

**STATUTORY PURPOSE AND DEFERRING TO  
AGENCY INTERPRETATIONS OF LAWS. THE  
IMMIGRATION LAW PARADIGM: “AGED OUT”—  
GET DEPORTED!**

**Ivan A. Pavlenko<sup>†</sup>**

CONTENTS

INTRODUCTION .....	147
I. “AGING OUT” OF K-2 VISA BENEFICIARIES .....	153
II. THE DOCTRINE OF <i>CHEVRON</i> DEFERENCE .....	156
III. <i>CHEVRON</i> DEFERENCE AND “AGING OUT” .....	157
IV. THE OFTEN MISSING VARIABLE IN THE <i>CHEVRON</i> ANALYSIS .....	161
A. <i>Statutory Purpose and the First Prong of Chevron</i> .....	161
B. <i>Statutory Purpose and the Second Prong of Chevron</i> .....	164
V. WHY IS THIS ANALYSIS NECESSARY IF THE “AGING OUT” PROBLEM IS NOW GONE? .....	165
A. <i>They Still Age Out</i> .....	166
B. <i>The BIA May Revert Back to Its Previous Interpretation</i> ....	169
VI. RECOMMENDATIONS .....	170
A. <i>Statutory Purpose Should Become an Integral Part of the         Chevron Analysis</i> .....	170
B. <i>Courts Should Employ Canons of Statutory Construction         in the Chevron Analysis</i> .....	171
CONCLUSION.....	173

INTRODUCTION

Eager to accompany his mother to marry a United States citizen, and thereby create a new family, Dmytro Verovkin, a twenty-year-old Ukrainian national, withdrew from a law school, severed all the ties with his remaining family and friends, and followed his single parent to

---

<sup>†</sup> J.D. Candidate, Syracuse University College of Law, 2013; B.A. International Relations, State University of New York at New Paltz, 2009. I would like to express my sincere gratitude to Professor Evan J. Criddle for his continuing guidance and invaluable advice; to Professor Tucker B. Culbertson for endless support and mentorship; to Professors Richard R. Risman and Elton Fukumoto for making me a better writer; and to all my professors, advisors, and friends at the College of Law. A special word of gratitude goes to my mother, my stepdad, and my wife, Nadiia Pavlenko, for supporting me in all my endeavors. I dedicate this work to my beloved grandmother, Tamara T. Stabrovskaya, who passed away when I was working on this note. May God rest her soul in peace.

the United States.<sup>1</sup> His mother was admitted on a K-1 visa as a fiancée of a U.S. citizen; the son was admitted on a K-2 visa as her minor child.<sup>2</sup> The mother subsequently married her U.S. fiancé within ninety days of admission to the U.S., as required by the terms and conditions of her visa.<sup>3</sup>

On September 14, 2005, the mother and her son filed I-485 applications with the United States Citizenship and Immigration Services (“USCIS”) seeking to have their status adjusted to that of lawful permanent residents (“LPRs” or “green card holders”).<sup>4</sup> On October 16, 2005, the son turned twenty-one.<sup>5</sup> His mother’s application for adjustment of status was later approved; however, in a notification dated April 25, 2006, USCIS denied the son’s application because he was “now over twenty-one years of age,” and therefore, “no longer qualified as an accompanying child.”<sup>6</sup> As such, just because he was among those children who dared to turn twenty-one before USCIS could review their case, he was no longer eligible to remain in the U.S. with his new family, and as it was usually the case, Dmytro faced deportation (now called “removal”) proceedings.<sup>7</sup> A similar fate awaited numerous other K-2 visa applicants who had already withdrawn from their studies or gainful employment and left behind relatives and friends in order to accompany their single parents to the U.S. in the hope of creating new families.<sup>8</sup>

Until June 23, 2011,<sup>9</sup> USCIS, along with the Department of Homeland Security (“DHS”)—its governing agency—and the

---

1. *Verovkin v. Still*, No. C 07-3987 CW, 2007 WL 4557782, at \*1 (N.D. Cal. Dec. 21, 2007).

2. *Id.*

3. *Id.*

4. *Id.*; 8 U.S.C. § 1255(d) (2006).

5. *Verovkin*, 2007 WL 4557782, at \*1. At issue was the government’s interpretation of the meaning of the term “child” under 8 U.S.C. § 1101(a)(15)(K)(iii) (2006). *Id.* at \*3.

6. *Id.* at \*1.

7. *Id.*; see also *Carpio v. Holder*, 592 F.3d 1091, 1095 (10th Cir. 2010).

8. See *Carpio*, 592 F.3d at 1095; see also *Zizhao Huang v. Napolitano*, No. CV-09-2125-PHX-NVW, 2010 WL 3283561, at \*2 (D. Ariz. Aug. 18, 2010); *Kondrachuk v. U.S. Citizenship & Immigration Servs.*, No. C 08-5476 CW, 2009 WL 1883720, at \*3 (N.D. Cal. June 30, 2009).

9. On June 23, 2011, the Board of Immigration Appeals held that a derivative child of a nonimmigrant fiancé(e) visa holder under section 101(a)(15)(K)(iii) of the Immigration and Nationality Act is not ineligible for adjustment of status simply because of turning twenty-one after his or her admission to the U.S. on a K-2 visa. See generally *Matter of Le*, 25 I. & N. Dec. 541 (BIA 2011). Rather, “to adjust status based on a K-2 visa, an alien derivative child must establish that he or she was under 21 years of age at the time of admission to the United States.” *Id.* at 541.

2012] **Agency Interpretation of Laws in Immigration** 149

Department of Justice (“DOJ”), interpreted the meaning of the “child” under section 1101(a)(15)(K)(iii) of the Immigration and Nationality Act (“INA”), codified at 8 U.S.C. § 1101(a)(15)(K)(iii),<sup>10</sup> as being a person under twenty-one years of age not at the time when such a child entered the U.S. on a K-2 visa to accompany his or her parent-fiancé(e) of a U.S. citizen, or when one applied for adjustment of status to become a permanent resident of the U.S. pursuant to one’s parent’s bona fide marriage to a U.S. citizen.<sup>11</sup> Rather, to qualify as a “child” under the aforementioned code section, such a person had to remain under twenty-one years of age “on the date his [or her] application was adjudicated [by USCIS].”<sup>12</sup>

This interpretation produced an unjust and illogical outcome that defeated the very purpose behind the K-visa immigration statute: upon arrival to the U.S., an otherwise eligible child within the meaning of the statute faced the risk of turning twenty-one before USCIS could review his or her case, and therefore, be determined ineligible to become a LPR, as a result of which a deportation procedure would become an almost definite outcome.<sup>13</sup> In fact, the DHS admitted K-2 visa holders into the country right up until their twenty-first birthday, sometimes with “only days or weeks to spare.”<sup>14</sup> This interpretation, therefore, not only conflicted with the very purpose behind the K-2 visa statute—i.e., family unification—and Congress’s evident, albeit not expressly stated intent, but also led to absurd, arbitrary, and illogical results.<sup>15</sup>

In the “age out” cases, the government used the *Chevron* doctrine in defense of their interpretation of the term “child.”<sup>16</sup> The doctrine of *Chevron* deference requires reviewing courts to defer to agency interpretation of ambiguous provisions of the statutes they administer,

---

10. 8 U.S.C. § 1255(d) (2006) and 8 U.S.C. §1101(a)(15)(K) (2006) will be collectively referred to as the “K-2 visa statute.”

11. See *Verovkin v. Still*, No. C 07-3987 CW, 2007 WL 4557782, at \*5 (N.D. Cal. Dec. 21, 2007).

12. *Id.*

13. See Cathy Woodruff, ‘Aging out’ Snarls U.S. Resident Status, TIMESUNION (Jan. 17, 2010, 8:10 AM), <http://blog.timesunion.com/advocate/aging-out-snarls-u-s-resident-status/2144/>.

14. Brief of the American Immigration Council and the American Immigration Lawyers Association as Amici Curiae Supporting Respondent at 1, In re Qiyu Zhang, Case No: A096-796-201, available at <http://www.aila.org/content/default.aspx?docid=30587> [hereinafter “AILA Brief”].

15. See *id.* at 1-2.

16. See OVRapi, *Tenth Circuit Holds K-2 Visa Holders Do Not “Age-out” for Purposes of Adjustment of Status*, AILA IMMIGR. SLIP OPINION BLOG (Feb. 2, 2010, 4:42 PM), <http://www.ailaslipopinionblog.com/2010/02/02/tenth-circuit-holds-k-2-visa-holders-do-not-age-out-for-purposes-of-adjustment-of-status/>.

where Congress expressly delegated its authority in highly specialized areas, such as immigration law.<sup>17</sup> Following the DHS's interpretation of the K-2 visa statutes, children of many fiancé(e)s of U.S. citizens were either forced to leave or stay in the country illegally without any opportunity to work, study, or lead otherwise normal lives.<sup>18</sup> Thus, this interpretation of the fiancé(e) visa statute,<sup>19</sup> which was enacted to keep families together and to avoid separation of an immigrant child from a single (and sometimes the only) parent, defeated the very purpose of the statute by deporting such children just because they turned twenty-one while USCIS was still reviewing (or did not bother to timely review) their cases, no matter how long it took.<sup>20</sup>

In 2010, in *Carpio v. Holder*, the U.S. Court of Appeals for the Tenth Circuit found that “a K-2 visa holder who timely applies for an adjustment of status under 8 U.S.C. § 1255(d) must be under twenty-one when he or she seeks to enter the United States, not when his or her subsequent application for adjustment of status is finally adjudicated.”<sup>21</sup> However, *Carpio* only resolved the problem in that Court's jurisdiction. It was not until June 23, 2011, that the Board of Immigration Appeals (“BIA”) conceded and held that “[a] derivative child of a nonimmigrant fiancé(e) visa holder under section 1101(a)(15)(K)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(K)(iii) (2006), is not ineligible for adjustment of status simply by virtue of having turned twenty-one after admission to the United States on a K-2 nonimmigrant visa.”<sup>22</sup> To be able to adjust, (1) the child now has to be

---

17. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

18. See Julia Preston, *Readers Share Immigration Stories*, N.Y. TIMES, (Apr. 11, 2008, 5:32 PM), <http://news.blogs.nytimes.com/2008/04/11/share-your-immigration-story/?ref=juliapreston>; see also Mary Kenney, *The BIA Has the Chance to Prevent the Wrongful Deportation of Immigrant Children*, IMMIGR. IMPACT (Dec. 17, 2009), <http://immigrationimpact.com/2009/12/17/the-bia-has-the-chance-to-prevent-the-wrongful-deportation-of-immigrant-children/>.

19. 8 U.S.C. §1101(a)(15)(K)(i)-(iii) (2006).

20. See Woodruff, *supra* note 13.

21. 592 F.3d 1091, 1093 (10th Cir. 2010).

22. *Matter of Le*, 25 I. & N. Dec. 541, 541 (BIA 2011). Generally, federal trial courts, established by Congress pursuant to Article III of the U.S. Constitution, have no jurisdiction to hear immigration cases: such cases are heard in specialized immigration courts, established by Congress as Article I courts. See Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2537 (1998). These courts are part of the DOJ; immigration cases are appealed to the Board of Immigration Appeals—another executive-branch agency court supervised by the DOJ. See Sarah A. Moore, Note, *Tearing Down the Fence Around Immigration Law: Examining the Lack of Judicial Review and the Impact of the REAL ID Act While Calling for A Broader Reading of Questions of Law to Encompass “Extreme Cruelty”*, 82 NOTRE DAME L. REV.

2012] **Agency Interpretation of Laws in Immigration** 151

twenty-one at the time of admission to the U.S. and (2) there has to be a subsequent bona fide marriage between the child's alien-fiancé(e) parent and a U.S. citizen.<sup>23</sup>

While the issue has finally been resolved, the *Chevron* doctrine permits a different composition of the BIA to return to its previous interpretation of the law and apply it to pending cases at USCIS.<sup>24</sup> Moreover, this “aging out” phenomenon is not limited to fiancé(e) visas. Other visa categories dealing with minor “children,” whose categories do not fall under the Child Status Protection Act (“CSPA”),<sup>25</sup> are potential targets.<sup>26</sup> For instance, battered children, who have escaped their native countries and come to the U.S. to seek asylum from their abusive parents, are facing essentially the same problem: if they turn twenty-one before their case is adjudicated, they are cast into the illegal alien category and face deportation when apprehended.<sup>27</sup> Additionally, similar problems with agency interpretations, pursuant to *Chevron*, persist with agencies and courts construing other vague immigration statutes.<sup>28</sup> Finally, the DHS and the DOJ have consistently

---

2037, 2041 (2007). Because USCIS (formerly known as the Immigration and Naturalization Service (INS)) is also an executive branch-agency by virtue of it being a constituent part of the DHS, it follows the BIA's interpretations of immigration laws and regulations. *See id.* *See also* UNITED STATES DEP'T OF JUSTICE, <http://www.justice.gov/eoir/orginfo.htm> (last visited Feb. 20, 2012); UNITED STATES DEP'T OF HOMELAND SECURITY, <http://www.dhs.gov/department-components> (last visited Feb. 20, 2012).

23. *Matter of Le*, 25 I. & N. 541, 550 (BIA 2011).

24. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

25. The Child Status Protection Act amended the INA by changing who qualifies as a “child” for purposes of immigration. *See* Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002) (codified at 8 U.S.C. §§ 1151(f), 1153(h), 1154(a)(1)(D), (k), 1157(c)(2), 1158(b)(3) (2006)). This act permits certain child-beneficiaries to retain classification as a “child,” even after he or she has reached the age of twenty-one. *See id.*; *see also* *Li v. Renaud*, 654 F.3d 376, 379 (2d Cir. 2011). However, the government's position is that the CSPA does not apply to V, K, or any other nonimmigrant visa categories. *See* Memorandum, “The Child Status Protection Act—Memorandum Number 2, AD 03-15” Johnny N. Williams, Exec. Assoc. Comm., Office of Field Operations, HQADN 70/6.1.1 (Feb. 14, 2003), available at [http://www.uscis.gov/files/pressrelease/CSPA2\\_pub.pdf](http://www.uscis.gov/files/pressrelease/CSPA2_pub.pdf).

26. *See* Emily Rose Gonzalez, *Battered Immigrant Youth Take the Beat: Special Immigrant Juveniles Permitted to Age-Out of Status*, 8 SEATTLE J. FOR SOC. JUST. 409, 410 (2009) (discussing the “aging out” problem of another similar-type group of children—child asylum-seekers who face persecution by their parents and fall within a particular social group of being a member of a family suffering from abuse by a family member. They essentially face the same threat: if one turns twenty-one before his or her case can be reviewed by USCIS, the applicant will be deemed to have “aged out,” the case will be denied, and the applicant will have to go back and suffer at the hands of the abusive parent—precisely what the relevant statute was enacted to prevent).

27. *Id.*

28. *See* Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17

failed to follow the Supreme Court's pre-*Chevron* guidelines in interpreting vague immigration statutes, which, despite the advance of *Chevron*, still remain good law.<sup>29</sup>

This note examines the extent and limits of the current application of the *Chevron* doctrine in the area of immigration and naturalization. While *Chevron* may have been viewed as an obstacle to immigrants,<sup>30</sup> the argument of this note is that *Chevron* is not an impediment at all. First, the government's interpretation of the K-2 visa statute was impermissible, and consequently, should have been declared void. Second, even if not void and if the legislative intent is unclear (although it is the argument of this note that the intent of Congress here has always been clear and unambiguous),<sup>31</sup> this interpretation was unreasonable in that it produced absurd and inconsistent results, thereby defeating the entire purpose behind the K-2 visa statute—here, family unification.<sup>32</sup> Third, while the BIA in *Matter of Le*<sup>33</sup> finally resolved the problem of “aging out” of K-2 visa beneficiaries, the issue should have been decided based on a different rationale in order to encompass all the immigration categories of children facing deportation just because they had turned twenty-one before their case could be adjudicated by the national immigration authorities.

Part I of this note discusses the “aging out” phenomenon. Part II outlines the doctrine of *Chevron* deference in its current state. Part III

---

GEO. IMMIGR. L.J. 515, 519 (2003) (analyzing the conflict between the immigration rule of lenity and *Chevron* deference and arguing that courts should consider lenity, and canons in general, when reviewing agency interpretations of vague immigration statutes).

29. See *Bonetti v. Rogers*, 356 U.S. 691, 699 (1958) (holding that ambiguity in immigration statutes should be resolved “in favor of lenity”—i.e., in immigrants' favor); accord *Costello v. Immigration & Naturalization Serv.*, 376 U.S. 120 (1964); see also *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (voicing the “longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizens]”).

30. See generally Sanford N. Greenberg, *Who Says It's a Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability*, 58 U. PITT. L. REV 1 (1996) (arguing that *Chevron* deference may conflict with the doctrine of lenity or the canon of strict construction of criminal statutes; also because deportation's often harsh results share many of the qualities of criminal sanctions, the author provides his analysis of the opinion that the deportation exception rests on a clear statement canon—i.e., courts purportedly should construe deportation statutes narrowly to avoid approving deportations that are not clearly authorized by Congress).

31. “Nothing in the legislative history of the IMFA suggests that Congress intended to eliminate the availability of permanent residence for K-2 visa holders between the ages of eighteen and twenty-one.” *Verovkin v. Still*, No. C 07-3987 CW, 2007 WL 4557782, at \*5 (N.D. Cal. Dec. 21, 2007).

32. See AILA Brief, *supra* note 14, at 1-2.

33. See generally 25 I. & N. Dec. 541 (BIA 2011).

2012] **Agency Interpretation of Laws in Immigration** 153

explores *Chevron's* application in immigration law to children of non-immigrant fiancé(e) visa holders who obtained admission to the U.S. as derivatives of their parent's fiancé(e) status. Part IV identifies the missing variable in the current application of *Chevron* by reviewing courts and outlines how the "age out" cases should have been resolved had this variable been included in the *Chevron* analysis. Part V identifies why this analysis is necessary despite the fact that the K-2 "age out" problem has now been resolved. Part VI provides recommendations of how the *Chevron* doctrine should be analyzed by agencies and courts, both in its broad application and as applied to immigration cases specifically.<sup>34</sup>

## I. "AGING OUT" OF K-2 VISA BENEFICIARIES

The fiancé(e) K-1 nonimmigrant visa is issued for a foreign-citizen fiancé(e) of a U.S. citizen and permits such a fiancé(e) to travel to the U.S. to marry his or her U.S. citizen-sponsor within ninety days since the day of arrival.<sup>35</sup> The foreign-citizen will then apply for adjustment of status to a lawful permanent resident with USCIS.<sup>36</sup> Eligible children of K-1 visa applicants receive K-2 visas to accompany their parents to the U.S. and obtain permanent residency.<sup>37</sup> To meet the eligibility requirement, children of K-1 visa applicants must be (1) unmarried and be (2) less than twenty-one years of age at the time his or her K-2 visa is issued.<sup>38</sup>

Under the applicable immigration laws, an alien with children who is engaged to a U.S. citizen and who seeks to enter the U.S. with them to become LPRs must proceed through a detailed multiple-step procedure.<sup>39</sup> First, on behalf of the alien-fiancé(e) and his or her minor children the affianced U.S. citizen must file a petition for visas (K-1 and K-2) with USCIS.<sup>40</sup> Second, in order for K-1 and K-2 visas to become available to the intended beneficiaries, the U.S. citizen-applicant must

---

34. See Slocum, *supra* note 28, at 519.

35. See UNITED STATES DEP'T OF STATE, *Nonimmigrant Visa for a Fiancé(e) (K-1)*, [http://travel.state.gov/visa/immigrants/types/types\\_2994.html](http://travel.state.gov/visa/immigrants/types/types_2994.html) (last visited Sept. 16, 2012).

36. *Id.*

37. *Id.*

38. See UNITED STATES CITIZENSHIP AND IMMIGRATION SERVS., *Fiancé(e) Visas*, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=640a3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=640a3e4d77d73210VgnVCM100000082ca60aRCRD> (last visited Sept. 16, 2012).

39. See *Carpio v. Holder*, 592 F.3d 1091, 1093 (10th Cir. 2010) (citing *Choin v. Mukasey*, 537 F.3d 1116, 1118-19 (9th Cir. 2008) (describing the process of applying for adjustment of status to that of an LPR)).

40. 8 U.S.C. § 1184(d)(1) (2006).

establish that he or she and the fiancé(e) had previously met in person within two years before the date of the filing of the petition; that they have a bona fide intention to marry; and that they are legally able and actually willing to enter into a valid marriage in the U.S. within the period of ninety days after the beneficiaries' arrival.<sup>41</sup> Third, upon USCIS's approval of the [U.S.] citizen's petition, the citizen's fiancé(e) and his or her minor children must apply for K visas with the [U.S.] consular office in their country of origin.<sup>42</sup> In this context, a 'child' is defined as an unmarried person under the age of twenty-one.<sup>43</sup> The fiancé(e) and the child must file various documents establishing their eligibility for the visas and submit to a medical examination. . . .<sup>44</sup> The consular office must determine that the K-2 applicant is a child (i.e., under twenty-one years of age) at the time the K-2 visa is issued.<sup>45</sup> Fourth, "once the K visas are issued [], the fiancé(e) and his or her minor children may enter the [U.S.]"<sup>46</sup> Fifth, "the citizen and [the] fiancé(e) must marry within ninety days of the fiancé(e)'s entry."<sup>47</sup> "If the marriage does not occur within that period, the fiancé(e) and his or her children must depart from the [U.S.], and they are subject to removal if they [fail to] comply."<sup>48</sup>

Under the 1986 Immigration Marriage Fraud Amendments ("IMFA"),<sup>49</sup> the now-married alien spouse and his or her children must complete another (sixth) step: they must file an application for an adjustment of status "to that of [] alien[s] lawfully admitted to the United States on a conditional basis."<sup>50</sup> Both the alien spouse and his or her minor children would obtain two-year conditional residency<sup>51</sup> green

---

41. *Id.*; see UNITED STATES CITIZENSHIP AND IMMIGRATION SERVS., *Instructions for Form I-129F, Petition for Alien Fiancé(e)*, OMB No. 1615-0001, available at <http://www.uscis.gov/files/form/i-129finstr.pdf>.

42. See 8 U.S.C. § 1184(d)(1); see also 22 C.F.R. § 41.81 (2010) (State Department regulation addressing the issuance of K visas by consular officers).

43. See 8 U.S.C. § 1184(d)(1).

44. *Carpio*, 592 F.3d at 1093 (internal citations omitted).

45. *Id.* at 1093-94; see also 22 C.F.R. § 41.81(c) (2012).

46. *Carpio*, 592 F.3d at 1094.

47. *Id.*; see 8 U.S.C. § 1184(d).

48. *Carpio*, 592 F.3d at 1094; see 8 U.S.C. § 1184(d).

49. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (Nov. 10, 1986) (codified at 8 U.S.C. § 1186a (2012) and scattered sections in 8 U.S.C.).

50. 8 U.S.C. § 1255(d) (2006).

51. The IMFA of 1986 also provides that the initial adjustment of status granted to K-1 and K-2 visa holders is conditional. See 8 U.S.C. § 1186a(a)(1) (2006) (stating that "an alien spouse . . . and an alien son or daughter . . . shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained



2012] **Agency Interpretation of Laws in Immigration** 155

cards.<sup>52</sup>

“[D]uring the 90-day period before the second anniversary of the alien’s obtaining the status of lawful admission for permanent residence,” the couple and the children of the non-citizen may proceed to the seventh step in the adjustment process: filing a petition to have the conditional status removed.<sup>53</sup> In the joint petition, the couple must affirm that they are still married and that they did not enter into marriage for immigration purposes; they must also provide information about their places of residence and their employment histories over the previous two years.<sup>54</sup> This would lead to the removal of the conditional residency status and turn them into unconditional LPRs eligible to apply for U.S. citizenship once they have met all the necessary requirements.<sup>55</sup>

While the alien-parent’s age did not matter when he or she applied for a two-year conditional residency green card, until June 23, 2011,<sup>56</sup> the DHS, and consequently USCIS, required K-2 visa children to be under the age of twenty-one on the date of USCIS’s adjudication of their applications.<sup>57</sup> Therefore, if a child of an alien-spouse reached the age of twenty-one before USCIS could review his or her case, no matter how long it took, the child would become ineligible to adjust one’s status, would have his or her petition denied,<sup>58</sup> and be subject to deportation proceedings in front of an immigration court judge.<sup>59</sup> Therefore, the government’s interpretation of the term “child” as requiring derivative children of the alien fiancé(e) visa beneficiaries to remain under twenty-one years of age when their petitions are reviewed left them completely at the mercy of USCIS’s variable processing

---

such status on a conditional basis”).

52. See UNITED STATES CITIZENSHIP AND IMMIGRATION SERVS., *Conditional Permanent Residence*, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=4ca43a4107083210VgnVCM100000082ca60aRCRD&vgnextoid=4ca43a4107083210VgnVCM100000082ca60aRCRD> (last visited Sept. 16, 2012).

53. 8 U.S.C. § 1186(a)(d)(2)(A) (2006).

54. See *id.* § 1186(a)(d)(1).

55. See UNITED STATES CITIZENSHIP AND IMMIGRATION SERVS., *Instructions for I-751, Petition to Remove Conditions on Residence*, OMB No. 1615-0038, <http://www.uscis.gov/files/form/i-751instr.pdf> (last visited Sept. 16, 2012).

56. See *Matter of Le*, 25 I. & N. Dec. 541, 541 (BIA 2011) (holding that “to adjust status based on a K-2 visa, an alien derivative child must establish that he or she was under 21 years of age at the time of admission to the United States”).

57. See *Carpio v. Holder*, 592 F.3d 1091, 1095 (10th Cir. 2010).

58. See *Verovkin v. Still*, No. C 07-3987 CW, 2007 WL 4557782, at \*1 (N.D. Cal. Dec. 21, 2007); see also *Caprio*, 592 F.3d at 1095.

59. *Matter of Le*, 25 I. & N. Dec. at 542.

times.<sup>60</sup>

## II. THE DOCTRINE OF *CHEVRON* DEFERENCE

In immigration cases, courts have often deferred to agency interpretations of relevant immigration statutes.<sup>61</sup> This deference is the result of the U.S. Supreme Court's decision in *Chevron U.S.A., Incorporated v. Natural Resources Defense Council, Incorporated*, where the Court set forth "a two-step test to determine the deference a reviewing court should accord to an agency interpretation of a statute that it administers."<sup>62</sup> For the first step, the reviewing court must, after "employing traditional tools of statutory construction," make an inquiry into whether "Congress has directly spoken to the precise question at issue."<sup>63</sup> If so, the statute is unambiguous and the agency "must give effect to the unambiguously expressed intent of Congress."<sup>64</sup> If, however, the court does decide that the statute is indeed ambiguous, it then moves to the second step of the inquiry, which requires the court to ask whether the agency's interpretation is "based on a permissible construction of the statute."<sup>65</sup> The Court further stated that a "permissible interpretation" is not necessarily the "reading the court would have reached if the question initially had arisen in a judicial proceeding," or "the only one [that the agency] could have adopted."<sup>66</sup>

"Appellate courts have interpreted [the latter step] to require deference to any reasonable interpretation of the statute offered by the agency."<sup>67</sup> Reasonable interpretation means that "any ensuing [agency's] regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute."<sup>68</sup> However, "[t]he fact that the agency has from time to

---

60. 8 U.S.C. § 1101(a)(15)(K)(iii) (2011). The government made a similar argument in *Choin v. Mukasey*, where just five days short of two years from the date the alien spouse filed her application for adjustment, and while she was still waiting to have an interview with USCIS on her application, she and the U.S. citizen she had married were divorced. 537 F.3d 1116, 1118 (9th Cir. 2008). The government claimed that the alien was ineligible to adjust her status to that of a LPR if her marriage ended before the agency adjudicated her application for adjustment of status. *Id.*

61. See Slocum, *supra* note 28, at 529-30.

62. 467 U.S. 837, 842-43 (1984); Slocum, *supra* note 28, at 529.

63. *Chevron U.S.A., Inc.*, 467 U.S. at 842, 843 n.9.

64. *Id.* at 843.

65. *Id.*

66. *Id.*; see also Slocum, *supra* note 28, at 530.

67. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 144 (2010); see, e.g., *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1011-12 (9th Cir. 2006).

68. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); see also 5 U.S.C. § 706(2)(A) (2011) (Under § 706 of the Administrative Procedure Act ("APA"), the

2012] **Agency Interpretation of Laws in Immigration** 157

time changed its interpretation . . . does not . . . lead [courts] to conclude that no deference should be accorded the agency's interpretation of the statute," and, therefore, "[a]n initial agency interpretation is not instantly carved in stone."<sup>69</sup>

The DHS's and USCIS's previous interpretation of the term "child" as requiring derivative children of the alien fiancé(e) visa-holders to remain under twenty-one years of age at the time their petitions to adjust their status to that of LPRs are reviewed,<sup>70</sup> would fail both prongs of the *Chevron* test because of the failure to consider statutory purpose for either determining congressional intent, or in the alternative, the reasonableness of agency interpretation.

Because *Chevron* has not been applied in every case, has not produced a rigid test, and has been riddled with exceptions,<sup>71</sup> this note proposes the adoption of a solution that would bring greater consistency, clarity, and efficiency. This solution holds that absent a clear statement of intent from Congress, reviewing courts should concentrate on the purpose behind a given statute to either (1) infer congressional intent under the first prong of the *Chevron* test or, in the alternative, (2) analyze the reasonableness of agency interpretation under *Chevron*'s second prong. Otherwise, nothing prevents a different composition of the BIA from going back to the interpretation of a "child" as being under twenty-one years of age at the time when one's case is finally reviewed by USCIS.<sup>72</sup>

### III. *CHEVRON* DEFERENCE AND "AGING OUT"

8 U.S.C. § 1255(d) prohibits the adjustment of status of an alien child, unless the child is a "minor child."<sup>73</sup> The "minor child" under this statute is described as a "child of an alien described in clause (i)<sup>74</sup> . . . and is accompanying, or following to join, the alien."<sup>75</sup> It is

---

reviewing court has the authority to set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

69. *Chevron U.S.A., Inc.*, 467 U.S. at 863.

70. 8 U.S.C. § 1101(a)(15)(K)(iii) (2006).

71. *See* Zaring, *supra* note 67, at 145 ("Quite confusingly, however, *Chevron* is not the standard that applies in every case where an agency is interpreting a statute it administers, because sometimes the agency does so in a case where it is not acting with "force of law," as it might do if it were preparing materials for a handbook designed to educate its employees about its mission.").

72. *See Chevron U.S.A., Inc.*, 467 U.S. at 863.

73. 8 U.S.C. § 1255(d) (2006).

74. Clause (i) refers to "the fiancée or fiancé of a citizen of the United States . . . who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission[.]" 8 U.S.C. § 1101(a)(15)(K).

not arguable, therefore, that 8 U.S.C. § 1255(d) is ambiguous with respect to the time at which a K-2 visa holder must be under twenty-one to qualify for an adjustment of status,<sup>76</sup> and unlike other provisions of the U.S. immigration laws, it does not expressly address that question.<sup>77</sup> Because of its ambiguity, the statute would seem to trigger the application of *Chevron*.<sup>78</sup> However, as the “aging out” cases will demonstrate, the doctrine of *Chevron* deference may be found inapplicable by reviewing federal courts. While at first glance the doctrine seems to give agencies a lot of room for interpretation of seemingly ambiguous statutes, sometimes it is not the case in practice, as courts sometimes avoid dealing with the *Chevron* analysis, because the agency interpretation may fail to qualify for the *Chevron* framework.<sup>79</sup>

---

75. *Id.*

76. USCIS acknowledged that the IMFA left an unintended gap in the INA with respect to the adjustment of status of K-2 visa holders. *See* Interoffice Memorandum from Michael L. Aytes, Assoc. Dir. of Domestic Operations for USCIS, re: Adjustment of Status for K-2 Aliens (Mar. 15, 2007), available at [http://www.uscis.gov/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/k2adjuststatus031507.pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/k2adjuststatus031507.pdf). The agency filled the gap by enacting the following regulation: “[u]pon contracting a valid marriage to the petitioner within 90 days of his or her admission as a nonimmigrant pursuant to a valid K-1 visa issued on or after November 10, 1986, the K-1 beneficiary and his or her minor children may apply for adjustment of status to lawful permanent resident under section 245 [8 U.S.C. § 1255] of the Act. Upon approval of the application the director shall record their lawful admission for permanent residence in accordance with that section and subject to the conditions prescribed in section 216 of the [Immigration and Nationality] Act.” 8 C.F.R. § 214.2(k)(6)(ii) (2012). However, neither the regulation nor the INA require that a K-2 beneficiary must be under twenty-one years of age at the time his or her petition for adjustment of status is processed by USCIS. *See id.*; *see also* 8 U.S.C. §§ 1255(d), 1101(a)(15)(K).

77. 8 U.S.C. § 1255(d); *see also* *Carpio v. Holder*, 592 F.3d 1091, 1096 (10th Cir. 2010).

78. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

79. Indeed, the Supreme Court limited the scope of *Chevron*’s application. The agencies must demonstrate that they were acting pursuant to the rules “carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). It is also referred to as “*Chevron* [s]tep [z]ero” inquiry. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006). Thus, the BIA interpretations would probably pass this test as having the force of law, provided that they have precedential value; however, the DOJ or the DHS interoffice memorandums would probably flunk it. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”). Agency interpretations, which are not found to carry the force of law by reviewing courts, will be accorded the so-called *Skidmore* deference, meaning that the agency’s interpretations may be persuasive but “not controlling upon the courts.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

2012] **Agency Interpretation of Laws in Immigration** 159

In *Verovkin v. Still*,<sup>80</sup> USCIS denied petitioner's application for adjustment of status for the reason of his being "twenty-one years of age on the date his application was adjudicated."<sup>81</sup> USCIS concluded that "because Plaintiff was twenty-one years of age at the time his application was adjudicated, he 'no longer qualif[ied] as an accompanying child pursuant to section 203(d) of the [Immigration and Nationality] Act [8 U.S.C. § 1153(d)].'"<sup>82</sup> USCIS's decision that petitioner Verovkin was statutorily ineligible for adjustment of status was based on its legal interpretation of the INA; therefore, it qualified for the application of the *Chevron* analysis.<sup>83</sup> In *Carpio v. Holder*, under virtually the same set of facts, "the government maintain[ed] that the BIA's decision constitute[d] a reasonable interpretation of an ambiguous statute to which this court must defer under the principles set forth in *Chevron* . . . ."<sup>84</sup>

In *Verovkin*, the District Court relied on *United States v. Mead Corporation*,<sup>85</sup> where "the Supreme Court held that *Chevron* deference applies only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the

---

80. Interestingly, the district court in this case seemed to have no subject matter jurisdiction to hear cases involving a denial of an application for adjustment of status to that of a LPR to a K-2 visa holder. See 8 U.S.C. § 1252(a)(2)(B) (2006). Subsequent attempts to bring similar claims were dismissed for lack of subject matter jurisdiction. See generally *Zizhao Huang v. Napolitano*, No. CV-09-2125-PHX-NVW, 2010 WL 3283561 (D. Ariz. Aug. 18, 2010); *Chaabane v. Biggs*, No. 2:09-CV-2376, 2010 WL 2574044 (E.D. Cal. June 25, 2010); *Kondrachuk v. U.S. Citizenship & Immigration Servs.*, No. C 08-5476 CW, 2009 WL 1883720 (N.D. Cal. June 30, 2009). In *Kondrachuk*, the federal district court concluded that it did not have subject matter jurisdiction to review USCIS's denial of an application for adjustment to an immigrant's K-2 visa status. *Kondrachuk*, 2009 WL 1883720, at \*6. The immigrant's allegation that USCIS improperly determined that she was ineligible for adjustment properly raised an issue of law. *Id.* at \*5. However, the court concluded, the immigrant improperly raised her challenge to the USCIS determination by bringing an action in federal court. *Id.* at \*6. When plaintiff mentioned the *Verovkin* case, the court stated that "USCIS did not raise the issue of subject matter jurisdiction in *Verovkin* and, notwithstanding Plaintiff's assertion to the contrary, the Court did not examine the issue in any of its orders." *Id.* Instead, the immigrant plaintiffs should have challenged the USCIS determination at removal proceedings, as per statutory requirements. See 8 U.S.C. § 1252(a)(2)(B) ; see also *Hassan v. Chertoff*, 543 F.3d 564, 566 (9th Cir. 2008) (the Ninth Circuit considered a challenge to USCIS's denial of an application for adjustment of status and noted that "judicial review of the denial of an adjustment of status application—a decision governed by 8 U.S.C. § 1255—is expressly precluded by 8 U.S.C. § 1252(a)(2)(B)(i).").

81. No. C 07-3987 CW, 2007 WL 4557782, at \*5 (N.D. Cal. Dec. 21, 2007).

82. *Id.* (alteration in original).

83. *Id.* at \*2.

84. 592 F.3d 1091, 1096 (10th Cir. 2010).

85. 533 U.S. 218, 218 (2001).

exercise of that authority.”<sup>86</sup> The *Verovkin* Court concluded that USCIS’s case-by-case application adjudications did not carry the force of law because they had no “precedential value;” consequently *Chevron* did not apply.<sup>87</sup>

In *Carpio*, however, at issue was the BIA’s interpretation of 8 U.S.C. § 1255(d) to bar another child of a fiancée from adjustment of status because he was over twenty-one years of age when USCIS finally adjudicated his application.<sup>88</sup> The BIA is “the highest administrative body for interpreting and applying immigration laws.”<sup>89</sup> Therefore, by definition its decisions carry the force of law, and, consequently, hold precedential value.<sup>90</sup> However, the *Carpio* Court held that *Chevron* deference did not apply to a single-member decision of the BIA, where that member did not rely on the existing BIA precedential decisions.<sup>91</sup>

These two cases did not produce a coherent legal doctrine, thereby failing to resolve the “aging out” issue and limiting their outcome to case-by-case interpretations, pointing once again that courts will avoid dealing with *Chevron* when they can. Technically, the courts resolved two individual cases; however, they still left the DHS and the BIA free to interpret the term “minor child” as a person being twenty-one years of age at the time when his or her application is reviewed by USCIS. A better approach for these courts would have been to apply the *Chevron* analysis, even if they chose to do so in dicta, in order to reach a more coherent legal doctrine,<sup>92</sup> enhance predictability, and provide a clear

---

86. *Verovkin v. Still*, No. C 07-3987 CW, 2007 WL 4557782, at \*3 (N.D. Cal. Dec. 21, 2007) (quoting *Mead Corp.*, 533 U.S. at 226-27).

87. *Verovkin*, No. C 07-3987, 2007 WL 4557782 at \*3. In *Mead*, the Supreme Court explained the scope of *Chevron*, holding that *Chevron* deference applies only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *Mead Corp.*, 533 U.S. at 226-27. The *Mead* case, thus, “placed crucial ‘limits [on] Chevron deference owed to administrative practice in applying a statute,’ clarifying that agency interpretations promulgated in a non-precedential manner are ‘beyond the Chevron pale.’” *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1012 (9th Cir. 2006) (alteration in original) (quoting *Mead Corp.*, 533 U.S. at 226-27).

88. *Carpio*, 592 F.3d at 1096.

89. UNITED STATES DEP’T OF JUSTICE, *Board of Immigration Appeals*, <http://www.justice.gov/eoir/biainfo.htm> (last visited Jan. 27, 2012).

90. See *Mead Corp.*, 533 U.S. at 226-27; see also *Garcia-Quintero*, 455 F.3d at 1012.

91. See *Carpio*, 592 F.3d at 1097.

92. It is often argued that *Chevron* principles should be used to help promote important values of national uniformity, policy coherence, and equal treatment of private parties. However, its inconsistent application by federal judges and agencies may actually serve to undermine these values. See Greenberg, *supra* note 30, at 4 (citing Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 470 (1996)).

2012] **Agency Interpretation of Laws in Immigration** 161

guideline for future decisions because to date, the statute at issue has not been amended, and, consequently, still remains purportedly ambiguous.<sup>93</sup>

#### IV. THE OFTEN MISSING VARIABLE IN THE *CHEVRON* ANALYSIS

The BIA interpretation of the K-2 visa statutes would have failed the *Chevron* test had these statutes' purposes been taken into account before deferring to agency interpretation. When a court reviews an agency's construction of the statute it administers, the court is confronted with two questions:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>94</sup>

Appellate courts have interpreted the second step to require deference to "any reasonable interpretation of the statute offered by the agency."<sup>95</sup> Reasonable interpretation means that "any ensuing [agency's] regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute."<sup>96</sup> Absent Congress directly speaking on the precise question at issue, courts should consider the purpose behind each statute as the central and indispensable variable in the *Chevron* analysis.

##### A. *Statutory Purpose and the First Prong of Chevron*

The first step of the *Chevron* analysis requires that the reviewing court must, after "employing traditional tools of statutory construction," make an inquiry into whether "Congress has directly spoken to the precise question at issue."<sup>97</sup>

---

93. See generally 8 U.S.C. § 1255(d) (2006).

94. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

95. Zaring, *supra* note 67, at 144.

96. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (citing *Chevron U.S.A., Inc.*, 467 U.S. at 844; *United States v. Morton*; 467 U.S. 822, 834 (1984); 5 U.S.C. §§ 706(2)(A), (D) (2006)).

97. *Chevron U.S.A., Inc.*, 467 U.S. at 842, 843 n.9.

Several federal courts of appeals have suggested that in determining congressional intent under the first prong of *Chevron*, courts should “also read statutory terms in light of the purpose of the statute.”<sup>98</sup> The U.S. Supreme Court held that “it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”<sup>99</sup> Furthermore, the Court held that an “[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.”<sup>100</sup> Therefore, the Ninth Circuit remarked, “the structure and purpose of a statute may also provide guidance in determining the plain meaning of its provisions.”<sup>101</sup>

The immigration authorities’ interpretation of the K-2 visa statute<sup>102</sup> to deny adjustment applications of K-2 visa holders over twenty-one years of age frustrated the entire purpose of the K-2 visa program. When it created the K nonimmigrant classification, Congress was concerned primarily with family unification: prior to the creation of the K-visa classification, fiancé(e)s had to apply for immigrant visas and wait for extended periods of time before a visa would become available.<sup>103</sup> Another option was for a U.S. citizen to travel abroad to marry the non-citizen fiancé(e).<sup>104</sup> Having recognized the need to more quickly and easily unify U.S. citizens and their non-citizen fiancé(e)s and their children, Congress created the K-visa category.<sup>105</sup>

---

98. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009) (citing *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003), *amended on reh’g en banc in part sub nom.*, 360 F.3d 1374, 1374 (9th Cir. 2004) (holding that the structure and purpose of a statute may also provide guidance in determining the plain meaning of its provisions).

99. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989)) (internal quotation marks omitted); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”) (citing *Bethesda Hosp. Ass’n v. Bowen*, 485 U.S. 399, 403, 405 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-21 (1986)).

100. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006).

101. *Wilderness Soc’y*, 353 F.3d at 1060 (citing *K Mart Corp.*, 486 U.S. at 291); *see also United States v. Lewis*, 67 F.3d 225, 228-29 (9th Cir. 1995) (citing *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990)) (“Particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme.”).

102. *See* 8 U.S.C. §§ 1255(d), 1101(a)(15)(K) (2006).

103. *See* AILA Brief, *supra* note 14, at 20 (citing H.R. Rep. No. 91-851, at 8 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2750, 2758).

104. *See id.*

105. *See id.* (citing H.R. Doc. No. 99-906, at 10 (1986), *reprinted in* 1986



2012] **Agency Interpretation of Laws in Immigration** 163

The court in *Verovkin* also noted that “[n]othing in the legislative history of the [Immigration Marriage Fraud Amendments]<sup>106</sup> suggests that Congress intended to eliminate the availability of permanent residence for K-2 visa holders between the ages of eighteen and twenty-one.”<sup>107</sup> Indeed, the purpose of the Immigration Marriage Fraud Amendments was “to deter immigration related marriage fraud.”<sup>108</sup> Moreover, even the BIA itself has previously relied on legislative purpose to resolve statutory ambiguity.<sup>109</sup>

An argument can be made on behalf of the government, based on the doctrine of “*expressio unius est exclusio alterius*”<sup>110</sup> that by specifically including some categories and failing to name others in a given piece of legislature, “it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”<sup>111</sup> Albeit plausible,<sup>112</sup> this general principle has little application in the area of immigration because of the nature, legislative history, and subsequent development of the INA since its enactment in 1952:

[t]he various provisions of the INA were not enacted contemporaneously to effect a single policy objective. Rather, the INA has evolved gradually as Congress has reacted time and again to the need to cure one perceived defect or another in immigration

---

U.S.C.C.A.N. 5978, 5982 (1986) (IMFA was designed to address marriage fraud while still allowing “an alien spouse and son or daughter to come to the United States and therefore provid[ing] for family unification.”).

106. See Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 31 (2012) (The test under the IMFA is simply whether the U.S. citizen and the alien spouse intended to “establish a life” together or that they did not marry “for purposes of evading the immigration laws.”).

107. *Verovkin v. Still*, No. C 07-3987 CW, 2007 WL 4557782, at \*5 (N.D. Cal. Dec. 21, 2007); see also *Choin v. Mukasey*, 537 F.3d 1116, 1120 (9th Cir. 2008) (“[The] purpose of rooting out marriage fraud does not support the government’s reading of the statute as a tool to remove immigrants like Choin who marry a U.S. citizen in good faith but have their marriages end in divorce.”); accord *Moss v. Immigration & Naturalization Serv.*, 651 F.2d 1091, 1093 (5th Cir. 1981).

108. *Blackwell v. Thornburgh*, 745 F. Supp. 1529, 1533 (C.D. Cal. 1989) (citing H.R. Rep. No. 99-906 (1986), reprinted in 1986 U.S.C.C.A.N. 5978).

109. See *In re Briones*, 24 I. & N. Dec. 355, 369 (BIA 2007).

110. “[T]o express or include one thing implies the exclusion of the other.” BLACK’S LAW DICTIONARY 661 (9th ed. 2009).

111. *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

112. Indeed, the government attempted to use this reasoning in the *Verovkin* case, stating that the CSPA—which protects certain categories of children seeking immigration visas from “aging out”—does not apply to nonimmigrant petitioners; consequently, by specifically excluding the nonimmigrant visa categories in the CSPA, Congress must have intended to provide no protection against “aging out” to K-2 visa beneficiaries. *Verovkin v. Still*, No. C 07-3987 CW, 2007 WL 4557782, at \*8 (N.D. Cal. Dec. 21, 2007).

policy. Its piecemeal amendment and lack of cohesiveness call into question the significance of any minor variation in language between one section and another.<sup>113</sup>

Indeed, the federal government, faced with everlasting partisan conflicts, has continuously failed in its attempts to reform the immigration laws.<sup>114</sup> Consequently, the failure of Congress to include a particular group cannot be deemed intentional in light of the history and nature of the INA, as well as the overall failure of the immigration reform.

### B. *Statutory Purpose and the Second Prong of Chevron*

On other occasions, courts have relied on inquiring into statutory purpose while analyzing the second prong of *Chevron*, which requires “any reasonable interpretation of the statute offered by the agency.”<sup>115</sup> In *Demarest v. Manspeaker*, the U.S. Supreme Court held that courts should look past the statutory text if strict adherence to the text would lead to an absurd or bizarre result that is “demonstrably at odds with the [intent] of its drafters.”<sup>116</sup> Similarly, the Ninth Circuit held that “a regulation that specifically excludes [certain] aliens from applying for adjustment of status in removal proceedings directly conflicts not only with the specific statute on point . . . but creates absurd results when viewed in light of the larger statutory scheme.”<sup>117</sup>

Here again, the government’s previous interpretation of the K-2 visa statutes as requiring every child of an alien fiancé(e) to remain under twenty-one years of age until USCIS is able or willing to review his or her case can reasonably be expected to be described by the Supreme Court as “arbitrary or capricious in substance, or manifestly contrary to the statute.”<sup>118</sup> The government’s interpretation essentially held that a person who held a valid K-2 visa and who was lawfully admitted to the U.S. could immediately become ineligible for adjustment if, only days after admission, he or she reached the age of

---

113. *Verovkin*, No. C 07-3987, 2007 WL 4557782, at \*8.

114. See generally Tim Gaynor, *Analysis: “Dream Act” Failure Kills Immigration Reform Hopes*, REUTERS (Dec. 18, 2010), <http://www.reuters.com/article/2010/12/18/us-usa-immigration-idUSTRE6BH1Q720101218>; Robert Pear & Carl Hulse, *Immigration Bill Fails to Survive Senate Vote*, N.Y. TIMES (June 28, 2007), <http://www.nytimes.com/2007/06/28/washington/28cnd-immig.html>.

115. *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1012 (9th Cir. 2006); see also Zaring, *supra* note 67, at 144.

116. 498 U.S. 184, 190-91 (1991) (quoting *Griffin v. Oceanic Contractors*, 458 U.S. 564, 571 (1982)).

117. *Bona v. Gonzales*, 425 F.3d 663, 670 (9th Cir. 2005).

118. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

2012] **Agency Interpretation of Laws in Immigration** 165

twenty-one.<sup>119</sup> Additionally, such interpretation also implied that two K-2 visa holders, who were the exact same age when admitted to the U.S., could experience diametrically opposite outcomes based exclusively on a particular USCIS regional office's efficiency in adjudicating their applications.<sup>120</sup>

Therefore, under any prong of *Chevron*, using statutory purpose as a tool of statutory interpretation, the government's interpretation of the K-2 visa statutes as requiring derivative children of the fiancé(e)s of U.S. citizens to remain under the age of twenty-one while it is finally able to adjudicate their case, would be void.

#### V. WHY IS THIS ANALYSIS NECESSARY IF THE "AGING OUT" PROBLEM IS NOW GONE?

On June 23, 2011, the K-2 "age out" problem was finally resolved by the BIA. In *Matter of Le*, the BIA held that "to adjust status based on a K-2 visa, an alien derivative child must establish that he or she was under twenty-one years of age at the time of admission to the United States."<sup>121</sup> The agency appellate court found that the term "minor child," which was left undefined, meant a "child," as defined in section 101(b)(1) of the INA, thus concluding that the term "minor child" is now understood to mean "an unmarried person under twenty-one years of age."<sup>122</sup> The BIA further found that a fiance(e) [sic] derivative child "must only show that he or she is the 'child' of the alien fiance(e) [sic] parent whom he or she is accompanying or following to join" at the time of his or her admission to the United States.<sup>123</sup> In coming to this decision, the BIA concentrated, among other things, on the statutory purpose behind the establishment of the K-2 visa category that ". . . the [Immigration Marriage Fraud Amendments] were designed solely to address marriage fraud, not to otherwise disrupt the existing procedures for issuing visas to fiance(e) [sic] derivative children."<sup>124</sup>

---

119. See AILA Brief, *supra* note 14, at 21-22; see also *Moss v. Immigration & Naturalization Serv.*, 651 F.2d 1091, 1093 (5th Cir. 1981) (interpreting the former 8 U.S.C. § 1184(d), as applied to K-1 visa holders, and holding that "[i]t would be incongruous indeed to hold that the very same statute which facilitates entry into the United States for purposes of marriage would require deportation because the ceremony occurs two days late due to circumstances beyond the control of the nonimmigrant alien").

120. See AILA Brief, *supra* note 14, at 22 ("One K-2 visa holder whose security clearance process moves more quickly, for example, might be adjusted, while another K-2 beneficiary whose name check process lags, might be denied adjustment.").

121. 25 I. & N. Dec. 541, 541 (BIA 2011).

122. *Id.* at 549 (internal quotation marks omitted).

123. *Id.* at 550.

124. *Id.* at 543 ("Prior to the Immigration Fraud Amendments of 1986, Pub. L. No. 99-

*A. They Still Age Out*

Although the BIA has recently conceded that K-2 visa beneficiaries do not age out, the problem persists in another nonimmigrant visa category involving battered or otherwise abused immigrant children who seek to obtain Special Immigrant Juvenile Status (“SIJ”).<sup>125</sup> The SIJ provisions made it possible for abandoned, abused, and neglected children, who escape from their abusive parents and end up in the U.S., to acquire the LPR status and obtain a green card.<sup>126</sup>

SIJ is another nonimmigrant category that, like K-2 category in the recent past, is still subject to the “age-out” phenomenon, thereby placing such applicant children at the mercy of USCIS’s processing efficiency.<sup>127</sup> As it used to be the case with the “aged-out” K-2 visa beneficiaries prior to July of 2011, “aged out” SIJ applicants face the prospects of being detained by Immigration and Customs Enforcement and placed into the deportation proceedings.<sup>128</sup>

The only recent court case that addressed the problem of “aging out” of SIJ applicants is *Perez-Olano v. Gonzalez*.<sup>129</sup> Decided by the United States District Court for the Central District of California in January 2008, the case upheld the “age-out” regulations of the SIJ statute imposed by the United States Attorney General.<sup>130</sup> Applying *Chevron*,<sup>131</sup> the *Perez-Olano* Court first looked at the text of the SIJ

---

639, 100 Stat. 3537 (‘IMFA’), fiance(e)s [sic] and their derivative children adjusted status under former section 214(d) of the Act, 8 U.S.C. § 1184(d) (1982). Section 214(d) allowed these aliens to proceed directly to adjustment once the qualifying marriage had been accomplished, provided they were otherwise admissible. In 1986, fiance(e) [sic] adjustments were incorporated into the adjustment provisions under section 245(a) of the [Immigration and Nationality] Act. That section requires immigrant visa eligibility and availability—requirements that nonimmigrant fiance(e)s [sic] and their children would be unable to meet if these terms were given their ordinary meaning under our immigration laws.”).

125. See *Gonzalez*, *supra* note 26, at 409-11.

126. 8 U.S.C. § 1101(a)(27)(J) (2006); see also *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 252 (C.D. Cal. 2008); *Gonzalez*, *supra* note 26, at 409-10.

127. See *Perez-Olano*, 248 F.R.D. at 253 (After the enactment of the SIJ statute, the Attorney General enacted the “age-out” regulations. Under these regulations, a minor will “age-out” of eligibility if the child turns twenty-one years old before being granted SIJ status or SIJ-based adjustment, or if the child is no longer dependent on the state court or eligible for long-term foster care.); see also 8 C.F.R. §§ 204.11(c)(1), (5), 205.1(a)(3)(iv)(A), (C)-(D) (2012).

128. See *Gonzalez*, *supra* note 26, at 409-10.

129. See generally 248 F.R.D. 248.

130. *Perez-Olano*, 248 F.R.D. at 271; see also 8 C.F.R. §§ 204.11(c)(1), (5), 205.1(a)(3)(iv)(A), (C)-(D).

131. Clearly, the *Chevron* test was to be applied here because, unlike with K-2 visa

2012] **Agency Interpretation of Laws in Immigration** 167

statute and found that Congress did not speak directly to the issue of ‘age-out’ limitations on eligibility”; therefore, the Court further stated, it “must look to the congressional intent revealed in the history and purposes of the statutory scheme.”<sup>132</sup> This is where the court misinterpreted the primary purpose of the SIJ statute.

The *Perez-Olano* Court stated that when Congress amended the SIJ statute in 1997, it left undisturbed the “age-out” regulations.<sup>133</sup> Furthermore, the Court reasoned, “Congress chose to exclude SIJ applicants from the Child Status Protection Act of 2002, Pub.L. No. 107-208, 116 Stat. 927, which amended the INA to provide ‘age-out’ protection for certain immigrant children that filed for permanent resident status.”<sup>134</sup> Therefore, the Court concluded, “[t]his history suggests that Congress condones the age-out regulations with respect to SIJ eligibility.”<sup>135</sup>

These arguments lack plausibility. First of all, the Court itself conceded that “the SIJ provisions were enacted to protect abused, neglected, and abandoned immigrant youth by providing a method for adjustment to legal permanent resident status” and that “the ‘age-out’ regulations were enacted in 1993, a few years after passage of the SIJ statute.”<sup>136</sup> The Court clearly ignored the fact that these “aged-out” SIJ applicants still face the same conditions and consequences of abuse, neglect, and abandonment as they did when they applied to obtain the SIJ status.<sup>137</sup> Moreover, by reasoning that Congress, by not including SIJ applicants in the CSPA, condoned “the age-out regulations with respect to SIJ eligibility,”<sup>138</sup> the *Perez-Olano* Court failed to take into account the fact that the children protected by the CSPA are those who have immigrated with their parents and have family support in the U.S., whereas SIJ applicants are children who “lack parental guidance and support and who have come to the U.S. alone in *search of safety or a*

---

beneficiaries, the government’s interpretation here definitely would be found as “carrying the force of law” by virtue of being published in the Code of Federal Regulations following the notice-and-comment procedure. See *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); see also 8 C.F.R. §§ 204.11(c)(1), (5), 205.1(a)(3)(iv)(A), (C)-(D).

132. *Perez-Olano*, 248 F.R.D. at 268 (quoting *United States v. Buckland*, 289 F.3d 558, 565 (9th Cir. 2002) (en banc) (citation omitted and internal quotation marks omitted)).

133. *Perez-Olano*, 248 F.R.D. at 269.

134. *Id.* (citing *Padash v. Immigration & Naturalization Serv.*, 358 F.3d 1161, 1167 (9th Cir. 2004)).

135. *Perez-Olano*, 248 F.R.D. at 269.

136. *Id.* at 268-69.

137. See *Gonzalez*, *supra* note 26, at 425.

138. *Perez-Olano*, 248 F.R.D. at 269.

*better life.*"<sup>139</sup>

In applying the second prong of the *Chevron* test, the *Perez-Olano* Court concluded that "[s]ince the SIJ statute intended to protect immigrant children from abuse, neglect, and abandonment, it is reasonable that eligibility for SIJ status or SIJ-based adjustment of status would be limited to immigrant children, as opposed to adults or individuals no longer dependent on a state court."<sup>140</sup> Therefore, the Court concluded, these "age-out" regulations are "consistent with Congress's goal of protecting abused, neglected, and abandoned immigrant children," and "the adoption of those regulations was not arbitrary and capricious."<sup>141</sup>

However, the Court once again misinterpreted the principle that, in order to be reasonable, an agency's interpretation must not be one that the U.S. Supreme Court would describe as "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute."<sup>142</sup> Again, the District Court itself conceded that "the SIJ provisions were enacted to protect abused, neglected, and abandoned immigrant youth by providing a method for adjustment to legal permanent resident status."<sup>143</sup> In addition, the "age-out" regulation, as with K-2 visa beneficiaries, produces the same absurd results, whereby only days after a child's admission to the U.S. or application to obtain the SIJ status, the child would reach the age of twenty-one and would no longer be eligible to adjust his or her status.<sup>144</sup> Moreover, two SIJ applicants, while applying at the same time, may face diametrically opposite outcomes based solely on a particular USCIS office's speed and efficiency in adjudicating their applications.<sup>145</sup> Furthermore, without protection from "aging-out", SIJ applicants, who came to the U.S. perfectly legally and followed the procedure as prescribed by applicable federal laws, will be essentially left with two choices: either "fall into the shadows of American society" and be "forced to live the underground world of undocumented immigrants," denied access to healthcare, higher education, legal employment, and qualified government support;<sup>146</sup> or, in the alternative, be caught and placed in removal proceedings just to find themselves deported and to continue

---

139. *See* Gonzalez, *supra* note 26, at 427 (emphasis added).

140. *Perez-Olano*, 248 F.R.D. at 269.

141. *Id.*

142. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

143. *Perez-Olano*, 248 F.R.D. at 268-69.

144. *See* AILA Brief, *supra* note 14, at 20.

145. *See id.* at 22.

146. *See* Gonzalez, *supra* note 26, at 425-26.

2012] **Agency Interpretation of Laws in Immigration** 169

suffering at the hands of their abusive parents.

Clearly, Congress could not have intended that outcome, and it was obviously not the purpose of the SIJ statute to facilitate such an injustice. Consequently, in light of the aforementioned analysis, as well as the recent movement toward the abolishment of the “age-out” phenomenon, the *Perez-Olano* decision should be overruled as based on an incorrect application of the *Chevron* doctrine.

*B. The BIA May Revert Back to Its Previous Interpretation*

While the BIA in *Matter of Le* has finally concluded that K-2 beneficiaries do not age out,<sup>147</sup> nothing prevents a different composition of the BIA from reverting back to its previous interpretation of the meaning of the term “child” as being a person under twenty-one years of age at the time of adjudication of one’s immigrant petition.

The Supreme Court in *Cardoza-Fonseca* seemed to indicate that if an agency reverts to its previous interpretation, it would be accorded significantly less deference by reviewing federal courts.<sup>148</sup> However, the Supreme Court limited this *Cardoza-Fonseca* dictum in *National Cable & Telecommunications Association v. Brand X Internet Service*:

[a]gency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act. For if the agency adequately explains the reasons for a reversal of policy, [this] change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.<sup>149</sup>

Indeed, in *Chevron*, the fact that the Environmental Protection Agency had changed several times its interpretation of statutory language did not persuade the Supreme Court to accord it no deference.<sup>150</sup> “An initial agency interpretation,” the Court held, “is not instantly carved in stone.”<sup>151</sup> To the contrary, the Court continued, “to engage in informed rulemaking, [the agency] must consider varying interpretations and the wisdom of its policy on a continuing basis,” and “the fact that the

---

147. See generally 25 I. & N. Dec. 541 (BIA 2011).

148. See *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (“An agency interpretation of a relevant provision . . . is ‘entitled to considerably less deference’ than a consistently held agency view.”) (citations omitted).

149. 545 U.S. 967, 981 (2005) (internal citations and quotation marks omitted).

150. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 863 (1984).

151. *Id.*

agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible.”<sup>152</sup>

Therefore, unless courts examine statutory purpose—which seems to be demanded by the Supreme Court, whether applied in the first or second prong of the *Chevron* test—<sup>153</sup> the immigration authorities may continue to adopt controversial “age-out” regulations<sup>154</sup> or interpretations.<sup>155</sup>

## VI. RECOMMENDATIONS<sup>156</sup>

### A. *Statutory Purpose Should Become an Integral Part of the Chevron Analysis*

The first recommendation is, of course, that unless Congress has directly addressed the subject at issue, the courts, whether federal or agency, should always consider statutory purpose to determine both congressional intent and reasonableness of agency interpretation. Whether statutory purpose is to be applied in the first or the second step of *Chevron* is immaterial because “[a]ctual judicial practice reveals [the] recognition that the two-step inquiry tends to collapse into one.”<sup>157</sup> Some legal scholars even argued that *Chevron* itself is better understood as a one-step test because the two steps of the *Chevron* analysis essentially ask the same question but in different ways—i.e., whether

---

152. *Id.* at 863-64; *see also Brand X Internet Serv.*, 545 U.S. at 981 (“An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis,” [Chevron U.S.A., Inc., 467 U.S. at 863-4], for example, in response to changed factual circumstances, or a change in administrations . . .”) (internal citations omitted); *Rust v. Sullivan*, 500 U.S. 173, 187 (1991). An agency is not required to “establish rules of conduct to last forever,” but rather “must be given ample latitude to ‘adapt its rules and policies to the demands of changing circumstances.’” (brackets and internal citations omitted); *Peoples Fed. Sav. & Loan Ass’n v. Comm’r*, 948 F.2d 289, 304 (6th Cir. 1991) (holding that “[t]he fact that other reasonable or permissible interpretations of the statutory scheme exist is immaterial”).

153. *See supra*, Part IV.

154. *See, e.g., Perez-Olano v. Gonzalez*, 248 F.R.D. 248 (C.D. Cal. 2008).

155. *See, e.g., Verovkin v. Still*, No. C 07-3987 CW, 2007 WL 4557782 (N.D. Cal. Dec. 21, 2007); *Carpio v. Holder*, 592 F.3d 1091 (10th Cir. 2010).

156. To completely resolve the “aging out” problem for all the categories of applicants for adjustment of status to that of LPRs, all that is necessary is for Congress to amend the CSPA to include K-2 beneficiaries and SIJ applicants in order to statutorily lock their age at the point of their admission to the U.S..

157. Zaring, *supra* note 67, at 156 (citing Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt, 30 F.3d 190, 193 (D.C. Cir. 1994), *rev’d*, 515 U.S. 687 (1995) (where the D.C. Circuit acknowledged that “the factors involved in the first ‘step’ are also pertinent to whether an agency’s interpretation is ‘reasonable’”).



2012] **Agency Interpretation of Laws in Immigration** 171

the agency interpretation is reasonable.<sup>158</sup>

*B. Courts Should Employ Canons of Statutory Construction in the Chevron Analysis*

Both federal and agency courts should also resort to canons of statutory construction as part of their *Chevron* inquiry when deciding whether deference to agency interpretation is to be accorded. This argument is supported by the text of the *Chevron* decision that when a court, as part of the first step of the *Chevron* inquiry, in “employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”<sup>159</sup> Indeed, the only disagreement about the employment of tools of statutory construction has been not whether they should be used at all, but rather under which step of the *Chevron* analysis they must be considered and analyzed.<sup>160</sup>

The relevant traditional tools of statutory construction include: “(1) a review of the whole context of the statutory language; (2) a common sense reading of the whole statute; (3) a consideration of prior interpretation; and (4) a reading of applicable legislative history.”<sup>161</sup> Canons of statutory construction are also considered “traditional tools of statutory construction”; however, the question of which particular canons of construction should be employed in the *Chevron* framework remains a subject of a debate.<sup>162</sup> Canons have been grouped into three broad categories: textual canons, extrinsic source canons, and substantive canons.<sup>163</sup> It is not the goal of this note to argue for one

---

158. *See id.* (citing Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 599 (2009)).

159. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984).

160. *See Slocum, supra* note 28, at 534 (“Justice Stevens and Justice Scalia may have been debating the role traditional tools of statutory construction should play in the *Chevron* analysis, with Justice Scalia arguing that the Court should not employ traditional tools of statutory construction in Step One.”).

161. *Gonzalez, supra* note 26, at 422.

162. *See Slocum, supra* note 28, at 540 (“[M]ost would agree that at least some canons of statutory construction are ‘traditional tools of statutory construction,’ the question of which canons are applicable and how they should be incorporated into the *Chevron* framework, if at all, is a subject of much debate and confusion.”).

163. *Id.* at 540-41 (“*Textual* canons [or *intrinsic aids*] set forth inferences that are usually drawn from the drafter’s choice of words, their grammatical placement in sentences, and their relationship to other parts of the ‘whole’ statute. *Extrinsic source* canons are a variety of devices extrinsic to the statutory text that act as aids in attributing meaning to it. *Substantive* canons are essentially presumptions about statutory meaning based upon substantive principles or policies drawn from the common law, other statutes, or the Constitution.”) (emphasis added) (internal citations omitted).

particular category. Rather, canons should be employed, among other things, (1) when it is necessary to make sense out of an ambiguous statute, (2) when it is consistent with courts' prior use of a particular canon(s) in deciding the same or similar issues, and (3) when statutory purpose is ambiguous and difficult to ascertain.<sup>164</sup> There is even some support to the notion that after an ambiguous statute is interpreted using a relevant canon of construction, it ceases being ambiguous, thereby denying deference to agency interpretation altogether.<sup>165</sup>

There is, however, an interesting canon of construction commonly referred to as the "immigration rule of lenity."<sup>166</sup> Similar to the old and revered rule of lenity in criminal law, which directs that ambiguities in penal statutes be construed in favor of the defendant, the immigration rule of lenity<sup>167</sup> holds that statutory ambiguities in deportation provisions should be resolved in favor of the noncitizen aliens.<sup>168</sup> In fact, several Supreme Court cases demonstrate that the Court has had a long-standing history of construing immigration statutes in favor of immigrants.<sup>169</sup> As late as 2001, the Court "reaffirmed the continuing validity of the canon."<sup>170</sup>

The Court described deportation as "a drastic measure and at times the equivalent of banishment [or] exile," thereby laying the foundation for invoking the immigration rule of lenity in construing immigration statutes involving deportation.<sup>171</sup> Because the "age-out" phenomenon

---

164. See, e.g., *Gonzalez*, *supra* note 26, at 422.

165. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *accord* *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). See also *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 320 (2001).

166. *Slocum*, *supra* note 28, at 541; see *Greenberg*, *supra* note 30, at 3-4.

167. The immigration rule of lenity is not a grammatical guideline that helps interpret statutory meaning; rather the canon directs that statutes, which are found ambiguous after other traditional tools of construction have failed to ascertain statutory meaning, are to be construed in accordance with its underlying policy, thereby falling within the substantive category. See *Slocum*, *supra* note 28, at 541.

168. *Id.*

169. See, e.g., *Cardoza-Fonseca*, 480 U.S. at 449 (applying "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."); see also *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (holding that all doubts in construction of a statute providing for deportation of an immigrant should be resolved in favor of that noncitizen alien because deportation is a drastic measure, which sometimes is "the equivalent of banishment [or] exile"); see also *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903).

170. See *Slocum*, *supra* note 28, at 521 (citing *St. Cyr*, 533 U.S. at 320).

171. *Fong Haw Tan*, 333 U.S. at 10.

2012] **Agency Interpretation of Laws in Immigration** 173

defeats the affected legal aliens' reasonable expectations and threatens to place otherwise eligible immigrants into the deportation proceedings through the denial of their applications after they have turned twenty-one, thus separating them from their immigrant parents and sending them back to their countries of origin,<sup>172</sup> the immigration rule of lenity should be employed as one of the "traditional tools of statutory construction" referenced by the Court in the first step of the *Chevron* test.<sup>173</sup> In the alternative, the immigration rule of lenity can be treated as one among the several factors that courts employ to ascertain the reasonableness of an agency's interpretation of a statute.<sup>174</sup>

Whether applied as a last-resort factor or as a primary tool of statutory construction, "the immigration rule of lenity is employed by courts in the same way as the criminal rule of lenity" in that "both are invoked after a court has determined that a statute is ambiguous after consulting other traditional tools of statutory construction."<sup>175</sup> The immigration rule of lenity, therefore, is entirely consistent with the *Chevron* test and does not require much alteration of the already existing doctrinal framework of *Chevron* by virtue of being invoked on several occasions by the federal judiciary, including the Supreme Court, in deciding immigration cases.

#### CONCLUSION

Despite its limitations and exceptions, *Chevron* is a long-revered and relied-upon precedent. However, the federal agencies have misapplied the *Chevron* framework on numerous occasions. Moreover, several federal courts have either limited *Chevron's* application,

---

172. See Gonzalez, *supra* note 26, at 410.

173. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984).

174. See Slocum, *supra* note 28, at 577 ("In determining whether the agency's interpretation is a reasonable one within that range, courts sometimes consider factors such as the importance of agency expertise in a technical or complex area, detailed and reasonable consideration by the agency, and the need to reconcile conflicting policies.").

175. *Id.* at 520, 520 n.21 ("*Compare* Valansi v. Ashcroft, 278 F.3d 203, 214 n.9 (3rd Cir. 2002) (immigration rule of lenity "may be applied as a canon of last resort"); Lara-Ruiz v. Immigration & Naturalization Serv., 241 F.3d 934, 942 (7th Cir. 2001) (immigration rule of lenity "applies only when 'a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute'" (citation omitted) (emphasis in original) *with* *Reno v. Koray*, 515 U.S. 50, 65 (1995) (stating that "lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended") (quotations and citations omitted); *United States v. Shabani*, 513 U.S. 10, 17 (1994) (lenity is only applicable if court is left with ambiguous statute after consulting traditional canons of statutory construction).").

avoided dealing with it, or also misapplied it when reviewing agency interpretations of relevant statutes. To avoid these problems, when Congress has not directly and clearly spoken on a particular issue, courts and agencies must include statutory purpose in the *Chevron* analysis to either (1) determine congressional intent or (2) to determine the reasonableness of an agency's interpretation of a statute at issue.

Using statutory purpose in the first prong of *Chevron* is supported by the Court's requirement to use "traditional tools of statutory construction" because statutory purpose is considered to be one such tool. On the other hand, due to the almost infinite pool of tools of statutory construction, courts, as demonstrated above by the use of canons of construction, may pick and choose when and which particular tools of construction they will use. Therefore, inquiry into statutory purpose can also be made under the second prong of *Chevron* in determining reasonableness of agency interpretation, especially in light of the fact that some prominent legal scholars have argued that the *Chevron* test has been collapsed into a single inquiry of whether an agency's interpretation is reasonable.

Finally, courts and agencies should use canons of statutory interpretation in their ascertainment of congressional intent, should statutory purpose analysis prove unhelpful, or as an additional tool, in any particular case. In the immigration context, the immigration rule of lenity seems like a plausible canon to apply in light of legal immigrants' high expectations when they are allowed to legally enter and remain in the U.S., their unfamiliarity with the legal process, the inability to locate and afford a competent immigration attorney, and the undue harshness of the deportation proceedings. This approach will foster consistency and predictability of agency interpretations and prevent abuse of agency authority by discouraging bias and capriciousness in interpretations and adjudications that produce absurd and unjust results, such as the "age out" phenomenon.