Labor.

Spouses and children of immigrant applicants in either family-sponsored or employment-based categories are entitled to the same status, and the same order of preference of the principal applicant, if accompanying or following to join the principal applicant.[71]

4. Application for Permanent Residence

Neither a family-sponsored relative nor an employment-based foreign worker can submit a permanent residence application (Form I-485) to USCIS until an immigrant visa is available for his or her "priority date."[72] If an immigrant visa number is immediately available, then the permanent residence application may be filed concurrently with the immigrant petition on which the application is based. Otherwise, the applicant must wait until his or her "priority date" becomes current for his or her preference category.

Permanent residence applicants are eligible for work

[69] INA § 212(a)(5)(A)(i)(I), 8 U.S.C. § 1182(a)(5)(A)(i)(I).

[70] INA § 212(a)(5)(A)(i)(II), 8 U.S.C. § 1182(a)(5)(A)(i)(II).

[71] INA § 203(d), 8 U.S.C. § 1153(d).

[72] INA § 245(a), 8 U.S.C. § 1255(a); *see* 8 C.F.R. § 245.1. Those with pending applications for permanent residence are eligible to apply for employment authorization pursuant to 8 C.F.R. § 274a.12(c)(9).

authorization[73] and international travel[74] while their applications are pending. Applications for both work authorization (Form I-765) and travel documents (Form I-131) can be filed concurrently with Form I-485 without an additional filing fee.[75]

B. Limitations of the Visa Availability System

The current visa availability system for permanent residence applications is flawed. There are not enough immigrant visa numbers available for certain preference categories and countries. As explained below, it may take eight to twelve years in some cases for an immigrant visa to become available for a specialty occupation professional with a bachelor's degree.

Foreign nationals from countries with high demand for U.S. immigrant visas (i.e., China, India, Mexico, and the Philippines), face a longer wait than all other countries and are especially burdened by the current visa availability system.[76]

The Department of State's Visa Bulletins for May, June, July, and August of 2009 have reported that no immigrant visas were available for employment-based third-preference (EB-3) workers for *any* country.[77] Workers in the EB-3 preference category can range from engineers to nurses to restaurant cooks.

[73] § 274a.12(c)(9).

[74] § 245.2(a)(4)(ii)(A)–(D).

[75] DEP'T OF HOMELAND SEC., INSTRUCTIONS FOR I-131 APPLICATION FOR TRAVEL DOCUMENT 8 (2009), http://www.uscis.gov/files/form/i-131instr.pdf; DEP'T OF HOMELAND SEC., INSTRUCTIONS FOR I-485 APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS 8 (2009), http://www.uscis.gov/files/form/I-485instr.pdf; DEP'T OF HOMELAND SEC., INSTRUCTIONS FOR I-765 APPLICATION FOR EMPLOYMENT AUTHORIZATION 8 (2009), http://www.uscis.gov/files/form/I-765instr.pdf.

[76] Immigrant visa demand in these four oversubscribed countries exceeds the per-country limits of INA § 202(a)(2), 8 U.S.C. § 1152(a)(2), and therefore the visa prorating provisions of INA § 202(e), 8 U.S.C. § 1152(e) apply.

[77] U.S. Department of State, Visa Bulletin for May 2009, http://travel.state.gov/visa/frvi/bulletin/bulletin_4454.html (last visited Dec. 23, 2009); U.S. Department of State, Visa Bulletin for June 2009, http:/travel.state.gov/visa/frvi/bulletin/bulletin_4497.html (last visited Dec. 23, 2009); U.S. Department of State, Visa Bulletin for July 2009, http://travel.state.gov/visa/frvi/bulletin/bulletin_4512.html (last visited Dec. 23, 2009); U.S. Department of State, Visa Bulletin for August 2009, http://travel.state.gov/visa/frvi/bulletin/bulletin_4539.html (last visited Dec. 23, 2009).

Consequently, no permanent residence applications could be filed in the EB-3 preference category during this four-month period.

The last time employment-based third-preference numbers were available was in April of 2009, when the cut-off priority date for all countries except for India was March 1, 2003.[78] At the time, the cut-off date for India was November 1, 2001.[79] To apply these cut-off dates in an example, this means that an engineer from the United Kingdom whose labor certification was filed in October of 2008 and approved in April of 2009 would not be able to file his permanent residence application for another five years. Likewise, an engineer from India with the same filing and approval dates would be unable to file his permanent residence application for another seven years. These waiting periods are estimated under the assumption that immigrant visa availability will not further retrogress.

From November of 2008 to March of 2009, the EB-3 cut-off date remained at May 1, 2005 for all countries aside from the four most oversubscribed countries (i.e., China, India, Mexico, and the Philippines).[80] This means that when the Department of State *retrogressed* the cut-off date to March 1, 2003 for the April 2009 Visa Bulletin, and potential permanent residence applicants would have to wait an additional two years.

Conversely, the employment-based first-preference (EB-1) category has been current during this entire period, as has the second-preference category for all countries except China, India, Mexico, and the Philippines.[81] The demand for EB-1 preference

[78] *See* U.S. Department of State, Visa Bulletin for April 2009, http://travel.state.gov/visa/frvi/bulletin/bulletin_4438.html (last visited Dec. 23, 2009).

[79] *Id.*

[80] U.S. Department of State, Visa Bulletin for November 2008, http://travel.state.gov/visa/frvi/bulletin/bulletin_4371.html (last visited Dec. 23, 2009); U.S. Department of State, Visa Bulletin for December 2008, http://travel.state.gov/visa/frvi/bulletin/bulletin_4384.html (last visited Dec. 23, 2009); U.S. Department of State, Visa Bulletin for January 2009, http://travel.state.gov/visa/frvi/bulletin/bulletin_4406.html (last visited Dec. 23, 2009); U.S. Department of State, Visa Bulletin for February 2009, http://travel.state.gov/visa/frvi/bulletin/bulletin_4417.html (last visited Dec. 23, 2009); U.S. Department of State, Visa Bulletin for March 2009, http://travel.state.gov/visa/frvi/bulletin/bulletin_4428.html (last visited Dec. 23, 2009).

[81] *See supra* note 80.

and certain EB-2 applicants has been met, while other nationalities, such as China and India, show a nine year wait as of July 2009 for the EB-2 preference.

Also, the demand for the EB-3 preference applicants, and even certain nationalities for the EB-2 preference, has *not* been met. It is unreasonable that petitioning U.S. employers, for whom the Department of Labor has already determined that no U.S. workers would be displaced by the foreign workers' permanent residence (after the legally required testing of the labor market), would not be able to hire the employees they want for available positions.

The recurring unavailability and retrogressing of immigrant visa numbers serves as a disincentive for the best and brightest foreign professionals from oversubscribed countries to come to or remain in the United States. Under the current visa availability system, most foreign professionals must wait until their priority date has become current, after filing the immigrant petition, before they are able to file the permanent residence application. There is no incentive for them to wait potentially eight to ten years for a green card when they could go to another developed country with a demand for professionals, such as Canada or European countries, with the knowledge that they could buy a home, move for the position, and plan to build a family.

The lengthy wait for immigrant visa availability also affects the ability of foreign workers pursuing the employment-based green card process to maintain lawful status. All applicants for permanent residence are required to maintain lawful, nonimmigrant status to be "admissible" and therefore eligible for adjustment of status to permanent residence.[82] If a foreign national accumulates more than 180 days but less than one year of unlawful presence in the United States, then he or she may face a three-year bar from re-entering the United States.[83] This bar is extended to ten years if he or she accumulates more than one year of unlawful presence.[84]

If a nonimmigrant accumulates more than 180 days of unlawful presence, and he or she is not protected by an exception

[82] INA § 245(c), 8 U.S.C. § 1255(c) (2006); *see* INA § 245(k), 8 U.S.C. § 1255(k).

[83] INA § 212 (a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I); *see* INA § 212 (a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii) (defining "unlawful presence").

[84] INA § 212 (a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii).

such as INA § 245(i), then he or she cannot file for adjustment of status to permanent residence.[85] Nonimmigrant visas are temporary by definition, often with limited means for extension. Once an application for permanent residence is filed, the applicant is in a "period of stay authorized by the Attorney General" and does not accrue unlawful presence while the application is pending.[86]

C. Need to Increase Immigrant Visa Numbers or Permit Concurrent Filing

Congress should review the immigration visa numerical limitations and conclude that the visa numbers set in the year 1990[87] are insufficient for current demand. Congress should increase the numerical limitations for immigrant visas, especially those for employment-based third-preference (EB-3) workers, or allow for unused visa numbers in undersubscribed categories to be transferred to the oversubscribed categories. Both solutions would alleviate the backlog for the EB-3 category, even for high-demand countries such as China and India.

Simultaneously, Congress should allow permanent residence applications to be filed concurrently, or any time after an employment-based immigrant petition is filed. Under the current system, foreign nationals from oversubscribed countries must wait until immigrant visas become available for their priority date before applying. If foreign nationals are allowed to file

[85] INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I); *see* INA § 244(e), 8 U.S.C. § 1254a(e).

[86] INA § 212(a)(9)(B)(iv), 8 U.S.C. § 1182(a)(9)(B)(iv). *But see* Memorandum from Donald Neufeld et al., Acting Associate Director of Domestic Operations, U.S. Dep't of Homeland Sec. on Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act to Field Leadership (May 6, 2009) (highlighting the distinction between "unlawful presence" and "unlawful status"), http://www.uscis.gov/files/nativedocuments/revision_redesign_AFM.PDF.

[87] Immigration Act of 1990, Pub. L. No. 101-649, sec. 101, § 201(c)–(e), 104 Stat. 4978, 4982 (setting a worldwide numerical limit of 675,000, of which 480,000 were separated for family-sponsored immigrant visas; 140,000 for employment-based visas; and 55,000 for diversity visas. However, while immediate relatives are exempt from the numerical limits, the number of immediate relatives of U.S. citizens is subtracted from the 480,000 visa numbers available for family-sponsored visas).

permanent residence applications without waiting for their priority date to become current, they could also apply for the U.S. work and international travel authorization that is permitted for applicants in the United States. This solution might not alleviate the delays in obtaining a green card—permitting early filing of permanent residence applications does not mean that they will be adjudicated immediately, if there is no change in immigrant visa numbers[88] or adjudication resources—but applicants would be free to work and travel while they wait.

II. ERRONEOUS INTERPRETATION OF THE CHILD STATUS PROTECTION ACT BY THE BOARD OF IMMIGRATION APPEALS IN *IN RE WANG*

The CSPA was enacted to allow families to remain intact during the lengthy process of applying for lawful permanent residence, even if beneficiary children reach the age of twenty-one.[89] In its recently published decision in *In re Wang*,[90] the BIA limited the application of the CSPA with regards to certain derivative children of siblings of U.S. citizens.[91] The BIA failed to interpret the applicable CSPA provision according to the plain language of the statute. A class action, *Costelo v. Chertoff*, was certified regarding this issue on July 16, 2009 in the Central District of California.[92]

A. Background

In most permanent residency cases, a foreign national is first

[88] Under this solution, since immigrant visa numbers would not be increased, permanent residence applications filed early would not be adjudicated and the applicant must wait until immigrant visas became available for the his or her priority date.

[89] *See* INA § 201(f)(1), 8 U.S.C. § 1151(f)(1); Child Status Protection Act of 2002, Pub. L. No. 107-208, sec. 4, § 208(b)(3), 116 Stat. 927, 928–29.

[90] 25 I. & N. Dec. 28 (B.I.A. 2009). Note that co-author Scott Bratton is counsel for the visa applicant.

[91] *Id.* at 38–39.

[92] No. SACV 08-688 JVS (SHx), 2009 WL 2223006, at *9 (C.D. Cal. July 16, 2009). Since writing this article, the class action was decided against the visa applicants and is currently on appeal to the United States Court of Appeals for the Ninth Circuit.

sponsored by an employer or qualifying relative.[93] The sponsor, or petitioner, submits an immigrant petition on behalf of the beneficiary worker or relative to the USCIS. The petition lists any spouses and children of the principal beneficiary, because they would qualify as derivative beneficiaries and are entitled to the same status and the same order of preference as the principal beneficiary, if accompanying or following to join the principal beneficiary.[94]

A "child" is defined for immigration purposes as an unmarried individual under the age of twenty-one.[95] Once a son or daughter of a U.S. citizen of lawful permanent residence turns twenty-one, he or she usually becomes ineligible for the immigration benefits of being a "child" for immigration purposes, which can drastically change a foreign national's situation.[96]

The filing of an immigrant petition is required to establish the priority dates for the following four preference categories for family-sponsored petitions:

- F-1: unmarried adult children of U.S. citizens;[97]
- F-2A: spouses and children of lawful permanent residents;[98]

[93] 8 C.F.R. § 204.1(a) (2009).

[94] INA § 203(d), 8 U.S.C. § 1153(d).

[95] INA § 201(b)(1), 8 U.S.C. § 1101(b)(1).

[96] INA § 203(a)(2)(A), 8 U.S.C. § 1153(a)(2)(A); INA § 203(h), 8 U.S.C. § 1153(h). Unmarried children of a lawful permanent resident qualify for the second-preference "A" category (F-2A) for family-sponsored visas. However, once the unmarried child turns twenty-one, he or she becomes a family-sponsored, second-preference "B" applicant (F-2B). The most significant difference between the F-2A and F-2B categories lies in the length of time the applicant must wait until an immigrant visa becomes available for his or her respective category before applying for permanent residence. The current cut-off date for F-2A visa availability for all countries, except China, India, Mexico, and the Philippines, is January 15, 2005, whereas the respective cut-off date for the F-2B category is May 1, 2001. *See* U.S. Department of State, Visa Bulletin for August 2009, *supra* note 77. This means that a twenty-two-year-old son of a permanent resident, who submitted an immigrant petition for the son before May 1, 2001, did not have an immigrant visa available for him, and therefore, was not eligible to file a permanent residence application until August 2009. On the other hand, if the son was twenty years old, his permanent resident parent would have had to submit an immigrant petition before January 15, 2005 for an immigrant visa to be available in August 2009.

[97] INA § 203(a)(1), 8 U.S.C. § 1153(a)(1).

[98] INA § 203(a)(2)(A), 8 U.S.C. § 1153(a)(2)(A).

- F-2B: unmarried adult children of lawful permanent residents;[99]
- F-3: married adult children of U.S. citizens;[100] and
- F-4: brothers and sisters of adult U.S. citizens.[101]

B. The Child Status Protection Act

The CSPA of 2000, signed into law, effective on August 6, 2002, amended the INA by redefining the age of a foreign national "child" for purposes of immigration classification.[102] The CSPA permits an applicant for certain immigration benefits to retain classification as a "child" even if he or she has aged-out, by reaching the age of twenty-one.[103] The purpose of the Act was to remedy the age-out issue faced by many foreign families who wait the prescribed period of time to receive immigrant visas legally, but who are faced with devastating family separation due to the aging-out of their children by the time an immigrant benefit becomes available.

As explained by the United States Court of Appeals for the Ninth Circuit:

> Congress's goal in enacting the Child Status Protection Act was to address the "enormous backlog of adjustment of status (to permanent residence) applications" which had developed at the INS. The House Judiciary Committee, in recommending passage of the bill, noted that, at the time, the backlog of unprocessed vias [sic] applications was close to one million. Because of delays of up to three years, approximately one thousand of the applications reviewed each year by the agency were for individuals who had aged-out of the relevant visa category since the time they had filed their petitions. Congress stated that the purpose of the Child Status Protection Act was to "address[] the predicament of these aliens, who through no fault of their own, lose the opportunity to obtain [a] . . . visa."[104]

While the CSPA does offer hope and family unity in many

[99] INA § 203(a)(2)(B), 8 U.S.C. § 1153(a)(2)(B).

[100] INA § 203(a)(3), 8 U.S.C. § 1153(a)(3).

[101] INA § 203(a)(4), 8 U.S.C. § 1153(a)(4).

[102] Pub. L. No. 107-208, sec. 4, § 208(b)(3), 116 Stat. 927, 928–29 (2002).

[103] H.R. REP. NO. 107-45, at 2 (2001), *reprinted in* 2002 U.S.C.C.A.N. 640, 640–41.

[104] Padash v. INS, 358 F.3d 1161, 1172–73 (9th Cir. 2004) (quoting H.R. REP. NO. 107-45, at 2, *reprinted in* 2002 U.S.C.C.A.N. 640, 641).

cases, it has very specific and limited situations in which the CSPA age determination will actually permit a child to remain a "child" for immigration purposes.[105]

1. CSPA Eligibility

Pursuant to enactment of the CSPA, INA § 203(h)(1)[106] provides rules for determining whether certain foreign nationals are "children," as follows:

> (1) In general
>
> For purposes of subsections (a)(2)(A) and (d) . . . a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) . . . shall be made using—
>
> (A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or in the case of subsection (d) . . . the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by
>
> (B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.[107]

Section 203(h) provides a three-step analysis for determining CSPA eligibility.

The first step is to determine whether a foreign national's situation is covered by the CSPA. Under section 8, the effective date of the CSPA is August 6, 2002.[108] If an immigrant petition listing the child was approved on or after August 6, 2002, and the child turned twenty-one (thereby aging-out) on or after August 6, 2002, then the CSPA applies.[109]

The second step, if CSPA applies, is two tiered. First, the child's "CSPA age" is calculated.[110] The "CSPA age" is determined on the date the child's immigrant visa—or if the child is a derivative beneficiary, the principal beneficiary's immigrant

[105] INA § 203(h)(1), 8 U.S.C. § 1153(h)(1).

[106] *Id.*

[107] *Id.*

[108] Pub. L. No. 107-208, § 8, 116 Stat. 927, 930 (2002).

[109] INA § 204(a)(1)(D)(i)(1)(III)–(IV)(iii), 8 U.S.C. § 1154(a)(1)(D)(i)(1)(III)–(IV)(iii).

[110] INA § 203(h)(1)(A)–(B), 8 U.S.C § 1153(h)(1)(A)–(B).

visa—becomes available. The child's actual age on the date the immigrant visa becomes available, minus the number of days that the immigrant visa petition was pending with USCIS,[111] is the child's "CSPA age." If the difference is under twenty-one, then the derivative foreign national remains a "child" for purposes of the permanent residence application.

The foreign national child must also have "sought to acquire the status of an alien lawfully admitted for permanent residence within one year" of the immigrant visa becoming available.[112] Interpretation of the "sought to acquire" language depends on whether the derivative applicant is overseas or in the United States. If both the principal applicant and derivative are in the United States, then each individual must file an application to adjust to permanent residence (Form I-485). If the principal is in the United States but the derivative is overseas, the principal must file an Application for Action on an Approved Application or Petition (Form I-824) in order for the derivative to receive an immigrant visa.[113]

[111] The number of days the petition was pending, from the filing date to the approval date, represents the amount of time it took USCIS to adjudicate the petition.

[112] INA § 203(h)(1)(A), 8 U.S.C. § 1153(h)(1)(A).

[113] *Id.* The "sought to acquire" language and one-year requirement of INA § 203(h)(1)(A), 8 U.S.C. § 1153(h)(1)(A) have been the subject of some debate, particularly in the situation where the derivative is overseas. The State Department has issued a cable memorandum advising that the "sought to acquire" language can only mean when the immigrant visa first becomes available for the principal applicant. Memorandum from the U.S. Dep't of State on the Child Status Protection Act to all Diplomatic and Consular Posts (Jan. 17, 2003), http://travel.state.gov/visa/laws/telegrams/telegrams_1369.html. The cable memorandum recognizes that Form I-824 can be filed at the same time as when an application to adjust to permanent residence is filed by the principal, and states that the one-year "sought to acquire" requirement *can only* be met if the I-824 is filed within the one year when the immigrant visa becomes available to the parent. *Id.* However, this advisory memorandum fails to recognize that having an immigrant visa number available to the parent does not mean that the application for permanent residence has been reviewed or approved, nor does it mean that an immigrant visa is available to the derivative. An immigrant visa cannot be available to an overseas derivative until the underlying application to adjust status of the principal is approved. AUSTIN T. FRAGOMEN, JR., ET AL., IMMIGRATION LEGISLATION HANDBOOK § 6:18 (Apr. Update 2009).

Therefore, a true reading of the CSPA language is that a derivative is entitled to CSPA benefits so long as he or she had sought to acquire permanent

If the child's "CSPA age" is not under twenty-one, then the analysis moves on to the third step, as described in INA § 203(h)(3) as follows:

> (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)[114] and (d)[115] . . . 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.[116]

The plain language of this provision addresses the aging-out of derivative beneficiaries of parents' family-sponsored and employment-based petitions. It does not restrict the definition to any one specific category. According to the statutory language, these derivative beneficiaries automatically convert to the appropriate preference category and retain their parents' original priority date, if they age-out. The BIA, with the USCIS, has limited this provision to derivatives beneficiaries of the F-2A category; the Service's interpretation was upheld by the decision of the BIA in *In re Wang*.[117]

C. Board of Immigration Appeal's Decision in In re Wang

In *In re Wang*, the BIA held that the priority date retention and automatic conversion provision of section 3 of the CSPA does not apply to a derivative beneficiary of a fourth-preference family-sponsored immigrant petition.[118]

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residence through his or her principal parent filing an I-824, so long as it was filed within one year of the approval of the principal's application for permanent residence. This interpretation recognizes the title of the Form I-824, Application for Action on an Approved Application or Petition, which cannot be approved or acted upon until the principal's permanent residence application is approved. Congress could rectify the erroneous interpretation of the CSPA both in terms of clarifying "sought to acquire" to mean when parents' I-485 applications are approved, and also to confirm language already in CSPA to allow retention of priority dates.

[114] INA § 203(a)(2)(A), 8 U.S.C. § 1153(a)(2)(A) (providing the statutory authority to issue visas to sons and daughters of lawful permanent residents).

[115] INA § 203(d), 8 U.S.C. § 1153(d) (providing the statutory authority to issue visas to derivative beneficiaries, i.e., spouses and children, to immigrate with the principal beneficiary).

[116] INA § 203(h)(3), 8 U.S.C. § 1153(h)(3) (emphasis added).

[117] 25 I. & N. Dec. 28 (B.I.A. 2009).

[118] *Id.* at 39.

The case involved an immigrant, Mr. Wang, who had obtained his permanent residency through the sponsorship of his U.S. citizen sister in the fourth-preference category.[119] The priority date for Mr. Wang's approved immigrant petition was in 1992.[120] His wife and three children were also listed in the petition. They were planning to join him in the United States upon availability of immigrant visa numbers for the F-4 preference category for China and approval of their immigrant visas.[121] However, by the time an immigrant visa number became available in February 2005, his eldest daughter had turned twenty-one, and there were no laws or exceptions at the time allowing her to be eligible for an immigrant visa as a derivative beneficiary of the approved petition.[122] In 2006, Mr. Wang filed an immigrant petition in the second-preference category for his eldest daughter, requesting a priority date from the original 1992 petition filed by the F-4 petitioner.[123] Wang claimed that the priority date retention provision of the CSPA in INA § 203(h)(3) applied, since his daughter had been listed as a derivative beneficiary on the earlier petition. Retaining this earlier priority date would enable his daughter to be immediately eligible for an immigrant visa upon approval of the new petition.

It was undisputed that Wang's daughter was considered twenty-one years or older for purposes of INA § 203(h)(1). Wang, nonetheless, argued that the new petition should retain the priority date of the 1992 F-4 petition and be automatically converted to the second-preference category (F-2B), as his daughter was an unmarried adult daughter of a permanent resident; thus, she should retain the 1992 priority date of the original fourth-preference petition. However, the BIA rejected Wang's argument finding the INA § 203(h)(3) provision to be ambiguous. The BIA held that the retention provision would apply only to original second-preference petitions filed by a permanent resident parent for a child as either a principal or derivative beneficiary, and that the automatic conversion provision would apply only where the petitioner remained the

[119] *Id.* at 29.
[120] *Id.*
[121] *See id.*
[122] *Id.*
[123] *Id.*

same on both original and new petitions.[124]

D. Analysis of Wang Decision

The BIA's decision should be overturned. It erroneously construed the provisions at issue, and in effect, interpreted INA § 203(h)(3) as if the phrase relating to subsection (d) of INA § 203 was not present. The BIA's interpretation ignores a portion of the subsection, divides the subsection so as to provide no weight to the language relating to 203(d), and rewrites the subsection as if 203(d) were not part of it. The BIA's interpretation is contradicted by the plain language, structure, history, and purpose of section 3 of the CSPA.

As set forth by the United States Court of Appeals for the Ninth Circuit, the provisions of the CSPA should be read broadly.[125] When interpreting a statute, the BIA must ascertain the intent of Congress by giving effect to its legislative will.[126] Additionally, the "general canon of [statutory] construction [is] that a rule intended to extend benefits should be 'interpreted and applied in an ameliorative fashion.'"[127] "Deference to the [agency's] interpretation of the immigration laws is only appropriate if Congress' intent is unclear."[128] If congressional intent can be ascertained "by employing 'traditional tools of statutory construction,' deference [to the agency's interpretation] is not required."[129]

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[124] *Id.* at 39.

[125] Padash v. INS, 358 F.3d 1161, 1172–74 (9th Cir. 2004) (stating "[t]he legislative objective reflects Congress's [sic] intent that the Act be construed so as to provide expansive relief to children of United States citizens and permanent residents," and that the CSPA "was intended to address the often harsh and arbitrary effects of the age-out provisions under the previously existing statute").

[126] *Id.* at 1168 (citing Hernandez v. Ashcroft, 345 F.3d 824, 838 (9th Cir. 2003)).

[127] *Id.* at 1173 (quoting *Hernandez*, 345 F.3d at 840).

[128] *Id.* at 1168 (internal quotation marks omitted) (citing Socop-Gonzalez v. INS, 272 F.3d 1176, 1187 (9th Cir. 2001); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)).

[129] *Id.*; *see* INS v. St. Cyr, 533 U.S. 289, 320 (2001) ("We only defer . . . to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous." citing *Chevron*, 467 U.S. at 843 n.9).

1. Plain Meaning of the Statute

The plain language of the statute at issue supports the position that the automatic conversion and priority date retention provisions of INA § 203(h)(3) apply to a foreign national whose age is out of eligibility for an immigrant visa as the derivative beneficiary of a fourth-preference family-sponsored petition, and on whose behalf a second-preference petition is later filed by a different relative petitioner who was the beneficiary of the earlier filing. The specified provision is not ambiguous and Congress' intent is clear.

Section 203(h)(3) of the INA specifically applies to all derivative beneficiaries who age-out under paragraph (1)[130] and not, as the BIA concluded, solely to beneficiaries of INA § 203(a)(2)(A). The structure of INA § 203(h)(3), specifically including both (a)(2)(A) and (d), clearly indicates Congress' intent to provide the mandatory conversion and automatic retention of a priority date for both subsections. The phrase "for purposes of subsection (a)(2)(A) and (d)" is used in both subsections (1) and (3) of INA § 203(h). However, the BIA overlooks the inclusion of INA § 203(d) in INA § 203(h)(3), without explanation as to why those who fall within INA § 203(d) are excluded in the BIA's interpretation for one subsection, while recognized for the other subsection, in contravention of canons of statutory construction.

If a phrase is used in different subsections of a statute, it is well-established that Congress intends the phrase to have the same meaning throughout the statute.[131] In the instant case, the BIA violated this canon when it applied subsection (1) correctly to all derivative beneficiaries under INA § 203(d), but then limited the application of subsection (3) to only derivative beneficiaries of INA § 203(a)(2)(A). The BIA imposed a limitation on subsection (3) that does not exist within the statute.[132] Had Congress intended to limit subsection (3) to derivative beneficiaries of INA § 203(a)(2)(A) only, it would have specified this restriction. In all

[130] *See* INA § 203(h)(1)(A)–(B), (h)(3), 8 U.S.C. § 1153(h)(1)(A)–(B), (h)(3) (2006).

[131] United States v. Various Slot Machs. on Guam, 658 F.2d 697, 703–4 & n.11 (9th Cir. 1981).

[132] *See* Schneider v. Chertoff, 450 F.3d 944, 956 (9th Cir. 2006) (explaining that it is impermissible for an agency to impose a new requirement that is not intended by Congress).

circumstances, Congress has set forth clear limitations.[133]

The BIA has failed to explain how its interpretation of INA § 203(h)(3) would be consistent with the plain language of the remainder of the statute. INA § 203(h)(2)(B) clearly states "with respect to an alien child who is a derivative beneficiary under subsection (d)," that all of INA § 203(h) ("this paragraph") applies to any "petition filed under section [204] . . . for classification of the alien's parent under subsection (a), (b), or (c)."[134] Therefore, all of INA § 203(h) applies to any petition filed for a foreign national child of a principal beneficiary under family-sponsored, employment-based, or diversity immigrant petitions. There is no distinction in INA § 203(h)(2)(B) between derivative beneficiaries of second-preference family-sponsored petitions, or any other preference. As set forth above, INA § 203(h)(3) specifically references INA § 203(d).

2. Erroneous Reliance on 8 C.F.R. § 204.2(a)(4)

The BIA has also failed to explain why it believes Congress meant to create only a statutory benefit for a group who previously had always had an automatic conversion and had been able to retain prior priority dates.

In examining the applicability of the statute, the BIA addresses the regulations at 8 C.F.R. § 204.2(a)(4)[135] which have been in

[133] *See, e.g.*, INA § 201(b)(1)(A), 8 U.S.C. § 1151(b)(1)(A) (limiting this section to certain categories of special immigrants); INA § 201(b)(2)(A)(ii), 8 U.S.C. § 1151(b)(2)(A)(ii) (limiting this section to individuals "admitted under 211(a)"); INA § 203(d), 8 U.S.C. § 1153(d) (limiting this section to certain definitions of the term "child").

[134] INA § 203(h)(2)(B), 8 U.S.C. § 1153(h)(2)(B).

[135] 8 CFR § 204.2(a)(4) (2009) provides in pertinent part:

> A child accompanying or following to join a principal alien under section 203(a)(2) of the Act may be included in the principal alien's second preference visa petition. The child will be accorded second preference classification and the same priority date as the principal alien. However, if the child reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required. In such a case, the original priority date will be retained if the subsequent petition is filed by the same petitioner. Such retention of priority date will be accorded only to a son or daughter previously eligible as a derivative beneficiary under a second preference spousal petition.

effect since 1987.[136] The BIA notes that the retention provision of 8 C.F.R. § 204.2(a)(4) is limited to a lawful permanent resident's son or daughter who was previously eligible as a beneficiary under a second-preference spousal petition filed by that same lawful permanent resident.[137] Relying on 8 C.F.R. § 204.2(a)(4), the BIA found that the petitioner must remain the same for the automatic conversion provision to apply.[138] However, the regulation was in existence at the time that INA § 203(h) was enacted. There is no reason why Congress would have addressed only this situation in a new statute where a prior regulation was already in place providing relief for those derivative children of a second-preference beneficiary spouse of a permanent resident.

3. Lack of Same Petitioner Requirement

The BIA erroneously concludes that in constructing the statute, Congress believed automatic conversions only operate when the petitioner remains the same.

In its decision, the BIA referenced various automatic conversion regulations and concluded that when Congress enacted the CSPA, they were aware that conversions only operate where the petitioner remains the same.[139] This is incorrect. The BIA failed to consider many other sections of immigration law permitting conversion and retention of a priority date where the petitioner does not remain the same. One example is contained in 8 C.F.R. § 204.5(e), which states:

> A petition approved on behalf of an alien under sections 203(b) (1), (2), or (3) of the Act accords the alien the priority date of the approved petition for any subsequently filed petition for any classification under sections 203(b) (1), (2), or (3) of the Act for which the alien may qualify. In the event that the alien is the beneficiary of multiple petitions under sections 203(b) (1), (2), or (3) of the Act, the alien shall be entitled to the earliest priority date. A petition revoked under sections 204(e) or 205 of the Act will not confer a priority date, nor will any priority date be established as a result of a denied petition. A priority date is not

[136] *Id.*; *see In re* Wang, 25 I. & N. Dec. 28, 34 (B.I.A. 2009).

[137] *See id.* at 34.

[138] *See id.* at 35.

[139] *Id.* at 34.

transferable to another alien.[140]

This provision allows an employer to petition for a person in the EB-1, EB-2, or EB-3 categories. If the person changes employment after the I-140 immigrant petition is approved, then a new employer may sponsor the person in the same or a different category. Once the second I-140 is approved, the person can apply for permanent residence by retaining the priority date of the initial immigrant petition.[141] Numerous other examples can be found throughout the INA.[142] In all of these circumstances, the petitioners do not remain the same.

Therefore, federal regulations permit individuals to change jobs, preference categories, and petitioners while retaining the original priority date. The automatic conversion clause in the CSPA is not the only law that allows a person to retain the priority date of a previous petition where the new petition is filed by a different petitioner. The BIA's decision is flawed as it fails to consider other regulations where retention of a priority date is permitted despite a subsequent petition involving a new petitioner. The BIA's interpretation is inconsistent with the statutory and regulatory scheme, and incorrectly concludes that Congress intended for automatic conversion to apply only for

[140] 8 C.F.R. § 204.5(e).

[141] For example, a person who receives an I-140 petition approval in the EB-3 category from employer/petitioner number one can change employment and receive an approved I-140 in the EB-2 category from employer/petitioner number two, and still retain the original priority date from employer/petitioner number one's petition. He or she can adjust status in the EB-2 category using the initial priority date of the EB-3 I-140 approval, which was filed by a different petitioner but on behalf of the same beneficiary.

[142] The USA PATRIOT Act provides another example where Congress provided for retention of a priority date for use in a subsequent petition by a different petitioner. Section 421(c) of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 357 (2001), provides that where a family-sponsored immigrant petition was revoked or terminated due to specified terrorist activity, the beneficiary can file a new "self-petition" while retaining the priority date of the family member's earlier petition. Additionally, a non-citizen physician working in a medically underserved area who changes jobs may retain the priority date of the prior employer's petition for purposes of the new employer's petition. 8 C.F.R. § 204.12(f)(1). Another regulation allows transfer of priority date of petition filed by an abusive spouse or parent to a new petition. *See* 8 C.F.R § 204.2(h)(2); *see also* Brief of the American Immigration Law Foundation (AILF) and the American Immigration Lawyers Association (AILA) as Amici Curiae Supporting Plaintiffs, Costelo v. Chertoff, No. SACV 08-688-JVS-SH, 2009 WL 2223006 (C.D. Cal. 2009).

petitions filed by the same petitioners.

4. Unexplained Rejection of Decision in *In re Garcia*

The BIA rejects its prior unpublished decision in *In re Garcia*,[143] without explanation or analysis, despite its applicability to *In re Wang*. In a footnote, the BIA briefly addressed its prior unpublished decision in *Garcia*, which supports the position of *Wang* regarding the applicability of INA § 203(h)(3).[144] The BIA rejects the decision, but fails to explain why its analysis in *Garcia* was erroneous.

In *Garcia*, the BIA addressed a very similar situation to *Wang*. Garcia was a derivative beneficiary of a fourth-preference family-sponsored petition (F-4), filed by her aunt on behalf of her mother in 1983.[145] Garcia was nine years old at the time.[146] However, a visa number did not become available until she was twenty-two years old.[147] Subsequently, her mother filed a second-preference (F-2B) petition on Garcia's behalf.[148] Garcia argued that she retained her mother's original 1983 priority date for purposes of establishing her eligibility in the second-preference category.

The BIA addressed whether Garcia was eligible to apply for permanent residence under INA § 203(h)(1). Because Garcia's immigrant visa number became available when she was twenty-two years old and the petition was approved on the day it was filed, she was twenty-two for CSPA age purposes and no longer could be considered a child.[149] The BIA next turned to the question of whether a visa was immediately available to Garcia by operation of the automatic conversion provision at INA § 203(h)(3). The BIA held that "where . . . classified as a *derivative* beneficiary of the original petition, the 'appropriate category' for purposes of section 203(h)(3) is that which applies to the 'aged-out' derivative vis-a-vis the *principal beneficiary* of the original petition."[150] Thus, the F-2B category was the "appropriate

[143] No. A79 001 587, 2006 WL 2183654 (B.I.A. June 16, 2006).
[144] *In re* Wang, 25 I. & N. Dec. 28, 33 n.7 (B.I.A. 2009).
[145] *Garcia*, 2006 WL 2183654.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*

category" to which Garcia's petition was converted and respondent retained the 1983 priority date of the original F-4 petition, without concern for the fact that the subsequent petitioner (Garcia's mother) was different from the original petitioner (Garcia's aunt).[151] The same holds true in the *Wang* case.

The BIA's prior, unpublished decision in *Garcia* is consistent with the plain language and intent of the statute. INA § 203(h)(3) also applies to the petition at issue in the *Wang* case, the automatic conversion and priority date retention provisions should apply without concern as to whether the petitioner remains the same.

5. Derivative Beneficiaries Would Not "Jump Ahead"

The BIA misstates that the derivative beneficiaries in these CSPA cases would jump ahead of others if the interpretation allows for automatic conversion and priority date retention. In its decision in *Wang,* the BIA misstated the effect of the proper interpretation of INA § 203(h)(3). The BIA believed that it would be unfair for the derivative beneficiary, or someone in her position, to jump ahead of thousands of other foreign nationals patiently awaiting consideration.[152] Their contention is incorrect and also conflicts with the plain language of the statute and Congressional intent. The derivative beneficiary has already been waiting since 1992. She would not be jumping ahead of others who have waited for a longer time. She is attempting to save her place in line and avoid having to go to the back of another long line.

Although she cannot take advantage of INA § 203(h)(1), she falls under INA § 203(h)(3) and her subsequent petition is automatically converted and "shall" be given the original 1992 priority date. Just as Congress included INA § 203(d) in INA § 203(h)(3) to refer specifically to derivative beneficiaries, Congress also used the word "shall" intentionally to indicate that there is no discretion for losing the priority date already obtained for the family.

[151] *See id.*

[152] *In re* Wang, 25 I. & N. Dec. 28, 37–38 (B.I.A. 2009).

6. Legislative History[153]

In its decision, the BIA also improperly relied on irrelevant legislative history. There is no legislative history of the automatic conversion clause. The discussion of legislative history is taken from the 2001 House Report and from individual members of the House of Representatives.[154] The automatic conversion clause was added in 2001.[155] There was no further legislative history cited by the BIA to evidence any intent concerning the automatic conversion clause.[156]

It is even more appropriate to rest with the plain meaning of the language, as there is no ambiguity to the inclusion of subsection (d) in INA § 203(h)(3), and there is no legislative history pertaining to the automatic conversion clause upon which to oppose or contradict the plain language written directly in the statute.

7. Conclusion

For the reasons set forth above, the BIA's decision in *Wang* should be overturned. Its decision was not consistent with the plain language, structure, history, and purpose of section 3 of the CSPA. The focus should be on the derivative beneficiary's relationship with the original beneficiary, not on the original petitioner and the derivative beneficiary. The case directly impacts thousands of similarly situated individuals who are separated from their families as a result of USCIS' erroneous interpretation of INA § 203(h)(3). There are currently several lawsuits pending in federal court regarding the INA § 203(h)(3) issue raised by *Wang*, including a class action in the United States District Court for the Central District of California, *Costelo v. Chertoff*,[157] which was certified on July 16, 2009.[158]

[153] This section was adapted from a petition authored by Scott Bratton in *In re Wang*. Motion to Reconsider and Request for En Banc Consideration at 14, *In re* Wang, 25 I. & N. Dec. 28 (B.I.A. 2009).

[154] *Wang*, 25 I. & N. Dec. at 37–38 (citing 148 CONG. REC. H4989 (2002); 147 CONG. REC. H2901 (2001)).

[155] *Id.*

[156] *See generally id.*

[157] No. SACV 08-688 JVS (SHx), 2009 WL 2223006 (C.D.Cal. July 16, 2009).

[158] *Id.* The certified class has been defined as:

III. NEGATIVE EFFECTS OF THE REAL ID ACT: MAKING IT HARDER FOR LEGITIMATE ASYLUM SEEKERS TO BE GRANTED RELIEF DUE TO HEIGHTENED STANDARDS

The REAL ID Act was enacted on May 11, 2005[159] in part to improve national security in the wake of the September 11th terrorist attacks.[160] The REAL ID Act amended the INA, resulting in significant changes in the way asylum, withholding of removal, and CAT claims are adjudicated. This section of the article will analyze several INA provisions and changes that make it harder for legitimate asylum seekers to be granted relief.

A. Asylum Prior to the REAL ID Act

The INA provides that an applicant can demonstrate eligibility for asylum by showing that he or she was a "refugee."[161] The applicant is required to demonstrate that he or she was unwilling or unable to return to his or her country because of persecution or a well-founded fear of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion."[162]

Prior to the REAL ID Act, the BIA stated that "an applicant

> Aliens who became lawful permanent residents as primary beneficiaries of third- and fourth-preference visa petitions listing their children as derivative beneficiaries, and who subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters, for whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to § 203(h)(3).

Id. at *9; *see supra* note 91 and accompanying text.

[159] Pub. L. No. 109-13, 119 Stat. 302.

[160] MICHAEL JOHN GARCIA ET. AL., CONGRESSIONAL RESEARCH SERV., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 1–3 (2005), http://fpc.state.gov/documents/organization/47141.pdf.

[161] INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006). Defining "refugee" as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

[162] *Id.*; *In re* Mogharrabi, 19 I. & N. Dec. 439, 440 (B.I.A. 1987).

does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor' where different reasons for actions are possible."[163] Recognizing that "[p]ersecutors may have differing motives for engaging in acts of persecution," the BIA had indicated that an applicant for asylum need not show "conclusively" that the persecution was, in fact, motivated on account of one of the five grounds protected under the Act.[164] Instead, the BIA has stated that an applicant for asylum must produce "direct or circumstantial [evidence], from which it is reasonable to believe that the harm was or would be motivated in part by an actual or imputed protected ground."[165]

B. After the Rearing and Empowering America for Longevity Against Acts of International Destruction Act

1. Establishment of Eligibility for Asylum

Section 101(a)(3)[166] of the REAL ID Act amended the conditions for granting asylum, in INA § 208(b)(1)(B)(i), as follows:

> The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A). To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion *was or will be at least one central reason* for persecuting the applicant.[167]

This amendment to the INA clarifies that foreign nationals seeking asylum bear the burden of proving their eligibility. Those seeking asylum must also prove that harm on one of the protected grounds is "at least one central reason" for the persecution.[168] The established harm "cannot be merely

[163] *In re* J--- B--- N--- & S--- M---, 24 I. & N. Dec. 208, 211 (B.I.A. 2007) (quoting *In re* Fuentes, 19 I. & N. Dec. 658, 662 (B.I.A. 1988)).

[164] *Id.* (quoting *In re* S--- P---, 21 I. & N. Dec. 486, 489 (B.I.A. 1996)).

[165] *Id.* (quoting *S--- P---*, 21 I. & N. Dec. at 494).

[166] According to REAL ID Act § 101(h)(2), the amendments made by § 101(a)(3), (b), (c), and (d) apply to applications for asylum, withholding, or other relief from removal made on or after May 11, 2005. Pub. L. No. 109-13, § 101(h)(2), 119 Stat. 302, 305.

[167] INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2006) (emphasis added).

[168] *Id.*

'incidental or tangential to the persecutor's motivation.'"[169]

In examining the history behind the REAL ID Act amendments, the BIA in *In re J--- B--- N--- & S--- M---* determined that "incidental" reflected Congress' intent that "where a protected ground is only subordinate to another (nonprotected) reason for the persecution, an applicant is ineligible for asylum."[170] Likewise, the use of "tangential" indicated that a claimant who "raises a protected ground as only a superficial part of the overall claim will likewise be ineligible for asylum."[171]

The amendment to INA § 208(b)(1)(B)(i) changed the law in the United States Court of Appeals for the Ninth Circuit, which had established a lower nexus requirement between the harm that must be proven and the persecution endured. Specifically, "[p]ersecutory conduct may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied."[172]

The heightened standard imposed by the REAL ID Act continues to allow for "mixed motive" situations, "where there is more than one motive for mistreatment, as long as at least one central reason for the mistreatment is on account" of one of the protected grounds in INA § 101(a)(42)(A).[173]

2. Credibility Determination

A bigger issue is that, as a result of the amendments to the INA, courts must now consider the totality of the circumstances in determining whether or not applicants for asylum, withholding of removal, or CAT relief are credible.[174]

The REAL ID Act lists the following factors for a trier of fact's

[169] *J--- B--- N---*, 24 I. & N. Dec. at 213 (B.I.A. 2007) (quoting Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,592 (Dec. 7, 2000)) (citing H.R. REP. NO. 109-72, at 163 (2005)).

[170] *Id.*

[171] *Id.*

[172] Borja v. INS, 175 F.3d 732, 736 (9th Cir. 1999) (citing Singh v. Ilchert, 63 F.3d 1501, 1509 (9th Cir. 1995)).

[173] H.R. REP. NO. 109-72, at 165; *see J--- B--- N---*, 24 I. & N. Dec. at 212 ("Congress purposely did not require that the protected ground be *the* central reason for the actions of the persecutors.").

[174] *See* INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2006); *see also* INA § 240(c)(4)(C), 8 U.S.C. § 1229a(c)(4)(C).

credibility determination:

> 1. The totality of the circumstances, and all relevant factors;
> 2. The demeanor, candor, or responsiveness of the applicant or witness;
> 3. The inherent plausibility of the applicant's or witness's account;
> 4. The consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions);
> 5. Any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.[175]

"There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal."[176]

This amendment to the INA created a huge hurdle for asylum seekers, in that adjudicators can now base adverse credibility on testimony and matters that are not relevant and that do not go to the heart of the asylum claim.[177] Prior case law dictated that any inconsistencies had to go to the "heart of the claim" to result in an adverse credibility finding.[178] The United States Court of Appeals for the Ninth Circuit had previously held that "[u]ntrue statements by themselves are not reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case."[179] For example, an adjudicator now could deny a legitimate application for asylum if any of the applicant's testimony is

[175] Pub. L. No. 109-13, sec. 101(d)(2), § 240(c), 119 Stat. 302, 304–05; INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii); INA § 240(c)(4)(C), 8 U.S.C. § 1229a(c)(4)(C).

[176] INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii).

[177] *In re* J-Y-C-, 24 I. & N. Dec. 260, 265 (B.I.A. 2007).

[178] *Id.* ("While *some* of these inconsistencies may not relate to the 'heart of the respondent's claim,' as required by established precedent of the United States Court of Appeals for the Ninth Circuit, the REAL ID Act no longer requires the trier of fact to find a nexus between inconsistencies and the 'heart of the claim.'").

[179] Ceballos-Castillo v. INS, 904 F.2d 519, 520 (9th Cir. 1990) (quoting Turcios v. INS, 821 F.2d 1396, 1400 (9th Cir. 1987)).

inconsistent with his or her application. Small inconsistencies should not be used to discredit a valid asylum claim and provide reasons for adverse findings of credibility.

3. Sustaining the Applicant's Burden of Proof

The REAL ID Act amends the INA to add language providing an adjudicator with the right to demand that an applicant for asylum, withholding of removal, or CAT produce evidence to corroborate otherwise credible testimony. The applicant must comply unless he or she does not have evidence and cannot reasonably obtain it. The amended sections of the INA are as follows:

> The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.[180]

In amending the INA, Congress intended to "[c]odify[] the BIA's corroboration standards."[181] The BIA has found that where an adjudicator requires corroborative evidence, the "absence of such corroborating evidence can lead to a finding that an applicant has failed to meet [his or her] burden of proof."[182]

These corroboration requirements are detrimental to applicants with legitimate asylum claims because it is often difficult for applicants to obtain evidence, and adjudicators often require corroboration in such impossible situations. For example, it is often difficult to obtain medical, police, or detention records (if any)—documents from a foreign country in which the applicant has to rely on others—especially if those people must risk their

[180] REAL ID Act of 2005, Pub. L. No. 109-13, sec. 101(a)(3), § 208(b)(1), 119 Stat. 303.

[181] *J-Y-C-*, 24 I. & N. Dec. at 264 (quoting H.R. REP. NO. 109-72, at 165–66 (2005)).

[182] *Id.* (quoting *In re* S-M-J-, 21 I. & N. Dec. 722, 725–26 (B.I.A. 1997)).

own well-being to send correspondence through the mail in a foreign country that monitors the mail.

4. Conclusion

The law should be changed to eliminate the foregoing provisions of the REAL ID Act. They are unduly burdensome for asylum seekers and make it much more difficult to meet their burden of proof. The provisions fail to recognize the practical realities in preparing and presenting an asylum claim, therefore, the provisions should be eliminated.

IV. RECENT AMENDMENTS TO VOLUNTARY DEPARTURE RULES

A. Voluntary Departure

Voluntary departure, if granted, allows certain foreign nationals with travel documents to leave the United States willingly at their own expense, in lieu of being subject to removal proceedings under INA § 240B or before the completion of proceedings.[183] If granted, the maximum length prior to departure is limited to 120 days, which begins to run on the date of the order.[184]

Voluntary departure imparts benefits for both the government and the foreign national. From the government's standpoint, the foreign national's departure process is expedited, and the government avoids the expense of deportation—including detention, procurement of necessary travel documents, assigning and paying guards to accompany the departure, plus all litigation costs of removal proceedings.[185] The foreign national avoids extended detention, ankle bracelets, and supervision orders (while the Government completes travel arrangements), can choose when to depart, the destination country, and voluntary departure makes the process of readmission to the United States easier by avoiding some consequences of deportation.[186]

A foreign national who has been removed or deported from the United States is "ineligible for readmission for a period of 5, 10,

[183] INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1) (2006).
[184] INA § 240B(a)(2)(A), 8 U.S.C. § 1229c(a)(2)(A).
[185] *See* Dada v. Mukasey, 128 S. Ct. 2307, 2314 (2008).
[186] *Id.*

or 20 years, depending upon the circumstances of removal."[187]

A foreign national is ineligible for voluntary departure if he or she is deportable for conviction of an aggravated felony,[188] or for terrorist activities,[189] or if he or she was previously granted voluntary departure after entering the United States illegally.[190]

1. Voluntary Departure at Conclusion of Proceedings

A foreign national at the conclusion of removal proceedings may be granted a voluntary departure of up to sixty days[191] if he or she meets certain additional requirements pursuant to INA § 240B(b)(1), which states in pertinent part:

> [I]f, at the conclusion of a proceeding under section 240, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that—
>
> (A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 239(a);
>
> (B) the alien is, and has been, a person of good moral character

[187] *Id.*; *see* INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i) ("Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 of this title initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal . . .) is inadmissible."); *see also* INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii):

> Any alien not described in clause (i) who—
>
> (I) has been ordered removed under section 240 or any other provision of law, or
>
> (II) departed the United States while an order of removal was outstanding,
>
> and who seeks admission within 10 years of the date of such alien's departure or removal . . . is inadmissible.

[188] INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

[189] INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B) ("Any alien who is described in subparagraph (B) or (F) of section 212(a)(3) is deportable."); INA § 240B(c), 8 U.S.C. § 1229c(c) ("The Attorney General shall not permit an alien to depart voluntarily under this section if the alien was previously permitted to so depart after having been found inadmissible under section 212(a)(6)(A).").

[190] *See* INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) ("An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.")

[191] INA § 240B(b)(2), 8 U.S.C. § 1229c(b)(2).

> for at least 5 years immediately preceding the alien's application for voluntary departure;
> (C) the alien is not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4); and
> (D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.[192]

Furthermore, a foreign national permitted to voluntarily depart at the conclusion of proceedings is required to post a bond, which is surrendered upon proof that he or she has left the United States timely.[193]

2. Consequences of Failure to Depart Timely

If a foreign national has been granted voluntary departure, and fails to depart timely, then he or she is subject to a civil penalty of $1,000 to $5,000 and will face a ten-year bar[194] for cancellation of removal,[195] adjustment of status to permanent residence,[196] change of nonimmigrant status,[197] and permanent residence pursuant to the "registry" provisions of INA § 240.[198]

B. Recent Supreme Court Decision in Dada v. Mukasey

In *Dada v. Mukasey*,[199] the Supreme Court of the United States addressed the situation in which a foreign national who had been ordered removed had to choose between pursuit of a motion to reopen the removal proceedings, or departing the United States before expiration of the voluntary departure period. In *Dada*, an immigration judge found the petitioner removable, and granted his request for voluntary departure.[200] The BIA affirmed, and ordered the petitioner to depart the United States within thirty days.[201] The petitioner sought to withdraw his voluntary

[192] INA § 240B(b)(1), 8 U.S.C. § 1229c(b)(1).
[193] INA § 240B(b)(3), 8 U.S.C. § 1229c(b)(3).
[194] INA § 240B(d), 8 U.S.C. § 1229c(d).
[195] INA § 240A, 8 U.S.C. § 1229b.
[196] INA § 245, 8 U.S.C. § 1255.
[197] INA § 248, 8 U.S.C. § 1258.
[198] INA § 249, 8 U.S.C. § 1259; *see* 8 C.F.R. § 1240.26 (2009).
[199] 128 S. Ct. 2307, 2310 (2008).
[200] *Id.* at 2311.
[201] *Id.*

departure request and filed a motion to reopen removal proceedings.[202] After the departure period had expired, the BIA denied the petitioner's request, and the United States Court of Appeals for the Fifth Circuit affirmed.[203]

The Supreme Court found that the filing of a motion to reopen his or her removal proceedings after the removal order was at odds with the requirement to depart the United States pursuant to a grant of voluntary departure.[204] The foreign national could either remain in the country to pursue the motion to reopen, but incur penalties for overstaying the voluntary departure period, or he or she could depart, but abandon the motion to reopen.[205] The Court concluded that a foreign national shall be permitted to withdraw his or her motion for voluntary departure, as long as the request is made before the expiration of the departure period.[206]

1. New Regulations of the Executive Office for Immigration Review

After the Supreme Court's decision in *Dada*, the EOIR[207] issued new voluntary departure rules, effective as of January 20, 2009,[208] to address the *Dada* decision and the relationships between

[202] *Id.*

[203] *Id.* at 2312.

[204] *Id.* at 2311.

[205] *Id.*

[206] *Id.* at 2320.

[207] U.S. Department of Justice, Executive Office for Immigration Review Background Information, http://www.usdoj.gov/eoir/background.htm (last visited Dec. 23, 2009) ("The Executive Office for Immigration Review (EOIR) was created on January 9, 1983, through an internal Department of Justice (DOJ) reorganization which combined the Board of Immigration Appeals (BIA or Board) with the Immigration Judge function previously performed by the former Immigration and Naturalization Service (INS) (now part of the Department of Homeland Security).").

[208] The EOIR's new rules apply prospectively. Voluntary Departure: Effect of a Motion To Reopen or Reconsider or a Petition for Review, 73 Fed. Reg. 76,927, 76,936 (Dec. 18, 2008) (to be codified at 8 C.F.R. pts. 1240 & 1241). The automatic termination provisions will not apply to motions pending on the effective date of the rule. *Id.* Those not covered by the new rule, including those with motions pending on the effective date, may withdraw their request for voluntary departure pursuant to the Supreme Court's decision in *Dada*. *Id.*; *see Dada*, 128 S. Ct. at 2310.

voluntary departure, motions to reopen and reconsider, and petitions for review in the circuit courts.[209]

2. If a Motion to Reopen or Reconsider is Filed

The EOIR's new rules do not adopt the Supreme Court's approach in *Dada* to permit withdrawal of voluntary departure requests.[210] Instead, at the filing of a motion to reopen or reconsider during the voluntary departure period, a voluntary departure grant automatically terminates, and the alternate order of removal takes effect immediately.[211] The penalties for failing to depart voluntarily under INA § 240B(d) would not apply.[212]

Applicable motions include those filed at Immigration Court or the BIA. An immigration judge or the BIA may reinstate a grant of voluntary departure, if the case was reopened for a reason other than making an application for voluntary departure, and if reopening was granted prior to the expiration of the original voluntary departure period.[213] The total period of any extension cannot exceed the 120-day or 60-day period set in INA § 240B.[214]

3. If a Petition for Review is Filed

Under the EOIR's new rules, the voluntary departure grant automatically terminates upon the filing of a federal appeal[215] or other judicial challenge to the final order of removal, and the alternate order of removal takes effect.[216] However, a person

[209] *See* 8 C.F.R. § 1240.26 (2009); 73 Fed. Reg. at 76,927. Note that final orders of removal issued from the BIA can only be appealed and reviewed by the circuit courts, not district courts, as codified in the REAL ID Act. INA § 242(b)(2), 8 U.S.C. § 1252(b)(2) (2006). District courts are devoid of jurisdiction to hear discretionary relief cases issued by Immigration Judges or USCIS. *See id.*

[210] 73 Fed. Reg. at 76,930.

[211] 8 C.F.R. § 1240.26(b)(3)(iii).

[212] 73 Fed. Reg. at 76,928; *see* INA § 240B(d)(1), 8 U.S.C. § 1229c(d)(1); *see also* 8 C.F.R. § 1240.26(b)(3)(iii).

[213] 8 C.F.R. § 1240.26(h).

[214] *Id.*; INA § 240(a)(2)(A), 8 U.S.C. § 1229c(a)(2)(A); INA § 240(b)(2), 8 U.S.C. § 1229c(b)(2).

[215] 8 C.F.R. § 1240.26(e)(1).

[216] § 1240.26(i).

granted voluntary departure is not deemed to have been removed if he or she departs within thirty days of filing the petition for review, provides the DHS with evidence of departure, and remains outside the United States.[217]

As with the filing of a motion to reopen or reconsider during the departure period, a foreign national who files a petition for review and remains in the United States while the petition is pending, will not be penalized for failing to depart.[218]

4. Bond Requirement

According to the new EOIR rule, if an individual fails to post the required voluntary departure bond within five days[219] of the immigration judge's order, then the alternate order of removal goes into effect.[220] An individual must still depart even if he or she fails to post the required bond and will be subject to the penalties under INA § 240B(d).[221]

A person granted voluntary departure is not deemed to have been removed if he or she departs within twenty-five days of the failure to post bond, provides DHS with evidence of departure, and he or she remains outside the United States.[222]

5. Where the New Executive Office for Immigration Review Rules Fall Short

The new EOIR rules do not change the 120-day maximum period for which voluntary departure can be granted (or the sixty-day period that can be granted at the end of proceedings).[223] No additional extensions can be granted beyond these time periods. The EOIR should extend the permissible voluntary departure periods to allow immigration judges and DHS to extend the time period of voluntary departure grants. This is because the current time period is often insufficient for an individual to wrap-up his

[217] *Id.*

[218] *Id.*

[219] § 1240.26(c)(4).

[220] § 1241.1(f).

[221] § 1240.26(c)(4).

[222] § 1240.26(c)(4)(i)–(iii).

[223] INA § 240B(a)(2)(A), 8 U.S.C. § 1229c(a)(2)(A) (2006); INA § 240B(b)(2), 8 U.S.C. § 1229c(b)(2).

or her affairs before departing the United States.

Under the prior rules, an individual who was granted voluntary departure, but subsequently had a basis to reopen his or her case, had to consider the ten-year bar implications of not departing the United States during his or her departure period.[224] Before, the failure to depart timely would result in a monetary penalty and ineligibility for adjustment of status to permanent residence, as well as other forms of relief, for a ten-year period.[225] The new EOIR rules attempt to fix the problem by automatically terminating the voluntary departure order, provided that the motion to reopen or federal appeal was filed during the departure period.[226]

An individual should not have to choose between voluntary departure and pursuing some other relief. The EOIR's new rules do not help because they do not permit an individual to pursue a federal appeal and to keep a voluntary departure grant at the same time. The new rules not only fail to follow the Supreme Court's decision in *Dada* to allow withdrawal of voluntary departure, but also provide no help in most cases that need to be litigated on the merits. The EOIR should allow for tolling of the voluntary departure period while a motion to reopen or a petition for review is pending, rather than just vacating the grant. Under the prior law, federal appellate courts could grant a stay of voluntary departure.[227] This remedy has been taken away from the judicial branch. Congress should direct the tolling of voluntary departure during any pending motion to reopen or petition for review to permit cases to be determined on the merits, rather than create a Catch-22 situation for the foreign national.

[224] INA § 240B(d)(1)(B), 8 U.S.C. § 1229c(d)(1)(B).

[225] INA § 240B(d)(1)(A)–(B), 8 U.S.C. § (d)(1)(A)–(B). For example, the BIA will deny an individual's case while he or she has an employment-based immigrant petition pending until the petition is later approved, at which point the individual files a motion to reopen the removal case. However, if the motion to reopen was not adjudicated prior to the expiration of the individual's voluntary departure period, then he or she becomes subject to the ten-year bar.

[226] 8 C.F.R. § 1240.26(e)(1).

[227] *See, e.g.*, Nwakanma v. Ashcroft, 352 F.3d 325, 327 (6th Cir. 2003).

CONCLUSION

The lack of immigrant visa numbers, the BIA's limitations on the CSPA, the burdens of the REAL ID Act on asylum seekers, and the restrictive voluntary departure regulations are not the only problematic immigration policies that require reform.

Additional issues that require the immediate attention of lawmakers include:

- The administratively evolving inclusion of misdemeanors and minor crimes in the expansive definition of aggravated felony;[228]
- The mandatory detention[229] of certain foreign nationals with criminal backgrounds, despite eligibility for relief or lack of danger to the community or flight risk;
- The lack of incentive for illegal immigrants to leave the United States if they face three-year[230] or ten-year[231] bars of admissibility back to the United States;
- The lack of separate immigrant visa numbers for nurses and other professionals of which there is a recognized shortage in the United States;[232]
- The requirement that foreign students not having immigrant intent upon entry into the United States, and therefore risk the inability to re-enter the United States if they visit their home country;[233]

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[228] *See* INA § 201(a)(43), 8 U.S.C. § 1101(a)(43) (defining "aggravated felony"); *see also* IIRIRA, Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-627–3009-628 (expanding the definition of aggravated felony).

[229] *See* INA § 236A, 8 U.S.C. § 1226a (setting forth those subject to mandatory detention).

[230] INA § 212(a)(9)(B)(i), 8 U.S.C. § 1182(a)(9)(B)(i) (stating that those who have been "unlawfully present" in the United States for more than 180 days but less than 365 days, and subsequently depart the United States, are inadmissible for the next three years).

[231] *Id.* (stating that those who have been "unlawfully present" in the United States for more than 365 days and subsequently depart the United States are inadmissible for the next ten years).

[232] *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., IMPROVING THE PROCESSING OF "SCHEDULE A" NURSE VISAS 1 (2008), http://www.dhs.gov/xlibrary/assets/cisomb_recommendation_36.pdf.

[233] *See* INA § 214(b), 8 U.S.C. § 1184(b) (explaining that applicants for certain nonimmigrant visas may be refused visas on grounds that they have not rebutted the presumption of immigrant intent); U.S. Department of State, Students and Immigrant Intent, http://travel.state.gov/visa/laws/telegrams/

- The burdensome "exceptional and extremely unusual" requirement for cancellation of removal relief;[234] and
- The inability for foreign nationals with material misrepresentation findings to file for waivers of inadmissibility if they have U.S. citizen children born in the United States.[235]

Immigration reform has been touted as a priority for the current administration, and we expect a comprehensive review of immigration law and policy in the coming years.

telegrams_2734.html (last visited Dec. 23, 2009).

[234] *See* INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D).

[235] INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C).