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The Child Status Protection Act: Does Immigration Math Solve the Family Unity Equation?

Shane Dizon*

I. INTRODUCTION

Using a seemingly straightforward mathematical formula, the Child Status Protection Act (“CSPA”)¹ changes how children can attain permanent residence in the United States immigration system. Historically, a child “aged out,” and thus lost the ability to retain status as a child² as soon as she reached twenty-one, regardless of whether the immigration petition was timely filed. Using a cryptic statutory calculation, the CSPA fixes the child’s age when the petition for the child (with the child as direct beneficiary of the petition) or her parent (with the child as a “derivative” beneficiary, tagging along to a petition filed for her parent as the direct beneficiary) is filed, guaranteeing that the child would not suddenly age out due to processing delays within the Bureau of Citizenship and Immigration Services (“BCIS”)³ and/or the Department of State (“DOS”).⁴

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1. Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (codified as amended in scattered sections of 8 U.S.C.).

2. 8 U.S.C. § 1101(b)(1) (2004) (defining a “child” for United States immigration purposes as “an unmarried person under twenty-one years of age”). The CSPA altered this general definition to make the date of filing, not just the child’s actual age, a crucial date in determining whether a son or daughter would be considered a “child” for filing purposes. See CSPA §§ 2-6 (amending 8 U.S.C. §§ 1151, 1153, 1154, 1157, 1158).

3. The Bureau of Citizenship and Immigration Services now performs the functions of the old Immigration and Naturalization Service (“INS”), including the adjudication of immigrant petitions and for granting permanent residence to those present in the United States based on those petitions via a process known as adjustment of status. See 8 U.S.C. § 1103(a) (2004). While the Department of Homeland Security has now renamed BCIS as United States Citizenship and Immigration Services, this note retains the use of BCIS for consistency and clarity. All references to INS are those made in titles of cited authorities.

This note analyzes the difficulties the CSPA poses in its applications to eligible petitions — as illustrated by the amount of clarifying guidance issued by BCIS and DOS, the expansive amount of literature generated by immigration practitioners and interested organizations, and most recently, the input of courts in interpreting the CSPA. This note also discusses how the CSPA may represent a trend away from the institutional solutions used to combat the “age out” problem and towards a stronger preference for statutory fixes. Lastly, this note questions the CSPA’s effectiveness in promoting family unity in U.S. immigration law, particularly against the backdrop of other recent legislation purporting to address that goal.

II. SUMMARY OF THE CSPA’S EFFECT⁵

Broadly speaking, the CSPA fixes the age of an alien child as “the date on which the petition is filed with the Attorney General” for classification based on the following qualifying petitions:⁶ as an immediate relative of a United States citizen,⁷ as the child of a lawful permanent resident,⁸ as the child of an applicant for employment-based permanent residence,⁹ as a diversity immigrant,¹⁰ or as a child accompanying or following to join an asylum or refugee parent.¹¹ The effect of the CSPA is to “credit” the time lost while the petition is being adjudicated by the appropriate government agencies back to the alien child.

In practice, the CSPA is a subtraction formula. It reduces a child’s actual age at the time her application for permanent residence is approved — either within the U.S. through adjustment of status or abroad through an immigrant visa issued by a U.S. consulate — by the amount of time the petition was pending.¹² In the case of petitions on behalf of the spouses

4. The Department of State is responsible for granting permanent residence to aliens outside of the United States who are the beneficiaries of approved immigrant petitions via its consulates in a process known as an immigrant visa application, or more popularly, consular processing. See 8 U.S.C. § 1104(a) (2004).

5. An exploration of each difficult situation — and the resulting minutiae of calculations — that may hypothetically arise under the CSPA is beyond the scope of this note. For a sampling of such scenarios, see Howard W. Gordon & Tina Niedzwiecki, *The Child Status Protection Act: Is the Problem of “Aging Out” Solved?*, IMMIGR. L. TODAY, May-June 2003, at 14.

6. A qualifying petition may be one filed for the parent which gives the child “derivative” status, or one filed directly for the child.

7. CSPA, *supra* note 1, at § 2. Such individuals are eligible for permanent residence pursuant to 8 U.S.C. § 1151(b)(2)(A) (2004).

8. *Id.* at §§ 3, 6. Such individuals are eligible for permanent residence pursuant to 8 U.S.C. §§ 1153(a)(2)(A), 1153(d) (2004).

9. *Id.* at § 3. Such individuals are eligible for permanent residence pursuant to 8 U.S.C. § 1153(d).

10. *Id.* Such individuals are eligible for permanent residence pursuant to 8 U.S.C. § 1153(d).

11. *Id.* at §§ 4-5. Such individuals are eligible for permanent residence pursuant to 8 U.S.C. § 1158(b)(3) (2004) and 8 U.S.C. § 1157(c)(1)(2) (2004), respectively.

12. CSPA, *supra* note 1.

and/or children of United States citizens, this “CSPA age” is simply the date of filing, since there is no additional waiting time involved due to visa backlogs for such immigrants.¹³

Yet, in the cases of children of permanent residents, the calculation is slightly different due to visa backlogs that result from the limitation on the number of immigrants admitted under this category.¹⁴ In such instances, the CSPA starts with the child’s age on the day the visa number becomes available — mandating that the application for permanent residence be made within one year of this date — then subtracts the amount of time the petition was pending to figure the “CSPA age.”¹⁵

Finally, in those cases where a lawful permanent resident parent acquires citizenship while the child’s qualifying petition is pending — the “CSPA age” is the child’s age as of the date of the parent’s naturalization.¹⁶ To use the subtraction analogy, the child’s “CSPA age” is her actual age at the time she acquires permanent residence minus the days the petition was pending since the child became eligible to apply for permanent residence based on the qualifying petition. A similar provision governs cases where a married child of a U.S. citizen divorces while the qualifying petition is pending — the “CSPA age” is the child’s age of the date of the divorce.¹⁷

III. THE GUIDANCE PROBLEM: ONE ACT, FOUR VOICES

Though much anticipated during its trip through Congress and widely lauded upon its approval, the CSPA has been a source of noticeable confusion for the immigration law community in the two years since its passage. Government agencies, practitioners, and interested organizations alike have taken diverse stances on the CSPA — addressing practical issues

13. CSPA, *supra* note 1, at § 2; 8 U.S.C. § 1151(b)(2).

14. CSPA, *supra* note 1, at § 3. Due to the backlogs in the family-based second preference category for spouses and children of lawful permanent residents, these individuals cannot apply immediately for permanent residence upon approval of the immigrant petition. They must wait until their priority dates — the date on which the immigrant petition was filed — become current. See 8 U.S.C. §§ 1151(a)(1), 1153(a), 1153(g). The current visa backlog as of February 2004 is nearly four and a half years, except for Mexican nationals, for which the backlog is approximately seven years. See Department of State, Bureau of Consular Affairs, Visa Services, Visa Bulletin, No. 66, Vol. 8, available at http://travel.state.gov/visa_bulletin.html (last visited Feb. 28, 2004).

15. CSPA, *supra* note 1, at § 3.

16. A child under twenty-one of a lawful permanent resident benefits if the parent becomes a United States citizen through naturalization by changing classification from a visa-backlogged second preference to a non-backlogged immediate relative. See CSPA, *supra* note 1, at §§ 2, 6.

17. For children under twenty-one to attain permanent residence as an immediate relative of a United States citizen or child of a permanent resident, they must be unmarried. See 8 U.S.C. § 1101(c)(1). So an under-twenty-one-year-old married child of a U.S. citizen, who divorces, changes classification from a visa-backlogged third preference to a non-backlogged immediate relative. See CSPA, *supra* note 1, at § 2.

of applicability and scope as well as substantive legal interpretation. Courts have also chimed in on the CSPA — with the majority of decisions, save one, giving the CSPA at least cursory mention.

A. BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES MEMORANDA

Roughly a month after passage of the CSPA on August 6, 2002, the BCIS issued its first “preliminary” field guidance memorandum to its officers on the new law.¹⁸ The three-page memorandum spoke largely about basic difficult scenarios caused by changes in marriage and citizenship status.¹⁹ It also emphasized the centrality of the one-year filing requirement for children of lawful permanent residents and the immediate effectiveness of the CSPA.²⁰ Lastly, the memorandum stressed the applicability of the CSPA to approved immigrant petitions where no “final action” had been taken by the appropriate government agency on a subsequent application for permanent residence.²¹ Due to its brevity, the first memorandum met with much criticism from the immigration community at large.²²

Five months after issuing the first memorandum, BCIS issued a second memorandum containing “additional” guidance about the CSPA.²³ Over twice the length of its predecessor, the new memorandum clarified many key questions about inapplicability, retroactivity, and finality.²⁴ In particular, the memorandum extensively addressed the CSPA’s application in cases where a priority date visa backlog prevented immediate use of an approved immigrant petition to apply for permanent residence.²⁵ In addition, the memorandum noted that the CSPA all but eliminated the need to process “age out” cases — those immigrant petitions and applications for permanent residence where a primary or derivative beneficiary was in danger of turning twenty-one — via special expedited processing units at the BCIS’s Service Centers.²⁶ The memorandum also explained the

18. INS Memorandum, The Child Status Protection Act (Sept. 20, 2002), *available at* http://uscis.gov/graphics/lawsregs/handbook/CSPA092002_pub.pdf. Earlier, shorter guidance had been issued specifically to INS asylum personnel, since only § 4 of the CSPA applied to asylum cases. *See* INS Memorandum, “H.R. 1209 - Child Status Protection Act” (Aug. 7, 2002), *at* <http://uscis.gov/graphics/lawsregs/handbook/hr1209.pdf>.

19. INS Memorandum, The Child Status Protection Act, *supra* note 18.

20. *Id.*

21. This portion of the memorandum reflects the fact that the immigrant petition approval and the subsequent application for permanent residence based on that approved petition are separate steps in some cases. Essentially, the child gets “credit” for the time her permanent residence is pending during each of the two steps.

22. Criticism of this memorandum and subsequent ones appears at Part B, *infra*.

23. INS Memorandum, The Child Status Protection Act – Memorandum Number 2 (Feb. 14, 2003), *at* http://uscis.gov/graphics/lawsregs/handbook/CSPA2_pub.pdf.

24. *Id.*

25. *See id.*

26. INS Service Centers have guidelines and procedures for requesting expedited handling of petitions and applications; historically, “age out” cases have fallen under this

adaptation of the CSPA formula to diversity visa applicants. First, it determined pendency as the time period between the first day the child's parent could apply for the lottery and the date indicating selection (in essence, "approval") of the lottery application. Then, it subtracted the resulting period from the child's age on the date a visa became available to her parent, thus enabling an application for permanent residence.²⁷

Arguably, the most controversial effect of the second memorandum was that it narrowed the interpretation of the CSPA for practitioners and aliens hoping to benefit from an expansive reading of the statute.²⁸ Specifically, the memorandum's dismissal of the CSPA's potential applicability to other immigrant categories and its inapplicability to reopened and/or reconsidered cases have provoked concern in the immigration law community at large.²⁹

On its face, the CSPA never intended to reach nonimmigrant visa cases, as it addressed only immigrant classifications.³⁰ Still, the memorandum confirmed a narrow inference that there was no overall "intent" to apply the principles of the CSPA to all other immigrant classifications.³¹ The implications of this statement — isolating the principles and impact of the CSPA from those of other major pieces of immigration legislation — suggest its shortcomings in contributing to family unity.³²

The memorandum's discussion of Motions to Reopen and/or Reconsider likewise starts with the obvious: that denial traditionally ends the pendency of an application for permanent residence.³³ A Motion to Reopen and/or Reconsider filed after the CSPA's August 6, 2002, deadline would not fall under the CSPA, especially for fear of encouraging less timely motions filed solely in an attempt to benefit from the CSPA.³⁴ What is troubling is the case in which denial occurs after all administrative appeal remedies had been exhausted,³⁵ where the Motion to Reopen and/or

category. See e.g., Expedited Handling Requests, U.S. Citizenship and Immigration Services, California Service Center, at <http://uscis.gov/graphics/fieldoffices/california/aboutus.htm> (last visited Oct. 1, 2004).

27. The result of a successful diversity visa application — one selected by the diversity visa lottery — essentially gives the applicant the functional equivalent of an approved immigrant petition which the applicant can subsequently use to apply for permanent residence, subject to a waiting period not unlike the priority date visa backlog, although much shorter. See generally 8 U.S.C. §§ 1153(c), (g).

28. See INS Memorandum, *supra* note 23, at 2, 4.

29. Again, criticism from the larger immigration law community of this memorandum and subsequent ones appears at Part B, *infra*.

30. INS Memorandum, *supra* note 23, at 2.

31. See *id.* at 2, fn. 2.

32. This topic is explored in detail at Section V, *infra*.

33. See INS Memorandum, *supra* note 23, at 4.

34. See *id.*

35. Arguably, this would trigger the "final action" referred to by BCIS in the first memorandum. See INS Memorandum, *supra* note 18, at 3.

Reconsider was filed before August 6, 2002, and is still pending after August 6, 2002. The memorandum states that such a case would also not enjoy protection.³⁶

Such a reading seems to encourage the very thing the CSPA hoped to avoid — processing delays. Here, the delays are in the adjudication of the Motion, so as to cause loss of eligibility to individuals as children under applications for permanent residence that were timely filed before they reached age twenty-one. An extension of this logic would also be potentially devastating if applied to asylum applications, which take long periods of time to process due to the fact that such cases can be appealed, in some instances, all the way up to the United States Supreme Court.³⁷ That is, once the case leaves the administrative system to be reviewed at the Court of Appeals level, a “final” decision by the immigration authorities is arguably being appealed, and such “finality” cuts off the use of the CSPA.

B. DEPARTMENT OF STATE CABLES

The Department of State issued its own field guidance to United States consulates abroad on implementation of the CSPA.³⁸ The first DOS cable was more on point than its BCIS counterpart, immediately delineating where the CSPA would have the largest, novel, or no impact.³⁹ The August 2002 DOS cable, released two weeks before the first BCIS memorandum focused on the anticipated problem areas that were not addressed until the second BCIS memorandum, released in February 2003.⁴⁰ The DOS also gave detailed notation instructions for CSPA cases as a “workaround” for the old, non-CSPA-ready consular computer records.⁴¹

One particularly striking interpretation made by the first DOS cable was that aliens qualifying as K-4 children (those with a U.S. citizen parent petitioning for them directly or as a derivative through a petition for their

36. *See id.*

37. The Board of Immigration Appeals (“BIA”), the highest administrative reviewing body of immigration law, has jurisdiction to review an immigration judge’s denial of asylum (either after its referral by an asylum officer or directly in removal proceedings). *See* 8 C.F.R. § 3.1(b)(3) (2002). The United States Circuit Courts of Appeal have jurisdiction to review BIA decisions. *See* 8 U.S.C. § 1252(a) (2002); 8 C.F.R. § 208.18(c) (2002).

38. *See* DOS Cable, Child Status Protection Act of 2002: ALDAC #1 (Aug. 26, 2002), at <http://travel.state.gov/state163054.html>.

39. *See generally id.*

40. *See generally id.* These problem areas were methodically explored category-by-category by the first DOS memo, and included discussion of the marriage and naturalization problems in determining “CSPA age,” applying the CSPA formula to diversity visa applicants, and the CSPA’s effect or non-effect on K or V visa categories (both turn on the presence of a pending family-based immigrant petition), to list a few. Curiously, the DOS interpretation of how CSPA would be used on diversity visa cases was precisely the one used by BCIS in its second memorandum six months later.

41. *Id.* ¶¶ 21-26.

noncitizen parent) could get CSPA protection if they had filed their own immediate relative immigrant petition and were accompanying a K-3 parent (an immigrant with a U.S. citizen spouse petitioning for her) with her own immediate relative immigrant petition.⁴² This view directly contradicted that expressed in the second INS memorandum that the CSPA did not reach the K visa category at all.⁴³

The second DOS cable on the CSPA was more exhaustive than the first, correcting several preliminary assumptions made, and delving deeper into difficulties specific to processing of permanent residence applications at consulates abroad.⁴⁴ It again offered specific instructions on using the consular communication system and resources to determine CSPA applicability, which the INS memoranda did not.⁴⁵

Although the second cable reversed initial DOS guidance about CSPA's applicability to the K visa category,⁴⁶ its language raised an interesting dilemma about the interaction between that category and immigrant petitions. The K category, as well as the V category,⁴⁷ depends upon the pendency of an immigrant petition.⁴⁸ Would the fact that the CSPA keeps the underlying immigrant petition valid fail to protect the K or V status, since that status is conferred because a valid immigrant petition is pending?⁴⁹ These seemingly inconsistent points of view are of general

42. Aliens are allowed to enter the United States on K-3 and K-4 nonimmigrant visas while their immigrant petitions are pending; this entry allows them to reunify with their United States citizen parent or spouse and to file for permanent residence through adjustment of status instead of waiting abroad to do so via consular processing. See Legal Immigration Family Equity ("LIFE") Act, Pub. L. 106-553, 114 Stat. 2762; "K" Nonimmigrant Classification for Spouses of U.S. Citizens and Their Children Under the Legal Immigration Family Equity Act of 2000, 66 Fed. Reg. 42,587 (Aug. 14, 2001), 67 Fed. Reg. 74,727 (Dec. 9, 2002) (to be codified at 8 C.F.R. §§ 212, 214, 245, 248, 274a). The DOS cable seems to extend CSPA protection only to those children who were direct beneficiaries, not derivative beneficiaries under their non-citizen parent. For more on K visa holders, see Part V, *infra*.

43. See INS Memorandum, *supra* note 23, at 2, n.2. The DOS later reversed this position in its second cable. See DOS Cable, Child Status Protection Act of 2002: ALDAC #2 ¶ 31 (Jan. 17, 2003), at <http://travel.state.gov/state015049.html>.

44. See DOS Cable, *supra* note 43. The second DOS memo dealt squarely with the difficulties of meeting the one-year requirement in § 3 of the CSPA if the applicant was applying via a consulate, since this process requires transmission of paperwork between INS and DOS in addition to correspondence between the applicant and DOS. See *id.* ¶¶ 15-25.

45. See *id.* ¶¶ 27, 33.

46. See *supra* note 43.

47. The requirements for V visa holders are similar in nature to those of K visa holders, only the qualifying immediate relative relationship is to a lawful permanent resident, not a United States citizen. See LIFE Act, *supra* note 42. In fact, to qualify for a V visa, applicants must not only have an immigrant petition on their behalf pending, it must have been pending for a long time — at least three years. *Id.*

48. See *supra* note 42.

49. The aim of the LIFE Act in expanding the K and V nonimmigrant visa categories was to reunite families kept apart by the fact that the immigrant petition was still pending, and that there would be no way to bring the beneficiary over until the application for permanent residence was approved. See, e.g., 146 Cong. Rec. S. 11850 (daily ed. Dec. 15,

concern to those who consider family unity an important objective of the U.S. immigration law system, as well as of immediate, specific concern to practitioners left trying to make sense of the conundrum for themselves, let alone for their clients.

C. PRACTITIONER INTERPRETATIONS

The immigration law community had greatly anticipated the passage of the CSPA from its introduction in the House of Representatives in 2001 to its ultimate signature into law by President George W. Bush in 2002.⁵⁰ There was concern that the events of September 11, 2001, would cool government attitudes towards pro-immigrant legislation.⁵¹ Yet, the legislation rode smoothly through the legislative process on its way to eventual signature by President Bush on August 6, 2002.⁵² Accordingly, practitioners expressed their enthusiasm about what promised to be an important statutory remedy to a pressing problem in immigration law.⁵³

However, that anticipation was tempered by the realization that the "math" of the CSPA would hardly be an easy fix to the "age out" problem.⁵⁴ Practitioners begrudgingly noted that the government would

2002) (statement of Sen. Kennedy).

50. Coverage of the CSPA's progress through the U.S. Congress was particularly extensive in practitioner update newsletters. See, e.g., *Lawyers Introduce a Variety of New Legislation*, 78 INTERPRETER RELEASES NO. 15, 664, 665 (Apr. 16, 2001); *House Approves Bill to Address "Aging-Out" Problem; Subcommittee Passes Affidavit of Support Legislation*, 78 INTERPRETER RELEASES, NO. 23, 985 (June 11, 2001); *Senate Judiciary Committee Approves "Age-Out" Measure; New Bills Introduced*, 79 INTERPRETER RELEASES NO. 21, 780-81 (May 20, 2002); *President Sends Homeland Security Dept. Bill to Congress, Signs Refugee Bill; Senate Clears Child Status Protection Act; Other Activity*, 79 INTERPRETER RELEASES NO. 25, 940, 942 (June 24, 2002); *Congress Sends Bill Providing "Age-Out" Protection to President; Other Activity*, 79 INTERPRETER RELEASES NO. 30, 1124 (July 29, 2002); *President Signs "Age-Out" Bill; Other Activity*, 79 INTERPRETER RELEASES NO. 32, 1193 (Aug. 12, 2002).

51. See, e.g., Austin T. Fragomen & Howard W. Gordon, *Recent Legislation and Current Immigration Topics*, 1275 PRACTISING L. INST., CORP. L. & PRAC. COURSE HANDBOOK SERIES 7, 25 (Oct. 18, 2001).

52. See generally H.R. REP. NO. 107-45 (2001), reprinted in 2002 U.S.C.C.A.N. 640 (CSPA approved by voice vote in committee without amendment); 147 CONG. REC. D538-39 (2001) (CSPA passed by the House of Representatives by suspension of the rules); 148 CONG. REC. D607 (2002) (CSPA passed by Senate with only technical corrections as amendments).

53. See, e.g., Charles Foster, *Legally Entering and Staying in the U.S.A.*, 66 TEX. B.J. 38, 39 (Jan. 2003) (calling the CSPA a "welcome piece of legislation"); Christopher Nugent & Steven Schulman, *A New Era in the Legal Treatment of Alien Children: The Homeland Security and Child Status Protection Acts*, 80 INTERPRETER RELEASES NO. 7, 233, 239 (Feb. 19, 2003) (predicting the impact of the CSPA to be "far-reaching, as it fundamentally reforms the process for determining whether a child has 'aged out' of eligibility for visa issuance or adjustment of status in most immigration visa categories.").

54. See, e.g., Foster, *supra* note 53 (evaluating the CSPA's formula as "fairly complex, but basically allow[ing] the age of the child to be fixed on the date on which the visa petition for the parent is filed"); Austin T. Fragomen & Howard W. Gordon, *Managing Change: Recent Legislation and Current Immigration Topics*, 1340 PRACTISING L. INST., CORP. L. & PRAC. COURSE HANDBOOK SERIES 173, 190 (Oct.-Nov. 2002) (describing the

take a long time to determine its guidance on the CSPA with regards to its own personnel, let alone to the immigration law community.⁵⁵

Practitioners characterized the final version of the CSPA as well-meaning in theory, but difficult to apply in practice.⁵⁶ To prove this point, the majority of practitioner articles written within the first year of the CSPA's enactment concentrated on developing and analyzing countless hypotheticals where the CSPA would fail to protect a child from aging out.⁵⁷ Their criticism focuses squarely on Section 3 of the CSPA, which tries to address the situation where, although the immigrant petition for the parent has been approved, a visa number is not available due to backlogs.⁵⁸

Another major concern cited by practitioners is the inability of the CSPA to protect against delays in the other agencies potentially involved in the approval of an immigrant petition. For example, when children seek permanent residence based on a U.S. employer sponsoring their parent, the CSPA does not guard against delays by the Department of Labor and state workforce agencies in processing the labor certification needed to start such a process.⁵⁹ Given the delays at these agencies, a child seeking such derivative status, who initially would not need to worry about aging out, might be in trouble.⁶⁰

However, practitioners' concerns about Department of Labor delays putting a child in danger of aging out pale in comparison to potential delays

CSPA's formula as "relatively complex" and predicting that "agency interpretation may ultimately differ from our initial understanding of the provisions.").

55. See, e.g., Pravinchandra J. Patel, *The Child Status Protection Act* (Public Law 107-208, 116 Stat. 927, August 6, 2002), IMMIG. DAILY (ILW.COM), ¶ 2 (Dec. 5, 2002), available at <http://www.ilw.com/lawyers/articles/2002,1205-patel.shtm> (noting that "the Department of State has candidly acknowledged that the language of some CSPA sections is complex and that there may be refinements in interpretation in the future . . . [t]herefore, one has to keep an eye on any guidance or instructions that the DOS and/or INS may periodically issue.").

56. See, e.g., Tammy Fox-Isicoff & H. Ronald Klasko, *The Child Status Protection Act: Is Your Child Protected?*, 80 INTERPRETER RELEASES No. 28, 973 (July 21, 2003) (remarking that "unfortunately, the [CSPA], though benevolent in intention, may not be as benevolent in implementation.").

57. See, e.g., Patel, *supra* note 55, ¶¶ 12-28.

58. See *supra* note 14.

59. Carl Shusterman & Elif Keles, *An Analysis of the Child Status Protection Act*, 1340 PRACTICING L. INST., CORP. L. & PRAC. COURSE HANDBOOK SERIES 35, 41 (Oct.-Nov. 2002). Prior to the filing of the immigrant preference petition, the sponsoring employer must file an application for labor certification with the Department of Labor demonstrating that there are no able, willing, qualified, and available United States workers to fill the position on a permanent basis, and that the employment of the sponsored alien will not adversely affect the wages and working conditions of similarly employed workers in the United States. 8 U.S.C. § 1182(a)(5) (2004).

60. Processing times for labor certifications are roughly one year at the Department of Labor, but around two years at the respective state workforce agencies. See U.S. DEPT. OF LABOR, EMPLOYMENT AND TRAINING ADMIN., Foreign Labor Processing Times and Dates, available at <http://workforcesecurity.doleta.gov/foreign/times.asp> (Feb. 2004).

in the Department of State's handling of immigrant petitions.⁶¹ Specifically, because an approved immigrant preference petition for an alien outside the United States needs to be sent from the BCIS system to the DOS for final immigrant visa processing at a U.S. consulate, there may be confusion as to whether the child met the one-year filing requirement.⁶² Since immigrant visa processing cannot begin until DOS receives the approved petition from BCIS and then asks the alien to apply for the immigrant visa abroad, the fact that no application is technically "pending" between BCIS approval and the alien's immigrant visa application potentially counts against the one-year filing requirement, even though the delay is not due to any fault of the alien.⁶³ Some practitioners have argued that the one-year requirement be read more liberally. In particular, they contend that notification from the consulate that the child can be interviewed for the immigrant visa — the last step in the permanent residence process — will start the one-year clock, rather than the time the priority date on the preference petition becomes current.⁶⁴

More broadly speaking, some point out that the CSPA does not save those children who cannot file for permanent residence within one year of visa availability. In these cases, although the immigrant preference petition is approved before the child's twenty-first birthday or August 6, 2002, whichever is later, visa backlogs prevent either the adjustment of status or the immigrant visa application from being filed based on the preference petition so as to create the necessary "pending" application.⁶⁵

A related concern is the problem of visa regression, where although a visa number is available at the time the child files for permanent residence,

61. Only employment-based immigrants need to go through labor certification, and they make up less than seventeen percent of all legal immigrants to the United States. See Ruth Ellen Wasem, *U.S. Immigration Policy on Permanent Admissions*, CONG. RESEARCH SERV. 9 (Library of Cong. Feb. 18, 2004). Yet all immigrants must deal with the Department of State if they are seeking permanent residence from outside the United States. See *supra* note 4.

62. Cyrus D. Mehta, *New Interpretations of the Child Status Protection Act*, ¶¶ 13-15 (Mar. 14, 2003), available at http://www.cyrusmehta.com/news_cyrus.asp?news_id=817&intPage=11.

The process requires several communications regarding information submission and appointment scheduling with the Department of State's National Visa Center and the United States consulate abroad at which the alien will be filing for her immigrant visa.

63. A practitioner has yet to make the argument that although the U.S. government automatically transmits the approved petition from BCIS to DOS to enable the alien to start the immigrant visa application process, this period of transmittal should allow the application to be considered as "pending" for CSPA purposes.

64. Fox-Isicoff & Klasko, *supra* note 56, at 977. The authors interpret the language in § 3 of the CSPA of "when an immigrant visa becomes available" as being when the DOS schedules the immigrant visa interview, not when the preference petition is approved and its priority date is current. *Id.* They likewise interpret the CSPA's "seeking to obtain the immigrant visa" language as being satisfied when the child applies in person for the immigrant visa. *Id.*

65. *Id.* at 975.

it subsequently becomes unavailable, preventing completion of the permanent residence application.⁶⁶ The intricacies of visa retrogression aside, practitioners have noted the lack of comprehensiveness in the BCIS and DOS memoranda on this issue, conceding it is one they will have to resolve without guidance.⁶⁷

Another concern is the instance in which the sponsoring parent is receiving permanent residence through adjustment of status in the United States, while her child is processing a following-to-join application abroad.⁶⁸ A following-to-join application poses an interesting dilemma for family unity, since it often applies in cases where only one parent can come to the United States first and must wait to bring the rest of the family over much later for reasons that could be personal, financial, or employment related. Similar to the aforementioned concerns, practitioners wanted to make sure not only which actions of the child would trigger the one-year filing requirement of the CSPA, but that the behavior of the BCIS concerning the forms necessary to process a following-to-join application would not further cause the child to lose time and thus be in danger of “aging out.”⁶⁹

Practitioners were also concerned about the ability of the CSPA to protect an alien child if the denial of the preference petition was being appealed or a motion was made to reopen and reconsider the case.⁷⁰ Yet, they were fairly confident that government interpretation would allow for a child to exhaust her remedies in the BCIS and DOS hierarchies and still retain the protection of the CSPA since a “final determination” had not been made on the immigrant petition.⁷¹

Although practitioners generally noted that the CSPA was only narrowly retroactive — it only applied to immigrant petitions filed before enactment that were still “pending,” rather than ones already approved — a broad hope that the CSPA was retroactive was exactly what foreign nationals harbored.⁷² While not a problem of practitioner interpretation, the immigrant community’s initial beliefs about the breadth of the CSPA’s

66. This situation would happen, for example, if the visa preference category under which the child or the parent through which the child is attaining derivative permanent residence is oversubscribed, causing the DOS to go backwards, only making current preference petitions with a priority date earlier than that of the applying alien.

67. See Gordon & Niedzwiecki, *supra* note 5, at 20 (commenting that “while the [government’s February 14, 2003] memorandum addresses two possible retrogression scenarios, practitioners should be aware that other complex retrogression circumstances might arise, which will require careful analysis of age-out questions[.]”).

68. Fox-Isicoff & Klasko, *supra* note 56, at 977.

69. *Id.*

70. Gordon & Niedzwiecki, *supra* note 5, at 18.

71. *Id.* at 20.

72. See, e.g., Online Chat with Carl Shusterman,

Child Status Protection Act: Explaining the New Law, available at <http://immigration.about.com/library/weekly/aa092002b.htm> (Sept. 9, 2002).

retroactivity has proved to be an obstacle to providing accurate legal advice on the CSPA to frustrated immigrants.⁷³

Practitioners also criticize the CSPA because the specific backlog problem it addresses is merely symptomatic of "the inability [of the BCIS] to efficiently perform the functions allocated to it by Congress."⁷⁴ Practitioners characterize acts such as the CSPA as "piecemeal, 'fix the symptom not the underlying problem'" measures⁷⁵ instead of as comprehensive or fundamental changes. Legislators, in concert with the practitioner community, repeatedly introduce bills which criticize the fundamental flaws in the system responsible for processing U.S. immigrant benefits.⁷⁶ Some practitioners have even called on their peers to take their criticisms of the CSPA's perceived inflexibility to the courts.⁷⁷

D. COURT DECISIONS

Due to the recency of the CSPA's passage, only a few courts have had the opportunity to apply it. These courts typically have done so without extensive comment.⁷⁸ In some cases, they reaffirm long-standing principles of review in immigration law, such as preclusion of certain types of relief (such as the CSPA) if a foreign national does not exhaust her administrative remedies during the appeal process before the immigration judge or Board of Immigration Appeals.⁷⁹

73. *Id.*

74. Joseph Spanier, *The Legal Immigration Family Equity Act and Immigration and Naturalization Service Implementation*, 4 J.L. L. & FAM. STUD. 363, 373 (2002).

75. *Id.* But cf. Nugent & Schulman, *supra* note 53, at 238 (characterizing the CSPA as "substantive, improving children's access to certain immigration benefits" and "fundamentally reform[ing] the process for determining whether a child has 'aged out' of eligibility"). The Nugent & Schulman article does concede that despite the laudable theme of the CSPA, it does not cover "age out" problems for immigrant children who are detained or in the juvenile court system.

76. See, e.g., 147 CONG. REC. S3275 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein); CONG. REC. H907 (daily ed. March 14, 2001) (statement of Sen. Pallone).

77. See, e.g., Cyrus D. Mehta,

Pushing the Envelope with the Child Status Protection Act, § 4 (Nov. 14, 2003), available at http://www.cyrusmehta.com/news_cyrus.asp?news_id=915&intPage=6 (predicting that "practitioners may ultimately have to resort to litigation in order to ensure that the CSPA protects the broadest group of beneficiaries.").

78. See, e.g., *Razik v. Perryman*, No. 02 C 5189, 2003 WL 21878726 (N.D. Ill. Aug. 7, 2003) at *2 (reaffirming briefly that because the CSPA allows for the adjustment of status of children who would have aged out is one reason BCIS should adjudicate plaintiffs' long-pending adjustment of status applications); *Alvidrez v. Ridge*, 311 F. Supp. 2d 1163, 1165 (D. Kan. 2004) (clarifying that the CSPA does not apply to nonimmigrant visas such as the V visa, so standing does not lie for a challenge of constitutional rights even if the plaintiff actually filed for a V visa, which he did not do); *Doe v. Merten*, 219 F.R.D. 387, 389 n.5 (E.D. Va. 2004) (noting that there is no applicability of the CSPA to defendant, who herself or whose family can not possibly file an immigrant petition); *Catalan-Zacarias v. Ashcroft*, 73 Fed. Appx. 284 (9th Cir. 2003) (rebutting the notion that CSPA can apply to a foreign national if he does not exhaust his administrative remedies before an immigration judge or the Board of Immigration Appeals).

79. See *Catalan-Zacarias*, *supra* note 78.

However, one Ninth Circuit case, in affirming the CSPA's potential applicability to a foreign national tied up in the appeals process on his asylum case, discusses the CSPA extensively.⁸⁰ To directly resolve the case, the court applied a general, common-law definition of "final determination" to find the CSPA protection was still available to the foreign national since it is the decision of an appellate court such as a circuit court or the Supreme Court that "ultimately settles the dispute between the parties," rather than the "final determination" of an administrative court such as the Board of Immigration Appeals.⁸¹ But the court, in going through congressional intent, confirmed legislative desire "to address the often harsh and arbitrary effects of the age-out provisions under the previously existing statute" and "to override the arbitrariness of statutory age-out provisions that resulted in young immigrants losing opportunities, to which they were entitled, because of administrative delays."⁸² Finally, the court addressed a desire of the federal court system not to have essentially the same effect of foreclosing an "age out" remedy, such as the very well-documented administrative backlog the CSPA was intended to prevent.

No statutory purpose or objective would be furthered by giving the narrower or less usual of the two fixed meanings to the term "final determination," and thus depriving immigrants of their eligibility for adjustment of status simply because their cases were pending before a court instead of an administrative agency.⁸³ This broad statement by the court seems to allay any fears of misinterpreting "final determination" by the courts so as to disadvantage those foreign nationals seeking CSPA protection who are burdened by the lengthy appeals process. Moreover, the entire decision reflects what is hopefully judicial mindfulness of the CSPA's basic goals and corresponding understanding of how its statutory math may apply to young immigrants stuck in the judicial system.

IV. OLD SOLUTIONS VERSUS NEW: INSTITUTIONAL "AGE OUT" UNITS VS. STATUTORY AGE-FIXING

This note now turns to comparing the long-standing institutional methods employed by the U.S. government of dealing with the "aging out" problem with more recent statutory methods such as the CSPA. Due to the varying sources of authority in immigration, it is unreasonable to think that only one method is workable.⁸⁴ As illustrated below, the current state of

80. See generally *Padash v. INS.*, 358 F.3d 1161 (9th Cir. 2003).

81. *Padash*, 358 F.3d at 1170.

82. *Id.* at 1174.

83. *Id.*

84. Statutes governing immigration are found at 8 U.S.C. Regulations governing the functions of the BCIS are found at 8 C.F.R., clarified through Operations Instructions ("OI") and field memoranda. Guidelines governing the functions of the Department of State are

the approach is a tenuous mix between the institutional and statutory methods, although pieces of legislation such as the CSPA may represent a shift towards the latter.

A. THE PAST AND PRESENT: INSTITUTIONAL EXPEDITING AND "AGE OUT" UNITS

For many years now, the BCIS has had institutional means of dealing with time sensitive issues, such as "aging out," at its four main service centers.⁸⁵ Generally, one could request that the Service Center expedite the case for any number of compelling reasons and receive, at the very least, a negative decision on the request to expedite within a short period of time (to allow for alternative planning) or, of course, an actual disposition.⁸⁶

While "age outs" historically merited expedited consideration, the Service Centers specifically developed smaller "age out" units to handle the preference petitions and adjustment of status applications of children in danger of turning twenty-one before approval.⁸⁷ The idea was straightforward — to separate these "age out" cases from the normal load of petitions and applications by sending them to a smaller unit, thus avoiding the chance of an adjudicating officer misprioritizing the time-sensitive case.⁸⁸ BCIS Service Centers actively encouraged applicants to assist in the process.⁸⁹

The asylum offices took a slightly different tact to the "age out" problem by adjudicating children's cases *nunc pro tunc* to avoid the consequence of a child "aging out" before attaining permanent residence. As recently as September 2004, they vowed to continue making such adjudications when requested even though the CSPA might protect the child.⁹⁰

Despite the existence of the aforementioned expediting systems and "age out" units, it would not be uncommon for applicants to have to resort

found in the Foreign Affairs Manual, clarified through periodic cables disseminated across the consular network.

85. See *Expeditious Handling Requests*, *supra* note 26.

86. See *id.*

87. See *id.*

88. See, e.g., U.S. Citizenship and Immigration Services, Texas Service Center, Age-Outs, available at <http://uscis.gov/graphics/fieldoffices/texas/aboutus.htm> (last visited Oct. 1, 2004) (asking applicants to "bring age outs to our attention a minimum of six months before the 18th or 21st birthday depending on the type of benefit sought" and to direct reminder faxes to "AGE OUT in bold letters" to the respective product line fax numbers).

89. See, e.g., *Expeditious Handling Requests*, *supra* note 26 (instructing an applicant that "reasons for the expedite request must be stated on the optional expedite work sheet and should include a **one page** support letter," that to flag an expedite request, she should "mark the [mailing] envelope with a **red dot**," and that "if your case falls within [the "age out"] category, please indicate on your application that it is an 'Age Out' case").

90. See Mary A. Kenney, *Updated Practice Advisory on the Child Status Protection Act: Practice Advisory*, AMERICAN IMMIG. L. FOUND., (March 8, 2004) at 1, n.3, available at http://www.aifl.org/lac/lac_pa_010504.pdf.

to drastic measures.⁹¹ Commonly used measures include notifying a congressman's office so that it could make a direct inquiry with the expedited processing unit or "age out" unit or exert indirect legislative pressure through a floor speech or private legislation.⁹²

In spite of its flaws, the BCIS had, at the very least, an institutional mechanism for dealing with "aging out"; the DOS had no organization-wide inquiry system at all, let alone one for expedited review. Inquiries to U.S. consulates were met with notorious variability in terms of the responsiveness of the consular staff.⁹³ Again, what made this lack of an institutional expediting mechanism in DOS even more problematic is the need for extra communication between BCIS and DOS when an immigrant petition is to be ultimately used by an alien outside the United States for immigrant visa processing.⁹⁴ This part of the process is yet another opportunity for time to lapse while a child becomes dangerously close to "aging out," a situation the CSPA intended to ameliorate. Worse still, since a consular decision is not appealable, the CSPA will not protect the child whose immigrant visa appointment was wrongly rejected and who cannot seek the appeal that will keep the application "pending" for CSPA purposes.⁹⁵

B. THE FUTURE: STATUTORY AGE-FIXING

Given the aforementioned shortcomings of institutional workarounds for "age out" issues, statutory fixes, such as the CSPA, may have several corresponding advantages. First, a statute, at least on its face, purports to have more clarity than the personal discretion of an individual consular officer or an "age out" unit adjudicator. It could, as the CSPA does, lay

91. See Laura A. Lichter, *Nuts and Bolts of Family-Based Immigration*, 79 A.L.I.-ABA COURSE OF STUDY MATERIALS, IMMIGR. L. BASICS & MORE 113, 117 (2003) (explaining that "practitioners developed creative and often effective strategies to deal with 'age outs,' however, the larger problem — BCIS processing times — meant that many cases were denied their rightful classification due to paperwork delays.").

92. See, e.g., Emil Guillermo, *The Deportation of Yana*, SF GATE, Feb. 10, 2004, ¶¶ 6, 54, available at <http://sfgate.com/cgi-bin/article.cgi?file=/gate/archive/2004/02/10/eguillermo.DTL>. While it does not involve an "age out" situation, the case described by Guillermo highlights the frequently used practitioner tactic of lobbying members of Congress to exert special influence on expediting and remedying "human interest" immigration cases.

93. See, e.g., Posting of USCIT to Immigration Information, General Discussion and Immigration Policy Issues, Agency Inquiries (Dec. 12, 2002), available at <http://www.immigrationinformation.com/showthread.php?s=09db5ea09a9fa25346c0de027504868d&t=1471>; cf. generally Consular Processing Tracker (various user comments noting that interviews were smooth and officers were helpful), available at <http://www.cptracker.com> (last visited Oct. 1, 2004).

94. See *supra* note 63 and accompanying text.

95. See *supra* note 35. By contrast, the only administrative recourse within the DOS is to ask the consular office to obtain an advisory opinion from DOS headquarters pursuant to the FOREIGN AFFAIRS MANUAL, VOL. 9, app. E, "Sub-headings Used in Memoranda" § 202.3 (2002). As it is an advisory opinion, it is not binding on the consular officer.

down those specific circumstances in which the "age out" phenomenon needs to be guarded against. Second, the statute can affect all government agencies involved in the immigration process, as opposed to BCIS operating instructions, DOS cables, or service center public guidelines, which may only impact one such agency, or one subdivision in such an agency.⁹⁶ Third, the statute sends an unmistakable policy message that the U.S. government realizes the institutional problem and intends to install some sort of broad remedy.⁹⁷ Finally, practitioners continue to hang their hats on legislative measures addressing problems such as the "age out" phenomenon.⁹⁸

By comparison, the statute authorizing a grace period for certain children whose petitions were delayed because of the events of September 11, 2001, was fashioned in a similar manner to the provisions of the CSPA.⁹⁹ One could argue that this choice to enact a statutory remedy as a means of combating the "age out" issue represents a trend towards clear legislative remedies for BCIS processing delays. That a statutory remedy was favored over merely institutional instructions, even for the comparatively small window of delays caused by September 11, lends support to this argument. Incidentally, guidance about handling "age out" matters under the CSPA matters and the relevant PATRIOT Act provisions frequently appears together in government memoranda.¹⁰⁰

V. THE CSPA AND FAMILY UNITY IN IMMIGRATION

The CSPA is the latest in a long line of recent legislation aimed at making the immigration of families easier. However, its means of operation — to extend the deadline for an existing process — is vastly at odds with the approach its predecessor acts take, which is to expand a new class of benefits to affected immigrants.

The Violence Against Woman Act ("VAWA") created a new immigrant category for battered spouses and children.¹⁰¹ Immigrants could essentially meet the requirement by demonstrating that in addition to having good moral character, their U.S. citizen or permanent resident spouse battered them or subjected them to extreme cruelty, and that deportation would result in hardship to the individual, or, in the case of a

96. See generally sources cited *supra* notes 18, 23, 38, 43.

97. See sources cited *supra* note 76.

98. See Gordon & Niedzwiecki, *supra* note 5, at 20.

99. USA PATRIOT ACT of 2001 ("PATRIOT Act") § 424, Pub. L. No. 107-56, § 424, 115 Stat. 362 (2001).

100. See, e.g., INS Memorandum, *supra* note 23, at 1-2, n.1; DOS Cable, *supra* note 38, ¶ 18.

101. Violence Against Woman Act of 1994 § 40701, Pub. L. No. 103-322, § 40701, 108 Stat. 1796 (codified at 8 U.S.C. § 1154.). VAWA also amended 8 U.S.C. § 1254 by adding a similar provision that allowed for deportation proceedings to be suspended for battered spouses and children.

battered spouse, to that spouse's child.¹⁰² An existing form in the BCIS structure, Form I-360, was updated to accommodate battered spouse and children applications.¹⁰³ Existing time frames were modified to accommodate the often unpredictable nature of when aliens would become eligible for battered individual protection due to changing family situations.¹⁰⁴

Likewise, in 2001, "dual career" spouse legislation was introduced to give the spouses of E and L nonimmigrant visa holders — the ability to obtain work authorization.¹⁰⁵ By its very name, the legislation aimed to lessen the burden on spouses of nonimmigrants who often came to the United States in E or L status because a foreign employer assigned them there.¹⁰⁶ New categories were created in the Code of Federal Regulations to classify such spouses, and the same form, Form I-765, was made available for them to apply.¹⁰⁷ The dual career legislation's grant of work authorization was more generous than that given for other categories, since, unlike the normal grant of one year, it could be granted for the duration of the spouse's derivative nonimmigrant status or two years, whichever is shorter.¹⁰⁸

The immigration problem that the Legal Immigration Family Equity ("LIFE") Act intended to alleviate was similar — the disruption in family unification caused by lengthy processing times within the BCIS and DOS system.¹⁰⁹ However, the LIFE Act dealt with this problem by creating several new visa classifications.¹¹⁰

The K-3 and K-4 nonimmigrant visa categories allow spouses and

102. *Id.*

103. *See* 8 C.F.R. §§ 204.1(a)(3), 204.2(c), 204.2(e) (2002).

104. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(D) (2002), which, even before the CSPA's enactment, already fixes the age of certain battered children applying for permanent residence as of the date of filing; 8 C.F.R. § 204.2(e)(1)(v) (2002), which does not preclude a battered child from applying if by the time she does so, she is no longer living with the abusive parent. Rather, she need only to have lived with the abusive parent in the United States sometime in the past.

105. Pub. L. No. 107-124, 115 Stat. 2402 (2002) (amending 8 U.S.C. § 1184(e)); Pub. L. No. 107-125, 115 Stat. 2403 (2002) (amending 8 U.S.C. § 1184(c)(2)).

106. Generally speaking, E visa holders are professionals who are trades or investors from a country with whom the United States has established a treaty of commerce and navigation. *See* 8 U.S.C. § 1101(a)(15)(E). L visa holders are professionals ("intracompany transferees") who previously worked abroad for a company and are working for that same company in the United States. *See* 8 U.S.C. § 1101(a)(15)(L) (2002).

107. *See* 8 C.F.R. §§ 274a.12(a)(17), 274a.12(a)(18), 274a.13(a) (Supp. 2004). Note that the first two of these sections have yet to be formally codified in 8 C.F.R., nor has notification of an interim or final rule appeared in the Federal Register, although the legislation enacting the work authorization was passed in January 2002.

108. *See generally* INS Memorandum, Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determinations on the Requisite Employment Abroad for L Blanket Petitions (Feb. 22, 2002), *available at* http://uscis.gov/graphics/lawsregs/handbook/E_LEmpAuthPub.pdf.

109. *See generally* LIFE Act, *supra* note 42.

110. *Id.*

children of United States citizens who are the beneficiaries of pending immigrant petitions filed by those citizens to come into the United States before the approval of such petitions.¹¹¹ Normally, they would have to wait for the petition's approval, then transmittal to the Department of State for ultimate immigrant visa processing, and finally, receipt of the approved immigrant visa after the interview to enter the United States.¹¹²

The expansion of the V nonimmigrant visa category likewise allows certain spouses and children of permanent residents who are the beneficiaries of pending immigrant petitions filed by those permanent residents to come into the United States before the approval of such petitions.¹¹³ While the K-3 and K-4 categories do not require the immigrant petition to have been pending for a set period of time, the V category requires that the immigrant petition have been pending for three years.¹¹⁴

Also of note is that both nonimmigrant visa categories allow spouses to apply for work authorization while the immigrant petition remains pending.¹¹⁵ Again, the ability for a second parent to work is arguably a significant tool in keeping the family unit in an immigrant family together for several reasons: it restores the ability to work of the second parent which she enjoyed in the foreign country, it discourages the procurement of unlawful employment that would trigger grounds for deportation, and it encourages integration of working families into the U.S. community in which they reside.

By contrast, the CSPA can best be described as "tolling" a statute of limitations. Namely, it stipulates that the filing of an immigrant petition for a child who is a direct or derivative beneficiary will satisfy her "status" as being that of a child, rather than the approval of such a petition.¹¹⁶ The CSPA does not extend any benefits to the child or her family other than the assurance that the child's age is "frozen" upon filing and that eligibility will not be lost due to government processing delays.¹¹⁷

In fact, the only reference in the CSPA to the alterations of benefits of affected children is a reassurance that the CSPA will not abridge the already existing benefits of certain battered children.¹¹⁸ However, the

111. *Id.*

112. *See generally supra* notes 4, 63.

113. *See* LIFE Act, *supra* note 42.

114. *Id.*

115. Since K-3 and K-4 nonimmigrants have a United States citizen sponsor who has already filed immigrant petitions on their behalf, they are allowed to file for adjustment of status as soon as they enter and obtain employment authorization via 8 C.F.R. 274a.12(c)(9) (2002). V nonimmigrants cannot file immediately for adjustment of status due to the family-based second preference visa log; they therefore derive the ability to attain employment authorization from 8 C.F.R. 274a.12(a)(15) (2002).

116. CSPA, *supra* note 1, §§ 2-6.

117. *See id.*

118. *See* CSPA, *supra* note 1, § 8; *supra* note 104.

government's refusal to make the CSPA's principle interact with the K and V visa categories created by the LIFE Act¹¹⁹ arguably abridges a benefit such children should have. Specifically, while a child retains the ability to attain permanent residence based on the immigrant petition that was filed when she was less than twenty-one years of age, she would lose her K-4 or V-2 status upon turning twenty-one, since the CSPA does not affect the LIFE Act. This situation is problematic, for example, for a child who came to the United States on a V-2 visa while the immigrant petition — timely filed before she turned twenty-one — was pending, turned twenty-one while that immigrant petition was pending and before she could file for adjustment of status (due to visa backlogs), and thereby loses her V-2 status as well as her basis for staying in the country.¹²⁰ The complexities of such a hypothetical aside, it is problematic to think that a nonimmigrant visa benefit directly tied to a pending immigration petition would not be able to protect a child's ability to stay in the country with her family despite "aging out." On the other hand, the immigrant petition would be able to protect a child's ability to attain permanent residence with her family despite "aging out" via the CSPA but would not protect her right to remain with them before she does attain permanent residence.

It is arguable that one should not have expected the CSPA to be as generous with conferring benefits as its predecessors. After all, by its very name, the CSPA was protecting status, as opposed to creating "equity" for families, expanding "careers" for families used to having two working parents, or offering an alternative route to immigration for aliens who would have reached permanent residence in traditional fashion but for the presence of an abusive parent and spouse.¹²¹

But its characterization as a "specific" remedy for only a handful of situations seems to suggest that the CSPA adds little, even conceptually, to the theme of family unity in immigration.¹²² A few practitioners have rolled out the notable argument that acts such as the CSPA merely treat symptoms of a flawed immigration system — the delays of the system — rather than the cause, and that the system is practically incapable of, if not sometimes incompetent in, the handling and adjudication of immigrant benefits.¹²³ Taking the theme of such arguments further, one could say that

119. See *supra* text accompanying note 40.

120. See 8 U.S.C. § 1255(a) (2002), which requires an alien's eligibility for an immigrant visa at the time of filing to adjust. In this situation, the alien child may face a second-preference visa backlog preventing him from having eligibility, turn twenty-one, lose the V-2 status upon turning twenty-one, and therefore have no "status" to adjust.

121. See generally CSPA, *supra* note 1; LIFE Act, *supra* note 42; Pub. L. No. 107-124, *supra* note 99; Pub. L. No. 107-125, *supra* note 105; VAWA, *supra* note 101.

122. See Fragomen & Gordon, *supra* note 54, at 190 (describing the CSPA as providing "specific remedies for several situations where aging out becomes a problem").

123. See Spanier, *supra* note 74, at 373 (lamenting that although "there are consistent calls to reform the INS . . . [n]o previous proposal, and no current proposal fundamentally address the problem of back logged visa processing . . . [a]nother current fix-the-symptom is

the CSPA represents a desire to fix shortcomings in a currently flawed system rather than a broader attempt to reform a system inflexible to the unification needs of immigrant families. Indeed, many other pieces of legislation, though unlikely to succeed, take exactly this tact — suggesting everything from zeroing out employment-based immigration, to allowing family-based applicants a shorter wait, to treating relatives of permanent residents on equal footing as those of U.S. citizens.¹²⁴

Worse yet, the confusion noted above in the interpretive government memoranda and the practitioner commentary on the CSPA paint the picture of a piece of legislation that at its best was well meaning but may cause more headaches in discerning how the goal it purports to accomplish can be achieved in practice.¹²⁵ That the energy of immigrant enforcement agencies in the government and scholars in the immigration law practitioner community might be wasted on the intricacies of “CSPA math” as opposed to broader yet thoughtful ways of promoting family unity that expand benefits, rather than codifying a “grace period” meant to compensate for bureaucratic delays.

VI. CONCLUSION

The CSPA was a promising piece of legislation swiftly passed by Congress and greatly anticipated by the immigration law community. Yet, after nearly two years of guidance, clarification, commentary, and criticism, practical confusion as to its usage still remains. Indeed, the dearth of practitioner literature after 2003 — the CSPA’s own “one-year anniversary” might suggest the community’s resignation to the idea that the CSPA was not a broad, meaningful fix to the “age out” problem, and that very little is left for meaningful interpretation given its narrow applicability.

The CSPA suffers from being thematically inconsistent with other recent legislation aimed at family unity. Admittedly, the CSPA is similar to such pieces of legislation by aiming to ameliorate the detrimental effects on family unity caused by processing delays. Yet rather than expanding a new class of benefits to immigrant children stuck in the middle of unforgiving delays in the permanent residence process, the CSPA merely buys the government time to sort out its legendary backlogs. Almost rightfully so, practitioners have turned their collective noses up at yet

being proposed by Senator Dianne Feinstein in the Child Status Protection Act.”).

124. See, e.g., Mass Immigration Reduction Act of 2001, H.R. 2712, 107th Cong. (2001) (essentially allowing only immediate relatives of United States citizens and first preference employment-based aliens to receive permanent residence during a proposed moratorium); H.R. 814, 107th Cong. (2001) (providing for the admission of spouses of permanent resident aliens without the current numerical limitations that exist at 8 U.S.C. § 1153(a)(2) (2002), although it is worth noting that Representative Andrews did not include children of permanent resident aliens in his bill).

125. See Fox-Isicoff & Klasko, *supra* note 56.

another gesture meant to treat the effects of a slow, obsolete system instead of reforming that system itself. Much ink has been spilled trying to make the CSPA's "math" add up to an equation that makes sense and ultimately protects the ability of immigrant children to stay with their immediate families. In the end, practitioners might need to line up behind more sweeping legislation that overhauls the immigration processing system, bombard congressional offices with requests for private bills for each immigrant child who becomes a "human interest" case, or attack the lack of the CSPA's breadth through judicial challenges.

Courts seem to understand their role in interpreting how the CSPA ameliorates the effects of the court system's lengthy appeals process just as it intends to remedy BCIS administrative delays. Ultimately, legislators, practitioners, and government adjudicators of immigrant petitions will need to work more closely in concert to develop meaningful immigration reform that does more than apply damage control to processing delays. Rather than just increasing funding or stipulating the creation of additional adjudication units, perhaps they should consider more long-term revisions to the immigration laws that finally lighten the burdens and decrease the wait times of the family-based immigrant preference system and its visa backlogs. Furthermore, they should take the lessons of previous pieces of less controversial, more benevolent pieces of legislation to heart and explore ways to expand benefits for immigrant children in danger of "aging out," and not just stop the clock when processing has gone on too long.

Ultimately, the solution to the family unity question should not be about complicated math protecting a child's status. Rather, it should be about a better legal system providing tangible benefits to ensure a child's lasting connections to her family throughout the difficulties of the immigration process.

* * *