

4-14-2018

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Recommended Citation

Rodriguez, Adrienne (2018) "A Cry for Change: The Fallacy of the American Dream for K-4 Children," *Seattle Journal for Social Justice*: Vol. 16 : Iss. 2 , Article 13.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol16/iss2/13>

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A Cry for Change: The Fallacy of the American Dream for K-4 Children

By Adrienne Rodriguez

I. INTRODUCTION

Today, older children between the ages of eighteen and twenty-one who enter the United States using a K-4 visa—via the marriage abroad between their foreign parent and American stepparent—are caught in a legal paradox that prevent them from adjusting their status to legal permanent residents, ultimately resulting in their deportation away from their families.¹

John and his mother were citizens of the Philippines when his mother met his stepfather, a U.S. citizen. The marriage between his mother and stepfather subsequently took place in the Philippines. John was nineteen at the time of the marriage. After the marriage occurred, John's stepfather returned to the United States and wanted to have his new family move to the United States with him. After filing the appropriate documentation, both John and his mother obtained non-immigrant visas that allowed them to join the stepfather and live in the United States as non-immigrants while they awaited the approval of their green cards. While in the United States, John's mother obtained her green card; unfortunately, John was unable to do so because he didn't qualify as the child of his U.S. citizen stepparent under his non-immigrant visa. Thus, he was sent back to the Philippines to apply for a green card abroad.

Suzie, a citizen of the Philippines, was also nineteen years old at the time of the marriage between her Filipino mother and American stepfather. Suzie's stepfather met her mother while vacationing in the Philippines, proposed to her, and wanted Suzie and his new fiancé to move to the United

¹ See *Cen v. Att'y Gen.*, 825 F.3d 177, 195 (3d Cir. 2016).

States with him. When he returned to the United States, he filed the required documentation to obtain non-immigrant visas to allow them to move and live in the United States. Once they obtained these visas, both Suzie and her mother reunited with the stepfather, and the marriage subsequently occurred in the United States. Suzie and her mother then filed applications for green cards, and both applications were approved. Once they received their green cards, Suzie and her mother were happily able to start a new life and family within the United States with her stepfather.

Why was John sent abroad to await the approval of his green card while Suzie was permitted to stay with her parents in the United States? John and Suzie were each the child of a foreign parent and a U.S. citizen stepparent, were unmarried, and were between the ages of eighteen and twenty-one at the time of their parents' marriage. In both cases, the American stepfather filed the appropriate petitions on their children's behalf, and each child was permitted to enter the United States using non-immigrant visas. This situation presents a legal quirk in immigration law that is continuously overlooked despite recent judicial rulings in the Third and Seventh Circuits that aim to prevent this outcome.²

This article aims to demonstrate the differences between K-2 and K-4 visa holders and the protections available (or denied) to them if these older children "age out" during the adjustment of status process.³ To understand how these regulations are applied, a brief statutory history is discussed following relevant case law.⁴ This article will then address policy considerations for the application of such regulations and will conclude

² See 8 C.F.R. § 245.1(i) (2012) ("An alien admitted to the U.S. as a [K-4] alien may not adjust to that of permanent resident status in any way other than as a . . . child of the U.S. citizen who originally filed the petition for that alien [parent's] [K-3] status."); *Cen v. Att'y Gen. U.S.*, 825 F.3d 177, 198 (3d Cir. 2016). 8 C.F.R. § 245.1(i) adversely impacts older K-4 children who are eighteen to twenty-one years old at the time of their parents' marriage by precluding this age group from applying for adjustment while present *within* the United States.

³ See *infra* Part II.

⁴ See *infra* Part III & IV.

with possible solutions to combat the misapplication of the Regulation that negatively impacts older K-4 children who are consequently sent back abroad to apply for legal permanent residency.⁵

II. THE FOREIGN MARRIED SPOUSE VS. THE FOREIGN SPOUSE-TO-BE

John entered the United States with his foreign parent using a non-immigrant K-4 visa.⁶ For the stepchild of a U.S. citizen to obtain a K-4 visa, the stepparent must file an I-130 petition⁷ and an I-129F petition⁸ on the child's behalf.⁹ Once these petitions are filed, the stepchild is then eligible to apply for a non-immigrant K-4 visa—which allows the stepchild to enter the United States with the foreign parent—after the marriage takes place abroad.¹⁰ The foreign spouse of the U.S. citizen enters the United States

⁵ See *infra* Part V.

⁶ See *K-3/K-4 Non-immigrant Visas*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/family/family-us-citizens/k3-k4-visa/k-3k-4-nonimmigrant-visas> [<https://perma.cc/DWE7-ZV6H>] (last updated Apr. 1, 2011) (a child is eligible for a K-4 visa if he is unmarried, under the age of twenty-one, and is the child of a qualified K-3 non-immigrant visa applicant—i.e., the child's biological foreign parent).

⁷ *I-130, Petition for Alien Relative*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/i-130> [<https://perma.cc/L8NJ-9B7E>] (last updated Sept. 7, 2017). The filing and approval of an I-130 petition is the first step of the adjustment of status process. The purpose of the I-130 petition is for a “citizen or lawful permanent resident (“LPR”) of the United States to establish the relationship to certain alien relatives who wish to immigrate to the United States.” The U.S. Citizenship and Immigration Services (“USCIS”) processes I-130 petitions as visa numbers become available. When the foreign relative (i.e., foreign spouse or child) obtains a visa number, the foreign relative may then apply for an immigrant visa (i.e., a green card).

⁸ *I-129, Petition for Alien Fiancé(e)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/i-129f> [<https://perma.cc/9XZF-PGMK>] (last updated Sept. 7, 2017) (purpose of the I-129F Petition is for a U.S. citizen to bring his or her “fiancé(e) (K-1) and that person's children to the U.S. for marriage to [the U.S. citizen] or to bring [the spouse of the U.S. citizen] and that person's children (K-3 and K-4 visas, respectively) to the United States to complete processing for permanent resident status.”).

⁹ U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 6.

¹⁰ *Bringing Children, Sons and Daughters to Live in the United States as Permanent Residents*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/family/family-us-citizens/children/bringing-children-sons-and-daughters-live-united-states-permanent-residents> [<https://perma.cc/ZT93-EXEF>] (last updated Mar. 30, 2016).

using a non-immigrant K-3 visa, and the same petitions are filed by the U.S. citizen stepparent on the foreign spouse's behalf.¹¹ Once these petitions are filed by the stepparent, the foreign spouse and child may move to the United States and “may apply to adjust status to permanent resident at any time.”¹²

The Department of Homeland Security (“DHS”) allows K-3 and K-4 visa holders to stay within the United States to await the approval of their immigrant visas¹³ for a two-year period.¹⁴ The two-year period presents a technical issue for the K-4 child who is over the age of eighteen at the time of the marriage because his non-immigrant status can expire sooner than two years if he turns twenty-one prior to the end of that period—resulting in the child's removal.¹⁵ Furthermore, if the K-4 child is over the age of eighteen at the time of the marriage, the Regulation¹⁶ precludes that older child from qualifying as the *stepchild* of the U.S. stepparent and ultimately

¹¹ U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 6; *Nonimmigrant Visa for a Spouse (K-3)*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/visas/en/immigrate/family/spouse-citizen.html> [<https://perma.cc/5A3X-RFZE>] (last visited Sept. 12, 2016) (“It should be noted that under U.S. immigration law, a foreign citizen who marries a U.S. citizen outside the U.S. must apply for the K-3 visa in the country where the marriage took place.”). *See also* U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 7; U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 8.

¹² U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 6.

¹³ *What is the Difference Between an Immigrant Visa vs. Nonimmigrant Visa?* [*sic*], U.S. CUSTOMS & BORDER PROT., https://help.cbp.gov/app/answers/detail/a_id/72/~/-immigrant-visas-vs.-non-immigrant-visas [<https://perma.cc/35ZK-C98A>] (last visited Sept. 14, 2016).

¹⁴ 8 C.F.R. § 214.2(k)(8) (2017) (“Aliens entering the United States as a K-4 shall be admitted for a period of [two] years.”); U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 6 (K-3 and K-4 non-immigrant visa holders may apply for an extension of status in two-year increments upon the expiration of their K-visas so long as “the marriage-based I-130 visa petition or a corresponding application for adjustment of status or visa application is still pending adjudication.”).

¹⁵ *See* *Cen v. Att’y Gen.* U.S., 825 F.3d 177, 185 (3d Cir. 2016).

¹⁶ *See* 8 C.F.R. § 245.1(i), *supra* note 2 and accompanying text.

bars him from applying for the immigrant visa within the United States.¹⁷ If the K-4 child's non-immigrant status expires while he is awaiting the approval of his application to adjust his status, he is essentially left with "no recourse but to leave [his] family behind in the United States and return to [his] home country to apply for a permanent visa from abroad."¹⁸ Thus, the K-4 stepchild must have been under the age of eighteen at the time of the marriage that took place abroad to avoid the risk of being sent back to his natural parent's homeland.¹⁹

Conversely, Suzie entered the United States with her foreign parent using a non-immigrant K-2 visa, and her mother entered the United States using a non-immigrant K-1 visa.²⁰ Both K-visas are non-immigrant visas that serve the same function as K-3 and K-4 visas because they allow foreign fiancés of U.S. citizens and their children to move to the United States and await the approvals of their immigrant visas.²¹ Applicants for any of the K-visas

¹⁷ See, e.g., *Akram v. Holder*, 721 F.3d 853, 856 (7th Cir. 2013) (explaining that "although Akram was her mother's 'minor child' for K-visa purposes, she was not [her stepfather's] 'child' for I-130 purposes") (emphasis added).

¹⁸ *Cen*, 825 F.3d at 185; see also 8 C.F.R. § 214.2(k)(10)(i). The K-4 visa holder over the age of eighteen at the time of the marriage is unable to apply for an extension of stay when the K-visa has expired after the two-year period, or if he turns twenty-one while his application to adjust status is pending, because he must show that either an I-130 petition, an immigrant visa based on an I-130 petition, or an application to adjust status based on an I-130 petition is pending approval. However, the K-4 visa holder between the ages of 18–21 is barred from having an I-130 petition filed on his behalf because he does not qualify as the *child* of the U.S. stepparent. Thus, the K-4 child is unable to successfully apply for an extension of stay.

¹⁹ *Cen*, 825 F.3d at 185; See also *Consular Processing*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/consular-processing> [<https://perma.cc/E8H3-QFJT>] (last updated Jun. 26, 2017) (distinguishing between two different paths for obtaining permanent resident status). Consular processing involves *applying for an immigrant visa abroad* to be admitted into the United States as a permanent resident, whereas an adjustment of status involves *applying for an immigrant visa within the United States* as a non-immigrant.

²⁰ See *K Non-immigrant*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/fiancees> [<https://perma.cc/PYZ2-XKKA>] (last updated Feb. 16, 2016).

²¹ *Id.*

referenced above are required to have the U.S. citizen stepparent file the appropriate petitions on their behalf.²² Once foreign fiancés obtain their K-1 visas and their children obtain K-2 visas, they are allowed to join the U.S. citizen in the United States.²³ Since the parents of K-2 children (K-1 visa holders) have not yet been married abroad, the U.S. citizen and foreign fiancé must marry within ninety days of arriving in the United States.²⁴ Failure to marry within ninety days results in the K-1 fiancé and K-2 child being “removable from the United States and [precluded to adjust of status] through any other means.”²⁵ After the marriage, K-1 and K-2 visa holders are authorized to stay within the United States while awaiting the approval of their immigrant visas on a conditional basis.²⁶ But, if the child turns twenty-one while the application is still pending, his or her non-immigrant status expires, and the K-2 visa holder is ineligible to apply for an extension to stay within the United States.²⁷

Both K-2 and K-4 children who “age-out”²⁸ of the system can prevent their K-visas from expiring under the Child Status Protection Act of 2002 (“CSPA”), as long as the stepparent files an I-130 petition on the child’s behalf before the child’s twenty-first birthday, and the child is under age

²² *Id.*

²³ *Id.* (“Those applying based on K-1 or K-2 status will not need a Form I-130 filed on their behalf. However, a K-2 stepchild may have a Form I-130, Immediate Relative Petition, filed on his/her behalf if eligible and necessary to prevent age-out concerns.”).

²⁴ *Id.*

²⁵ *Id.*

²⁶ 8 U.S.C.S. § 1186a(a)(1) (2017).

²⁷ 8 C.F.R. § 214.1(c)(3)(iv) (2017); *see also* 8 U.S.C.S. § 1186a(d)(2)(A). To remove the conditional permanent resident status of a K-2 child the petition “must be filed during the [ninety]-day period before the second anniversary of the alien’s obtaining the status of lawful admission of permanent resident.”

²⁸ *Child Status Protection Act (CSPA)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/child-status-protection-act> [<https://perma.cc/EPA9-HW27>] (last updated June 26, 2017) (defining “child” as “an individual who is unmarried and under the age of 21. . . . Congress recognized that many beneficiaries were aging out because of large backlogs and long processing times for visa petitions.”).

eighteen at the time of the marriage.²⁹ However, this remedy is not available to the K-4 child who is over the age of eighteen at the time of the parents' marriage; in this case, the Regulation bars the child from having an I-130 petition filed on his or her behalf because he or she is not technically the *stepchild* of the U.S. citizen.³⁰ However, if a K-2 child is over eighteen at the time of the marriage, and cannot qualify as the stepchild of the U.S. citizen under the CSPA, the child can rely on a "gap-filling regulation"³¹ that aims at fixing this outcome by allowing only K-2 children to adjust their non-immigrant status based on the marriage of their parents without requiring the approval of an I-130 petition.³² Unfortunately, this gap-filling regulation does not extend to K-4 visa holders.³³

²⁹ *See id.* The CSPA allows a child of a foreign parent who marries a U.S. citizen to "retain classification as a *child*, even if he or she has reached the age of [twenty-one]," while the child's application of approval for adjustment of status is still pending. If a child turned twenty-one "at any time prior to receiving permanent residence [the child] could not be considered a child for immigration purposes." The CSPA was designed to protect a child who would "age out" due to long processing times of applications for adjustment of status. Thus, the K-2 visa child is only eligible for the protection of the CSPA if the I-130 petition was "filed by a U.S. citizen parent for his or her child, [and if the child is eligible, the child's age] 'freezes' on the date of filing."

³⁰ *See* 8 C.F.R. § 245.1(i) (2011); *Child Status Protection Act (CSPA)*, *supra* note 28. To qualify for CSPA, the Form I-130 must be filed by the U.S. citizen parent of the child to "freeze" the child's age on the date of filing. A stepchild is considered a "child" in the immigration process, "as long as the marriage creating the step-relationship occurred before the child turned [eighteen]." *Bringing Children, Son and Daughters to Live in the United States as Permanent Residents*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/family/family-us-citizens/children/bringing-children-sons-and-daughters-live-united-states-permanent-residents> [<https://perma.cc/BYN3-SWJB>] (last updated Mar. 30, 2016).

³¹ *See* 8 C.F.R. § 214.2(k)(6)(ii) (2016) ("gap-filling" regulation for K-2 children). The "gap-filling" regulation states in relevant part that: *Upon contracting a valid marriage to the petitioner within [ninety] days of his or her admission as a nonimmigrant pursuant to a valid K-1 visa issued . . . the K-1 beneficiary and his or her minor children may apply for adjustment of status to lawful permanent resident under section 245 of the Act* (emphasis added).

³² *See id.*

³³ *Id.*; *Cen v. Att'y Gen. U.S.*, 825 F.3d 177, 184 (3d Cir. 2016).

John, the child of a foreign spouse who married a U.S. citizen abroad, was precluded from staying in the United States while awaiting the approval of his immigrant visa even though his K-4 visa permitted him enter the United States with his foreign mother. Although John was the minor child (under twenty-one years old) of his foreign mother for purposes of obtaining his K-4 visa, he was not the minor child of his stepfather within the meaning of the Regulation because he was over age eighteen at the time of the marriage. Even if he had not turned twenty-one prior to the expiration of the two-year period, he still wouldn't have been eligible to apply for an immigrant visa within the United States because he would not have been able to establish that he was the *stepchild* of his stepfather as required by the I-130 petition. For these reasons, he was sent back to the Philippines to apply for an immigrant visa abroad.

Suzie, on the other hand, was the child of a foreign spouse-to-be of a U.S. citizen, whose parent married the U.S. citizen within the United States. Although she was nineteen at the time of her parents' marriage and was, therefore, unable to benefit from the CSPA, she was protected under the gap-filling regulation, which allows a K-2 visa holder to adjust her status based on her parents' marriage. Thus, she was not required to qualify as the child of the U.S. citizen pursuant to an I-130 petition. Neither John nor Suzie would have benefitted from the protections provided by the CSPA because they were both over eighteen at the time of the marriage and would not have qualified as the stepchildren of their U.S. stepparents. However, the gap-filling regulation—available only to K-2 visa holders—protected Suzie from aging out under the CSPA because it doesn't require a K-2 visa holder to establish a relationship (i.e. the minor stepchild) to the American stepparent per the I-130 petition. Instead, Suzie could adjust her status to a legal permanent resident merely based on the marriage that took place within the United States. Since John could not benefit from neither the CSPA or the gap-filling regulation, the only way he could adjust his status was to establish that he was the minor stepchild of the American stepparent

who originally filed on behalf of the foreign parent. The Regulation adversely affected John's path to legal permanent resident status and serves as a legal dead end for other K-4 children.³⁴

III. STATUTORY HISTORY

Foreign immediate relatives³⁵ and family members³⁶ of U.S. citizens have generally been allowed to migrate to the United States and live together with U.S. citizens through the K-visa program, which unlocks the path to permanent residency once the required administrative procedures have been satisfied—i.e., the filing and approval of the appropriate petitions.³⁷ However, the issue presented regarding K-visas is the following: Why are unmarried youths between the ages of eighteen and twenty-one, the children of foreign spouses who married U.S. citizens abroad, not permitted to stay within the United States alongside their families while awaiting approval of their immigrant visas? Answering this question requires a brief explanation of (1) the contradicting statutory definitions of the word *child*, and (2) the effects of the Regulation that precludes children who are over the age of eighteen at the time of their parents' marriage from remaining in the United

³⁴ Matthew Bultman, *3rd Circ. Strikes Down "Legal Dead End" Under K-4 Visa Rule*, LAW360 (June 6, 2016, 7:23 PM), <https://www.law360.com/articles/804043/3rd-circ-strikes-down-legal-dead-end-under-k-4-visa-rule> [<https://perma.cc/6DAU-J7BZ>].

³⁵ *Green Card for Immediate Relatives of a U.S. Citizen*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/green-card/green-card-through-family/green-card-immediate-relative-us-citizen> [<https://perma.cc/V56N-GTX2>] (last updated July 10, 2017). Eligible immediate relatives whom a U.S. citizen may petition for to live in the United States include "the U.S. citizen's spouse, unmarried child under the age of [twenty-one], [and] parent (if the U.S. citizen is over the age of [twenty-one])."

³⁶ *Green Card for Family Preference Immigrants*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/family-preference> [<https://perma.cc/A2U6-VPS4>] (last updated Jul. 10, 2017). If a family member of a U.S. citizen "is not an immediate relative, then the U.S. citizen may still be able to sponsor them via what is called a 'family preference category.'" "Eligible relatives include: Unmarried sons or daughters over the age of 21, married child[ren] of any age, [and] brothers and sisters (if the U.S. citizen petitioner is over the age of [twenty-one])."

³⁷ Gisela A. Ades, *Lawful Permanent Residents: The Forced Bachelors and Bachelorettes of America*, 40 U. MIAMI INTER-AM. L. REV. 521, 524, 52627 (2009).

States while awaiting the approval of their immigrant visa either when their K-4 non-immigrant status has expired or upon their twenty-first birthday.³⁸

A. *The LIFE Act*

Prior to the amending the Legal Immigration Family Equity (“LIFE”) Act in 2000, foreign spouses of U.S. citizens and their children had to wait for the approval of their immigrant visas abroad and were not allowed to wait alongside the American spouse within the United States.³⁹ The LIFE Act only applied to K-1 and K-2 visa holders before the year 2000; it authorized them to adjust their non-immigrant status to legal permanent resident status pursuant to section 1255(a), instead of staying abroad while waiting for their immigrant visa applications to be approved.⁴⁰ Although the Attorney General had the discretion to ultimately approve applications for the adjustment of the status of non-immigrants, it was barred from adjusting status solely on the basis of the non-immigrant’s K-visa.⁴¹ This meant that the K-2 child had to further prove that a parent-child relationship existed between the stepchild and the U.S. citizen.⁴² For the stepchild to demonstrate that he was the child of the U.S. citizen, he had to be under the age of eighteen at the time of his parents’ marriage.⁴³ Such a definition of the word *child*, as applied to the stepchildren of a U.S. citizen, created a problem for the K-2 child because once his non-immigrant status expired—

³⁸ *Cen*, 825 F.3d at 179.

³⁹ *Id.* at 183. *See also* Legal Immigration Family Equity (LIFE) Act, Pub. L. No. 106–553, § 1103(a), 114 Stat. 2762, 2762A144 (2000) (as amended 2000).

⁴⁰ *Cen*, 825 F.3d at 183. *See also* 8 U.S.C. § 1255(a) (2016). To apply for an adjustment of status as a non-immigrant, three requirements must be met. The applicant must (1) file an application to adjust his status, (2) demonstrate eligibility under existing law to adjust his status, and (3) show that a permanent visa is immediately available to him. 8 U.S.C. § 1255(a).

⁴¹ *Id.* (prior to 2000 amendment).

⁴² *Cen*, 825 F.3d at 181.

⁴³ 8 U.S.C. § 1101(b)(1)(B) (2016). (“The term *child* means an *unmarried person under twenty-one years of age* who is . . . a *stepchild* . . . provided the child had *not reached the age of eighteen years at the time of the marriage* creating the status of the stepchild occurred.”) (emphasis added).

either at the end of two years or upon his twenty-first birthday—the child would then have to go back the country he came from and apply for an immigrant visa via consular processing abroad based on the foreign parent’s newly acquired status of legal permanent resident.⁴⁴

As a result, the U.S. Citizenship and Immigration Services (“USCIS”)⁴⁵ implemented a gap-filling regulation⁴⁶ in an attempt to fix the problem K-2 children faced, allowing them to demonstrate their parents’ valid marriage, rather than requiring them to prove that a familiar relationship existed between the stepchild and American stepparent by the filing of the I-130 petition.⁴⁷ Subsequently, Congress amended section 1255(d), allowing the Attorney General to adjust the status of a non-immigrant based on the marriage of the U.S. citizen stepparent and foreign spouse-to-be.⁴⁸

In 2000, Congress expanded the K-visa program to K-3 and K-4 visa holders, therefore amending the LIFE Act to include foreign spouses of U.S. citizens and their children.⁴⁹ The purpose of adding two new subcategories of K-visas was to “reunite families that have been or could be subject to a long period of separation during the process of immigrating to the United States.”⁵⁰ In response to the LIFE Act’s amendment, the USCIS failed to extend the gap-filling regulation that applied to K-2 children to K-4 children.⁵¹ Instead, the USCIS implemented a regulation that limits K-4

⁴⁴ *Id.*

⁴⁵ *Did you Know?: The INS No Longer Exists*, THE BEACON (Apr. 13, 2011), <https://www.uscis.gov/archive/blog/2011/04/did-you-know-ins-no-longer-exists> [<https://perma.cc/NVN7-UXFK>]. On March 1, 2003, most of the functions handled by the Immigration and Naturalization Service (“INS”) were transferred to the USCIS, a newly formed component of the Department of Justice.

⁴⁶ *See* 8 C.F.R. § 214.2(k)(6)(ii) (2017).

⁴⁷ *Id.*

⁴⁸ 8 U.S.C. § 1255(d); 8 C.F.R. § 214.2(k)(6)(ii); *Cen v. Att’y Gen.* U.S., 825 F.3d 177, 182–83 (3d Cir. 2016).

⁴⁹ The Legal Immigration Family Equity (LIFE) Act, Pub. L. No. 106-553, § 1103(a), 114 Stat. 2762, 2762A-142 (2000) (as amended 2000).

⁵⁰ *See* 8 U.S.C. § 1101(a)(15)(K)(ii), (iii) (2016) (explaining that the K-2 or K-4 child must be a *minor child* of the alien spouse or fiancé).

⁵¹ *Cen*, 825 F.3d at 184.

children over the age of eighteen at the time of their parents' marriage from adjusting their status within the United States by requiring that the U.S. citizen stepparent file an I-130 petition on their behalf.⁵² The Regulation reinvents the gap that K-2 children experienced before because a K-4 child over the age of eighteen is not the stepparent's child within the statutory definition.⁵³ Thus, the Regulation presents a *legal quandary* for a K-4 child over the age of eighteen at the time of his or her parents' marriage because "[h]aving qualified for the K-4 visa to accompany [his] parent and younger siblings to the United States to reunite with [his] U.S. stepparent, a K-4 child between ages eighteen and twenty-one is limited by the Regulation to obtaining lawful permanent residence only by way of an I-130 petition filed by stepparent."⁵⁴ Requiring the American stepparent to file an I-130 petition, however, creates an insurmountable hurdle for the K-4 child because it is technically impossible for the child to comply with the requirement due to the statutory definition of the word *child*.⁵⁵

IV. THE LEGAL QUIRK IN IMMIGRATION LAW TODAY

Although minimal precedent exists describing the inconsistency between the Regulation and the LIFE Act's actual purpose, the available case law does express that applying the Regulation in this manner is an abuse of the Attorney General's discretion.⁵⁶ In a 2016 case involving K-4 visas, the

⁵² 8 C.F.R. § 245.1(i) (2017). The Regulation provides that:

An alien admitted to the United States [as a K-4 non-immigrant] may apply for adjustment of status to that of a permanent resident . . . at any time following the approval of the Form I-130 petition filed on the alien's behalf, by the same citizen who petitioned for the alien's parent's K-3 status. . . . An alien admitted to the U.S. as a K-3/K-4 alien may not adjust to that of permanent resident status in any way other than as a spouse or child of the U.S. citizen who originally filed the petition for that alien's K-3/K-4 status.

⁵³ 8 U.S.C. § 1101(b)(1)(B) (2016); *Cen*, 825 F.3d at 184.

⁵⁴ *Cen*, 825 F.3d at 184 (emphasis added).

⁵⁵ *Id.*

⁵⁶ *See id.* at 185–86. The Court stated that

Third Circuit court recognized in its holding that current immigration laws “offer older K-4 children nothing more than a *legal dead end*.”⁵⁷ The court relied on a prior Seventh Circuit case and deemed the Regulation to be invalid.⁵⁸

A. Cen’s Case: A Factual and Procedural Synopsis

Cen, a Chinese citizen, was nineteen years old at the time her Chinese mother and American stepfather were married in China.⁵⁹ Cen and her mother obtained non-immigrant K-visas to move to the United States with her stepfather after the marriage and applied for an adjustment of their status from non-immigrant to immigrant status.⁶⁰ Cen’s application was denied because the Regulation did not allow her stepfather to file an I-130 petition on her behalf.⁶¹ Because Cen was nineteen years old at the time of the marriage, she was not the minor child of her stepfather.⁶² When Cen’s mother adjusted her status to a lawful permanent resident, she then filed another I-130 petition on Cen’s behalf since her stepfather was barred from doing so.⁶³ The application was denied because

[E]ven though her mother’s I-130 petition [filed] on her behalf had been approved—and even though her mother by that point had become a naturalized U.S. citizen—the *Regulation* specifies that,

Where Congress has made it clear through the statutory language, structure, history, and purpose its intent to authorize . . . [one] class of aliens to apply for adjustment of status, a regulation that strips such [a class] cannot be deemed ‘reasonable in light of the legislature’s revealed design.’ Here, the Attorney General overstepped those bounds.

Id. at 197 (quoting *NationsBank of North Carolina v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 811 (1995)).

⁵⁷ *Id.* at 198 (emphasis added).

⁵⁸ *Id.* See also *Akram v. Holder*, 721 F.3d 853, 864 (7th Cir. 2013).

⁵⁹ *Cen*, 825 F.3d at 185.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

in order to be eligible for status adjustment, a K-4 child's I-130 petition must be filed by "the same citizen who petitioned for the alien's parent's K-3 status," i.e., the U.S. stepparent.⁶⁴

Leaving *Cen* with no other recourse, the government then commenced removal proceedings against her for overstaying her K-4 visa.⁶⁵ The government justified this decision by arguing that the "legislative history and structure of relevant immigrant laws supported the Regulation's requirement that *only the stepparent* may file an I-130 petition for the K-4 visa holder;" despite the Seventh Circuit's prior holding that invalidated the Regulation, the government was not bound by its decision.⁶⁶

B. Chevron's Two-Step Test

In the *Cen* case, the court utilized Chevron's two-step analysis, which addresses whether an administrative agency's interpretation of an ambiguous statute is contrary to Congress' intent.⁶⁷ The first step asks whether Congress has expressed intent regarding the specific issue.⁶⁸ If the statute is ambiguous, and Congress' intent is unclear, the second step of the test provides that the administrative agency has the authority to interpret the statute so long as "the agency's answer is based on a permissible construction of the statute," and the regulation is not "*arbitrary capricious, or manifestly contrary to the statute.*"⁶⁹

⁶⁴ *Cen*, 825 F.3d at 185 (emphasis added) (citing 8 C.F.R. § 245(i)—the Regulation).

⁶⁵ *See id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 186.

⁶⁸ *Id.* (considering "traditional tools of statutory construction" in step one of the Chevron Test). The agency is given an express delegation of authority by Congress to fill in the gaps that ambiguous statutes create. *Chevron U.S., Inc. v. Nat. Res. Def. Counsel, Inc.*, 467 U.S. 837, 843 (1984).

⁶⁹ *Chevron*, 467 U.S. at 844 (emphasis added).

1. Ambiguity of the Statute and Congressional Intent

Cen argued that because section 1255(d) authorized her “status adjustment ‘as a result of the marriage of’ the K-3 parent and the U.S. stepparent, all K-4 children under twenty-one [were] unambiguously eligible to adjust status on the basis of the marriage alone rather than the parent-child relationship with their parents.”⁷⁰ Conversely, the government argued that section 1255(a) barred K-4 children over the age of eighteen from adjusting their non-immigrant status because they could not qualify as the child of the U.S. stepparent.⁷¹ If the plain language of the statute clearly and unambiguously reflects Congress’ intent, then the analysis under the Chevron test does not pass step one.⁷²

First, the government omits language from the statute by not considering the marriage between the K-4 child’s foreign parent and U.S. stepparent as a basis for adjusting the child’s non-immigrant status.⁷³ Instead, the government argued that the K-4 child must qualify as the stepchild of the U.S. stepparent by demonstrating a legally cognizable parent-child relationship.⁷⁴ Relying on the Regulation, the government argued that the only way to demonstrate such a parent-child relationship was for the U.S. stepparent to file an I-130 on the child’s behalf.⁷⁵ The court disagreed because the plain language of the statute did not require K-4 children to

⁷⁰ *Cen*, 825 F.3d at 187. *See also* 8 U.S.C. § 1255(d) (2016). That statute states the Attorney General may not adjust:

[T]he status of a non-immigrant alien described in section 1101(a)(15)(K) of this title except to that of an alien lawfully admitted to the United States on a conditional basis under section 1186a of this title *as a result of the marriage of the non-immigrant* (or, in the case of a *minor child*, the parent) *to the citizen who filed the petition to accord that alien’s non-immigrant status* under section 1101(a)(15)(K) of this title.

8 U.S.C. § 1255(d) (emphasis added).

⁷¹ 8 U.S.C. §§ 1101(b)(1)(B), 1255(a); *Cen*, 825 F.3d at 187.

⁷² *Cen*, 825 F.3d at 187.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 188. *See also* 8 C.F.R. § 245(i) (2016) (the Regulation).

solely apply for an adjustment of status through the stepparent, and the filing of an I-130 petition was not the only means for proving eligibility for an immigrant visa.⁷⁶ For these reasons, the statute leaves some ambiguity as to whether a regulation gives the Attorney General broad discretion to determine what classes of non-immigrants are eligible to apply for an adjustment of status within the United States.⁷⁷ This ambiguity in the statute brings the analysis to step two of the Chevron Test.⁷⁸

2. Permissible Construction of the Statute

To answer whether the Regulation that barred a class of aliens—who would have otherwise been eligible to apply for an adjustment of their status under the existing section 1255(a)—was a permissible construction of the statute, it is necessary to determine whether the regulation “harmonized with the plain language of the statute, its origin and purpose.”⁷⁹ Although the Attorney General has discretion in deciding who will ultimately be approved to adjust their status within the United States, it does not follow that the Attorney General’s discretion reaches as far as completely negating Congress’ purpose in implementing the existing statute.⁸⁰

The court held that the Regulation in the *Cen* case was invalid because it was manifestly contrary to Congress’ purpose in enacting section 1255(a).⁸¹ The court further expressed that it “would hesitate to conclude that Congress clearly intended to deprive older K-4 children of any opportunity

⁷⁶ *Cen*, 825 F.3d at 189. See also 8 U.S.C. § 1255(d) (explaining that the stepchild may prove eligibility for an immigrant visa *as a result of the marriage* between the foreign parent and the U.S. citizen—not limited to the filing of I-130 by the U.S. stepparent on the child’s behalf).

⁷⁷ *Cen*, 825 F.3d at 189.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 190.

⁸¹ *Id.*

to adjust status from within the United States.”⁸² The Regulation states, in relevant part:

An alien admitted to the United States as a K-4 [visa holder] may apply for an adjustment of status to that of permanent residence . . . at any time following the approval of the Form I-130 petition filed on the alien’s behalf, by the same citizen who petitioned for the alien’s parent’s K-3 status. Upon approval of the application, the director shall record his or her lawful admission for permanent residence . . . [and the] alien admitted to the U.S. as a [K-4] alien *may not adjust to that of permanent resident status in any way other than as a . . . child of the U.S. citizen who originally filed the petition for that alien’s [K-4] status.*⁸³

First, the plain language of section 1255(d) did not conform with the language of the Regulation because the statute did not require the stepchild of the U.S. citizen to prove a parent-child relationship for purposes of adjusting his status.⁸⁴ Instead, the language of the statute makes it clear that the child’s relationship is already established based on the marriage between his foreign parent and U.S. stepparent so long as the child is under twenty-one and unmarried.⁸⁵ The purpose of the “K-4 visa—like the K-2—is designed to reunify families and, ultimately, to serve as a stepping-stone toward permanent residence; [thus] the most logical reading of the statute, . . . is that, whatever paperwork is required once stateside, Congress meant to authorize an application for adjustment [based on marriage].”⁸⁶ Congress further demonstrated its purpose by authorizing the use of both K-2 and K-4 visas in the same subsection of Title 8 of the United States Code—this implies that Congress wanted both categories of visa holders to be treated in the same manner.⁸⁷

⁸² *Cen*, 825 F.3d at 188.

⁸³ 8 C.F.R. § 245.1(i) (2016) (emphasis added).

⁸⁴ *Cen*, 825 F.3d at 189.

⁸⁵ *Id.*

⁸⁶ *Id.* at 191.

⁸⁷ *See* 8 U.S.C. § 1101(a)(15)(K)(iii) (2016); *Cen*, 825 F.3d at 192.

In an unsuccessful attempt to justify the Regulation’s bar against K-4 children, the government explained that since the U.S. stepparent was the only person who could file the I-130 petition on behalf of the child, the child had to be under eighteen years old at the time of the marriage to qualify as the child of the stepparent.⁸⁸ However, the court rejected this argument and concluded that the term *child*—which requires the child to be under twenty-one—applies to both K-visas and adjustment of status applications.⁸⁹ When Congress amended the LIFE Act to include K-4 visas for children of foreign spouses who marry U.S. citizens, the government implemented the gap-filling Regulation only to K-2 children to protect them from aging-out while awaiting the approval of their immigrant visas.⁹⁰ Using two different definitions of the word *child* creates a gap for K-4 children over the age of eighteen at the time of the marriage, while K-2 children of spouses-to-be are allowed to circumvent this dead end by either freezing their age under the CSPA or adjusting their status based on the marriage.⁹¹ Thus, the court expressed that if Congress wanted to treat K-4 and K-2 children differently, it would have done so expressly.⁹² The court further stated that:

[T]he Government’s reading of [section] 1255(d) would transform K-4 visas for older K-4 children into nothing more than tourist visas, giving their holders only a glimpse of what life with their families might have been like in America before being sent home because they are legally incapable of fulfilling [the statute’s] eligibility requirement. Such a reading defies common sense.

. . . .

⁸⁸ *Cen*, 825 F.3d at 193. *See also* 8 U.S.C. § 1101(b)(1)(B)(b) (2016) (demonstrating that a *stepchild* qualifies as the *child* of a U.S. stepparent if the child is under the age of eighteen at time of the marriage).

⁸⁹ *Cen*, 825 F.3d at 193.

⁹⁰ *Id.* at 195. *See also* 8 C.F.R. § 214.2(k)(6)(ii) (2016) (“gap-filling” regulation for K-2 children).

⁹¹ *Cen*, 825 F.3d at 195.

⁹² *Id.* at 196.

. . . Where Congress has made clear through the statutory language, structure, history, and purpose its intent to authorize a certain class of aliens to apply for adjustment of status, a regulation that strips such aliens of eligibility altogether cannot be deemed “reasonable in light of the legislature’s revealed design.”⁹³

C. Akram’s Case: The Regulation in the Seventh Circuit

The *Akram v. Holder*⁹⁴ case is factually parallel to the *Cen* case—the court held that the Regulation was directly contrary to Congress’ will.⁹⁵ Akram was eighteen years old at the time of her foreign mother’s marriage to her stepfather, a U.S. citizen.⁹⁶ The marriage took place in Pakistan, and her stepfather filed the appropriate petitions for K-visas which allowed Akram, her younger sibling, and her mother to wait for the approval of their immigrant visas within the United States.⁹⁷ Akram’s mother’s and younger sibling’s I-130 petitions were later approved after arriving to the United States, but Akram’s I-130 petition was denied because she was eighteen at the time of the marriage.⁹⁸ As established in *Cen*’s case, “although Akram was her mother’s *minor child* for K-visa purposes, she was not [her stepfather’s] *child* for I-130 purposes.”⁹⁹ Thus, Akram was too old to qualify as her stepfather’s child, which resulted in the denial of her petition and rendered her ineligible to become a legal permanent resident through a relative of a U.S. citizen.¹⁰⁰

As the *Cen* court concluded, the court in *Akram* held that nothing in the statute authorized the government to treat K-4 visa holders as “temporary visitors,” and Congress intended to give K-4 children the opportunity to adjust their status based on the marriage of their parents, just as K-2

⁹³ *Id.* at 195, 97.

⁹⁴ *Akram v. Holder*, 721 F.3d 853 (7th Cir. 2013).

⁹⁵ *Id.* at 855.

⁹⁶ *Id.* at 856.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Akram*, 721 F.3d at 856.

¹⁰⁰ *Id.* at 856–57.

children may.¹⁰¹ It further explained that section 1186a of the statute defines the alien son or daughter as “an alien who obtains the status of an alien lawfully admitted for permanent residence . . . by virtue of being the son or daughter of an *individual through a qualifying marriage*.”¹⁰² Additionally, section 1245.1(c)(6)(ii) provides that “a K-4 must adjust status ‘based upon the marriage of K-3 spouse.’”¹⁰³ These statutes further demonstrated that the Regulation as applied in *Akram* was contrary to Congress’ intention of allowing K-4 children to apply for an adjustment of status on the basis of the marriage and not on solely the parent-child relationship with the U.S. citizen.¹⁰⁴ Even though section 1255(a) grants the Attorney General the discretion to adjust the status of a non-immigrant, such discretion does not allow the government to utilize a regulation that ultimately impairs Congress’ purpose for enacting the statute.¹⁰⁵

D. Combatting Marriage Fraud

In the *Cen* and *Akram* cases, the government argued that implementing the Regulation would further the goal of preventing marriage fraud, because K-3 foreign spouses were more prone to committing fraud since the marriage takes place abroad prior to entering the United States.¹⁰⁶ This argument does not pass muster, however, because Congress has already implemented measures that help prevent marriage fraud such as the following:

¹⁰¹ *Id.* at 860, 864. *See also* 8 C.F.R. § 214.2(k)(6)(ii) (2016). K-2 children may adjust their status within the United States *based on the marriage* of the U.S. citizen stepparent and foreign spouse because the gap-filling regulation allows K-2 visa holders to adjust their status without proving a qualifying relationship between the stepparent and the child—by filing an I-130 petition. 8 C.F.R. § 214.2(k)(6)(ii).

¹⁰² *Akram*, 721 F.3d at 861 (citing in relevant part 8 U.S.C. § 1186a(h)(2) (2016)).

¹⁰³ 8 U.S.C. § 1245.1(c)(6)(ii); *Akram*, 721 F.3d at 865 n.6. (emphasis added).

¹⁰⁴ *Akram*, 721 F.3d at 865.

¹⁰⁵ *Id.* *See also* 8 U.S.C. § 1255(a) (2016).

¹⁰⁶ *Cen v. Att’y Gen. U.S.*, 825 F.3d 177, 196 (3d. Cir. 2016); *Akram*, 721 F.3d at 862.

[Under section 1186a] a K-3 parent must have her initial visa petition—which includes proof of a valid marriage—approved before she and her children may even enter the United States, and the lawful permanent resident status that K-3 and K-4 aliens obtain thereafter is conditional. . . . This conditional status remains in place until the married couple jointly files to lift this designation in the ninety-day window preceding the second anniversary of obtaining conditional legal status. . . . Only if after an interview with the couple, the Government concludes that the marriage is not fraudulent does the aliens status and that of her children become truly permanent. On the other hand, if at any time during this two-year period the Government concludes the marriage was fraudulent or has been annulled or terminated, the alien’s permanent resident status is rescinded and she and, by extension, her children are rendered removable. This temporary, conditional status thus provides the Government with a backstop to prevent fraudulent marriages from resulting in permanent legal status and an additional mechanism to catch fraud that may have slipped through an initial review.¹⁰⁷

The government was unable to show how applying the Regulation in a manner that results in deporting older K-4 children—after lawfully arriving to the United States—further the goal of combatting marriage fraud in either case.¹⁰⁸ More specifically, the court found no valid reasoning for targeting K-4 children in this manner to advance this goal since the I-130 petition and I-129 petition already establishes the relationship between the foreign spouse and child, as well as the relationship between the foreign spouse and the U.S. citizen.¹⁰⁹ Thus, the government’s interpretation of the statute and application of the Regulation was not a permissible construction

¹⁰⁷ *Cen*, 825 F.3d at 196–97 (citing 8 U.S.C. §§ 1186a(c)(1)(A), (B), (c)(3), (d)(2)(A); 1227(a)(1)(D)(i) (2016)).

¹⁰⁸ *Id.* at 196; *Akram*, 721 F.3d at 862.

¹⁰⁹ *Cen*, 825 F.3d at 197. (The court explained that the “goal may be served by careful scrutiny of the K-3 parent’s [petitions] and documentation required at the visa interview to prove both . . . [relationships], but the Government has not shown.”).

of the statute, and it deviated from Congress' intent of reuniting families in both cases.¹¹⁰

V. RECOMMENDATION

The case law and interpretation of Congress' purpose in amending the LIFE Act calls for an urgent change by the Attorney General to help fix the paradox that older K-4 children face due to the Regulation.¹¹¹ Instead of applying quick piecemeal fixes that further complicate the issue, the USCIS must focus on the main problem that it strives to prevent—i.e., marriage fraud.¹¹² Applying a regulation that produces a contrary effect from what the statute intends unjustly disadvantages specific classes or groups of people and does nothing to further congressional intent.¹¹³ The change must make sense, or legal inadequacies will continue to result in adverse outcomes for older K-4 children who would otherwise be eligible to benefit from law that is already in place.¹¹⁴ It is imperative to balance governmental powers and congressional intent in enacting law.¹¹⁵ Absent this balance, government agencies will continue to overstep their authority, contrary to

¹¹⁰ *Id.*; *Akram*, 721 F.3d at 863.

¹¹¹ *See supra* Part IV.

¹¹² *See* Joseph Spanier, Statute Note, *The Legal Immigration Family Equity Act and Immigration and Naturalization Service Implementation*, 4 J.L. & FAM. STUD. 363, 373 (2002) (explaining that the spouse of a U.S. citizen may not agree to a frivolous marriage for the purposes of defrauding the immigration system).

¹¹³ *See Cen*, 825 F.3d at 194 (explaining that applying a contrary statute results in a “devastating burden on K-4 children that is inconsistent with the statutory treatment of and the agency’s own preexisting regulatory framework for, K-2 children”); Spanier, *supra* note 112, at 375 (stating that “it is unclear under what circumstances a K-3 will definitely speed the reunification of couples and families, as opposed to merely an extra burden and gamble for the couple” in the future).

¹¹⁴ *See e.g.*, Cain W. Oulahan, *The American Dream Deferred: Family Separation and Immigrant Visa Adjudications at U.S. Consulates Abroad*, 94 MARQ. L. REV. 1351, 1379 (2011) (eliminating bars for unlawful presence would promote family unity and increase the chances of immigrant visas being approved).

¹¹⁵ *See Cen*, 825 F.3d at 197.

Congress' will, merely due to misinterpretations of ambiguous statutory language.¹¹⁶

A. Policy Considerations & Abuse of Governmental Discretion

The Supreme Court has recognized that Congress expressly authorizes the Attorney General to adjust the status of a non-immigrant who is physically present in the United States to that of a permanent resident.¹¹⁷ However, if the adjustment of status is denied, the non-immigrant visa holder must apply to a U.S. Consul in his native country, even though a statute was “enacted so that such aliens would not inevitably be required to leave the country and apply to a U.S. Consul in order to obtain permanent-resident status.”¹¹⁸ While deference is given to the Attorney General’s authority to regulate eligibility for an adjustment of status, there is an even “higher obligation to respect the clearly expressed will of Congress.”¹¹⁹

The denial of adjustment of status applications for K-4 visa holders, or expirations of their nonimmigrant visas, unnecessarily adds to today’s perceived “illegal immigrant problem.”¹²⁰ The DHS does not place great

¹¹⁶ See generally *id.* at 179 (explaining that the government’s interpretation of the statute was not in congruence to Congress’ will); *Akram*, 721 F.3d at 853 (7th Cir. 2013) (discussing how K-4 children are left with no recourse but to return abroad due to the government’s impermissible construction of the statute).

¹¹⁷ *INS v. Bagamasbad*, 429 U.S. 24, 24 (1976). See also 8 U.S.C. § 1255(a) (2016). The statute provides in relevant part:

The status of an alien, . . . who was inspected and admitted . . . to the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe to that of an alien lawfully admitted for permanent residence.

8 U.S.C § 1255(a).

¹¹⁸ *Bagamasbad*, 429 U.S. at 24, n.*.

¹¹⁹ *Cen*, 825 F.3d at 197.

¹²⁰ See Monica Ortiz Uribe, *Visa Overstays Present Challenge for Immigration Reform*, KPBS (Mar. 7, 2013), <http://www.kpbs.org/news/2013/mar/07/visa-overstays-present-challenge-immigration-refor/> [https://perma.cc/LX96-5JHG]. Forty percent of eleven million undocumented immigrants are those who entered the United States legally using a temporary visa. Since the terrorist attacks of September 11, 2001, there has been a rising

emphasis on detaining or apprehending non-immigrant visa holders who overstay their visas or who are denied an adjustment of status to lawful permanent resident.¹²¹ Due to limited resources, the DHS encourages non-immigrants to seek other relief to avoid being deported back to their countries of origin.¹²² Immigration officers who pursue the removal of non-immigrants in this “low category” have the burden of proving that the removal “would serve an important federal interest. . . . [Furthermore,] field office directors should not expend detention [resources] on aliens . . . whose detention is otherwise not in the public interest.”¹²³

Although the foregoing measures that the DHS has implemented seem to help impacted K-4 visa holders, it is possible that stricter rules enforcing the Regulation may emerge due to presidential administrative changes.¹²⁴ During the 2016 presidential election, President Donald Trump addressed immigration in relevant part:

[A]ll immigration laws will be enforced. As with any law enforcement activity, we will set priorities. But, unlike this Administration, no one will be immune or exempt from enforcement—and ICE and Border Patrol officers will be allowed to do their jobs. Anyone who has entered the United States illegally is subject to deportation—that is what it means to have laws and to have a country. Our enforcement priorities will include removing criminals, gang members, security threats, *visa overstays*, public charge—that is, those relying on public welfare or straining the safety net, along with millions of recent illegal

concern about visa overstays that “potentially could be a way for terrorist to come and remain in the United States.”

¹²¹ See Jeh Charles Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, DEPT. HOMELAND SEC. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [https://perma.cc/KA9X-966X].

¹²² *See id.*

¹²³ *Id.*

¹²⁴ *See* Donald J. Trump, Address on Immigration (Aug. 31, 2016).

arrivals and *overstays who've come here* under the current administration.¹²⁵

In achieving these adverse goals, K-4 children over the age of eighteen at the time of their parents' marriage, but under twenty-one at the time of filing, will be further impacted in the future, even though they qualify as minor children of their foreign biological parent.¹²⁶ Continuing the application of the Regulation in the same manner, and depriving an older K-4 child over age eighteen from adjusting his status, only causes more friction in the immigration system and is contrary to the LIFE Act's goals of reuniting families.¹²⁷ To advance Congress' goals, statutory requirements in immigration law should be implemented with more flexibility, and the Attorney General should correct (or eliminate) the Regulation that negatively impacts K-4 children.¹²⁸ But today's "concerns regarding fraud, national security, and administrative feasibility prevent such a [flexible application of statutory requirements]."¹²⁹ The Attorney General must at least recognize the impact the misapplication of an invalid regulation can

¹²⁵ *Id.* (emphasis added).

¹²⁶ See 8 U.S.C. § 1101(b)(1)(B) (2016); Donald J. Trump, Speech on Immigration (Sept. 1, 2016). President Donald Trump further expressed that immigrants who overstay their visa pose a *substantial threat to national security* and removing these immigrants would be the top priority in his administration. *Id.*

¹²⁷ *Cen v. Att'y Gen. U.S.*, 825 F.3d 177, 195 (3d Cir. 2016).

[W]hile Congress was presumptively aware that the definition of child when it passed the LIFE Act, it was presumptively aware that the [USCIS] had long interpreted minor child to mean an individual under age twenty-one and already interpreted [section] 1255(d), through the gap-filler regulation, to relieve K-2 children of the strictures of [section] 1101(b)(1) for purposes of adjusting status. Thus, had Congress intended to deviate from the gap-filler's existing interpretation [regarding K-4 children], we would expect such deviation to have been explicit.

Id.

¹²⁸ See *id.* at 197–98.

¹²⁹ Aubry Holland, *The Modern Family Unit: Toward A More Inclusive Vision of the Family in Immigration Law*, 96 CAL. L. REV. 1049, 1085 (2008).

have on family members that were otherwise lawfully admitted to the United States.¹³⁰

B. A Gradual Path to Change for the K-4 Child

Although there is limited case law invalidating the Regulation, these cases do not represent the majority of the impacted K-4 children who were eighteen at the time of the marriage, and suffered the same consequences of the Regulation—being sent back abroad merely for being unable to establish a stepparent-child relationship that is sufficient in the eyes of the government.¹³¹ Today, internet blogs and websites serve as a platform for those non-immigrants in the same dilemma who don't know how to avoid being removed from the United States.¹³² Perhaps the adverse outcome resulting from applying the Regulation in a literal sense has been overlooked because illegal immigrants are generally more reluctant to engage in litigation and are deterred from suing due to high federal court costs and the fear of being deported.¹³³

¹³⁰ See *Cen*, 825 F.3d at 179 (explaining that “these aliens may spend significant time separated from their loved ones while they wait in their home countries for the appropriate visa approval”).

¹³¹ *Legal Immigration and Adjustment of Status Report Fiscal Year 2017, Quarter 3*, DEPT. OF HOMELAND SEC. (Oct. 25, 2017), https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration#File_end [<https://perma.cc/Q8N8-W77C>]; Lourdes Santos Tancinco, Esq., *Immigration Guide: Visa Options for Immigrant Stepkids in US*, GMA News Online (Aug. 27, 2013, 1:00 PM), <http://www.gmanetwork.com/news/news/pinoyabroad/323759/immigration-guide-visa-options-for-immigrant-stepkids-in-us/story/> [<https://perma.cc/W9JZ-RBEV>].

¹³² Tancinco, *supra* note 131. Older children who enter on K-4 visas “may only adjust through petitions filed by [the] . . . stepfather” and a reconsideration of the adjustment denial could be challenged based on the ruling in the *Akram* case—it is the K-3’s marriage that matters, not the K-4’s relationship to the stepparent.

¹³³ EDWARD R. DRACHMAN & ROBERT LANGRAN, *YOU DECIDE: CONTROVERSIAL CASES IN AMERICAN POLITICS* 28 (2008). Some undocumented immigrants come here legally and subsequently overstay their visas. “Only the technicality of their legal status, which is often in the process of litigation, keeps many undocumented students from a college education.” Generally, undocumented immigrants are reluctant to disclose their undocumented status for fear of deportation or other serious consequences.

The problem is still prevalent today and there is “no statutory reason for treating K-2s and K-4s so differently” from each other.¹³⁴ Removing older K-4 children from the United States and having them apply through consular processing in their respective native countries presents extreme difficulty and hardship.¹³⁵ The threshold in proving an extreme hardship for immigration purposes is high, and merely “missing the family upon being deported” is not enough to constitute an extreme hardship for a waiver.¹³⁶ Therefore, action by the Attorney General is necessary to effectuate change and prevent this catch-22 older K-4 children endure.¹³⁷ Since the Regulation has been invalidated by the Third and Seventh Circuits, perhaps the best solution is to extend the gap-filling regulation that K-2 children benefit from to K-4 children.¹³⁸ Extending the gap-filling regulation would allow K-4 children to adjust their status within the United States based on the parents’ marriage, and would eliminate the requirement of filing a separate

¹³⁴ *Cen v. Att’y Gen.* U.S., 825 F.3d 177, 197 (3d. Cir. 2016). The court explained that:

The stated goal of combatting marriage fraud thus cannot explain the Regulation’s differential treatment of K-2 and K-4 children or why the Government should, in effect, accord less value to the dignity and integrity of a family unit when a U.S. citizen is already married to an alien spouse than when an alien is entering the United States with the stated intention of marrying a U.S. citizen.

¹³⁵ *See id.* at 194 (“To interpret the LIFE Act to require these children to separate from their parents and younger siblings in the United States and return to their home countries to apply for lawful permanent residence would hardly ‘encourage immigrant family reunification;’ it would statutorily impede it.”).

¹³⁶ *See* Ilona Bray, *Getting a Hardship Waiver for a Deported Family Member*, ALLLAW, <http://www.alllaw.com/articles/nolo/us-immigration/hardship-waiver-deported-family-member.html> [<https://perma.cc/89UC-UP7U>] (last visited Nov. 24, 2016). It is difficult to obtain a waiver to avoid deportation of a family member because mere “anxiety and sadness that anyone would face upon separation” is not enough and documents evidencing the hardship of the family member are required.

¹³⁷ *See Cen*, 825 F.3d at 194–95 (explaining that it is “unreasonable to believe that legislature intended, that, in granting K-4 visas to older alien children, it was, in effect, disqualifying any such child who chose to exercise that visa from seeking lawful permanent residence from within the United States”).

¹³⁸ *See* 8 C.F.R. § 214.2(k)(6)(ii) (2016) (“gap-filling” regulation for K-2 children).

I-130 petition on behalf of the child, provided that he is still under twenty-one.¹³⁹ Affording this remedy to K-4 children would also comport with Congress' intention of enacting the LIFE Act.¹⁴⁰

IV. CONCLUSION

It is unclear why the same administrative fix made for K-2 children was not made for K-4 children.¹⁴¹ One possible reason is that the negative outcome experienced by K-4 children may have simply faded from the government's attention over the years since Congress amended the LIFE Act in 2000.¹⁴² Even so, the Regulation has posed several consequences for K-4 children trying to adjust their status within the United States with their families.¹⁴³ The Regulation does not cure the ambiguous statute enacted by Congress, nor is its application a permissible construction of the statute.¹⁴⁴ The Regulation is manifestly contrary to what Congress' purpose was for enacting section 1255(a) and the LIFE Act.¹⁴⁵ Utilizing the Regulation for the purpose of removing older K-4 children is just one example of how a government agency can abuse its discretion.¹⁴⁶ Thus, the Regulation should no longer be utilized in determining eligibility for an adjustment of status, and the gap-filling regulation should be extended to protect K-4 children as well.¹⁴⁷

¹³⁹ *See id.* "After all, K-2 and K-4 visas arise from the exact same statutory language." *Akram*, 721 F.3d at 853, 862–63.

¹⁴⁰ *See supra* Part IV.B.1.

¹⁴¹ *Akram*, 721 F.3d at 862.

¹⁴² *Id.*

¹⁴³ *See supra* Part V.A.

¹⁴⁴ *See supra* Part IV.B.

¹⁴⁵ *See supra* Part IV.B.2.

¹⁴⁶ *See supra* Part V.A.

¹⁴⁷ *See supra* Part V.B.