The Green Card

Welcome to the Newsletter of the FBA's Immigration Law Section

H. Raymond Fasano, Section Chair

Message From The Section Chair: The Critics We Face When We Serve the Immigration Public

Immigration law is all over the news now. Unfortunately, most of the news we hear is negative. Immigration judges, government lawyers and lawyers representing aliens often have a thankless job that is misunderstood by most of the public. Groups that are pro-immigration seemed to only want blanket amnesty that will create a give away with no opportunity to earn lawful status. They view any regulation that would require eligibility requirements to be reactionary. Then on the other end of the spectrum we have conservative think tanks, such as the Center for Immigration Studies that attack any provision or proposal that would seem to extend a benefit to deserving non-citizens. I was the target of an attack from the Center for Immigration Studies that criticized an article that I penned for Interpreter Releases in January of this year. The title of my article was the subject of the attack, to wit "How to Present a Successful Non-LPR Cancellation of Removal Application when there is no Obvious Hardship." The Center for Immigration Studies, CIS, awarded me a "gold medal" for writing an article that showed "how an immigration lawyer can argue successfully that his client, who is not here legally, should be deported, even though such an act will not impose an obvious hardship on anyone." CIS obscured the actual text of my article and completely misled its followers by disseminating an intentionally malicious article that was intended to malign me and show that I put on a smoke and mirror show for my clients' benefit. Nothing could be further from the truth. My article was based on well settled and principled law that used Board of Immigration Appeals precedent to demonstrate my point.

As lawyers, we all face this criticism, whether we work for the government, decide the cases, or represent the alien. The FBA and especially the ILS gives us the opportunity within a unique forum to work together to improve the system within which we work. Our board is comprised of immigration judges, government lawyers, and private attorneys who work together to foster cooperation among the different roles that we serve in the courtroom.

I hope to see as many ILS members as possible in Memphis so we can learn together to improve what we do within our immigration system. ◆

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SECTION NEWS

Monthly Immigration Leadership Luncheons in DC

The monthly Immigration Leadership Luncheon Series hosted by the Immigration Law Section and the DC Chapter, successfully held its third monthly luncheon in Washington, D.C., on April 17, 2013, with more than 50 people in attendance. The speaker was Jeffrey Gorsky, chief of the Legal Advisory Opinion Section , Visa Section, U.S. Department of State.

On May 15th, Maria Odom, the Citizenship and Immigration Services ombudsman was the speaker. All luncheons cost $15 for ILS and DC Chapter members. The events begin at 11:30am and end promptly at 1:30pm. Please register online at baimmiglunchmay2013.eventbrite.com. The Immigration Law Section is interested in co-sponsoring similar Immigration Leadership luncheons with local chapters nationwide. The luncheons would focus on inviting EOIR, USCIS, ICE and CBP leaders and local district chief counsel as speakers at these luncheons. All interested chapters should contact the ILS chair, H. Raymond Fasano, at hrfasano@ymflaw.com or the luncheon organizer, Prakash Khatri, at prakash@khatrilaw.com for more information on setting up these meetings.

Prakash Khatri, Jeff Gorsky and Larry Burman at the luncheon

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For more information about the section, please visit www.fedbar.org/Sections/Immigration-Law-Section.aspx.

Immigration Reform for Asylum Seekers

JASON DZUBOW

Now that comprehensive immigration reform is finally on the table, I thought I would discuss my own "wish list" for reforming the asylum and humanitarian relief system:

One Year Filing Deadline: The current law requires aliens to file for asylum within one year of their arrival in the United States. There are two exceptions to this rule: (1) changed circumstances (i.e., it was safe to return home when the alien arrived here, but something changed, and it is no longer safe to return home); and (2) extraordinary circumstances (i.e., something prevented the alien from filing for asylum–maybe she was a child and did not have the capacity to file, or maybe she was suffering from post traumatic stress disorder). Aliens who cannot demonstrate an exception to the rule will be denied asylum if they file more than one year after they arrive in the U.S.

Supposedly the original purpose of the one-year rule was to prevent fraud. However, the real-life effect of the rule is to block legitimate refugees from obtaining asylum. One group in particular that has been negatively affected are LGBT asylum seekers. In many cases such people are not "out" when they arrive in the U.S., and it takes them time—often more than one year—to understand their sexual orientation and then decide to seek asylum. Other people harmed by the one-year rule include those who are emotionally unable to prepare their cases due to the severe traumas they suffered, people who do not know about the one-year requirement, and people who wait to seek asylum in the hope that country conditions back home will improve.

Having litigated dozens of cases where the one-year rule was a factor, I don't see how it ever prevented fraud. It is an arbitrary rule, which does nothing except block legitimate asylum seekers from obtaining relief. My number one hope for asylum reform is that the one-year rule will be eliminated.

Asylum Clock: When an alien files for asylum, DHS starts a "clock." When the clock reaches 150 days, the applicant can file for a work permit. If the applicant does anything to delay her case, the clock stops. Theoretically, when the delay ends, the clock should re-start. But thanks to ambiguous rules governing the asylum clock, that does not always happen.

Although I really can't stand the asylum clock, I suppose I recognize that it is a necessary evil. Prior to the clock, it was common for aliens to file frivolous asylum applications in order to obtain a work permit. In those days, cases took years to adjudicate, so anyone claiming asylum could work lawfully in the U.S. for years before their case was denied. The asylum clock, combined with the fact that asylum cases—at least at the asylum offices—are usually decided in a matter of months, have greatly reduced frivolous applications. Although it has helped to reduce fraud, the asylum clock is incredibly annoying.

The bottom line for me is that the presumption of the asylum clock should be in favor of keeping the clock moving. If an asylum officer or an immigration judge finds that the alien is purposefully delaying his case or that the case is frivolous, they should stop the clock. But the clock should not be stopped for legitimate delays (For example, sometimes an attorney must refuse an appointment date due to a conflict. When this happens, the clock stops. But why should the alien be penalized because the attorney is unavailable on a particular date?). My "wish" here is that the asylum clock rules will be re-written to make it easier and faster for asylum seekers to get their work permits.

Withholding of Removal and Convention Against Torture (CAT): There are two distinct categories of people who receive withholding or CAT instead of asylum. One group are people who are ineligible for asylum because they are criminals or human rights abusers. The other group are people who missed the one-year filing deadline for asylum (and receive withholding) and people who face torture in their countries, but not on account of one of the protected grounds for asylum (they receive CAT). Aliens who receive withholding or CAT receive a work permit, which must be renewed every year, but they can never become residents. Unlike asylees, they cannot petition to bring immediate family members to the U.S. and if they leave the U.S.,

RANT continued on page 28

Motions Practice #4: Know Your Limits

Hon. Paul Wickham Schmidt, *U.S. Immigration Judge, Arlington, Virginia*

A number of types of motions have limitations. Some of these, like the limitations on the time and number of motions to reopen and motions to reconsider, are statutory in origin.[1] Others, like the deadlines for filing and responding to motions, are established in the *Immigration Court Practice Manual* (*ICPM*) or by the order of the immigration judge on a case-by-case basis.[2] In either event, strict compliance with deadlines and other filing requirements insures that the immigration judge will actually be able to consider the merits of your motion. This article will describe the time and number limitations generally applicable to motions to reconsider and motions to reopen and the exceptions to those requirements.

Motions to Reconsider

Generally, only one motion can be filed to reconsider the decision of an immigration judge.[3] That motion must be filed within *30 days* of the immigration judge's final administrative order.[4]

Exceptions to Limits on Motions to Reconsider

For respondents, there are no specific statutory or regulatory exceptions to the time and number limitations on motions to reconsider. However, the immigration judge may reconsider a decision at any time on his or her own motion.[5] Such motions also are known as *sua sponte* motions. A respondent may file a motion requesting that the Immigration Judge exercise this authority.

The *ICPM* states that a respondent "may file a motion to reconsider the denial of a motion to reopen."[6] However, the respondent may *not* move to reconsider the denial of a motion to reconsider.[7]

Also, a motion to reconsider an "interim ruling" by an immigration judge, that is a ruling that precedes the entry of the final administrative decision, would not be considered a "motion to reconsider" for purposes of the time and number limitations. For example, suppose the immigration judge finds the respondent removable at a master calendar and then schedules an individual hearing on the merits of the respondent's application for relief. A motion by the respondent for the immigration judge to reconsider the ruling on removability made before the conclusion of the individual hearing would *not* exhaust the "one motion to reconsider" limit. Consequently, the respondent could still file a motion to reconsider within 30 days of the immigration judge's final administrative order in the case.

The Department of Homeland Security (DHS) is *not* subject to the time and number limitations on motions to reconsider in *removal proceedings* (which includes almost all cases currently pending before the immigration courts).[8] The DHS is subject to the limits in the now-rare "old" deportation or exclusion proceedings.[9]

Motions to Reopen

Generally, only one motion to reopen can be filed with the immigration court.[10] That motion must be filed within 90 days of the immigration judge's final administrative order.[11]

Exceptions to Limits on Motions to Reopen

The *ICPM* lists exceptions to the limits on motions to reopen.[12] These include:

- **Changed circumstances**.[13] This applies *only* to cases involving *asylum, withholding of removal under the INA, and protection under the convention against Torture (CAT)*. Also, the "changed circumstances" are limited to changes *arising in the country of removal*. Changed "personal circumstances," such as the birth of a child in the United States to a national of a country that practices coercive population control, do not fit within the exception.[14] Additionally, the fairly common situation of a respondent potentially becoming eligible for adjustment of status based on a post-hearing marriage to a U.S. citizen does not fit the exception because it neither relates to one of the covered forms of relief (asylum, withholding, CAT) nor does it involve a change arising in the country of removal.
- ***In absentia* proceedings.** An *in absentia* proceeding is one at which the respondent failed to appear. These motions to reopen are governed by their own special rules which will be the subject of a future article.[15]
- **Joint motions.**[16] These motions to reopen "are agreed upon by the parties and are jointly filed."[17] This is a powerful exception because it waives *both* the time and number limitations and is *not* limited to particular forms of relief (like, for example, the "changed circumstances" exception). A joint motion *must actually be signed* by the chief counsel or an assistant chief counsel. Merely captioning the motion as a "joint motion," serving it on the Chief Counsel's Office, or stating that you have notified the assistant chief counsel by telephone does not qualify it as a "joint" motion.
- ***Sua sponte* motions.**[18] Similar to motions to reconsider, mentioned above, an immigration judge may reopen a hearing on his or her own motion. This is also a very powerful exception because it waives *all* time and number limitations and is *not restricted* as to forms of relief. However, according to the BIA, this power should be exercised only in "exceptional situations," and should

not "be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship."[19] Therefore, a respondent asking an immigration judge (or the BIA) to exercise *sua sponte* authority should attach evidence and cogent arguments showing why an "exceptional situation" exists that would warrant reopening (or reconsideration, since the same criteria apply to both).

- **Pre-09/30/96 motions.** A motion filed prior to Sept. 30, 1996, does not count toward the one motion limit.[20]
- **Battered spouses, children, and parents.** Special rules on reopening apply to certain individuals within these categories.[21]
- **DHS motions.**[22] As with motions to reconsider, the DHS is exempt from the time and number limitations on motions to reopen except for the very rare circumstance of "old" deportation and exclusion cases.

"Equitable Tolling" of Limitations

Some circuit courts of appeals have found that the time and number limitations on motions can be "equitably tolled," that is not strictly enforced, if the respondent's failure to comply is because of ineffective assistance of counsel.[23] Outside of those circuits, however, the BIA has *not adopted* "equitable tolling" as a generally applicable rule.[24] Consequently, if considering an equitable tolling argument in connection with a late or number-barred motion, you must carefully consult the precedents applicable in your particular jurisdiction. Even in jurisdictions where equitable tolling is a viable argument, the moving party must also show "due diligence" in pursuing the claim. For example, a court has held that a respondent who waited two years before pursuing a claim of ineffective assistance of counsel had not shown "due diligence."[25]

Interplay Between Motions to Reopen and Motions to Remand

Significantly, a motion to the BIA to remand a case to the immigration judge while an appeal is pending does *not count* as a motion to reopen. A motion to reopen addressed to the BIA while an appeal is pending will be treated as a motion to remand.[26]

Summary and Conclusion

To use motions to reopen and reconsider effectively, you must be aware of and comply with the time and number limitations. If a motion will be untimely or number barred, you must fit it within an exception to the applicable limitation. There are more exceptions for motions to reopen than for motions to reconsider. The most powerful exceptions are those for joint motions with the DHS or for the exercise of *sua sponte* authority by the immigration judge. However, these exceptions must be carefully and properly invoked and meticulously documented to have a chance of succeeding. ◆

NOTE: These are my views, and they do not represent the official position of the attorney general, the Executive Office for Immigration Review, the Office of Chief Immigration Judge, the Federal Bar Association, my colleagues at the Arlington Immigration Court, or anyone else of any importance whatsoever. They also do not represent my position on any case that I decided in any capacity in the past, that is pending before me, or that might come before me in the future. They also are not legal advice and are not a substitute for reading the applicable statutes, regulations, precedents, and practice manuals. These articles are an expansion of my remarks at a D.C. Bar CLE program on Sept. 22, 2011.

Endnotes

1INA §§ 240(c)(6)(A), (B), 8 U.S.C. §§ 1229a(c)(6)(A), (B) (motions to reconsider); INA §§ 240(c)(7)(A), (C), 8 U.S.C. §§ 1229a(c)(7)(A), (C) (motions to reopen).

2*See, e.g., ICPM* § 3.1(b)(i)(A) (motions for Nondetained Master Calendars must be filed at least 15 days in advance with a 10 day response time); ICPM § 3.1(b)(i)(B) (filing deadlines for motions at Detained Master Calendars are set by the Immigration Court).

3INA § 240(c)(6)(A), 8 U.S.C. § 1229a(c)(6)(A); *ICPM* § 5.8(d).

4INA § 240(c)(6)(B), 8 U.S.C. § 1229a(c)(6)(B); *ICPM* § 5.8(c).

58 C.F.R. § 1003.23(b)(1); *ICPM* § 5.8(e)(iii).

6*ICPM* § 5.8(d).

78 C.F.R. § 1003.23(b)(2); *ICPM* § 5.8(d).

88 C.F.R. § 1003.23(b)(1); *ICPM* § 5.8(e)(ii).

98 C.F.R. § 1003.23(b)(1); *ICPM* § 5.8(e)(ii).

10INA § 240(c)(7)(A), 8 U.S.C. § 1229a(c)(7)(A); *ICPM* § 5.7(d).

11INA § 240(c)(7)(C)(i), 8 U.S.C. § 1229a(c)(7)(C)(i); *ICPM* § 5.7(c).

12*ICPM* § 5.7(e).

138 C.F.R. § 1003.23(b)(4)(i).

14*See Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007).

15*See generally ICPM* § 5.9.

168 C.F.R. §1003.23(b)(4)(iv).

17*ICPM*

188 C.F.R. § 1003.23(b)(1).

19*Matter of J-J-*, 22 I&N Dec. 976, 984 (BIA 1997).

20*ICPM* § 5.7(e)(v).

21*See* INA § 240(c)(7)(C)(iv), 8 U.S.C. § 1229a(c)(7)(C)(iv).

228 C.F.R. §1003.23(b)(1).

23*Zhao v. INS*, 452 F.3d 154 (2d Cir. 2006); *Ray v. Gonzales*, 439 F.3d 582 (9th Cir 2006). *But see Abdi v. Att'y Gen.*, 430 F.3d 1148 (5th Cir. 2005) (rejecting equitable tolling).

24*See Matter of Lei*, 22 I&N Dec. 113 (BIA 1998) (ineffective assistance of counsel is not an exception to the 180 day limit).

25*Iavorski v. INS*, 232 F.3d 124, 134-35 (2d Cir.2000).

268 C.F.R. § 1003.2(c)(4); *Board of Immigration Appeals Practice Manual* § 5.6(h).

Article

OCAHO: Precedence, or Not, of Unpublished Rulings, Decisions, and Case Law

Eileen M.G. Scofield

As a general rule, unpublished Office of the Chief Administrative Hearing Officer (OCAHO) cases **cannot** and should not be used for precedential value. *See United States v. Workrite Uniform Co. Inc.*, 5 OCAHO no. 755, 266, 271 (1995) (attached); *See also* OCAHO Vol 1., at vii (Forward) (also reproduced on OCAHO's website http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm , as shown below). As noted at OCAHO's website, administrative OCAHO decisions that may be cited, used, or relied upon as precedents in future adjudications are only those that are available electronically under the heading "Published Decisions" at the noted website. Unpublished decisions or other information sought from OCAHO should be sought via a Freedom of Information Act (FOIA) request of the EOIR's FOIA Contact.

Published decisions are selected and published at the discretion of the Office of the chief administrative hearing officer. The CAHO publishes and determines which rulings and decisions may be used as precedent pursuant to 5 U.S.C. § 5 U.S.C. section 552(a)(2). Each decision is given an OCAHO reference number for publication purposes.

As explained in *Workrite*, OCAHO follows the APA rule prohibiting the use of unpublished decisions as set forth at 5 U.S.C. § 552(a)(2). That statute provides, in pertinent part: "**A final order [or] opinion ... that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—(i) it has been indexed and either made available or published as provided by this paragraph; or (ii) the party has actual and timely notice of the terms thereof.**"

Expanding upon the APA, some courts, including the Ninth Circuit, prohibit citing to unpublished cases, except in limited circumstances. *See Workrite* at 271. OCAHO does allow citation to unpublished decisions when such an unpublished decision was issued in that particular case; i.e., OCAHO follows the "law of the case" doctrine. See *Charo's Corp. v. United States*, 5 OCAHO no. 761, 337, 339 (1995) (rev'd on other grounds); *Workrite* at 271. *Kupferberg v. Univ. of Okla. Health Scis. Ctr.*, 4 OCAHO no. 689, 884, 887 (1994) describes in a footnote a Tenth Circuit unpublished decision in which the preface noted that the case " 'is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel,' and **citation of it is disfavored but nevertheless it 'may be cited** under the terms and conditions of the Court's General Order [GO] ..." *Id.* (emphasis added). The footnote goes on to explain that "[t]he GO authorizes citation of an unpublished opinion, order or judgment 'if it is believed that ... [it] ... has persuasive value with respect to a material issue in a case and would assist the court in its disposition,' **provided that a copy is attached to the brief or other document in which it is cited**." *Id.* (emphasis added).

Since the vast majority of cases before OCAHO have either the DHS or DOJ as a Complainant, these two agencies have full access to all to ALL the 1324a and 1324b and 1324c rulings, decisions, pleadings, etc., while the respondent's only have access to the limited published decisions. **The option created in this footnote appears contrary to the OCAHO rules**. In addition, this footnote provides these two U.S. government agencies an incredible advantage over respondent employers and employees because not only do the agencies already have full access to the legal body of knowledge, but they only need, when convenient, attach a copy of an unpublished ruling in order to be able to cite and rely upon such. While true that any source of law can arguably be used for persuasive value, the fact that the footnote enables the ruling to rise to persuasive value is logically premised on the assumption that all parties have access to such—which is not the case with OCAHO. The use of the footnote would enable the agencies to wait until the last minute and spring a new argument before the court and onto the unknowing respondent. In addition, the use of the footnote would unfairly, and logically in violation of due process, also bar the respondent equal access to those persuasive arguments or legal decisions which might help the respondent. To practice law in a vacuum of case law is difficult, but to do so when the opposing side has full access to the body of law, and is able to "publish for persuasive value" only those rulings which supports it position, clearly violates due process. Accordingly, practitioners should eagerly search the published decisions of OCAHO, but should also eagerly push back on any use of persuasive arguments under this footnote, or any other source that is not equally available to all. ◆

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Article

Relief in Their Own Right: Asylum for the Children of Victims of Coercive Population Control Policies

ELIZABETH DONNELLY

Introduction

Section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat 3009-586, 3009-689, which was codified at 101(a)(42) of the Immigration and Nationality Act, U.S.C. 1101(a)(42), defines four classes of refugees against whom enforcement of a coercive population control program constitutes persecution on account of a political opinion:

1. Persons who have been forced to abort a pregnancy;
2. Persons who have been forced to undergo involuntary sterilization;
3. Persons who have been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program; and;
4. Persons who have a well founded fear that they will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance.

In 2008, the attorney general held that the spouse of a person forced to undergo an abortion or sterilization is not per se eligible for asylum but may nonetheless qualify for relief under either the third or fourth prong of the analysis, or, for that matter, any other ground enumerated in the act. *See Matter of J-S-*, 24 I&N Dec. 520, 527 (A.G. 2008). Federal appellate courts have since followed suit. *See Ni v. Holder*, 613 F.3d 415, 423 (4th Cir. 2010) (collecting cases).

A related problem is playing out in the appellate courts: whether and under what circumstances the children of individuals who run afoul of coercive population control (CPC) policies may qualify for asylum. The issue is a particularly sensitive one, in part because it may arise in cases involving unaccompanied minors. *See, e.g.*, *Shi Chen v. Holder*, 604 F.3d 324, 328 (7th Cir. 2010); *Xue Yun Zhang v. Gonzales*, 408 F.3d 1239, 1242 (9th Cir. 2005); *Xiu Ming Chen*, 113 F. App'x 135, 136 (6th Cir. 2004). As explained below, the courts have delineated theories as to when relief may be available—but determining an individual applicant's eligibility remains a challenge, both legally and factually.

Legal Theories

Federal appellate courts, some even well before *Matter of J-S-*, have held that children are not automatically eligible for asylum based on a parent's forced abortion, sterilization, or resistance to CPC policies. *See, e.g.*, *Shi Chen*, 604 F.3d at 331-32; *Tao Jiang v. Gonzales*, 500 F.3d 137, 141 (2d Cir. 2007) (relying on reasoning in *Shi Liang Lin*, 494 F.3d 296 (2d Cir. 2007)); *Xue Yun Zhang*, 408 F.3d 1239 (9th Cir. 2005); *Neng Long Wang v. Gonzales*, 405 F.3d 134, 142-43 (3d Cir. 2005); *see also Jian Hui Li v. Keisler*, 248 F. App'x 852 (10th Cir. 2007); *Cai Hong Wang v. Att'y Gen. of U.S.*, 176 F. App'x 969, 970 (11th Cir. 2006), *Xiu Ming Chen*, 113 F.App'x at 138-39. Although the persecution of the parent remains relevant, *see, e.g.*, *Shi Chen*, 604 F.3d at 331, a child applicant cannot typically stand in the parent's shoes for purposes of asylum. As the U.S. Court of Appeals for the Third Circuit has noted, a child may have an even more tangential claim to relief than the spouse of an individual subjected to CPC policies: "whereas a husband has a direct interest in whether his wife can have additional children, a child is in a very different position as the family planning policies as applied to his parents can affect him only as a potential sibling and not as a parent." *Neng Long Wang*, 405 F.3d at 143; *see also Shao Yan Chen v. U.S. Dep't of Justice*, 417 F.3d 303, 305 (2d Cir. 2005) (reasoning that "because the procreative rights of children are not sufficiently encroached upon when their parents are persecuted under coercive family planning policies, children are not *per se* as eligible for relief under § 601(a) as those directly victimized themselves"); *Xue Yun Zhang*, 408 F.3d at 1245. Consequently, the courts have agreed that a child must craft a claim of independent eligibility based on an enumerated ground.

The courts of appeal have most readily accepted arguments based on imputed political opinion. *See Shi Chen*, 604 F.3d at 332; *Tao Jiang*, 500 F.3d at 141; *Xue Yun Zhang*, 408 F.3d at 1246-47. As the Seventh Circuit has recognized, a child may fall under "the third and fourth classes of refugees under § 1101(a)(42)(B)—those who have a well-founded fear of involuntary sterilization ... or those who fear persecution for refusing sterilization or otherwise resisting a coercive population-control program." *Shi Chen*, 604 F.3d at 332. Such a claim is a "specific application" of a more generally recognized theory, namely that persecutors "have mistreated or will mistreat [the applicant] because they attribute someone else's—often a family member's—political beliefs to him." *Id.*; *see also Xue Yun Zhang*, 408 F.3d at 1246-47. This theory permits the applicant to rely in part on the parent's persecution to establish eligibility for relief. *Shi Chen*, 604 F.3d at 332. Of course, as detailed below, the applicant must provide some evidence that the political opinion the parent is deemed to hold was or will be, in fact, actually imputed to him. *Id.*; *see also Tao Jiang*, 500 F.3d at 142.

Applicants have also advanced claims based on membership in various social groups. In this context, an applicant's immediate family may qualify as a particular social group. *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1029 (9th Cir. 2004). This legal

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theory comes laden with factual issues, however. For example, the applicant's claim may remain "too closely connected with the alleged mistreatment of his parents. Because his parents will almost always suffer more severe personal hardship and potential persecution than will their child, the circumstances affecting a child are overshadowed by those affecting his parents." Brian Erdstrom, *Assessing Asylum Claims From Children Born in Violation of China's One-Child Policy: What the United States Can Learn from Australia*, 27 Wis. Int'l L.J. 139, 164 (2009). The child, therefore, may encounter difficulty in demonstrating the harm he or she personally suffered is sufficiently severe to constitute persecution. As discussed more fully below, the Third Circuit's decision in *Wang v. Gonzales*, 405 F.3d 134 (3d Cir. 2005), illustrates this concern. Additionally, "while basing a claim for asylum on family as a particular social group makes sense for accompanied children, it makes less sense when a child is leaving his family behind." Kristi M. Deans, Comment: Less than Human: Children of a Couple in Violation of China's Population Control Laws and the Barriers They Face in Claiming Asylum in the United States, 36 Cal. W. Int'l L.J. 353, 373 (2006).

The applicant in *Shi Chen*, 604 F.3d at 324 (7th Cir. 2010), proposed a social group of the *hei haizi*, or children born illegally in China. As a member of the *hei haizi*, he asserted that he suffered various economic hardships as well as the denial of certain rights, including that "he is denied access to health care and other governmental services; is excluded from higher education and many types of employment; and will be denied the right to marry and have children, the right to own property, and the right to freely travel within and outside of China." The court found that the agency failed to fully analyze the "cumulative significance" of the hardships on the applicant as a member of this group. *Id.* at 333. It remanded in part for the agency to conduct a more complete analysis of the evidence and to determine whether the respondent warranted relief.

Other proposed social groups have met with less success. In *Neng Long Wang*, the applicant argued for a social group consisting of "poor and uneducated Chinese who are forced to pay a heavy fine far larger than they can afford" for violating the CPC policy. 405 F.3d at 140. The applicant, who was smuggled into the United States, theorized that "the heavy fine ... forces members of this particular social group to turn to international smuggling operations to search for work in foreign lands and the Chinese government directly and indirectly supports those smuggling organizations." *Id.* The immigration judge rejected this claim "due to a lack of evidence that 'official Chinese government policy is either to encourage alien smuggling or to support such endeavors.'" *Id.* The applicant essentially abandoned this claim before the Third Circuit, which noted that the record did not, in any event, support a substantial argument on this theory.

Factual Issues

A significant challenge that child applicants face is proving that they individually have suffered or will suffer harm rising to the level of persecution. Overall, the case law suggests that the inquiry is highly fact specific. Typically, applicants assert a pattern of ongoing past mistreatment against the entire family and various forms of nonphysical abuse that impact them individually. Common aspects of these claims include being forced into hiding with their families; limitation or deprivation of educational opportunities; confiscation or destruction of property; fines and other financial consequences amounting to economic persecution; and emotional trauma stemming from the applicant's or family members' interactions with authorities. *See Shi Chen*, 604 F.3d at 329; *Tao Jiang*, 500 F.3d at 139; *Xue Yun Zhang*, 408 F.3d at 1247-48; *Neng Long Wang*, 405 F.3d at 136-37; *see also Jian Hui Li*, 248 F.App'x at 853-54. Particularly in the absence of violence against the applicant, appellate courts have emphasized the need to consider any mistreatment cumulatively. *E.g.*, *Shi Chen*, 604 F.3d at 333; *Xue Yun Zhang*, 408 F.3d at 1249. Some courts have also expressed sensitivity to harm the applicant endured as a young child. The Ninth Circuit has noted that "[t]he harm a child fears or has suffered ... may be relatively less than that of an adult and still qualify as persecution." *Xue Yun Zhang*, 408 F.3d at 1247 (quoting INS Policy and Procedural Memorandum from Jack Weiss, Acting Director, Office of International Affairs, to INS officers 19 (Dec. 10, 1998), *available at* 1998 WL 34032561(INS) (entitled *Guidelines for Children's Asylum Claims*) (internal quotation marks omitted). Several other courts have made the same point in other contexts. *See, e.g.*, *Kholyavskiy v. Mukasey*, 540 F.3d 555, 570 (7th Cir. 2008); *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045-46 (9th Cir. 2007); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006); *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004); *see also* Memorandum from Jack Weiss, *supra*, at 26.

The Third Circuit's decision in *Neng Long Wang* highlights an applicant's potential difficulties in establishing sufficiently individualized harm. The alien asserted that the cumulative harm amounted to past persecution on account of his membership in his family where the Chinese government:

> (1) imposed a fine grossly disproportionate to their income on his parents for violating the family planning policies; (2) engaged in a lengthy pattern of destruction of the Wang family's property, including total destruction of the family home; (3) destroyed equipment necessary to the family business; (4) left the family with no choice but to leave their home temporarily to run from the government; (5) caused family separation at several points in time; and (6) refused to acknowledge the payments the family made towards the family planning fine.

405 F.3d at 142. The court assumed, without deciding, that these acts amounted to persecution of Wang's parents. Nonetheless, the Third Circuit refused to disturb the Board's conclusion that Wang had not established that the harm *he experienced* rose to the level of persecution, reasoning as follows.

> As the BIA pointed out, Wang "was not arrested, detained or fined in China, and testified that neither he nor his sister had any trouble attending school." Thus, the BIA observed that the worst effect on him of the actions against his parents was the destruction of their home, but "he testified the family was able to live in a different home that was not as good."

Id. at 143 (citation omitted). In short, the court concluded that Wang's claim amounted to an assertion of economic detriment that was not particularly severe, namely, that the economic harm to his parents caused him to be separated from them periodically and eventually forced him to live in an inferior house. Without more, the court held that this harm did not rise to the level of persecution. As the court summarized:

> [O]ur result has the disadvantage of being uncertain in its application as compared to a bright-line rule that persecution only of parents never can be regarded as persecution of a minor child who is a member of the parents' household or always should be so regarded. Thus, application of the principles here will require that immigration judges and the BIA decide cases on an individual basis.

Id. at 144. Child applicants have also asserted independent claims of future persecution. For example, some argue that they are more likely to be subjected to forced abortion or sterilization because family planning officials more closely scrutinize people whose parents or other close relatives have violated CPC policies. *See, e.g.*, *Shi Chen*, 604 F.3d at 332; *see also Jie Chen v. Holder*, 375 F.App'x 56, 58 (2d Cir. 2010); *Qiu Lin v. Mukasey*, 337 F.App'x 99, 100 (2d Cir. 2009); *Jun Kai Zhang v. Mukasey*, 275 F.App'x 77, 78-79 (2d Cir. 2008). Such claims have been considered speculative, particularly where the applicant is unmarried and childless. *See Jie Chen*, 375 F.App'x at 58; *Qiu Lin*, 337 F.App'x at 100.

Proving a nexus to a protected ground also presents challenges. A mixed-motive analysis may be necessary, but not sufficient, to establish this aspect of a claim. In *Tao Jiang*, 500 F.3d 137, the Second Circuit upheld the board's determination that the applicant had failed to show adequate nexus to an imputed political opinion.

Jiang was the second-born child in his family. Three months after his birth, the Chinese Government forcibly sterilized his mother, causing lingering health effects. His mother became less productive in her work and his father was forced to care for the children on a regular basis. This ultimately resulted in economic detriment to the family. The applicant worked during his school years and dropped out after elementary school. When his father died, Jiang came to the United States to escape poverty. The board found that the family's post-sterilization economic hardship did not constitute persecution because "there is no evidence that the government deliberately imposed substantial economic disadvantage upon the applicant and his family, especially on account of a protected ground." *Id.* at 139-40.

The Second Circuit assumed, without deciding, that the harm rose to the level of persecution but affirmed on a lack of nexus. It noted that an applicant may establish past persecution where he or she shares, or is perceived to share, a characteristic that motivated the persecutor to harm the applicant's family member, was within the "zone of risk" when the family member was harmed, and suffered "some continuing hardship after the incident." *Id.* at 141. Jiang fell outside these parameters, failing to adduce sufficient evidence that the Chinese Government imputed a political opinion to him:

> [T]he persecution Jiang's mother suffered was not inflicted on account of some characteristic Jiang shared with his mother. ... § 1101(a)(42) provides that those who have been subject to forced sterilization are "deemed" to have suffered persecution by reason of political opinion; but this constructive political opinion—whatever its exact contours—cannot be presumed to have been imputed to the family of the individual who undergoes the procedure; there must be some evidence that it was so imputed. ... The government appears to have taken no further action against the family after persecuting Jiang's mother. And Jiang has adduced no evidence that government actors imputed to him the political opinion his mother is deemed to have had by virtue of the forced sterilization.

Id. at 142 (citations omitted).

Conclusion

Several appellate courts have spoken on the availability of asylum for children of CPC violators. All agree that Immigration Judges may consider persecution of the applicant's parents, but the case law reveals that the mere fact that one is the offspring of an individual who is a victim of CPC policies does not by itself establish eligibility for relief. Cases based on imputed political opinion are now widely recognized and some courts have indicated willingness to entertain social group theories; although factual matters may still present significant hurdles to applicants. Some courts have cautioned Immigration Judges to resist isolating instances of mistreatment and encouraged them to consider the relative age of the applicant when he or she experienced the harm. However, the case law indicates that children swept up in the hardships their families endure must nonetheless establish relatively individualized and targeted harm to be eligible for relief. ◆

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Rethinking Immigration: If American Will Welcome More Entrepreneurs, Why Not More Creatives?

ANGELO A. PAPARELLI

> The purpose of the [Immigration and Nationality Act is] to prevent an influx of aliens which the economy of individual localities [cannot] absorb. ... Entrepreneurs do not compete as skilled laborers. The activities of each entrepreneur are generally unique to his own enterprise, often requiring a special balance of skill, courage, intuition and knowledge. ... The same can be said of the activities of an artist.
>
> *Konishi V. Immigration and Naturalization Service*, 661 F.2d 818 (9CA, 1981)(citations and quote marks omitted)

Immigration entrepreneurship is all the rage. Comprehensive immigration reformers on the left and right agree that entrepreneurs beget innovation which begets jobs for Americans. Our history proves it. Research studies support the link. Foreign entrepreneurs are encouraged to come through the "front door." The President wants to welcome more of them. Members of Congress, hoping to avoid stemming the tide of innovation, are proposing a new flow of workers, especially in the STEM fields—science, technology, engineering and math—with a three's-the-charm bill, the Startup Act 3.0.

In addition, a shoeleather-avoidant "Virtual March for Immigration Reform," dubbed the "March for Innovation," is set for a day this spring in order "to ensure that the broad immigration bills being considered in Congress include provisions to boost innovation and entrepreneurship, and ... to seize the moment and get immigration reform passed."

While we obsess on the need to invite more immigrant entrepreneurs, why is there no comparable fixation on the importance of welcoming entrepreneurship's kissing cousin, creativity?

We acknowledge the creativity of knowledge workers, yet we fail to see the urgency of freely inviting members of the creative classes, our free-lance artists, writers, journalists, poets, painters, inspirational speakers, filmmakers, bloggers, videographers, performing artists, multi-media stylists and other creativity entrepreneurs. As the artist, Konishi, convinced the court, the "activities of each entrepreneur are generally unique to his own enterprise, often requiring a special balance of skill, courage, intuition and knowledge. ... The same can be said of the activities of an artist."

Regrettably for America, however, our immigration laws are just as broken and dysfunctional when applied to creatives as to entrepreneurs. Foreign artists, even if they possess "extraordinary ability," or manifest their artistry in "culturally unique" ways, must still be tied to an established U.S. agent or an employer. They must also present a "consultation" from a peer group (usually a labor union that extorts a protectionist fee to confirm for the benefit of Homeland Security that its guild members' would accept the foreign artist into the fold on payment of union dues). Similar restrictions apply to media free-lancers who must present journalistic credentials and a contract with a U.S. company even if they propose to enter the U.S. to offer or produce creatively presented information or education.

Surprisingly, although we recognize the compelling need to eliminate immigration barriers for noncitizen entrepreneurs, we ignore the job-creating qualities of foreign artists, even though both groups share Steve Jobs' remarkable insight into the creative process—one that likewise motivates many immigrants to embark for America:

> If you want to live your life in a creative way, as an artist, you have to not look back too much. You have to be willing to take whatever you've done and whoever you were and throw them away. The more the outside world tries to reinforce an image of you, the harder it is to continue to be an artist, which is why a lot of times, artists have to say, "Bye. I have to go. I'm going crazy and I'm getting out of here."

Artists and creatives are everywhere, yet America mostly spurns them. Our legislators and the Obama Administration, just like the commissars of the old Soviet Union, must ultimately wake up to the reality that the *Federales* have no special talent for picking winners, and that planned economies, more often than not, tend to overlook the budding artist and the possibly math-phobic virtuoso.

Let us also therefore revise our immigration laws to welcome these promising, early-stage artistic strangers even before they find an audience. With fair and open-hearted screening processes we surely can craft a way to identify creatives offering the potential to spawn new art forms, new industries and new jobs. ◆

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Article

A Call for the Designation of Boko Haram as a Foreign Terrorist Organization

Joseph Grieboski

Jama'atu Ahlis Sunna Lidda'awati wal-Jihad, or People Committed to the Propagation of the Prophet's Teachings and Jihad, was established in Maiduguri, Nigeria, in 2002 by radical Islamist cleric Mohammad Yusuf. More popularly known today as Boko Haram, this militant group has been singularly focused on the establishment of an Islamic state in Nigeria through the implementation of Shari'ah (Islamic law) criminal courts and the exclusion of "corrupting ideals" such as Western education.

In the pursuit of this goal, Boko Haram has become increasingly violent, utilizing ever more sophisticated tactics against a widening range of domestic and international targets. The intention of Boko Haram to continue engaging in violent attacks against civilian targets, its adoption of practices from international insurgent and terrorist groups, and its commitment to destabilizing the government of Nigeria necessitate that Boko Haram be designated a Foreign Terrorist Organization (FTO) by the U.S. Department of State.

The U.S. State Department uses specific legal criteria for the designation of an FTO: (1) the organization in question must be foreign; (2) the organization must engage in terrorist activity or retain the capability and intent to engage in terrorist activity or terrorism; and (3) The organization's terrorist activity or terrorism must threaten the security of U.S. nationals or the national security of the United States. A careful analysis of the history, motivation, tactics, and international context of Boko Haram clearly demonstrates that it fits these criteria.

The origins of Boko Haram lie in the Ibn Taimiyyah Masjid mosque in Maiduguri, where Mohammed Yusuf capitalized on the corrupt government and weak economy of northern Nigeria to attract scores of young people to reject what he believed were corrupting Western influences in Nigeria. Instead of withdrawing from society, as had previous Salafist movements in Nigeria, Yusuf advocated for the implementation of Shari'ah law across the entire country, thereby establishing an Islamic state. He claimed that the predominantly Muslim north of Nigeria was ruled by corrupt Muslims, and that Western education and other practices were a shameful influence on Islamic society in general.

Between 2002 and 2009 Boko Haram spread its ideology to several states in Nigeria. This time was characterized by low-level conflict with security forces and assassinations of individuals critical of their ideology. Having been left more-or-less unchecked, Boko Haram was able to create parallel structures of government that dispensed much-needed aid and assistance to struggling Nigerians in the North.

The simmering conflict between the Nigerian government and Boko Haram came to a head in 2009 when security forces stopped a funeral procession of Boko Haram members to enforce motorcycle helmet laws. The confrontation quickly escalated, resulting in the death of several members of the group. In the aftermath of this incident Boko Haram organized attacks on police stations in Yobe and Bauchi. Mass arrests and violent jail breaks followed, until the security forces were able to regain control of the affected regions. At the end of the conflict, over 1000 people lay dead throughout Bauchi, Wudil, Potiskum and Maiduguri. Among the dead was Mohamad Yusuf himself, who was captured by security forces and killed hours later without a trial. Other known members of Boko Haram were captured and summarily executed, forcing the group to flee Maiduguri.

Following 2009, the sophistication of attacks increased. The implementation of Shari'ah law in Nigeria remained the primary goal of Boko Haram, but their tactics incorporated greater amounts of violence, including the bombings of churches, police stations and restaurants. Their initial resurgence in 2010 demonstrated a heightened proficiency in bomb-making and a tactical prowess that have led some to suggest that members of Boko Haram may have received training from international terrorist organizations such as Al-Qaeda in the Maghreb (AQIM). The use of hit-and-run attacks, suicide bombings, and assassinations became widespread, aiming at a wider array of strategic targets designed to destabilize the country.

The 2010 Christmas Eve bombing in Jos, Nigeria, was one such effort. The aftermath of this bombing left at least 80 people dead, igniting clashes between Christians and Muslims across Nigeria. Retaliatory attacks led to approximately 200 more deaths.

Boko Haram's use of targeted violence in areas that have previously experienced ethno-religious conflict contribute to greater ethnic, religious and socioeconomic divisions, further increasing the likelihood of destabilizing civil strife throughout Nigeria. Boko Haram was originally formed as a religious alternative to the perceived corrupt and economically unstable Nigerian government, but the diffuse nature of Boko Haram and external influences have greatly impacted the operating philosophy and tactics of the group.

Extensive poverty in Nigeria inevitably generated widespread dissatisfaction and unrest, which led to a breakdown of confidence in the government. This mistrust has created ideal conditions for the growth of Boko Haram, an organization with strong and unwavering political, economic and social objectives with potential support from international Salafist terrorist organizations like AQIM. The preexisting tensions between Muslim and Christian communities in Nigeria

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have covered the intense political, economic, and social aspirations with religious and extremist overtones.

The shift within Boko Haram toward the operating model of international terrorist organizations became evident in 2011 when the organization attacked the United Nations mission in Abuja. The attack marked a widening of scope by Boko Haram to include international targets in its operations.

Boko Haram systematically attacks aspects of society that have Western influences or are not in keeping with their view of Shari'ah law. In their fight to impose Shari'ah law, attacks on churches, police and Western associations have become trademarks of Boko Haram. Three churches were attacked by gunmen and suicide bombings in northern Nigeria on June 9 and 10, 2012. In response, Boko Haram's spokesman, Abu Qaqa, claimed, "yes, we did both [attacks] and we will continue until we achieve our goal". This implies that Boko Haram's attacks are methodically planned acts of violence that contribute to building their larger objectives.

Attacks and assassinations are directed toward Christianity—perceived to be a Western religion—and Imams and Muslims who speak out against the Boko Haram interpretation of Islam and Shari'ah law. Attacks directed toward religious peoples and structures simply create the perception that Boko Haram's ultimate goal is religious in nature. The correlation between these three types of targets is not religious affiliation, but their association with Western society, beliefs and government, all of which are in the eyes of Boko Haram in opposition to Shari'ah law.

An association with AQIM and bombing churches and other religious structures undeniably connects Boko Haram with religious persecution, but the elimination of religious opposition in Nigeria also has political incentives for the organization. The ultimate goal of Boko Haram, which is political in nature, is to implement Shari'ah law throughout Nigeria, but this is not easily achieved if a large majority of the Nigerian population opposes it.

Political motivation has also led Boko Haram to assassinate non-Salafist Muslims, and in fact, Boko Haram has killed more Muslims than Christians since 2009. The use of force and intimidation to reduce the influence of Christianity and non-Salafist Muslims is designed to reduce the opposition's opportunity to successfully counter Boko Haram and their desired legislation. A consistent religious focus, however, was only acquired recently and is exacerbated by their alleged ties to AQIM. Boko Haram has also consistently attacked schools, media outlets and police stations.

An assessment of the targets and attacks executed by Boko Haram over the course of their existence shows a drastic transition. Originally, the attacks had a wide variety of targets associated with the Nigerian government, and they were performed with lower levels of sophistication and were chaos-driven. Occurring sporadically in 2011 and almost weekly in 2012, highly sophisticated, well-organized and concentrated attacks on a wide range of targets are being claimed by Boko Haram.

Following the church bombings carried out by Boko Haram on Sunday, June 17, 2012, pressure was put on the U.S. State Department to react to Boko Haram, as an organization, and their attacks. The Central Intelligence Agency, Department of Defense, Defense Intelligence Agency, Department of Justice and FBI have strongly urged the State Department to designate formally Boko Haram a Foreign Terrorist Organization (FTO). However, various scholars and government officials argued that Boko Haram should not be added to the State Department's List of Designated Foreign Terrorist Organizations.

In consultation with the secretary of Treasury and the attorney general, Secretary of State Hilary Clinton announced the designation of Abubakar Shekau, Abubakar Adam Kambar, and Khalid al-Barnawi as Specially Designated Global Terrorists. The State Department chose not to designate Boko Haram as an FTO, despite the fact that Boko Haram meets all standards for designation: they (1) are a foreign organization, (2) engage in terrorist activity and retain the capacity to continue to do so in the future, and (3) threaten the interests of the United States through their attempts to destabilize one of its strongest allies in the region.

Concerns about a designation were raised at several US Congressional briefings and Committee hearings on Nigeria and Boko Haram in 2012. These concerns included that declaring Boko Haram an FTO would (1) give the organization greater international recognition; (2) unintentionally aid recruitment; and (3) act as a catalyst that unites Boko Haram with other local terrorist groups.

When asked why the organization is not an FTO, Assistant Secretary of State for the Bureau of African Affairs Ambassador Johnnie Carson responded that Boko Haram is not believed to be a homogenous organization. He referenced two factions of Boko Haram: a militant faction and a faction solely attempting to discredit the Nigerian Government and Nigerians.

This lack of action poses greater risks to Nigeria, the United States and the international community than the risk of potential repercussions from the designation. It could just as easily be argued that the designation of Boko Haram as an FTO could cause these militant and domestic factions to splinter even further. Exemplified by Al-Qaeda, it is common for terrorist organizations to capitalize on local dissatisfaction to implement extremist views within society. Several Salafist-jihadist organizations have been found to provide humanitarian aid, criminal justice, and economic benefits in the society in which they operate. Since its creation in 2002, Boko Haram has shown to be highly adaptable and fluid in its operation, but its dedication to violence in order to enact change and to drive Western influences out of the Nigeria has remained constant. It is the destabilizing effect of the entire organization, not just the military arm, which poses a threat to U.S. interests in Nigeria.

Rather than name Boko Haram a, FTO, the State Department added Shekau, Kambar and al-Barnawi to the list of Specially Designated Global Terrorists. The rational followed that naming the leaders of Boko Haram's militant faction as individual terrorists would prevent Boko Haram from gaining new members, mitigate the risk of misdiagnosis of the non-

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Relief After Rebuttal: Reaching Humanitarian Asylum Under the Regulations

Rebekah Bailey and Laura Lunn

Introduction

The regulations are clear that an asylum applicant who experienced past persecution may merit asylum even if the government rebuts the presumption that the applicant has a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1)(iii); *see also Matter of L-S-*, 25 I&N Dec. 705, 710 (BIA 2012). This form of relief from removal is commonly termed "humanitarian asylum." While the scope and boundaries of humanitarian asylum are relatively undefined, this area of immigration law is slowly developing.

The seminal case in which the Board of Immigration Appeals addressed eligibility for humanitarian asylum was *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989). The respondent in *Chen* was a Chinese national who suffered from grave past persecution but could not establish a well-founded fear of future persecution because of changed country conditions. The board examined the severity of his past persecution and determined that he merited asylum because of the extreme nature of the persecution he suffered. The *Chen* standard for a grant of humanitarian asylum in the absence of a well-founded fear of persecution was later formalized and added to the Code of Federal Regulations at 8 C.F.R. § 208.13(b)(1)(ii). *See Matter of L-S-*, 25 I&N Dec. at 711 n.6 (citing Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674, 30,683 (July 27, 1990) (codified at 8 C.F.R. § 208.13(b)(1)(ii) (1991))). In 2001, the regulatory definition of humanitarian asylum was expanded to include applicants who experienced past persecution and would face "other serious harm" if they were to return. *See* Asylum Procedures, 65 Fed. Reg. 76,121, 76,133 (final rule Dec. 6, 2000) (effective Jan. 5, 2001); *see also* 8 C.F.R. § 1208.13(B)(iii). The types of harm that may qualify one for humanitarian asylum continue to be considered by the board and the courts through a case-by-case analysis. *See Matter of L-S-*, 25 I&N Dec. at 715.

This article will first address when and how an alien may qualify for humanitarian asylum. Then, it will discuss the initial basis for humanitarian asylum—the severity of past persecution. Next, the article will discuss the newer method of qualifying for humanitarian asylum based on "other serious harm." Finally, the article will conclude with a discussion of how different circuit courts have considered "other serious harm" claims.

Reaching Humanitarian Asylum: Burden Shifting under the Regulations

The preliminary issue that adjudicators must address in making a determination on an asylum application is whether the applicant meets the initial burden of establishing that he or she qualifies as a refugee under the act. Section 208(b)(1)(B) of the Act, 8 U.S.C. § 1158(b)(1)(B). A "refugee" is defined as

> any person who is outside [his or her] country ... 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 ... .

Section 101(a)(42)(A) of the act, 8 U.S.C. § 1101(a)(42)(A). There are many elements within the definition of who constitutes a refugee that an adjudicator must evaluate in determining whether an applicant is eligible for asylum (e.g., the applicant's inability or unwillingness to return; a government's inability or unwillingness to provide protection; past persecution or well-founded fear of future persecution; nexus to a protected ground).

The board's decision in *Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008), provides an excellent roadmap to begin the proper process for evaluating asylum claims, including those based on humanitarian asylum. In that case, the board noted that an asylum applicant has the burden to establish refugee status, but the basis for the claim, whether past persecution or a well-founded fear of future persecution, dictates the regulatory framework applicable in determining overall asylum eligibility. *Id.* at 449-50. In a humanitarian asylum analysis, the first question that the fact-finder must address is whether the asylum applicant established past persecution on account of one of the protected grounds. *Id.* If not, then the inquiry as to humanitarian asylum eligibility goes no further. *Id.* at 450. If, however, the applicant is able to establish past persecution on account of one of the protected grounds, then the Department of Homeland Security (DHS) must rebut the presumption of a well-founded fear of future persecution on account of the same ground. *See* 8 C.F.R. § 1208.13(b)(1)(i)-(ii). If the DHS rebuts the presumption, then the burden shifts to the applicant to demonstrate another basis for a well-founded fear of future persecution. If the adjudicator finds there is no other basis for a well-founded fear of future persecution, then the burden is on the applicant to establish that he or she merits relief based

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on humanitarian asylum. *See* 8 C.F.R. § 1208.13(b)(1)(iii).

A good roadmap for the final stages of the humanitarian asylum analysis can be found in the board's recent decision in *Matter of L-S-*, 25 I&N Dec. 705. As the board noted there, the regulations disjunctively state two ways in which an applicant may establish humanitarian asylum. *Id.* at 710. The first requires that the applicant demonstrate "*compelling reasons* for being unwilling or unable to return to the country *arising out of the severity of the past persecution*." 8 C.F.R. § 1208.13(b)(1)(iii)(A) (emphasis added). The second requires the applicant to establish "that there is a *reasonable possibility* that he or she may suffer *other serious harm* upon removal to that country." 8 C.F.R. § 1208.13(b)(1)(iii)(B) (emphasis added). As the board explained, if the adjudicator determines that an asylum applicant has not demonstrated "compelling reasons" for granting humanitarian asylum, then the applicant can still fulfill his or her burden by showing that there is a "reasonable possibility" that "other serious harm" may be suffered upon removal. *Matter of L-S-*, 25 I&N Dec. at 713. Finally, if the applicant has shown that either basis exists, an Immigration Judge considering whether to grant humanitarian asylum must also determine if the applicant deserves a favorable exercise of discretion, as would be the case with any application for asylum. 8 C.F.R § 1208.13(b)(1)(iii). Ultimately, an immigration judge should consider both favorable and adverse factors when making determinations regarding humanitarian asylum. *Matter of Chen*, 20 I&N Dec. at 19; *see also Matter of Pula* 19 I&N Dec. 467 (BIA 1987) (noting the special considerations present in asylum cases). The central consideration should be the compelling humanitarian concerns involved. *See Matter of H-*, 21 I&N Dec. 337, 347 (BIA 1996).

Severe Past Persecution

The first possible ground for a grant of humanitarian asylum is raised when the applicant shows compelling reasons arising out of the severity of past persecution that make him or her unwilling or unable to return to the country designated for removal. 8 C.F.R. § 1208.13(b)(1)(iii)(A).

In *Matter of Chen* the alien's persecution began when he was 8 years old and continued into his adulthood, causing physical, psychological, and emotional scarring. 20 I&N Dec. at 21. Furthermore, he was traumatized by the Chinese government's mistreatment of his father, which ultimately led to his father's death. In its decision, the board referenced the United Nations High Commissioner for Refugees (UNHCR) Handbook, which discussed the "general humanitarian principle" recognizing that individuals should not be expected to repatriate to countries in which they or their family members suffered from "atrocious forms of persecution." *Id.* at 19 (quoting *The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, 1988)).[1]

The board found that Chen suffered from severe past persecution on account of his family and their religious beliefs but that he did not have a well-founded fear of future persecution because of changed country conditions. Nevertheless, the board granted Chen's application for asylum in the exercise of its discretion based on the severity of his past persecution. Thus, the majority of decisions addressing the issue of humanitarian asylum discuss whether past persecution in a case meets the *Chen* standard, that is, whether the applicant suffered particularly "severe" or "atrocious" persecution. *See, e.g.*, *Matter of H-*, 21 I&N Dec. at 347–48 (remanding to the immigration judge based on the board's analysis of humanitarian asylum and its finding that the petitioner suffered past persecution on account of his membership in a particular social group); *Matter of B-*, 21 I&N Dec. 66 (BIA 1995) (granting humanitarian asylum based on the severity of the past persecution).

The board expanded the application of humanitarian asylum in its holding in *Matter of B-*, 21 I&N Dec. 66. The board found that the applicant established that he suffered past persecution in Afghanistan when the KHAD, the Afghan secret police, arrested and imprisoned him for 13 months. The harms that he faced during imprisonment as a result of his support for the mujahidin constituted past persecution on account of his political opinion, and the conditions he faced were "deplorable, involving the routine use of various forms of physical torture and psychological abuse, inadequate diet and medical care, and the integration of political prisoners with criminal and mentally ill prisoners." *Id.* at 72.

In contrast, in *Matter of N-M-A-*, 22 I&N Dec. 312 (BIA 1998), the board determined that the asylum applicant's past persecution did not rise to the level of severe past harm demonstrated in *Matter of Chen*, and *Matter of B-*. The applicant, also from Afghanistan, described past harms that he endured for a month while he was detained by the KHAD who hit and kicked him and deprived him of food for 3 days. He sustained severe bruising and a painful wound on his right leg as well as mental anguish from not knowing his father's fate. Nevertheless, this past persecution did not rise to the level of harm required to merit a grant of humanitarian asylum, and the board remanded case for the immigration judge to evaluate the merits of the applicant's claim solely based on his fear of future persecution. *Id.* at 327.

"Other Serious Harm"

As previously mentioned, the preliminary question in cases that may qualify for humanitarian asylum is the same as the basic asylum inquiry: whether the applicant suffered from past persecution on account of a protected ground. *See Matter of L-S-*, 25 I&N Dec. at 710. The board clearly indicated in *Matter of Chen* and *Matter of B-* how to establish humanitarian asylum on grounds relating to the severity of past persecution. If the applicant did not suffer from past persecution severe enough to provide a basis for humanitarian asylum under 8 C.F.R. § 1208.13(b)(iii)(A), then an adjudicator may also consider whether the applicant merits humanitarian asylum based on "other serious harm" he or she may face in the country of removal. *See*

8 C.F.R. § 1208.13(b)(iii)(B).

In *Matter of L-S-*, the board provided a comprehensive discussion of humanitarian asylum on the "other serious harm" ground. The board explained that unlike severe past persecution, the analysis of "other serious harm" is a forward-looking inquiry, which requires the applicant to show that the current conditions in his or her country of removal are bad enough that he or she might suffer new "physical or psychological harm" if removed. *Matter of L-S-*, 25 I&N Dec. at 714. Although the applicant must have suffered past harm sufficient to establish past persecution, he or she need not show that this past harm was atrocious. *Id*. The board was careful to point out that there is *no nexus* that must be shown between the future "other serious harm" and an asylum ground protected under the act. The applicant must show that the potential future harm will be equal to the severity of persecution but "it may be wholly unrelated to the past harm." *Id*.

Ultimately, the "other serious harm" analysis must consider "the totality of the circumstances in a given situation" and should be determined on a case-by-case basis. *Id*. at 715. The threshold of proof is different from the other humanitarian asylum ground, which requires compelling reasons—a "reasonable possibility" of serious harm must be shown. The immigration judge should be aware of and consider conditions in the applicant's country of return, paying particular attention to major problems that large segments of the population might face and any conditions that might not significantly harm others but that could severely affect the applicant. *Id*. at 714. Examples of these conditions or problems may include, but are not restricted to, civil strife, extreme economic deprivation beyond economic disadvantage, or situations where claimants could experience severe mental or emotional harm or physical injury. *Id*.

Since the board possesses limited fact-finding authority, it ultimately remanded the case to the immigration judge for a consideration of both grounds of humanitarian asylum. The board instructed the immigration judge to first consider if the severity of the respondent's past persecution evidenced "compelling reasons" for being unable or unwilling to return to Albania. The board stated that relevant considerations would include not only the specifics of the respondent's internment, but also the experiences of his politically active family members. The board found that even if compelling reasons were not shown, the immigration judge should consider whether the respondent established a "reasonable possibility" of suffering "other serious harm" upon return to Albania.

Prior to the Board's decision in *Matter of L-S-*, each circuit raised or at least discussed the topic of humanitarian asylum, although some only in passing. Since the board rendered its decision in *Matter of L-S-* last year, no circuit courts have issued published decisions that create binding precedent specifically adopting or interpreting *Matter of L-S-*.[2]

Circuit Courts' Interpretation of Other Serious Harm

In deciding *Matter of L-S-*, the board looked extensively to circuit court cases examining "other serious harm" humanitarian asylum cases. 25 I&N Dec. at 714-15. The cases discussed below involve the board's examples of conditions that may qualify as "other serious harm" for purposes of humanitarian asylum.

Civil Strife

The Ninth Circuit addressed whether civil strife may constitute "other serious harm" in *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005). While the court did not definitively grant humanitarian asylum, it did remand to the board to examine the possibility of relief based on civil strife. Particularly, it cited to the U.S. State Department report that described the frequent human rights abuses in the petitioner's home of Somalia and took into account the applicant's "risk for other harm, because the Benadiri clan has been so decimated by violence, leaving its female members particularly vulnerable." *Id.* at 801; *see also Marrogi v. Holder*, 375 F. App'x 781 (9th Cir. 2010); *Hanna v. Keisler*, 506 F.3d 933 (9th Cir. 2007); *Belishta v. Ashcroft*, 378 F.3d 1078 (9th Cir. 2004).

Extreme Economic Deprivation

In an unpublished decision, the Sixth Circuit explored the issue whether economic deprivation constitutes an "other serious harm" under the act. *Pergega-Gjonaj v. Gonzales* 128 F. App'x 507 (6th Cir. 2005) (unpublished); *accord Marku v. Gonzales*, 200 F. App'x 454, 460 (6th Cir. 2006) (unpublished) (denying humanitarian asylum where the alien cited only poor general conditions and not specific harms that would be faced upon removal). In *Pergega-Gjonaj*, the petitioner was from the former Yugoslavia and claimed that "any future in Kosovo would be grim because it would be difficult to find work and food." 128 F. App'x at 512. However, the Sixth Circuit found that the petitioner failed to establish that he would suffer from any specific harm, let alone a serious harm if returned to his country. Therefore, the applicant's economic deprivation was a consideration, but the court found that his harm did not rise to the requisite level needed to qualify for humanitarian asylum based on "other serious harm." *Id.* at 512-13.

Severe Mental or Emotional Harm

The Second Circuit considered when "other serious harm" exists on account of severe mental anguish and emotional hardship in *Kone v. Holder*, 596 F.3d 141 (2d Cir. 2010). The petitioner in this case suffered from past persecution in the form of female genital mutilation (FGM) in her home country of Côte d'Ivoire. She argued that if she were returned it was likely that her daughter would suffer the same fate. The circuit court instructed the board to examine whether "the mental anguish of a mother who was herself a victim of genital mutilation who faces the choice of seeing her daughter suffer the same fate, or avoiding that outcome by separation from her child, may qualify as such 'other serious harm.'" *Id.* at 153.

Both the Fourth and Fifth Circuits considered similar

claims by female aliens fearing for their daughters' safety upon removal. *Niang v. Gonzales*, 492 F.3d 505, 514 n.13 (4th Cir. 2007); *Osigwe v. Ashcroft*, 77 F. App'x 235 (5th Cir. 2003) (unpublished). The Fifth Circuit in *Osigwe* remanded the petition to the board so that it could address the applicant's claim that her daughter would be compelled to undergo FGM if her mother and father were forced to return to Nigeria. *Osigwe v. Ashcroft*, 77 F. App'x 235. The court recognized that while this claim failed under the general asylum provisions, it might be a viable claim under the humanitarian asylum grounds based on the previous severe persecution of the mother or some other serious harm. The Fourth Circuit, in a footnote, cited to the Fifth Circuit's decision in *Osigwe* and noted that humanitarian asylum may be warranted "in circumstances where a mother, who has been subjected to FGM, fears her daughter will be subjected to FGM if she accompanies her mother to the country of removal." *Niang v. Gonzales*, 492 F.3d at 514 n.13. The court did not decide the "other serious harm" issue, however, because the alien did not raise it on petition for review. *Id*.

Physical Injury

Other serious harm related to mental and physical health issues has been discussed by the Third, Sixth, and Seventh Circuits. *Lleshi v. Holder*, 460 F. App'x 520 (6th Cir. 2012) (unpublished); *Pllumi v. Att'y Gen. of U.S.*, 642 F.3d 155 (3d Cir. 2011); *Sheriff v. Att'y Gen. of U. S.*, 587 F.3d 584 (3d Cir. 2009); *Kholyavskiy v. Mukasey*, 540 F.3d 555 (7th Cir. 2008). In *Kholyavskiy*, the alien, who was from the former Soviet Union, began suffering harassment, humiliation, and physical attacks because of his Jewish ethnicity during his childhood. *Kholyavskiy*, 540 F.3d at 559-60. As a side effect of the attacks, the alien was diagnosed with severe social anxiety disorder and depression in his teenage years. While the Seventh Circuit did not find that the past attacks amounted to severe persecution, it remanded the case to the Board to consider whether the inevitable debilitation and homelessness the alien would suffer in Russia because of the lack of medications for his mental illness and lack of housing would amount to an "other serious harm." *Id*. at 577.

The Third Circuit discussed the possibility of relief on the "other serious harm" ground of humanitarian asylum in a case involving an alien from Liberia who suffered numerous incidents of physical harm. *Sheriff v. Att'y Gen. of U. S.*, 587 F.3d at 595 (remanding to the board with instruction to consider the "other serious harm" issue). She witnessed the murder of her mother, the murder and rape of her daughter, and the murder of her caregiver; watched her home being burned to the ground; and endured being tied with electrical wire and raped multiple times. *Id*. at 586, 595. Even though the alien suffered this harm at the hands of the defunct Charles Taylor regime and therefore could not argue fear of future persecution, the court remanded for consideration of humanitarian asylum. *Id*. at 595–96. The Third Circuit cited to the Seventh Circuit's decision in *Kholyavskiy*, 540 F.3d at 577, commenting that if "debilitation and homelessness are 'serious' enough" for "other serious harm" consideration, "one wonders how the harms Sheriff faces ... could not be 'serious.'" *Id*. at 596.

In *Pllumi v. Attorney General of the United States*, the Third Circuit applied the "other serious harm" framework again to examine an alien's claim that the healthcare in Albania was insufficient to treat his severe injuries. 642 F.3d at 162-63 (citing *Kholyavskiy v. Mukasey*, 540 F.3d at 557). The court remanded on a motion to reopen for the fact-finder to consider the availability of health care for the alien, stating "it is conceivable that, in extreme circumstances, harm resulting from the unavailability of necessary medical care could constitute 'other serious harm'" for purposes of humanitarian asylum. *Id.* at 162.

Similarly, in *Lleshi v. Holder*, 460 F. App'x 520, the Sixth Circuit affirmed the board's holding that the various other harms the aliens claimed they would face if returned to Albania, including inadequate medical care for one of the aliens who had been hospitalized for her psychiatric condition, were not sufficiently serious to warrant a grant of humanitarian asylum. In addition to poor medical care, the aliens had also listed "discrimination, inferior education, risk of kidnapping and trafficking, [and] police corruption" as the "other harms" they would face upon removal. *Id*. at 526. The court pointed out that the "other serious harm" considered by the Seventh Circuit in *Kholyavskiy*, 540 F.3d at 577, was not the poor mental health facilities, but rather, it was the resulting debilitation and homelessness from the inadequate care. Since the Lleshis did not make any showing of such resulting harms, the Sixth Circuit found that poor mental health facilities were not sufficient alone to warrant a finding of humanitarian asylum.

Other Circuit Cases Addressing Humanitarian Asylum

The First, Eighth, Tenth, and Eleventh Circuits have considered humanitarian asylum based on the severity of past persecution, but have not discussed the merits of "other serious harm" claims. *See, e.g.*, *Precetaj v. Holder*, 649 F.3d 72, 78 (1st Cir. 2011) (finding that the past persecution was not severe enough to warrant humanitarian asylum); *Hernandez v. Holder*, 579 F.3d 864, 876 (8th Cir. 2009) (remanding to the Board for consideration of the alien's "other serious harm" claim), *vacated in part on other grounds*, 606 F.3d 900 (2010); *Mehmeti v. U.S. Att'y Gen.*, 572 F.3d 1196, 1200–01 (11th Cir. 2009) (referring to both avenues of humanitarian asylum under the regulations but only considering the severity of past persecution ground); *Wambugu v. Gonzales*, 140 F. App'x 7, 13 (10th Cir. 2005) (unpublished) (finding that since the alien failed to establish past persecution, there was no basis for showing "other serious" harm that might be suffered upon removal).

Conclusion

Asylum laws in the United States protect aliens from returning to countries in which they have faced past persecution or have a well-founded fear of future persecution. *See* section 101(a)(42)(A) of the act; *see also* section 208

of the act. Humanitarian asylum expands this protection for individuals who suffered past persecution but who do not have a well-founded fear of future persecution based on a protected ground. 8 C.F.R. § 1208.13(b)(1)(iii). The regulatory scheme for humanitarian asylum recognizes the importance of providing refuge for those individuals who experienced past persecution and either (1) demonstrate compelling reasons arising out of the severity of persecution they experienced; or (2) demonstrate a reasonable possibility of "other serious harm" if returned to the country where they previously suffered persecution. While this area of law is still developing, the aforementioned cases provide important considerations for how to analyze claims based on humanitarian asylum. ◆

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Endnotes

1While the UNHCR Handbook is not binding on the Attorney General, the Board, or the courts, the United States Supreme Court has stated that it "provides significant guidance" in interpreting and construing the 1967 Protocol Relating to the Status of Refugees. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437–39 (1987); *see also INS. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

2The Second Circuit, however, has issued three unpublished decisions on this topic, suggesting that it will likely adopt the "other serious harm" analysis as set forth in *Matter of L-S-*. *See Obando-Flores v. Holder*, No. 11-3451, 2012 WL 3932645, at *2 (2d Cir. Sept. 11, 2012) (unpublished); *Zongxun Jiang v. Holder*, No. 11-3158-ag., 2012 WL 2819385, at *2 (2d Cir. Jul. 11, 2012) (unpublished); *Bello v. Holder*, 480 F. App'x 646, 648 (2d Cir. 2012) (unpublished).

FTO continued from page 12

militaristic faction of the group as being terrorists, and limit any gain of credibility the organization could have enjoyed from being named an FTO.

The placement of a person on the list of Specially Designated Global Terrorists freezes their assets and makes it illegal to have transactions with the person, limiting their access to supplies and funds. Designating Shekau, Kambar and al-Barnawi as terrorists puts a ban only on those particular individuals. It does not prevent weaponry, supplies and funds from getting to Boko Haram as a whole.

The State Department's designation of Boko Haram leaders as terrorists made news worldwide, illegitimating the argument that Boko Haram should not be an FTO because it would further their international recognition.

It is necessary to designate Boko Haram as a FTO in order to isolate it by legally detracting its sources of finances and supplies. For example, locals are currently selling Boko Haram supplies that are then used to make improvised explosive devices (IEDs), but the consequences for selling supplies to an FTO would be too great and would greatly diminish their sales to the organization. The designation would also isolate the organization internationally because the public and other governments will be aware of the threats posed by Boko Haram and the consequences that come from cooperating with them. It is already referred to by the United Kingdom as the main terrorist threat in Nigeria.

The primary objective is to isolate the group from influential beings and keep the issue local, rather than allow for the development of an exaggerated, dissatisfied regional mindset. On May 17, 2012, H.R. 5822, the Boko Haram Designation Act of 2012, was introduced in the United States Congress. Based on tactics learned from fighting against Al-Qaeda, the bill was intended to isolate Boko Haram before it could expand and to prevent the escalation of attacks. In keeping with the definitions established of FTOs, Boko Haram should already be a designated as such.

Semantics should not be the basis of whether an organization is named an FTO or not. The most important question that needs to be asked is whether or not Boko Haram's political, economic, and social interests stand in contravention to those of the United States of America. If Boko Haram succeeds in its goals, the most populous country in Africa will adopt a system of government hostile to the West, and a large minority of Christians and moderate Muslims will be at risk. If the United States does not take the step of naming Boko Haram an FTO now, it will be forced to become involved once Boko Haram begins exporting violence to its neighbors, and begins to be a destabilizing force in the region. We watched this process develop in Afghanistan with the Taliban; we cannot now allow a similar transition of Boko Haram into an international threat. ◆

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Article

A New Hope for "Aged Out" Derivative Beneficiaries: Re-Examining the Child Status Protection Act in Light of De Osorio v. Mayorkas

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Introduction

Each year, thousands of children who are derivative beneficiaries[1] on their parents' visa petitions turn 21 years old and "age out" while waiting for visas to become available, threatening the separation of families and the deportation of children who have lived in the United States for most of their lives.[2] These "aged out" children, who have often waited decades for a visa to become available in the appropriate visa category, can no longer immigrate[3] or adjust status along with their parents.[4] The Child Status Protection Act (CSPA) was enacted in 2002, amending the Immigration and Nationality Act (INA) to protect derivative child beneficiaries and keep families intact despite long visa waiting times. Among its main protective measures, the act creates a mathematical formula that subtracts the amount of time that a visa petition was pending from a child's age. If the child "ages out" despite the CSPA formula, the act provides relief in the form of an "automatic conversion" provision, to permit an "aged out" child to retain the priority date gained in a derivative preference category and use it when she becomes eligible in another category, so that she can more expeditiously adjust status or reunite with her family in the United States. The applicability of "automatic conversion" for "aged out" derivative beneficiaries has recently become a source of immense controversy, resulting in a three-way circuit split and a pending Writ of Certiorari with the Supreme Court. The CSPA's "automatic conversion" clause is codified as follows:

> If the age of an alien is determined [under the CSPA formula] to be 21 years of age or older for the purposes of [INA § 203(a)(2)(A)[5] and (d)[6]], the alien's petition shall be automatically converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.[7]

To summarize the controversy surrounding this clause, the Board of Immigration Appeals (BIA) in *Matter of Wang*[8] held that automatic conversion and priority date retention applied to some family based visa categories but did not apply to individuals who "age out" of eligibility as the derivative beneficiary of a fourth-preference family petition.[9] Subsequently, the Second, Fifth and Ninth circuits weighed in on the issue with inconsistent results. The Second Circuit[10] interpreted "automatic conversion" narrowly to apply only to aged-out beneficiaries in one strictly defined preference category and not derivative beneficia-

1 A "principal beneficiary" is an individual who has a qualifying relationship with a U.S. citizen or LPR petitioner, who files a visa petition on behalf of the principal beneficiary. Derivative beneficiaries, defined as the spouse or minor child of the principal beneficiary, may also be named in the principal beneficiary's visa petition, and are entitled to the same preference status, and the same priority date, as the principal alien. 9 FAM 42.31 n. 2.

2 See Brief for Plaintiffs-Appellants by American Immigration Lawyers Association and Catholic Legal Immigration Network, Inc., as Amicus Curiae, p. 11, De Osorio v Mayorkas, 695 F.3d 1003 (9th Cir. 2012) ("AILA Amicus Brief").

3 Immigrate means "to come into a country of which one is not a native for permanent residence." "Immigrate," The Merriam-Webster Dictionary (1994). For purposes of this article, the word may be used interchangeably with the term, "consular processing."

4 There are two different processes for obtaining an immigrant visa: consular processing and adjustment of status. During consular processing, applicants apply for and process an immigrant visa at a U.S. Department of State consulate abroad, most often in their home country. Adjustment of status is the process by which a person already in the U.S. has their immigration status adjusted to that of a permanent resident. See "Consular Processing," USCIS Website, available at < < http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid = 62280a5659083210VgnVCM100000082ca60aRCRD&vgnextchannel = 62280a5659083210VgnVCM100000082ca60aRCRD > > .

5 INA § 203(a)(2)(A) ("spouses or children of an alien lawfully admitted for permanent residence")

6 INA § 203(d) ("A spouse or child […] shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under [a family-based, employment-based, or diversity category], be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.")

7 INA § 203(h)(3).

8 25 I. & N. 954 (BIA 2009).

9 As described in a chart on page six of this article, the INA establishes the following family-based preference categories: (1) First Preference: unmarried adult sons and daughters of U.S. citizens and their children (23,400 visas per year); (2) Second Preference: spouses and unmarried minor children of LPRs (2A) and unmarried adult sons and daughters of LPRs (2B) (114,200 total for this category); (3) Third Preference: married sons and daughters of U.S. citizens (23,400); (4) Fourth Preference: brothers and sisters of adult U.S. citizens (65,000); see also INA §§ 203(a)(1)-(4).

10 Li v. Renaud, 654 F.3d 376 (2d Cir. 2011).

ries of other family-based visa categories. Thus, when a derivative child beneficiary of her parent's third- or fourth-preference family visa petition turns 21, she is not entitled to retain the priority date of that initial petition upon the parent's filing of a new second-preference (F-2B) petition on behalf of the now "adult" child.[11] Conversely, the Ninth[12] and Fifth[13] circuits came to the opposite conclusion, reasoning that Congress plainly made automatic conversion and priority date retention available to all petitions described in the CSPA's "automatic conversion" clause, INA § 203(h).[14]

In order to reconcile these competing circuit opinions, one must examine the problem facing these derivative beneficiaries in light of the legislative purpose of the CSPA. Part I provides an overview of the family-based immigration scheme, the quota system, and the concept of "priority dates." The article then addresses the crisis facing children who "age out" of visa eligibility and Congress's response in enacting the CSPA. An examination of the legislative history behind CSPA reveals that it was motivated by Congress's concern over both the separation of families resulting from lengthy visa-category backlogs and adjudicative delays. Part II traces the BIA's controversial ruling in *Matter of Wang* and the ensuing split between the Second, Fifth, and Ninth circuits over the proper scope of CSPA protection for aged-out derivative beneficiaries of various family-based visa categories. Part III discusses the challenges and potential strategies for implementing the Fifth and Ninth Circuits' decisions and upholding CSPA protection for all derivative child beneficiaries while meeting the concerns of conflicting opinions.

I. Background

A. The Child Status Protection Act

In 2002, Congress enacted the Child Status Protection Act.[15] At its most fundamental level, the legislation was designed to preserve family unity within the confines of the existing immigration framework.[16] Further, an examination of the CSPA's legislative history reveals that its proponents in both chambers of Congress expressed concern not only about adjudicative delays,[17] the sole concern recognized in *Matter of Wang*, but also an equal concern over "growing immigration backlogs […] caus[ing] the visa to be unavailable before the child reached his 21st birthday."[18]

The CSPA amended the INA to permit an applicant for certain immigration benefits to retain classification as a child under the Act, even if he or she has reached the age of 21.[19] The CSPA amendments fall under INA § 203(h), entitled "Rules for determining whether certain aliens are children."[20]

Among its protective measures, the CSPA created a complex mathematical formula that helps to allow applicants to maintain "child" status despite delays in adjudicating their visa petitions. The formula essentially subtracts the number of days the alien's petition was pending from the alien's age at the time a visa becomes available.[21] For example, where an applicant's petition was pending for 365 days prior to its approval, and she was 21 years old when a visa became available in her preference category, her age for immigration purposes is determined to be 20 years old under the CSPA formula. For aliens who "age out" of "child" status despite the CSPA's mathematical formula, the CSPA provides protection in the form of an "automatic conversion" clause, INA § 203(h), to allow the now-adult alien to convert her application to an appropriate visa category while letting her retain the priority date from the original

11 Gerald Seipp, "Ninth Circuit Rejects Matter of Wang; Finds CSPA Applies to All Derivatives," 89 NO. 39 Interpreter Releases 1901 (Oct. 8, 2012).

12 De Osorio, 695 F.3d at 1003.

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

14 See Austin T. Fragomen, Jr., Careen Shannon, and Daniel Montalvo, Immigr. Legis. Handbook § 6:17 (April 2012).

15 Pub. L. No. 107-20, § 3, 116 Stat. 927 (2002); see also INA § 203(h).

16 147 Cong. Rec. H2901-01 (June 6, 2001) (statement of Rep. Jackson-Lee) ("We believe that this will reunite families. This is what our immigration laws are all about, to unite families."); id. (statement of Rep. Gekas) ("These injustices were perpetrated in this particular set of circumstances inadvertently by the way that the original law was fashioned. What we do here today is adjust, through the use of common sense, a bad situation.");148 Cong. Rec. H4989-01 (July 22, 2002) (statement of Rep. Sensbrenner) ("Bringing families together is a prime goal of our immigration system. [The CSPA] facilitates and hastens the reuniting of legal immigrants' families.").

17 147 Cong. Rec. H2901-01 (June 6, 2001) (statement of Rep. Jackson-Lee) ("[S]ome sons and daughters of citizens ... have to stay on a waiting list from 2 to 13 years entirely because the INS did not in a timely manner process the applications for adjustment of status on their behalf."); id. (statement of Rep. Sensbrenner) ("If a U.S. citizen parent petitions for a green card for a child before that child turns 21, but the INS does not get around to processing the adjustment of status application until after the child turns 21, the family is out of luck."); id. (statement of Rep. Smith) ("Children of citizens are penalized because it takes the INS an unacceptable length of time--often years--to process adjustment of status applications."); Christina A. Pryor, "'Aging Out' of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act," 80 Fordham L. Rev. 2199, 2212 (2012).

18 147 Cong. Rec. S3275-01 (Apr. 2, 2001) (statement of Sen. Feinstein) ("[A] family […] may be forced to leave that child behind either because the INS was unable to adjudicate the application before the child's 21st birthday, or because growing immigration backlogs in the immigration visa category caused the visa to be unavailable before the child reached his 21st birthday."); 147 Cong. Rec. H2901-01 (June 6, 2001) (statement of Rep. Jackson-Lee) ("H.R. 1209 addresses the predicament of these immigrants. […] [I]nstead of being entitled to admission without numerical limitation, the U.S. citizens' sons and daughters are placed in the back of the line of one of the INS backlog family-preference categories of immigrants.")

19 See Donald Neufeld, Acting Associate Director of Domestic Operations, INS, "AFM Update: Chapter 21.2(e) The Child Status Protection Act of 2002 (CSPA) (AD07-04)," 2008 WL 1963663 (INS), 1 (Apr. 30, 2008).

20 INA § 203(h).

21 As illustrated in a chart on page 10, under the CSPA's formula, the alien's age for immigration purposes is determined to be his or her age at the time a visa becomes available reduced by the number of days in which the visa petition was pending. See INA § 203(h)(1).

visa petition. Whether automatic conversion and priority date retention apply to "aged out" derivative beneficiaries in all family-based visa categories is the subject of a current circuit split and the focus of this article.

B. The Problem of Immigration Backlogs

A central animating force behind the CSPA involves concerns over the effect of immigration backlogs on families and children. In particular, legislators described two kinds of backlogs: (1) the administrative backlog due to an immigration agency's lack of sufficient resources to handle its workload, and (2) the more serious problem which has developed because the annual number of statutorily available visas is less than the number of applicants getting in line each year to wait for a visa.[22] In order to understand the "aging out" problem fully, one must examine our country's family-sponsored immigration scheme and the visa allocation system. [23]

Under the current immigration system, a U.S. citizen or LPR may file a Form I-130 petition on behalf of an alien relative.[24] This petition forms the basis for a later filed visa application. Petitions may be filed in different family-based categories depending on such factors as the relationship between the beneficiary and petitioner, the beneficiary's age and marital status, and whether the petitioner is a lawful permanent resident or U.S. citizen. Immediate relatives, defined as spouses, parents, or unmarried children of U.S. citizens under the age of twenty-one, are exempt from the numeric limits that apply to other permanent resident visas.[25] However, for adult children of U.S. citizens and all qualifying relatives of LPRs, the number of annual immigrant visas is statutorily capped.[26] Chart 1 illustrates the various family-based preference categories established by the INA.

In order for an applicant to determine whether a visa is available in her family-based preference category, she must compare her priority date with the date listed in the monthly U.S. Department of State *Visa Bulletin*.[27] The "priority date" is the date the petition is filed, which essentially holds the applicant's place in line. The applicant's visa is available when her priority date becomes "current," meaning that her priority date is earlier than that listed on the *Visa Bulletin* under the corresponding preference category and country of nationality.[28]

Visa backlogs arise in part because of differences in supply and demand within the visa allocation system. Specifically, each year, the number of available visas in family-based preference categories is vastly exceeded by the number of applicants.[29] Accordingly, applicants in family-based preference categories must wait, sometimes indefinitely, for a visa in their category to become available. The result is that families are often kept apart for many years.[30]

C. The Problem of "Aging Out" of Visa Eligibility

A derivative beneficiary "ages out" and becomes ineligible for an immigration benefit when she reaches 21 years of age, and thus loses her qualifying "child" status, before her application is processed or a visa becomes available in her preference category.[31] Prior to the enactment of the CSPA in 2002, in order for a "child" derivative beneficiary to be granted a visa, the government needed to adjudicate her petition and grant immigration status before she "aged out," or turned 21 years of age.[32] Under this regime, the child had to remain a "child" under immigration law up to and including the date that the final benefit was granted.[33] Due to adjudicative delays and limited visa availability, countless children who applied as dependents of their parents lost eligibility and had to switch into an adult visa category when they reached their 21st birthday, at which point they were no longer considered "child" dependents under immigration law.[34] Upon switching into an adult visa category, these "aged out" beneficiaries also lost their place in line under the quota system.[35]

D. Legislative Concerns over the Effect of Backlogs on "Aged Out" Children

22 "Immigration Backlogs are Separating American Families," National Immigration Forum, 2 (Aug. 2012), available at <www.immigrationforum.org>.

23 See AILA Amicus Brief, supra note 2, at 11.

24 See INA § 203(a).

25 INA §§ 203(a)(1)(A)(i), (b)(2)(A)(i),. The INA defines a "child" as an unmarried person under the age of twenty-one. Once a child turns twenty-one, he or she is no longer deemed an immediate relative but rather a "son" or "daughter." INA § 203(b).

26 See INA § 203(a)(1)-(4).

27 See Visa Bulletin, U.S. Department of State ("U.S. Dept. of State Visa Bulletin") available at <http://travel.state.gov/visa/bulletin/bulletin_1360.html>; see also National Immigration Forum supra note 24, at 2.

28 AILA Amicus Brief, supra note 2, at 11-12.

29 To arrive at the quota for these categories, the number of immediate relatives who immigrated in the previous fiscal year is subtracted from the total allocation of 480,000, and the number of unused employment-based visas is then added to that amount. See Christina A. Pryor, "'Aging Out' of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act," 80 Fordham L. Rev. 2199, 2205 (2012); see also National Immigration Forum, supra note 24, at 2.

30 National Immigration Forum, supra note 24, at 2; see also AILA Amicus Brief, supra note 2, at 14-15 ("The number of F-2B visas available to Mexico is 1,841. The number of pending F-2B applicants from Mexico is 212,621. The length of time it will take to clear up the current backlog is approximately 115.5 years (212,621 ÷ 1,841). […] The number of F-2B visas available to the Philippines is also 1,841. The number of pending F-2B applicants from the Philippines is 52,823. The length of time it will take to clear up the current backlog is approximately 28.7 years (52,823 ÷ 1,841)").

31 Seipp, supra note 12, at 1902.

32 Austin T. Fragomen, Jr., Careen Shannon, Daniel Montalvo, Immigr. Proc. Handbook § 12:26 (Nov. 2012).

33 Id.

34 Id.

35 Seipp, supra note 12, at 1902.

CHART 1

Preference category	Description	Visas allocated per year
First Preference (F-1)	Unmarried adult sons and daughters of U.S. citizens and their children	23,400 visas per year[1]
Second Preference: (F-2A and F-2B)	F-2A: Spouses and unmarried minor children of LPRs F-2B: Unmarried adult sons and daughters of LPRs	114,200 visas per year[2]
Third Preference (F-3)	Married sons and daughters of U.S. citizens	23,400 visas per year[3]
Fourth Preference (F-4)	Brothers and sisters of adult U.S. citizens	65,000 visas per year[4]

Due to current backlogs and anticipated demands, "aging out" carries a devastating price for children who are derivatives on a parent's visa petition. Generally, they must wait for their parent to become a lawful permanent resident so that their parent can file a new petition on their behalf in the F-2B category, accorded to adult sons and daughters of lawful permanent residents. For many "aged out" derivative beneficiaries who lose their place in line and must wait for a new F-2B petition to be filed on their behalf by their parents, it becomes mathematically impossible for them to ever immigrate based on these new petitions.[36] Many aged out derivative beneficiaries have already been waiting for decades for a visa to become available in the category in which they "aged out," and unless they can be credited with the time that they have already been waiting for a visa, they will have to wait an additional decade or more for a visa to become available.[37] Given current visa wait times, the worldwide F-2B category is backlogged approximately 9 1/3 years.[38]

Sen. Diane Feinstein illuminated the tragic consequences of "aging out" upon families when she introduced a version of the CSPA to the Senate in 2001:

> [A] family whose child's application for admission to the United States has been pending for years may be forced to leave that child behind either because the INS was unable to adjudicate the application before the child's 21st birthday, or because growing immigration backlogs in the immigration visa category caused the visa to be unavailable before the child reached his 21st birthday. […] Situations like these leave both the family and the child in a difficult dilemma. […] Emigrating parents must decide to either come to the United States and leave their child behind, or remain in their country of origin and lose out on their American dream in the United States. […] For lawful permanent residents who already live in the United States, their dilemma is different. They must make the difficult choice of either sending their child who has "aged-out" of visa eligibility back to their country of origin, or have the child stay in the United States out-of-status, in violation of our immigration laws, and thus, vulnerable to deportation. No law should encourage this course of action.[39]

Sen. Feinstein's statement highlights the main legislative concerns behind the CSPA. In enacting the CSPA, Congress sought to preserve family unity in situations where children "age out" of visa eligibility. More importantly for this article's discussion, her statement memorializes the legislature's concern over "aging out" situations caused by both adjudicative delays and immigration backlogs within the visa allocation system. Legislative concerns over "aging out" situations caused by immigration backlogs were raised by the CSPA's proponents in both the House of Representatives and Senate. U.S. Rep. Sheila Jackson Lee stated that the CSPA "addresses the predicament of […] immigrants" who have "aged out" of immediate relative status and "are placed in the back of the line of one of the INS backlogged family-preference categories of immigrants."[40]

As discussed in Parts II and III of this article, the legislative intent behind the CSPA has become a focal point in the current circuit split over the applicability of "automatic

36 AILA Amicus Brief, supra note 2, at 16

37 Id.

38 For Filipinos, the F-2B category is backlogged almost 30 years. And for Mexicans, the category is backlogged over 100 years. Therefore, it is mathematically unfeasible for a Mexican child who turns 21 and whose LPR parent files an I-130 petition on her behalf today to ever immigrate or adjust status based on that petition. Id.

39 147 Cong. Rec. S3275-01 (Apr. 2, 2001) (statement of Sen. Feinstein).

40 147 Cong. Rec. H2901-01 (June 6, 2001) (statement of Rep. Jackson-Lee).

conversion" for "aged out" derivative beneficiaries.

E. How the Child Status Protection Act Works for Derivative Beneficiaries

The CSPA seeks to address the problem of derivative beneficiaries "aging out" of immigration benefits due to immigration backlogs and adjudicative delays in two basic ways. First, the CSPA applies a complex mathematical formula to determine whether an applicant may retain status as a "child" for immigration purposes despite having turned 21 before a visa becomes available.[41] If the mathematical formula determines that the applicant does not retain status as a "child" for immigration purposes, the CSPA attempts to preserve her place in the visa line by automatically converting her petition to the "appropriate" category. This allows the applicant to retain the priority date of the original petition, rather than assigning her a new priority date.

Step #1: CSPA's Complex Mathematical Formula

The CSPA provides for the following mathematical formula to help prevent aliens from losing "child" status due to administrative delays in adjudicating their I-130 petitions. For derivative applicants seeking to adjust under a preference category, an applicant's adjusted age under the CSPA, or "CSPA age" is determined by taking her age on the date a visa becomes available and subtracting the number of days that the petition was pending.[42] If the applicant is under 21 using this formula, she satisfies the age requirement for that visa.[43] If the applicant's CSPA age is 21 or over, she must look to "Step 2." (See Chart 2)

Significantly, the CSPA formula allows an applicant to retain "child" status for immigration purposes where she would not have "aged out" but for the administrative delay in adjudicating her visa application. However, the CSPA formula does not allow retention of "child" status where she "aged out" as a result of immigration backlogs associated with limited visa availability. To address this second type of backlog, the CSPA offers a different ameliorative measure: the "automatic conversion" clause under INA § 203(h)(3), as discussed below in "Step #2."

Step #2: If the Applicant's "CSPA age" Is 21 or Above, Automatic Conversion and Priority Date Retention

If the applicant's adjusted age is 21 or over, then the applicant has "aged out." She will no longer qualify as a "minor child" based on her relationship to her parents, so she will have to pursue status as an "adult son or daughter" of her parents. However, the CSPA's automatic conversion and retention provisions allow her to switch to a new category while maintaining the same priority date from the original petition.

Under INA § 203(h), the "automatic conversion" provision of the CSPA, "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."[44] Thus, if the son or daughter has a CSPA age of 21 or older, his or her case will automatically be switched to a petition in the appropriate family-based category, i.e., a second-preference petition for an adult son or daughter of a permanent resident or a first-preference petition for an unmarried adult son or daughter of a U.S. citizen.[45] Additionally, the applicant is able to retain the priority date associated with the original petition.[46]

Automatic conversion seems relatively straight-forward, for instance, where the applicant is the direct beneficiary of a petition filed in the F-2A category by her LPR parent. In these cases, if the applicant "ages out" and loses "minor child" status, her case can convert to the appropriate F-2B

Chart 2: Calculating "CSPA Age"

Mathematical Formula for Determining CSPA Age	"[T]he age of the alien on the date on which an immigrant visa number becomes available for such alien […] reduced by […] the number of days in the period during which the applicable petition […] was pending.[5]
Sample Application #1:	▯ Age on date visa number available = 22 ▯ Time I-130 petition pending = 2 years ▯ CSPA Age = [22 years] – [2 years] = ***20 years (not aged out)***
Sample Application #2:	▯ Age on date visa number available = 22 ▯ Time I-130 petition pending = 6 months ▯ CSPA Age = [22 years]– [6 months][6] = ***21 years (aged out)***

41 INA § 203(h)(1).

42 INA § 203(h)(1).

43 INA § 203(h)(1).

44 INA § 203(h)(3).

45 Immigr. Proc. Handbook, supra note 40.

46 Id.; see also See H.R. Rep. No. 107-45, at 2-3 (2001), reprinted in 2002 U.S.C.C.A.N. 640, 641-642; Johnny N. Williams, Office of the Executive Associate Commissioner, "The Child Status Protection Act, Memorandum Number 2," 1 (Feb. 14, 2003).

category, for unmarried adult sons and daughters of LPRs. Thus, there clearly exists an "appropriate category" to which her petition may automatically convert, as provided under INA §203(h), the CSPA's "automatic conversion" provision.

However, a different and less clear situation arises where the applicant is a *derivative beneficiary*[47] on her parent's petition filed by the parent's mother, father, brother or sister. The problem is that once the derivative applicant "ages out" and loses her "minor child" status, there is no "appropriate category" to which her petition can immediately convert. She can no longer be a derivative on her parent's petition, nor does she qualify for a visa based on her relationship to the petitioner, as one can see from the preference category chart above on page six, no visa category exists for grandchildren, nieces or nephews of U.S. citizens or LPRs. Once the parent, the principal beneficiary, becomes an LPR, the parent can file a petition for the "adult son or daughter." The question that has vexed courts is whether the applicant can retain the priority date from the original petition for a petition subsequently filed by the parent. The controversy surrounding this question involves how courts have interpreted the automatic conversion and retention language of the CSPA.

II. The BIA's Decision and the Current Circuit Split

A. The BIA's Precedential Ruling in *Matter of Wang*

The purpose of the CSPA, a statute created to facilitate and hasten the reunification of immigrants with their U.S. citizen and LPR families,[48] has been narrowly interpreted by the BIA in *Matter of Wang,* which limited the applicability of the automatic conversion provision to certain family-based visa petitions.[49]

In *Matter of Wang*, a U.S. citizen filed a fourth preference (F-4) petition on behalf of a brother in 1992. The brother's wife and three children were listed as derivative beneficiaries. By the time the principal immigrant was admitted as an LPR in October 2005, one of his three children aged out. In September 2006, the brother filed a second-preference (F-2B) petition on behalf of his now adult, unmarried daughter, requesting that she be assigned the priority date of Dec. 28, 1992, given to the F-4 visa petition that had been filed on his behalf by his U.S. citizen sister, the beneficiary's aunt. After examining the issue of whether an aged-out beneficiary of an F-2B petition could retain the priority date from the earlier F-4 petition, the BIA denied the request.[50]

The BIA arrived at its conclusion by examining the CSPA's language, regulatory framework, and legislative history.[51] First, with regard to the statute's text, it determined that the language of the "automatic conversion" provision under INA § 203(h)(3) was ambiguous, holding that it "does not expressly state which petitions qualify for automatic conversion and retention of priority dates."[52]

Second, after finding ambiguity in the language of the "automatic conversion" provision, INA § 203(h)(3), the BIA considered the usage of "conversion" and "retention" in other regulations in order to determine the legislative intent behind the "automatic conversion" clause.[53] The BIA reasoned that because the term "conversion" consistently refers to a visa petition that moves from one category to another in immigration regulations, the beneficiary of that petition transfers her classification but does not need to file a new visa petition.[54] Moreover, the BIA asserted that the concept of "retention" of priority dates has historically been limited to visa petitions filed by the *same* family member, whereas petitions filed by relatives received their own priority dates.[55] Therefore, when the beneficiary's daughter "aged out" from her eligibility for derivative status on the F-4 petition, there was no family preference category that her visa could be converted to because no visa category recognizes the niece of a U.S. citizen.[56] Also, the BIA found that because the new F-2B petition was filed by a *different* petitioner, her father, allowing her to retain the priority date of the original petition filed by her aunt would conflict with the historic usage of the term "retention."[57]

Third, the BIA examined the statute's legislative history for clear evidence of congressional intent to expand historical use of the terms "automatic conversion" and "priority date retention."[58] The BIA, citing statements from members of the House of Representatives, observed that the CSPA was principally focused on extensive administrative delays in the processing of visa petitions and applications.[59] The BIA contended that the legislative record of the CSPA does not provide "clear evidence" that it aimed to address waits due to visa allocation issues, such as long waits associated with priority dates.[60] The board found that if automatic conversion and priority date retention for F-4 visas were allowed, the beneficiary would displace other applicants

47 A "principal beneficiary" is an individual who has a qualifying relationship with a U.S. citizen or LPR petitioner. Derivative beneficiaries are spouses or minor children of principal beneficiaries, may also be named in the principal beneficiary's visa petition, and are entitled to the same preference status, and the same priority date, as the principal alien. 9 FAM 42.31 n. 2.

48 148 Cong. Rec. H4989-01 (July 22, 2002) (statement of Rep. Sensbrenner).

49 25 I. & N. Dec. at 39.

50 Id. at 38-39.

51 Id. at 33 n.7.

52 Id. at 33 (interpreting INA §§ 203(h)(1)-(3)).

53 Id. at 33-34.

54 Id. at 35.

55 Id.

56 Id. at 35-36.

57 Id. at 34-36.

58 Id. at 36-38.

59 Id. at 36-38, citing 147 Cong. Rec. H2901 (daily ed. June 6, 2001) (statements of Reps. Sensenbrenner, Jackson-Lee, and Smith).

60 Id. at 38.

who had been waiting longer in that category.[61] The BIA then concluded that the "automatic conversion" clause does not apply broadly to all "aged out" derivative beneficiaries, finding that "there is no indication in the statutory language or legislative history of the CSPA that Congress intended to create a mechanism to avoid the natural consequence of a child aging out of a visa category because of the length of the visa line."[62] In its ruling, the BIA acknowledged in a footnote that it was disregarding its prior unpublished opinion in *Matter of Garcia*,[63] which came to the opposite conclusion on a similar set of facts.

The practical result of the *Matter of Wang* decision is that the priority date established by the earlier fourth-preference petition cannot be applied to the later-filed second-preference petition, causing the beneficiary to lose her place in line within the visa allocation system. Rather, the applicant is assigned a new priority date and is not credited with the time she has spent waiting under the earlier petition for a visa to become available.[64]

B. The Circuits Weigh In

A split among circuit circuits has developed concerning the scope of protection afforded by the CSPA for applicants who "aged out" of eligibility as derivative beneficiaries and upon whose behalf a second-preference petition is later filed. The Second Circuit[65] found the statute unambiguous but ultimately came to the same conclusion as the BIA in *Matter of Wang*,[66] while the Fifth[67] and Ninth[68] circuits wholly rejected the BIA's interpretation, adopting a view favoring family unification.[69] Specifically, the Fifth and Ninth circuits permitted aged-out derivative beneficiaries to retain the priority dates associated with their earlier F-4 petitions where a subsequent F-2B petition was filed on their behalf by permanent resident parents.

1. *The Second Circuit*

In the 2011 case, *Li v. Renaud*, the Second Circuit found the CSPA's "automatic conversion" clause was unambiguous but came to the same ultimate conclusion as the BIA in *Matter of Wang*.[70]

The case concerned Duo Cen, who "aged out" of eligibility as a derivative beneficiary on the F-2B petition filed in 1994 on behalf of his mother, Feimei Li, by Li's father, who was Cen's grandfather.[71] Because of visa backlogs, Cen's mother did not receive a visa until 2005, when Cen was 26 years old.[72] In 2008, Cen's mother, who had become a lawful permanent resident, filed a new F-2B petition for her son and USCIS established the priority date as 2008 rather than 1994, the priority date of the original petition.[73] Li argued that her son's 1994 petition should "automatically convert" and that he should be allowed to retain the 1994 priority date.[74]

As an initial matter, the court found no ambiguity because Congress's intent was clear on the "precise question at issue"—whether a derivative beneficiary who ages out of one family preference petition may retain the priority date of that petition to use for a different family preference petition *filed by a different petitioner.*[75] Because the court found clear congressional intent, it did not need to defer to the BIA's interpretation.[76] Next, the court based its analysis of the issue of priority date retention on whether or not the family preference petition could be "converted to [an] appropriate category." Focusing its opinion narrowly, the court concluded that an earlier family preference priority date could not apply to a later family preference petition made by a different petitioner.[77]

2. *The Fifth Circuit*

In 2011, the Fifth Circuit in *Khalid v. Holder* stepped in, adopting a position favoring a broad interpretation of the automatic conversion provision and rejecting the conclu-

61 Id.

62 Id. at 38.

63 No. A79 001 587, 2006 WL 2183654 (BIA June 16, 2006).

64 AILA Amicus Brief, supra note 2, at 3.

65 Li, 654 F.3d at 376.

66 25 I. & N. at 954.

67 Khalid , 655 F.3d at 363.

68 De Osorio, 695 F.3d at 1003.

69 All three circuit courts applied a two-part analysis set forth in a seminal Supreme Court decision, Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). First, the reviewing court determines whether the statutory language is clear on its face based on traditional rules of statutory construction. If Congress has spoken directly to the precise question at issue, the analysis ends there. If, on the other hand, the language or congressional intent is ambiguous, a reviewing court proceeds to the second step of analysis and defers to the agency's interpretation, assuming it is reasonable. Charles Wheeler, "Automatic Conversion and Retention of Priority Date for Aged-Out Derivatives: Circuit Courts Only Add to the Confusion," Catholic Legal Immigration Network, Inc. (CLINIC), available at < < http://cliniclegal.org/sites/default/files/Automatic%20Conversion%20and%20Retention%20of%20Priority%20Date%20for%20Aged.pdf > >

70 Li, 654 F.3d at 382 ("an alleged ambiguity in some part of the statutory provision at issue does not end the inquiry. Even absent 'explicit[] articulat[ion]' of all components of a statutory provision, […] a reviewing court must still ask whether Congress has spoken to 'the precise question at issue' in the case."), citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984) (internal citation omitted).

71 Li, 654 F.3d at 379.

72 Id.

73 If USCIS had given the petition a 1994 priority date, Cen would have received a visa immediately. However, because the petition was given a 2008 priority date, the Department of State estimates that based on current processing times Cen will have to wait until 2017 for a visa. Id. at 379-380.

74 Id. at 381.

75 Id. at 382 (footnote omitted, emphasis added).

76 Id. at 383 (emphasis added).

77 Id. at 385; see also David Froman, "De Osorio v. Mayorkas, 2012 U.S. App. LEXIS 20177 (9th Cir. Sept. 26, 2012) (en banc): Suggestions for Implementing Court's Ruling Upholding Child Status Protection Act Coverage for Over-Twenty-One Derivative Beneficiaries: An Emerging Perspective," 2012 Emerging Issues 6736 (Nov. 16, 2012).

sions of the BIA and *Li*.[78] According to the Fifth Circuit, Congress plainly made automatic conversion and priority date retention available to all petitions described in INA § 203(h)(2).

In *Khalid*, the Fifth Circuit vacated a removal order by the BIA against an alien, Mr. Khalid, who had "aged out" as a derivative on his mother's fourth-preference petition filed by her sister, and held that he was entitled to utilize the priority date of the original petition in connection with a subsequent second preference petition filed on his behalf by his mother.

Like the Second Circuit, the Fifth Circuit rejected *Matter of Wang*'s notion that INA § 203(h)(3) was ambiguous.[79] Although the court agreed with *Wang* that the "automatic conversion clause" under INA § 203(h)(3) does not explicitly delineate which petitions qualify for automatic conversion and priority date retention, it found that "read as a whole," the statute clarifies the meaning of the otherwise-ambiguous "automatic conversion clause."[80] The Fifth Circuit looked at the interrelatedness between the "automatic conversion" clause of INA § 203(h)(3) and the CSPA's other provisions, the CSPA's age formula clause of INA § 203(h)(1) and the "Petitions described" clause of INA 203(h)(2), suggesting that the three provisions cannot fully operate unless read in tandem. For instance, the benefits of priority date retention under the "automatic conversion" clause, INA § 203(h)(3), are "explicitly conditioned on a particular outcome" from CSPA's age formula, INA § 203(h)(1)—that the alien's "age" is at least 21.[81] Therefore, "[the 'automatic conversion' clause of INA § 203((h)(3)] must operate on this same set of petitions because the outcome that triggers the ['automatic conversion' clause's] benefits can occur only if the formula applies."[82]

The Fifth Circuit held that "[i]n light of the interrelated nature of the three provisions, reading the subsection as a whole confirms that Congress intended [the 'automatic conversion' clause of INA § 203(h)(3)] to apply to any alien who 'aged out' under [the CSPA's age adjustment formula, INA § 203(h)(1)] with respect to the universe of petitions described in [INA § 203(h)(2), the 'Petitions described' clause]."[83]

After shattering this central point of ambiguity relied on by the BIA in *Matter of Wang*, the *Khalid* court moved on to the issue of Congress's intent. The Court referenced legislative history from the Senate that revealed not only a concern over adjudicative delays but also an equal concern for "growing immigration backlogs" relating to the non-availability of visas.[84] This evidence directly undercut the BIA's argument in *Matter of Wang* that Congress was concerned solely with adjudicative delay.

Notably, the *Khalid* court recognized that the necessary calculation of an alien's "CSPA age" under the complex mathematical formula described in INA § 203(h)(1) "cannot be made at the moment the child 'ages out,'" because it requires the date on which a visa becomes available to the alien.[85] In short, automatic conversation cannot be triggered until the principal's visa becomes available, since only then can the CSPA age adjustment formula be computed. Looking to guidance from the BIA's unpublished decision in *Matter of Garcia*, the court found that there would be another category to convert to at that time: "the 'appropriate category' for purposes of [the "automatic conversion" clause, INA § 203(h)(3)] is that which applies to the 'aged-out' derivative vis-a-vis the *principal beneficiary* of the original petition."[86]

Additionally, the *Khalid* court found that the effect of the *Li* decision was to "exclude an entire class of derivative beneficiaries from the 'automatic conversion' clause's benefits by silent implication based on the unwritten assumption that the petitioner must remain the same" and held that it was "unlikely that Congress would [make this exclusion]. Rather, one would expect any such exclusion to be express, since it would effectively operate categorically."[87] Accordingly, the Fifth Circuit held that the petitioner was entitled to utilize the priority date of an F-4 petition in connection with a subsequent F-2B petition filed on his behalf by his mother.[88]

The Fifth Circuit concluded that Congress plainly made automatic conversion and priority date retention available to derivative beneficiaries in all family-based preference categories.[89]

3. *The Ninth Circuit*

On Sept. 26, 2012, an *en banc* decision by the Ninth Circuit in *De Osorio v. Mayorkas* reversed an earlier Ninth Circuit ruling[90] and held that the plain language of the CSPA unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries in all family visa categories.[91]

The Ninth Circuit in *De Osorio* rebutted all conceivable

78 Khalid, 655 F.3d at 375; Li, 654 F.3d at 376.

79 Id. at 370, quoting Matter of Wang, 25 I. & N. Dec. at 33 ("[T]he language of [INA § 203(h)(3)] does not expressly state which petitions qualify for automatic conversion and retention of priority dates.")

80 Id., quoting Brown v. Gardner, 513 U.S. 115, 118 (1994) ("Ambiguity [in a statute] is a creature not of definitional possibilities but of statutory context.").

81 Id., citing INA § 203(h)(3) ("If the age of an alien is determined under paragraph (1) to be 21 years of age or older....").

82 Id. at 371.

83 Id. at 371.

84 Id. at 371-72, quoting 147 Cong. Rec. S3275 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein).

85 Id. at 372.

86 Id. at 372, citing Matter of Garcia, 2006 WL 2183654 (BIA July 16, 2006).

87 Id. at 374.

88 Id. at 375.

89 Id. at 373.

90 Cuellar de Osorio v. Mayorkas, 656 F.3d 954 (9th Cir. 2011).

91 695 F.3d at 1016; see also Interpreter Releases, supra note 12, at 1901-02.

arguments concerning ambiguity: the existence of a circuit split, the perceived impracticability of application to certain derivative beneficiaries, the requirement for a new petitioner, and the exception for "unreasonable or impracticable results."[92] Concerning this last point, the court stated:

> Plainly, a change in policy announced by the statute's plain language cannot be impracticable just because it is a change or because it does not specify how exactly that change is to be implemented. […] A statute that requires an agency to change its existing practices does not necessarily "lead to absurd or impracticable consequences."[93]

The court agreed with the Fifth Circuit that Congress intended a greater benefit through this legislation than that "meager benefit" to derivative F-2A beneficiaries set forth in *Matter of Wang* and touted by the government.[94] The court concluded that under the clear wording of the CSPA, priority-date retention and automatic-conversion are available to all visa petitions identified in subsection (2).[95] (See Chart 3)

IV. TEMPERED HOPE FOR "AGED OUT" DERIVATIVE BENEFICIARIES

A. Challenges Ahead

While the *De Osorio* ruling may signal hope for some aged-out derivative beneficiaries, the decision is not final for applicants in the Ninth Circuit jurisdictions given that the government has requested an appeal of the decision with the Supreme Court.[96] Therefore, the Ninth Circuit ruling remains on hold and it would be reckless for most individuals in the Ninth Circuit who stand to benefit from the Court's decision to apply immediately.[97] If the Supreme Court agrees to hear the *De Osorio* case, whatever the outcome, its decision for resolving the circuit split will drastically affect the lives of "aged out" derivative beneficiaries in all jurisdictions, for better or worse.

In the meantime, the effect of the *De Osorio* ruling upon any jurisdiction, including the Ninth Circuit, remains unclear. *De Osorio* represents only the latest ruling in a three-way circuit split. Only the Second, Fifth, and Ninth circuit have ruled on the issue and found the statute unambiguous, so adjudicators in other jurisdictions will continue to defer to the BIA's obsessively restrictive decision in *Matter of Wang*. Guidance from the Supreme Court may be necessary before this issue is settled.

B. The Government Urges the Supreme Court to Resolve the Circuit Split

The debate over the proper interpretation of the CSPA's "automatic conversion" clause has now reached the Supreme Court. On January 25, 2013, U.S. Solicitor General Donald Verrilli, on behalf of Attorney General Eric Holder, filed a petition for *writ of certiorari* asking the Supreme Court to review the Ninth Circuit's decision in *De Osorio* and resolve the current circuit split over the meaning of the CSPA's "automatic conversion" provision.[98] In its petition, the government requested that the Ninth Circuit's decision be reversed, arguing that it misinterpreted the "automatic conversion" provision and applied a mistaken analysis.

C. Immigrant Advocates Urge Resolution of the Circuit Split

Should the Supreme Court choose to hear the *De Osorio* case, it should adopt the reasoning of the Fifth and Ninth circuit rulings. The Fifth and Ninth circuit decisions are attractive for a number of reasons.

Like the Second Circuit, the Fifth Circuit and the Ninth Circuit found the plain language of the CSPA unambiguous. Thus, all three circuits agree that deference to the BIA in *Matter of Wang* is inappropriate. The Ninth Circuit reaffirmed the Fifth Circuit's determination that under the clear wording of the CSPA, priority date retention and automatic conversion are available to "aged out" derivative beneficiaries in all family-based categories.[99] Both the Fifth and Ninth circuits' decisions are more recent than the rulings by the BIA and the Second Circuit. Additionally, the Ninth Circuit's decision covers consolidated cases including a class action and as such the decision has broader application than prior individual decisions.[100] As an *en banc* ruling, the Ninth Circuit decision carries greater weight and force of persuasion.

The Fifth and Ninth circuit rulings are also in line with Congress's intent in enacting the CSPA to preserve family unity. Unlike the holdings in *Matter of Wang* and *Li,* which force families to separate or live apart for years, the Fifth and Ninth circuit cases represent a breakthrough for tens of thousands "aged-out" sons and daughters who have waited for years as a parent sought a visa in the United States.

In addition, the *Khalid* and *De Osorio* rulings are appealing in their logic, simplicity, and focus on reading the language of the CSPA "as a whole" without having to read out certain clauses, rely on prior agency practices, create exceptions, or imply congressional intent when none was specifically stated. Together, the Fifth and Ninth circuit cases provide clear, well-reasoned and highly persuasive support for

92 De Osorio, 695 F.3d. at 1011-14.

93 Id. at 1014.

94 Id. at 1015.

95 Id. at 1015.

96 See "Child Status Protection Act (CSPA) Victory!" Carl Shusterman Immigration Update (Sept. 27, 2012), available at <http://blogs.ilw.com/carlshusterman/2012/09/child-status-protection-act-cspa-victory.html>.

97 See "9th Circuit CSPA Victory: Don't File Yet!" 2012 U.S. Immigration Blog (Oct. 19, 2012), available at <http://shusterman.com/9th-circuit-cspa-victory-dont-file-yet.html>.

98 Mayorkas v. Cuellar de Osorio, No. 12-930, 12A612 (Jan. 25, 2013).

99 De Osorio, 695 F.3d at 1015-16.

100 Froman, supra note 87.

Chart 3: How CSPA Treats "Aged Out" Derivative Beneficiaries in Different Family-Based Categories in Various Jurisdictions

	Facts		**Automatic conversion and priority date retention under *Matter of Wang***	**Practical consequences under *Matter of Wang*. When will visa be available?**
F-2A derivative → F-2B principal	John, a native and citizen of Germany, is 19 years old when he becomes a derivative beneficiary on an F-2A visa petition (spouse or minor child of LPRs) filed by John's father, an LPR, on behalf of his mother. The F-2A visa petition is filed in October 2010. The petition is approved in October 2011, and a visa number becomes available in February 2013,[7] when John is 22 years old.	22 - 1 = 21 (aged out)	John's father will need to file a new petition on John's behalf, since John is no longer a minor child and can no longer be a derivative. John will convert to the F-2B category and will be able to retain the priority date from the original October 2010 petition filed by John's father on behalf of his mother.	Based on current backlogs, visa wait time estimate is 8 years, but John is credited with the 3 years he has already waited. Visa available in about 5 years, 2018, when John is 27 years old.
F-4	Jane, a native and citizen of Germany, is 10 years old when she becomes the derivative beneficiary on her mother's F-4 visa petition filed by her mother's U.S. citizen sister, her aunt, in April 2001. The petition is approved in April 2002, and a visa number becomes available in February 2013, when Jane is 22 years old.	22 – 1 = 21 (aged out)	Jane is no longer considered a minor child, so she can't adjust status at the same time as her mother as a derivative F-4 beneficiary. But since a visa is now available for her mother, once her mother is an LPR, she can file an F-2B petition (for unmarried adult sons/daughters of LPRs) on behalf of her daughter. Jane's mother becomes an LPR and files an F-2B petition for her daughter in 2013. Under *Matter of Wang*, Jane will not be able to retain the earlier 2001 priority date but rather will be given a new 2013 priority date.[8]	Jane is not credited with the 12 years that she has already been waiting under the F-4 petition. Given the 8-year backlog in the F-2B category, a visa will not be available for Jane until 2021, when Jane is 30 years old. In the meantime, she must wait in Germany and will be unable to join her mother in the U.S.

	Second Circuit:	**Fifth Circuit:**	**Ninth Circuit:**
F-2A derivative → F-2B principal	Same as under *Matter of Wang.* Visa converts to F-2B category and he retains original 2010 priority date.	Same as under *Matter of Wang*. Visa converts to F-2B category and he retains original 2010 priority date.	Same as under *Matter of Wang.* Visa converts to F-2B category and he retains original 2010 priority date.
F-4 derivative → F-2B principal	Same as under *Matter of Wang*. Automatic conversion not recognized for Jane.	Jane is credited with the 12 years that she has already been waiting and retains the 2001 priority date. A visa number is immediately available to her and she can join her mom in the U.S.	Jane is credited with the 12 years that she has already been waiting and retains the 2001 priority date. A visa number is immediately available to her and she can join her mom in the U.S.

the rights of countless derivative beneficiaries who waited for years to immigrate to the United States only to lose their place in line upon turning 21.

Even if the Supreme Court chooses not to adopt the reasoning of the Fifth and Ninth circuits, it should still come to the same conclusion as these courts just by looking at the plain meaning of the CSPA "automatic conversion" provision. The CSPA's "automatic conversion" clause provides:

> If the age of an alien is determined [under the CSPA age adjustment formula] to be 21 years of age or older for the purposes of [INA § 203(a)(2)(A)[101] and (d)[102]], the alien's petition shall be automatically converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.[103]

In other words, automatic conversion and priority date retention apply where an alien's "CSPA age" is 21 or above and she "ages out" of eligibility for a visa "for purposes of [INA §§ 203(a)(2)(A) and (d)]," referring to principal beneficiaries in the F-2A category (spouses or children of LPRs) and derivative beneficiaries in *all family-based visa categories*. Given that the "automatic conversion" clause itself references INA § 203(a)(2)(d), which sets out the INA's definition for derivative status, it clearly intended to allow "aged out" derivative beneficiaries to avail themselves of the same protections undisputedly accorded to "aged out" F-2A principal beneficiaries. Further, in no place does the statute explicitly limit the provision's general protection of "aged out" derivatives to apply only to "aged out" derivatives in the F-2A category on whose behalf a subsequent petition may be filed by the same petitioner.

Conclusion

In conclusion, the recent decisions by the Fifth and Ninth circuits offer hope to thousands of derivative child beneficiaries who, due to devastating immigration backlogs, lose their visa eligibility and face separation from their families when they turn 21.[104] Serious questions remain for the future of these over-21 derivative beneficiaries, but the Fifth and Ninth circuit decisions offer an appealing solution based on existing law. The debate over the proper interpretation of the "automatic conversion" clause has now reached the Supreme Court, as the government has recently requested the Court to review the Ninth Circuit's decision in *De Osorio*. Ultimately, Supreme Court decision guidance may be necessary to resolve the existing circuit split. If it chooses to hear the *De Osorio* case, the Supreme Court should adopt the Fifth and Ninth circuits' reasoning. Even without looking to the Fifth and Ninth circuit rulings, the Supreme Court should come to the same conclusion just by looking to the plain meaning of the CSPA's "automatic conversion" clause. ◆

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101 INA § 203(a)(2)(A) ("spouses or children of an alien lawfully admitted for permanent residence")

102 INA § 203(d) ("A spouse or child […] shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under [a family-based, employment-based, or diversity category], be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.")

103 INA § 203(h)(3).

104 See AILA Amicus Brief, supra note 2, at 11.

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they cannot return. Finally, because few people have these statuses, people with CAT or withholding often have trouble obtaining a driver's license and convincing employers that they are lawfully present in the United States.

Frankly, I am not in favor of giving more benefits to criminals or human rights abusers who receive withholding or CAT. Some immigration rights advocates would disagree with this (and there are legitimate reasons to disagree), but I feel that there should be consequences for our bad actions, and people who do not qualify for asylum due to their own bad conduct should suffer those consequences.

On the other hand, it is unfair to penalize people who receive withholding or CAT because they missed a filing deadline, or because they face torture for some reason other than race, religion, nationality, particular social group or political opinion. My "wish" here is that such people receive some or all of the benefits normally given to asylum seekers. These people have done nothing wrong, and often they have suffered serious abuse in their homelands. ◆

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Quote of the Month

"If a conservative is a liberal who has been mugged, a liberal is a conservative who has been arrested." ----- **Tom Wolfe**